

# THE LAW REFORM COMMISSION OF HONG KONG

## REPORT

### PRIVACY: THE REGULATION OF COVERT SURVEILLANCE

#### EXECUTIVE SUMMARY

##### Introduction

1. In order to provide adequate and effective protection and remedies against arbitrary or unlawful intrusion into the privacy of an individual as guaranteed under Articles 29 and 30 of the Basic Law, and Article 17 of the International Covenant on Civil and Political Rights as incorporated in Article 14 of the Hong Kong Bill of Rights, the Law Reform Commission recommends that a legislative framework should be set up to regulate covert surveillance and the unlawful obtaining of personal information involving intrusion into private premises. Such a regulatory system should meet the requirements of legality, proportionality and accountability. An integrated approach should be adopted towards the regulation of the interception of communications and covert surveillance to provide effective protection against undue interference with privacy.

##### Chapter 1 – Proposed criminal offences relating to covert surveillance

2. The Commission recommends the creation of two criminal offences to prohibit the unlawful obtaining of personal information involving intrusion into private premises.

##### *The first offence*

3. The Commission recommends that the first offence should consist of “*entering or remaining on private premises as a trespasser with intent to observe, overhear or obtain personal information.*”

4. “Private premises” is defined to include: “*any premises, or any part of premises, occupied or used by any person, however temporarily, for residential purposes or otherwise as living accommodation; any room hired by the proprietor of a hotel or guesthouse to guests for lodging; or those parts of a hospital or nursing home where patients are treated or which are used as*

*sleeping accommodation*”, but does not include any common area to which an individual is allowed access in connection with his use or occupation of such premises.

5. The use of a technical device is not a necessary ingredient of the first offence. Neither does it require that the offender’s actions be covert so long as the offender entered or remained in the private premises as a trespasser.

### ***The second offence***

6. The Commission recommends that it should be an offence for a person *“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.”*

7. A person would be exempt from criminal liability if he had the consent of the lawful occupant to carry out the prohibited act of surveillance. The legislation should clearly specify the categories of persons by whom, and the circumstances in which, valid consent may be given to such intrusion.

8. Where the private premises concerned are occupied or used by any person, however temporarily, for residential or sleeping purposes or otherwise as living accommodation, consent to the use of a technical device for surveillance inside the premises may be given:

- (a) in the case of premises lawfully occupied by one person, or occupied jointly by more than one person, by any one of those lawful occupants who is an adult; and
- (b) in the case of premises lawfully occupied by more than one person independently of each other, only by every lawful adult occupant.

9. In respect of private premises used as living accommodation, there should be an express prohibition on covert surveillance in changing rooms, rooms used wholly or in part for sleeping accommodation, and any toilet, shower or bathing facilities, other than where authorised by a warrant or internal authorisation.

10. The term “sense-enhancing, transmitting or recording device” has not been defined. Whether any device would fall within this category would depend on its use in the particular circumstances of the case, which should involve the enhancement of sensory perception beyond normal human capability. It is not the Commission’s intention that the use of everyday devices such as spectacles or hearing aids, designed to correct sensory deficiencies, should be caught by the offence.

11. Where an individual or his property is in plain view and is visible to the naked eye, the use of photographic equipment such as binoculars or a telephoto-lens camera to record the presence and nature of the objects observed should not constitute an offence as it does not deprive the person observed of any reasonable expectation of privacy. However, if what is observed could not be seen without the use of a telescopic aid, then that amounts to an invasion of the right of privacy of the person observed.

12. Whether the conduct of covert surveillance from inside or outside private premises into the activities or conversations of persons inside the private premises amounts to an offence would depend on whether there is any infringement of the reasonable expectation of privacy of the persons concerned. In determining whether a person has a reasonable expectation of privacy, the person's conduct must exhibit a subjective expectation of privacy and satisfy an objective test that the expectation is one that society is willing to recognise as reasonable.

### ***Application of the proposed offences***

13. A person will not be guilty of either of the proposed offences if the act of surveillance was carried out pursuant to a warrant, and will not be guilty of the second proposed offence where the act of surveillance was carried out with the consent of the lawful occupant of the private premises.

