

## **State Powers of Investigation and Article 23**

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### **Abstract**

The consultation paper proposes to give the state new extraordinary powers to search premises and to obtain financial information without warrant or prior judicial authorization. The arguments put forward for these new powers are unconvincing, especially since Article 23 itself does not expressly require implementing such powers.

It has been said that these powers are necessary given the great calamitous consequences arising from the commission of internal security offences. However, this calamitous consequences argument ignores the existing emergency powers available to the government when such consequences occur or appear imminent. It has also been said that the new powers are necessary because none presently exist. While this may be true, it hardly answers the question of whether they are empirically necessary to deal with the specified Article 23 offences, having regard to the wide powers enjoyed by Hong Kong state agents at present. A further point has been made that the new powers are not extraordinary as there exists already many similar powers in Hong Kong for other offences. But by their nature, some of these other emergency warrantless search powers can be clearly justified (e.g. drugs are easily disposed of, firearms are inherently dangerous, etc.). It is also noteworthy that laws aimed at tackling organized crime, money laundering, and terrorist financing have not seen fit to include extraordinary warrantless search powers in relation to premises. Finally, it has been said that many other countries have similar powers. However, this point is weakened by the lack of uniformity in state practice. As well, differences in the legal regime of other countries may result in differences in the practical application of these powers, especially in terms of how often they are resorted to.

Any proposal to create new police powers must be subjected to principled scrutiny having regard to the fundamental freedoms and rights potentially threatened by those powers, namely the inviolability of one's home, the right to privacy and the freedom of expression. It

is submitted that three governing principles should inform the thinking behind any legislative proposal in this area. The three principles are as follows, (1) all warrantless searches are *prima facie* unreasonable and should be prohibited; (2) the state has the onus of demonstrating that the warrantless search (and/or search power) is empirically necessary and reasonably restricted; and (3) there must be special considerations given to constitutionally protected domains.