

# 香 港 人 權 監 察

## HONG KONG HUMAN RIGHTS MONITOR

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### 就警方新的搜身指引 給立法會保安事務委員會 研究警方搜查被羈留者的處理手法小組委員會會議 2008年7月16日會議的 意見書

警方聽取了公眾意見，進行了有關被羈留人士進行搜查的現行安排的檢討，並決定修訂《警察通例》及《程序手冊》的指引內容，香港人權監察對此表示歡迎。

人權監察亦注意到，這些新的搜身指引吸收了包括本會在2007年12月4日的意見書中引述的一些國際上的良好做法，以及法律改革會多年前的建議，處理了一些搜身安排上的問題，包括事前的通知和事後的紀錄。

但是新指引要求前線人員，重覆地、循例地對被捕和被羈留人士進行例行搜身。這實質上否定了每次搜身都要有合理懷疑，證明有必要，才可進行。

當考慮限制一項非絕對的人權時，有關的限制必須符合三個測試，包括必要性 (necessity)、合理性 (rationality) 及合乎比例 (proportionality) 測試。警方搜查被捕人士及被羈留者時的處理手法，因涉及限制或干擾受影響人士的私隱、人身安全和自由，因此亦必須符合上述三個測試。

新指引中說：警務處處長決定警方會對所有被羈留人士進行搜查，就明顯地妄顧合理懷疑的需要，更沒有考慮合理懷疑和其他因素的舉體情況，去判斷是否有搜查的必要性。

新指引指示警務人員，被捕人士要在被捕後立即被搜查，到達警署後要再被搜身，值日官在把羈留人士收押在臨時羈留處或羈留室前要再一次安排搜查，被羈留人士前後合共起碼搜身三次。新指引無疑為警方進行多次搜身開了綠燈，更令拒絕進行無合理懷疑的搜查的警務人員變成違規，這對被捕人士和前線警務人員都不合理、不公平。新指引應訂明每次搜身都要證明有必要、合理和合乎比例。

由於在關鍵性的原則問題上，新的搜查指引犯上了嚴重的錯誤，嚴重侵犯受影響人士的人身、私隱和尊嚴，令其他改進帶來的好處，變得意義不大。

修改後的指引和執行的配套工亦有其缺憾或值關注的地方，令被羈留人士的人權並未得以充分保障。

在新的指引下，羈留搜查將會分為三個級別：「無需脫去衣服」、「脫去衣服」以及「脫去內衣」。雖然指引要求警務人員必須要有充分理據解釋搜查的理由，但卻並未有清楚指出三個級別的搜身需於何種情況下才能進行。人權監察必須強調，所有搜身都必須在有合理懷疑及必要性的情況下才能進行，特別是搜身程度較高的「脫去衣服」及「脫去內衣」搜身。人權監察擔心警方會因為這些灰色地帶而引起刻意與及無心的濫權，不時用上超出合理和合乎比例的搜身級別。

