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Clerk to Bills Committee on
Interception of Communications
and Surveillance (Amendment) Bill 2015
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

BY EMAIL & BY POST

Dear Sir,

Interception of Communications and Surveillance(Amendment) Bill 2015

The Law Society has reviewed the captioned amendment bill and would like to bring the attention of the Bills Committee to the enclosed submission.

Thank you.

Kind regards,


Kenneth Fok
Director of Practitioners Affairs Department

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**INTERCEPTION OF COMMUNICATIONS
AND SURVEILLANCE (AMENDMENT) BILL 2015**

SUBMISSIONS ON LEGAL PROFESSIONAL PRIVILEGE

1. The Law Society has reviewed the the Interception of Communications and Surveillance (Amendment) Bill 2015 (“the Amendment Bill”), and wish to draw the attention of the Bills Committee on the Amendment Bill to those issues concerning Legal Professional Privilege (LPP).
2. Comments on the procedural and technical amendments to the Interception of Communications and Surveillance Ordinance (“the Ordinance”), which are unrelated to LPP, are reserved.

LACK OF SAFEGUARDS

3. The Law Society notes that while the Amendment Bill proposes various amendments on operational matters, it is distinctly silent on statutory safeguards, or improvement thereof, against any intentional or inadvertent access to and use of LPP by the law enforcement agencies (LEAs) throughout all stages of the covert operations.
4. The Law Society invites the Bills Committee to specifically take notice of the importance of the LPP.
5. In a Legislative Council Paper LC Paper No. CB(2)1172/14-15(04) dated 2 April 2015, we note the following¹:

¹ Legislative Council Secretariat, ‘Bills Committee on Interception of Communications and Covert Surveillance (Amendment) Bill 2015: Background brief prepared by the Legislative Council Secretariat’ (LC Paper No. CB(2)1172/14-15(04) (2 April 2015), para. 15

“Protection of information subject to legal professional privilege and journalistic material

14. Members noted that the Administration had formed an interdepartmental working group ("the Working Group") to conduct a comprehensive review of ICSO. In undertaking the review, the Administration would take into account the recommendations of the Commissioner, the views of panel judges and the operational experience of LEAs. Members considered it necessary to strike a balance between protecting privacy and legal professional privilege ("LPP"), while allowing LEAs to carry out interception of communications and covert surveillance operations for the prevention or detection of serious crimes and the protection of public security.

15. According to the Administration, it recognized the need to strike a balance between combating serious crimes and protecting the privacy of individuals ..." [emphasis supplied]

6. While the need to combat serious crimes is acknowledged, the balancing exercise, as averred in the above, should not be perceived or taken as any means to curtail the basic entitlement to the protection of privacy of individuals.

IMPORTANCE OF LEGAL PROFESSIONAL PRIVILEGE

7. In the recent Court of Appeal judgment in *Citic Pacific Ltd v Secretary for Justice* CACV 7/2012 dated 29 June 2015, the Court of Appeal said the following.

“2. Though legal professional privilege ("LPP") has its origins in the common law, it has since 1997 been constitutionally entrenched in Hong Kong as a basic right under Article 35 of the Basic Law . Our Court of Final Appeal has repeatedly reiterated that LPP is a fundamental right which the courts will jealously protect, see *Solicitor v Law Society of Hong Kong* (2006) 9 HKCFAR 175 [14-17]; *Akai Holdings Ltd v Ernst & Young* (2009) 12 HKCFAR 649 [66-69]; *Secretary for Justice v Florence Tsang Chiu Wing* (2014) 17 HKCFAR 739 [27-29] ...

29. In *Greenough v Gaskell* (1833) 1 My & K 98... Lord Brougham LC explained the foundation of LPP in these words:

‘ ... it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, everyone would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case. If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous.”

30. This was said at a time when the need for legal professional assistance arose mainly in the conduct of business in courts. Even then, the Lord Chancellor was of the view that LPP could not be restricted to situations where litigation was contemplated. In the modern world, developments in the rule of law increase the need for legal advice and the justification for the protection afforded by LPP can arise in every aspect of our daily life. This was highlighted by *Wilson J in Baker v Campbell* (1983) 153 CLR 52 at 95:

‘ ...the extension of the privilege ... beyond communications between the client and his professional adviser in relation to pending or anticipated litigation to embrace any communications undertaken with the object of seeking or give legal advice serves, in my opinion, to emphasize that the public interest involved extends beyond legal proceedings. In fostering the confidential relationship in which legal advice is given and received the common law is serving the ends of justice because it is facilitating the orderly arrangement of the client's affairs as a member of the community. Furthermore, in promoting the faithful discharge of his responsibilities and the enjoyment of his rights under the law the ends of justice are being served. It is in the public interest to encourage the service of such ends. The multiplicity and complexity of the demands which the modern state makes upon its citizens underlines the continued relevance of the privilege to the public interest. ...

... The freedom to consult one's legal adviser in the knowledge that confidential communications will be safeguarded will often make its own contribution to the general level of respect for and observance of the law within the community.’

