

**立法會**  
**Legislative Council**

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LC Paper No. CB(2)2653/04-05  
(These minutes have been seen  
by the Administration)

**Panel on Security**

**Minutes of special meeting held on Monday, 15 August 2005  
at 10:45 am in the Chamber of the Legislative Council Building**

**Members present** : Hon James TO Kun-sun (Chairman)  
Hon Daniel LAM Wai-keung, BBS, JP (Deputy Chairman)  
Hon CHEUNG Man-kwong  
Dr Hon Philip WONG Yu-hong, GBS  
Hon WONG Yung-kan, JP  
Hon Howard YOUNG, SBS, JP  
Hon LAU Kong-wah, JP  
Hon Audrey EU Yuet-mee, SC, JP  
Hon Andrew LEUNG Kwan-yuen, SBS, JP  
Hon LEUNG Kwok-hung  
Hon CHIM Pui-chung

**Members attending** : Hon James TIEN Pei-chun, GBS, JP  
Hon Fred LI Wah-ming, JP  
Hon Emily LAU Wai-hing, JP  
Hon LEE Wing-tat  
Hon TAM Heung-man

**Members absent** : Hon Albert HO Chun-yan  
Dr Hon LUI Ming-wah, SBS, JP  
Hon Margaret NG  
Hon CHOY So-yuk, JP

**Public Officers attending** : Mr Ambrose S K LEE  
Secretary for Security

Miss CHEUNG Siu-hing  
Deputy Secretary for Security

Mrs Apollonia LIU  
Principal Assistant Secretary for Security

Mr Ian WINGFIELD  
Law Officer (International Law)  
Department of Justice

**Clerk in attendance** : Mrs Sharon TONG  
Chief Council Secretary (2)1

**Staff in attendance** : Mr Jimmy MA  
Legal Adviser

Mr LEE Yu-sung  
Senior Assistant Legal Adviser 1

Mr Raymond LAM  
Senior Council Secretary (2) 5

Ms Alice CHEUNG  
Legislative Assistant (2) 1

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**I. The Law Enforcement (Covert Surveillance Procedures) Order**  
(LC Paper Nos. CB(2)2419/04-05(01), CB(2)1420/04-05,  
CB(2)2280/04-05(01), CB(2)2431/04-05(01) to (05) and LS103/04-05)

Secretary for Security (S for S) and Law Officer (International Law) (LO(IL)) briefed Members on the Administration's paper and supplementary paper on the Law Enforcement (Covert Surveillance Procedures) Order (the Order). LO(IL) stated that –

- (a) existing legislation provided that the commissioner or director concerned could direct and control the respective disciplined services, subject to the orders and control of the Chief Executive of the Hong Kong Special Administrative Region (CE). In the issuance of the Order, CE had not exceeded the power conferred by existing legislation; and

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- (b) legal procedures limiting the power of certain officers were set out in an instrument published for public information so that the question of whether an officer had acted in accordance with the legal procedures in a case could be tested by evidence. Thus, the Order complied with the requirements for legal procedures under Article 30 of the Basic Law (BL30).

2. LO(IL) updated Members on the two cases referred to in paragraphs 19 and 20 of the background brief on regulation of surveillance and the interception of communications prepared by the Legislative Council (LegCo) Secretariat. He said that in Criminal Case No. DCCC689 of 2004, two of the defendants had lodged an appeal against their conviction by the District Court. The Independent Commission Against Corruption (ICAC) had sought judicial review on the judgment delivered by the District Court in Criminal Case No. DCCC687 of 2004.

3. Mr CHIM Pui-chung raised the following queries –

- (a) whether the Administration intended to demonstrate an executive-led government and change the mechanism for mutual check and balance among the executive authorities, the judiciary and the legislature through the issuance of the Order;
- (b) whether the issuance of the Order would have a negative impact on the relations between the Administration and LegCo;
- (c) whether the issuance of the Order amounted to contempt of the court, given that an appeal and a judicial review on the cases concerned were yet to be heard by the court; and
- (d) whether the crime situation and the views of the public at large reflected an urgent need for the issuance of the Order.

4. S for S responded that the principle of an executive-led government was not laid down by CE, but by BL. The Administration had no intention to change the mechanism for mutual check and balance among the executive authorities, the judiciary and the legislature. The Administration respected the judges' views in the cases concerned. The Order was issued by CE under BL48(4) to address the concern of the public arising from the two District Court judgments and as to whether covert surveillance work undertaken by law enforcement agencies was lawful. As the Order was binding on law enforcement officers but not members of the public, it was not legislation and there was no question of the Administration bypassing LegCo.

