Legislative Council Panel on Security
Comparative Study on the
Power of Search and Seizure of Journalistic Material

Purpose

This paper summarizes our research on the search and seizure power of law enforcement agencies in respect of journalistic material in five overseas jurisdictions, namely, Australia, Canada, New Zealand, UK and US, in comparison with the statutory scheme laid down in Part XII of the Interpretation and General Clauses Ordinance (Cap 1) ("the Cap 1 Scheme") briefly outlined below.

The Cap 1 Scheme

2. The Cap 1 Scheme provides for a three-tier approach on access to journalistic material[1] by law enforcement agencies, namely,

a) Tier One (production order, *inter partes* hearing) – Under this tier, an officer may apply to a judge of the District Court or Court of First Instance ("CFI") for a production order, requiring the person who possesses the journalistic material to produce it or to give the officer access to it. An application for the order shall be made *inter partes*, ie with both sides present. The officer has to satisfy the judge that a number of conditions are met before an order can be made. The conditions include, inter alia, that the material is likely to be of substantial value to the investigation of an arrestable offence[2], and that it is in the public interest to grant the order, having regard to the likely benefit to the investigation, and the circumstances under which the journalistic material is held, such as whether it is given in confidence. It is an offence for not complying with a

[1] "Journalistic material" is defined in s 82(1) of Cap 1 to mean "subject to subsection (2), any material acquired or created for the purposes of journalism". Section 82(2) provides that "[m]aterial is only journalistic material for the purposes of this Part if it is in the possession of a person who acquired or created it for the purposes of journalism". Section 82(3) further provides that "[a] person who receives material from someone who intends that the recipient shall use it for the purposes of journalism is to be taken to have acquired it for those purposes."

[2] "Arrestable offence" is defined in s 3 of Cap 1 to mean "an offence for which the sentence is fixed by law or for which a person may under or by virtue of any law be sentenced to imprisonment for a term exceeding 12 months, and an attempt to commit any such offence".

production order, or for destroying or altering the material after a notice of an application has been served.

b) Tier Two (warrant application, seize and seal) – This tier provides that an officer may make an *ex parte* application to a District Court or CFI judge for a warrant authorising him to enter premises and to search for or seize journalistic material. Such an application shall not be made unless approved personally by a directorate disciplined officer. Moreover, the applicant will have to satisfy the judge: either (a) that a production order has not been complied with, or (b) in addition to meeting most of the Tier One conditions, that it is not practicable to apply for a production order or that the service of a notice to the other party for an *inter partes* hearing may seriously prejudice the investigation. Any journalistic material seized pursuant to the warrant has to be sealed. The person from whom the material was seized may make an *inter partes* application for the return of the material. Unless the judge is satisfied that it would be in the public interest that the material be made use of by the authorities, he shall order it to be immediately returned to the person from whom it was seized.

c) Tier Three (warrant application, seize and use) – In exceptional circumstances, an officer may go for Tier Three, that is, to make an *ex parte* application for a warrant and for the immediate use of the journalistic material seized. Apart from satisfying all the additional requirements in Tier Two, the officer has to prove to the satisfaction of the judge that the investigation may be seriously prejudiced if immediate access to the material is not permitted.

3. It is relevant to note that the Cap 1 Scheme does not confer a new power on law enforcement agencies to search for or seize journalistic material. Instead, it restricts their statutory powers to enter premises for the purpose of searching for, or seizing, journalistic material.

Overview of Overseas Jurisdictions

4. Of the five jurisdictions that we have considered, the schemes in force in UK and US are similar to the one adopted in Hong Kong under Part XII of Cap 1, in that journalistic material is excluded from the application of general search and seizure powers conferred on law enforcement agencies. In both jurisdictions, there are specific statutory

schemes which provide for and regulate the search and seizure of journalistic material. A two-tier approach is adopted in UK under the Police and Criminal Evidence Act 1984 ("PACE") (ie production order and warrant) and in US through the Privacy Protection Act 1980 (42 U.S.C. § 2000aa) ("PPA") (ie subpoena and warrant)[3].

