

Law Enforcement (Covert Surveillance Procedures) Order

Statement of the Hong Kong Bar Association

1. The Hong Kong Bar Association (“the Bar”) expresses its serious concern about the Law Enforcement (Covert Surveillance Procedure) Order (“the Order”) that was published on 5 August 2005 in a special supplement to the Government Gazette.

2. The Order was made by the Chief Executive pursuant to the power vested in him under the Basic Law of the HKSAR, Article 48(4), which states that the Chief Executive “shall ... decide on government policies and issue executive orders”.

3. The Order contains provisions requiring officers of law enforcement agencies to seek authorization from an authorized officer in the relevant agency to carry out of covert surveillance; to specify the conditions under which authorization may be granted; and to require the agencies to issue internal guidelines for the purpose of providing guidance to its officers in respect of matters provided for in the Order.

4. The Bar is of the view that the Chief Executive, who is vested under the Basic Law with executive power only (Articles 16, 48, 60 and 62), cannot, under the pretext of regulating by executive order, assert a power to *authorize* covert surveillance when such surveillance may infringe the fundamental rights of HKSAR residents. Only a law can do that.

5. The fundamental rights affected by government covert surveillance are those guaranteed by:-
 - i. Article 30 of the Basic Law (freedom and privacy of communication of Hong Kong residents to be protected by law);
 - ii. Article 35 of the Basic Law (right of Hong Kong residents to confidential legal advice);
 - iii. Article 39 of the Basic Law (incorporating Article 17 of the International Covenant on Civil and Political Rights which guarantees the right to protection of the law against arbitrary and unlawful interference with a person's privacy).

6. The Chief Executive, in purporting to assert a power to regulate by issuing the Order, might, under the guise of executive action, have impermissibly sought to assume legislative power, which under Articles 17 and 66 Basic Law, is

exclusively vested in the Legislative Council of the HKSAR.

7. The Bar disagrees with the argument that the Chief Executive in making the Order merely established “legal procedures” rather than made “law”. The Order purports to make lawful what may otherwise be unlawful by requiring prior authorization to carry out covert surveillance. That is quintessential law-making. That is what a law made to implement Article 30 Basic Law can do but an executive order cannot.

8. Whether a set of provisions constitutes “legal procedures” for the purpose of Basic Law Art 30 depends in the first place on the subject matter of the ‘legal procedures’. If the subject matter is inconsistent with the Basic Law it does not become consistent with it by virtue of it being made the subject of an executive order under Article 48(4). What matters is what lies underneath. It is a matter of substance and not one of form.

9. It is well-established in international human rights law that government covert surveillance needs a statutory foundation as an essential first step to protecting rights of privacy. ‘Legal procedures’ governing covert surveillance need to be based on a law that recognizes and protects that right. That is what Article 30 Basic Law contemplates. When there is no law protecting the right

to privacy against covert surveillance then 'legal procedures' regulating intrusions into that right contained in an executive order are no substitute.

10. The Bar disagrees with the argument that support for the Order is to be found in the case of *Association of Expatriate Civil Servants v Chief Executive* [1998] 1 HKLRD 615. That first instance case is legal authority only for the proposition that when regulating the appointment or removal of holders of public office, an executive function, the Chief Executive may, consistent with Article 103 Basic Law and the long-established non-statutory system of regulation recognized there, use executive orders.
11. The case is not authority for saying that rights guaranteed under the Basic Law can be limited by executive measures which, although having a source *in law* (Article 48(4) of the Basic Law), do not have the force or status of *a law*. Article 18 of the Basic Law sets out the sources of law in the HKSAR (the Basic Law, the laws previously in force, i.e. 'common law, rules of equity, ordinances, subordinate legislation and customary law', and the laws enacted by the legislature of the HKSAR). Executive orders are not included amongst them.
12. The Bar is very disappointed that the Chief Executive, having realized that

there is a serious problem respecting covert surveillance and HKSAR residents' fundamental rights did not seek to address the matter through legislation. Constitutionally dubious executive orders, even though said to be temporary measures, are no substitute for legislation designed to conform to the Basic Law. (In this respect, it is regrettable that the Chief Executive did not set a time-limit on the life of the Order within which time legislation compatible with the Basic Law could have been introduced.)

Dated 8 August 2005.

Hong Kong Bar Association