For information
29 November 2004

Legislative Council Panel on Security

Protection of Journalistic Material

Purpose

This paper sets out the Administration's response to the submission of the Hong Kong Journalists Association (HKJA) (LC Paper No. CB(2)111/04-05(06)) discussed at the Panel meeting held on 2 November 2004. It should be read together with the other papers prepared for that meeting, i.e.,

(a) "Obtaining and Execution of Search Warrants for Journalistic Material" prepared by the Independent Commission Against Corruption (ICAC) (LC Paper No. CB(2)111/04-05(03));

(b) "The Interpretation and General Clauses (Amendment) Bill 1995 – Protection of Journalistic Material" prepared by the Security Bureau (LC Paper No. CB(2)111/04-05(04)); and

(c) "Comparative Study on the Power of Search and Seizure of Journalistic Material" prepared by the Department of Justice (LC Paper No. CB(2)111/04-05(05)).

Response

Freedom of the press and public interest

2. First and foremost, the Administration fully agrees with HKJA that freedom of the press is one of the most important pillars underlining Hong Kong's success. There are constitutional and legislative safeguards to ensure that such freedom is duly protected. Article 27 of the Basic Law stipulates, inter alia, that Hong Kong residents shall have freedom of speech, of the press and of publication. Part XII of the Interpretation and General Clauses Ordinance (IGCO) also sets out stringent conditions governing the law enforcement agencies' access to journalistic material in order to provide additional safeguards for press freedom. The existence of a statutory search and seizure scheme specially tailored to the needs of journalistic material underlines the importance accorded to the protection of press freedom.

3. At the same time, in line with internationally agreed norms, press freedom, like many other freedoms, is not absolute. As stated by the Court of Appeal in its judgment on the case at issue of *So Wing Keung v Sing Tao Limited*, there are limits to freedom of the press and often a balancing exercise between competing interests is involved. The statutory scheme set out in Part XII of IGCO seeks to balance freedom of the press against the need to effectively detect and investigate crime in order to protect individuals and the community as a whole. Of note is the importance accorded to "public interest". The concept is referred to in three provisions of Part XII, i.e. sections 84(3)(d), 87(2) and 89(2). In particular, section 89(2) puts it beyond any doubt that public interest is the paramount consideration. The section reads "[f]or the avoidance of doubt, it is declared that nothing in this Part shall be construed as requiring a judge to make an order under this Part where he considers that, in all the circumstances of the case, it would not be in the public interest to make that order". Given that constitutional guarantees of fundamental freedoms are to be given a generous interpretation, this emphasis on the public interest, together with the other tests for evaluation in Part XII of the IGCO, act to ensure that legitimate interests are properly considered and protected and an appropriate balance is struck.

ICAC's operation

4. In its submission, HKJA referred to ICAC's operation on 24 July 2004 to support its contention that the present law is inadequate to protect journalistic material. It is not appropriate for us to comment on the case in detail, as investigation is still on-going. However, insofar as the two judgments by the Court of First Instance and Court of Appeal are concerned, it is important that we should not conduct a public re-trial of a case that has gone through the judicial process, especially in the absence of all the necessary information (part of which has been disclosed to the judges concerned but not made available for public consumption in view of its sensitive nature). In addition, we should not lose sight of the fact that the disclosure of the identity of a person protected under the witness protection programme is a serious criminal offence. Indeed the court at various levels has expressed serious concern over the disclosure concerning an individual witness. The Court of Appeal was of the opinion that there was justification for ICAC to issue the search warrant because the factual background revealed an extremely troubling scenario which no responsible person could regard as anything other than a serious situation, and the facts justified the conclusion that a section 84

application might have seriously prejudiced the investigation.

5. To facilitate Members' consideration and without prejudicing the ongoing investigation, we have invited ICAC to set out at Annex A the background (which is already publicly available information) against which it investigated the matter and made application for the search warrants on 23 July 2004.

Overseas experience

6. In HKJA's submission, reference is made to the experience in a number of overseas jurisdictions. Our general observation is that Part XII of the IGCO is at least comparable to, if not better than, the laws and practices governing the search and seizure of journalistic material overseas. Whilst various comparable overseas jurisdictions have dealt with the issue of access by the law enforcement agencies to journalistic material in different ways, and that they acknowledge the importance of giving due regard to freedom of the press, they also recognize that access to journalistic material by a law enforcement agency will sometimes be necessary and justified in the public interest. Although Part XII of the IGCO does not specifically deal with the question of the sources of journalistic material, the court will no doubt take this matter into consideration when dealing with the applications under Part XII. For example, sections 84(3)(d)(ii) and 87(2) require the court to consider the circumstances under which the journalistic material is held. Section 89(2) further emphasizes the importance of the public interest in considering whether an order under Part XII should be given. As Part XII of the IGCO is a specially tailored scheme applicable to journalistic material only, particular care should be taken to assess its adequacy against cases where there are no such schemes. Our detailed comments on the overseas cases cited by HKJA are set out at Annex B.

