



## HONG KONG BAR ASSOCIATION

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11<sup>th</sup> February 2012

Dr. Hon. Margaret Ng  
Chairman  
Panel on Administration of Justice and Legal Services  
Legislative Council Complex  
1 Legislative Council Road, Central  
Hong Kong.

Dear *Margaret,*

### **Comprehensive Review on the Interception of Communications and Surveillance Ordinance (Second Round of Consultation)**

The Hong Kong Bar Association has considered the issue on "Comprehensive Review on the Interception of Communications and Surveillance Ordinance (Second round of circulation)". The Comments of the Bar Association dated 11<sup>th</sup> February 2012 have been sent to the Security Bureau for consideration. I would also like to enclose a copy of the Comments for the attention of the Panel on Administration of Justice and Legal Services.

Yours sincerely,

*Kumar Ramanathan*  
Kumar Ramanathan SC  
Chairman

## 香港大律師公會

香港金鐘道三十八號高等法院低層二樓

### Chairman 主席：

Mr. Kumar Ramanathan, S.C. 林孟達

### Vice Chairmen 副主席：

Mr. Paul Shieh, S.C. 石永泰

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Mr. Michael Blanchflower, S.C. 白孝華

Mr. Nicholas Cooney, S.C. 高樂賢

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Mr. Andrew Mak 麥業成

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Mr. Osmond Lam 林國輝

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Mr. Charles J Chan

Mr. Colin Wright

Mr. Lin Feng

Mr. Jose-Antonio Maurellet

Ms. Elaine Liu

Mr. Isaac Chan

Ms. Queenie Lau

蘇國良

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11<sup>th</sup> February 2012

The Secretary for Security  
Security Bureau  
10/F, East Wing  
Central Government Offices  
2 Tim Mei Avenue  
Tamar  
Hong Kong.

Attn: Ms. Alice Yeung

Dear *Sirs,*

### **Comprehensive Review on the Interception of Communications and Surveillance Ordinance (Second Round of Consultation)**

I refer to your letter of 30<sup>th</sup> December 2011.

Please find enclosed a copy of the Comments of the Hong Kong Bar Association dated 11<sup>th</sup> February 2012 on the "Comprehensive Review on the Interception of Communications and Surveillance Ordinance" for the consideration of the Security Bureau, which has been endorsed during the Bar Council Meeting held on 9<sup>th</sup> February 2012.

Yours sincerely,

*Kumar Ramanathan*  
Kumar Ramanathan SC  
Chairman

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Ms. Queenie Lau 劉恩沛

# **Comprehensive Review on the Interception of Communications and Surveillance Ordinance**

## **Comments of the Hong Kong Bar Association on the Second Round of Consultations**

In reply to the Security Bureau's letter, dated 30 December 2011, to Mr Kumar Ramanathan SC, Chairman of the Hong Kong Bar Association, asking for the Bar Association's views on:

- (1) specific issues in relation to the proposal by the Commissioner on Interception of Communications and Surveillance (the "Commissioner") to check intercept products (paragraph 10 of **Annex A**); and
- (2) the Commissioner's latest two recommendations as set out in his Annual Report 2010 (**Annex B**).

The Bar Association sets out its views and positions below.

### **Annex A: Commissioner's Proposal on Checking Intercept Products**

1. The Bar Association refers to its Comments provided to the Security Bureau, dated 9 September 2011, in which it set out the reasons why the Commissioner presently has the power to request and listen to intercept products under the Interception of Communications and Surveillance Ordinance (Cap 589) (the "ICSO").
2. Before addressing the specific questions set out in paragraph 10 of Annex A, it is necessary to consider: (i) the Commissioner's functions and powers under the ICSO, and (ii) the decision of the Supreme Court of Canada in *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, which is relied upon by the Security Bureau.<sup>1</sup>

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<sup>1</sup> [2008] 2 SCR 574



## (1) Commissioner's Functions and Powers

3. The purpose of the ICSO is set out in its preamble:

*An Ordinance to regulate the conduct of interception of communications and the use of surveillance devices by or on behalf of public officers and to provide for related matters.*

The important phrase is "*to regulate the conduct*". The Commissioner plays a vital role in ensuring the proper regulation of such conduct.

