THE LAW SOCIETY OF HONG KONG 香港律師會

Comments by the Law Society on the key comments and recommendations made in the Annual Report 2007 of the Commissioner on Interception of Communications and Surveillance ("the Commissioner")

	Comments and recommendations made by the Commissioner	Law Society's Comments
A.	**Recommendations to Law Enforcement Agencies (see Chapter 9)**	
1.	Interception of "if known" under Part 1(b)(xi), Part 2(b)(xii) and Part 3(b)(xii) of Schedule 3 to the Interception of Communications and Surveillance Ordinance ("ICSO")(paragraphs 9.4 – 9.8)	
	(a) Schedule 3 to the ICSO requires the affidavit or statement supporting an application for the issue of an authorisation to set out, if known, whether during the preceding two years, there has been any application for the issue or renewal of a prescribed authorisation in which any person set out in the affidavit or statement has also been identified as the subject of covert operation under the ICSO. The knowledge was interpreted by an law enforcement agency ("LEA") to be the personal knowledge of the applicant rather than that of the department. The Commissioner considers that the words "if known" should be interpreted as the knowledge of the LEA to which the applicant belongs. The Commissioner recommends	

	that the LEA should have a central database with suitable search functions to facilitate applicants or authorising officers to ascertain whether the department has made previous applications on the same subject before. (paragraphs 9.4 and 9.6)	As the LEA concerned has accepted the Commissioner's proposal the Security Bureau (SB) should provide details of how the recommendation has been implemented to the Panel on Security i.e. there is a public record of the action taken to address the problem.
	(b) Schedule 3 to the ICSO also requires the affidavit supporting an application for the issue of an authorisation for interception to set out, if known, whether during the preceding two years, there has been any application for the issue or renewal of a prescribed authorisation in which interception of any telecommunications service set out in the affidavit has been sought. The affidavit should thus mention whether there has been any application for the issue or renewal of a prescribed authorisation in respect of any such telephone number, if known, regardless of whether the application has been approved or refused. (paragraph 9.8)	The Law Society notes the comments of the SB.
2.	Regular submission of inventory list of surveillance devices and device registers (paragraphs 9.9 – 9.12)	
	The Commissioner recommends that – (a) LEAs should provide the Commissioner with various devices-related documents in a prescribed format. (b) The inventory list should include all devices (excluding fixtures) capable of performing covert surveillance even though they may not be used for covert surveillance. (c) Each device is to be assigned a unique device code and/or serial number in the manner prescribed by the Commissioner. (d) (d) Each device is to be identified in the inventory list/device registers in the manner prescribed by the Commissioner. (e) A detailed description of the functions of each device	The Law Society notes SB's comments in relation to (a) (c) (d) (e) and (h). In relation to (b) (f) (g) and (i), SB cites lack of resources as the impediment to implementing the Commissioner's recommendations. **The Law Society does not accept SB's response. The Law Society is of the view the Administration should provide adequate resources to enable clear records to be maintained by the LEAs.**

	should be provided in the inventory list. (f) Additions to and deletions from the inventory lists should be made in the manner prescribed by the Commissioner. (g) LEAS should inform the Commissioner of the updating of the device registers within a specified timeframe. (h) All the device registers should be paginated for easy reference. (paragraph 9.9) (i) For withdrawal of devices, be it for ICSO purpose or non-ICSO purpose, there should be a request memo or an application form. For withdrawal of devices for non-ICSO purpose, the request memo/application form should be signed by the officer withdrawing the device, endorsed by the team leader who should at least be of Inspector (or equivalent) grade, and approved by an officer outside the team who must be senior in rank to the endorsing officer. (paragraph 9.10)	
3.	Duration of executive authorisation for Type 2 surveillance (paragraphs 9.13 – 9.15)	
	Applications have the duty to provide sufficient grounds or evidence for the duration sought. At the same time, authorising officers should take a critical approach when considering applications and should seek further clarification from applicants whenever necessary. The justification and further clarification should be properly recorded. (paragraph 9.13)	The Law Society notes the response of the SB.
4.	Duration of authorisation for interception (paragraphs 9.16 – 9.17)	
	LEA should consider applying for a shorter duration than three months in normal cases and highlighting their justification for a longer duration when submitting applications that deserve special consideration. (paragraph 9.17)	The Law Society notes the response of the SB.

