

Annual Report 2007 to the Chief Executive
by the Commissioner on Interception of Communications and
Surveillance

Comments of the Hong Kong Bar Association

1. The Hong Kong Bar Association (“HKBA”) has considered the Annual Report 2007 to the Chief Executive (“the 2007 Report”) by the Commissioner on Interception of Communications and Surveillance (“the Commissioner”).
2. The HKBA has the following comments on the 2007 Report, dealing mainly with the statistical information and the topic of legal professional privilege (“LPP”). The HKBA is of the view that the issues raised in the 2007 Report deserve more in-depth consideration and notes that the Administration intends to conduct a review of the Interception of Communications and Surveillance Ordinance (Cap 589) (“ICSO”) after considering the experience of implementation in 2008.
3. The HKBA considers that the 2007 Report has provided the public with much needed, though incomplete, information on the operation of law enforcement agencies (“the LEAs”) with the intrusive measures of interception of communications and covert surveillance. The HKBA also appreciates that the Commissioner has made a strong effort in ensuring that the LEAs follow both the language and the intent of the ICSO and in informing the public of the extent to which there has been compliance with the ICSO on the part of the LEAs.

The Statistics

4. The HKBA first makes observations on the statutory tables in Chapter 11 of the 2007 Report and the associated detailed description in Chapters 2 to 4 of the same.
5. Paragraphs 2.5, 2.8 and 2.10 and Table 1(a) of the 2007 Report indicate that there were a total of 1,556 applications for authorization for interception of communications in 2007. This appears to mean about 5 applications per day.
6. Breaking down the total number further indicates that there were 798 successful fresh applications in 2007, or 2.2 applications per day. While it is difficult to draw any conclusions from these statistics, it appears to the HKBA nonetheless that the LEAs are making use of interception of communications frequently in their operations. A comparison with other jurisdictions may allow the overseeing bodies in Hong Kong, including the Commissioner, the ICAC Operations Review Committee, the Security Bureau and the Legislative Council, to gauge whether this means of investigation has been overused or has been abused to become a measure of monitoring.
7. The HKBA also notes the significant proportion of successful renewed applications (727 out of 1,556), bearing in mind that the average duration of a fresh authorization is 30 days and the average duration of a renewed authorization is again 30 days. This seems to mean that for a significant portion of cases, the subject person or premises had had communications intercepted for at least 60 days if not more. Further, paragraph 2.20 indicates that there were 23 authorizations for interception with 5 or more previous renewals within 2007. While the HKBA acknowledges that Panel Judges had been relatively cautious in granting authorizations in the sense of granting only 30 days' authorization when they are empowered to grant up to 90 days' authorization on any one occasion, the HKBA nevertheless cautions

against consecutive authorizations for a prolonged duration and suggests that the Commissioner should seek to persuade the Security Bureau and the LEAs to begin to provide data on repeated authorizations for interception where such authorizations reach the point of 3 or more previous renewals.

8. The HKBA further suggests that the Commissioner sub-divides data concerning interception of telecommunications and interception of postal communications to assist better understanding of the situation.
9. Table 2(b) sets out the major categories of offences for the investigation of which prescribed authorizations for surveillance have been issued or renewed in 2007. The HKBA notes that the categories of offences of “conspiracy to commit an offence” and “attempting to commit an offence” indicate very little on the nature of the offences involved. The HKBA suggests that the Commissioner should obtain and present such data in relation to the substantive offence(s) involved in the alleged conspiracy or attempt.

Legal Professional Privilege

10. The HKBA has reviewed Chapter 5 of the Report. The HKBA finds it unedifying that the ICAC, the Security Bureau and the Department of Justice chose to disagree with the Commissioner and the Panel Judges, on the question of whether Panel Judges may revoke a judge’s authorization in light of a material change of circumstances disclosed in a report made by the LEA pursuant to the standard condition in the authorization; and the consequential question of whether interception activities the ICAC carried on after a Panel Judge revoked an authorization in light of the report was unauthorized. See paragraphs 5.15 to 5.19. Having considered these paragraphs as well as paragraphs 5.27, 10.4 to 10.11, the HKBA expresses *support* of the Commissioner’s views. The HKBA also notes that the Commissioner’s views uphold the objects of the ICSO to subject interception of

communications and covert surveillance under regulation external of the LEAs and to safeguard LPP. It must be noted that LPP is a fundamental right that is best safeguarded by the external regulator than by the regulated agency.

