SB Ref: ICSB 11/06

Bills Committee on
Interception of Communications and Surveillance Bill

Response to Issues Raised by Bills Committee
Protection of Legal Professional Privilege

This paper sets out the Administration's response to the issue of protection of legal professional privilege (LPP) previously raised by the Bills Committee.

General

2. As explained to Members at previous meetings, our law enforcement agencies (LEAs) **will not knowingly** seek to obtain information subject to LPP, and our Bill seeks to preserve that arrangement. However, whilst we seek to preclude operations targeting at communications subject to LPP, it is not possible to ensure that information protected by LPP will not be inadvertently obtained in the course of a duly authorized operation. (A summary of the relevant case law of Hong Kong is at **Annex A**.) The Bill, together with the proposed amendments below, therefore propose further safeguards beyond the stage of authorization, to ensure that –

- information subject to LPP which is inadvertently obtained will be screened out and withheld from the investigators and prosecutors;
- such information will not be used as evidence by the prosecution;
- products from covert surveillance and postal interception will be retained in order to have a complete record of the product of that operation, for consideration of disclosure where court proceedings are in contemplation; and
- mechanisms are in place to ensure compliance with the above requirements.

Authorization

3. The following safeguards for materials protected by LPP are already provided for in the Bill –

- LEAs are required to consciously provide an **assessment** on the likelihood that any information which may be subject to LPP will be obtained by carrying out a covert operation in making an application for the authorization of that operation.

- In case it is likely that any information which may be subject to LPP will be obtained by carrying it out, the covert surveillance will be escalated as a Type 1 operation and, hence, require prior **authorization by a panel judge** even if it would otherwise be Type 2 surveillance.

- The authorizing panel judge will have to be satisfied that the operation is both necessary and proportionate before granting an authorization for the operation. If the degree of collateral intrusion is disproportionate, then the judge will not authorize the operation. In granting an authorization, the judge can **impose conditions** under clause 31 of the Bill to ensure that communications subject to LPP are safeguarded.

4. Although we believe that the Bill as drafted would in practice rule out operations targeting privileged communications at a lawyer's office or residence, given the concerns raised by some Members, we are prepared to make that policy intent express in the Bill. Taking reference from a similar provision in the Canadian Criminal Code (at **Annex B**), we now propose amendments prohibiting operations targeting the communications at a lawyer's office (or any other premises ordinarily used by him for the purpose of providing legal advice to clients) or residence, unless –

(a) the lawyer, or any other person working in his office or residing in his residence, is a party to any activities that constitute or would constitute a serious crime or a threat to public security; or

(b) the communications in question is "for the furtherance of a criminal purpose".

In respect of (a), under the Canadian legislation the protection is

available to criminal cases and not available to operations conducted on the ground of "threat to the security of Canada", but we think our Bill should extend the protection to operations conducted for protecting public security. In respect of (b), at common law communications "for the furtherance of a criminal purpose" do not come under the protection of LPP (please see **Annex C**). In practice, (b) covers two types of rare scenarios : LEAs with information satisfying the judge that the communications involved would not be subject to LPP as the advice is being sought for a criminal purpose (whether the lawyer knows or is ignorant of the criminal purpose[1]), or the lawyer himself believes that divulging such information to the LEAs would be necessary to, for example, prevent the commission or furtherance of a crime, and therefore acting as an informant or a participating agent.

5. The proposed Committee Stage Amendments (CSAs) to give effect to the above, adapted from the Canadian model but providing further protection, are as follows –

Clause 30A

30A. What a prescribed authorization may not authorize in the absence of exceptional circumstances

(1) Notwithstanding anything in this Ordinance, unless exceptional circumstances exist –

(*a*) no prescribed authorization may contain terms that authorize the interception of communications by reference to –

(i) in the case of a postal interception, an office or other relevant premises, or a residence, of a lawyer; or

(ii) in the case of a telecommunications interception, any telecommunications service used at an office or other relevant premises, or a residence, of a lawyer, or any telecommunications service ordinarily used by a lawyer for the purpose of providing legal advice to clients; and

[1] See *Pang Yiu Hung Robert v Commissioner of Police*, HCAL 133/2002, para. 24.

(*b*) no prescribed authorization may contain terms that authorize any covert surveillance to be carried out in respect of oral or written communications taking place at an office or other relevant premises, or a residence, of a lawyer.

