

For discussion
on 6 July 2004

Legislative Council on Security
Law Reform Commission Report on Arrest

Purpose

This paper outlines the progress of implementation of the recommendations put forward by the inter-departmental working group (WG) on the Law Reform Commission (LRC) Report on Arrest (the Report).

Background

2. In 1992, LRC published its Report on Arrest which contains a number of recommendations covering the law enforcement agencies' powers of stop, search, arrest and detention, as well as other matters incidental or related to the exercise of such powers. Many of the recommendations were modelled on the Police and Criminal Evidence Act 1984 (PACE) of the United Kingdom.

3. In 1993, the Administration set up the WG, comprising representatives from the then Security Branch, the law enforcement agencies concerned (the Police, Immigration Department (ImmD), Customs and Excise Department (C&ED) and Independent Commission Against Corruption (ICAC)) and the then Legal Department, to study the Report. Of the 61 recommendations put forward by LRC, the WG accepted 30 in full, 21 in principle but with suitable adaptations taking into account existing law enforcement practice and local situation, and rejected 10 because they were considered unnecessary, impracticable and/or would unjustifiably weaken the existing law enforcement capability. The WG proposals were published in 1996 for consultation and were subsequently endorsed by the Executive Council in 1997.

Progress

4. The Administration has been taking steps to implement the WG proposals in a phased manner. Details of implementation are set out in the table at the Annex. The following sets out some examples of the measures that have been put in place –

- (a) All law enforcement agencies have appointed “Custody Officers” to ensure those in detention are treated properly, and “Review Officers” to review the need for further detention.
- (b) In relation to the power to stop and search, as a standing practice officers of the Police, ImmD and C&ED will state in layman’s term the reasons for the stop and search to the persons affected.
- (c) The Dangerous Drugs, Independent Commission Against Corruption and Police Force (Amendment) Ordinance 2000 was enacted in June 2000 and it came into operation on 1 July 2002. The Ordinance empowers the Police, C&ED and ICAC to take samples from suspects and provides for the establishment of a DNA database, both of which have contributed to the detection and investigation of serious crimes. At the same time, the Ordinance also puts in place the necessary safeguards to prevent abuse of power (e.g. the taking of samples will require the authorisation by officers at the rank of superintendent or above; the taking of intimate samples will require authorisation by the magistrate and consent by the suspect).
- (d) The use of video-interviewing of suspects has been expanded. The number of Police Video Interview Rooms (VIRs) has been increased from 11 in 1996 to 70 at present. There is at least one VIR in every major divisional Police station now. Such a measure has helped enhance transparency of the statement taking process and the admissibility of confession statements.

Way Forward

5. The Administration will continue to take appropriate steps to implement the recommendations put forward by the WG. In the process, we will take into account developments since the WG's report, e.g. changes to PACE. We are committed to improving our law enforcement system by striking a careful balance between ensuring that law enforcement agencies have the necessary powers to discharge their statutory duties on the one hand, and guarding against possible abuse of powers and protecting rights of individuals on the other.

Security Bureau

July 2004

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**Progress of Implementation of the Proposals
by the Inter-departmental Working Group
on the Law Reform Commission Report on Arrest**

	Proposal	Progress of Implementation
<i>General</i>		
1.	The existing ordinances should be rationalised and improved to ensure consistency in the powers available to law enforcement agencies.	On-going. This will be taken on board as the Administration implements the various proposals of the Working Group (WG).
2.	There should be a rationalisation exercise to determine whether any trivial offences ought to become “non-imprisonable”.	Guidelines have been issued to bureaux and departments. The rationalisation exercise should be conducted as a standard requirement as and when individual bureaux propose new amendment legislation and in any legislative review.
<i>Powers to Stop and Search</i>		
3.	Information on powers and procedures relating to stop, search, arrest and detention should be published.	Information leaflets have been published by ImmD, C&ED and ICAC since 1998 and by the Police since February 1999.
4.	Information to be made available to Police officers during an identity check under the Immigration Ordinance is to be restricted to certain relevant information.	The Police’s Force Procedures Manual (FPM) has set out the relevant guidelines.