5.	Ground for discontinuance of interception (paragraphs 9.22 – 9.23)	
	The reason "intelligence of value had been obtained" was used as the ground for discontinuance for a number of interception cases. The Commissioner considers such description ambiguous and confusing, and advises that a more specific and clearer description should be given for the ground of discontinuance. (paragraph 9.23)	The Law Society notes the response of the SB.
6.	Description of ambit for "premises-based" surveillance (paragraphs 9.24 – 9.25)	
	The form of surveillance in a number of applications for Type 2 surveillance of an LEA was categorised as both premises-based and subject-based. The Commissioner considers the description of the premises-based ambit of the surveillance too wide. He asks for the wording to be tightened so as not to unwittingly expand the ambit of the authorisation. (paragraph 9.24)	The Law Society notes the response of the SB.
7.	Counting of renewals (paragraphs 9.26 – 9.27)	
	When different authorisations of the same case are combined on occasion of renewal, the counting of renewal should start from the earliest authorisation, irrespective of any subsequent discontinuance of any facilities contained in that authorisation. Where different authorisations of the same case have not been combined, each authorisation should be treated as s stand-alone case and the counting of renewal should not be affected by each other. (paragraph 9.27)	The Law Society notes the response of the SB.
B.	**Recommendations made after the Commissioner's review of cases of irregularities and incidents (see paragraph 9.30)**	

1.	Paragraph 2(d) of the form "COP-13: statement in writing in support of an application for renewal of an executive authorisation for Type 2 surveillance" was misleading. The paragraph should be improved by adding a remark to alert the applicant that the starting time of the renewal should dovetail with the expiry time of authorisation to be renewed. (paragraph 9.30(i))	The Law Society notes the response of the SB.
2.	The procedure for return of surveillance devices should be tightened (paragraph 9.30 (m))	The Law Society notes the response of the SB.
3.	To address the problem of unauthorised interception during the time gap between the revocation of a telecommunications interception authorisation by a panel judge under section 58 of the ICSO following a report of arrest from LEAs and the actual disconnection of the facilities intercepted, the Commissioner suggests that LEAs should discontinue the interception temporarily at the time of submitting the arrest report and re-start the activity if the relevant authority decides not to revoke the prescribed authorisation. (paragraph 9.30(o)).	**The Law Society adopts the Commissioner's recommendation.** SB's suggestion fails to provide details on the audit trail in relation to the information obtained. Has guidance been provided in the Code of Practice (COP) in relation to "*critical cases*"? We do not agree with the SB's proposal that a "*comprehensive review of the ISCO [takes place] after the second full year report of [the Commissioner] is available*". **See comments in paragraph C1 below.**
C.	**Other Recommendations (see Chapter 10)**	
1.	Interception or covert surveillance conducted during the brief interim period between the revocation of prescribed authorisation under section 58 and the actual discontinuance of the operation (paragraphs 10.4 – 10.7)	
	The interception or surveillance carried out during the interim period between the revocation of a prescribed authorisation under section 58 and the actual discontinuance of the operation is unauthorised as it is carried out without the authority of a	The Law Society considers the stance adopted by SB in relation to the Panel Judge's authority to authorise the revocation of a prescribed authorisation under S.58 is ***without merit.***