5. S for S explained that the Order sought to regulate covert surveillance. A law enforcement officer could carry out covert surveillance only with an authorisation granted by designated officers in accordance with section 3 of the Order. The Order also provided for the regular review of such authorisation.

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6. The Chairman asked whether the seriousness of the offence concerned would be considered when deciding whether an authorisation should be granted.

7. S for S responded that such a requirement had been laid down in the internal guidelines for the relevant law enforcement agencies. The Chairman requested the Administration to provide members with a copy of the internal guidelines. S for S agreed to consider providing the internal guidelines on a confidential basis. Ms Emily LAU added that the Administration should also provide a comparison of the protection provided under the internal guidelines, section 33 of the Telecommunications Ordinance (Cap. 106) and the Interception of Communications Ordinance (Cap. 532).

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8. Mr CHIM Pui-chung asked whether law enforcement officers would be in breach of the law, if they carried out covert surveillance before the enactment of legislation to regulate covert surveillance.

9. S for S replied in the negative. LO(IL) said that although the judge held in Criminal Case No. DCCC689 of 2004 that the evidence gathered through covert surveillance was unlawfully obtained, it should be noted that the ICAC officer concerned had not complied with ICAC's standing orders when obtaining such evidence. As the defendants had been convicted, the prosecution could not lodge an appeal regarding the question of whether the evidence concerned had been unlawfully obtained. In Criminal Case No. DCCC687 of 2004, one of the issues in question was whether surveillance in a public restaurant contravened BL30. As the former case was subject to appeal and the latter case was subject to judicial review, he was not in a position to comment further on the cases.

10. Ms Audrey EU said that the Administration had indicated in the explanatory notes on the White Bill entitled "Interception of Communications Bill" issued in 1997 that it accepted the recommendation of introducing a judicial warrant system. She queried why a judicial authorisation system had not been provided for in the Order.

11. The Chairman expressed disappointment that the Administration had not indicated any intention to introduce a judicial authorisation system. He considered that the Order could not create the legal procedures required under BL30.

12. S for S responded that the Administration had an open mind towards a judicial authorisation system. The issue could be further discussed when the legislative proposal on covert surveillance was introduced. He said that a balance should be struck between the protection of individual rights and efficiency in the operations of law enforcement agencies.

13. Ms Audrey EU asked why the Administration had not, after the report entitled "Privacy : Regulating the Interception of Communications" was published by the Law

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Reform Commission in 1996 and the White Bill entitled “Interception of Communications Bill” was published by the Administration in 1997, introduced legislation on interception of communications, but issued the Order in 2005. She questioned why there were substantial differences between the contents of the White Bill and the Order. Mr LEUNG Kwok-hung queried why the Interception of Communications Ordinance had not come into operation eight years after enactment.

14. S for S responded that the proposals in the LRC report and the White Bill were related to interception of communications, whereas the Order was related to covert surveillance. He said that the Administration was still conducting a review on interception of communications because it had accorded priority to other more pressing work in the past few years. Nevertheless, the Administration would consult the Panel on the way forward in respect of interception of communications within the next legislative session.

15. Ms Audrey EU asked about the scope and definition of covert surveillance. S for S responded that besides ICAC, the Hong Kong Police Force, the Immigration Department and the Customs and Excise Department, covert surveillance might be conducted by some government departments such as the Food and Environmental Hygiene Department (FEHD). After the Order had come into operation, covert surveillance had to be conducted in compliance with the provisions in the Order. If FEHD wished to carry out covert surveillance as defined in the Order, it had to draw up internal guidelines for consideration by the Security Bureau or seek the assistance of the Police. LO(IL) added that covert surveillance referred to any surveillance undertaken covertly while the subjects were unaware that they were under surveillance. Such surveillance would likely result in the obtaining of their private information.

16. Ms Audrey EU queried why legal professional privilege was not provided for in the Order.

17. S for S responded that as legal professional privilege was already well established under the common law, it was not provided for in the Order. However, reference to legal professional privilege was included in the internal guidelines. LO(IL) said that the Order did not change the law on legal professional privilege. He added that the question of whether the conversation recorded in Criminal Case No. DCCC687 of 2004 was subject to legal professional privilege was a question to be determined in the judicial review.