	Proposal	Progress of Implementation
5.	Officers of Police, ImmD and C&E should state in layman's term the reasons for the stop and search to the person affected.	The requirement has been stipulated in the internal guidelines of the law enforcement agencies.
6.	Police officers should have access to all information which can currently be made available when conducting stop and searches.	This has been stipulated in FPM.
7.	Road block checks should be retained without any statutory requirement of "reasonable suspicion".	Road checks retained as proposed.
8.	Statistics and information on stops, searches and road block checks should be published for public scrutiny.	Relevant statistics have been included in the Police's annual performance figures; the Fact Sheet and Annual Report of ImmD; and the annual performance pledge leaflets and Fact Sheet of C&ED.
9.	There should be a statutory requirement for officers to keep record of identity checks under section 17(2) of the Immigration Ordinance.	Upon further review, it is noted that the LRC's original intention was to enable disciplinary action to be taken in the event of an abuse of power when the authority to conduct identity checks is exercised. No statutory provision is required for the purpose. Relevant requirements to keep record are stipulated in FPM and ImmD's internal instructions.

	Proposal	Progress of Implementation
10.	The power to stop and search must be exercised under a test of “reasonable suspicion” where there is a current statutory requirement for it, when the subject is in a public place, and when the subject has committed or is about to commit any “imprisonable” offence.	Under consideration.
11.	Law enforcement officers with the exception of C&ED and ImmD officers at control points should be required to keep written records of search. To avoid excessive written records, a copy of the record will be passed to the affected person on request.	Internal guidelines of C&ED, Police, ImmD and ICAC set out the information which should be recorded by an officer. Applications for access to the relevant records may be made pursuant to the Personal Data (Privacy) Ordinance.
<i>Powers of Entry, Search and Seizure</i>		
12.	Warrants should only be issued by magistrates for entry and search of evidence if there are reasonable grounds to believe that an “imprisonable offence” has been committed, that there is material on the premises of substantial values to the investigation or is likely to be relevant evidence there.	Under consideration.

	Proposal	Progress of Implementation
13.	Access to legal privilege material should be absolutely protected. Material held with the intention of furthering a criminal purpose should not be covered.	Guidelines have been issued to protect items subject to legal privilege. Officers will seek advice from Department of Justice on the handling of these items as appropriate.
14.	Access to excluded material should be subject to an inter partes application made to a judge. Material held with the intention of furthering a criminal purpose should not be covered.	Guidelines on access to journalistic materials are in place. Access to personal data is governed by the Personal Data (Privacy) Ordinance.
15.	Access to special procedure material should not be subject to an inter partes application made to a judge.	No action required.
16.	Procedural safeguards regulating the application for and execution of search warrants should be adopted.	Safeguards regarding application for and execution of search warrants are provided in internal guidelines.
17.	Warrantless entry and search could be exercised to execute a warrant of arrest, to arrest a person for an “imprisonable offence”, to arrest for illegal conduct at a public meeting or offensive behaviour likely to cause a breach of the peace, in hot pursuit of a person unlawfully at large, and to save life and limb or prevent serious damage to property.	Under consideration.

	Proposal	Progress of Implementation
18.	Warrantless entry and search for evidence after arrest should be permissible only where it is impracticable to obtain a warrant.	Under consideration.
19.	An officer may seize anything he reasonably believes to be evidence of an offence provided he is lawfully on the premises.	Under consideration.
20.	The general seizure powers should be extended to computerized information. The occupier of the premises or owner of the seized items may request a record of all items seized, be allowed to have access to such items, and to have photos or copies made of them. The latter request may be refused if there are reasonable grounds to believe this will prejudice the investigation of any criminal proceedings. The Police may retain evidence as long as it is necessary.	Computerized information is covered by existing legislation. Relevant documentation on items seized will be provided upon request.
21.	The term “premises” should be defined along the lines of section 23 of PACE with suitable modification.	Under consideration.
<i>Power of Arrest</i>		
22.	The person arrested should be informed that he is under arrest and of the ground for the arrest.	Stipulated in internal guidelines.

