

For information
on 8 March 2005

**Legislative Council Panel on Security
Subcommittee on Review of Existing Statutory Provisions
on Search and Seizure of Journalistic Material**

Initial Response to the List of Issues Proposed by Hon James To

Purpose

This paper sets out the Administration's initial response to the list of issues proposed by Hon James To for study by this Subcommittee in respect of Part XII of the Interpretation and General Clauses Ordinance (IGCO).

Initial Response

2. The Administration's position on protection of journalistic material has been enunciated in the various papers discussed at the two meetings of the Panel on Security held on 2 and 29 November 2004 respectively¹. In short, we consider that the current legislation, with its three-tier system and detailed stipulations on criteria and procedures, already strikes a proper balance between the need to protect press freedom and that of safeguarding public interest. In addition, we wish to reiterate the following points –

- (a) The stringent criteria set out in Part XII of the IGCO are specially tailored for journalistic material and not applicable to any other type of material. The entire statutory scheme was designed precisely for the purpose of providing additional safeguards to press freedom by circumscribing the powers of law enforcement agencies to access journalistic material.
- (b) The existing statutory scheme should be seen in its totality. A

¹ The discussion papers are –

- (a) "Obtaining and Execution of Search Warrants for Journalistic Material" (LC Paper No. CB(2)111/04-05(03);
- (b) "The Interpretation and General Clauses (Amendment) Bill 1995 – Protection of Journalistic Material" (LC Paper No. CB(2)111/04-05(04);
- (c) "Comparative Study on the Power of Search and Seizure of Journalistic Material" (LC Paper No. CB(2)111/04-05(05); and
- (d) "Protection of Journalistic Material" (LC Paper No. CB(2)270/04-05(02).

number of conditions have to be met before a production order or search warrant is granted. Satisfying any one of the conditions alone would not lead to any such order or warrant being granted. It would be inappropriate to treat each individual condition singly without regard to the overall context in which the condition operates.

- (c) Compared with the legislative schemes in overseas jurisdictions, ours is a robust one. Indeed many overseas jurisdictions do not even have a specific statutory scheme overseeing the search and seizure of journalistic material and have to rely on the general provisions governing all material. Even compared with places with a tailored scheme, ours is at least comparable, if not better. Our three-tier approach, particularly the sealing of seized journalistic material under Tier Two, is unique.
- (d) In practice our law enforcement agencies have all along exercised extreme caution in implementing Part XII. In line with the spirit and letters of the legislation, they never look upon journalistic material as their normal means of acquiring evidence for the purpose of criminal investigation. The provisions in the IGCO on journalistic material have been very infrequently resorted to and only where there were strong and sufficient justifications to do so.

3. Turning to the list of issues raised by Hon James To, as explained to the Panel on Security, the Administration will keep Part XII under review from time to time but does not consider it necessary to amend the provisions at this juncture. We would welcome the opportunity to discuss the list with members in greater detail at the Subcommittee. In the meantime, we set out below some preliminary observations –

- (a) Circumstantial factors (issues no. 1, 2, 8 and 9) – The IGCO scheme is intended to and does already provide for sufficient flexibility and scope for the court to examine and balance all the relevant factors in reaching a decision whether to issue a production order or search warrant. Most fundamentally, “public interest” serves as the guiding principle as well as the paramount consideration. In particular, section 89(2) stipulates that for the avoidance of doubt Part XII shall not be construed as requiring a judge to make an order where he considers that, in all the circumstances of the case, it would not be in the public interest to make that order. In addition, sections 84(3)(d)(ii)

and 87(2) require the court to consider the circumstances under which the journalistic material is held. Taken in its entirety, the IGCO scheme already allows the court to take into account all relevant factors.

- (b) Public interest (issues no. 7 and 10) – Consideration of public interest involves a careful balancing act. It requires the court to consider all aspects of any given case, with no bias or predisposition towards any particular factor. The circumstances of each case before the court will be unique, and factors to be considered different. Hence it would not be appropriate or indeed possible to prescribe by law exhaustively the meaning of public interest and how it should be applied in each case.
- (c) Source versus content (issue no. 5) – The protection under the IGCO scheme targets material, irrespective of its source. It was a conscious decision, as agreed by the then Bills Committee, to define “journalistic material” generally to provide the best protection to bona fide journalistic material.
- (d) All material to be sealed (issue no. 6) – It cannot be precluded that there will be exceptional circumstances where law enforcement agencies require immediate access to the material seized, such as where lives are in imminent danger. Tier Three caters for such contingencies and a very high threshold is required for the issuance of a Tier Three warrant. Apart from fulfilling all the requirements in Tier Two, the officer has to prove to the satisfaction of the judge that the investigation may be seriously prejudiced if immediate access to the material is not permitted. No Tier Three warrant has been executed since the IGCO scheme came into force.
- (e) Procedural safeguards for *inter partes* application and production order to precede search warrant (issues nos. 3 and 11) – It may not be feasible in all cases to apply for a production order before resorting to a search warrant, since in some cases this may seriously prejudice the investigation. The service of affidavit on the Respondent for *inter partes* application, as required by the Rules of High Court, may in some cases alert the suspects and enable them to destroy or conceal the material sought by the investigators. Procedural safeguards may not completely avoid information being revealed, since the information could still be disclosed clandestinely to the suspect in contravention of the

legislative prohibition or judicial order. On the other hand, the current legislation already provides sufficient safeguards against the use of a search warrant. It specifies that a search warrant can only be authorised if a number of conditions are met, including the other methods of obtaining the material have been tried and failed, or have not been tried because of the likelihood of failure or serious prejudice to the investigation.

- (f) Appeal procedure for search warrant in Cap. 1 (issue no.4) – The requirement of obtaining judicial warrant itself provides the safeguards against arbitrary search and seizure of journalistic material. As a search warrant would be granted upon *ex parte* application, the individuals affected would not be aware of the warrant until it is executed. To stay the execution of the warrant pending an appeal would defeat the purpose of the *ex parte* application. Therefore, the appropriate safeguard against the execution of the warrant under section 85 should be in the form of “seal and return” of the seized articles. Such safeguard is provided under section 85(6), which requires that, subject to the exceptional circumstances under section 85(7), any journalistic material seized pursuant to the search warrant has to be sealed. Section 87 further provides that the person from whom the material was seized may make any *inter partes* application for the return of the material.

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