31. Thus, in *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121, the High Court of Australia expressed the rationale for LPP in the non-litigious context in terms of fundamental rights in furtherance of the rule of law. McHugh J said at p.161:

‘Now that this Court has held that legal professional privilege is not a rule of evidence but a substantive rule of law, the best explanation of the doctrine is that it is ‘a practical guarantee of fundamental, constitutional or human rights. By protecting the confidentiality of communications between lawyer and client, the doctrine protects the rights and privacy of persons including corporations by ensuring unreserved freedom of communication with professional lawyers who can advise them of their rights under the law and, where necessary, take action on their behalf to defend or enforce those rights. The doctrine is a natural, if not necessary, corollary of the rule of law and a potent force for ensuring that the equal protection of the law is a reality.’

32. To the same effect, Brennan J said at p.127:

‘In my opinion, the basic justification for allowing the privilege is the public interest in facilitating the application of the rule of law. Administration of the law is not the function of the courts alone. The law is administered more frequently and more directly by legal advisers than it is by judges. Legal professional privilege ensures that the law's writ can run effectively whenever a legal problem arises or a person seeks to chart a course of conduct in conformity with law.’

33. English jurisprudence also accepts the notion that LPP is a fundamental human right even in the non-litigious context. *R (Morgan Grenfell Ltd) v Special Commissioner [2003] 1 AC 563* was a case in which an inspector of taxes sought disclosure by a bank of its instructions to counsel for advice on a tax scheme devised by the bank. At [7] of the judgment, Lord Hoffmann highlighted the fundamental nature of LPP.

34. In *Balabel v Air India* [1988] 1 Ch 371, Taylor LJ said at p.330 D to G:

‘Although originally confined to advice regarding litigation, the privilege was extended to non-litigious business. Nevertheless, despite that extension, the purpose and scope of the privilege is still to enable legal advice to be sought and given in confidence. ... In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the

solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as 'please advise me what I should do.' But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.'

[Emphasis in the above supplied].

8. See also the comment of Lord Taylor CJ in another case, where His Lordship put it "is a fundamental condition on which the administration of justice as a whole rests"².
9. We have quoted fairly extensively the above Court of Appeal judgment (with emphasis) in this submission. This is because the above citations very aptly serve as a reminder of the prime importance of the rights to legal advice, which must be privileged and which is a fundamental entitlement.
10. We also wish to draw the Administration's attention to the following provisions on the Basic Law on the rights to privacy of communication and legal advice.
 - (1) **BL30** provides that the freedom and privacy of communication of Hong Kong resident shall be protected by law.
 - (2) **BL35** goes further and provides that Hong Kong resident shall have the rights to confidential legal advice, access to the Court, choice of lawyers for timely protection of their lawful rights and interest. This protection is not dependent upon any legislation or statutory provision.

SAFEGUARDS PROPOSED

11. Insofar as the protection of the LPP is concerned, we restate in the following some of our submission dated 12 May 2006 for the attention of

² *R v. Derby Magistrates Court ex p B* [1996] AC 487, at 507

the Bills Committee. If the following should not be accepted, we consider that convincing reasons should be offered by the Administration.

- (1) The existing safeguards on LPP in the Ordinance do not cover situations of inadvertent access to LPP information by the LEAs. The Ordinance or the Code of Practice does not prohibit an officer from continuing to listen to the conversation *during an operation* when it becomes apparent that it is covered by LPP, and has nothing to do with the furtherance of a crime. There should be express statutory duty for 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) Destruction of the intercepted products containing LPP is provided for under section 59 of the Ordinance. However the provision for the destruction of all intercepted LPP products notwithstanding any intended or pending prosecution could be unfair to the accused, as the destruction of the intercepted LPP products would make it difficult for the accused to seek redress from the Court. In some overseas jurisdictions, such as England and Wales, the accused could apply for a stay of proceedings if his rights to LPP were infringed by the LEAs.³
- (3) In the light of the above, we repeat that in case any communications with a lawyer are recorded during an operation:
 - (a) the recorded LPP conversations (and copies thereof) must be kept in a sealed envelope and not further be disclosed to the LEA officers.
 - (b) 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.

³ *R v. Derby Magistrates Court Ex p. B* [1996] AC 487; *R. (on the application of Customs and Excise Commissioners) v. Nottingham Magistrates Court* [2004] EWHC 1922 (Admin); *R v. Grant* [2005] EWCA Crim 1089

- (c) all kinds of LPP products (be they intercepted products or surveillance products) must be retained for a reasonable period of time for any pending legal proceedings.

CONCLUSION

12. The Law Society takes the view that there must be appropriate and proper protection for LPP, and the Administration should seriously consider introducing an express statutory provision to the effect that nothing in the Ordinance could be construed as authorising any arbitrary or intentional access to LPP information by the LEAs⁴. We urge the Administration to make use of this legislative exercise to put in place a sound and a reliable mechanism for the protection of LPP.

The Law Society of Hong Kong
27 October 2015

⁴ Submission of the Law Society of Hong Kong dated 12 May 2006, para. 17