

立法會 *Legislative Council*

LC Paper No. CB(2)2980/03-04(04)

Ref : CB2/PL/SE

Panel on Security

Background brief prepared by the Legislative Council Secretariat

Proposals of the Interdepartmental Working Group on the Law Reform Commission Report on Arrest

Purpose

This paper gives a summary of past discussions held by the Panel on Security on the proposals of the Interdepartmental Working Group on the Law Reform Commission (LRC) Report on Arrest (the Report).

Background

2. In its Report published in 1992, LRC recommended the adoption of a number of provisions in the Police and Criminal Evidence Act 1984 of the United Kingdom which set out detailed procedural requirements and safeguards to avoid possible abuse of Police powers. In 1993, the Administration formed an Interdepartmental Working Group (the Working Group) to study the Report. The Administration subsequently announced in June 1997 its decision to implement the proposals of the Working Group in a phased manner.

Discussions by the Panel

Meeting on 11 November 1996

3. At its meeting on 11 November 1996, the Panel was briefed on the views of the Working Group on the recommendations in the Report.

4. Members were informed that among the 61 major recommendations in the Report, the Working Group accepted 30 in full and 21 in principle but with suitable adaptations taking into account existing law enforcement practice and the local situation, and rejected six which were considered unnecessary, impracticable and/or would weaken law enforcement capability unjustifiably. The remaining four were not adopted because they involved technical amendments consequential to the six rejected recommendations. Members were informed that the Administration was conducting a public consultation exercise, which would end on 28 December 1996, on the proposals of the Working Group.

Meeting on 19 February 1998

5. At the Panel meeting on 19 February 1998, the Administration briefed the Panel on the progress of implementation of the proposals of the Working Group. The Administration informed members that -

- (a) it had announced in June 1997 its decision to implement the Working Group's proposals in a phased manner over the following three years;
- (b) priority would be accorded to the implementation of improvement measures relating to detention; and
- (c) for other improvement measures including those relating to stop and search, search and seizure, entry and arrest, most of those which did not require legislative amendments had been implemented. Those requiring legislative amendments would be implemented by phases by 2000.

6. The Working Group's proposals which require legislative changes and which can be implemented administratively are in **Appendices I** and **II** respectively.

Relevant minutes of meetings

7. Members may wish to refer to the following minutes for further details of the discussions -

- (a) Extract from the minutes of the Panel meeting held on 11 November 1996 (**Appendix III**); and
- (b) Extract from the minutes of the Panel meeting held on 19 February 1998 (**Appendix IV**).

**(I) Proposals of WG on LRC Report on Arrest
which require legislative changes**

Rationalisation of existing ordinances

- 1 The existing ordinances should be rationalised and improved to ensure consistency in the powers available to law enforcement agencies.

Identification of trivial offences

- 2 There should be a rationalisation exercise to determine whether any trivial offences ought to become “non-imprisonable”.

Powers to stop and search

- 3 There should be a statutory requirement for officers to keep records of identity checks under section 17(2) of the Immigration Ordinance.
- 4 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”.
- 5 Law enforcement officers with the exception of Customs and Excise and Immigration 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.

Powers of Entry, Search and Seizure

- 6 Warrants should only be issued by magistrates for entry and search 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.
- 7 Access to legal privilege material should be absolutely protected. Material held with the intention of furthering a criminal purpose should not be covered .
- 8 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.
- 9 Procedural safeguards regulating the application for and execution of search warrants should be adopted.
- 10 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 behaviours 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.
- 11 Warrantless entry and search for evidence after arrest should be permissible only where it is impracticable to obtain a warrant.
- 12 An officer may seize anything he reasonably believes to be evidence of an offence provided he is lawfully on the premises.
- 13 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 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.

- 14 The term “premises” should be defined along the lines of section 23 of PACE with suitable modifications.

Power of Arrest

- 15 Warrantless arrest should only be exercised in respect of “imprisonable offences”.
- 16 Power of arrest for “non-imprisonable offences” should be exercised under a list of conditions.
- 17 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.
- 18 The powers under s.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”.
- 19 Arrest warrants might be executed irrespective of whether the warrant was in possession of the law enforcement officer.

Power of Detention

- 20 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.
- 21 There should be statutory limit on the length of detention without charge.

