

**For information
15 August 2005**

Legislative Council Panel on Security

Law Enforcement (Covert Surveillance Procedures) Order

Supplementary Paper

Introduction

This paper provides supplementary information to LC Paper No. CB(2)2419/04-05 dated 5 August 2005 and should be read together with that paper.

Importance of Covert Surveillance as an Investigation Technique

2. Covert surveillance has long been one of the effective investigation techniques used by law enforcement agencies, including those in Hong Kong, in their work in the prevention and investigation of crimes and protection of public safety and security. This investigation technique is of particular importance in pursuing criminal offences, such as corruption, which are secretive and conspiratorial in nature, often with no readily identifiable victims nor witnesses willing to come forward to give evidence. The products of such surveillance have been introduced as evidence in our criminal courts in the past on many occasions, and have enabled us to bring many criminals to justice.

3. The fact that Hong Kong is one of the world's safest and most corruption-free cities is due in no small measure to the efforts by our law enforcement agencies in maintaining law and order and combating corruption throughout the years. It is important that they continue to be able to use the various necessary investigative techniques, including covert surveillance, in carrying out their duties.

The Two Court Cases

4. There has been some comment on the effect of the two court cases in April and July 2005. It may be useful to briefly recap the situation.

5. On 22 April 2005, in the case of LI Man-tak and others, the District Court ruled surveillance evidence in the form of tape recordings of certain conversations admissible. However, in delivering the ruling, the judge expressed the view that the recordings had not been obtained “in accordance with legal procedures” as required by Article 30 of the Basic Law.

6. On 5 July 2005, in the case of SHUM Chiu and others, the District Court granted a permanent stay of proceedings. The stay was granted because the judge accepted that the ICAC had carried out a covert recording of a meeting which was subject to legal professional privilege. In delivering the ruling, the judge expressed the view that regulations on covert surveillance should be introduced.

7. In both cases, therefore, it has not been authoritatively determined whether the technique of covert surveillance by itself was lawful or not. Nonetheless, the Administration respects the judges’ views and has studied them carefully.

The Executive Order

8. In view of the public concerns arising from the views of the judges in the two court cases, the Administration is now actively considering how best to put in place legislation to regulate the conduct of covert surveillance. In the interim, to expeditiously address the concern of the public and the need of law enforcement agencies for a clearer legal basis in this important area of their work, the Law Enforcement (Covert Surveillance Procedures) Order (“the Order”) made by the Chief Executive (CE) took effect on 6 August 2005 to regulate covert surveillance carried out by law enforcement agencies prior to legislation.

Legal Status of the Executive Order

9. An Executive Order is not legislation or law. It cannot create

criminal offences, amend legislation, or impose obligations on members of the public.

10. The Order does not purport to do any of these things, or to create the power to conduct covert surveillance. That power is found in Article 30 of the Basic Law, which provides that “relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences.” In fact, the Order restricts the exercise of that power in particular cases by requiring, for example, the regular review of authorizations by senior officers. By issuing the Order, the CE has not, therefore, impermissibly sought to assume legislative power.

11. The Order does, however, have binding effect on law enforcement officers. The CE is authorised by Article 48(4) of the Basic Law to issue executive orders. Moreover, since he is head of the government, any order he issues to civil servants or members of the ICAC is binding on them and can be enforced through disciplinary action.

12. The Administration also considers that the Order creates “legal procedures” for the purposes of Article 30 the Basic Law. In the case of *The Association of Expatriate Civil Servants of Hong Kong v The Chief Executive of the HKSAR* [1998] 1 HKLRD 615 (the AECS case), the Court of First Instance held that an Executive Order amounted to “legal procedures” for the purposes of Article 48(7) of the Basic Law. The learned judge held that “when the Basic Law contemplates that a particular course of action has to be prescribed by law, the Basic Law says so”. The fact that Article 30 speaks of “legal procedures” therefore indicates that a meaning other than “prescribed by law” was intended.