	prescribed authorisation. The solution lies in amending the provisions of section 58 to allow the relevant authority flexibility to defer the time of revocation of prescribed authorisations as he considers appropriate. (paragraph 10.7)	**Panel Judges and the Commissioner must have the power to bring authorised interceptions to an end and failure to do so by individual officers should be subject to criminal penalties.** The Law Society **cannot support** SB's proposal for a review of the ICSO until after the publication of the Commissioner's second full report as there are outstanding issues which cannot be left unresolved. The Law Society notes that "*according to the SB, the considered view of the DOJ was that the statutory scheme does not have any lacuna in relation to revocation that needs to be filled*". The Law Society submits ***there is a lacuna*** in S.58 which needs to be addressed urgently. The ICSO should be amended to remove any doubt the Commissioner's interpretation is indeed the correct one. The SB and ICAC should not be allowed to assert their own interpretation of S.58 until a review takes place at an undetermined date in the future. **The Law Society recommends that where there is any doubt on the interpretation of the ICSO the LEAS *must* make an immediate application for clarification to a Panel Judge.** S.49 of ICSO provides the Commissioner shall "*for every report period, submit a report to the Chief Executive*". The Law Society notes the Commissioner's Annual Report 2007 ("Report") was sent to the Chief Executive on 30 June 2008, the very last possible day for submission. The Law Society considers it appropriate that an explanation be provided as to why the Report was not made public until February 2009.

		One of the incidents involving breaches of the ICSO is 2 years old: LPP Case 1 took place in February 2007 LPP Cases 2 and 3 took place in November 2007 LPP Case 4 took place in December 2007 If SB's proposal on review is accepted then, given the recent timeline, a review of ICSO would not take place until February 2011 at the earliest. Consultation on proposed amendments would then delay the introduction of amendments to ICSO until the end of this Legco term. The Law Society considers this to be unacceptable. S.50 of ICSO authorises the Commissioner "*...from time to time [to] submit any further report to the Chief Executive on any matter relating to the performance of his functions under the Ordinance as he sees fit*". **SB must make immediate arrangements for a review of ICSO before the end of 2009. A review of ICSO this year does not prevent an on-going assessment of the ordinance after the Commissioner's Report in 2008. It is a work in progress and should be regarded as such given the draconian powers the LEAs can exercise under the Ordinance. The failure by the ICAC to take adequate steps to ensure compliance, prior to the publication of the Commissioner's Report, bears out the concerns expressed before the enactment of ICSO, that inadequate mechanisms were in place to ensure compliance by the ICAC.** **The Law Society also recommends S.49 be amended to:** **(a) require the Commissioner to send a copy of the Report to Legco at the same time it is sent to the Chief Executive; and** **(b) The reporting time should be reduced from 6 months to 3 months.**

2.	Revocation of a prescribed authorisation upon receipt of an REP-11 report (paragraphs 10.8 – 10.11)	
	The Commissioner does not concur with the Security Bureau's view that a panel judge does not have the power to revoke a prescribed authorisation upon receipt of an REP-11 report on a material change of circumstances or initial material inaccuracies because a prescribed authorisation can only be revoked in circumstances specified in sections 24, 26, 27, 57 and 58 of the ICSO, and that the panel judge had acted ultra vires in revoking the authorisation in LPP Case 1 upon receipt of the REP-11 report. (paragraph 10.8) Although Security Bureau has stated that the LEA should take the panel judge's view as a ground for discontinuance and submit a discontinuance report under section 57 as soon as reasonably practicable, the Commissioner is concerned that it would still be the LEA which has the say on what "as soon as reasonably practicable" is, instead of the panel judge who would revoke the authorisation upon discovery of the mistake. (paragraph 10.10)	The Law Society ***does not*** accept that compliance with the judge's interpretation of S.58 will lead to an "*unworkable situation*". **Clarification of S.58 should be addressed as soon as possible.**
3.	The proper construction of the terms "relevant person" and "duration" under section 48(7) and (1) (paragraphs 10.12 and 10.13) and the practical difficulty in complying fully with section 48(1)(a) and (4) (paragraph 10.14)	
	(a) "Relevant person" is defined by section 48(7) as meaning "any person who is the subject of the interception or covert surveillance concerned". The word "subject" is far from pellucid in situations, for example, where a telephone line has been intercepted by mistake. Neither is the subscriber of the telephone line the subject unless the subscriber is also the user at the material time. (paragraph	In relation to (a) (b) and (c) the review of ICSO must take place this year. The Law Society is of the view that the SB ***has not*** provided any justification to postpone the review until 2010.