新的指引應明文禁止警員進行脫去內衣搜查時觸及被搜身者的私處和其他身體部分，並明確列出一些禁止警員或搜查人員作出侮辱性的行為，例如評論被搜查者的身體等。

指引除規定在進行搜身期間，必須沒有任何異性人員在場外，亦應明文禁止任何異性人員在場外或透過任何器材觀看搜身過程。

警方現時的指引並沒有法律上的約束力，未必有足夠的阻嚇作用防止警方濫權。政府必須盡速落實法律改革委員會就逮捕問題所作出的建議，將訂立法例，以加強對警方的規管。

除上列缺憾外，人權監察認為新的指引中仍有其他不足的地方，需要立法會詳細審議，並研究何時立法提供應有的搜身保障。

Introduction

1. Fifteen protesters were arrested on 5 October 2007 for obstruction and were detained overnight at North Point Police Station. They complained that during the detention, their human rights were seriously violated.
2. The most serious complaint against the Police is their practice regarding the handling and searching of the detainees. The detainees claim that some of them were strip searched (a search involving any removal of clothing worn next to the skin), which was unnecessary and unreasonable. Some of them were asked to perform unnecessary gestures during the search, which they found to be humiliating. Furthermore it is alleged that a male police officer entered the detention area when a female detainee was being strip-searched.
3. The Monitor is most concerned about practices carried out by the police regarding the handling and searching of detainees, especially strip search. It should be stated that unwarranted and unreasonable searches cause embarrassment, engender a distrust of law enforcement officers and constitute an intrusion into a person's privacy. An unwarranted and unreasonable search, when amounting to ill treatment of attaining a minimum level of severity, are inhuman and degrading treatment of a detained person and offend against international standards (See *Atici v. Turkey*, ECHR, 2007, at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=5&portal=hbkm&action=html&highlight=%22strip%20search%22&sessionid=3761207&skin=hudoc-en> )
4. The International Covenant on Civil and Political Rights (ICCPR) highlights the importance of human dignity. It enshrines the freedom of a person against violation of the person, his security and his dignity. It also protects the right of a person to privacy.
5. Article 9(1) of the ICCPR guarantees that  

Everyone has the right to liberty and security of person.
6. Article 10(1) enshrines that,  

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
7. Article 7 states that,  

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.
8. The ICCPR provides the right to privacy in Article 17(1) that,  

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

9. The General Comments on Article 17 provides a more detailed guideline on conducting search. It stipulates that,

So far as personal and body search is concerned, effective measures should ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched. Persons of the State, should only be examined by persons of the same sex.

10. All the Articles 7, 9, 10 and 17 of the ICCPR are domesticated into the law of Hong Kong as the Hong Kong Bill of Rights Ordinance. Hong Kong therefore has a legal obligation to adhere to these domesticated international standards.

11. The Basic Law, the mini-constitution of Hong Kong, has incorporated and entrenched the rights guaranteed by the ICCPR as constitutional rights since the Handover in 1997. It also guarantees the non-violation Article 28 of the Basic Law,

(1) The freedom of the person of Hong Kong residents shall be inviolable.

(2) No Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited. Torture of any resident or arbitrary or unlawful deprivation of the life of any resident shall be prohibited.

12. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) is also applicable to Hong Kong under international law. Article 16(1) of the CAT states,

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

13. The CAT has not been specifically incorporated into local laws except for torture, which has been domesticated to a limited extent by the Crimes (Torture) Ordinance. International standards of inhuman and degrading treatment and punishment are generally domesticated by Article 3 the Bill of Rights Ordinance and Articles 28 and 39 of the Basic Law.

#### Foreign Legislation on Strip Searches

14. While the above international standards provide generalized statements with regard to inhuman and degrading treatment, and intrusion into privacy, there is no detailed guideline on strip searching. Accordingly, the New South Wales legislation in Australia and case law in the US and Canada provide us with insights into specific requirements and procedures in regard to conducting strip searches.

10. US case of : *Noelle Way V County of Ventura*

- a. On 6 September 2000, Ventura County Sheriff Bob Brooks and Deputy Karen Hanson conducted a strip search with a *visual cavity inspection* of Noelle Way during the booking process at a pre-trial detention facility on a misdemeanor charge of being under the influence of cocaine or methamphetamine in violation of California Health & Safety Code 11550(a). Hanson argued that *'the nature of the charges is viewed as providing the reasonable suspicion required under the law to perform a visual strip search'*.
- b. Way brought this civil rights action under 42 U.S.C. 1983 against Brooks and Hanson, as well as the County of Ventura, alleging that they violated her civil rights by subjecting her to a body cavity search following her arrest.
- c. Brooks and Hanson argued that the visual body cavity search did not violate Noelle Way's constitutional rights because of jail security requirements. They argued that the interest in securing the jail during the booking process outweighed Way's right to be free from a compulsory visual inspection of her genitalia and anus. Way responded that drug charges alone were insufficient to justify such an extreme intrusion, given that she was merely a misdemeanor arrestee charged with being under the influence of a controlled substance who was detained for only a few hours and never housed with the jail's general population.
- d. The case is significant because the District Court held that the search violated Way's constitutional rights. The Court affirmed that individualized suspicion is required in respect of arrestees who are not admitted to the general jail population. The policy of strip search must be reasonably related to the interest in maintaining security. In general, the court could not see how the charge of being under the influence of a drug necessarily poses a threat of concealing additional drugs in jail during the limited time between booking and bail, or booking and placement in the general population.