13. The Administration notes that this decision was made in the context of Article 48(7) of the Basic Law, not Article 30, and that the Chinese expression for “legal procedures” in the two Articles differs. The term “法律程序” as used in Article 30 of the Basic Law can literally be translated as “legal procedures” whereas “法定程序” as used in the other Basic Law provisions (Articles 48, 73 and 74) can literally be translated as “legally laid-down procedures”. While both terms require some form of legal basis for the relevant act, neither of them on their own suggests that legislation must be put in place. It is considered that the slightly different Chinese renditions of the term “legal procedures” in Articles 30 and 48(7) have the same legal

implications in the context of the phrase “in accordance with legal procedures”.

14. It is also noted that, in the *AECS* case, the court struck down a provision in the Public Service (Administration) Order 1997, an Executive Order, that purported to prohibit interdicted officers from leaving Hong Kong without the permission of the Chief Executive. This was held to contravene Article 8 of the Hong Kong Bill of Rights, which provides that everyone shall be free to leave Hong Kong and that permissible restrictions on that right must be “provided by law”. The court, relying on international human rights jurisprudence, held that the Executive Order was not law and that the restriction was therefore invalid.

15. As emphasized above, Article 30 of the Basic Law refers to “legal procedures” rather than “law”. The international human rights jurisprudence on the meaning of “law” is not directly relevant to the meaning of “legal procedures” in Article 30. The Administration therefore considers that the Order creates “legal procedures” for the purposes of Article 30 and is legally effective.

16. It is also noted that the right to privacy is protected by Article 14 of the Hong Kong Bill of Rights, which is constitutionally underpinned by Article 39 of the Basic Law. Article 14 of the Bill of Rights provides that –

“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence”

The Administration considers that covert surveillance permitted by Article 30 of the Basic Law and undertaken in accordance with the legal procedures contained in the Order would be neither arbitrary nor unlawful.

Compliance with Rule of Law

17. There has been criticism that, by the use of an Executive Order, the Government is undermining the rule of law and “bypassing” the Legislative Council. That is not the intention. In this regard, it is essential to note that the Order, by its nature, is an administrative direction from the CE to enforcement agencies to maintain and implement the existing policy on covert surveillance by means of legal procedures. The Order is intended as an interim

measure. When issuing the Order, the Administration pledged to put forward legislative proposals as soon as practicable. These proposals will be fully scrutinized by the Legislative Council and reflect community views, including the views of members of the legal profession. We look forward to Members' views on our proposals.

Interception of Communications Ordinance

18. There have been suggestions that the Government should commence the Interception of Communications Ordinance (IOCO) to regulate covert surveillance. The IOCO, however, specifically regulates interception of communications, which does not include covert surveillance. Provisions regarding oral communication were withdrawn from the Bill leading to the IOCO before its passage, and the use of covert surveillance as in the recent court cases would fall outside the scope of the IOCO. The commencement of IOCO would not address the current concerns regarding covert surveillance.

19. Nonetheless, the Administration is reviewing the subject, including the existing legal provisions¹ governing the interception of communications. We will consult Members on our proposals.

Timetable

20. We are actively considering how best to put the measures governing covert surveillance into the form of legislation as a matter of priority. However, the issue is complex because, inter alia, besides law enforcement agencies, the private sector such as the media or private detectives may carry out covert surveillance. We would need to carefully consider the scope and content of our legislative proposals, taking into account the need to protect privacy and the need of our law enforcements agencies to carry out their duties

1. Section 33 of the Telecommunications Ordinance (Cap.106) provides that whenever he considers that the public interest so requires, the Chief Executive may order that any message or any class of messages brought for transmission by telecommunication shall not be transmitted or that any message or any class of messages brought for transmission, or transmitted or received or being transmitted, by telecommunication shall be intercepted or detained or disclosed to the Government or to the public officer specified in the order.

Section 13(1) of the Post Office Ordinance (Cap.98) provides that it shall be lawful for the Chief Secretary for Administration to grant a warrant authorizing the Postmaster General, or authorizing any or all the officers of the Post Office, to open and delay any specified postal packet or all postal packets of any specified class or all postal packets whatsoever.

to protect the public. We aim to present our proposals to Members as soon as possible in the 2005/06 session of the Legislative Council.

Security Bureau
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