立法會
Legislative Council

LC Paper No. CB(2)924/05-06
(These minutes have been seen by the Administration)

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Subcommittee on
Review of Existing Statutory Provisions
on Search and Seizure of Journalistic Material

Minutes of meeting
held on Tuesday, 25 October 2005 at 2:30 pm
in Conference Room A of the Legislative Council Building

Members present	:	Hon James TO Kun-sun (Chairman) Dr Hon LUI Ming-wah, JP Hon Margaret NG Hon WONG Yung-kan, JP Hon Howard YOUNG, SBS, JP Hon Audrey EU Yuet-mee, SC, JP Hon Daniel LAM Wai-keung, BBS, JP
Member attending	:	Hon Ronny TONG Ka-wah, SC
Members absent	:	Hon Albert HO Chun-yan Dr Hon Philip WONG Yu-hong, GBS
Public Officers attending	:	Mrs Apollonia LIU Principal Assistant Secretary for Security Miss Rosalind CHEUNG Assistant Secretary for Security Mr Kevin ZERVOS, SC Senior Assistant Director of Public Prosecutions Department of Justice

Ms Roxana CHENG
Senior Assistant Solicitor General
Department of Justice

Mr Philip WONG
Chief Superintendent of Police (Crime Headquarters) (Crime Wing)

Mr Gerald Roger OSBORN
Assistant Director/Operations
Independent Commission Against Corruption

Attendance by invitation : Hong Kong Bar Association

Mr Philip DYKES, SC

Mr Phillip ROSS

Clerk in attendance : Mrs Sharon TONG
Chief Council Secretary (2)1

Staff in attendance : Mr LEE Yu-sung
Senior Assistant Legal Adviser 1

Mr Raymond LAM
Senior Council Secretary (2)5

Ms Alice CHEUNG
Legislative Assistant (2)1

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I. Election of Chairman

Members noted that the Panel on Security had agreed at its meeting on 13 October 2005 that it would be up to the Subcommittee to decide whether it was necessary to re-elect its Chairman. Members agreed that there was no need for re-election of the Chairman of the Subcommittee.

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II. Meeting with the Hong Kong Bar Association and the Administration
(LC Paper Nos. CB(2)1455/04-05(02), CB(2)2567/04-05(01) and (02), CB(2)2668/04-05)

2. The Chairman said that at the last meeting held on 10 May 2005, a member referred to paragraph 10 of the submission from Hong Kong Bar Association (the Bar) and queried why the Bar did not consider it necessary to have the test posed by Hartmann J to be cast in statutory form, although it considered that the test should be adopted. The Subcommittee decided at the meeting that representatives of the Bar should be invited to the meeting to clarify the views as set out in its submission. Ms Margaret NG said that although a number of members agreed to the definition suggested by Hartmann J, what had been stated by the Court of Appeal seemed to be construed by the Administration as being different. These members had suggested that the test be written into the statute.

3. Mr Philip DYKES and Mr Phillip ROSS explained the Bar's view as set out in paragraph 10 of its submission. They said that some particular circumstances might not be covered, if the test posed by Hartman J was cast in statutory form. A definition that was too precise might exclude situations that fell under more general interpretation. Proper construction of statutory provision by a judge was as good as a precise definition. However, this did not imply that the relevant provisions in Part XII of the Interpretation and General Clauses Ordinance (IGCO) could not be improved.

4. Principal Assistant Secretary for Security (PAS(S)E) briefed Members on the Administration's response to the submission from the Bar and to the issues raised by members at the Subcommittee meeting on 10 May 2005. She stressed that –

(a) existing provisions in Part XII of IGCO had already struck a balance between protection of press freedom and protection of public interest;

(b) Part XII of IGCO did not provide law enforcement agencies with extra power. It only regulated the powers of law enforcement agencies in the search and seizure of journalistic materials;

(c) there had only been a few applications for search warrants under Part XII of IGCO since its enactment in 1996; and

(d) the ultimate decision on whether a search warrant should be granted rested with the court.