11. Case in Canada: *R. v. Golden*

- a. In 2001, Mr. Golden was suspected of drug trafficking. Whilst he was inside a restaurant, the police conducted a pat-down search. No weapons or drugs were found. He was then strip-searched and drugs were found. Mr. Golden was subsequently found guilty of drug possession. He argued however that his basic Charter right to be free from an unreasonable search and seizure had been violated.
- b. The Supreme Court ruled that the arrest was lawful, but the strip search was unlawful. Considering not only that the strip search could have been conducted at the police station, the Court determined that the police needed 'reasonable and probable grounds' ("good and likely reason") to justify the strip search. The Court also noted that

*'whereas strip searching could be justified when introducing an individual into the prison population to prevent the individual from bringing contraband or weapons into prison, different considerations arise where the individual is only being held for a short time in police cells and will not be mingling with the general prison population. While we recognize that police officers have legitimate concerns that short term detainees may conceal weapons that they could use to harm themselves or police officers, these concerns must be*

*addressed on a case by case basis and cannot justify routine strip searches of all arrestees.'*

12. Legislation in New South Wales, Australia
  - a. The Law Enforcement (Powers and Responsibilities) Act 2002 (LEPRA) of New South Wales, Australia, provides a detailed guideline on the requirements and procedures for conducting strip searches. Some of the important principles are worth examining here. The extract of the LEPRA is attached in Annex A.
  - b. Section 31 of LEPRA spells out the requirements for a strip search to be conducted: A police officer or other person who is authorized to search a person may conduct a strip search of the person if the police officer or other person suspects on reasonable grounds that it is necessary to conduct a strip search of the person for the purposes of the search and that the seriousness and urgency of the circumstances require the strip search to be carried out.
  - c. Section 32 of LEPRA provides certain safeguards for the preservation of privacy and dignity during search. Important ones include:
    - the person must be informed that they will be required to remove clothes and the reason why;
    - the police officer or other person must conduct the search in a way that provides reasonable privacy for the person searched, and as quickly as is reasonably practicable;
    - the police officer or other person must conduct the least invasive kind of search practicable in the circumstances;
    - a search must be conducted by a police officer or other person with the same sex.
  - d. Section 33 of LEPRA sets out specific rules for conducting strip searches. Important ones include:
    - A police officer or other person who strip searches a person must, as far as is reasonably practicable in the circumstances, comply with the following:
      - (i) the strip search must be conducted in a private area,
      - (ii) the strip search must not be conducted in the presence *or view of* a person who is of the opposite sex to the person being searched,
      - (iii) except as provided by this section [Section 33], the strip search must not be conducted in the presence or view of a person whose presence is not necessary for the purposes of the search;
    - a strip search must not involve a search of the person's body cavities or an examination of the body by touch;
    - a strip search must not involve the removal of more clothes than [an officer] believe on reasonable grounds to be necessary to be reasonably necessary for the purposes of the search;
    - a strip search must not involve more visual inspection than [an officer] believe on reasonable grounds to be reasonably necessary for the purposes of the search.
  - e. In Annexure A – Rules for conducting personal searches of the Code of Practice for CRIME, it is stated that *'in the case of a strip search, the custody manager will record the reasons and the result on the custody record.'* Although the

Code of Practice for CRIME is not a comprehensive set of requirements which must be followed by police in exercising the powers of their office, it sets out a good practice for the police to follow.