(2) For the purposes of subsection (1), exceptional circumstances exist if the relevant authority is satisfied that there are reasonable grounds to believe –

(*a*) that –

(i) the lawyer concerned;

(ii) in the case of an office or other relevant premises of the lawyer, any other lawyer practising with him or any other person working in the office; or

(iii) in the case of a residence of the lawyer, any other person residing in the residence,

is a party to any activity which constitutes or would constitute a serious crime or a threat to public security; or

(*b*) that any of the communications concerned is for the furtherance of a criminal purpose.

(3) In this section –

"lawyer" (律師) means a barrister, solicitor or foreign lawyer as defined in section 2(1) of the Legal Practitioners Ordinance (Cap.159) who practises as such, or any person holding an appointment under section 3(1) of the Legal Aid Ordinance (Cap. 91);

"other relevant premises" (其他有關處所), in relation to a lawyer, means any premises, other than an office of the lawyer, that are ordinarily used by the lawyer and by

other lawyers for the purpose of providing legal advice to clients.

Minimising effect of LPP information inadvertently monitored

Discontinuance of operations

6. Under clause 55(2)(a) and (b) of the Bill, the officer concerned –

"*(a) shall, as soon as reasonably practicable after he becomes aware that any ground for discontinuance of the prescribed authorization exists, cause the interception or covert surveillance to be discontinued; and*

(b) may at any time cause the interception or covert surveillance to be discontinued."

As far as LPP materials are concerned, the first provision will require the officer to stop the operation when, in the circumstances of the particular case, the conditions for the continuance of the prescribed authorization under clause 3 are no longer met by reason of, for example, LPP information being more likely to be obtained and thus the operation becoming more intrusive. The second provision will enable the officer to stop an operation in other cases.

During an authorised operation

7. During an authorized covert operation, operational arrangements will be in place to minimize the extent of disclosure of any materials subject to LPP which are inadvertently obtained. Such operational arrangements for all interception and Type 1 covert surveillance operations include –

(a) the actual monitoring is done by dedicated units of the LEAs. These units are strictly separated from the investigators;

(b) these units are under instruction to screen out information protected by LPP, and to withhold such information from the investigators. The latter will only be passed information with LPP information already screened out;

(c) the exception to the above arrangement is in operations involving immediate threats to the safety (or well-being) of a person, including the victims of crimes under investigation, informants, or undercover officers in a participant monitoring situation or in situations that may call for the taking of

immediate arrest action. In such cases, there may be a need for the investigators to listen to the conversations in real time. If this is necessary, it will be specified in the application to the panel judges, and the panel judges will take this into account in deciding whether to grant an authorization and, if so, whether any conditions should be imposed. After such an operation, investigators monitoring the operations will be required to hand over the recording to the dedicated units, who will screen out any LPP information before passing them to the investigators for their retention; and

(d) for operations that are likely to involve LPP information, LEAs will be required to notify the Commissioner on Interception of Communications and Surveillance (the Commissioner). In other cases, LEAs will also be required to notify the Commissioner if information involving LPP is obtained inadvertently. On the basis of the LEA's notification, the Commissioner may, inter alia, review the information passed on by the dedicated units to the investigators to check that it does not contain any information subject to LPP that should have been screened out. Since the Commissioner will have the power to make recommendations to the head of the LEA regarding any irregularity, further report it to the Chief Executive, or refer to it in his annual report which will be tabled at the Legislative Council, the LEAs would no doubt ensure strict compliance.

The above will be spelt out in the Code of Practice, the compliance with which will be subject to the oversight of the Commissioner. In practice, LEAs will seek legal advice when they come across anything related to LPP in their operations.

Minimising retention of LPP materials

8. Under the Bill, all products obtained by interception of telecommunications will be destroyed as soon as their retention is not necessary for the relevant purpose of the operations. For postal interception products and covert surveillance products –

(a) if the operations are not followed by court proceedings, all products subject to LPP will be destroyed; and

(b) if the operations are followed by court proceedings, such products will be retained for as long as they may be required for disclosure in the proceedings. Information subject to LPP will

be retained to ensure a complete record of the products. Such products will remain unavailable to investigators and prosecutors and may only be made available to the person to whom the LPP belongs.

9. We will introduce the following CSAs to reflect the proposals in our earlier paper (SB Ref : ICSB 4/06) –

Clause 56(1A)

(1A) Where any protected product described in subsection (1) contains any information that is subject to legal professional privilege, subsection (1)(*c*) is to be construed as also requiring the head of the department concerned to make arrangements to ensure that any part of the protected product that contains the information –

(*a*) in the case of a prescribed authorization for a postal interception or covert surveillance, is destroyed as soon as its retention is not necessary for the purposes of any civil or criminal proceedings before any court that are pending or are likely to be instituted; or

(*b*) in the case of a prescribed authorization for a telecommunications interception, is as soon as reasonably practicable destroyed.

