

## THE EXECUTIVE ORDER ON COVERT SURVEILLANCE: LEGALITY UNDERCOVER?

*With a month into his two-year term, Chief Executive Donald Tsang issued an executive order governing covert surveillance by law enforcement.<sup>1</sup> This was only the second time an original executive order had been issued pursuant to Article 48(4) of the Basic Law.<sup>2</sup> The Order touched upon matters of significant public concern and brought a storm of questions and criticisms at the start of Hong Kong's rainy typhoon season.*

### The Provisions of the Order

The Order laid down a procedural scheme for law enforcement agents to obtain authorisations for covert surveillance from senior authorising officers, designated as such by their department heads. Covert surveillance is defined as having four ingredients: (i) systematic surveillance of any person for the purposes of a specific law enforcement investigation or operation; (ii) the surveillance is carried out in circumstances where the person is entitled to a reasonable expectation of privacy; (iii) the surveillance is carried out in a manner calculated to ensure that the person is unaware that the surveillance is or may be taking place; and (iv) the surveillance is likely to result in the obtaining of any private information about the person. Before issuing the authorisation, the authorising officer must be satisfied on the written information provided that the covert surveillance furthers a specified purpose (ie preventing or detecting crime, or protecting public safety or security) and is proportionate to the purpose sought to be furthered, having balanced the operational need for the covert surveillance against its intrusiveness and considered whether the purposes could be furthered by less intrusive means. According to official statements, the Order was intended not to confer new investigative powers but merely to codify and provide uniformity to the existing practices of the various law enforcement agencies.<sup>3</sup>

<sup>1</sup> Executive Order No 1 of 2005 gazetted as Law Enforcement (Covert Surveillance Procedures) Order, Special Supplement No 5 to *Hong Kong Government Gazette* No 31/2005, E57-E75 [hereinafter referred to as "the Order"].

<sup>2</sup> Art 48(4) provides that the Chief Executive shall have the power and function to "decide on government policies and to issue executive orders".

<sup>3</sup> See "CE speaks on Law Enforcement (Covert Surveillance Procedures) Order", Hong Kong Government Press Release, 6 Aug 2005 [hereinafter referred to as "CE's Remarks No 1"]; "Transcript of Chief Executive's media stand-up session", Hong Kong Government Press Release, 11 Aug 2005 [hereinafter referred to as "CE's Remarks No 2"].

Section 4 provided that the Order did not apply to covert surveillance authorised under any law, such as section 33 of the Telecommunications Ordinance (Cap 106), which confers an unfettered power on the Chief Executive to authorise interception of private telecommunications in the public interest.<sup>4</sup> Notwithstanding section 4, the Order still applied to a wide range of electronic and non-electronic forms of surveillance, such as bugging, hidden cameras, undercover operations, stake-outs, computer spyware, tracking devices, global positioning system devices, etc.

The Order is also noteworthy for what it did not provide. The information upon which the authorisations are granted need not to be presented under oath or affirmation, which is the usual requirement for search warrants. Although officers are expressly prohibited from conducting covert surveillance without proper authorisation, the consequences for failing to comply with the Order are not spelled out. No stipulations are imposed on the use or destruction of the evidence gathered by covert surveillance. No special safeguards are provided for the surveillance of confidential communication between persons having a special trust relationship such as those between lawyer and client, journalist and source, priest and penitent, doctor and patient, etc. The process involves no judicial oversight whatsoever, although it is doubtful, as acknowledged by the government, that such an oversight mechanism could be prescribed in an executive Order.<sup>5</sup> The Order only provides for periodic review by superior officers and internal guidelines specific to the law enforcement agency. Simply stated, the Order left the police to police themselves.

### The Legality and Legal Effect of the Order

The most interesting legal issues surrounding the Order concern its legality and legal effect. These two issues cannot be addressed in isolation for one must know the Order's legal effect to assess its lawfulness. Legality concerns whether it was lawful for the Chief Executive to issue the Order. This in turn requires an examination of the scope of the Chief Executive's power under Article 48(4) of the Basic Law to make executive orders, and more generally

<sup>4</sup> The constitutionality of this provision has been called into question, see Ng Hon Wah, "Remedies Against Telephone Tapping by the Government" (2003) 33 HKLJ 543; Philip Dykes, "Must Private Respects Always Yield to the Public Good?", paper for the Archbold Hong Kong Criminal Law Conference 2004, 13 Nov 2004.