### ***Defences***

14. The Commission recommends that it should be a defence to either of the proposed offences that the accused had an honest belief, and there were reasonable grounds for believing, that:

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

## **Chapter 2 – The regulatory system**

### ***Circumstances in which a warrant is required to conduct covert surveillance***

15. The Commission recommends that a warrant should be required to authorise covert surveillance carried out in a manner calculated to ensure that the persons who are subject to the surveillance are unaware that it is, or may be, taking place, in circumstances where such surveillance:

- (1) would otherwise fall within the scope of the proposed criminal offences set out in Chapter 1 of this report;
- (2) involves the use of a device on private premises, whether or not that conduct would constitute one of the proposed criminal offences;
- (3) involves intrusion into school premises, commercial premises, aircraft, vessels and vehicles, from any of which the public are excluded;
- (4) is likely to result in the acquisition of knowledge of matters subject to legal privilege;
- (5) is likely to result in the acquisition of confidential journalistic material; or
- (6) is likely to result in the acquisition of personal information of a highly sensitive nature.

### ***Covert surveillance by a party to the targeted activity***

16. The Commission notes that the particular circumstances of “participant surveillance” (where the surveillance is carried out by a party to the conversation or other targeted activity) may merit special consideration, but does not think that they justify discarding a requirement for authorisation. The Commission accordingly recommends that authorisation should be required in the case of participant surveillance on private premises involving the use of a device. Whether that authorisation in non-criminal participant surveillance should be by judicial warrant or internal authorisation should be left to the internal guidelines to be prepared by each of the law enforcement agencies and approved by the proposed supervisory authority, taking account of the degree of intrusion involved.

17. Under the Commission's proposals, the authorisation required for covert surveillance on private premises will therefore be as follows:

- (a) where the surveillance falls within the terms of either of the proposed offences, a warrant will be required to escape criminal liability;
- (b) where the surveillance involves the use of a device on private premises but is neither within the terms of either of the proposed offences nor participant surveillance, a warrant will be required; and
- (c) where the surveillance is participant surveillance, but does not fall within the terms of either of the proposed offences, authorisation must be obtained, but whether that should be by warrant or internal authorisation should be specified in the internal guidelines to be prepared by each of the law enforcement agencies and approved by the supervisory authority.

#### ***Covert surveillance by an informer or undercover agent***

18. Where a law enforcement agency wishes to use an informer or undercover agent to undertake covert surveillance on its behalf, the agency should be required to obtain the same level of authorisation which would have been necessary if the covert surveillance in question were carried out by an officer of the law enforcement agency itself. Provision should be made to exempt an informer or undercover agent from the application of the offences proposed in Chapter 1 where the requisite authorisation has been obtained.

#### ***Use of tracking devices for covert surveillance***

19. The circumstances under which a warrant or internal authorisation is required for the use of a tracking device by a law enforcement agency for covert surveillance of an individual should be decided by the supervisory authority having regard to the accuracy of the tracking device used, the extent of the intrusion on the individual's privacy, and whether or not the tracking is continuous.

#### ***Circumstances in which internal authorisation is required to conduct covert surveillance***

20. An internal authorisation must be obtained from a designated senior officer of the law enforcement agency where covert surveillance is to be carried out for a specific investigation or operation in circumstances in which a person is likely to have a reasonable expectation of privacy, even though the act does not involve intrusion of a sort that requires a warrant.

21. The relevant factors to be taken into account in assessing whether an individual's privacy expectation is reasonable include: the place where the intrusion occurred; the object and occasion of the intrusion; the means of intrusion employed and the nature of any device used; and the conduct of the individual prior to or at the time of the intrusion.

22. The legislation should require each law enforcement agency to issue internal guidelines specifying the factors that should be taken into account by its officers in an application for, and in the grant of, internal authorisation for covert surveillance. The guidelines should be approved by the supervisory authority and made available to the public.

