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Legislative Council

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LC Paper No. CB(2)1861/05-06
(These minutes have been seen by
the Administration)

**Subcommittee on
Review of Existing Statutory Provisions
on Search and Seizure of Journalistic Material**

**Minutes of meeting
held on Friday, 20 January 2006 at 4:30 pm
in Conference Room B of the Legislative Council Building**

Members present : Hon James TO Kun-sun (Chairman)
Hon Albert HO Chun-yan
Hon Margaret NG
Dr Hon Philip WONG Yu-hong, GBS
Hon Howard YOUNG, SBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Daniel LAM Wai-keung, BBS, JP

Members absent : Dr Hon LUI Ming-wah, JP
Hon WONG Yung-kan, JP

Public Officers attending : Mrs Apollonia LIU
Principal Assistant Secretary for Security

Miss Rosalind CHEUNG
Assistant Secretary for Security

Mr Kevin ZERVOS, SC
Senior Assistant Director of Public Prosecutions
Department of Justice

Ms Roxana CHENG
Senior Assistant Solicitor General
Department of Justice

Mr Alfred MA
Chief Superintendent of Police (Crime Headquarters) (Crime Wing)

Mr Gerald Roger OSBORN
Assistant Director/Operations
Independent Commission Against Corruption

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

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

Mr Raymond LAM
Senior Council Secretary (2)5

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I. Meeting with the Administration
(LC Paper Nos. CB(2)888/05-06(01) and LS24/05-06)

Principal Assistant Secretary for Security (PAS(S)) briefed members on the Administration's response to issues raised at the meeting on 25 October 2005. She said that as the legal system in the United Kingdom (UK) differed from that in Hong Kong, it would be more appropriate to focus deliberations on issues relating to the situations in Hong Kong.

2. Senior Assistant Legal Adviser 1 (SALA1) briefed members on his paper about the amendments made to the relevant legislation of UK in relation to the types of judges who might deal with applications for production orders or search warrants in respect of journalistic material, and whether decisions of those judges were subject to judicial review. He pointed out that in the previous meeting, the Administration suggested that in view of the amendments made to the relevant UK legislation, the trend in UK seemed to be expanding the level of judges available for handling the relevant applications. After considering the relevant amendments, his view was that the inclusion of judges of the High Court into the list of judges who might deal with applications might not have the effect of expanding the list and providing a choice for law enforcement agencies.

3. Referring to paragraph 7 of the Administration's paper, the Chairman asked about the means of redress other than judicial review on a decision made by a judge of

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the Court of First Instance (CFI) under Part XII of the Interpretation and General Clauses Ordinance (IGCO).

4. PAS(S) responded that an application could be made for setting aside the final orders of the High Court on the ground of fraud or perjury. An aggrieved party could claim damages for the tort of malicious procurement of a search warrant or apply for the discretionary exclusion of evidence at any subsequent criminal trial. Senior Assistant Director of Public Prosecutions (SADPP) added that the aggrieved party could, by way of separate action, institute proceedings in respect of trespass or lodge a complaint with the law enforcement agency concerned. Section 87 of IGCO also provided for a party to seek the return of items seized with a search warrant.

5. The Chairman considered that the means of redress referred to by the Administration were very narrow in scope and could hardly be sought in practice. Malicious procurement of a search warrant was difficult to prove, as all relevant information was kept by the law enforcement agency concerned. Fraud on the part of the law enforcement agency was also difficult to prove, given that the aggrieved party did not have any power of search.

6. Ms Audrey EU shared the Chairman's view that it was very difficult to seek the means of redress referred to by the Administration. She asked whether any of the means of redress had been sought in the past. She said that since such means of redress were not effective, consideration should be given to providing a channel for appeal or review in Part XII of IGCO.