<sup>5</sup> See Statement of Ian Wingfield, Law Officer, Department of Justice, "The Regulation of Covert Surveillance", 10 Aug 2005, para 16, which can be found on the website of the Hong Kong Department of Justice, [www.doj.gov.hk](http://www.doj.gov.hk) [hereinafter referred to as the "Wingfield Statement"].

the question of how powers are divided and separated between the executive and legislative branches of government under the Basic Law.

Official statements on the legal effect of the Order confirmed a narrow understanding of the Chief Executive's power to make executive orders. It was said that the Order "is not law", that it "cannot create criminal offences, amend legislation, or impose obligations on members of the public", that "the Chief Executive has no power to regulate members of the community by way of an Executive Order", that executive orders cannot "give powers to, or impose functions on, members of the independent Judiciary", that the Order "does not affect the rights and privileges of private citizens" and "only regulates the behaviour of public servants".<sup>6</sup> From these statements, the government appeared to accept the position that executive orders are only administrative measures binding on public servants when acting in their capacity as such. This narrow interpretation of the Chief Executive's power is welcome for a number of reasons.

First, the interpretation respects the language of Article 48(4) because the power to "issue executive orders" is joined with and follows the authority to "decide on government policies". The Chief Executive does not have a free-standing power to promulgate laws but only a limited power to mobilise the executive authorities for the purpose of implementing government policies. Secondly, the interpretation respects the strong separation of powers provided for in the Basic Law.<sup>7</sup> As only the Legislative Council has been given the power and function to enact, amend and repeal laws, any law-making powers conferred on the executive must be narrowly construed.<sup>8</sup> Thirdly the interpretation is consistent with the exercise of the power on the first and only other occasion. The Public Service (Administration) Order 1997 was issued on 9 July 1997 to fill the void left after the lapse of the Letters Patent and Colonial Regulations on 1 July 1997.<sup>9</sup> This executive order provided for the appointment, dismissal, suspension and discipline of public servants. With the exception of one provision, the 1997 Order survived a constitutional challenge in the Court of First Instance.<sup>10</sup>

<sup>6</sup> See Wingfield Statement, *ibid.*, paras 11, 14 & 16; CE's Remarks No 1 (n 3 above).

<sup>7</sup> See Peter Wesley-Smith, "Executive Orders and the Basic Law", in Alice Lee (ed), *Law Lectures for Practitioners 1998* (Hong Kong: Hong Kong Law Journal Ltd, 1998) 187-191.

<sup>8</sup> See Art 73 of the Basic Law for the powers and functions of the Legislative Council.

<sup>9</sup> Executive Order No 1 of 1997, cited as Public Service (Administration) Order, Special Supplement No 5 to *Hong Kong Government Gazette* No 2/1997, E5-E19 [hereinafter referred to as "the 1997 Order"].

<sup>10</sup> See *The Association of Expatriate Civil Servants of Hong Kong v The Chief Executive of the HKSAR* [1998] 1 HKLRD 615 (CFI).

## The Contradiction

Having said that the Order was not law capable of imposing obligations on members of the public, the government appeared to contradict itself when it came to the legal effect of the order on protected rights and freedoms, particularly those in Article 30 of the Basic Law, which provides as follows:

“The freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication *in accordance with legal procedures* to meet the needs of public security or of investigation into criminal offences.” [Emphasis added.]

In the same official statements, it was said that the Order provided the “necessary legal procedures” for restricting rights under Article 30.<sup>11</sup> The implication was that covert surveillance done pursuant to the order would survive constitutional scrutiny. This is a classic example of wanting to suck and blow at the same time. The government would like to have it both ways: on the one hand, to allay the public concern by minimising the legal effect of the Order but, on the other, to claim it is of sufficient legality to overcome constitutional challenge.

In defending its position, the government relied on the decision of Justice Keith in the constitutional challenge to the 1997 Order. It was argued in this case that the dismissal of a public servant could only be pursuant to Article 48(7) of the Basic Law which provided for the Chief Executive’s power to remove holders of public office “in accordance with legal procedures”. Since the 1997 Order was not “legal procedures”, as it was argued, dismissal taken under the order would not be in compliance with Article 48(7). Justice Keith rejected this argument. He held that the 1997 Order could be “legal procedures” for the purposes of Article 48(7).<sup>12</sup> However, Justice Keith reached his decision by construing Article 48(7) in light of Article 103 which provided that Hong Kong’s previous system of employment and discipline of public servants was to be maintained.<sup>13</sup> Since the previous system was based on the Letters Patent and Colonial Regulations, instruments flowing from the Crown prerogative, allowing an executive order to take the place of these instruments was consistent with Article 103.