### ***Application by the private sector***

23. The Commission recommends that 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.

### ***Who may apply for a warrant to conduct covert surveillance***

24. An authorised officer of any department of the Government of the Hong Kong Special Administrative Region, and the Independent Commission Against Corruption, may apply to the Court of First Instance for a warrant for covert surveillance to be carried out by their respective officers.

25. Any application for a warrant by a department other than the Hong Kong Police Force, the Customs and Excise Department, the Immigration Department and the Correctional Services Department must be made on that department's behalf by the Department of Justice to ensure that the application would *prima facie* satisfy the requirements for the issue of a warrant and has merit.

### ***Who may apply for internal authorisation***

26. An application for internal authorisation to carry out covert surveillance may only be made by designated officers of the Independent Commission Against Corruption or any of the following Government departments:

- (a) the Hong Kong Police Force;
- (b) the Customs and Excise Service;
- (c) the Immigration Department; or

- (d) the Correctional Services Department.

### **Chapter 3 – Grounds for the issue of warrants and internal authorisations for covert surveillance**

#### ***Grounds for the issue of warrants***

27. The Commission recommends that the grounds for issuing a warrant authorising covert surveillance should be that:

- (a) it is for the purpose of preventing or detecting serious crime; or
- (b) it is for the purpose of safeguarding public security in respect of Hong Kong.

28. “Serious crime” is to be defined by reference to the maximum sentence applicable to an offence with the appropriate level of sentence to be determined by the Administration. Offences which do not meet the requisite level of sentence may be included in the category of “serious crimes” for surveillance purposes if the Administration considers them particularly harmful to the community.

29. In view of the Commission’s recommendation that evidence obtained by covert surveillance should be admissible in legal proceedings, the meaning of the “prevention and detection” of crime should be extended to include the prosecution of an offence.

30. A warrant authorising covert surveillance may be issued if the court is satisfied that:

- (a) the covert surveillance is to be carried out for a legitimate purpose, namely, for the purpose of preventing or detecting serious crime, or for protecting public security in respect of Hong Kong;
- (b) the covert surveillance is proportionate to what is sought to be achieved by carrying it out.

31. In deciding whether covert surveillance is proportionate to the purpose sought to be achieved by carrying it out, the court must be satisfied that:

- (a) there is reasonable suspicion that an individual is committing, has committed, or is about to commit, a serious crime or, as the case may be, the information to be obtained is likely to be of substantial value in safeguarding public security in respect of Hong Kong;

- (b) there is reasonable belief that information relevant to the investigation will be obtained through the covert surveillance; and
- (c) the information to be obtained cannot reasonably be obtained by less intrusive means.

32. In reaching its decision, the court should have regard to the following factors:

- (a) the immediacy and gravity of the serious crime or the threat to public security in respect of Hong Kong, as the case may be;
- (b) the place where the intrusion will occur;
- (c) the means of intrusion to be employed and the nature of any device to be used; and
- (d) taking into account any reasonable expectation of privacy in the circumstances, the extent to which the privacy of the individual subject to the covert surveillance and of any other person may be affected by the surveillance.

### ***Grounds for the issue of internal authorisations***

33. An internal authorisation to undertake covert surveillance may be issued if the authorising officer is satisfied that:

- (a) the covert surveillance is to be carried out for a legitimate purpose, namely, for the purpose of preventing or detecting crime, or for protecting public security in respect of Hong Kong;
- (b) the covert surveillance is proportionate to what is sought to be achieved by carrying it out.

34. The reference in condition (a) to the prevention or detection of “crime” (rather than “serious crime” as in the case of a warrant) is to provide greater flexibility to the law enforcement agencies in the investigation of offences in circumstances where the use of covert surveillance would have a less intrusive effect on the individual’s right to privacy than those under which judicial authorisation is required.

35. In deciding whether the covert surveillance is proportionate to the purpose sought to be achieved, the authorising officer must be satisfied that:

- (a) there is reasonable suspicion that an individual is committing, has committed or is about to commit a crime, or, as the case may be, the information to be obtained is likely to be of

substantial value in safeguarding public security in respect of Hong Kong;

- (b) there is reasonable belief that information relevant to the investigation will be obtained through the covert surveillance;
- (c) the information to be obtained cannot reasonably be obtained by less intrusive means.