4. Part 4 of ICSO sets out the Commissioner's functions and powers. Section 40 sets out his functions in the broadest manner, as seen in s.40(a):

*40. The functions of the Commissioner are –*

*(a) to oversee the compliance by departments and their officers with the relevant requirements; and..*

Subparagraph (b) lists his specific functions, but without limiting the generality of (a).

5. Section 41 provides for the Commissioner's powers of review – he can review anything he considers necessary to carry out his functions. Section 41(1) provides:

*41(1) The Commissioner shall conduct such reviews as he considers necessary on compliance by departments and their officers with the relevant requirements.*

Subsection 41(2) describes the reviews that the Commissioner must undertake. Subsection 41(3) provides that after conducting a review under ss (1) or (2), he must record in writing: (a) details, as identified in his review, of any case of failure by any department or its officers to comply with any relevant requirement; and (b) any other finding he has made in the review. Under s.42, the Commissioner must notify the department head of his findings under s.41(3). The Commissioner may also refer his findings to the Chief Executive ("CE"), the Secretary for Justice ("SJ") or any panel judge: s.41(3). Once the department head is notified of the Commissioner's findings he

(the department head) must submit a report to the Commissioner of the details of measures taken to address the issues in the findings: s.41(2).

Clearly, the Commissioner has the power to listen to intercept products, otherwise, he cannot identify the failures of departments to comply with requirements, or make other findings.

6. If a person suspects that his communications have been intercepted, he may apply to the Commissioner to examine and determine whether the interception has taken place, and if so, whether the interception has taken place without the authority of a prescribed authorization: s.44(1). If the Commissioner finds that the interception or surveillance was carried out without an authorization, then he must notify the person of his finding, and indicate whether the case is one of interception and the duration of the interception: s.44(2)(a). He must also invite the person to confirm whether he wishes to seek an order for payment of compensation under the application: s.44(2)(b). Upon receiving a confirmation for an order for payment of compensation the Commissioner may make an order for such payment by the Government to the applicant: s.44(3).

The Commissioner must be able to satisfy himself by listening to the relevant intercept product whether there that there has been an interception, and if so, whether it was done without a proper authorization.

Furthermore, in order to properly assess the amount of compensation that should be awarded, the Commissioner must listen to the unauthorized intercepted product to know of its duration or seriousness.

7. Where the Commissioner has made a determination under s.44 he must notify the department head of this determination, including any order or findings he has made: s.47(1). Thereafter, the department head must report to the Commissioner the details of measures taken to address the issue, including any disciplinary action taken against an officer: s.47(2). As well, the Commissioner has the power to refer his determination to the CE, SJ or any panel judge: s.47(3).

8. When performing his functions under the ICSO, if the Commissioner considers that an interception has been carried out without the authority of a prescribed



authorization, he must notify the relevant person of the interception, and its duration: s.48(1)(a). As well, he must inform the person of his right to apply to the Commissioner for an examination of the interception.

The Commissioner must be able to listen to the intercept products in order to first determine whether they have been carried out without an authorization, and if so, to be able to assess the proper amount of compensation.

9. The Commissioner must make an annual report to the CE in relation to the operation of the ICSO and his review of its operation: s.49. One matter that he must report on is the number of cases in which information subject to legal professional privilege ("LPP") has been obtained in consequence of any interception carried out pursuant to a prescribed authorization during the report period: s.49(2)(f).

Consequently, in order to satisfy himself of the cases which are subject to LPP, he must listen to those intercepts where LPP communications might have been intercepted.

10. For the purpose of performing his functions the Commissioner has power to require any public officer or any other person to answer any questions, and to provide any information, document or other matter in his possession to him: s.53(1)(a), and to require any officer of a department to prepare any report on any case of interception: s.53(1)(b). In addition, the Commissioner may request a panel judge to provide him with access to any document or records made available to a panel judge for the application or renewal of an authorization: s.53(2).

Section 53 is broad and clear on what information the Commissioner may request: "information, document or other matter". This includes intercept products made and stored electronically. "Document" includes electronic matter that provides information or evidence.<sup>2</sup> In the context of search warrants, "document" has been interpreted to include information stored on a computer's hard disk or on floppy disks.<sup>3</sup>

11. When an application is made for a judge's authorization for interception, amongst the matters that must be included in the applicant's affidavit is whether there is

<sup>2</sup> *Concise Oxford English Dictionary*, 11<sup>th</sup> ed, revised, Oxford University Press, 2006  
<sup>3</sup> *R v Commissioner of Customs and Excise (ex parte Bottlestop)* 1997 EWHC (Admin) 467, para 16

a likelihood that any information which may be the subject to LPP will be obtained by carrying out of the interception: Part 1 of Schedule 3, subparagraph (b) (ix).