<sup>11</sup> Wingfield Statement (n 6 above), para 6.

<sup>12</sup> *The Association of Expatriate Civil Servants of Hong Kong* (n 10 above), para 14.

<sup>13</sup> *Ibid.*

While the 1997 Order constituted “legal procedures” for the purposes of Article 48(7), this does not answer the question of whether the 2005 Order is capable of being “legal procedures” for the purposes of Article 30. This is because Article 30, unlike Article 48, confers a fundamental human right which all persons in Hong Kong enjoy. Article 48(7) is a provision that confers powers and functions on the Chief Executive in respect of public servants. Since executive orders are only binding on public servants, it is understandable that they can constitute “legal procedures” for the purposes of Article 48(7). But for executive orders to constitute “legal procedures” under Article 30, it would mean that they were capable of binding all persons in Hong Kong, a position which even by the government’s account is untenable given the restricted authority to issue executive orders.

### The Legal Effect on Fundamental Rights and Freedoms

Another fundamental flaw in the government’s argument lies in its position that Article 30 confers a power on law enforcement to conduct covert surveillance and the Order serves to limit the exercise of this power. While Article 48(7) may confer a power, Article 30 does no such thing. The position has confused a test for restriction with a law prescribing a restriction. The second part of Article 30 contains a test for restriction and is not a law prescribing a restriction. It is highly doubtful that the Basic Law would confer a fundamental human right in one breath and then undermine it in the same breath by providing the prescription for its restriction. It is for this reason that there exists the overriding rule in Article 39 of the Basic Law that the “rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law.” The clear intention in Article 39 is that the “prescribed by law” requirement applies to all protected rights and freedoms. Article 30 merely fleshes out additional requirements which must be met before a prescribed law can justifiably restrict the freedom and right in Article 30. The “prescribed by law” requirement is of fundamental importance because it reinforces the rule of law and requires that restrictions not only be lawful but have some basis in the positive law that is sufficiently certain. Thus, it is likely that “legal procedures” in Article 30 shares the same meaning as “prescribed by law” in Article 39.<sup>14</sup> It follows from this argument that even with the Order there exists no prescribed law that empowers law enforcement to carry out covert surveillance.

<sup>14</sup> In an analogous manner, the Court of Final Appeal in *Leung Kwok Hung & Others v HKSAR* [2005] HKEC 1035 interpreted the expression “in conformity with the law”, which qualified the right to peaceful assembly in Article 17 of the Hong Kong Bill of Rights, as having the same meaning as “prescribed by law” in Art 39 of the Basic Law.

There are other reasons to doubt the ability of the Order to immunise covert surveillance from a successful constitutional challenge. There has yet to be close judicial consideration of Article 30. The first part of the article provides for the freedom in a special manner because it does not stop at the mere statement of the freedom but also provides that the freedom and right “shall be protected by law”. This formulation suggests a positive obligation on the state to have in place adequate laws that allow individuals to enjoy the freedom and privacy of communication. Not only must there be criminal laws that prohibit interference with these rights and interests but also laws that facilitate and enhance the enjoyment of the right and freedom. It also implies, and this becomes clearer in the second part of Article 30, that the article covers infringements by both governmental authority and private persons. In other words, Article 30 was intended to have horizontal effect.

As discussed above the second part of Article 30 provides the pre-requisite conditions which the government must satisfy before the prescribed law can be used to restrict justifiably the freedom and right in Article 30. This express qualification is rare for the rights and freedoms contained in Chapter III of the Basic Law, although fairly common for those in the Hong Kong Bill of Rights. This however does not diminish the status of the protected freedom for the Court of Final Appeal has adopted restriction tests to Basic Law rights expressed in unqualified language.<sup>15</sup> The scope of restriction provided is quite narrow as it only allows governmental authorities to “inspect communication in accordance with legal procedures” for the purposes of either public security or investigation into criminal offences.

One should pause to ponder the choice of the word “inspect” rather than “infringe”, which is the word used in the first clause of the second sentence. Notice as well that the words, “restrict”, “limit”, “intercept”, “record”, or “monitor” were not used. It is arguable that the phrase “inspect communication” when construed narrowly in light of its ordinary meaning contemplates at least one of the persons involved in the communication having knowledge of the inspection when it is carried out. Indeed it is difficult to think of a situation where government officials would normally carry out a lawful inspection, whether of premises, facilities, property, documents, or a person’s body, without the knowledge of someone who is affected by the inspection.