	10.12) (b) There is no definition of the term "duration" in section 48(1)(a) of the ICSO. It is not clear whether it is date and time specific or period specific. (paragraph 10.13) (c) The Commissioner considers that section 48 of the ICSO imposes on him various constraints and restrictions in giving notice to the relevant person. He may not be able to find out who the relevant person is, nor may the relevant person be able to make meaningful written submissions to him for the purpose of seeking an order for the payment of compensation. He may not be able to disclose in his Annual Report more than he can disclose in a notice to the relevant person, or else the relevant person may still get the information by reading the relevant part of his Annual Report. (paragraph 10.14)	
4.	Issues relating to the obtaining of legal professional privilege ("LPP") information or where LPP information is likely to be obtained. (paragraphs 10.22 to 10.25)	
	Based on his review of the handling of the four suspected LPP cases in the report period, the Commissioner identified a number of issues regarding the access, preservation and use of information arising from LPP cases for the Administration's consideration. (paragraphs 10.22 to 10.25)	The Law Society repeats its comments in paragraph C1 above. The 4 cases involving breaches LPP involved the ICAC which indicates a need to improve the cultural mindset of some officers within that organisation. The Law Society finds it ***inconceivable*** that senior ICAC officers professed *misunderstanding* of the provisions of the ICSO given the vigorous debate on the Bill in the summer of 2006. The COP is 46 pages long and yet in the 4 LPP cases, officers chose to pursue their own interpretation of the new law rather than seek guidance from superior officers. In the Law Society's submissions dated 16 May 2006 on Clause 65 (originally clause 61 of the Bill) the following comments were made

		in relation to "immunity": 1. *Clause 61(1)(b) provides that a person shall not incur any civil or criminal liability if he has acted in good faith, which means presumably* ***that immunity from suit should not be applicable when the LEA has acted in bad faith****.* 2. *In the recent judgment of Watkins v. Home Office and others [2006] UKHL 17, the House of Lords considered the issue of civil liability in the tort of misfeasance in public office for intercepting correspondence with legal advisers and courts by public officers. At trial, it was established that a number of prison staff had acted in bad faith by opening and reading material protected by LPP in breach of the Prison Rules when they were not entitled to do so. The House of Lords held that even though it was unlawful for the prison staff to interfere with the appellant's enjoyment of his right to confidential legal correspondence, he could not succeed in his civil action in tort for misfeasance in public office as he had suffered no "material damage" (i.e. financial loss, or physical or mental injury).* 3. *In the light of Watkins, the* ***Bill fails to provide adequate safeguard for breach of LPP by public officers who have intercepted LPP material in bad faith, or maliciously or recklessly.*** *A private individual whose right to LPP has been infringed will not have a civil remedy in tort in the absence of proof of any material damage. The public law remedies will be illusory.* 4. *In order to address Watkins, the Bill should specifically provide for the creation of a statutory duty on the part of any public officer to respect privacy in general, and observe LPP in particular;* ***any breach of such statutory duty, if not in good***

		faith, would give rise to both criminal proceedings and a civil remedy in damages against that public officer by the individuals whose rights have been infringed, without the necessity of proof of "material damage". *5. The Administration has put forward the argument that it would be wrong to impose criminal sanctions on LEAs when private individuals can intercept communications. It should be noted that the LEAs have significant resources and intrusion by LEAs would not be on the same scale as individuals. The unlawful intrusion onto property can be quantified but intrusion into communications cannot. The proposed regulatory scheme is an authorization to intrude into a person's basic rights.* ***Intrusions into privacy are so great that LEAs should be criminally sanctioned for any abuse, and it should not be left to internal disciplinary action as put forward by the Administration.*** *6. The current proposal fails to impose proportionate checks and balances. It should be noted that under the Banking Ordinance and the Securities and Futures Ordinance, similar offences can carry a maximum fine of $1 million and a maximum term of imprisonment of 2 years (s.120 of the Banking Ordinance and s.378 of the Securities and Futures Ordinance).* *7. Two separate criminal offences should be created for:* *(i) unauthorized covert surveillance; and* *(ii) dealing with protected products in an improper manner (e.g. disclosure of protected products to third parties).* *8. The appropriate threshold should be "deliberately" or "recklessly".* **The Law Society repeats its recommendation that in order to**