- 22 A magistrate court may commit a person to detention at a police station for a maximum period of 3 days.
- 23 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, i.e. an offence for which the term of imprisonment is 5 years or more, and the item being searched for cannot be found other than by intimate search.
- 24 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".

Taking of Intimate and Non-intimate samples

- 25 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.
- 26 Non-intimate samples may be taken with a written consent, or without consent if the person is in police custody and taking of non-intimate samples 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.

- 27 To set out definition of terms relating to fingerprints and samples similar to section 65 of PACE.
- 28 “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.

Others

- 29 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.
- 30 New legislation in arrest should in general be applicable to relevant law enforcement agencies unless specifically exempted.
- 31 To adopt s. 117 of PACE which confers a power to the Police to use reasonable force in exercising the relevant powers.

**(II) Proposals of WG on LRC Report on Arrest
which can be implemented administratively**

- 1 Information on powers and procedures relating to stop, search, arrest and detention should be published.
- 2 *Information to be made available to police officer during an identity check under the Immigration Ordinance is to be restricted to certain relevant information.
- 3 *Police officers (including Immigration and Customs and Excise Officers) should state in layman terms the reasons for the stop and search to the person affected.
4. *As with present arrangements, Police officers should have access to all information which can currently be made available when conducting stop and searches.
- 5 *Road block checks should be retained without any statutory requirement of “reasonable suspicion”.
- 6 Statistics and information on stops, searches and road block checks should be published for public scrutiny.
- 7 *Access to special procedure material should not be subject to an inter partes application made to a judge.
- 8 *The person arrested should be informed that he is under arrest and of the ground for the arrest.
- 9 *Persons 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.

- 10 *The person arrested should be taken to a nearest police station as soon as practicable. Other law enforcement agencies may convey their arrested persons to their nearest offices instead of a police station.
- 11 *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.
- 12 Orders and procedures relating to detention should be published.
- 13 "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.
- 14 Detention facilities at police stations should be improved subject to the necessary feasibility study.
- 15 *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.
- 16 Statistics on detention would be made available upon request.
- 17 *Statutory basis for police bail and the legal authority already set out in section 52(3) of the Police Force Ordinance.
- 18 "Custody Officer" should be authorised to search a detained person to ascertain and record everything the person has with him.
- 19 *Additional safeguards to children and young persons under arrest should be adopted.
- 20 Subject to availability of resources, tape-recording and video-taping of interviews should be progressively implemented for all law enforcement agencies.

- 21 *The existing practice of making available legal aid to persons charged with a criminal offence should continue.
- 22 *To preserve the existing provision in section 59 of the Police Force Ordinance which authorises any police officer to take fingerprints of arrested persons.
- 23 No need to provide for the right to witness destruction of fingerprints of samples taken. It would be sufficient to return them to the person from whom the fingerprints or samples are taken.

*Existing practice

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LegCo Paper No. CB(2) 1545/96-97
(The minutes have been seen
by the Administration)

Ref : CB2/PL/SE/1

LegCo Panel on Security

Minutes of Meeting held on Monday, 11 November 1996 at 10:45 am in the Chamber of the Legislative Council Building

- Members present** : Hon James TO Kun-sun (Chairman)
Hon Mrs Selina CHOW, OBE, JP (Deputy Chairman)
Hon CHEUNG Man-kwong
Hon Emily LAU Wai-hing
Hon Fred LI Wah-ming
Hon Howard YOUNG, JP
Hon Andrew CHENG Kar-foo
Hon CHEUNG Hon-chung
Hon IP Kwok-him
Dr Hon LAW Cheung-kwok
Hon Bruce LIU Sing-lee
Hon TSANG Kin-shing
Hon Lawrence YUM Sin-ling
- Member attending** : Dr Hon Anthony CHEUNG Bing-leung
- Members absent** : Dr Hon Philip WONG Yu-hong]
Hon Zachary WONG Wai-yin]
Hon Albert HO Chun-yan] other commitments
Hon LO Suk-ching]
Hon Margaret NG]
- Public Officers attending** : **Item III**
Mrs Carrie YAU
Deputy Secretary for Security 1