The scheme in totality

7. HKJA has put forward some proposals for change in its submission. As explained in the preceding paragraphs and detailed at Annex B, we believe that the existing scheme already strikes the right balance between the need to uphold press freedom and the need to respect other public interests. The scheme should be seen in its totality, in that a number of conditions have to be met before an order or warrant is granted. Satisfying any one of the conditions alone would not lead to any such order being granted. It would, therefore, be inappropriate to treat each individual condition singly without regard to the overall context in which

the condition operates.

8. The amendments to the IGCO leading to the enactment of Part XII were thoroughly discussed by a Bills Committee. Extensive amendments were made to the original amendment bill to take into account the Bills Committee's suggestions. In practice, since Part XII came into operation, the law enforcement agencies have always sought to abide by the provisions in the IGCO, and have resorted to the provisions very sparingly and only when there were strong justifications to do so. The power to grant an order or a warrant is vested in a judge who can only do so upon being satisfied of a number of stringent requirements for each tier. Compared with the legislative schemes in overseas jurisdictions, ours is a robust one. We do not consider that it is necessary to amend Part XII at this juncture. However, as with other ordinances, we will keep the provisions under review from time to time.

Security Bureau
Department of Justice

November 2004

Annex A

Background Leading to ICAC's Application for Search Warrants under Part XII of IGCO

On 9 July 2004, a number of persons were arrested by the ICAC for suspected corruption offences under the Prevention of Bribery Ordinance, Cap. 201 (POBO). One of the arrested persons agreed to assist the ICAC and was put into a witness protection programme pursuant to the Witness Protection Ordinance, Cap. 564 (WPO). Under section 3 of that Ordinance, the approving authority *"arranges for or provides protection and other assistance for witnesses whose personal safety or well-being may be at risk as a result of being witnesses"*. The legislation provides protection to the witness and assistance including the provision if necessary of a new identity.[1] Heavy penalties exist against any person who, without lawful authority or reasonable excuse, discloses information (a) about the identity or location of a person who is or has been a participant or who has been considered for inclusion in the witness protection programme or (b) that compromises the security of such a person. A person who contravenes this section is liable on conviction on indictment to a maximum term of imprisonment of ten years.[2]

2. On 13 July 2004, lawyers acting on instructions of persons purporting to have communicated with the person in the witness protection programme sought access to the person. When this was denied by the ICAC, on the following day, an application for a writ of habeas corpus was made to the Court of First Instance seeking the release of the person from ICAC custody. The application was heard by Hartmann J on 15 and 16 July 2004.[3] He dismissed the application being satisfied that the person was not in any form of custody nor was the person being in any way held against their will. Hartmann J in his judgment referred to the submission of leading counsel for the ICAC that the application bore the hallmarks of a "contrived artificiality" in which the real concern was not the person's unlawful detention but rather to forge a means of gaining access to the person, and said *"I confess that by*

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[1] Section 8(2) of the WPO

[2] Section 17 of the WPO.

[3] *In re W, Application for a writ of habeas Corpus*, HCAL 89/2004

the conclusion of the hearing that too was my concern".[4] The Court of Appeal in the Sing Tao Daily case also noted in its judgment that *"A question mark thus arose in relation to the motives of those persons who had purportedly instigated the habeas corpus proceedings."*[5] As stated by Hartmann J in the Sing Tao Daily case in respect of the habeas corpus application : *"In my judgment, it cannot be disputed that it must overwhelmingly be in the public interest to prevent its perversion for criminal ends. Certainly, it was an issue which caused Stone J the deepest concern."*[6]