5. Senior Assistant Legal Adviser 1 (SALA1) briefed Members on his paper regarding the use of terms in describing various degrees of "prejudice" in existing local legislation. He also informed Members that the expression "may seriously prejudice investigation" in section 85(7) of IGCO was the same expression used in the Police

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and Criminal Evidence Act 1984 (PACE) of the United Kingdom (UK), which contained provisions on search and seizure of journalistic materials.

6. Mr Philip DYKES stressed that there were differences between the views of the Bar and those of the Administration regarding Part XII of IGCO. The Bar considered that conferring the Court of First Instance (CFI) with the jurisdiction to issue warrants was a waste of judicial resources. District Court judges were more likely to be conversant with the day-to-day matters concerning investigation and detection of crime. It was also the practice in UK that district court judges were conferred with the power to issue search warrants. He added that the decision of a District Court judge to issue a search warrant was subject to judicial review, which was an important safeguard in ancillary criminal procedures. He noted from the Administration's response to issues raised at the Subcommittee meeting on 8 March 2005 that all the forms annexed to the extract from the Force Procedures Manual were applicable to CFI only.

7. The Chairman said that it could be noted from the minutes of the meeting of the Bills Committee to study the Interpretation and General Clauses (Amendment) Bill 1995 (the Bills Committee) on 6 July 1995 that the Bills Committee was aware that the decision of a CFI judge on the issuance of a search warrant would not be subject to judicial review. However, the minutes did not indicate any discussion on the issue. He asked whether the seriousness of a case and whether the issuance of a search warrant was subject to judicial review were factors considered by law enforcement agencies in determining whether an application for a search warrant should be submitted to a District Court or CFI. He requested the Administration to provide information on the factors considered by law enforcement agencies in making such a decision.

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8. PAS(S)E undertook to research on the matter and advise the Panel accordingly. On the Bar's view that conferring CFI with the jurisdiction to issue search warrants was a waste of judicial resources, she did not agree that it was the case as a judicial review on the decision of a District Court judge to issue a search warrant would need to be conducted by CFI. She said that in all the four cases where applications for production order / search warrants were made under Part XII of IGCO, the applications were submitted to CFI because serious crime was involved. It however did not imply that all applications for search warrants would necessarily be submitted to CFI.

9. Mr Philip DYKES said that search warrants were issued by magistrates in murder cases. Thus, the seriousness of an offence was irrelevant to the level of judicial office which granted search warrants. As Part XII of IGCO sought to provide extra protection for journalistic material, search warrants issued under Part XII should be subject to judicial review and thus should be issued by District Court judges.

10. Senior Assistant Director of Public Prosecutions (SADPP) responded that,

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owing to the seriousness of the crime concerned, applications for search warrant had been made to CFI so that the law enforcement agencies would be subject to the highest level of judicial scrutiny. In this connection, he said that when the Prevention of Bribery Ordinance was amended a few years ago, the various compulsory powers were amended so that they were subject to an application to CFI. The amendment sought to ensure that law enforcement agencies were subject to the highest level of judicial scrutiny.

11. SADPP said that the Bar had stated in paragraph 13 of its submission that "Appeals against the issue of coercive orders like production orders and search warrants are not desirable as a matter of legal policy. These orders, like other similar orders made under different ordinances, should be capable of being obtained quickly and challenged only on conventional grounds of judicial review." The Bar had acknowledged in its submission that it was not desirable as a matter of legal policy to provide for an open challenge to the issuance of a coercive order under Part XII of IGCO. He pointed out that the scope of judicial review was generally limited to matters of illegality, irrationality, procedural unfairness or impropriety. He informed Members that there were calls in UK that applications for coercive orders under PACE should be made to a higher level of judicial office.

12. Mr Ronny TONG asked whether law enforcement agencies had issued any guidelines on whether an application for search warrant should be made to a District Court or CFI.