Mr Clement LEUNG
Principal Assistant Secretary for Security

Mr Stephen WONG
Deputy Solicitor General
Legal Department

Item IV

Mr Philip CHAN
Principal Assistant Secretary for Security

Mr Howard CHAN
Assistant Secretary for Security

Mr K BRAITHWAITE
Assistant Commissioner of Police (Support)
Royal Hong Kong Police Force

Item V

Mr Philip CHAN
Principal Assistant Secretary for Security

Mr Howard CHAN
Assistant Secretary for Security

Mr D M HODSON
Assistant Commissioner of Police (Crime)
Royal Hong Kong Police Force

Mr R J STOKER
Assistant Police Research Officer (Crime)
Royal Hong Kong Police Force

Mr P K LEUNG
Principal Immigration Officer
Immigration Department

Mr Michael CHIK
Assistant Commissioner of Customs & Excise
Customs and Excise Department

Mr C J KERSHAW
Principal Investigator
Independent Commission Against Corruption

Mr C K CHO
Chief Investigator
Independent Commission Against Corruption

Clerk : Mrs Sharon TONG
in attendance Chief Assistant Secretary (2)1

Staff : Miss Salumi CHAN
in attendance Senior Assistant Secretary (2)1

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V. Law Reform Commission Report on Arrest
(LegCo Paper No. CB(2) 257/96-97)
(LegCo Paper No. CB(2) 263/96-97)

Briefing by the Administration

31. Principal Assistant Secretary for Security briefed members on the Administration's paper and the "Proposals by an Interdepartmental Working Group on the Law Reform Commission (LRC) Report on Arrest". The Administration was conducting a public consultation exercise on the Working Group's proposals and the consultation period would end by 28 December 1996.

Discussions

Power to stop and search (Serial No. 4)

32. Mrs Selina CHOW supported most of the Working Group's proposals. However, she was concerned that some of the proposals might hinder the prevention of crime. For example, the Working Group had proposed that "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 is suspected of having committed or being about to commit any imprisonable offence." Law enforcement officers must therefore make sure that the offence committed or being about to be committed by the subject was an "imprisonable offence" before exercising their power to stop and search. This requirement might hinder them from taking law enforcement action.

33. Principal Assistant Secretary for Security explained that the threshold of “imprisonable offence” was established to provide a yardstick for the front line officers to exercise their power to stop and search. Assistant Commissioner of Police (Crime) added that police officers were familiar with the concept of imprisonable offence, which was currently linked to the power of arrest. Hence, there should be no serious problem in linking it with the power to stop and search.

34. Dr LAW Cheung-kwok pointed out that some of the police officers were quite impolite in exercising their power to stop and search. He noted that the Working Group had proposed that a police officer should explain to the person affected, in layman terms, the reasons for the stop and search. He asked whether there were any concrete proposals to ensure that police officers would communicate politely and effectively with the persons affected. Principal Assistant Secretary for Security advised that as stated in the 1996 Policy Address, the Administration aimed to strengthen public confidence in the Police Force in 1997 by fostering a service culture through service quality projects, including streamlining procedures in report rooms and in other areas of contact with the public so that police officers would maintain their courtesy in their contact with the public. However, it would take time to implement the projects and for the results to be seen.

Keeping of detailed written record (Serial No. 7)

35. Mrs Selina CHOW noted that the Working Group had proposed that law enforcement officers with the exception of Customs and Excise and Immigration officers at control points should be required to keep written records of search by making entries in their official notebooks. Mrs CHOW was concerned that excessive paperwork might discourage law enforcement officers from taking enforcement action. Assistant Commissioner of Police (Crime) considered this a valid point. He informed members that after the introduction of the Police and Criminal Evidence Act 1984 (PACE) in the UK, it took the police officers on average 4 to 5 hours to process the paperwork after a simple arrest. The Administration would make sure that such things would not happen in Hong Kong.

Threshold of road checks (Serial No. 8)

36. Mr Bruce LIU supported the Working Group’s proposal that “road checks should be retained as it is essential in curbing illegal immigration and as a crime prevention measure, e.g. anti-taxi robberies. There should not be any statutory requirement of “reasonable suspicion” for any officer

to conduct such checks.”