### Local Implementation

13. The above examples deliver detailed guidelines on strip searching. The judgments of the above cases in the US and Canada affirm the need for reasonable suspicion for a strip search to be conducted. Further, the Law Enforcement (Powers and Responsibilities) Act 2002 in Australia, sets out specific principles and requirements for conducting strip searches.
14. By comparison, the legislative provisions in Hong Kong regarding strip searches are too vague. The following safeguards governing strip searches are limited in their scope and basically set out in internal police general orders and procedures manual which have no force of the law rendering their breach a disciplinary offence but not a crime per se:
  - a. this type of search should only be carried out in the privacy of a police station, a police launch or a location providing equal privacy to the suspect;
  - b. this type of search shall be conducted only upon the direction of an officer of or above the rank of Sergeant who must properly record the incident;
  - c. under no circumstances will an officer search a detainee of the opposite gender;
  - d. the Duty Officer must be prepared to justify this level of search.
15. Vagueness and lack of formal legal status in these safeguards make them not very effective for combating abuses by police officers and for protection of the citizen against violation of their human rights. It is therefore important to have clarification and more detailed rules regarding the conducting of strip searches. These should clearly set out the requirements, procedures and rules regarding the conducting of strip searches.
16. In 1992 the Law Reform Commission of Hong Kong published a report on Arrest, which made recommendations based on the English Police and Criminal Evidence Act 1984 (PACE).concerning the existing legislative provisions in Hong Kong
17. The Report on Arrest recognized PACE provisions regarding the conducting of searches. It stated that

*‘The PACE provisions lay down clear guidelines as to the circumstances in which strip searches or intimate searches may be carried out.’*
18. It recommends the adoption of the related part of PACE into Hong Kong legislation.
19. An Interdepartmental Working Group (WG) was formed to study the recommendations in the Report on Arrest and the WG’s proposal was published for Legislative Council consultation.. The WG reaffirmed the need for reasonable suspicion before intimate searches to be conducted. It also

proposes the appointment of custody officer and review officer to ensure the proper treatment of detainees.

### Recommendations

20. The Government should adopt the 1992 recommendations of the Report on Arrest and the Interdepartmental Working Group proposals to protect the rights of arrestees.  
These include:
  - a. the need for reasonable and concrete suspicion for a strip search to be conducted;
  - b. custody officers and review officer should be appointed to ensure detainees are treated properly;
  - c. records should be made concerning searches with the grounds and reasons for the search and copies should be provided to the reasons searched at their requested..
21. The Monitor submits that the Hong Kong Government should further adopt the relevant legislative provisions of New South Wales detailing the requirements, rules and procedures to be adopted in Hong Kong. Such provisions should be incorporated into local legislation to remove the grey areas that engender police abuse of power.
22. In practical terms, facilities in the detention area should be improved to protect the rights of detainees. Video cameras for instance could be set up *at the entrance* of the detention suite to monitor compliance with detainees privacy rights
23. Regulations should clearly prohibit police officers of the opposite sex from entering the detention suites of detainees of the opposite sex without strong justification. Police officers should record all searches and complaints immediately to facilitate further investigations.
24. The local complaints system should also be improved in parallel with the introduction of clearer rules and requirements to ensure compliance. The Complaints Against Police Office (CAPO) is the sole organization which handles complaints against the police. This office is however part of the police force, manned by serving police officers who carry out the complaint investigations against police colleagues. It is submitted that this investigative role should be taken over by the Independent Police Complaints Council (IPCC) which is independent of the police force. This would ensure independent, objective and fair investigations on complaints against police and instill confidence in a complaints system that is widely perceived as fatally compromised. It is further submitted that this should be a preliminary to the establishment of a Human Rights Commission in line with the Paris Principle to protect human rights. It should be empowered to punish any police officer who violates human rights.