36. In reaching his decision, the authorising officer should have regard to the following factors:

- (a) the immediacy and gravity of the crime or the threat to public security in respect of Hong Kong, as the case may be;
- (b) the place where the intrusion will occur;
- (c) the means of intrusion to be employed and the nature of any device to be used; and
- (d) taking account of any reasonable expectation of privacy in the circumstances, the extent to which the privacy of the individual subject to the covert surveillance and any other person may be affected by the surveillance.

## **Chapter 4 – The procedure for authorisation**

### ***The issuing authority***

37. 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.

### ***Information to be provided in an application for a warrant or internal authorisation***

38. An application for a warrant or an internal authorisation to undertake covert surveillance should be in writing and should include the following information: the name and rank or post of the applicant; the ground(s) for application and the facts relied upon; the identity, if known, of the subject of surveillance; the information sought; the form of covert surveillance and the kind of device(s) to be used; where the surveillance is to be carried out; the number of previous applications, if any, made in relation to the same subject matter or the same person and whether they have been granted, withdrawn or rejected; the duration of surveillance requested; whether it is likely to result in any person acquiring knowledge of matters subject to legal privilege,

confidential journalistic information or sensitive personal information; the details of any potential collateral intrusion and the justification; whether other less intrusive means have been tried and why they have failed or are unlikely to succeed; the reasons why the covert surveillance is considered proportionate to what it seeks to achieve; and information on the extent of the likely disclosure of the surveillance material obtained.

### ***Duration and renewal of authorisation***

39. A warrant for covert surveillance may be granted by the Court of First Instance for an initial period not exceeding 90 days. An initial internal authorisation may be issued for the same duration.

40. An application for renewal of an internal authorisation should be made on the first occasion to the appropriate approving officer in the law enforcement agency concerned. An application for a second or subsequent renewal of an internal authorisation should be made to the Court of First Instance before its expiration, as should any application for renewal of a warrant. A renewal should only be granted in respect of the same subject matter as the previous application for a warrant or internal authorisation.

41. A warrant or an internal authorisation may be renewed for a further period not exceeding 90 days if the court (or the approving officer, as the case may be) is satisfied that the grounds on which the warrant or internal authorisation was issued still exist. There should not be any limit to the number of renewals that can be made.

42. An application to the court for renewal of a warrant or an internal authorisation may be made *ex parte* and should be in writing with information provided on the reason and period for which the renewal is required; the type of information likely to be obtained; the particulars of any previous applications involving the same person; and the reasons why the covert surveillance continues to be considered proportionate to what it seeks to achieve.

43. The legislation should specify the procedures for the application for, and the renewal of, warrants and require internal guidelines regulating the procedures for application and renewal of internal authorisations to be issued by the relevant law enforcement agencies. Those guidelines should be subject to approval by the supervisory authority and made available to the public.

### ***Emergency application for a warrant or internal authorisation***

44. The Commission proposes that in circumstances where it is not practicable to apply for a warrant or internal authorisation in the usual way, a law enforcement officer should be able to authorise covert surveillance for an initial 24 hour period. A judge would then have to consider whether the

authorisation should have been granted in the first place and whether it should be continued. As an alternative to this *ex post facto* authorisation, the Commission proposes, where circumstances permit, that a prospective emergency application may be made for authorisation of covert surveillance in the manner described below.

45. An application for emergency authorisation may be made to the court or an authorising officer if a law enforcement officer reasonably believes that the circumstances are so serious and urgent that covert surveillance should be used; and it is not practicable to apply for a warrant or internal authorisation in the usual way.

46. An emergency application for a warrant may either be made orally by telephone or by a law enforcement officer appearing in person before the court or by other electronic means, including facsimile and e-mail. An emergency application for an internal authorisation may be made in oral form or by electronic means of communication to an officer of the rank of Assistant Commissioner of Police or its equivalent in the relevant law enforcement agency.