11. The HKBA notes with dismay that the ICAC failed to reply substantively to the Commissioner's requests for factual information about LPP Case 1 while the parties were disputing on the legal questions above, bearing in mind that there were communicated in the meantime to the Commissioner two versions of events, one of which indicating that the interception continued for 105 minutes after revocation of the authorization; see paragraph 5.22. The ICAC's incident report produced 11 months after the revocation advised that there had not been any listening after the relevant officers had been notified of the revocation but all records had been destroyed in accordance with prevailing policy; see paragraphs 5.24 to 5.26. The Commissioner's efforts in ensuring compliance were frustrated.
12. The HKBA is alarmed to learn that the ICAC destroyed the relevant records of LPP Case 2 and LPP Case 3 despite a categorical and specific request for their preservation by the Commissioner. While the Commissioner was unable, due to the lack of evidence (which he must rely on the ICAC to provide), to make any finding of "recalcitrance or willful obstruction on the part of the officers concerned", he noted that his "investigation of the main issue was obstructed, or distracted and somewhat hindered and delayed" (paragraph 12.7). The HKBA regrets that the ICAC had not considered disciplinary action or criminal investigation for offences of, inter alia, misconduct in a public office and perverting the course of public justice, against the relevant officers and had only given them "appropriate advice"; see paragraph 5.38.
13. The HKBA finds it extraordinary that the Panel Judges were denied *real time or shortly after the event* access to the recorded intercept product for the purpose of verifying the representations on the report

by the LEA as to material change in circumstances; see paragraphs 5.39 and 5.87. This contrasts with the fact that the Commissioner was provided with such access *well after the event*; see paragraphs 5.53 and 5.76. The HKBA recalls that it asked in 2006 during the legislative process for the ICSO for turning over to a panel judge for retention and ultimate disposition of such product of an interception of communications or surveillance pursuant to a prescribed authorization that unintentionally or unexpectedly captures communications under LPP.

14. Paragraphs 5.98 to 5.100 discuss the issue of whether information subject to LPP obtained through interception of communications be used for criminal investigation. The HKBA is of the opinion that both the ICSO and the code of practice should make clear that there cannot be any use made of the LPP information, ie to use it as intelligence or otherwise to obtain derivative evidence.
15. The HKBA considers that the code of practice should make it clear that all safeguards must be taken so as to ensure that no LPP communications are recorded. The code of practice should also make it clear that all breaches of LPP beyond a prescribed authorization must be immediately notified, thoroughly investigated and fully reported and explained at first instance to the Panel Judge and shortly thereafter to the Commissioner. It cannot be greater emphasized that breaches of LPP are very serious matters, regardless whether it is claimed that they came about by inadvertence.
16. The HKBA considers that the frequency and circumstances of the 4 LPP cases in 2007 and the conduct of the LEA involved (which all happened to be the ICAC) were such that it is necessary to reiterate its proposal in 2006 during the course of the legislative process for the ICSO that the LEAs be required to notify all lawyers whose chambers, office, or residence; or whose person, or whose pupil, trainee, staff, intern or associate, has been or become the object of an interception of

communications or surveillance as a result of a prescribed authorization, of the particulars of the interception or surveillance, including but not restricted to, particulars of time and duration of interception or surveillance, the methods used, and the communications inspected, listened to, monitored and/or recorded. The HKBA considers that the present ICSO s 48(3) mechanism whereby the Commissioner decides whether notification of unauthorized interception or surveillance be given after taking advice from the relevant LEA involved is not a sufficient safeguard against breaches of LPP, bearing in mind that the lawyer in question is usually not the subject person of the prescribed authorization.

Revised Code of Practice

17. Paragraphs 13 and 14 of the revised code of practice refer to a reasonable expectation of privacy of a person in the context of covert surveillance and then states in paragraph 21 that that a person “does not normally have a reasonable expectation of privacy in respect of optical surveillance when he is in an area open to the view of the general public”. The HKBA maintains its view, articulated in 2006 in the course of the legislative process for the ICSO that a person has a “reasonable expectation of privacy” even in a public place and the ICSO s 2(2), which denies such an entitlement, is a violation of Article 39 of the Basic Law and Article 17(2) of the International Covenant on Civil and Political Rights.

Dated 20 February 2009.

Hong Kong Bar Association.