



**Commissioner on Interpretation on Interception of Communications and Surveillance
Annual Report 2008**

Comments by the Law Society of Hong Kong

The Commissioner on Interpretation of Communications and Surveillance issued his first Annual Report in 2007 and the Law Society notes several important recommendations remain outstanding. The Commissioner's second Annual Report, published on 30 November 2009, made some additional recommendations which covers 2008.

The Law Society commentary below notes matters which remain outstanding and additional commentary is provided where appropriate:

A. Recommendations to Law Enforcement Agencies in the Commissioner's Report dated 2007

1. The Commissioner noted 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 a 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.

The Law Society stated in March 2009: 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.

December 2009: The Law Society requests details on whether the Commissioner's recommendation has been implemented.

2. The Commissioner made the following recommendations:

- (a)
- (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)

- (d)
- (e)
- (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)
- (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.

December 2009:

The Law Society indicated it did not accept SB's response to the Commissioner's recommendations in the 2007 Report. The Law Society is of the view the Administration should provide adequate resources to enable clear records to be maintained by the LEAs.

Have additional resources been provided to the LEAs to enable the Commissioner to improve supervision of the inventory list of surveillance devices and device registers?

B. Recommendations made after the Commissioner's review of cases of irregularities and incidents in 2007

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.

December 2009:

The Law Society adopted the Commissioner's recommendation.

Has the Code of Practice been amended to provide guidance in relation to "critical cases"?

C. Other Recommendations

1. Commissioner's comments in 2007 Report

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 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.

The Law Society stated the following in March 2009:

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*.

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.

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.

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*”.

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.

December 2009:

1. We note the Commissioner’s Report was again submitted on 30 June 2009 to the Chief Executive and again there has been a lengthy delay of 5 months before its publication. The Security Bureau has failed to address our complaint over this lengthy delay.

2. We re-iterate our previous submission that S. 49 should be amended as this would improve transparency.

3. We re-iterate our submissions dated March 2009 that an immediate review of ICSO be undertaken given the draconian powers by which LEAs can intrude upon a citizen’s privacy. The Commissioner has identified loopholes in the legislation which need to be eliminated as a matter of urgency. Clearly clarification of S58 of ICSO is required.

D. Legal Professional Privilege (LPP)

The Law Society re-iterates its submissions dated March 2009 in relation to breaches of LPP by the LEAs:

“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 ICSCO

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 rationale 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."

December 2009:

1. The importance of LPP has been discussed in the recent judgment of Philip PH Wong, Kennedy YH Wong & Co v. Commissioner of the Independent Commission Against Corruption CACV 4 and 272/2008 (02/10/2009) when Stock JA stated that where there is

any interception of LPP by LEAs, such intervention by the relevant LEA must stop immediately.

2. The attitude of some of LEA officers as highlighted in the Reports support our submissions that criminal sanctions should be imposed given the arrogant attitude of some officers which regrettably gives an impression they consider themselves to be above the law.

E. Commissioner's Annual Report 2008

The Commissioner has made a series of recommendations in his latest Report, a majority of which have been accepted by the Security Bureau. However, the following are still being considered:

1. Recommendations in connection with covert surveillance in paragraph 8.30

(b) The computerized Interception of Communications and Surveillance Ordinance ("ICSO") device recording system of an LEA should be extended to cover the device registers for non-ICSO purpose. Computer system should similarly be used by other LEAs where appropriate to better control the issue and collection for its surveillance devices.

December 2009:

The Law Society endorses the Commissioner's recommendation. Adequate resources must be provided to enable the Commissioner to perform his statutory duties.

2. Proposed system of checking intercept product and related records (paragraphs 9.2-9.11)

The Commissioner recommends that the content of intercept products and related records should be preserved to enable his staff and him to check cases of special interest or chosen at random.

December 2009

The Law Society endorses this recommendation in light of the inexplicable destruction of material by an LEA officer after requests had been made by the Commissioner.

3. Reporting requirement on obtaining of information which may be the contents of journalistic material (paragraph 9.21)

There is no provision in the Code of Practice requiring LEAs to report to the Commissioner incidents where information which may be the contents of journalistic material has been obtained. The Commissioner suggests that these doubts should be clarified when the Ordinance or the Code of Practice is reviewed.

December 2009

The Law Society endorses the Commissioner's recommendation.

4. Reporting of irregularities (paragraph 9.22)

The Commissioner suggests that appropriate amendments be made to the Ordinance to include a duty of the LEA heads to report to him promptly whatever irregularity in the operation of the ICSO regime, regardless of whether it is due to the fault of the LEA and its officers.

December 2009

The Law Society endorses the Commissioner's recommendation.

We also note some LEAs have taken months to reply to the Commissioner's enquiries. It would be appropriate to introduce a "performance pledge" so that matters do not drag on because of a failure by an LEA to respond in a timely manner.

Appendix 1: Response time to Commissioner's enquiries by an LEA

The Law Society submits the review of the ICSO should take place as soon as practicable and expects to be consulted on the views expressed above. If the review does not take place until the second quarter of 2010 the loopholes in the ICSO will continue to be a cause of great concern to the public.

**The Law Society of Hong Kong
Constitutional Affairs Committee
30 December 2009**

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