Use of LPP materials as evidence

10. As we have previously explained, the Bill does not override LPP. It follows that any information obtained under the authorized covert operations which is subject to LPP will continue to be so. For the avoidance of doubt we would propose CSAs to expressly provide that any information subject to LPP that has been obtained during a covert operation will continue to be privileged. This means, among other things, that the information in question could not be given as evidence without the consent of the client concerned.

Clause 58A

58A. Information subject to legal professional privilege

Any information that is subject to legal professional privilege is to remain privileged notwithstanding that it has been obtained pursuant to a prescribed authorization.

Other Issues

11. Apart from the main issues set out above, the Assistant Legal Advisor in her letter of 24 April 2006 has also raised a few issues related to the operation of the various provisions of the Bill regarding the protection of LPP. Our response is set out below.

- ***To clarify whether the prosecutor would "carry out his duty to ensure a fair trial" (having regard to the proposed amendments to the Bill in relation to the use and destruction of products protected by LPP as set out in paragraph 7 of the paper SB Ref: ICSB 4/06) in the same way as provided in Clause 58 in relation to telecommunications interception products.***

12. Clause 56(2)(b) provides for the retention of products other than telecommunications interception products and for the retained products' possible use in court proceedings. If LPP material is acquired in the course of postal interception or covert surveillance, it will be retained if this is necessary to ensure a complete record of the surveillance material obtained and to be available for the purposes of disclosure.

13. The issue of disclosure by the prosecutor as part of his duty is dependent upon whether any defendant is the client of the LPP material. If the defendant is the client, then the prosecutor can properly disclose the material to him (although the prosecutor is himself unaware of the content) and in these circumstances there is unlikely to be any controversy surrounding the LPP material. The defendant's lawyer will be in a position to corroborate the defendant's assertion that he was consulted and gave certain advice on any particular occasion. If the prosecutor is aware that there was such a communication, then he can admit that fact although he is not aware of the content. If the defendant wants the record of the communication to be used as evidence, he can waive his privilege and ask the prosecutor to produce it.

14. In the case when the client is not a defendant in the court proceedings, or is one of several defendants, if those defendants who do not enjoy the benefit of the privilege seek access to the LPP material, the prosecutor must refuse disclosure of this part of the covert surveillance or postal interception product to them should the client not waive his privilege. However, these defendants could always challenge the claim of LPP and ask the trial judge to examine the LPP material and determine whether LPP does in law attach to the material over which it is claimed.

15. In respect of telecommunications interception product the position is different. The underlying policy of the Bill is that such product will not be used as evidence and hence there is no need to retain it for court proceedings. It will be destroyed as soon as it is not necessary for the relevant purpose.

- ***To confirm whether LPP applies to communications between a client and his legal adviser for the purpose of obtaining legal advice in furtherance of a civil wrong, i.e. a non-criminal purpose (e.g. to commit a tortious act).***

16. While a document prepared in furtherance of a civil wrong might not attract LPP in civil proceedings, we do not intend that the possibility of a civil wrong should be a ground for overriding the protection under the proposed CSA. In the event when the lawyer is knowingly assisting in the furtherance of a civil wrong, it is possible that his conduct may attract criminal liability. If it does then LPP would not attach to the communication.

- ***To explain whether the procedure under clause 58(6) (i.e. a judge may direct the person conducting the prosecution to make any admission of fact) apply to products protected by LPP, and whether this is the same as proof by formal admission under section 65C of the Criminal Procedure Ordinance (Cap. 221).***

17. The telecommunications interception product protected by LPP will be destroyed as soon as possible. The lawyer will be in a position to corroborate that he gave legal advice on a certain occasion and the prosecutor will not question that assertion. It will be a matter for the client as to whether the lawyer discloses what advice was given. Again the prosecutor will not be in a position to gainsay that evidence unless there is other evidence which is admissible which casts doubt on its veracity. Admissions of fact would be admissions for the purposes

of section 65C of the Criminal Procedure Ordinance, but the need for such an admission is unlikely to arise in relation to material that is subject to LPP.