47. An emergency warrant or internal authorisation would be valid for only 24 hours, and a full application providing details of the reason and grounds for the emergency application would have to be submitted in writing within 24 hours of the original emergency application to the court or to the appropriate authorising authority. The court or the authorising authority may require the personal appearance of the law enforcement officer making the application for further information and may impose conditions on the execution of the warrant or the internal authorisation.

48. The emergency application may be granted if the court or the authorising officer is satisfied that there are reasonable grounds to believe that the circumstances are so serious and urgent that covert surveillance should be used and it is not practicable to apply for a warrant or internal authorisation in the usual way. The court or authorising officer must also be satisfied that the criteria for granting a warrant or an authorisation under normal circumstances have been fulfilled. An application for the renewal of a warrant or internal authorisation cannot be made by the emergency process.

### ***Record of warrants and internal authorisations***

49. A record of all warrants and internal authorisations granted in respect of covert surveillance carried out by each law enforcement agency should be kept by the agency for an appropriate minimum period specified by the Administration and should be regularly updated. The records should include the date of issue, expiry or termination of the warrant or internal authorisation; the name and rank of the authorising officer; details of the surveillance operation, including particulars of the subject(s) of the surveillance; whether it was an emergency application, and, if so, the

justifications; and if the warrant or internal authorisation was renewed, when it was renewed and who granted the renewal.

50. Each law enforcement agency should also be required to keep relevant documentation relating to its warrants or internal authorisations.

## **Chapter 5 – Admissibility as evidence of materials obtained from covert surveillance**

51. The Commission recommends that materials obtained lawfully through covert surveillance carried out pursuant to a warrant or internal authorisation should be admissible as evidence in court. However, an accused should be entitled to an opportunity to challenge the use and admission of the surveillance materials in evidence and to a judicial assessment of the effect of the admission of that evidence upon the fairness of the trial. Whether material obtained by authorised covert surveillance is admissible in any proceedings should depend on whether its use in evidence against the accused would be fair.

52. Where materials have been obtained through unlawful covert surveillance as a result of a contravention of the statutory requirements relating to the issue of warrants or internal authorisations, the Commission recommends that the materials should not be excluded simply on the ground of their having been obtained unlawfully. The Commission takes the view that such evidence may still be admissible if, having regard to all the circumstances, including whether the materials had been obtained lawfully, it appears to the court that the admission of such evidence would not have an adverse effect on the proceedings.

53. The Commission further recommends that where the surveillance materials have been obtained so unfairly as to constitute an affront to public conscience and to seriously undermine public confidence in the administration of justice, these would be sufficient grounds to justify the exclusion of such materials as evidence, even though it is not shown that the accused could not have a fair trial.

## **Chapter 6 – Disposal of materials obtained from covert surveillance**

### ***Internal guidelines for retention of personal information***

54. The Commission recommends that the legislation regulating covert surveillance should require each law enforcement agency to ensure that systematic arrangements are in place for the handling, storage and destruction of materials obtained through covert surveillance and to draw up internal guidelines (to be approved by the supervisory authority), setting out the policy and procedures for the disposal of surveillance materials. This

would provide standards for the agencies concerned and help to preserve the public's confidence in the system.

55. Materials obtained lawfully from covert surveillance should be retained for a specified period in accordance with internal procedural guidelines. The procedures must clearly specify the circumstances in which surveillance materials are to be destroyed. Records of information obtained by covert surveillance must be destroyed as soon as practicable if they are not likely to be required for use in connection with civil or criminal proceedings or if their retention is no longer necessary for the specified purpose. Appropriate measures should be taken to ensure that surveillance materials are protected against unauthorised or accidental access, processing, erasure or other use.

56. Where the surveillance was authorised by an internal authorisation, then material relating to any crime, no matter how minor, may be passed to another law enforcement agency. Where the surveillance was authorised by a warrant, only material relating to a serious crime may be passed to another law enforcement agency. Surveillance materials should not be passed to a third party in either case. There should not, however, be any restriction on a law enforcement agency passing *intelligence* obtained through covert surveillance to another law enforcement agency.