		impress on the LEAs and particularly the ICAC that breaches of the ICSO and the COP are of the utmost seriousness there should be criminal sanctions applied for breaches. **The Law Society further considers that the Commissioner's oversight functions require strengthening which can be achieved by removing the "grey areas" rather than by LEAs "*adopting various measures to facilitate the oversight functions of the Commissioner*". The Law Society is most concerned that the SB continues to see the supervision of the Ordinance from the perspective of the LEAs rather than from that of the Commissioner!** **We repeat our recommendation that where there is any doubt on the interpretation of the ICSO, the LEAs *must* make an immediate application for clarification to a Panel Judge.** **ICAC's Information Paper ("Paper") 2 March 2009** **Action on breaches of the ICSO** We note the ICAC states in paragraph 11 of its Paper the following comments on the breaches of the Ordinance: "*In broad terms, acts which breach no specific rules or instructions but constitute inappropriate judgment, omissions or other inadequate performances will be dealt with by counselling and management advice*". The Law Society considers this approach to the problems identified in the Report to be ***wholly inadequate.*** The ICAC (and other LEAs) should provide adequate training on LPP so that dedicated teams would be accredited.

		The Law Society notes the ICAC's comments on training in paragraph 32 (ii) of its Paper but recommends: **(a) The standard of training be increased to require officers dealing with LPP matters to be "accredited".** **(b) The training of such officers to be on a continuing education basis.** **(c) All LEAs must confirm that once LPP has been detected officers understand it is their *duty* to stop the interception immediately.** **Number of LPP cases** The Report is unclear on the number of cases involving unauthorised interception of LPP material. **(a) The Law Society recommends that when material is handed to the Commissioner for review the ICAC officers involved in the interception must declare under the Oaths and Declaration Ordinance (Cap. 11) that the report covers *all the material involved with the interception exercise.*** **(b) The Commissioner should provide statistics on LPP material in his future Reports.** **(c) In paragraph 24 of the paper, the ICAC provides details of its revised policy on retention of the:** ***"... suspected LPP call but also, in the case of a revocation by a PJ, all subsequent calls until the time of actual disconnection of the telecommunications facility the summaries and other relevant records as required by C/ICS. In accordance with the requirement of C/ICS all these materials would be kept for eighteen months or until the completion of his enquiry".*** **There is no rational for SB's proposal to destroy this material**

		after eighteen months. Intercepted material should be sealed and retained to enable inspection of unused materials when a decision has been made to prosecute, and should only be destroyed after trial.
5.	Report of discontinuance under section 57 received after the expiry of a prescribed authorisation (paragraph 10.26)	
	Section 57(4) of the ICSO provides that where the relevant authority receives a report of discontinuance of operation under section 57(3), he shall, as soon as reasonably practicable after receiving the report, revoke the prescribed authorisation concerned. There were a number of cases where the report of discontinuance pursuant to section 57 reached the relevant authority at a time when the authorisation had already expired. The Commissioner recommends that section 57(4) be amended to cater for the situation where a discontinuance report is received by the relevant authority after the natural expiration of a prescribed authorisation so that the relevant authority would not be obliged by section 57(4) to revoke a prescribed authorisation which is no longer afoot. (paragraph 10.26)	The Law Society repeats its recommendation that a review of the ICSO ***must*** be conducted before the end of 2009.

The Law Society of Hong Kong
Constitutional Affairs Committee
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