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12 May 2006

Mrs. Sharon Tong
Clerk
Bills Committee on Interception of Communications and Surveillance Bill
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road, Central
Hong Kong

Dear Mrs. Tong,

Re: Interception of Communications and Surveillance Bill

I attach the Law Society's submissions on Legal Professional Privilege in relation to the Bill and additional submissions on other issues will follow shortly.

Yours sincerely,

Joyce Wong

Joyce Wong
Director of Practitioners Affairs
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Encl.

Interception of Communications and Surveillance Bill
Submission of the Law Society of Hong Kong on Legal Professional Privilege

Legal Professional Privilege (LPP) and its importance

1. Legal professional privilege is "*the name given to the common law rule which protects client-lawyer communications from disclosure to a client's prejudice and contrary to his wishes.…It is a right which our courts will always be vigilant to accord proper protection.*" (per Bokhary JA in ***A Solicitor v the Law Society of Hong Kong*** FACV 23/2005 at para. 15). All clients expect utmost privacy in their dealings with their lawyers, and their confidence in engaging in full and frank discussions with a lawyer of their choosing is an important aspect of the rule of law and the administration of justice.

2. These principles are enshrined in Article 35 of the Basic Law, which states that Hong Kong residents have "the right to confidential legal advice".

3. In ***R v Derby Magistrates Court ex p B*** [1996] AC 487 (House of Lords) at 507, Lord Taylor CJ said: "*Legal professional privilege … is a fundamental condition on which the administration of justice as a whole rests.*"

4. Courts have given the highest regard to LPP. In ***R v Grant*** [2005] EWCA Crim 1089, nothing gained from the interception of solicitors' communications was used as, or gave rise to, evidence relied on by the Crown at trial; in other words there was no prejudice to the defence. However Lord Justice Laws still maintained that "*unlawful acts of the kind done in this case* [bugging of communications between the prisoner and his lawyer], *amounting to a deliberate violation of a suspected person's right to legal professional privilege, are so great an affront to the integrity of the justice system, and therefore the rule of law, that the associated prosecution is rendered obtuse and ought not to be countenanced by the court*" (para. 54). Accordingly, the English Court of Appeal allowed the appeal of the defendant who was convicted by the jury of the heinous offence of conspiracy to murder and ordered a permanent stay of the prosecution, notwithstanding that the necessary authorization for the covert surveillance had

been obtained under the UK Regulation of Investigatory Powers Act 2000 and that there was cogent evidence against the defendant which was independent of and not tainted by the LPP communications.

5. All these authorities suggest that LPP is a cornerstone of the rule of law and the due administration of justice which has to be guarded, and cannot be compromised.

Value of LPP and safeguards required

6. The value of LPP communications to the Law Enforcement Agencies ("LEA"s) lies not so much in their evidential use in the prosecution of the crimes (as LPP communications would generally be inadmissible in court), but in their use for intelligence purposes. Without sufficient safeguard against abuse, there is a great temptation for LEAs' officers to listen to LPP communications even though they know that they cannot retain the communications or use them in court. If clients know or even suspect that the communications they have with their solicitors might be intercepted by the Government, that may deter them from seeking legal advice or from speaking frankly with their lawyers, which will in turn seriously undermine the rule of law and the integrity of the justice system.

7. Hence, it is of utmost importance that sufficient statutory safeguards be in place to guard against any intentional or inadvertent access to and use of LPP communications by the LEAs throughout all stages of the covert operations, namely, (1) authorization stage; (2) execution of covert operations stage; (3) record retention and supervision by oversight authority; (4) prosecution and trial stage.

8. The Law Society submits that the present proposals by the Administration, notwithstanding its recent concession to insert additional provisions in the Bill to safeguard LPP, are far from adequate and so are unacceptable.

Authorization targeting lawyers

9. The Administration concedes that there should not be authorization targeting communications at a lawyer's office or residence except in cases where the

lawyer is suspected of acting in furtherance of a crime, and cited s.186(2) of the Canadian Criminal Code (Administration's Paper dated 12 April 2006). There is no pledge from the Administration to incorporate the exact wordings of s.186(2) into the Bill, in particular, it is not clear whether the Administration will confine the authorization to situation when the lawyer is suspected to be a party to the crime (instead of the lawyer being used by his criminal client).

10. The Law Society submits that even the incorporation of s.186(2) may not provide adequate safeguards.

11. While communications of a lawyer in furtherance of crimes are not protected by LPP, it does not follow that the LEAs should be allowed indiscriminate access to the lawyer's communications with third parties if the lawyer is suspected of being a party to a crime as this would easily if not inevitably result in the violation of LPP of the clients of the lawyer. The Administration's proposals contain no mechanism to prevent the LEAs from listening to LPP communications which have nothing to do with the crime suspected to be committed by the lawyer. The rights to LPP of the lawyer's clients should not be overridden as a result of the lawyer being suspected of a crime, as the LPP belongs not to the lawyer but to his clients. Under the Bill, once an authorization is granted, the LEAs are effectively given a general licence to listen to a large number of truly LPP communications involving the target lawyer, and this cannot be a proportionate measure.