18. Ms Emily LAU expressed concern whether the Order was constitutional and lawful. She asked why the Order was not legislation, but could create legal procedures for the purposes of BL30. Referring to the paper entitled “Comparison of provisions governing authorisation to carry out interception of communications or covert surveillance in the Telecommunications Ordinance, Interception of Communications Ordinance and Law Enforcement (Covert Surveillance Procedures) Order” prepared by the Legal Service Division of the LegCo Secretariat, she expressed

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concern that there was no provision in the Order regarding the scope of authorisation, the safeguards for the materials obtained, the disposal of material obtained by covert surveillance and remedies for unauthorised surveillance or disclosure.

19. S for S responded that covert surveillance had long been one of the effective investigation techniques used by law enforcement agencies. Evidence thus obtained had been admitted by the court previously on many occasions. The Order did not seek to introduce any new policy. It only regulated covert surveillance conducted by law enforcement agencies. He said that issues relating to the monitoring mechanism and remedies would be considered in the relevant legislative proposal to be introduced. The disposal of material obtained by covert surveillance was not covered in the Order since there was no policy change in the area. However, it had been set out in the internal guidelines for law enforcement agencies that the material obtained should be disposed of in compliance with the Personal Data (Privacy) Ordinance (Cap. 486).

20. LO(IL) said that the Order did not change the practices of law enforcement agencies in the retention, use and disposal of materials. BL30 provided that “the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences”. However, it did not require such procedures to be prescribed by law. The Administration considered that the Order created legal procedures for the purposes of BL30. Law enforcement officers who carried out covert surveillance had to do so in compliance with the Order, which had been published for public information. Those who failed to do so would be subject to disciplinary actions.

21. Ms Emily LAU queried how the Order could constitute legal procedures and substitute legislation. She expressed concern that the issuance of the Order might open up a precedent for the issuance of executive orders in place of legislation in the future. LO(IL) responded that legal procedures could be constituted by an executive order. He pointed out that the term “legal procedures” only appeared five times in BL, including once in BL30, twice in BL48 and, in relation to the procedures of the Legislative Council, in BL73 and BL74. It was used in distinction from matters which had to be prescribed by law.

22. In response to Ms Emily LAU’s question whether the Order created legal procedures for the purposes of BL30, Legal Adviser (LA) said that the Court of Final Appeal had stated that common law principles should be applied in the interpretation of BL. In construing a provision in BL, a purposive approach should be adopted and applied in the context of the provision.

23. LA informed Members that both the Hong Kong Bar Association (the Bar) and the Administration had commented on the question of whether the judgment delivered by the court in the case of *The Association of Expatriate Civil Servants of Hong Kong v The Chief Executive of the Hong Kong Special Administrative Region* provided support for the issuance of the Order. In his view, the case might not be authority on the question of whether the Order might be considered as legal

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procedures for the purposes of BL30.

24. LA said that the Bar had, in its statement dated 8 August 2005 which was tabled at the meeting, expressed disappointment that CE, having realised that there was a serious problem respecting covert surveillance and the fundamental rights of residents of the Hong Kong Special Administrative Region, did not seek to address the issue through legislation. The Bar considered that constitutionally dubious executive orders, even though said to be temporary measures, were no substitute for legislation designed to conform to BL. On the other hand, the Administration had stated in its supplementary paper that the Order was not legislation, but created legal procedures for the purposes of BL30. He considered that both the Administration and the Bar had their own grounds and the ultimate answer might have to be determined by the court under the established mechanism.

*(Post-meeting note : The statement tabled at the meeting was circulated to members vide LC Paper No. CB(2)2446/04-05 on 16 August 2005.)*

25. Mr Howard YOUNG said that the Liberal Party considered it necessary for law enforcement officers to carry out covert surveillance and a mechanism should be established for such work. He asked about the number of law enforcement officers designated as authorising officers. He also asked whether there was a loophole in existing legislation which necessitated the issuance of the Order and the enactment of legislation on covert surveillance. He added that the rank of authorising officers might be raised to the directorate level. Consideration should be given to designating officers of different ranks for authorising different types of covert surveillance.