	Proposal	Progress of Implementation
23.	A person voluntarily attending at Police stations to assist with an investigation shall be entitled to leave at will and shall be informed at once that he is under arrest if a decision is taken to prevent him from leaving at will.	The Rules and Directions for Questioning of Suspects and the Taking of Statements stipulate that a person not in custody can walk out of the station and make any calls he wishes.
24.	The person arrested should be taken to the nearest Police station as soon as practicable. Other law enforcement agencies may convey arrested person to their nearest offices instead of a Police station.	Section 51 of the Police Force Ordinance (PFO) requires that every person taken into custody by a Police officer (with or without a warrant) shall be forthwith delivered to a Police station, except a person detained for the mere purpose of taking his name and residence or detained under section 54 (i.e. stopping a person in public place for enquiries). For other law enforcement agencies this is governed by their respective internal orders which require the arrested person to be taken to the relevant division/office, depending on the circumstances and the offence.
25.	Warrantless arrest should only be exercised in respect of “imprisonable offences”.	Under consideration.
26.	Power of arrest for “non-imprisonable offences” should be exercised under a list of conditions.	Under consideration.

	Proposal	Progress of Implementation
27.	A Police officer may require a person convicted of a recordable offence and who did not have his fingerprints taken to attend a Police station for fingerprinting; and may arrest the person without warrant if he fails to comply with the requirement.	Section 59 of PFO empowers the Police to fingerprint any person who has been arrested for or convicted of any offence.
28.	The powers under section 50(6) of the Police Force Ordinance which provides for search upon arrest on reasonable suspicion of commission of an offence should be retained but the threshold should be increased to an “imprisonable offence”.	Under consideration.
29.	Warrant for arrest might be executed irrespective of whether the warrant was in possession of the law enforcement officer.	Section 53 of PFO provides that any warrant lawfully issued for any purpose may be executed at any time notwithstanding that the warrant is not in possession of the Police officer at the time. However, the warrant shall, on the demand of the person affected, be shown to him as soon as practicable after its execution.

	Proposal	Progress of Implementation
<i>Power of Detention</i>		
30.	The period of detention for each arrest should be calculated from the time a person was arrested for an offence originally, even if the same person is arrested for some other offences during the detention period.	Provided for in existing legislation/internal guidelines.
31.	Orders and procedures relating to detention should be published.	Under consideration.
32.	“Custody Officers” and “Review Officers” should be appointed in Police stations to ensure that those in detention are treated properly and to carry out review of the need for further detention.	Police, ImmD, C&ED and ICAC have appointed Custody Officers and Review Officers since 1998/1999.
33.	Detention facilities at Police stations should be improved subject to the necessary feasibility study.	Detention facilities have been and will continue to be improved as and when necessary.
34.	A person who is detained after charge should be taken before the court as soon as practicable, and in any event no later than the first sitting of a court after the person has been charged.	Under consideration.
35.	Statistics on Police detention would be made available upon request.	Statistics on arrests are published regularly by law enforcement agencies. Police will endeavour to provide statistics on detention upon request.

	Proposal	Progress of Implementation
36.	Basis for Police bail and the legal authority should be set out by law.	Section 52(3) of PFO requires that if the inquiry into a case cannot be completed forthwith, a Police officer may discharge the detained person on his entering into a recognizance, with or without sureties, to appear at such Police station and at such time as is named in the recognizance.
37.	“Custody Officer” should be authorised to search a detained person to ascertain and record everything the person has with him.	A system of “Custody Officer” has been put in place and their duties are stipulated in internal orders.
38.	Additional safeguards to children and young persons under arrest should be adopted.	Additional safeguards have been provided. For instance, as stated in the Rules and Directions for the Questioning of Suspects and the Taking of Statements, children and young persons under the age of 16 should only be interviewed in the presence of a parent or guardian, or, in their absence, another person who is not a Police officer and is of the same sex as the child.

	Proposal	Progress of Implementation
39.	<p>There should be statutory requirements to bring greater certainty on the length of detention, to provide continuous and accountable review of the need for longer periods of detention.</p> <p>There should be a statutory limit on the length of detention without charge.</p> <p>A magistrate court may commit a person to detention to a Police station for a maximum period of 3 days.</p>	<p>In respect of continuous review of need for detention, Police, ImmD, C&ED and ICAC have put in place a system of Custody Officers and Review Officers since 1998/1999.</p> <p>Limits for detention under consideration.</p>