3. The habeas corpus proceedings were in the main held either in Chambers or in camera. The proceedings were extensively reported in the press and did not deal only in general terms with the events but condescended into details including details of the identity of the person in the witness protection programme. The Sing Tao Daily reported details of the proceedings on 14, 15 and 16 July 2004 and as noted by the Court of Appeal *"Apart from identifying the relevant company which was at the centre of the investigation by the ICAC, the Participant was specifically named. Her full name was given. Not only that, the Participant's age, position within the company, area of residence and even the name of her friend were disclosed, as was the fact that the Participant was in a witness protection programme. The irony of these disclosures is that the article in the 16 July 2004 edition actually referred to the bar against disclosure of the name of the person in the witness protection programme."*[7] As a result of the press coverage of the habeas corpus proceedings, the Court of Appeal (Stock and Yuen JJA) which became involved as a result of an interlocutory matter arising from the proceedings, convened a hearing to convey its concern and to hear from counsel. The Court noted the wide press coverage of the proceedings which had been heard in camera and the possible ramifications of certain provisions of the WPO having been breached. The Court requested the Secretary for Justice to look into the matter and consider what appropriate action was merited. Notwithstanding the Court's expressed concern in open court and that the rest of the proceedings were held in camera, with an order under section 5(1)(e) of the Judicial Proceedings Ordinance, Cap. 287 that there be no publication of any information relating to the proceedings, further press reports appeared the next day repeating the fact

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[4] *In re W*, at page 20L-P

[5] *So Wing Keung v Sing Tao Limited and Anor.* (CA) at page 5B-C

[6] *So Wing Keung v Sing Tao Limited and Anor.* (CA) at page 6Q-S

[7] *So Wing Keung v Sing Tao Limited and Anor.* (CA) at page 5H-N

that the person was in a witness protection programme.[8] It was against this background that the ICAC investigated the matter and made application for the search warrants on 23 July 2004.

4. Hartmann J identified the offences that the ICAC were investigating as follows :

> *"16. First, the ICAC was concerned that certain persons may have contravened s.17(1) of the Witness Protection Ordinance by revealing the identity of the participant. The clearest evidence of this lay in the published stories themselves. But the ICAC considered it necessary to ascertain not only which journalists had played a role in the publication of the news stories and their degree of involvement but who had disclosed forbidden information to those journalists.*
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> *17. Second, the ICAC was concerned that certain persons may have pursued the habeas corpus application not for the bona fide purpose of seeking the release of the participant from what they believed to be her unlawful detention but instead for the sinister purpose of intimidating the participant and thereby dissuading her from acting as a prosecution witness. If that was shown to have happened, it would constitute a conspiracy to pervert the course of public justice, one aspect of that conspiracy being the leaking of information concerning the identity of the participant to the press."*[9]

5. It was the ICAC's position that in relation to the offence of conspiracy to pervert the course of public justice, the newspapers and journalists were not suspected of knowingly being complicit in that they had been unwittingly used. However, the publication of the identity of the person in the witness protection programme constituted on its face a serious breach of the criminal law. The newspapers, editorial staff and journalists were suspects for an offence under section 17(1) of the WPO. Evidence had to be gathered to establish who was involved, and to what extent, in perpetrating this crime.

6. As concluded by Ma, CJHC, with whom Stuart-Moore, VP and

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[8] *So Wing Keung v Sing Tao Limited and Anor*. (CA) at page 5N-S

[9] *So Wing Keung v Sing Tao Limited and Anor*. (CA) at page 6A-M

Stock, JA concurred, in the Sing Tao Daily case :

> *"49. The critical question on the facts is : was it justified for search warrants to have been issued? In my judgment, it clearly was : -*
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> *(1) Hartmann J was of the view that the only condition that merited consideration was the requirement in section 85(5)(c) that the making of a section 84 application "may seriously prejudice" the ICAC's investigation. He must therefore have accepted implicitly that the other conditions were satisfied. I agree with the Judge's analysis in this respect. Subject to one aspect to which I shall return, Mr Dykes appeared also to be content in this regard.*
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> *(2) Having read the affirmation in support of the ICAC's application, I find myself in no doubt whatsoever that had the ICAC made a section 84 application, this may have (if not would have) seriously prejudiced their investigations. Although it is not appropriate to reveal the contents of the affirmation, I can, however, highlight some of the factual aspects of the case already dealt with in paragraphs 3 to 9 above. One aspect of the suspected conspiracy to pervert the course of justice offence was the possibility that the leaking of information concerning the Participant to the press may have been for motives which may not be innocent or inadvertent. The leaking of information to the press had the effect, desired or not, of revealing the identity of the Participant, thus potentially putting the well-being of this person at risk and possibly – one knows not – of undermining her willingness to continue with such co-operation as she may wish to render. The 1st Respondent, like some other newspapers, published in great detail the identity of the Participant. If there has been a conspiracy, then it would follow that these newspapers were vehicles for it and became themselves the target of investigations in relation to section 17 of the WPO. I have earlier referred to the concession by counsel for the ICAC in the hearing before Stone J that the newspapers have not*

"knowingly" been complicit in the alleged conspiracy. At most they had been "unwittingly" used. There is no reason to think otherwise on the evidence before this Court but the fact remains that the press has been used in a potentially most damaging way to the Participant as part of a suspected conspiracy to pervert the course of justice.