26. S for S responded that the Order, which sought to set out existing practice in more transparent terms, was issued in view of public concerns arising from the two court cases. The authorisation of covert surveillance by suitably senior officers had been implemented without problems for many years. Among some 200 officers at or above the rank of senior superintendent of police or equivalent, only less than 50 were designated as authorising officers. Nevertheless, the rank of authorising officers could be further reviewed in the examination of legislative proposals on covert surveillance. Mr LAU Kong-wah requested the Administration to provide information on the distribution of the existing authorising officers.

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27. Mr Fred LI asked whether the Administration had consulted the Executive Council (ExCo) and the legal profession on the contents of the Order.

28. S for S responded that as the Order did not involve any new policy, there was not a need to consult ExCo before the Order was issued. However, he had notified all ExCo Members before the issuance of the Order.

29. Mr LEUNG Kwok-hung and Mr LAU Kong-wah queried why ExCo had not been consulted on the Order. The Chairman said that according to paragraph 8 of the

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Provisional Legislative Council Brief on the Public Service (Administration) Order 1997, an executive order should be made by CE in Council to reflect its importance and to ensure the validity of the order under BL56. He queried why ExCo had not been consulted on the Order in view of the importance which the Administration had attached to the Order.

30. S for S responded that the Order only introduced an interim measure and the Administration intended to introduce legislation governing covert surveillance. However, the Public Service (Administration) Order 1997 was different in that it involved a policy decision and there was no intention to put the contents into the form of legislation. He stressed that covert surveillance was one of the effective investigative techniques used by law enforcement agencies and evidence thus obtained had been admitted by the court for many years. As the Order did not involve any change in policy, there was not a need to consult ExCo before issuance.

31. Mr Fred LI asked whether covert surveillance conducted before the issuance of the Order complied with the requirements under BL30. He questioned how the authorisation of covert surveillance could be monitored. The Chairman asked how the regular reviews referred to in section 16 of the Order were to be conducted.

32. S for S responded that he was not in a position to disclose information about the investigation work of law enforcement officers. He stressed that all law enforcement officers had to act in accordance with the law and covert surveillance had long been one of the investigation techniques. Nevertheless, the monitoring of the authorisation of covert surveillance could be further studied in the examination of legislative proposals on covert surveillance.

33. Mr Fred LI said that BL39 provided that “the rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law”. He asked whether the phrase “prescribed by law” referred to legislation or legal procedure.

34. LO(IL) responded that although BL39 provided that the rights and freedoms enjoyed by Hong Kong residents should not be restricted unless as prescribed by law, BL30 provided an exception on the freedom and privacy of communication of residents. He added that there was no requirement in BL30 that the legal procedures had to be prescribed by law.

35. Mr Fred LI queried how law enforcement officers could act in accordance with the law, if they were only provided with internal guidelines. He asked how the law enforcement agencies concerned could maintain consistency in their internal monitoring work and prevention of abuse.

36. S for S responded that covert surveillance had long been subject to internal monitoring, and the work of the law enforcement agencies concerned had generally been commended by the society. Nevertheless, the Administration had an open mind on the mechanism for monitoring covert surveillance. The Administration would



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listen to the views of the public on the issue when the legislative proposal on covert surveillance was examined.

37. Mr LEE Wing-tat said that according to an article published in a newspaper on the same day, the European Court of Human Rights had ruled in the case of KHAN in 2000 and the case of LEWIS in 2003 that the use of intercepting devices to record the conversation of a suspect was in contravention of the European Convention on Human Rights. He asked whether the Administration had studied the relevant cases in other common law jurisdictions. He also asked what the Administration had done in the regulation of interception of communications since 1997.

38. S for S responded that covert surveillance and interception of communications were different investigation techniques. The Administration was reviewing interception of communications and intended to brief the Panel on the way forward in the next legislative session.

39. LO(IL) said that it was the practice of the Department of Justice to follow closely the developments of the relevant cases in other jurisdictions. However, it should be noted that the legal and constitutional frameworks of other jurisdictions were different from those of Hong Kong. The United Kingdom, for example, had no written constitution. Thus, it might not be appropriate to adopt fully the views of the European Court of Human Rights, although they provided useful guidance.

40. Mr LEE Wing-tat said that if evidence obtained in compliance with the Order was ruled inadmissible by the court, law enforcement agencies would suffer a greater impact. He considered that legislation on covert surveillance should be enacted as soon as possible.