One sees that the rights in Article 30 are provided in a robust manner and the scope for permissible restrictions is narrow. Thus it is highly doubtful that the Order with its minimal safeguards and lack of judicial oversight would meet the necessity and proportionality requirements for justifying restrictions.

<sup>15</sup> For example, in *Leung Kwok Hung, ibid.*, paras 17–21, the Court applied the express limitations clause in Article 17 of the Hong Kong Bill of Rights to the unqualified “freedom of assembly” provided for in Article 27 of the Basic Law.

The determination of these issues would also be affected by the intended use of the information obtained by covert surveillance. Currently, however, there are no legal prohibitions on using such information as incriminating evidence at trial.

### The Political Consequences

The decision to make the Order was a bold one for Tsang acted without consulting the public, the legislature and even his own executive council advisors. It was reported that the Executive Council was not consulted because the Order did not involve a change in policy and was not subsidiary legislation.<sup>16</sup> But the failure to consult proved to be a grave political mistake as the Order drew immediate and sharp criticism from legislators, the Bar Association, the Law Society, academics and others.

The decision was also bold because the Order purported to legitimise covert investigative practices which were the subject of criticism in two recent District Court cases.<sup>17</sup> The Order was an inadequate response to these criticisms. In the first case, the Independent Commission Against Corruption (ICAC) installed a bugging device in a VIP room of a Tsim Sha Tsui hotel restaurant.<sup>18</sup> A film recording of who entered and left the VIP room during a two and half hour period was also made. Surveillance was done at a second restaurant using a hidden video camera recording a meeting and conversation at a nearby table. By using these covert tactics, the ICAC was able to obtain incriminating admissions and other evidence which they sought to adduce in the bribery prosecution. At issue was whether these recordings could be admitted as evidence. The defence argued that the covert surveillance infringed the defendant's rights under Article 30 of the Basic Law.

Judge Sweeney accepted this defence submission and found that "the system of covertly intercepting private communication, as practiced by the ICAC" in this case "was not 'in accordance with legal procedures'".<sup>19</sup> He held that "both sets of recordings were made in breach of Article 30 of the Basic Law and so were unlawfully made".<sup>20</sup> For years, the ICAC have used a system

<sup>16</sup> See Jimmy Cheung, "Bugging order 'does not need Exco nod'", *South China Morning Post*, 15 Aug 2005. Article 56 of the Basic Law provides *inter alia* the following: "Except for the appointment, removal and disciplining of officials and the adoption of measures in emergencies, the Chief Executive shall consult the Executive Council before making important policy decisions, introducing bills to the Legislative Council, making subordinate legislation, or dissolving the Legislative Council."

<sup>17</sup> *HKSAR v Li Man-tak & Others* [2005] HKEC 1308, DC; *HKSAR v Shum Chiu & Others*, unreported ruling on permanent stay of proceedings, DCCC 687/2004, 5 July 2005, Deputy Judge Livesey.

<sup>18</sup> *HKSAR v Li Man-tak*, *ibid.*

<sup>19</sup> *Ibid.*, para 55.

<sup>20</sup> *Ibid.*

of internal authorisation pursuant to “Standing Orders” which have no legislative basis. In coming to his decision, Judge Sweeney reviewed authorities from England and the European Court of Human Rights which emphasised the essential requirement of having a “statutory system to regulate the use of covert listening devices” if the practices were to be “in accordance with the law”.<sup>21</sup> As there was no “legislative framework in Hong Kong to regulate covert surveillance”, Judge Sweeney found that “the minimum degree of legal protection to which citizens of Hong Kong are entitled under Article 30 of the Basic Law is lacking, i.e. there is a legislative lacuna”.<sup>22</sup> Ultimately Judge Sweeney admitted the recordings as evidence in the trial but he warned the authorities at the end of his ruling that that in future cases evidence obtained by covert surveillance might be inadmissible “if they continue this practice without some *legislative* basis”. [Emphasis added.]<sup>23</sup> Throughout the judgment his Honour consistently contemplated that nothing short of legislation could pass constitutional scrutiny under Article 30.