### Conclusion



24. The unwarranted and unreasonable use strip searches is a serious violation of human rights. Hong Kong requires clear and unambiguous requirements, rules and procedures relating to the conducting of searches by police officers or other agents. The Hong Kong government should adopt existing Law Reform Commission recommendations and incorporate the provisions as set out in the relevant New South Wales laws governing searches. An effective and trusted complaints body should be created in the expanding of the powers of the IPCC and this should be the precursor to the establishment of a Human Rights Commission in HK. Pending these changes CAPO, IPCC and the Legislative Council should immediately investigate the present case to determine the extent of abuse of the referenced detainees human rights.

## Annex A: Extracts of Law and Enforcement (Powers and Responsibilities) Act 2002

### **31 Strip searches**

(cf common law)

A police officer or other person who is authorised to search a person may conduct a strip search of the person if the police officer or other person suspects on reasonable grounds that it is necessary to conduct a strip search of the person for the purposes of the search and that the seriousness and urgency of the circumstances require the strip search to be carried out.

### **32 Preservation of privacy and dignity during search**

- (1) A police officer or other person who searches a person must, as far as is reasonably practicable in the circumstances, comply with this section.
- (2) The police officer or other person must inform the person to be searched of the following matters:
  - (a) whether the person will be required to remove clothing during the search,
  - (b) why it is necessary to remove the clothing.
- (3) The police officer or other person must ask for the person's co-operation.
- (4) The police officer or other person must conduct the search:
  - (a) in a way that provides reasonable privacy for the person searched, and
  - (b) as quickly as is reasonably practicable.
- (5) The police officer or other person must conduct the least invasive kind of search practicable in the circumstances.
- (6) The police officer or other person must not search the genital area of the person searched, or in the case of female or a transgender person who identifies as a female, the person's breasts unless the police officer or person suspects on reasonable grounds that it is necessary to do so for the purposes of the search.
- (7) A search must be conducted by a police officer or other person of the same sex as the person searched or by a person of the same sex under the direction of the police officer or other person concerned.
- (8) A search of a person must not be carried out while the person is being questioned. If questioning has not been completed before a search is carried out, it must be suspended while the search is carried out.
- (9) A person must be allowed to dress as soon as a search is finished.

(10) If clothing is seized because of the search, the police officer or other person must ensure the person searched is left with or given reasonably appropriate clothing.

(11) In this section: "**questioning**" of a person means questioning the person, or carrying out an investigation (in which the person participates). "**transgender person**" means a person, whether or not the person is a recognised transgender person:

(a) who identifies as a member of the opposite sex, by living, or seeking to live, as a member of the opposite sex, or

(b) who has identified as a member of the opposite sex by living as a member of the opposite sex, or

(c) who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex,

and includes a reference to the person being thought of as a transgender person, whether or not the person is, or was, in fact a transgender person.

### **33 Rules for conduct of strip searches**

(cf Cth Act, s 3ZI)

(1) A police officer or other person who strip searches a person must, as far as is reasonably practicable in the circumstances, comply with the following:

(a) the strip search must be conducted in a private area,

(b) the strip search must not be conducted in the presence or view of a person who is of the opposite sex to the person being searched,

(c) except as provided by this section, the strip search must not be conducted in the presence or view of a person whose presence is not necessary for the purposes of the search.

(2) A parent, guardian or personal representative of the person being searched may, if it is reasonably practicable in the circumstances, be present during a search if the person being searched has no objection to that person being present.

(3) A strip search of a child who is at least 10 years of age but under 18 years of age, or of a person who has impaired intellectual functioning, must, unless it is not reasonably practicable in the circumstances, be conducted in the presence of a parent or guardian of the person being searched or, if that is not acceptable to the child or person, in the presence of another person (other than a police officer) who is capable of representing the interests of the person and who, as far as is practicable in the circumstances, is acceptable to the person.

(4) A strip search must not involve a search of a person's body cavities or an examination of the body by touch.

(5) A strip search must not involve the removal of more clothes than the person conducting the search believes on reasonable grounds to be reasonably necessary for the purposes of the search.