5. As regards the other three jurisdictions, i.e. Australia, Canada and New Zealand, we have not come across specific legislation on search and seizure of journalistic material. It seems that journalistic premises and material are subject to the general search and seizure powers conferred on law enforcement agencies. However, specific principles in respect of the power to search for and seize journalistic material have been developed by courts in Canada and New Zealand in the light of their constitutional or statutory bill of rights.

General Schemes: Australia, Canada and New Zealand

6. The general schemes of Australia, Canada and New Zealand are outlined below.

Australia

7. In Australia, the principal Commonwealth search warrant provision is section 3E of the Crimes Act 1914. The provision empowers a magistrate or a justice of the peace to issue a warrant to search premises if he is satisfied by information on oath that there are reasonable grounds for suspecting that there is, or there will be within the next 72 hours, at the premises any evidential material (which means "a thing relevant to an indictable offence or a thing relevant to a summary offence, including such a thing in electronic form). The executing officer is also authorized to seize evidential material found at the premises (section 3F). These provisions do not specifically provide for the treatment of journalistic material.

Canada

8. In Canada, the power to issue a warrant for entry and search of premises generally in the course of criminal investigation is set out in section 487 of the Criminal Code, R.S.C. 1985. The provision empowers a justice of the peace to issue a search warrant if he is satisfied by

[3] In UK, "journalistic material" is defined in s 13 of PACE, and is identical to the definition of "journalistic material" in s 82 of Cap 1 in all material respects – see note 1 above. In US, the concept of "work product materials" is adopted in the PPA – see para 19 of this paper.

information on oath that there are reasonable grounds to believe that there is in the premises (a) anything on or in respect of which any offence against the Criminal Code or any other Act of Parliament has been or is suspected to have been committed or (b) certain offence-related material as specified in section 487(1). This provision does not specifically provide for the treatment of journalistic material.

9. Regarding the application of the general search power under section 487 of the Criminal Code to journalistic material, the Supreme Court of Canada in its companion decisions in *Canadian Broadcasting Corp v Lessard* 67 CCC (3rd) 517 (1991) and *Canadian Broadcasting Corp v AG for New Brunswick et al*, 67 CCC (3rd) 544 (1991) held that "the constitutional protection of freedom of expression afforded by s.2(b) of the Charter does not … import any new or additional requirements for the issuance of search warrants. What it does is provide a backdrop against which the reasonableness of the search may be evaluated. It requires that careful consideration be given not only to whether a warrant should issue but also to the conditions which might properly be imposed upon any search of media premises" (*AG for New Brunswick*, above, at p 556, per Cory J).

10. Cory J (speaking for the majority, at p 560) went further and set out the following nine factors that a justice of peace should take into consideration before deciding to exercise his or her discretion to issue a search warrant against the press:

a) It is essential that all the requirements set out in section 487(1)(b) of the Criminal Code for the issuance of a search warrant be met.
b) Once the statutory conditions have been met, the justice of the peace should consider all of the circumstances in determining whether to exercise his or her discretion to issue a warrant.
c) The justice of the peace should ensure that a balance is struck between the competing interests of the state in the investigation and prosecution of crimes and the right to privacy of the media in the course of their news gathering and news dissemination. It must be borne in mind that the media play a vital role in the functioning of a democratic society. Generally speaking, the news media will not be implicated in the crime under investigation. They are truly an innocent third party. This is a particularly important factor to be considered in attempting to strike an appropriate balance, including the consideration of imposing conditions on that warrant.

d) The affidavit in support of the application must contain sufficient detail to enable the justice of the peace to properly exercise his or her discretion as to the issuance of a search warrant.
e) Although it is not a constitutional requirement, the affidavit material should ordinarily disclose whether there are alternative sources from which the information may reasonably be obtained and, if there is an alternative source, that it has been investigated and all reasonable efforts to obtain the information have been exhausted.
f) If the information sought has been disseminated by the media in whole or in part, this will be a factor which will favour the issuing of the search warrant.
g) If a justice of the peace determines that a warrant should be issued for the search of media premises, consideration should then be given to the imposition of some conditions on its implementation, so that the media organization will not be unduly impeded in the publishing or dissemination of the news.
h) If, subsequent to the issuing of a search warrant, it comes to light the authorities failed to disclose pertinent information that could well have affected the decision to issue the warrant, this may result in a finding that the warrant was invalid.
i) Similarly, if the search itself is unreasonably conducted, this may render the search invalid.