7. SADPP responded that there had been cases where action had been taken in relation to trespass in Hong Kong and UK. An application could be made under rule 6, Order 32 of the Rules of the High Court and Rules of the District Court for review of an order issued under Part XII of IGCO. However, the court had stated in the case of *So Wing-keung v. Sing Tao Limited and Hsu Hiu Yee* that it was outside the jurisdiction of the Court of Appeal to deal with such an application. Referring to paragraph 13 of the submission from the Hong Kong Bar Association (the Bar), he said that the Administration agreed with the Bar's view that appeals against the issuance of coercive orders such as production orders and search warrants were not desirable as a matter of legal policy. Thus, there should only be a limited right to seek some form of redress.

8. SADPP said that there were situations where access to information to be obtained through the issuance of a search warrant was vital to the detection and prevention of crime. In such cases, it was necessary to access and examine such information through the expeditious issuance of a search warrant. He added that Part XII of IGCO had already provided for sealing of the journalistic material seized and the aggrieved party could apply for return of the seized material.

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9. Ms Audrey EU considered that the means of redress referred to by the Administration were not effective. She said that the decision to issue a search warrant under Part XII of IGCO should not be final. A review mechanism which provided speedy review of a limited scope similar to that of judicial review should be provided in Part XII of IGCO.

10. SADPP expressed concern that the threshold for seeking judicial review was low. He expressed doubt whether there was a need for establishing a separate review mechanism. He said that the existing mechanism, which allowed an applicant to submit an application for search warrant to a CFI judge, had already subject law enforcement agencies to the highest level of judicial scrutiny. The existing mechanism had operated well and facilitated the issuance of search warrants. According to his experience, judicial review was seldom sought on the issuance of search warrant by a magistrate or a District Court judge.

11. Mr Albert HO considered that the existing mechanism under which a CFI judge took a final decision on the issuance of a search warrant without any avenue for appeal was undesirable.

12. SADPP responded that it could be noted from the case of *Apple Daily Ltd. v. Commissioner of the Independent Commission Against Corruption* and the case of *So Wing-keung v. Sing Tao Limited and Hsu Hiu Yee* that the aggrieved party could have access to CFI. The aggrieved party could institute proceedings by way of an action in tort.

13. Mr Albert HO considered that an action in tort could only be instituted on very limited grounds. He asked whether there was any avenue for an aggrieved party to bring a case to a higher court, if CFI made an error of law.

14. SADPP responded that there was an argument that under the criminal jurisdiction of the Court of Appeal, an aggrieved party who was a party to the proceedings had the right of appeal against the issuance of a search warrant by CFI, as it was related to criminal cause or matter.

15. Mr Albert HO expressed concern that although the decision of a District Court judge to issue a search warrant under Part XII of IGCO was subject to judicial review and thus could be rectified, there was no avenue for rectification of a CFI judge's decision to issue a search warrant under Part XII of IGCO, if the aggrieved party was not a party to the proceedings. Even where the aggrieved party was a party to the proceedings, it was only arguable that the aggrieved party could lodge an appeal with the Court of Appeal. He asked whether a judicial review on the issuance of a search warrant by a District Court judge could delay the execution of a search warrant. SADPP replied that there was such a possibility.

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16. Ms Margaret NG said that if it was ruled in a judicial review that a search warrant should not have been issued, the search warrant could be stopped in the course of execution.

17. SADPP said that as a search warrant was issued under an *ex parte* application, the introduction of a review mechanism might not be meaningful, as the party to be searched would not be aware of the issuance of the search warrant until it was executed. Besides, it might affect expeditious access to information that was vital to the detection and prevention of crime, which was time-critical.

18. The Chairman commented that, having regard to what SADPP had said, paragraph 4 of the Administration's paper did not fully reflect the Administration's considerations in the submission of an application for search warrant to CFI under Part XII of IGCO.

19. SADPP responded that what he had said was not a reflection of the decision made by law enforcement agencies when submitting their applications for search warrant to CFI under Part XII of IGCO. He stressed that he had not been involved in providing any advice on whether an application for search warrant should be submitted to a District Court judge or a CFI judge. He had never advised that an application for search warrant should be submitted to CFI in order to avoid any possible judicial review.

