

For information
31 July 2006

Legislative Council Panel on Security
Interception of Communications and Covert Surveillance

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

Introduction

This paper sets out, in response to Members' request, the effect of the judgment of the Court of Final Appeal (CFA) in the *Leung Kwok-hung and Koo Sze Yiu v Chief Executive of the Hong Special Administrative Region* case, and an outline of the preparatory work for the implementation of the Interception of Communications and Surveillance Bill (the Bill) when enacted.

CFA's judgment

2. 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. In summary, the CFI made an order to the effect that section 33 of the Telecommunications Ordinance (TO) and the Law Enforcement (Covert Surveillance Procedures) Order (the Executive Order) were to be treated as valid and of legal effect for a period of 6 months (the temporary validity order) from the date of the CFI judgment notwithstanding the grant of declarations to the effect that section 33 of the TO, insofar as it authorizes or allows access to or disclosure of the contents of any message, is unconstitutional and that the Executive Order did not constitute "legal procedures" for the purpose of Article 30 of the Basic Law.

3. The applicants appealed to the Court of Appeal (CA) in respect of the temporary validity order. The appeal was dismissed on 10 May 2006. The applicants further appealed to the CFA.

4. The CFA allowed the appeal and ordered that the temporary validity order be set aside. In place of the temporary validity order, to afford an opportunity for the enactment of corrective legislation, CFA suspended the declarations of unconstitutionality of the Executive Order and section 33 of the TO, so as to postpone their coming into operation, such postponement being for six months from the date of the CFI judgment of 9 February 2006 and will expire on 8 August 2006.

5. The CFA judgment states 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”. The law enforcement agencies are therefore permitted to continue to undertake covert surveillance operations and interception of communications until 8 August 2006.

Preparatory work

6. The Bills Committee has completed scrutiny of the Bill and the Committee Stage Amendments (CSAs) proposed by the Administration and some Members. The resumption of the second reading debate at the Legislative Council will take place on 2 August 2006.

7. In preparation for the enactment of the Bill, the Administration has been making various arrangements, including, for example –

- (a) working out the various operational steps involved in making applications for judge’s authorizations with the Judiciary;
- (b) working out the various operational steps involved in making applications for executive authorizations;

- (c) identifying the necessary premises for the Commissioner on Interception of Communications and Surveillance (the Commissioner);
- (d) putting in place the support staff team for the Commissioner and panel judges; and
- (e) updating the LEAs on the latest CSAs and finalizing the Code of Practice.

8. This work will necessarily have to take into account the provisions of the legislation as enacted, and will therefore continue.

Security Bureau
July 2006