

LRC report on Covert Surveillance

Press release

1. The Law Reform Commission today, March 24 published its proposals for the regulation of covert surveillance in Hong Kong.

2. In its latest report, the Commission recommends that a legislative framework should be set up to regulate covert surveillance and the obtaining of personal information through intrusion into private premises.

3. Introducing the report, Dr John Bacon-Shone, the Chairman of the Commission's Privacy Sub-committee, said that the recommendations are intended to provide adequate and effective protection and remedies against arbitrary or unlawful intrusion into an individual's privacy, as guaranteed under the Basic Law.

4. The report recommends the creation of two new criminal offences:

- it should be an offence to enter or remain on private premises as a trespasser with intent to observe, overhear or obtain personal information;
- it should be an offence to place, use, service or remove a sense-enhancing, transmitting or recording device (whether inside or outside private premises) with the intention of obtaining personal information relating to individuals inside the private premises in circumstances where those individuals would be considered to have a reasonable expectation of privacy.

These offences would apply to all persons, though a law enforcement agency would not be liable where it had obtained a warrant or internal authorisation for the surveillance in question.

5. It would be a defence to either of the offences that the accused had an honest belief, and there were reasonable grounds for believing, that:

- a serious offence had been, or was being committed;
- the law enforcement agencies would not investigate or prosecute that offence;
- evidence of the commission of that serious offence would be obtained through surveillance, and could not be obtained by less intrusive means; and
- the purpose of the surveillance was the prevention or detection of a serious offence.

6. The Commission proposes that law enforcement agencies would have to obtain a judicial warrant before undertaking covert surveillance where the surveillance would otherwise constitute one of the proposed criminal offences; where it is to be carried out on certain specified premises from which the public are excluded; or where the surveillance is likely to lead to the acquisition of matters subject to legal privilege, confidential journalistic material or highly sensitive personal information.

7. In less intrusive cases, an internal authorisation from a senior officer of the law enforcement agency will be required where covert surveillance is to be carried out in circumstances where the target would have a reasonable expectation of privacy.

8. The Commission recommends that the the right to apply for a warrant to conduct covert surveillance should be restricted to the Administration, which is entrusted with the responsibility to maintain law and order and is accountable to the public.

9. Only an authorised officer of a Government department or a law enforcement agency will be able to apply for a warrant or internal authorisation. If a law enforcement agency wishes to use an informer or undercover agent to undertake covert surveillance on its behalf, the agency would have to obtain the same level of authorisation which would have been necessary if the law enforcement agency carried out the surveillance itself.

10. All applications for warrants for covert surveillance should be made to a judge of the Court of First Instance. Internal authorisations for covert surveillance should be issued by an officer equivalent to at least the rank of Senior Superintendent of Police in the law enforcement agency concerned.

11. A warrant will only be granted where the covert surveillance is for the purpose of preventing or detecting serious crime (or crime, in the case of an internal authorisation), or to protect public security in respect of Hong Kong. Before granting a warrant or internal authorisation, the court or authorising officer must be satisfied that the information cannot reasonably be obtained through less intrusive means.

12. The Commission recommends that materials obtained through covert surveillance should be admissible as evidence, subject to the court's power to exclude such evidence if its admission would have an adverse effect on the fairness of the proceedings.

13. The Commission does not consider that there should be a mandatory requirement to notify the target in every case of the fact that he had been subject to surveillance where a warrant or internal authorisation for surveillance has been granted.

14. The Commission proposes that a new supervisory authority should be created to keep the proposed warrant and authorisation system under review. The supervisory authority should be a serving or retired judge of the Court of First Instance, or a higher court, or a person eligible for appointment to the Court of First Instance.

15. The supervisory authority would review cases on a sample audit basis. It would also consider complaints from the public, and award compensation in appropriate cases. The internal guidelines to be drawn up by the law enforcement agencies for the granting of internal authorisations and the guidelines in respect of the retention, disclosure or destruction of materials obtained through covert surveillance or by covert means would require the supervisory authority's approval.

16. To further enhance the transparency and accountability of the system, the Commission recommends that the supervisory authority should submit a public annual report to the Legislative Council, and a confidential report to the Chief Executive.

17. "The Commission's proposals go further than those in the Government's Bill now before the Legislative Council in that they are intended to regulate all covert surveillance, not just where surveillance is carried out by the law enforcement agencies," said Dr Bacon-Shone. "The Basic Law gives a person the right to privacy in his home, and that requires broader protections than just dealing with law enforcement."

18. The report is now available on the Commission's website at www.hkreform.gov.hk. A printed version of the report is expected to be available in two or three weeks' time from the Commission's Secretariat at 20/F, Harcourt House, 39 Gloucester Road, Wan Chai, Hong Kong.

19. This report on covert surveillance concludes the Commission's review of the law relating to privacy. Previous reports in this project have dealt with data protection, interception of communications, stalking, privacy and media intrusion, and civil liability for invasion of privacy.

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