It follows that the Commissioner must listen to intercept products that might be the subject of LPP in order to satisfy himself whether they do or not. If they do, then he must assure himself that there is an authorization in place.

12. A judge's authorization for the interception of communications cannot, unless "exceptional circumstances exist", contain terms that authorize the interception of communications at the office or residence of a lawyer, or any communications service known or reasonably expected to be known to be ordinarily used by a lawyer for the purpose of giving legal advice: s 31(1). "Exceptional circumstances" would be where the lawyer is a party to a serious crime, or the communications further a criminal purpose: s.53(2).

The Commissioner must listen to the intercepted product to determine himself whether "exceptional circumstances" exist. There is a protection against the Commissioner disclosing anything that he has heard, because any information or material that the Commissioner receives in carrying out his functions, cannot be disclosed to a court or any person: s.53(4).

13. The Commissioner may determine the procedure to be adopted in performing any of his functions under the ICSO: s.53(5). The ICSO is clear that it is intended that the Commissioner determine himself how he is to carry out his functions.

14. When a person who is the subject of an authorization is arrested, then the officer of the department in charge of the interception must report to the relevant authority by whom the authorization is issued on the likelihood that any information which may be the subject of LPP will be obtained by continuing the interception: s.58(1). Upon receiving the report the relevant authority must revoke the authorization if he considers the conditions for the authorization are not met: s.58(2).

It follows that the Commissioner must listen to the intercept products to satisfy himself that the authorization has been properly revoked.



15. If any interception contains information that is subject to LPP, then the head of the department must ensure that the interception product is destroyed as soon as reasonably practicable: s.59(2). Any information that is subject to LPP is to remain privileged notwithstanding it has been obtained pursuant to an authorization: s.62.

In view of the importance of LPP, and the provisions in the ICSO for the protection of LPP communications, the Commissioner has the power to determine whether any intercept product is the subject of LPP. Otherwise, it would be left to intercepting officers and heads of departments to make that determination. If they were wrong, then LPP communications would no longer be privileged, in possible breach of s.62.

If the Commissioner (or his designated staff) are not allowed to listen to intercept products, then his general and broad powers of review given to him by the ICSO are necessarily circumscribed by the Security Bureau's views on the operation of the ICSO.

16. The ICSO contains numerous references to LPP. If the Legislature intended for the Commissioner not to have access to intercept products which might be the subject of LPP, then it would have specifically provided for this.

## **(2) The Canadian Court case**

17. In paragraphs 6-7 of Annex A, the Security Bureau refers to the decision of the Supreme Court of Canada in *Privacy Commissioner of Canada v Blood Tribe Department of Health*.<sup>4</sup> In paragraph 8 the Bureau mentions that it could not find any reference overseas where a similar supervisory personnel have been empowered to listen to interception products which contain or are likely to contain LPP information.

18. First, it is necessary to address the Security Bureau's apparent reliance upon the *Privacy Commissioner* case as justification for the Commissioner not being permitted to listen to intercept products that might contain LPP information. Not only is the *Privacy Commissioner* case not binding on the Hong Kong Administration or a Hong Kong court, it is factually and legally distinguishable from the regime for monitoring by the Commissioner under the ICSO.

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<sup>4</sup>

[2008] 2 SCR 574



19. In the *Privacy Commissioner* case:

(1) The purpose of Canada's *Personal Information Protection and Electronic Documents Act* (the "Act") is to provide a means by which persons have the right to access information kept about themselves by others in order to verify its accuracy.

In contrast, the ICSO has no such similar function.

(2) The Canadian Privacy Commissioner's function under the *Act* is to investigate disputes between a complainant who requested disclosure of his personal information kept by a federal business or organization, and the business or organization which refused to divulge that information. He is an "administrative investigator". After receiving a complaint, and carrying out his investigation the Privacy Commissioner makes a report of his findings and recommendations. The complainant then must seek a remedy in court, which can order the relevant agency to divulge the complainant's personal information. The Privacy Commissioner may intervene in the court proceedings, and then, if not before, he is in an adversarial relationship with the business or organization being complained about<sup>5</sup>

If the Privacy Commissioner intervenes in the court proceedings, it is possible that the information which is the subject of LPP being made public or used against the person entitled to the LPP<sup>6</sup>.