New Zealand

11. In New Zealand, section 198 of the Summary Proceedings Act 1957 empowers any District Court Judge or Justice, or any Registrar to issue a search and seizure warrant if he is satisfied on a written application on oath that there is reasonable ground for believing that in the premises there is (a) anything upon or in respect of which any offence punishable by imprisonment has been or is suspected of having been committed or (b) certain offence-related material as specified in section 198(1). That provision does not specifically provide for the treatment of journalistic material.

12. The application of section 198 to the press has been considered by the Court of Appeal in its decision in *Television New Zealand Ltd v A-G Police* [1995] 2 NZLR 641. According to the Court of Appeal, statutory powers in the field of compulsory search, whether powers to issue warrant or powers to execute them, must be exercised reasonably. While the freedom of the press is not separately specified in the New Zealand

Bill of Rights, it is an important adjunct of the rights concerning freedom of expression affirmed in section 14 of the New Zealand Bill of Rights Act. Having considered a number of overseas authorities on search warrant (including the Canadian Supreme Court cases *Lessard* and *Brunswick*), the Court of Appeal laid down (at pp 647-8) the following guidelines to be borne in mind when the reasonableness of granting a warrant or executing a search against a media organization was under consideration:

a) In a case where there is no suggestion that the media organisation has committed any offence and it has done no more than record events which might include the commission of offences by others, the intrusive procedure of a search warrant should not be used for trivial or truly minor cases.
b) As far as practicable, a warrant should not be granted or executed so as to impair the public dissemination of news.
c) Only in exceptional circumstances where it was truly essential in the interests of justice should a warrant be granted or executed if there was a substantial risk that it would result in the "drying-up" of confidential sources of information for the media.
d) A warrant should be executed considerately and so as to cause the least practicable disruption to the business of the media organisation.
e) A further consideration for the grant of a warrant relates to the relative importance of the material for the purposes of a prosecution. The proper test is when it was likely that the material will have a direct and important place in the determination of the issues before the Court.

Specific Schemes: UK and US

13. The statutory schemes relating to journalistic material in UK and US are described below.

UK

14. In UK, the PACE provides for special safeguards to protect certain categories of material mainly of a confidential nature, including journalistic material. Section 9 of PACE excludes the application of any pre-existing Act authorizing the issuance of search warrant so far as it relates to the authorization of searches of "excluded material" or "special procedural material". Journalistic material held in confidence falls within

the former whereas journalistic material not so held is covered by the latter. These two kinds of material are to be accessible to investigators only in the limited circumstances and subject to the special procedures laid down under Schedule 1 of PACE.

15. A two-tier approach on access to journalistic material by law enforcement agencies is adopted in PACE.

a) Tier One (production order, *inter partes* hearing) – Under this tier, a constable may apply to a circuit judge for a production order, requiring the person who possesses the journalistic material to produce it or to give the officer access to it. An application for the order shall be made *inter partes*. Under the relevant Code of Practice issued pursuant to PACE, such an application must be supported by a signed written authority from an officer of inspector rank or above. Moreover, the officer has to satisfy the judge that a number of requirements are met before an order can be made (in one of the two sets of access conditions laid down in Schedule 1 to PACE). The requirements in the first set of access conditions (which only apply to special procedure material) include, inter alia, that the material is likely to be of substantial value to the investigation of a serious arrestable offence[4] and that it is in the public interest to grant the order, having regard to the likely benefit to the investigation, and the circumstances under which the journalistic material is held. The second set of access conditions (which applies to both excluded material and special procedure material) include, inter alia, the requirements that but for the prohibition in s 9 of PACE on issuing search warrants for such material, a search of the premises for that material could have been authorized by a warrant issued to a constable under an enactment other than Schedule 1 itself, and that the issue of a warrant would have been appropriate. If a person fails to comply with a production order, a circuit judge may deal with him as if he had committed a contempt of the Crown Court.