Security Bureau
June 2006

Annex A

A summary of the case law of Hong Kong in relation to Legal Professional Privilege

Pang Yiu Hung Robert v Commissioner of Police

In *Pang Yiu Hung Robert v Commissioner of Police*, [2003] 2 HKLRD 125, the applicant sought a declaration that section 25A of the Organized and Serious Crimes Ordinance (Cap 455), insofar as it required a barrister to report to an authorized officer any information or communications communicated to him when he was acting for or advising his client in the capacity as a barrister, contravened Articles 35 and 39 of the Basic Law and Article 14 of the ICCPR. Section 25A(1) provided:

> *"Where a person knows or suspects that any property-*
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> *(a) in whole or in part directly or indirectly represents any person's proceeds of;*
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> *(b) was used in connection with; or*
>
> *(c) is intended to be used in connection with,*
>
> *an indictable offence, he shall as soon as it is reasonable for him to do so disclose that knowledge or suspicion, together with any matter on which that knowledge or suspicion is based, to an authorized officer."*

2. This provision did not require the disclosure of any items subject to legal professional privilege (LPP). It merely required that information not protected by LPP be reported. After noting that the law has always recognized that LPP has its limits and those limits are to a material extent defined by the vulnerability of LPP to exploitation and abuse, the Court held:

> *"The measures put into place in s. 25A in respect of legal practitioners, while far-reaching, are, I believe, rationally connected to that legislative purpose and no more than is necessary has been put into place to achieve the purpose. As to when LPP does or does not apply, lawyers have always been obliged to understand its limits and to act accordingly.*

> *Clients too should know that it has its limits and is not, by means of disguising their true intent from their lawyers, an invulnerable mechanism for seeking advice on (or being helped in) the pursuit of criminal purposes."*

Secretary for Justice v Shum Chiu

3. In *Secretary for Justice v Shum Chiu*, HCAL 101/2005, unreported, ICAC arranged for the covert recording of a meeting between a defendant and his lawyer by fitting a recording device on the body of a person who had agreed to act as an undercover agent for the Commission. ICAC knew that the defendant would be attending a meeting with a lawyer. In considering whether the covert recording amounted to a breach of the right of LPP vested in the defendant, the Court held (at para 32):

> *"if there are objectively cogent grounds for believing that a meeting, which prima facie is protected by legal professional privilege, is in fact to be used in order to further a criminal enterprise – and will not therefore in fact be privileged – then the investigating authorities must be able to discover what has passed at that meeting."*

A Solicitor v Law Society of Hong Kong

4. In *A Solicitor v Law Society of Hong Kong*, CACV 246/2004, unreported, the Court of Appeal examined whether section 8B(2) of the Legal Practitioners Ordinance (Cap 159) contravened the Basic Law. Section 8B(2) provided, *inter alia*, that documents required by an inspector under section 8AA must be produced or delivered *"notwithstanding any claim of solicitor-client privilege but documents that are subject to a solicitor-client privilege may only be used for the purposes of an inquiry or investigation under [the Ordinance]."*

5. Under section 8AA, the Council of the Law Society had the power to appoint an inspector to assist it: (a) in verifying compliance by a solicitor with the provisions of the Legal Practitioners Ordinance; (b) in

determining whether the conduct of a solicitor should be inquired into or investigated; or (c) in relation to an inquiry or investigation. An inspector might require a solicitor to produce or deliver to him for inspection all documents in the possession of the solicitor that the inspector reasonably suspected to be relevant, and copy or seize any of the documents so produced or delivered.

6. In holding that there was no contravention of the Basic Law, the Court of Appeal said (at paras 15 and 16):

> *"The Law Society is not entitled to use any document disclosed by the solicitor or otherwise obtained by the investigators for any purpose other than in respect of an inquiry or investigation. In every other respect, the confidentiality of the client is clearly maintained. In those circumstances the right to legal professional privilege is not breached, or, if such use is considered to be a breach, it is a technical breach which was authorised not only by the section in the Ordinance for a legitimate purpose, but the section sanctions the infringement of the privilege in a proportionate manner. …*
>
> *Legal professional privilege has always been subject to the principle that it is subject to the public policy that the privilege will not extend to transactions in furtherance of crime or fraud. Likewise here, there must be a public interest in the proper regulation of the solicitors under the auspices of the Law Society. If legal professional privilege could be prayed in aid to prevent investigations other than those sanctioned by lay clients, the investigation by the Law Society of complaints against solicitors would be hamstrung. Therefore, the insertion into the Ordinance of a provision which allows investigations is clearly in the public interest provided that there are adequate safeguards which makes the relaxation of the fundamental rule proportional. In my view the safeguard that the documents obtained on an investigation can only be used for the purposes of the investigation and an inquiry are in my view a sufficient safeguard."*