(3) Hartmann J regarded it determinative of the application the fact that there was no evidence to suggest that there was a real risk of the Respondents destroying or concealing the journalistic material, if they had been pre-warned of the ICAC's wish to see that material. He failed "utterly" to see how this was or could be demonstrated on the facts.

(4) With respect to the Judge, I think he has taken too narrow a view of the matter. Those factual aspects I have just set out were before the Judge and they revealed as I have said a very disturbing state of affairs not to mention the possibility of very serious criminal offences having been committed. Given the link between the newspaper (and their journalists) and those persons who supplied the information about the Participant to them, the Judge ought to have gone on to consider the very real possibility that had a section 84 application been made or the newspaper had otherwise been informed of the ICAC's wish to investigate the suspected perpetrators of the alleged conspiracy, those very people would or might well then have been alerted by the newspapers or journalists, perhaps quite innocently, to the fact that the authorities were onto them. It may here be observed that once a section 84 application is made, there is nothing in the relevant statutory provisions to prevent a journalist from revealing this fact or the information used to support it to colleagues, friends, his readers or to the sources themselves. Further, and importantly, by reason of the requirement to serve on the other party the supporting evidence when making a section 84 application (see O.118 r.3), the Respondents would also have been alerted to the state of the investigation with all its details,

with the added risk that this information might find its way to the suspected perpetrators of the alleged conspiracy. This aspect is clear from the affirmation in support. It refers (as indeed counsel referred in the hearing before Hartmann J) to "the sensitivity of the matter" and the need to preserve "the confidentiality of the investigation". These were the aspects, I believe, that must have ultimately persuaded Stone J to have issued the search warrants. Whilst I agree with the Judge that it is not to be assumed that a journalist will seek to thwart an investigation, it has to be recognized that an investigation may be thwarted even unintentionally and further that the legislature has itself assumed, by the very act of legislating as it has, that the efficacy of an investigation may be put at risk by service of papers on a journalist.

(5) Both Stone J and Hartmann J were sensitive to the aspect of the freedom of the press in this case and rightly so. Fundamental rights are to be broadly construed and respected. However, on occasion, the enjoyment of such rights must be balanced against the rights and interests of other persons or society as a whole. The present case involves just such a balancing exercise. The freedom of the press in the present case must be seen against the fact that serious crimes may well have been committed, one in which the Respondents (one of course has to assume innocently at this stage) have been caught up; the other in respect of which there is prima facie evidence against the Respondents themselves (the section 17 offence)."[10]

Independent Commission Against Corruption
November 2004

[10] *So Wing Keung v Sing Tao Limited and Anor.* (CA) at pages 71S-75O

Annex B

The Administration's Comments on HKJA's Submission Concerning Overseas Experience

European experience

1. We note HKJA expressed reservation on the Court of Appeal's opinion in *So Wing Keung v Sing Tao Ltd* (CACV 245/2004) that the media organizations in Hong Kong are in a better position than those in the UK (at the end of page 3 of HKJA's submission). For a detailed discussion on the scheme in force in the UK as compared with our scheme under the IGCO, please refer to the Department of Justice paper (LC Paper No. CB(2)111/04-05(05)). In particular, it is important to emphasize that in the UK there is no requirement that the journalistic material seized pursuant to the warrant has to be sealed, nor is there any specific provision under the UK legislation for an *inter partes* application for the return of the material.

2. The passage quoted at the end of page 4 of HKJA's submission is taken from paragraph 57 of the decision of the European Court of Human Rights in *Roemen and Schmit v Luxembourg* (App No. 51772/99, 25 February 2003). To put the quoted passage into context, it is relevant to note that the legislation authorizing the search and seizure in the *Roemen and Schmit* case is a set of general rules governing searches and seizures, rather than a special scheme for the protection of the press. It is against such a background that the European Court noted the calls for careful scrutiny of the search and seizure operations against the media. Under our scheme, which was devised specifically for the protection of the press, the requirement for careful scrutiny has been incorporated through the detailed provisions in Part XII of the IGCO.