In the second District Court case, the ICAC were investigating a number of employees in ABB company for conspiring to offer advantages to a public officer.<sup>24</sup> Early in the investigation, a subordinate in the company, who was also being investigated at the time, became an undercover agent for the ICAC. Over a period of more than one year, the agent periodically furnished the ICAC with company documents and tapes of covertly recorded conversations. About six months into his work as an undercover agent, the agent informed the ICAC of a forthcoming lunch meeting between the third defendant (D3) and a solicitor. The meeting was to take place only nine days after the ICAC had raided the company with search warrants and arrested employees but not D3 who was outside of Hong Kong at the time. On hearing of the meeting, the ICAC arranged to equip the agent with a covert recording device so that the meeting could be recorded. The agent secretly recorded the hour-long meeting attended by D3, the agent, and two solicitors from a prominent law firm specialising in criminal law, who provided legal advice during the meeting. The ICAC did not intend to use the tape recording as evidence, and at the trial, neither the prosecution nor defence had listened to the tape recording.

<sup>21</sup> *Ibid.*, para 51, citing from *Khan v United Kingdom* [2001] 31 EHRR 45 (EurCtHR). Art 8(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that there shall be no interference by a public authority with the exercise of the right to respect for his private and family life, his home and his correspondence “except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

<sup>22</sup> *Ibid.*, para 54.

<sup>23</sup> *Ibid.*, para 67.

<sup>24</sup> *HKSAR v Shum Chiu* (n 17 above), para 8.



At the outset of the trial, the defence (D3 and three other defendants) brought applications to have the prosecution stayed on the grounds of an abuse of process. Deputy Judge Livesey granted the stays but for different reasons in respect of the two groups of defendants. In respect of D3's application, the judge found that the ICAC "deliberately and intentionally" recorded a conversation between D3 and his solicitors knowing that legal advice protected by legal professional privilege "would almost certainly be given".<sup>25</sup> She found a "serious flaw" with the internal authorisation process as there was non-disclosure of the likelihood that solicitors would be present at the meeting.<sup>26</sup> She also found that it was unnecessary to carry out the covert recording as the ICAC already had enough evidence to charge D3.<sup>27</sup> She described the ICAC conduct as "a cynical and flagrant infringement of D3's right to legal professional privilege" and stayed the prosecution against him on the basis that it was "an affront to the public conscience with severe consequences for public confidence in the administration of justice."<sup>28</sup> As for the other defendants, Deputy Judge Livesey found that it was impossible for them to have a fair trial since they were barred from accessing the taped privileged conversation for the essential purpose of cross-examining the undercover agent at trial.<sup>29</sup>

There is nothing in the Order that prevents the ICAC from repeating the same conduct seen in these two cases. Failing to heed Judge Sweeney's closing admonition, the evidence in the first case would now more likely than not be excluded resulting in the possible acquittal of the defendants. From the perspective of political legitimacy, it seems difficult to justify in the face of these two strongly worded judicial rulings the issuance of an executive order that gives law enforcement false confidence in the constitutional firmity of their actions.

### The Interim Period: Implications for Admissibility

When the Order was issued, the government stated that it was only to be an interim measure until legislation could be passed. It has been argued in this comment that the Order is hardly a measure since it lacks the legality to alter the current unconstitutional character of covert surveillance. But constitutionally invalid executive action does not necessarily result in an acquittal, a stay of proceedings or the exclusion of evidence. Unfortunately, this issue of

<sup>25</sup> *Ibid.*, para 13.

<sup>26</sup> *Ibid.*, para 20.

<sup>27</sup> *Ibid.*, para 22.

<sup>28</sup> *Ibid.*, paras 33 & 36.

<sup>29</sup> *Ibid.*, paras 45–51.

constitutional remedy is one that is severely underdeveloped in Hong Kong's jurisprudence.

In the first District Court case, Judge Sweeney found a breach of Article 30 but still admitted the evidence in the trial and later convicted the defendants.<sup>30</sup> Judge Sweeney felt constrained to apply *R v Cheung Ka Fai*, an early Hong Kong Bill of Rights decision which held that the jurisdiction of the judge to exclude evidence for breaches of the Bill of Rights was no greater than that under the common law.<sup>31</sup> The common law has historically been shackled by the orthodox position expressed with great force and clarity in *R v Sang* that the court is generally not concerned with how evidence is obtained.<sup>32</sup> Unable to find that the admission of the recordings would affect the fairness of the trial and finding that the ICAC had made a bona fide mistake as to their powers, Judge Sweeney admitted the evidence.