In contrast, under the ICSO the Commissioner does not have an adjudicative role; he is independent and impartial. If he (or his designated staff) listen to LPP intercept product, he cannot disclose that to a court or to any person: s.53(4).

(3) Under the *Act* there are parties to a dispute.

In contrast, when the Commissioner is carrying out his functions under the ICSO there are no parties to a dispute.

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<sup>5</sup> Privacy Commissioner, paragraphs 2, 12, 20, 23  
<sup>6</sup> Paragraph 21

(5) In the *Privacy Commissioner* case there was a party which asserted its right to LPP.

In contrast, under ICSO there is no party that can assert his/her or its right to LPP. The subject of the interception does not know that his communications have been intercepted. It is left to the officer or department to decide whether in their opinion the intercept product is subject to LPP. What if they are wrong? The officer is not a trained lawyer; there is no experience or education that assists them in making that determination.

(4) In the *Privacy Commissioner* case the organization holding the personal information invoked its claim to LPP over the file.

In contrast, under the ICSO the department which has intercepted the communications which are or might be subject to LPP has no claim to LPP. The person with respect to whose communications has or might have a claim to LPP is not aware that his communications have been intercepted. Therefore, only the Commissioner can determine that.

(5) The Privacy Commissioner has other less intrusive remedies to have LPP verified: (i) he can refer the matter to the Federal Court to determine, or (ii) with the complainant's agreement, bring an application to the Federal Court for relief. The Court can review the contested material and determine whether LPP has been properly claimed<sup>7</sup>.

In contrast, under the ICSO the Commissioner has no such alternative remedies or powers.

(6) The Supreme Court of Canada held that a statute could not abrogate LPP by inference; that such incursions must be evidenced by clear statutory language, ie express words<sup>8</sup>.

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<sup>7</sup> Paragraphs 32-34  
<sup>8</sup> Paragraph 2



In contrast, the House of Lords and UK courts have held that a statute may, by express words or by “necessary implication” authorize the disclosure of LPP information or materials. In *R (Prudential PLC and Prudential (Gibraltar) Limited) v Special Commissioner of Income Tax and Another*,<sup>9</sup> Mr Justice Charles spoke about Parliament’s removal of LPP for the exercise of investigatory powers:

*(10) An aspect of the proper administration of justice and other functions is the exercise of investigatory powers given to promote the public interests supporting the disclosure of information to assist in the proper performance of those functions....In respect of those powers, the privilege against self-incrimination and the right to claim LPP can be expressly removed, modified or addressed by Parliament and if they are not questions can arise as to whether those rights have been removed or modified by necessary implication.*

The meaning of “necessary implication” in the context of LPP was discussed by Lord Hobhouse in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax and another*.<sup>10</sup>

*A necessary implication is not the same as a reasonable implication... A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation.*

20. Secondly, to address the Security Bureau’s observation in paragraph 8 of Annex A : the fact that the Bureau may not have found such powers being granted to similar supervisory personnel is not determinative nor persuasive. Each jurisdiction has different regimes and purposes for the interception of private communications, as well as safeguards for the protection of LPP information and regimes for the monitoring of the regimes. Furthermore, in other jurisdictions, such as Canada, the person who has

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<sup>9</sup> [2009] EWHC 2494 (Admin), para 32

<sup>10</sup> [2003] 1 AC 563, para 45

had his or her communications intercepted pursuant to a statutorily based authorization, must be informed of the interception. Consequently, they have the ability to take whatever action is necessary to protect any LPP communications.<sup>11</sup> Under the ICSO, they have no such rights.

### **(3) Bar Association's Views**

21. The Bar Association's views and position on the specific issues identified in paragraph 10 of Annex A, are as follows:

**(a)** The Bar Association's position is that under ICSO the Commissioner has the power to listen to intercept products which might be the subject of LPP. The Security Bureau's suggestion that there is a need to strike a balance taking into account the constitutional rights of privacy of communications and confidential legal advice is misplaced. The person's right to privacy in his communications has had that right interfered with pursuant to the judicial authorization. Article 14(1) of Hong Kong's Bill of Rights provides:

*(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence...*

The interception of the person's communications pursuant to a judicial authorization constitutes a lawful interference with the person's privacy. Therefore, his right to privacy of his communications has been overridden by a judge's authorization.