57. The supervisory authority should be consulted in difficult cases where there are uncertainties in relation to the application of any of these procedures.

### ***Disclosure of surveillance materials***

58. On an application for a warrant or internal authorisation authorising covert surveillance, the authorising judge or authorising officer should make such arrangements as he considers necessary to ensure that the disclosure of surveillance materials is limited to a necessary minimum.

59. A person who intentionally discloses to any person the contents of any information obtained from authorised covert surveillance, knowing or having reasonable grounds to believe that the information has been obtained by covert surveillance, commits a criminal offence.

60. The proposed legislation should make provision for exceptions to the prohibition on disclosure of covert surveillance materials to third parties. These exceptions should include disclosure for the purpose of giving evidence in any legal proceedings; for preventing, investigating or detecting crime; for the purpose of safeguarding public security in respect of Hong Kong; or pursuant to an order of the court.

### ***Disclosure of materials obtained from interception of communications***

61. The Commission considers that the arguments in respect of the admissibility of materials obtained through the interception of communications are finely balanced. The Commission has not reached a conclusion on this question but has set out the arguments in the report to assist public discussion.

## **Chapter 7 – Notification following termination of surveillance**

62. 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. However, the Commission recommends that in those cases where the supervisory authority considers that a warrant or an internal authorisation has not been properly issued (or not issued at all), or the terms of a warrant or internal authorisation have not been properly complied with, the supervisory authority should be required to notify the person(s) subject to surveillance that there has been a contravention of the statutory requirements relating to the issue of the warrant or authorisation.

63. Where the supervisory authority is satisfied that notification would cause any prejudice to the purposes of the original intrusion, the supervisory authority may delay the notification although the delay should be no longer than is necessary. The supervisory authority should keep the case under regular review and notify the persons concerned of the surveillance as soon as the reasons for the delay no longer apply. In exceptional circumstances of public security where indefinite delay of notification to an aggrieved person is required, the Commission recommends that the law enforcement agency concerned must seek an order from the court allowing notification to the aggrieved party to be indefinitely delayed.

64. Where an individual approaches the supervisory authority for confirmation as to whether or not he has been the subject of surveillance, and surveillance has been carried out but cannot yet be revealed, the response from the supervisory authority should be “no comment”. That could mean either that the person has not been under surveillance, or that he has been but the surveillance was legal, or that the surveillance was still ongoing.

## **Chapter 8 – The supervisory authority**

### ***The composition of the supervisory authority***

65. The Commission recommends that a supervisory authority should be created to keep the proposed warrant and internal authorisation system under review to promote accountability. The Commission recommends that 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. The person appointed as the supervisory authority should hold office for a period of three years and should be eligible for reappointment for a further period of three years. The Commission further recommends that the supervisory authority be established with sufficient administrative support to properly carry out its functions.

### ***The role of the supervisory authority***

66. The role of the supervisory authority should be to examine whether a warrant or internal authorisation has been properly issued, and whether the terms of a warrant or internal authorisation have been properly complied with or executed in accordance with its conditions.

67. The supervisory authority should not be expected to review every instance of covert surveillance but should be required to conduct random sample audits of selected cases. In addition, where an aggrieved person believes he is, or has been, subjected to unlawful surveillance by a law enforcement agency he may request the supervisory authority to investigate whether there has been any contravention of the statutory requirements relating to the issue of that warrant or internal authorization.

68. The supervisory authority should be given the power to determine any award of compensation for unlawful surveillance and to make such orders as it thinks fit, including orders for the destruction or retention of surveillance materials. The supervisory authority should also be responsible for approving the internal guidelines on the granting of internal authorisations to be issued by each law enforcement agency, and the guidelines in respect of the retention, disclosure or destruction of materials obtained through covert surveillance or by covert means.

### ***Review by the supervisory authority***

69. The principles to be applied by the supervisory authority in reviewing the validity of a warrant or an internal authorisation should be those that are applied by a court on an application for judicial review.

