

立法會
Legislative Council

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(These minutes have been seen
by the Administration)

Panel on Security

**Minutes of special meeting
held on Monday, 31 July 2006, at 10:45 am
in the Chamber of the Legislative Council Building**

- Members present** : Hon James TO Kun-sun (Chairman)
Hon Albert HO Chun-yan
Hon Margaret NG
Hon CHEUNG Man-kwong
Hon Howard YOUNG, SBS, JP
Hon LEUNG Kwok-hung
Hon CHIM Pui-chung
- Member attending** : Hon Emily LAU Wai-hing, JP
- Members absent** : Hon Daniel LAM Wai-keung, SBS, JP (Deputy Chairman)
Dr Hon LUI Ming-wah, SBS, JP
Dr Hon Philip WONG Yu-hong, GBS
Hon WONG Yung-kan, JP
Hon LAU Kong-wah, JP
Hon CHOY So-yuk, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
- Public Officers attending** : Item I
Ms CHEUNG Siu-hing
Deputy Secretary for Security

Mr Kevin P ZERVOS, SC
Department of Justice
Senior Assistant Director of Public Prosecutions
- Clerk in** : Mrs Percy MA

attendance Chief Council Secretary (2) 3

Staff in attendance : Mr LEE Yu-sung
Senior Assistant Legal Adviser 1

Mrs Eleanor CHOW
Senior Council Secretary (2) 4

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- I. Impact of the judgment delivered by the Court of Final Appeal in *Leung Kwok-hung and Koo Sze Yiu v. Chief Executive of the Hong Kong Special Administrative Region* on law enforcement before the enactment of the Interception of Communications and Surveillance Bill and the preparatory work undertaken by the Administration for the implementation of the Bill as enacted**
[LC Paper Nos. CB(2)2731/05-06(01) and CB(2)2860/05-06(01)]

The Chairman said that the purpose of the special meeting was to discuss the effect of the judgment of the Court of Final Appeal (CFA) in the *Leung Kwok-hung and Koo Sze Ziu v Chief Executive of the Hong Kong Special Administrative Region* case (the CFA judgment), and the preparatory work for the implementation of the Interception of Communications and Surveillance Bill (the Bill) when enacted.

CFA judgment

2. Members noted that on 9 February 2006, the Court of First Instance (CFI) handed down its judgment on an application for judicial review regarding the existing regime on interception of telecommunications and covert surveillance. CFI made an order to the effect that section 33 of the Telecommunication Ordinance (TO) and the Law Enforcement (Covert Surveillance Procedures) Order (the Executive Order) were valid and of legal effect for a period of six months from the date of the order, notwithstanding the grant of declarations to the effect that section 33 of TO, insofar as it authorized or allowed access to or disclosure of the contents of any message, was unconstitutional and that the Executive Order did not constitute "legal procedures" for the purpose of Article 30 of the Basic Law (the temporary validity order). Appeals were lodged to the Court of Appeal and subsequently to CFA in respect of the temporary validity order. CFA gave its judgment on 12 July 2006.

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3. Senior Assistant Director of Public Prosecutions of the Department of Justice (SAD/PP) briefed members on the background to the decision of CFA as follows -

- (a) CFA dealt with the issue of temporary validity or suspension with regard to the declarations that had been granted by CFI. The Government had sought to maintain the status quo as the temporary validity order would allow law enforcement agencies (LEAs) to continue to rely on existing legislation to carry out necessary telecommunication interception and covert surveillance for a period of six months. This would also provide an opportunity for the legislature to enact remedial legislation before the relevant legislation became unconstitutional;
- (b) CFA allowed the appeal and ordered that the temporary validity order be set aside. In place of the temporary validity order, CFA suspended the declarations of unconstitutionality of the Executive Order and section 33 of TO, so as to postpone their coming into operation. Section 33 would remain in the statute book until 8 August 2006 and thereafter it would be struck down. The Government was happy with a temporary suspension handed down by CFA because it allowed the relevant authorities to still rely on section 33 to carry out its interception power, and at the same time give an opportunity for the enactment of corrective legislation. The CFA judgment stated that "the Government can, during that period of suspension, function pursuant to what has been declared unconstitutional, doing so without acting contrary to any declaration in operation. But, despite such suspension, the Government is not shielded from legal liability for functioning pursuant to what has been declared unconstitutional"; and
- (c) CFA made a distinction between temporary validity and suspension as explained in paragraph 33 of the judgment. Where temporary validity was accorded, the result would appear to be twofold. First, the executive was permitted, during such temporary validity period, to function pursuant to what had been declared unconstitutional. Secondly, the executive was shielded from legal liability for so functioning. With suspension, it covered the first aspect but not the second. In effect, the suspension order did not have any impact on the way the Government carried out its function in respect of telecommunication interception and covert surveillance, and the Government continued to be legally liable for its function.