3. In *Roemen and Schmit*, the European Court "reaches the conclusion that the Government have not shown that the balance between the competing interests, namely the protection of sources on the one hand and the prevention and punishment of offences on the other, was maintained. ..." (paragraph 58 of the Judgment). The decision indicates that it is ultimately a question of balancing competing interests under the freedom of expression guarantee in the light of circumstances of individual cases. Neither the decisions of the European Court nor the

other authorities cited in HKJA's submission suggest that the freedom of the press and the confidentiality of the journalists' sources are absolute.

Canada - *R v National Post* 236 DLR (4th) 551

4. This is a recent (January 2004) decision of Benotto S.J. in the Ontario Superior Court on an application lodged by the newspaper National Post to challenge the issuance of a general warrant and an assistance order to compel production of certain documents pursuant to sections 487.01 and 487.02 of the Criminal Code, R.S.C. 1985.

5. To put Benotto S.J.'s remarks as quoted in page 5 of HKJA's submission into context, it is relevant to note that sections 487.01 and 487.02 of the Criminal Code authorize a wider range of investigative procedures (i.e. a scheme much more extensive than search and seizure under Part XII of the IGCO). Secondly, the scheme under sections 487.01 and 487.02 of the Criminal Code is applicable to everyone, including the press. Again, the statutory scheme itself does not incorporate special protection for the press. Benotto S.J.'s remarks on the importance of "confidential source" and the risk of *ex parte* hearing quoted in page 5 of HKJA's submission therefore reflect the judge's assessment of the appropriateness of applying the general scheme to the press and the appropriateness of the *ex parte* hearing in the individual case before him.

6. It is also relevant to note that Benotto S.J.'s remarks in no way suggest that the confidentiality of source is absolute and that *inter partes* should be the rule with no exception. In fact, virtually all important factors set out in Benotto S.J.'s remarks have been codified in our scheme under Part XII of the IGCO. First of all, section 84(4) requires that all application for production order shall be made *inter partes*. Secondly, judges of the HKSAR courts, when considering application for production order under section 84 of the IGCO, will no doubt take into consideration the importance of the confidentiality of the source (as highlighted by Benotto S.J.) before an order is made (section 84(3)(d)(ii)).

7. It is indicated in the footnote of the report of *R v National Post* 236 DLR (4th) 551 that "a Notice of Appeal was filed by the Crown in the Ontario Court of Appeal on 3 February 2004". We are not aware that the issues raised in this case have been finally settled before the Canadian courts.

UK - *British Steel v Granada Television* [1981] AC 1096

8. HKJA also quoted the remarks of Lord Denning as stated in the 1981 decision of *British Steel v Granada Television* [1981] AC 1096. It is important to note the passage quoted in page 5 of HKJA's submission is only the *obiter dictum* (i.e. a saying by the way – a comment by the judge on a legal question suggested by a case before him, but not arising in such a manner as to require decision) of Lord Denning in the Court of Appeal. In the same judgment, Lord Denning went further and stated clearly that the protection of journalists' sources is not absolute:-

> "In support of this right of access [to information], the newspapers should not in general be compelled to disclose their sources of information… Nevertheless, this principle is not absolute. The journalist has no privilege by which he can claim – as of right – to refuse to disclose the name… It seems to me that the rule – by which a newspaper should not be compelled to disclose its source of information – is granted to a newspaper on condition that it acts with a due sense of responsibility. (at pages 1129E-1130D of the Judgment)"

9. In this case, Lord Denning joined the other two judges of the Court of Appeal and ruled against the media by dismissing Granada's appeal. The decision was subsequently affirmed by the House of Lords. In particular, the House of Lords held that the media of information, and journalists who wrote or contributed for them, had no immunity based on public interest which protected them from the obligation to disclose in a court of law their sources of information, when such disclosure was necessary in the interests of justice.

US - *Branzburg v Hayes* 408 U.S. 665 (1972)

10. In the US, the press has claimed that the First Amendment gives it a right to resist subpoenas that require disclosure of the identity of confidential sources. The Supreme court, however, rejected this position in *Branzburg v Hayes* 408 U.S. 665 (1972). *Branzburg* presented several cases to the Court where reporters had refused to appear before state and federal grand juries and disclose the identity of confidential sources. In the majority opinion written by Justice White, the Court rejected the claim that the First Amendment created a shield for reporters that immunized them from having to disclose their sources. It

is significant to note that the three-limb test quoted in page 6 of HKJA's submission was taken from the dissenting view of Justice Stewart in the *Branzburg* case.

11. We note HKJA's comment (at page 6 of its submission) that a number of states of the US have passed press-shield laws. However, no federal press-shield law has so far been adopted by the US Congress and thus there is still no basis for a reporter's privilege in federal courts.

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