13. Chief Superintendent of Police (Crime Headquarters) (Crime Wing) responded that, apart from guidelines on the procedures on the making of an application, there was no guideline on the level of the court to which an application should be made. He said that the Police had not applied for any search warrant under Part XII of IGCO. Should there be such a need, the advice of the Department of Justice would be sought.

14. SADPP said that, to his knowledge, ICAC had applied for a search warrant under Part XII of IGCO on three occasions. The applications had been submitted to CFI not to avoid judicial review, but to subject ICAC to the highest level of judicial scrutiny.

15. Mr Ronny TONG considered it undesirable to provide law enforcement agencies with the choice of submitting an application for search warrant to either the District Court or CFI. He asked whether the Administration would consider confining the power to issue a search warrant under Part XII of IGCO to District Court judges.

16. SADPP responded that regardless of whether the application was submitted to a District Court or CFI, the judicial officer concerned, who was the gatekeeper of public interest, had to discharge his duties in accordance with existing legislation, which had

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set out the requirements clearly.

17. Mr Philip DYKES said that District Court judges were competent and experienced in dealing with applications for search warrants. As the decision of a District Court judge to issue a search warrant would be subject to judicial review by CFI, law enforcement agencies were still subject to the highest level of judicial scrutiny, if all search warrants were issued by District Court judges. It provided an opportunity for a review of the legality of the actions taken by law enforcement officers.

18. SADPP responded that as the scope of judicial review was limited to matters of legality, other forms of redress might be more appropriate. He stressed that it was necessary to maintain the efficiency of law enforcement agencies.

19. The Chairman said that as the past records of the Bills Committee did not indicate any discussion regarding why law enforcement agencies were given the choice of submitting an application for a search warrant under Part XII of IGCO to a District Court judge or a judge of CFI. He requested the Administration to examine the reasons for providing such a choice and re-consider requiring an application for a search warrant under Part XII of IGCO to be submitted to a District Court judge so as to provide more safeguard through providing an opportunity for a judicial review.

Adm 20. PAS(S)E agreed to provide a written response. She said that according to her understanding, under the Serious Organised Crime and Police Act 2005 of UK, the meaning of "judge" in Schedule 1 to PACE had been expanded to "a Judge of the Adm High Court, a Circuit Judge, a Recorder". The Chairman requested the Administration to provide information on the background to the amendment.

21. Dr LUI Ming-wah said that District Court judges and judges of CFI might have been empowered under Part XII of IGCO to deal with a projected large number of applications for search warrant, although the actual number of applications had turned out to be very small. He said that a judicial review on the decision of a District Court judge would ultimately be heard by a CFI judge. If full justifications were given by law enforcement agencies and one trusted a CFI judge, there should not be any problem with all applications for search warrant being submitted to CFI. He added that as the geographic distribution of courts in UK was different from that in Hong Kong, it might not be appropriate for Hong Kong to follow the mechanism adopted in UK.

22. PAS(S)E shared Dr LUI Ming-wah's view that District Court judges and CFI judges might have been empowered under Part XII of IGCO to deal with a projected large number of applications for search warrants in cases with different seriousness of crime. As there had only been four applications under Part XII of IGCO in the past, she said that it was more appropriate to consider whether any change should be made

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to the present mechanism after there had been more applications under Part XII of IGCO.

23. Mr Philip DYKES said that access to a senior judge was not a problem in UK. He pointed out that in the Crown Court of England, there were four categories of judges. Where a High Court judge was sitting as a Crown Court judge, his decision would be subject to judicial review. In Hong Kong, the decision of a High Court judge sitting as the Chairman of the Insider Dealing Tribunal was subject to judicial review.

SALA1 24. The Chairman requested SALA1 to liaise with the Bar and the Administration in obtaining more details of any proposed changes to the level of courts dealing with applications for search warrants under PACE, and whether the decisions of the respective levels were subject to judicial review.

25. The Chairman asked whether the Bar had any views regarding the suggestion in Hartmann J's judgment that the test of "a real risk that journalistic material may be hidden or destroyed" should be adopted.