70. Where the supervisory authority finds that there has been material non-disclosure or misrepresentation of information in the application for a warrant or an internal authorisation, the supervisory authority should either set aside the warrant or internal authorisation if it is still effective, or declare it has been improperly granted where the warrant or internal authorisation has expired

71. Because of the likely sensitivity of the materials and information relating to the application, issue or execution of a warrant or an internal authorisation, and the need to restrict their disclosure, the supervisory authority should be under no obligation to grant full disclosure of all relevant

materials to a complainant. The supervisory authority should also not be under any duty to give reasons for its decision.

72. In reviewing a warrant or internal authorisation, the supervisory authority would not be required to hold any oral hearing. The person who has lodged a complaint or requested a review would not be entitled to make oral representations to the supervisory authority during the process of the review (unless invited to do so), but he would be entitled to make written representations at the time he submits his complaint or requests a review. The review should be carried out in private, and counsel and solicitors would not have any right of audience unless the supervisory authority thinks fit. The Commission recommends that the supervisory authority should be given the power to:

- (a) summon before it any person who is able to give any information relating to the review and examine that person for the purposes of such review;
- (b) administer an oath for the purposes of the examination under (a) above; and
- (c) require any person to furnish to it any information (on oath if necessary) and to produce any document or thing which relates to the review.

The decision of the supervisory authority on the outcome of the review would not be subject to appeal (though it would be subject to judicial review).

73. Where the supervisory authority concludes that there has been a failure to obtain the requisite authorisation, or where the supervisory authority comes to the view that the warrant or internal authorisation for covert surveillance was not issued or executed properly, the supervisory authority should notify the complainant that there has been a breach of the relevant statutory requirements regulating covert surveillance and of his entitlement to apply to the supervisory authority for compensation. The supervisory authority may also make such order as it thinks fit, including an order for destruction or retention of surveillance materials.

### ***Notification of the result of the review***

74. Where the supervisory authority determines that surveillance has been conducted but that a warrant or an internal authorisation has not been issued, or has not been properly issued or complied with, the supervisory authority should notify the person subject to surveillance and the relevant law enforcement agency that there has been a contravention of the statutory requirements relating to the issue of the warrant or internal authorisation.

75. The supervisory authority should have power to delay notification to an aggrieved person if it is satisfied that notification would seriously hinder existing or future investigation of serious crime or prejudice the public security of Hong Kong. The delay should, however, be no longer than is necessary. The supervisory authority should keep the case under regular review and notify the aggrieved person of the result as soon as the reasons for the delay no longer apply.

76. Where the supervisory authority concludes that:

- (a) the complainant has not been subject to covert surveillance which requires the issue of a warrant or internal authorisation; or
- (b) a warrant or internal authorisation has been properly issued or complied with,

the supervisory authority should refrain from making any comments other than informing the complainant that there has not been any contravention of the statutory requirements relating to the issue of warrants or internal authorisations.

77. The Commission considers it inappropriate to notify the complainant that the surveillance was conducted in accordance with a properly issued warrant or internal authorisation, neither should the complainant be notified that there is no warrant or internal authorisation in existence.

### ***Orders by the supervisory authority on completion of review***

78. If the supervisory authority concludes that any officer of a government department or law enforcement agency has, in the purported exercise of his duties, contravened any statutory requirements in relation to the issue or execution of a warrant or internal authorisation, the supervisory authority must:

- (a) set the warrant or internal authorisation aside; and
- (b) make such order as the supervisory authority in its discretion thinks fit, including:
  - (i) the destruction of the surveillance materials; or
  - (ii) the retention of the surveillance materials where they are required to be used as evidence to establish the illegality of the surveillance or to be used in subsequent civil or criminal proceedings.

79. Where the supervisory authority is satisfied that the warrant or internal authorisation has been properly issued and complied with, or where

the warrant or internal authorisation has expired, it may still in its discretion make any of the orders specified in paragraph 78(b) above in relation to the disposal of the surveillance materials obtained under the warrant or internal authorisation.