4. SAD/PP added that covert surveillance, including interception of communications, was an important piece of armory in the fight against crime. Without it, it would make maintenance of law and order difficult. CFA considered that the exceptional circumstances justified the remedy of temporary suspension. By virtue of the CFA judgment, LEAs were permitted to continue to undertake surveillance operations and interception of communications until 8 August 2006.

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5. Ms Emily LAU sought advice from the Senior Assistant Legal Adviser 1 (SALA1) on the following -

- (a) whether it was in order for CFA to allow section 33 of TO to continue to take effect for another six months, despite the fact that the provision had been ruled unconstitutional by CFI; and
- (b) whether it was within CFA's jurisdiction to strike down section 33 of TO immediately.

6. SALA1 responded that the appeal to CFA was against one thing only, namely the temporary validity order. CFA had decided to set aside the temporary validity order and suspend declarations of unconstitutionality of section 33 of TO and the Executive Order for six months. The difference in legal effect between temporary validity order and suspension was explained by the CFA as that with suspension, the Government could function pursuant to what had been declared unconstitutional, but it was not shielded from legal liability.

7. SAD/PP explained that the decision to strike down section 33 of TO was made by the Court of First Instance of the High Court (Justice HARTMANN). The temporary validity order provided a six-month stop-gap measure pending corrective legislation. CFA could have struck down section 33 immediately but it chose the remedy of temporary suspension because of the exceptional circumstances. CFA recognized that there were exceptional circumstances whereby the immediate striking down of a piece of legislation would prevent LEAs from discharging their functions to fight against crime and to safeguard public security. By suspending the declarations, LEAs were permitted to function as normal and at the same time legally liable. There were two features to this exceptional remedy. First, it had taken into account societal interest and ensured that human rights consideration enshrined in the Basic Law that the society should be governed by law and order would not be undermined. Secondly, it allowed remedial action to be taken by the legislature to create a more comprehensive regime to accord with human rights consideration.

8. The Chairman expressed concern about the legal liability to be borne by front-line staff before the passage of the Bill, given that the suspension order would not shield the Government from such liability. He asked whether guidelines on how they should conduct their work would be provided.

9. SAD/PP responded with the following points -

- (a) normal law enforcement investigation was allowed under the CFA judgment. The obligations and requirements of law enforcement officers were the same as before. They had to act in accordance with the law and were subject to legal liability only if their conduct went

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outside the law. At present, they were exempt from criminal liability in the course of performing public duties;

- (b) section 33 had been in operation since 1963 and had only been subject to legal challenge in 2005. The court now ruled that it was unconstitutional because it did not comply with human rights requirements. The use of section 33 of TO was limited as an intelligence gathering mechanism for law enforcement, i.e. to find out and investigate criminal misconduct. If any legal issues arose in the process of gathering evidence which was ultimately used in a criminal trial, then it was a matter before the trial court;
- (c) section 33 of TO had already been determined by the court as unconstitutional. However, that determination had been put off for six months. Any law enforcement officer who had committed a civil wrong in the course of interception of communications and covert surveillance operations would be liable as in normal circumstances; and
- (d) once the declaration of unconstitutionality came into effect on 9 August 2006, it had retrospective effect.

10. Mr LEUNG Kwok-hung said that the CFA judgment was clear in that section 33 of TO and the Executive Order were unconstitutional and that the Government was legally liable for undertaking covert surveillance operations and interception of communications. He pointed out that as the Government was not shielded from legal liability for functioning pursuant to what had been declared unconstitutional, the Government might face legal challenges from those who suspected that they had been subjects of covert surveillance or interception of communications in the past. He further said that the party who had failed to put in a comprehensive statutory regime to meet the requirements of Articles 30 and 39 of the Basic Law should be held responsible.

11. SAD/PP responded that the Administration was not acting unconstitutionally because the declaration that made section 33 of TO invalid had been delayed and postponed by the CFA judgment. Section 33 of TO would be unconstitutional and become an invalid piece of legislation on 9 August 2006. In the meantime, the declaration of unconstitutionality had been suspended. SAD/PP reiterated that the CFA judgment had raised two points. First, the suspension was necessary because the problem of striking down section 33 of TO would undermine law and order. Secondly, the legislature was afforded an opportunity to enact corrective legislation. The court had recognized that LEAs should be allowed to continue to function as normal, but they would be subject to legal responsibility that might arise in the way they conduct themselves. The court would not accord the suspension if it was unnecessary, and would not accord it for a period that was longer than necessary.

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12. SALA1 explained that, as a matter of law, upon being declared inconsistent with the Basic Law, section 33 of TO became unconstitutional from the date the Basic Law applied to Hong Kong. The Chairman said that with the suspension, from the legal point of view, section 33 of TO would become unconstitutional on 9 August 2006 when the declarations of unconstitutionality made by CFI became effective. He added that given the meaning of "legal liability" referred to in the CFA judgment was not clear, those who intended to institute legal proceedings against the Government should seek independent legal advice.