Right to detain to inform others when arrested (Serial No. 44)

37. Mr Bruce LIU noted the Working Group’s proposal that the delay of up to 48 hours for an arrested person to exercise his right to inform a friend or relative or consult a lawyer privately should only be permitted in case of an “arrestable offence”. Mr LIU queried why the delay of up to 48 hours should be permitted.

38. Assistant Commissioner of Police (Crime) advised that at present, when a person was detained, he would be given a notice explaining what his rights were. If there was to be any delay in his access to a lawyer, it had to be based on very strong justifications and the police officers concerned were liable to explain this in court. One of the examples would be a kidnapping case where the life of the kidnapped person was still at risk, and there was good reason to believe that communication between the detained suspect and his friends/relatives might put the person’s life at risk.

39. The Chairman considered that in order to be fair to the detainee, the Police should not take a cautious statement from him during the period he was deprived of the right to consult a lawyer. Assistant Commissioner of Police (Crime) agreed to look into this point.

Adm

Code of Practice (Serial No. 54)

40. The Chairman noted that the LRC had recommended the adoption of the same practice of PACE which required the Secretary of State to issue codes of practice on the exercise by police officers the powers of search of persons, detention, treatment, questioning and identification of persons, search of premises, and seizure of property found on persons and on premises. The draft code should be approved by the legislature. He asked why the Working Group had not accepted this recommendation of the LRC. Principal Assistant Secretary for Security explained that the codes of practice would need to be amended frequently in the light of day-to-day operational experience. The Working Group was of the view that if the PACE approach was adopted, it would be very inflexible and might hamper the responsiveness of the law enforcement agencies to changing circumstances because they had to go through the legislative process frequently when they found it necessary to amend the codes regardless how minor the proposed changes were. The Working Group had therefore proposed to maintain the status quo, i.e. to amend the codes through administrative means.

41. The Chairman was not convinced. He considered that the codes of practice should be tabled in the LegCo as subsidiary legislation. The negative vetting procedure in the LegCo was not inflexible. Assistant Commissioner of Police (Crime) pointed out that from the experience in the UK, non-compliance with the codes of practice would invariably invalidate the whole process. For example, if a person was not detained in accordance with the codes, the detention would become unlawful. This approach had dramatically changed the focus of defence lawyers in various trials in the UK, where the defence lawyers aimed to find a breach in procedure which then invalidated the process. Trials by and large became a search for an error in procedure rather than a search for truth or innocence.

Cautioning statement

42. The Chairman pointed out that at present, police officers would make a cautioning statement to a person under arrest, "You are not obliged to say anything unless you wish to do so." He considered that the wordings of the Chinese version of this cautioning statement were not easily understood and did not positively inform the person his right to remain silent. He therefore proposed to change the wordings to "You are entitled to remain silent." Principal Assistant Secretary for Security agreed to consider this suggestion.

Adm

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LegCo Secretariat
10 March 1997

EXTRACT

臨時立法會

Provisional Legislative Council

PLC Paper No. CB(2) 1381

(These minutes have been seen
by the Administration)

Ref. : CB2/PL/SE/1

Provisional Legislative Council Panel on Security

Minutes of Meeting

**held on Thursday, 19 February 1998 at 2:30 pm
in the Chamber of the Legislative Council Building**

- Members present** :
- Hon Mrs Selina CHOW, JP (Chairman)
 - Hon CHENG Kai-nam (Deputy Chairman)
 - Hon Allen LEE, JP
 - Hon Mrs Elsie TU, GBM
 - Hon Henry WU
 - Hon MA Fung-kwok
 - Hon CHEUNG Hon-chung
 - Hon Andrew WONG Wang-fat, JP
 - Hon Kennedy WONG Ying-ho
 - Hon Howard YOUNG, JP
 - Hon IP Kwok-him
 - Hon Bruce LIU Sing-lee
 - Hon LAU Kong-wah
 - Hon Ambrose LAU Hon-chuen, JP
 - Hon KAN Fook-yee
 - Dr Hon LAW Cheung-kwok
- Members attending** :
- Hon LEE Kai-ming
- Members absent** :
- Hon HUI Yin-fat, JP] other commitments
 - Hon CHAN Choi-hi]