12. In **Kopp v Switzerland** (1999) 27 EHHR 91, the European Court of Human Rights condemned the practice in Switzerland for allowing an officer of the executive branch to be the first listener of the tapped conversations involving a lawyer: *"Above all, in practice, it is, to say the least, astonishing that this task should be assigned to an official of the Post Office's legal department, who is a member of the executive, without supervision by an independent judge, especially in this sensitive area of the confidential relations between a lawyer and his clients, which directly concern the rights of the defence."* (para 74) This is to be contrasted in the European Court's decision in **Erdem v Germany** (2002) 35 EHRR 383 which highlighted the safeguard in the German legislation: "… the power to monitor correspondence [between the prisoners and their lawyers] was vested in an independent judge who had to be unconnected with the investigation and was under a duty to keep the information thus obtained confidential." As our

system is different from the continental inquisitorial system, it is inappropriate for us to adopt the German system and involve our judge in the investigation process. However, the principle laid down by the European Court requiring the appointment of persons independent of the LEAs or unconnected with the investigation to be the first listeners to communications likely involving LPP should be adhered to.

13. **Accordingly, the Law Society submits that in the absence of a sound and reliable mechanism for persons independent of the LEAs to screen out material gathered that is subject to LPP, interception or surveillance operations against lawyers should not be permitted.**

Threshold required

14. **In any event, if a sound and reliable mechanism can be devised to prevent access by the LEAs to truly LPP information, the threshold requirement should be on the balance of probabilities that the lawyer is a party to the crime rather than being used by suspects.** The Law Society submits that it is far too easy for the LEAs to say that there are reasonable grounds (particularly by relying on informant source which cannot be verified) to suspect that a lawyer may be used by colluding with his client to pervert the course of justice.

15. For example, in **S v Switzerland** (1991) 14 EHRR 670, the Swiss Government relied on the risk of collusion between the accused and his defence counsel to curtail the accused's right to confer with his counsel and the Swiss courts accepted that there were indications pointing to such a risk. However, the European Court dismissed such risk as being a proper justification to curtain the accused's fundamental right. In **Erdem v Germany** (2002) 35 EHRR 383, the European Court recognised that a lawyer's correspondence with a prisoner might legitimately be intercepted if there is reasonable cause to believe that the privilege is being abused. "What may be regarded as 'reasonable cause' will depend on all the circumstances **but it presupposes the existence of facts or information which would satisfy an objective observer that the privileged channel of communication was being abused**" (paragraph 61; see also Fox, Campbell and Hartley v. the United Kingdom, judgment of 30 August 1990, Series A no. 182, p. 16, § 32).

Authorization not targeting lawyers but likely involving LPP communications

16. Covert operations not targeting lawyers' line or office may in other circumstances likely result in LPP information being obtained (e.g. bugging the suspect's meeting with his lawyer inside the interview room of the prison cell; intercepting the suspect's telephone after the suspect was arrested and was expected to consult his lawyer). The Administration's proposed safeguards are to make it mandatory for the LEAs to provide an assessment of the likelihood in their applications for authorization (Schedule 3, Part 1, para. b(iii); Part 2, para. (b)(ix); Part 3, para. (b)(ix)), and for the panel judge to take into account the likely impact on LPP in deciding whether the proposed operation is proportionate to the purpose sought to be furthered. The Law Society submits that these safeguards are inadequate.

17. First, if the operation will likely result in LPP information being obtained, authorization should be refused as a matter of principle (unless a sound mechanism can be put in place for persons independent of the LEAs to screen out the LPP information: see submissions above). It is trite that LPP cannot be overridden by carrying out a balancing exercise for crime prevention or prosecution. **The Law Society submits that an express statutory provision should be introduced to the effect that nothing in the Ordinance shall be construed as authorising any access to LPP information by the LEAs.**

18. Second, no guidance is laid down as to how the LEAs should assess the likelihood of LPP information being obtained. This is tantamount to leaving it up to the LEA applicant to judge whether LPP information will be likely obtained and the panel judge is in no position to make any informed and independent assessment. As in R v Grant (cited above), the police officer applying for the authorization could simply state in the standard form that the intrusion would be restricted to monitoring and recording conversations between the prisoners (and so unlikely to capture any LPP information), without mentioning the practice that lawyers were frequently allowed to be with their client prisoners in the exercise yard under surveillance.

19. **The Law Society submits that the Bill should contain express provision requiring the applicant to state with some specificity in the affidavit all facts**

relevant to his assessment on the likelihood of LPP information being obtained. At least the following information should be provided :

- The occupation of the target
- Whether the target has instructed lawyers
- Whether LEA anticipates the target will consult a lawyer
- Whether the covert operation would extend to the stage after the target is arrested or being contacted by the LEAs for enquiries into the suspected offences (this is important because of the likelihood of the target consulting a lawyer upon being arrested/alerted to the enquiries.

