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## **The Regulation of Covert Surveillance**

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Last Friday, the Chief Executive issued an Executive Order, as an interim measure, to regulate covert surveillance by law enforcement agencies. Not unexpectedly, in a city where the rule of law is fiercely protected, this move has been closely scrutinised.

2. Like elsewhere in the world, Hong Kong's law enforcement agencies need to use bugging and other covert methods to investigate criminal activities. Although this may interfere with the privacy of suspects, the right to privacy is not absolute.

3. Article 30 of the Basic Law expressly provides that "relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences".

4. In the past, covert surveillance in Hong Kong was regulated by internal guidelines. Recent developments have given rise to public concern over the need for increased transparency and safeguards governing covert surveillance. The government accepts that this should best be addressed through legislative means. It is committed to introducing legislation that will provide a fair balance between the right to privacy and the need to investigate crime and to safeguard public security.

5. However, legislation takes time to prepare and enact. A Bill will need to be introduced into the Legislative Council, and will no doubt be considered over a number of months by the legislature and the community. The Executive Order is an interim measure to quickly address the public concern. It also provides a clearer legal basis for law enforcement officers to continue to carry out this aspect of their work, after a District Court judge

recently expressed the view that covert surveillance is not subject to “legal procedures” as required by Article 30 of the Basic Law.

6. The government believes that the Executive Order provides the necessary legal procedures. It accepts that the constraints it places on law enforcement officers are not “prescribed by law”. However, a court has previously decided that “when the Basic Law contemplates that a particular course of action has to be prescribed by law, the Basic Law says so”. The fact that Article 30 speaks of “legal procedures” therefore indicates that a meaning other than “prescribed by law” was intended.

7. This is not the first time that constraints on the conduct of law enforcement officers have been created by non-legislative means to safeguard human rights. Since 1992, the questioning of suspects has been regulated by Rules and Directions issued by the Secretary for Security. A court has held that those Rules and Directions enshrine the principle that a defendant’s right to legal advice must be respected.

8. The Chief Executive is authorised by Article 48(4) of the Basic Law to issue executive orders. Moreover, since he is head of the government, any order he issues to civil servants or members of the ICAC is binding on them and can be enforced through disciplinary action.

9. The current Order contains detailed procedures and safeguards, including a requirement that covert surveillance can only be authorised if it is proportionate to the purpose for which it is to be carried out. The Order has been published, so it is accessible to the community. As a result, members of the public are given a clear indication of the scope and manner in which surveillance may be authorised.

10. For all these reasons, the government considers that the Order satisfies both the requirement of “legal procedures” in Article 30 as well as the principles that apply in respect of limiting fundamental human rights.

11. Some critics are concerned that, if an Executive Order can be used in this context, similar orders could be used indiscriminately to curtail human

rights. That is not correct. An Executive Order is not law. It cannot create criminal offences, amend legislation, or impose obligations on members of the public.

12. The Executive Order issued last week does not purport to do any of these things, or to create the power to conduct covert surveillance. That power is found in Article 30 of the Basic Law. In fact, the Executive Order restricts the exercise of that power in particular cases by requiring, for example, the regular review of authorizations by senior officers. By issuing the Executive Order, the Chief Executive has not, therefore, impermissibly sought to assume legislative power, as some have suggested.

13. An Executive Order can validly be used in relation to surveillance because Article 30 of the Basic Law authorises surveillance to be carried out for certain purposes in accordance with “legal procedures”, and because the Chief Executive has the authority to regulate the civil service and members of the ICAC.

14. But there is no other Basic Law Article dealing with fundamental rights that permits restrictions to be imposed in accordance with legal procedures. And the Chief Executive has no power to regulate members of the community by way of an Executive Order. There is therefore no reason to fear that Executive Orders are a threat to human rights.

15. It has also been suggested that the Order should have provided for judicial, rather than executive, control of surveillance. This question will no doubt be fully considered when a Bill relating to surveillance is being prepared and considered by the Legislative Council. But, the interim measure was not intended to make any radical change to the system adopted in the past.

16. In any event, it would not have been possible to include a judicial monitoring system in the Executive Order, since the Chief Executive cannot by such an Order give powers to, or impose functions on, members of the independent Judiciary.

17. Finally, there has been criticism that, by resorting to an Executive

Order, the government is undermining the rule of law. The government rejects this claim. Although the Executive Order may not itself be law, it is issued by virtue of an express power in the Basic Law. It is therefore a constitutional method of imposing restrictions on officers who conduct surveillance. Legislation may be a preferable way of ensuring that the restrictions reflect community views. And, as mentioned, legislation will be prepared in due course. But, as an interim measure, the Executive Order is consistent with the rule of law.

18. It will also help to maintain law and order. Law enforcement officers will be better able to carry out covert surveillance when investigating certain criminal activities in accordance with more transparent and consistent procedures. Any interference with privacy will therefore be better regulated and, at the same time, the community's need for protection against criminal activity and for public security will be safeguarded.