Public Officers : Item III
attending

Mr Raymond WONG
Deputy Secretary for Security 1

Mrs Carrie WILLIS
Principal Assistant Secretary for Security A

Mr TSE Chan-fai
Border District Commander
Hong Kong Police Force

Item IV

Mr Raymond WONG
Deputy Secretary for Security 1

Mr Philip CHAN
Principal Assistant Secretary for Security E

Mr Gordon FUNG
Assistant Commissioner of Police (Crime)
Hong Kong Police Force

Item V

Mr Raymond WONG
Deputy Secretary for Security 1

Mr Philip CHAN
Principal Assistant Secretary for Security E

Mr Michael HORNER
Assistant Commissioner of Police (Service Quality)
Hong Kong Police Force

Item VI

Mr Raymond WONG
Deputy Secretary for Security 1

Mr Philip CHAN
Principal Assistant Secretary for Security E

Mr Gordon FUNG
Assistant Commissioner of Police (Crime)
Hong Kong Police Force

Mr Y S CHIU
Chief Telecommunication Engineer
Hong Kong Police Force

Item VII

Ms Sally WONG
Deputy Secretary for Security 3

Mr Raymond FAN
Principal Assistant Secretary for Security C

Mr WONG Tat-po
Assistant Director
Immigration Department

Item VIII

Ms Sally WONG
Deputy Secretary for Security 3

Mr Raymond FAN
Principal Assistant Secretary for Security C

Mr WONG Tat-po
Assistant Director
Immigration Department

Clerk : Mrs Sharon TONG
in attendance Chief Assistant Secretary (2) 1

Staff : Miss Betty MA
in attendance Senior Assistant Secretary (2) 1

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IV. Progress report on implementation of Working Group's proposal on Law Reform Commission Report on Arrest
(PLC Paper No. CB(2) 1017(03))

14. DS/S(1) briefed members on the content of the PLC Paper, which updated the present position regarding the progress of implementing the proposals of the Interdepartmental Working Group (WG) on the Law Reform Commission (LRC) Report on Arrest. He informed members that the Administration had decided to implement the WG's proposals in a phased manner over the next three years. Improvement measures to be implemented were listed in paragraphs 5 and 6 of the PLC Paper.

15. Mrs Elsie TU noted from paragraph 6(e) of the PLC Paper that additional safeguards had been provided to children and young persons under arrest and enquired whether additional safeguards would also be provided for the mentally handicapped as well as "coloured" persons under arrest. Assistant Commissioner of Police (Crime) (ACP (Crime)) replied that assistance provided for the mentally handicapped under the age of 16 would be in line with those available for children and young persons under the age of 16. In the event of language problem arose, an interpreter would be provided in the course of questioning and taking of statement.

16. Mr Kennedy WONG opined that the formulation of legislation to bring greater certainty on the length of detention and provide accountable review of the need for longer periods of detention was one of the major recommendations made by the WG. He queried the lead time taken for drafting the relevant legislation and urged the Administration to expedite its action in this regard. In reply, Principal Assistant Secretary for Security E (PAS/(E)) said that the Administration was adopting a phased approach in implementing the recommendations by the WG. Having examined the recommendations carefully, the Administration considered the introduction of legislation on the taking of intimate and non-intimate samples of suspects was of utmost importance to tackle serious crimes and thus priority was accorded to. He pointed out that the proposal to appoint "Custody Officers" and "Review Officers" was another major improvement proposed by the WG which would be implemented in 1998. He shared the point that the length of detention was equally important and undertook to review whether the drafting of the relevant legislation could be speeded up. ACP (Crime) added that despite the proposed legislation on the length of detention would not be introduced in 1998, the current practice adopted by the Police was that the length of detention normally would not exceed 48 hours. The detainees would either be taken before the courts or released on bail within 48 hours after their arrest.

Adm

17. In response to the Chairman's enquiry, DS/S(1) said that at least one Video-Interview Room (VIR) would be set up in every major divisional

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Police station after a total of 60 VIRs had been made available to the Police by the end of 1998. The Administration had to take into consideration the availability of suitable venue in each police station as well as resources in determining the viability of providing one VIR in each police station. ACP (Crime) added that, in accordance with the internal guidelines of the Police Force, VIRs would be used on a sharing basis among different bureaux in a police station or among several police stations whenever needs arose.

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Provisional Legislative Council Secretariat
20 March 1998