For information
on 25 October 2005

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

Administration's response to the Hong Kong Bar Association's Submission

Purpose

This paper sets out the Administration's response to the Hong Kong Bar Association (HKBA)'s submission dated 29 April 2005.

Administration's Response

2. The HKBA has suggested changing Part XII of the Interpretation and General Clauses Ordinance (IGCO) (Cap. 1) by removing the power of judges of the Court of First Instance (CFI) to deal with applications under Part XII in order that the decision made (left to be made by the District Court only) would then be subject to review and appeal. At the same time, we note, and agree with, the HKBA's view that "[a]ppeals against the issue of coercive orders like production orders and search warrants are not desirable as a matter of legal policy".

3. In fact by design, all CFI decisions, and not just CFI decisions under Part XII of Cap. 1 are not subject to judicial review. Similar provisions are also found in the Organized and Serious Crimes Ordinance (Cap. 455). Whether judicial orders made should be subject to judicial review should be considered in the broader context of our judicial structure / system, and not in a piecemeal fashion. We believe that allowing an applicant to go before a Judge of the CFI means that the process is under the scrutiny of a senior member of the Judiciary and final[1]. As such, this should not be objectionable.

4. In addition, under section 87 of IGCO, provision is already made for a party to seek the return of items seized under a search warrant and this provides a form of review. Also, final orders of the High Court may be set aside on the ground of fraud/perjury[2], but only in a separate action[3]. Further,

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1 *IRC v Rossminister Ltd.* [1980] AC 952, 1003G-H (HL); *AG of Jamaica v Williams* [1998] AC 351, 358 (PC)

2 Lau Kak v Cheung Mo Kit [1996] 1 HKC 79

3 *Ainsworth v Wilding* [1896] 1 Ch 673

the specific tort of malicious procurement of a search warrant exists[4]. The discretionary exclusion of evidence at any subsequent criminal trial is available as well[5].

5. The Administration's response on the HKBA's comments on the 11 issues raised by the Hon James To (set out in LC Paper No. CB(2)689/04-05(03)) is set out below. The reference to the numbering follows that used in the HKBA's submission.

Number 1 (para. 10)

6. We agree with the HKBA that there is no need to include the test proposed by Hartmann J in statutory form. The current test is precise and comprehensive and caters for a range of situations that may arise. This is illustrated in the HKBA's submission.

Number 2 (para. 11)

7. The HKBA's observation regarding the threshold is based on the position of the United Kingdom (UK) prior to the enactment of the Serious Organized Crime and Police (SOCP) Act 2005. The position in England and Wales has changed and will no longer set the threshold for the issue of a search warrant at the criterion of serious arrestable offence when the SOCP Act comes into force. As the Administration pointed out at the Subcommittee meeting on 10 May 2005, the threshold under the Police and Criminal Evidence (PACE) Act 1984 had been amended to "indictable offence". The Joint Committee on Human Rights in the UK had commented that the amendment had the effect of extending the power to arrest without warrant, and other consequential police powers, to offences to which they have not previously been applied.

Number 3 (para. 12)

8. As explained in the Administration's paper submitted to the Legislative Council Panel on Security on 8 March 2005 (LC Paper No. CB(2)992/04-05(01)), procedural safeguards may not completely avoid information being revealed, since the information could still be disclosed clandestinely to the suspect in contravention of the legislative prohibition or judicial order. On the other hand, the current legislation already provides sufficient safeguards against the use of a search warrant. It specifies that a search warrant can only be authorized if a number of conditions are met,

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4 *Reynolds v Commissioner of Police of the Metropolis* [1985] QB 882, 886

5 *Secretary for Justice v Lam Tat Ming* (2000) 3 HKCFAR 168

including the other methods of obtaining the material have been tried and failed, or have not been tried because of the likelihood of failure or serious prejudice to the investigation.

Number 4 (para. 13)

9. We agree with the HKBA that "[a]ppeals against the issue of coercive orders like production orders and search warrants are not desirable as a matter of legal policy". Our comments on the HKBA's suggestion to remove the CFI's power to grant applications under Part XII of Cap. 1 are set out in paras. 3 and 4 above.

Number 5 (para. 14)

10. As detailed in the Administration's paper submitted to the Legislative Council Panel on Security on 8 March 2005 (LC Paper No. CB(2)992/04-05(01)), the protection under the IGCO scheme targets material. It was a conscious decision, as agreed by the then Bills Committee, to define "journalistic material" generally to provide the best protection to bona fide journalistic material. It is also useful to note that in some other jurisdictions the protection is only limited to the source which will be lifted if justified by an overriding requirement in the public interest[6].

Numbers 6, 7 and 8 (paras. 15, 16 and 17)

11. We agree with the HKBA's views and observations.

Number 9 (para. 18)

12. We agree with the HKBA's views and observations, save that the object of a production order or search warrant is to secure evidence in relation to criminal misconduct. It is to enable effective and proper investigation of criminal misconduct and the securing of evidence in relation to it.

Numbers 10 and 11 (paras. 19 and 20)

13. We agree with the HKBA's views and observations.

Conclusion

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[6] *Goodwin v United Kingdom* [1996] 22 EHRR 123 at p 143 and *Roemen and Schmit v Luxembourg* (Application No 51772/99) at p 9 para 46

14. The Administration wishes to reiterate that the existing legislative scheme already strikes a balance to meet the two needs of protecting journalistic material and enabling the effective investigation of crime. The application has to meet a number of stringent justifications and be scrutinized by the court. The law enforcement agencies will continue to exercise great care in considering whether to resort to the provisions in carrying out their duty of protecting the public.

Security Bureau
September 2005