(6) A strip search must not involve more visual inspection than the person conducting the search believes on reasonable grounds to be reasonably necessary for the purposes of the search.

(7) A strip search may be conducted in the presence of a medical practitioner of the opposite sex to the person searched if the person being searched has no objection to that person being present.

(8) This section is in addition to the other requirements of this Act relating to searches.

(9) In this section: "**impaired intellectual functioning**" means:

(a) total or partial loss of a person's mental functions, or

- (b) a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction, or
- (c) a disorder, illness or disease that affects a person's thought processes, perceptions of reality, emotions or judgment, or that results in disturbed behaviour.

Procedures for searches of a more invasive nature are dealt with under the *Crimes (Forensic Procedures) Act 2000*.

### **34 No strip searches of children under 10 years**

A strip search must not be conducted on a person who is under the age of 10 years.

### **201 Supplying police officer's details and giving warnings**

(cf *Crimes Act 1900*, s 563, *Police Powers (Vehicles) Act 1998*, s 6)

(1) A police officer must provide the person subject to the exercise of the power with the following:

- (a) evidence that the police officer is a police officer (unless the police officer is in uniform),
- (b) the name of the police officer and his or her place of duty,
- (c) the reason for the exercise of the power.
- (d) (Repealed)

(2) A police officer must comply with subsection (1) in relation to a power referred to in subsection (3) (other than subsection (3) (g), (i) or (j)):

- (a) if it is practicable to do so, before or at the time of exercising the power, or
- (b) if it is not practicable to do so, as soon as is reasonably practicable after exercising the power.

(2A) A police officer must comply with subsection (1) in relation to a power referred to in subsection (3) (g), (i) or (j) before exercising the power, except as otherwise provided by subsection (2B).

(2B) If a police officer is exercising a power to give a direction to a person (as referred to in subsection (3) (i)) by giving the direction to a group of 2 or more persons, the police officer must comply with subsection (1) in relation to the power:

- (a) if it is practicable to do so, before or at the time of exercising the power, or
- (b) if it is not practicable to do so, as soon as is reasonably practicable after exercising the power.

(2C) If a police officer exercises a power that involves the making of a request or direction that a person is required to comply with by law, the police officer must, as soon as is reasonably practicable after making the request or direction, provide the person the subject of the request or direction with:

- (a) a warning that the person is required by law to comply with the request or direction (unless the person has already complied or is in the process of complying), and
- (b) if the person does not comply with the request or direction after being given that warning, and the police officer believes that the failure to comply by the person is an offence, a warning that the failure to comply with the request or direction is an offence.

(3) This section applies to the exercise of the following powers (whether or not conferred by or under this Act):

- (a) a power to search or arrest a person,
- (b) a power to search a vehicle, vessel or aircraft,

- (c) a power to enter premises (not being a public place),
- (d) a power to search premises (not being a public place),
- (e) a power to seize any property,
- (f) a power to stop or detain a person (other than a power to detain a person under Part 16) or a vehicle, vessel or aircraft,
- (g) a power to request a person to disclose his or her identity or the identity of another person,
- (h) a power to establish a crime scene at premises (not being a public place),
- (i) a power to give a direction to a person,
- (j) a power under section 21A to request a person to open his or her mouth or shake or move his or her hair,
- (k) a power under section 26 to request a person to submit to a frisk search or to produce a dangerous implement or metallic object.

(3A) If a police officer is exercising more than one power to which this section applies on a single occasion, and in relation to the same person, the police officer is required to comply with subsection (1) (a) and (b) in relation to that person only once on that occasion.

(4) If 2 or more police officers are exercising a power to which this section applies, only one officer present is required to comply with this section.

(5) However, if a person asks another police officer present for information as to the name of the police officer and his or her place of duty, the police officer must give to the person the information requested.

(6) This section does not apply to the exercise of a power that is conferred by an Act or regulation specified in Schedule 1. See section 5 (1), which provides that this Act does not limit the functions of a police officer under an Act or regulation specified in Schedule 1.