20. PAS(S) said that Part XII of the IGCO had only been used sparingly since its introduction in 1995. There were so far only four cases where application for search warrants and production order made under Part XII of IGCO, and paragraph 4 of the Administration's paper only set out the considerations given in those four cases. She pointed out that Part XII of IGCO did not provide law enforcement agencies with extra power, but rather regulated the powers of law enforcement agencies in the search and seizure of journalistic material. Part XII of IGCO had already incorporated a three-tier approach for access to journalistic material by law enforcement agencies. It would eventually be the court which determined whether a Tier One production order, a Tier Two warrant which involved sealing of the material seized, or a Tier Three warrant which involved immediate use of the material seized should be issued in a case.

21. The Chairman expressed concern that the three-tier approach under Part XII of IGCO could not address the concern that the issuance of a search warrant by a CFI judge was not subject to any review. He said that consideration should be given to establishing a mechanism for review of a CFI judge's issuance of a search warrant under Part XII of IGCO.

22. Mr Albert HO said that although an administrative decision was subject to

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judicial review and a judicial decision was subject to appeal, the decision of a CFI judge to issue a search warrant under Part XII of IGCO did not fall into either category. The lack of an avenue for rectification of a CFI judge's decision to issue a search warrant under Part XII of IGCO was very undesirable.

23. SADPP responded that an aggrieved party could lodge an appeal under section 31(b) of the Hong Kong Court of Final Appeal Ordinance (CFAO) against any final decision of CFI where an appeal could not be lodged with the Court of Appeal, if the aggrieved party could establish sufficient interest in the case concerned.

24. The Chairman said that an aggrieved party might not be able to lodge an appeal under section 31(b) of CFAO, if the party was unable to establish sufficient interest in the case concerned. This created uncertainty in respect of the right of a person to lodge an appeal against the issuance of a search warrant. He reiterated that consideration should be given to providing a mechanism for review of a CFI judge's issuance of a search warrant in Part XII of IGCO.

25. PAS(S) said that there had only been four applications for search warrants and production order under Part XII of IGCO. The Administration considered that the operation of the scheme so far did not point to the need to introduce a new review mechanism into Part XII of IGCO.

26. The Chairman suggested that the Secretary for Security (S for S) and Secretary for Justice (S for J) should be invited to the next meeting to discuss the views and suggestions of members. If the Administration did not agree to members' suggestion on the provision of a review mechanism in Part XII of IGCO, the Subcommittee might consider taking other actions, such as the introduction of a Member's Bill, to provide for a review mechanism under Part XII of IGCO.

27. Mr Albert HO said that although there had only been very few cases where applications for search warrants had been made under Part XII of IGCO, the cases had aroused wide public concern. He said that although there were concerns that the introduction of a mechanism for review might open a channel for hindering the execution of a search warrant, such a channel was already found with a search warrant issued by a District Court judge. He considered that even if a review mechanism was established, the court could conduct a review expeditiously in an urgent case.

28. Mr Howard YOUNG said that, as a further meeting of the Subcommittee would be held, he would express his views on the suggestion at the next meeting. He hoped that the Subcommittee could conclude its work at the next meeting.

29. Dr Philip WONG said that while he was sympathetic to the media, law enforcement agencies should be provided with sufficient means to gather evidence. He considered that differences in views between members and the Administration

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might not be resolved merely with the attendance of S for S and S for J at the next meeting. The Chairman said that the Subcommittee had to deliberate the issues thoroughly with the Administration before concluding its work.

30. Members agreed that a further meeting of the Subcommittee would be scheduled and the Clerk would consult the Chairman on the date of the next meeting.

31. The meeting ended at 6:05 pm.

Council Business Division 2
Legislative Council Secretariat
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