7. On appeal to the Court of Final Appeal, FACV No 23 of 2005, unreported, the Court pointed out that the question as to whether any interference with privacy resulting from such disclosure was lawful or unlawful depended on whether or not the disclosure was compatible with the right to confidential legal advice. The Court held that LPP was a fundamental condition on which the administration of justice as a whole rests, but it was not the only such condition. There were a number of others, including the existence of a legal profession of efficiency and integrity. By virtue of section 8B, documents which the inspectors reasonably suspected were relevant to the performance of their task would include documents subject to LPP. However, the section also provided that "documents that are subject to a solicitor-client privilege may only be used for the purposes of an inquiry or investigation under [the Ordinance]". The Court held that section 8B(2) served the important purpose of maintaining high standards within the solicitors' branch of the legal profession. With the safeguard built into section 8B(2), the need for the Council's direction, and the strict confidentiality to be accorded to documents produced or delivered, the section was not disproportionate to what was needed in the service of that purpose. Section 8B(2) was therefore constitutional and compatible with the right to confidential legal advice.

Annex B

Legislative provisions in Canada

on the protection of premises of solicitors from interception

Part VI of Canadian Criminal Code

"*s.186(2) No authorization may be given to intercept a private communication at the office or residence of a solicitor, or at any other place ordinarily used by a solicitor and by other solicitors for the purpose of consultation with clients, unless the judge to whom the application is made is satisfied that there are reasonable grounds to believe that the solicitor, any other solicitor practising with him, any person employed by him or any other such solicitor or a member of the solicitor's household has been or is about to become a party to an offence.*"

Canadian Security Intelligence Service Act

"*s.26 Part VI of the Criminal Code does not apply in relation to any interception of a communication under the authority of a warrant issued under section 21 or in relation to any communication so intercepted.*"

Annex C

Legal Professional Privilege and "Furtherance of Criminal Purpose"

General principle

Legal professional privilege (LPP) does not attach to communications between a client and his legal adviser, or documents brought into existence, as a step in a criminal or fraudulent enterprise, or for the purpose of stifling or covering up a crime or fraud, whether or not the legal adviser is himself a party to the plot[1].

"Furtherance of criminal purpose"

2. The phrase "in furtherance of a criminal purpose" has not been defined by statute nor at common law. However, case law has confirmed that communication in furtherance of a criminal purpose **does not come into the ordinary scope of the solicitor's professional employment**[2]. Thus, it is immaterial whether the solicitor was aware of the illicit purpose, as such matters are otherwise than in the ordinary course of professional communications[3].

3. There is a clear distinction between advice given in the furtherance of a criminal purpose and advice given in relation to a proposed activity to enable the client to avoid breaching the criminal law or in relation to a client's defence after a criminal act has been committed. Advice that a certain activity or proposed activity would or might be contrary to the criminal law does not come within the scope of this exception. Hence, communications for the purpose of obtaining legal advice after the relevant crime has been committed (unless the purpose of obtaining the advice was itself to undertake destruction of evidence or the like) is not within this exception to the rule and would be privileged[4].

4. A distinction has to be drawn between proper defence of a client and improper concealment of wrongdoing. If a solicitor is asked to properly prepare a defence to an offence being charged, LPP would

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[1] *R. v. Cox and Railton* (1884) 14 QBD 153; *Bullivant v Attorney-General for Victoria* [1901] AC 196 at 201, *per* Lord Halsbury

[2] Stephen, J. indicated in *R. v. Cox and Railtorn* (1884), 14 QBD 153 at 161

[3] *Banque Keyser Ullmann S.A. v. Skandia (U.K.) Insurance Co. Ltd* [1986] 1 Lloyd's Rep. 336, CA

[4] Bruce and McCoy - Criminal Evidence in Hong Kong at Chapter VII para. 254-300

attach to the communications in question. If however the solicitor is asked to give advice as to how to cover up a crime already committed, any LPP would be lost as being in furtherance of a criminal purpose.

5. The court may be entitled to look at the documents for which privilege was claimed to decide if there is a prima facie case at least of criminal intent or purpose to exclude the privilege[5], and this practice has also been followed in Hong Kong[6]. Hence, there is procedural safeguard to ensure that a client seeking to further his criminal purpose cannot hide behind the shield of LPP.

Conclusion

6. If the seeking of advice by a client on how he/she could prepare defence to an offence being charged, any communications would be covered by LPP. If however the advice is sought as to how to cover up a crime already committed, any privilege would be lost as being in furtherance of a criminal purpose.

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[5] *R v. Governor of Pentonvill Prison, ex p. Osman* (1990) 90 Cr App R 281, QBD

[6] In *Shun Tak Holdings & Others v. Commissioner of Police* [1995] 1 HKLR 48