	Proposal	Progress of Implementation
40.	<p>An officer at the rank of Superintendent or above could authorise an intimate search if he has reasonable grounds to believe that a detained person may have concealed on him a dangerous drug or anything that could be used to cause physical injury to himself or others, or evidence in relation to a serious arrestable offence, and the item being searched for cannot be found other than by intimate search.</p>	<p>Pursuant to section 52(1A) of the Dangerous Drugs Ordinance an inspector may request a medical practitioner or nurse to examine the body cavities of a person. This follows on from section 52(1)(f) where there has already been established reason to suspect that a person has in his actual custody an article liable to seizure under the Ordinance.</p> <p>Where it has been decided that this power should be invoked, the person will be escorted to a government hospital for the search. Section 52(1D) provides that the person may be detained for such time as may be reasonable necessary to complete the examination.</p>
41.	<p>An arrested person has a right to inform a friend or relative or consult a lawyer privately at any time. Delay of up to 48 hours for the exercise of such right is only permitted in case of an “arrestable offence”.</p>	<p>Provided for under Direction 8 of the Rules and Directions for the Questioning of Suspects and the Taking of Statements.</p>

	Proposal	Progress of Implementation
<i>Taking of Intimate and Non-intimate Samples; Fingerprinting</i>		
42.	Intimate samples may be taken if consent is given and if authorised by an officer of the rank of Superintendent or above who has reasonable grounds for suspecting the person's involvement in a serious arrestable offence and that the sample will confirm or disprove his involvement. Prior authorisation from a magistrate should also be obtained in all such cases except where prior authorisation is not possible or impractical. In case where prior judicial authorisation has been obtained, inferences could be drawn from refusal of consent without good cause.	Implemented through the enactment of the Dangerous Drugs, ICAC and Police Force (Amendment) Ordinance 2000.

	Proposal	Progress of Implementation
43.	Non-intimate samples may be taken with written consent, or without consent if the person is in Police custody and taking of non-intimate sample is authorised by an officer of the rank of Superintendent or above who has reasonable grounds for suspecting the person's involvement in a serious arrestable offence and for believing that the sample will confirm or disprove his involvement. Prior authorisation from a magistrate should also be obtained wherever there is to be non-consensual taking of non-intimate samples.	Implemented through the enactment of the Dangerous Drugs, ICAC and Police Force (Amendment) Ordinance 2000.
44.	To set out definition of terms relating to fingerprints and samples similar to section 65 of PACE.	Implemented through the enactment of the Dangerous Drugs, ICAC and Police Force (Amendment) Ordinance 2000.
45.	“Serious arrestable offence” should be defined as an offence for which the term of imprisonment is 5 years or more, together with a schedule of appropriate additional offences (to be determined) which allows the exercise of the relevant powers.	“Serious arrestable offence” is defined in the Dangerous Drug, ICAC and Police Force (Amendment) Ordinance 2000 as an offence which carries an imprisonment term of not less than 7 years or those offences specified in Schedule 2 of the PFO.

	Proposal	Progress of Implementation
46.	To preserve the existing provision in section 59 of the Police Force Ordinance which authorises any Police officer to take fingerprints of arrested persons.	Provision preserved as proposed.
47.	No need to provide for the right to witness destruction of fingerprints or samples taken. It would be sufficient to return them to the person from whom the fingerprints or samples are taken.	Destruction of fingerprints already reflects the existing practice. Destruction of samples has been provided in the context of the Dangerous Drugs, ICAC and Police Force (Amendment) Ordinance 2000.
<i>Others</i>		
48.	Subject to availability of resources, tape-recording and video-taping of interviews should be progressively implemented for all law enforcement agencies.	Police, ImmD, C&ED and ICAC have put in place Video Interview Rooms.
49.	The existing practice of making available legal aid to persons charged with a criminal offence should continue.	Existing practice retained as proposed.

	Proposal	Progress of Implementation
50.	The court should be given a statutory discretion to exclude prosecution evidence if in all circumstances, including those in which the evidence was obtained, its admission of the evidence would have such an adverse effect on the fairness of the trial that it should be excluded.	It is already the existing common law practice that the court has a discretion to exclude evidence.
51.	New legislation on arrest should in general be applicable to relevant law enforcement agencies unless specifically exempted.	On-going. This will be taken on board as the Administration implements the various proposals of the Working Group (WG).
52.	To adopt section 117 of PACE which confers a power to the Police to use reasonable force in exercising the relevant powers.	Under consideration.