For information
on 20 January 2006

Legislative Council Panel on Security
Subcommittee on Review of Existing Statutory Provisions
On Search and Seizure of Journalistic Material

Administration's response to the issues raised by Members at the Subcommittee meeting on 25 October 2005

Purpose

This paper sets out the Administration's response to the issues raised by Members at the Subcommittee meeting on 25 October 2005. The Administration was requested to –

(a) advise on the reasons for providing a choice between a District Court judge and a judge of the Court of First Instance (CFI) under Part XII of the Interpretation and General Clauses Ordinance (IGCO) (Cap. 1), as well as the factors considered by law enforcement agencies in choosing between the two levels of court;

(b) re-consider requiring an application for a search warrant under Part XII of IGCO to be submitted to a District Court judge only; and

(c) provide background information on the expansion of the meaning of "judge" in Schedule 1 of the Police and Criminal Evidence Act 1984 (PACE).

District Court vs. CFI

2. According to the minutes of meetings of the Bills Committee on the Interpretation and General Clauses (Amendment) Bill 1995, it had been pointed out that CFI decisions would not be subject to judicial review (para. 21(b) of minutes of meeting held on 6 July 1995 – LC Paper No. CB(2)2668/04-05). It is therefore clear that the Bills Committee consciously retained the choice.

3. The effect of providing a choice is allowing suitable flexibility to cater for the different circumstances of different cases. Each time when it was considered necessary that journalistic material be

obtained for purposes of a criminal investigation, the law enforcement agency has sought the advice of counsel in the Prosecutions Division of the Department of Justice.

4. To date, the number of applications made under Part XII of ICGO is extremely small (three search warrants and one production order). And in all four cases, the offences involved are serious – including "*offering / accepting an advantage*" under the Prevention of Bribery Ordinance (POBO) (Cap. 201), "*trafficking in a dangerous drug*" under the Dangerous Drugs Ordinance (Cap. 134), and "*disclosing the identity of a participant in a witness protection programme*" under the Witness Protection Ordinance (Cap. 564). The maximum penalties of these offences range from 7 years to life imprisonment. In all these cases where it was decided that search warrants be obtained to secure the material sought, the application was made to the CFI taking into account -

(a) the seriousness of the case and the material sought related to journalists who were suspects;

(b) the desirability of subjecting the application to a higher level of judicial scrutiny.

5. The following underlined the above considerations for making the application to the CFI -

(a) important questions of public interest and public policy (in particular human rights considerations) had to be considered which would be best dealt with by a senior member of the Judiciary; and

(b) the law enforcement agency should be held accountable for its request at the highest level of judicial scrutiny provided under the legislation.

6. Furthermore, in the operations of the Independent Commission Against Corruption (ICAC) where search warrants are sought in respect of journalistic material under the IGCO, it may also be necessary for the ICAC to apply for search warrants under the POBO as well. A case on point was *Apple Daily Ltd. V. Commissioner of the Independent Commission Against Corruption (No. 2)* [2001] 1 HKLRD 647. Search warrants under Part XII of IGCO and section 17 of POBO were respectively sought and obtained. Search warrants under the POBO may only be issued by a magistrate's court or the CFI (the avenue

of District Court is not available). In these circumstances, it is logical for the ICAC to apply to the same level of court, i.e. the CFI, for search warrants relating to the IGCO and POBO in the same case. This will maintain the consistency of judicial consideration throughout the case.

7. As regards the suggestion that applications made under Part XII of IGCO should be submitted to District Court judges so that the decision made would be subject to review, the Administration's response has been set out in detail in paragraphs 2 to 4 of the paper entitled "*Administration's response to the Hong Kong Bar Association's Submission*" (LC Paper No. CB(2)2567/04-05(01), which was submitted to the Subcommittee on 25 October 2005. In brief, our view is that by design, all CFI decisions, and not just CFI decisions under Part XII of IGCO, are not subject to judicial review. We believe that allowing an applicant to go before a Judge of the CFI should not be objectionable. Furthermore, means of redress other than judicial review are indeed available for such cases. Nonetheless, we shall continue to keep under review the operation of Part XII of the IGCO and would be happy to consider any necessary adjustments to its operation should the need arise.

The meaning of "judge" in PACE

8. Originally, applications under Schedule 1 of PACE, i.e. disclosure notice and search warrant relating to journalistic material in general, should be made to a Circuit judge. However, the meaning of "judge" has now been expanded by two statutes, namely the Courts Act 2003 and the Serious Organised Crime and Police Act 2005 (SOCPA). Paragraph 6, Schedule 4 of the Courts Act 2003 has replaced "Circuit judge" with "judge" and defined judge as "Circuit judge" or a "District judge (Magistrates' Courts)". Section 114(9) of SOCPA further replaces "Circuit judge" with a "judge of the High Court, a Circuit judge, a Recorder". The expansion has increased the pool of judges available for handling the relevant applications.

Security Bureau
January 2006