### ***Compensation***

80. The Commission considers that an aggrieved person should be entitled to compensation for intrusion into his privacy as a result of unlawful covert surveillance by a government department or law enforcement agency. As the most feasible way of balancing the need to protect the privacy of the individual and the public interest in maintaining the secrecy of the surveillance capabilities of the law enforcement agencies, the Commission proposes that an aggrieved person should be allowed to seek compensation for unlawful intrusion into his privacy through an application to the supervisory authority.

81. The Commission does not consider it essential to provide an aggrieved person with access to materials relating to the application, issue or execution of the warrant or internal authorisation for covert surveillance in an application for compensation. However, the Commission believes in principle that this evidence should be provided unless there is a public interest justification for not doing so. The Commission recognises that that may still severely limit the evidence, but it should not automatically exclude it all. The Commission recommends that before reaching any decision on the award of compensation and on the making of any order for disposal of surveillance materials, the supervisory authority should give the aggrieved person an opportunity to be heard on the issue.

82. The Commission further recommends that the supervisory authority should be able to include in its award of compensation such amount as it considers appropriate for injury to feelings, and may, where appropriate, award punitive damages.

83. The Commission considers that where a court convicts a person of one of the proposed criminal offences, an aggrieved person should be entitled to apply for damages to be paid to him by the defendant.

## **Chapter 9 – Reports**

### ***The need for reports***

84. Detailed annual reports play a crucial role in increasing public accountability for, and in enhancing transparency of, intrusive activities carried out by the law enforcement agencies. The Commission recommends that the supervisory authority should furnish annually a public report to the Legislative Council and a confidential report to the Chief Executive.

### ***Report to the Legislative Council***

85. The information that should be included in the report to the Legislative Council should be specified in the legislation. The report should state in respect of each government department and law enforcement agency:

- (a) the number of warrants and internal authorisations for covert surveillance applied for, withdrawn, rejected, granted as requested and granted subject to modifications;
- (b) the average length of the warrants and internal authorisations granted, and of any renewals;
- (c) the number of warrants and internal authorisations which the supervisory authority has found on review were not properly issued or executed;
- (d) the number of instances reported by law enforcement agencies to the supervisory authority, or discovered by the authority on review, where covert surveillance was carried out without the requisite warrant or internal authorisation having been issued;
- (e) information on the destruction of materials gathered through covert surveillance;
- (f) the class of location at which covert surveillance was conducted (for example, whether the surveillance was targeted at residential or commercial premises);
- (g) the class of device used (for instance, visual, oral or location tracking device);
- (h) the major categories of crime (including “serious crimes”) involved;
- (i) statistics relating to the effectiveness of covert surveillance in leading to the arrest and prosecution of those charged with crime;
- (j) the total number of reviews undertaken by the supervisory authority and the number of reviews carried out in response to a request by an aggrieved person;
- (k) an overview of the findings and conclusions of the review conducted by the supervisory authority in respect of the application of the warrant and internal authorisation system.

### ***Confidential report to the Chief Executive***

86. The Commission recommends that the supervisory authority should furnish annually a confidential report to the Chief Executive. The report should cover such matters as are considered relevant by the supervisory authority, or such other matters as are required by the Chief Executive.

### ***Reports by the law enforcement agencies***

87. Each law enforcement agency or government department which has applied for a warrant or which has issued internal authorisations for covert surveillance should be required to furnish quarterly reports to the supervisory authority. Each agency or department's quarterly report should provide the following information:

- (a) the number of warrants and internal authorisations applied for, withdrawn, rejected, granted as requested and granted subject to modifications during the reporting period;
- (b) the number of renewals sought and denied;
- (c) the nature and location of covert surveillance carried out by its officers under a warrant or internal authorisation;
- (d) the average duration of each surveillance carried out under a warrant or internal authorisation which has expired within the reporting period;
- (e) the offences for which surveillance has been used as an investigatory method;
- (f) the number of persons arrested and prosecuted as a result of the covert surveillance;
- (g) any errors discovered by a law enforcement agency in the application for, and the execution of, a warrant or internal authorisation; and
- (h) information on the destruction of materials gathered through surveillance.