41. S for S responded that the Administration hoped that legislation on covert surveillance would be enacted as soon as possible. He said that the Administration would have been irresponsible, if no action was taken after the court delivered the two judgments in the cases concerned. The Order only introduced an interim measure before the enactment of the relevant legislation.

42. The Chairman asked about the Administration's progress of work on the enactment of legislation on covert surveillance. S for S responded that the relevant groundwork had already commenced. The Administration hoped to introduce the legislative proposal in the first half of the next legislative session.

43. The Chairman asked what the Administration had done in the enactment of legislation on covert surveillance. He also asked about the number of internal meetings held for such a purpose in the past few months.

44. S for S responded that after the court had delivered the judgments, the Administration had conducted a lot of research and considered various options, including the enactment of legislation, for the way forward. As BL30 was applicable

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to the Government as well as individuals and the issue was a complicated one, it was not viable for the relevant legislation to be enacted within the 2004-05 legislative session. The Administration had thus decided to issue the Order in the interim. He stressed that the Administration intended to brief Members on its legislative proposal in the next legislative session.

45. Mr LEUNG Kwok-hung said that he would apply for judicial review of the Order. He considered that the issuance of the Order had created a precedent for bypassing LegCo. The Order was unconstitutional and did not create legal procedures for the purposes of BL30. He questioned how covert surveillance could be monitored with the existing legal framework. He expressed concern that the Order would allow law enforcement officers to abuse their powers and infringe upon the freedom and privacy of communication of residents. He considered that S for S should step down.

46. S for S responded that the Order only regulated covert surveillance. It did not provide law enforcement agencies with any new power. He believed that the public had a fair view on who should step down.

47. LO(IL) said that the Order only reflected the provisions in the relevant legislation that the administration of the relevant disciplined services was subject to the orders and control of CE.

48. Mr LAU Kong-wah considered that there was a need for the Order. He asked when the Administration commenced its work on the drafting of the Order and when the legislative proposal governing covert surveillance would be introduced. He asked whether the Administration would consider introducing legislation to regulate covert surveillance by the Government and that by the private sector on a separate basis. The Chairman said that the legislative proposal to be introduced should focus on the regulation of covert surveillance by the Government. Mr LEUNG Kwok-hung considered that BL30 was mainly applicable to the Government.

49. S for S responded that since the delivery of the judgment by the court in April 2005, the Administration had been examining the issue. The Administration had examined the feasibility of proceeding directly with the enactment of legislation on covert surveillance, but noted that it was not possible for such a task to be completed within the 2004-05 legislative session, as the issues involved were complex. Legal advice indicated that the requirement regarding the legal procedures under BL30 could be met through the issuance of the Order by CE in accordance with BL48(4). He added that the Administration shared the view that legislation on covert surveillance should be enacted as soon as possible. Although the issue was complex and sensitive, the Administration intended to brief the Panel on its proposal as soon as possible and introduce the relevant legislative proposal in the first half of the next legislative session. He said that the Administration had an open mind on the suggestion of introducing legislation to regulate covert surveillance by the Government and that by the private sector on a separate basis.

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50. Mr LAU Kong-wah asked whether any abuse of covert surveillance had been identified in the past. S for S responded that there had not been any complaint about abuse of such a nature since reunification.

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51. The Chairman asked whether the Order provided for the covert surveillance of offences under BL23 where legislation had not been enacted. S for S replied in the negative. He said that, under the Order, covert surveillance would not be conducted for those BL23 offences that had yet to be created. LO(IL) added that some of the offences under BL23 had already been covered under existing legislation. Moreover, section 4 of the Order expressly excluded any covert surveillance which was already provided for under existing legislation. The Chairman requested the Administration to provide a written response.

52. The Chairman asked whether information obtained in covert surveillance would be provided to Mainland public security officials and state security officials. S for S replied that intelligence was exchanged with the law enforcement agencies of other jurisdictions in combating transnational crime. Such exchanges were made in compliance with the requirements under the Personal Data (Privacy) Ordinance.

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53. Ms Audrey EU requested the Administration to provide statistics on covert surveillance currently undertaken by law enforcement officers.

54. Members agreed that a further meeting would be scheduled to continue discussion on the Order. The Chairman said that members would be invited to indicate any additional information which they wished the Administration to provide before the meeting. Ms Emily LAU asked the LegCo Secretariat to draw up a list of the issues raised by Members.

55. There being no further business, the meeting ended at 1:15 pm.