The reliance on *Cheung Ka Fai* is somewhat problematic because this authority turned on the Court of Appeal's interpretation of the remedial provision in the Hong Kong Bill of Rights Ordinance (Cap 383), a provision which has no obvious application to Basic Law rights.<sup>33</sup> Judge Sweeney was presented with a difficult question of first impression: what test for exclusion is to be applied for evidence obtained in breach of a Basic Law right when the Basic Law itself has no remedial provision? There were only two possible answers. Either the Basic Law conferred a unique jurisdiction to exclude evidence or it conferred nothing, in which case, the common law continued to apply. If the answer was the former then it was open to the court to devise a new test for exclusion that was sufficiently strict to befit a constitutional instrument. If the answer was the latter, there was still the further question of whether the common law had evolved since *Sang* to recognise a wider basis for excluding improperly obtained evidence. In this respect, pre-existing common law principles, such as the principle of integrity evident in both the doctrine of abuse of process and the law of confessions, could ground a new basis for excluding evidence obtained as a result of a serious breach of the defendant's constitutional right by state agents acting with little if any good faith.<sup>34</sup>

<sup>30</sup> Jonathan Li, "Executives jailed for their role in stock share scam", *South China Morning Post*, 26 June 2005, 2.

<sup>31</sup> *R v Cheung Ka Fai* (1995) 5 HKPLR 407 (CA).

<sup>32</sup> *R v Sang* [1980] AC 402 (HL).

<sup>33</sup> s 6(1) of the Hong Kong Bill of Rights Ordinance (Cap 383) provides that the court "may grant such remedy or relief, or make such order, in respect of such a breach, violation or threatened violation as it has power to grant or make in those proceedings and as it considers appropriate and just in the circumstances". [Emphasis added]

<sup>34</sup> See Chapter 6 of Simon N.M. Young, *Hong Kong Evidence Casebook* (Hong Kong: Sweet & Maxwell Asia, 2004) 551–639 for a development of this position by reference to relevant authorities.

## The Future

In the debate to enact legislation on covert surveillance discussions will likely focus on two contrasting models of implementation. The first model, which could be described as the “intelligence-gathering model”, imposes minimal hurdles on law enforcement at the authorisation stage. This results in a high volume of information gathered by covert surveillance, but law enforcement takes added precautions to protect the privacy of this information including the timely destruction of the recorded information. The information is treated as “intelligence” rather than as evidence in trial proceedings. The intercepted communication is kept private from the public but not from law enforcement.

The second model envisages the process as a means of gathering fruitful evidence to be admitted at trial. Thus this “evidence-gathering model” provides greater safeguards at the authorisation stage, which most likely will involve judicial authorisation. Law enforcement must also act responsibly when carrying out the surveillance since improper or unreasonable behaviour may jeopardise the admissibility of the evidence. The consequence is a smaller volume of information gathered but the advantage gained is that this information can be used as evidence and in most cases, it will be very strong evidence for the prosecution. But the open court principle and disclosure to the defence will mean that the evidence will be made public.

While it is true that the two models are not mutually exclusive, the second model offers a higher degree of protection for fundamental rights and freedoms. One should not be misled by the privacy assurances of the intelligence-gathering model. Privacy interests are compromised from the moment the covert surveillance begins. The first model is already being practiced by law enforcement in Hong Kong with authorisations granted under section 33 of the Telecommunications Ordinance (Cap 106).<sup>35</sup> Unfortunately this experience has been marked by an aura of secrecy and overly broad claims of public interest immunity. The total lack of transparency has bred public cynicism in both the law enforcement agency and the government. The assurance that the intelligence gathered will not be used as evidence is also misleading because such intelligence can often lead to the finding of admissible evidence which would not otherwise have been found. Use of this derivative evidence allows law enforcement to realise the fruits of the evidence-gathering model without having to surpass the due process hurdles of that model. The policy to destroy surveillance information helps law enforcement to obfuscate the degree to which their evidence gathering has been aided by the intelligence obtained.

<sup>35</sup> The practices of the ICAC are described in *HKSAR v Mo Yuk Ping & Others* [2005] HKEC 1318, DC, paras 10–22.

These considerations and others will no doubt be hotly debated in the Legislative Council after the tabling of proposed legislation. While it is near impossible to predict the outcome of these debates, one thing is clear: the Order will be largely irrelevant to these debates and in the meantime will have served more to cause unnecessary public concern and legal uncertainty than to clarify the law.

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