

**For information
on 4 May 2006**

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

Review / Appeal Mechanism

Purpose

At the Subcommittee's meeting of 20 January 2006, it was agreed that the only remaining question was whether there should be an additional review / appeal mechanism for decisions made by the Court of First Instance (CFI) under Part XII of the Interpretation and General Clauses Ordinance (Cap. 1). This paper sets out the Administration's response to that question.

Existing Remedies

2. As explained in the Administration's papers "*Administration's response to the Hong Kong Bar Association's Submission*" and "*Administration's response to the issues raised by Members at the Subcommittee meeting on 25 October 2005*" (LC Paper No. CB(2)2567/04-05(01) and LC Paper No. CB(2)888/05-06(01)), a number of remedies are already available under the current system. They are summarized below for Members' ease of reference.

3. Part XII of Cap. 1 provides two special safeguards for journalistic materials. First, for production orders issued under section 84, Rule 3 of Order 118 of the Rules of the High Court (Cap. 4A) provides that the application has to be made *inter partes*. The party from whom the journalistic material is required may therefore make his case before the court before a decision is made as to whether the application should be approved. Second, a sealing requirement applies to search warrants issued under section 85. Section 85(6) requires that, subject to the exceptional circumstances under section 85(7), any journalistic material seized pursuant to a search warrant made under section 85 has to be sealed. Section 87 provides that the person from whom the material was seized may make an *inter partes* application for the return of the material.

4. A number of other remedies generally applicable to CFI decisions, including appeal, are also available, for example –
- (a) to set aside the final orders of the Court on the ground of fraud/perjury in a separate action;
 - (b) to institute proceedings for any civil wrong (including trespass) or lodge a complaint with the law enforcement agency (LEA) concerned in a separate action;
 - (c) to institute specific tort of malicious procurement of a search warrant; and
 - (d) to seek discretionary exclusion of evidence at any subsequent criminal trial.

Possible Additional Measure

5. Having regard to the very small number of past cases (one involving a production order and three search warrants), the safeguards and remedies already available, the Administration considers that necessarily subjecting the CFI's decision under Part XII of Cap. 1 to an additional review / appeal mechanism is not a proportionate response and is not necessary. Nonetheless, insofar as Part XII of Cap. 1 allows a choice between making an application to the District Court or the CFI, we agree that there is room for making it clearer as to the circumstances under which an application will be made to either.

6. Taking into account some Members' concern, we propose that in future, all applications under Part XII of Cap. 1 should be made to the District Court, unless the circumstances clearly warrant seeking a decision from a higher judicial authority, i.e., the CFI, at the outset. More specifically, all applications made in respect of production orders, which are made *inter partes* and are usually related to less serious and sensitive cases, would invariably be submitted to the District Court. For search warrants applied for under s. 85(6) and s. 85(7) of Cap. 1, i.e. "search and seal" and "search and read" warrants, applications would also be made to the District Court as far as possible unless the matter is of such importance to warrant a decision from the CFI upfront. We envisage that such circumstances would be very limited, for example, where there is an imminent risk of serious harm to life and limb, or when it involves cases of utmost sensitivity where confidentiality is of grave importance in the interests of the investigation, for example, serious corruption allegations against very senior government servants holding very sensitive posts. Each case where it is contemplated that an application to the CFI should be made would have to be personally

cleared by a directorate officer of the LEA concerned, and would only be made after consultation with a directorate officer in the Prosecution Division of the Department of Justice.

7. A corollary of the above arrangements is that the District Court decisions would be subject to judicial review. We believe that, coupled with the existing remedies, this should address the concern of some Members.

8. Subject to Members' views, we intend to promulgate the above arrangements among the LEAs, including the Police, Independent Commission Against Corruption, Immigration Department and Customs and Excise Department. They will be required to amend their internal guidelines accordingly.

Security Bureau
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