26. Mr Philip DYKES said that the Bar had no objection to the suggestion, which sought to ensure that a search warrant would not be issued merely because there was a mere possibility that journalistic material might be hidden or destroyed.

27. The Chairman said that the test of "may seriously prejudice" comprised an element about the likelihood of occurrence and an element about the degree of prejudice. He suggested that the word "may" in section 85 of IGCO be amended along the lines of words such as "reasonably likely" or "very likely".

28. SADPP responded that the judge had to apply, among others, his common sense and decide whether the adoption of a production order route might seriously prejudice investigation. The word "may" had to be read in conjunction with "seriously prejudice investigation". The court had to be satisfied that the prejudice to investigation was serious. He considered that the existing provisions were clear and precise. There was no need to amend the existing provisions.

29. The Chairman said that there was difference in meaning between the words "may" and "very likely". He pointed out that although there had only been four applications under Part XII of IGCO, the four cases had already aroused widespread concern in the society. He considered that if there had been an oversight in the enactment of legislation in the past, legislative amendments should be introduced. He added that a number of examples of the terms used in existing legislation had been provided in the paper prepared by SALA1 regarding the use of terms in other local legislation to describe various degrees of "prejudice".

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30. PAS(S)E responded that although legislation should be amended where necessary, it would be necessary to first examine whether there were problems with the existing provisions. The test given in section 85(5)(c) of IGCO was only one of the considerations of the judge. It should be noted that section 89(2) of IGCO provided that nothing in Part XII of IGCO should be construed as requiring a judge to make an order where it would not be in the public interest to do so. She considered that sufficient flexibility should be provided to the judge. The Administration did not see any need for amendment of the existing provisions in Part XII of IGCO.

31. The Chairman considered it inappropriate to provide the court with too much flexibility. He said that the considerations of the judge would have been different, for example, if the term "seriously" in section 85(5)(c) of IGCO was deleted. In this connection, SALA1 said that the term "seriously" imposed a higher threshold. If the word "seriously" was deleted from the section, the court would take into account the deletion when considering an application. A possible interpretation might be that the threshold had been lowered. Mr Howard YOUNG said that the deletion of the term "seriously" would result in a lower threshold.

32. Mr Philip DYKES said that legislation imposed constraints on decision-making. If the legislature considered that "seriously prejudice investigation" should be predicated by a real risk, he could not see why such a requirement could not be incorporated in legislation. It would provide safeguard against the issuance of a search warrant on the basis of a remote risk of investigation being seriously prejudiced.

33. PAS(S)E said that a judge would not issue a warrant merely because of a remote risk that investigation might be seriously prejudiced. She stressed that it was not possible to set out every details in legislation. The existing provisions had generally operated well. Nevertheless, the Administration would monitor the operation of Part XII of IGCO and consider reviewing the provisions, if problems were identified.

34. Referring to page 74 of the judgment of the Court of Appeal on the case of *So Wing-keung v. Sing Tao Limited and Hsu Hiu Yee*, the Chairman expressed concern that the court might not take both the possibility and seriousness of prejudice into account when considering whether a search warrant should be issued. He considered that the test in section 85(5)(c) of IGCO should be amended along the lines of "the judge shall take into account all the circumstances, including the real risk of the investigation being seriously prejudiced, and the need that the warrant ought to be granted in public interest".

35. Mr Howard YOUNG considered it unnecessary to introduce amendments to Part XII of IGCO, given that there had only been four applications under the Part. He said that one had to trust the judgment of the court. Dr LUI Ming-wah said that there was no need to introduce amendments to Part XII of IGCO, if the judges had not made any mistakes in the four cases concerned.

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III. Date of next meeting

36. Members agreed that the next meeting would be scheduled, pending the availability of the information to be provided by the Administration.

37. The meeting ended at 4:25 pm.

Council Business Division 2
Legislative Council Secretariat
19 January 2006