20. **The Law Society further suggests that the authorization should in generally be valid only up to the stage when the target is arrested or being contacted by the LEAs for enquiries into the suspected offences.** Once that stage is reached, the assessment of the likelihood of LPP information being obtained will be significantly different from that in the early stage. Moreover, at that stage the target's right to silence and the LEAs' corresponding duty to caution the target will also be relevant factors to be taken into account by the authorizing authority in the balancing exercise. It is therefore not right for the authorization granted upon significantly different circumstances to continue its validity. **To avoid abuse, the Bill should expressly provide that notwithstanding the validity period (which is 3 months in maximum), any authorization granted should cease to have effect once there is significant change to the likelihood of LPP information being obtained or of the target's right to silence being infringed.**

Type 2 surveillance relating to LPP

21. Clause 2(3) of the Bill reads:

For the purposes of this Ordinance, any covert surveillance which is Type 2 surveillance under the definition of "Type 2 surveillance" in subsection (1) is regarded as Type 1 surveillance if it is likely that any information which may be subject to legal professional privilege will be obtained by carrying it out.

22. There is again a lack of guidance as to how the line is drawn. The onus of positively establishing likelihood makes it tempting for the LEA officers not to put their minds to such likelihood so as to avoid the need to go for judicial

authorization. **The Law Society proposes that any surveillance be regarded as Type 1 Surveillance *"unless there are reasonable grounds to believe that any information which may be obtained by carrying it out will unlikely be subject to legal professional privilege."* For executive authorization, the applicant is also required to state with some specificity in the written statement all facts relevant to his assessment on the likelihood of LPP information being obtained.**

Inadvertent access to LPP information

23. Notwithstanding any safeguards at the authorization stage, there are bound to be cases when information subject to LPP will be collected during the operation. The Law Society submits that there are inadequate safeguards under the Administration's proposals against such inadvertent access to LPP information.

24. At paragraph 7of the Administration's Paper dated 12 April 2006 (LC Paper No. CB(2) 1693/05-06(01), the Administration proposes to introduce amendments to the Bill to prohibit the use of LPP products "*unless they are necessary for the prosecutor to carry out his duty to ensure fair trial in future proceedings"* and provide for the early destruction of all intercepted products but the retention of surveillance products for pending proceedings. The Law Society submits that these proposed safeguards are inadequate and unacceptable.

25. First, the Administration's proposed safeguards ignore the huge intelligence value of LPP information to LEAs and the corresponding temptation on the LEAs to access to it. The Law Society considers that LEAs will be tempted to listen to the LPP communications for intelligence purposes, even if such materials cannot directly or indirectly be used in the prosecution of cases in court. Therefore an officer concerned is not likely to stop listening to the conversation even when it becomes apparent that a particular conversation is covered by LPP, and has nothing to do with the furtherance of a crime. Initially, the obtaining of the LPP information during the covert operation may be inadvertent, but there is nothing in the Bill which prohibits the LEAs from continuing listening to the LPP information.

26. Second, the "fair trial" exception should be deleted as LPP cannot be overridden

by any "fair trial" exception. LPP can only be waived by the relevant client. LPP communications should remain inadmissible as evidence before any court without the consent of the person entitled to waive the privilege.

27. Third, the soon destruction of all intercepted LPP products notwithstanding any intended or pending prosecution would also be unfair to the accused. As in **R v Grant** (cited above), the accused could apply for a stay of prosecution if his rights to LPP were infringed by the LEAs. Destruction of all intercepted LPP products would make it difficult, if not impossible, for the accused to seek redress from the court.

28. The Law Society therefore proposes the following safeguards be introduced:

(1) An express statutory duty be imposed on the LEAs to halt the covert operation immediately if it becomes known that a particular conversation involves communications with a lawyer or is covered by LPP.

(2) The LEAs should be required to prepare and keep records of the execution of the authorization e.g. whether lawyers' conversations have been intercepted, otherwise the oversight authority will not be able to trace their activities to see if they have exceeded their scope of authority.

(3) In case any communications with a lawyer are recorded during an operation:

  (a) the LEAs need to record in the file such a fact and the duration of the conversation, together with the names and ranks of all persons who have listened to the conversation, and the file is to be shown to the independent oversight authority (so that he can check if there is any abuse).

  (b) The recorded LPP conversations (and copies thereof) must be kept in a sealed envelope and not further be disclosed to the LEA officers.

  (c) The target should also be notified of this fact as soon as practicable after the operation (such notification can be delayed upon application to the judge if it is shown that the notification will jeopardise any ongoing or intended investigations cf. Section 196 of the Canadian Criminal Code), so that he may seek any necessary redress.

  (d) All LPP products (be they intercepted products or surveillance products) must be retained for any pending legal proceedings and be disclosed to the target to whom the LPP belongs.

(e) There be an absolute prohibition on the use of the LPP information in court proceedings without the consent of the person to whom it belongs.

The Law Society of Hong Kong
Council
12 May 2006

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