b) Tier Two (search warrant, *ex parte* hearing) – This tier provides that a constable may make an *ex parte* application to a circuit judge for a warrant authorising him to enter premises and to search for or seize journalistic material. Under the relevant

[4] "Serious arrestable offence" is defined in s 116 of PACE to mean an offence which (a) is arrestable within the meaning of section 24 of PACE and (b) satisfies one of the statutory criteria for seriousness.

> Code of Practice issued pursuant to PACE, such an application must be supported by a signed written authority from an officer of inspector rank or above. Moreover, the applicant will have to satisfy the judge: either (a) that the second set of access conditions is fulfilled and that a production order has not been complied with and, or (b) in addition to meeting either set of access conditions, that it is not practicable to apply for a production order or that the service of a notice to the other party for an *inter partes* hearing may seriously prejudice the investigation.

16. There is no requirement that the journalistic material seized pursuant to the warrant has to be sealed, nor is there any specific provision under PACE for an *inter partes* application for the return of the material.

United States

17. In US, the Supreme Court in *Zurcher v Stanford Daily* 436 US 547 (1978) upheld the ability of the police to search press newsrooms to gather information to aid criminal investigation on the basis that the First Amendment of the US Constitution did not protect the press from valid searches pursuant to valid warrants. Justice White, writing the opinion for the Court, said (at pp 565 – 566), "[p]roperly administered, the preconditions for a warrant – probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices …"

18. Protection of the press from searches of newsrooms was reinforced by the enactment by the US Congress of the Privacy Protection Act. The PPA prohibits law enforcement from searches of those reasonably believed to be engaged in disseminating information to the public unless there is probable cause to believe that the person committed a crime or that giving notice by subpoena would result in the loss of evidence.

19. More specifically, the Act prohibits government officials, in connection with the investigation or prosecution of a criminal offence, from searching for and seizing "work product materials" [5] and "documentary materials (other than work product materials)" possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication. Subject to a number of important exceptions, the PPA requires law enforcement agencies to rely on the cooperation of the media or through the court process by way of a *subpoena duces tecum* to obtain such materials. These exceptions include cases where:

a) there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offence to which the materials relate (subject to exceptions);
b) there is reason to believe that the immediate seizure of such materials is necessary to prevent the death of, or serious bodily injury to, a human being;
c) there is reason to believe that the giving of notice pursuant to a *subpoena duces tecum* would result in the destruction, alteration, or concealment of such materials; or
d) such materials have not been produced in response to a *subpoena duces tecum* (subject to further conditions).

Search of "work product materials" is only permitted if either (a) or (b) above is satisfied. Moreover, application for a warrant has to be approved by an attorney for the government (except in case of emergency).

Conclusion

20. The introduction and implementation of a specific statutory scheme to regulate the search and seizure of journalistic material by the three-tier approach in Cap 1 reflect the importance which the Government and the community attach to freedom of the press. From a comparative perspective, different approaches to the protection of journalistic material are adopted in the five overseas jurisdictions surveyed above. The three-

[5] Under PPA s 2000aa – 7, "work product materials" is defined to mean "materials, other than contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used, as the means of committing a criminal offence, and (i) in anticipation of communicating such materials to the public, are prepared, produced or authored, or created whether by the person in possession of the materials or by any other person; and (ii) are possessed for the purposes of communicating such materials to the public; and (iii) include mental impressions, conclusions, opinions …"

tier approach in the Cap 1 Scheme (particularly the sealing of seized journalistic material under Tier Two) is unique and demonstrates the ongoing effort of the HKSAR to strike a fair balance between press freedom and the public interest in effective law enforcement.

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