Furthermore, the person's right to confidential legal advice is protected by allowing the Commissioner to listen to intercept products which are or might be the subject to LPP; not the reverse, as the Security Bureau submits. By allowing the Commissioner to listen to such products that there is greater protection that they remain protected.

**(b)** The Bar Association's position is that there should be no limitations on the extent to which the Commissioner (and his designated staff) may select intercept products for listening, albeit on a random basis. Having the power to randomly listen to such products further enhances the vigilance of all officers and departments in the

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<sup>11</sup> Section 196 of the Criminal Code of Canada



interception of communications that LPP communications are not intercepted, and provides an effective deterrent against any officer or department intercepting and listening to such products without authorization.

(c) The Bar Association's position is that there cannot be a threshold that the Commissioner and his designated staff must meet before they exercise the power to randomly listen to intercept products or to listen to intercept products that an law enforcement agency ("LEA") has reported to contain LPP information or information that might be protected by LPP. If the exercise of this power is to be random, then that argues against there being a threshold requirement, such as "reasonable suspicion". A "reasonable suspicion" threshold involves both objective and subjective elements. However, in the absence of a report from an LEA, the Commissioner would not have any information to satisfy that threshold, so he could not exercise the power, consequently, the effectiveness of random checks as a deterrent would be lost.

Furthermore, a threshold such as a "reasonable suspicion" contradicts the express power of the Commissioner to conduct such reviews "*as he considers necessary*" on compliance by departments and their officers with the ICSO's requirements: s.41(1).

(d) The Security Bureau suggests that if the Commissioner was given the power to listen to such products, then it might have to retain such products longer than reasonable practicable before their destruction. It cites the decision in *Re Li Man-tak*, DCCC 689/2004 (5 May 2005) in support of the Administration's destruction policy. However, that case was decided in the absence of any statutory provisions regulating the preservation or destruction of interception products. Since that case, the ICSO has come into force with its provisions for the retention and destruction of LPP intercept products. We now are guided by the ICSO, and not by a former law enforcement policy.

The Bar Association suggests that the ICSO may be amended to accommodate the Commissioner and his designated staff listening to intercepted products by:

- (i) requiring the relevant department to notify the Commissioner immediately upon the issuance of an authorization that permits the interception of communications of a lawyer, or at the offices or residence of a lawyer, so that the intercepts may be listened to immediately;

- (ii) requiring the intercepting officer or department to notify the Commissioner of any interception involving a lawyer, or made to or from the offices or residence of a lawyer; or
  - (iii) requiring the officer or department to notify the Commissioner immediately upon a reasonable suspicion that LPP communications might be, or have been, intercepted.
- (e) If the Commissioner and his designated staff listen to intercept products of LPP cases, then the designated staff should be subject to disciplinary arrangements in the event of non-compliance akin to those that LEAs are required to comply with under the ICSO.
- (f) The Bar Association's position is that the Commissioner should not be required to obtain authorizations from panel judges in order to listen to such intercept products, since this would seriously distort his role and function under the ICSO.
- (g) The Bar Association's position is that in instances where the Commissioner wished to listen to such intercept products, it would be wrong for him to have to request a panel judge to listen to the product.

Under the ICSO, the Commissioner has a supervisory and monitoring role to ensure that the ICSO is complied with, including the work of panel judges. Under s.53(2) he can request a panel judge to provide him with access to any document or record kept under s 3 of Schedule 2, and under s.53(5) the Commissioner determines the procedure for the carrying out of his functions. In performing his functions under the ICSO the Commissioner is monitoring the work of panel judges. If a panel judge, for whatever reason, refused the Commissioner's request, then the Commissioner would be unable to carry out his function under the ICSO to oversee compliance by departments and their officers with the requirements of the ICSO: s.40.



## **Annex B: Commission's latest recommendations**

**Paragraph 5:** For the reasons set out by the Commissioner in his Annual Report 2010, the Bar Association is in full agreement with the Commissioner's recommendations that he be given express power to inspect and listen to any products of covert surveillance.

**Paragraph 10:** The Bar Association agrees with Recommendation 2.

Dated: 11th February 2012.

**Hong Kong Bar Association**