LC Paper No. CB(2)1455/04-05(02)

Hong Kong Bar Association

comments on Seizure of Journalistic Material

1) The Bar Association takes the view that the provisions of Part XII Interpretation and General Clauses Ordinance, Cap. 1 ('Part XII') are in need of revision.

2) The single most useful change that could easily be made would be to remove the power of judges of the Court of First Instance ('CFI') to deal with applications for orders under Part XII. This would have the effect of requiring all applications for orders under that part to be made to District Judges. Decisions of District Judges whether or not to make an order under Part XII are subject to judicial review under section 21I High Court Ordinance.

3) The present situation, where a law enforcement agency can choose to go to either a District Judge or a judge of the Court of First Instance ('CFI') to seek an order under Part XII, is anomalous and very undesirable.

4) This is because it allows the agency to choose between a decision maker whose decision is subject to judicial review and capable of being appealed under s.14A High Court Ordinance (the District Judge) and a decision-maker whose decision cannot be reviewed and cannot be appealed (the CFI judge). (As far as is known, all applications under Part XII that have been made in the past have been made to CFI judges.)

5) The reason why a judge of the CFI cannot be judicially reviewed when performing functions within the jurisdiction of that court is simply that the jurisdiction of review is vested in the CFI and the CFI does not supervise itself.

6) The reason why there is no appeal from a CFI judge's decision under Part XII is because applications for warrants are made in 'a criminal cause or matter'. Not every decision made in a criminal cause or matter can be appealed. If a decision is a decision of a kind not included in s.13 (3) High Court Ordinance (criminal jurisdiction of Court of Appeal) there is no right of appeal.

7) This highly unsatisfactory state of affairs was disclosed in the recent Court of Appeal case concerning Sing Tao where the appeal of the ICAC was dismissed for want of jurisdiction.

8) District Judges are clearly competent to make orders under Part XII as they feature in the present scheme. CFI judges should feature in the scheme only to the extent that they figure in any statutory scheme affecting legal rights and obligations. That is to say they should exercise the ordinary judicial review jurisdiction. Errors of law made by them in that jurisdiction can be put right by the Court of Appeal under s.14A High Court Ordinance which permits appeals in judicial reviews concerning criminal causes or matters.

9) The Bar Associations comments on the Hon James To's eleven issues set out in LC Paper No. CB(2)689/04-05(03) are set out below.

Number 1

10) The test posed by Hartmann J should be the test to be adopted when considering whether to issue a warrant for journalistic material. The Bar Association does not see the need to have this test cast in statutory form because it arises as a matter of construction and it is conceivable that, in very exceptional cases, the issue of a warrant would be justified in without there being material demonstrating such risk, e.g. transmission to a third party who might take the material out of the jurisdiction.

Number 2

11) It is arguable that the existing criterion of 'arrestable offence' sets the threshold at too low a level. In England and Wales search and seizure powers are generally exercisable only when an offence carrying a sentence of 5 years imprisonment or more is suspected. Additional restrictions can arise: see Police and Criminal Evidence Act 1984 Schedule1, Paragraph 12.

Number 3

12) If the Part XII procedure was not governed by elaborate rules of court made for the CFI (RHC O.118) the enforcement agency applying for an order would not be subject to them. Materials placed before a judge to obtain an order would be disclosed only to the extent that was needed to meet a challenge by way of judicial review.

Number 4

13) The Bar Association is of the view that an appeal procedure is unnecessary if judicial review is available. Appeals against the issue of coercive orders like production orders and search warrants are not desirable as a matter of legal policy. These orders, like other similar orders made under different ordinances, should be capable of being obtained quickly and challenged only on conventional grounds of judicial review.

Number 5

14) The concern behind drawing a distinction between source and content is not understood. Journalistic material will very often reveal, or give a strong indication of, the source. The aim of Part XII should be the protection of the source which may mean protecting the material if it is likely to identify the source.

Number 6

15) The existing scheme provides that where an exceptional case can be made for issuing a warrant to seize journalistic material it will be sealed. The enforcement agency has to make out a further exceptional case under s.85 (7) of Part XII for having immediate access to the material. If the approving judge applies the relevant provisions rigorously and properly it will be only cases those where there is demonstrable serious prejudice that access will be permitted. The Bar Association sees no problems with the existing structure.

Number 7

16) The amendment proposed by the HKJA is unnecessary. The combined effect of Articles 27 and 39 Basic Law (incorporating Article 19 ICCPR by reference) should incorporate this proviso in the decision-making process when a judge is asked to make a coercive order under Part XII.

Number 8

17) The protection attaches to the journalistic material and not to the journalist. The fact that a journalist may be a suspect and hence likely to dispose of the material may be a reason for granting a warrant rather than a production order. That does not mean that the judge discounts the value of the material because the suspect is a journalist. In a proper case, he might protect the material even though the journalist holding it was a suspect.

Number 9

18) If the journalistic material has already been published the judge is likely to be even more reluctant to make a coercive order because the reasonable inference to be drawn is that the application is made to discover information about sources. The whole purpose of Part XII is to afford a degree of protection to sources that the common law does not provide. See *AG v. Mulholland* [1963] 2 QB 477 CA for an example of how the common law does not protect sources (journalists going to prison for refusing to identify sources). There is no need to spell out what should be obvious to the judge dealing with the application.

Number 10

19) There is no need to spell out the meaning of ‘public interest’. In the context it requires the judge dealing with an application under Part XII to consider the constitutional protection guaranteed the press in the context of the detection and investigation of crime. The balance he strikes in one case where an order is made may not be repeated in another where it is refused. It would be undesirable to set the balance by legislative means.

Number 11

20) It is a matter of legislative implication that an agency applying for a warrant must have explained to the judge why a production order would not be appropriate in the circumstances. A warrant issued without such explanation being made would be liable to set aside.

29th April 2005
Hong Kong Bar Association