13. Deputy Secretary for Security (DS for S) said that section 33 would be replaced by a new provision following passage of the Bill to enable continued operation of interception of telecommunications.

Preparatory work

14. DS for S briefed members on the various preparatory arrangements for the enactment of the Bill as set out in paragraph 7 of the Administration's paper.

15. The Chairman said that the various preparatory arrangements set out in paragraph 7 were too general. Given that the Bill would soon be enacted and the ordinance would come into effect on the day of gazettal, the Administration should provide a detailed account of its preparatory work for the implementation of the Bill, e.g. appointment of the Panel Judges, preparation of manual for LEAs, training for front-line staff, etc. He said that LegCo had the responsibility to ensure the effective operation of the ordinance after enactment. Ms Emily LAU expressed similar concerns.

16. DS for S responded that the Administration was well aware of the urgency of making preparation for the enactment of the Bill. To this end, relevant departments had been taking necessary steps to prepare for the operation of the new statutory regime. As some of the arrangements were operational in nature, the Administration had not provided such details in the paper. In further response to the Chairman, DS for S provided further details in the following areas of work -

- (a) appointments - the Chief Executive was well aware of the need to appoint the Commissioner on Interception of Communications and Surveillance (the Commissioner) and three to six Panel Judges on the recommendation of the Chief Justice. The appointments could only be made by the Chief Executive after the Bill had been enacted and come into operation. At this stage, the Administration was not in a position to reveal the details. Separately, the heads of LEAs were making preparation to designate the authorizing officers and reviewing officers as required under the Bill;

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- (b) detailed operational procedures - LEAs were working out the detailed operational procedures for submitting various applications and for making reports to the relevant authority under the ordinance. Where the relevant authority was a Panel Judge, the steps had to be agreed with the Judiciary;
- (c) premises for the Commissioner - the Administration was identifying a suitable office for the Commissioner's Secretariat in private premises. Meanwhile, the Secretariat would be temporarily accommodated in a government premises;
- (d) support for the Commissioner and Panel Judges - funding proposals for staff establishment had been approved by the Establishment Subcommittee and the Finance Committee. The respective teams of support staff for the Commissioner and the Panel Judges would be put in place; and
- (e) Code of Practice (CoP) and training - the draft CoP had already been provided to the Bills Committee for information, and would be updated having regard to the views of the Bills Committee. LEAs had been informed of the amendments proposed to the CoP. Initial training sessions would start before passage of the Bill.

17. Mr Howard YOUNG said that Members and the public were concerned whether the Bill could offer protection against invasion of privacy by LEAs and whether it could be effectively enforced after its enactment. He expressed concern about a possible legal vacuum in the event that the necessary preparatory work could not be completed in time.

18. DS for S responded that the suspension order would expire on 8 August 2006. If, for example, the enacted ordinance took effect on 9 August 2006, the necessary preparatory work had to be completed before then. Arrangements which were requirements under the ordinance, such as the appointment of Panel Judges, could only be implemented after the commencement of the ordinance. DS for S added that in the absence of Panel Judges, heads of the departments were empowered under the ordinance to issue emergency authorizations such as in the case of an imminent risk of death or serious bodily harm of any person, or substantial damage to property.

19. Mr Howard YOUNG questioned the desirability of providing training to front-line staff before passage of the Bill, given the number and complexity of the amendments to be proposed to the Bill. He considered that training should be provided after enactment of the Bill, on the basis of the provisions of the enacted ordinance.

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20. DS for S responded that in view of the limited time available between the passage of the Bill and the expiry of the suspension order, initial training would be provided to staff on the basis of the procedures set out in the Bill. LEAs had been informed of the progress of scrutiny of the Bill and the amendments proposed to the Bill and the possible variations to some of the procedures arising from the amendments. The training course, which would last for two to three days, would also provide information on basic principles such as the importance of human rights and protection of privacy.

21. The Chairman asked about the progress of the pre-appointment checking for the prospective Panel Judges and whether the checking could be done in time. He said that LegCo had the duty to ensure that the checking was properly done and not compromised due to time constraint.

22. DS for S said that the appointment of Panel Judges was a matter between the Chief Executive and the Chief Justice. They were aware of the timeframe for making the appointments and had made the necessary arrangements to ensure that the Panel Judges would be in post shortly after the ordinance took effect. The checking procedure had to be initiated by the authority responsible for the appointment, and in this case, the Chief Executive's Office. In response to Mr LEUNG Kwok-hung, DS for S said that the time required for conducting the pre-appointment checking varied from case to case.

23. In response to members, DS for S undertook to provide an account of the preparatory work for the implementation of the Bill once it took effect.

(Post-meeting note: The Bill was enacted on 8 August 2006 and the Ordinance came into effect from 9 August 2006. The information paper provided by the Administration was issued to members vide LC Paper No. CB(2)2921/05-06(01) on 11 August 2006.)

24. The meeting ended at 12:40 pm.