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本函編號 OUR REF.: SBCR 1/2801/07 Pt. 6

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11 July 2008

By Fax (5 pages)
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Mr Raymond Lam
Clerk to Subcommittee
Legislative Council
3/F, Citibank Tower
3 Garden Road
Central
Hong Kong

Dear Mr Lam,

Panel on Security

Subcommittee on Police's Handling of Searches of Detainees

Thank you for your letter dated 9 July 2008. The Administration's responses to issues raised on the Police's handling of searches of detainees at the meeting of the Panel on Security held on 8 July 2008 are set out below.

Issue 1: The new arrangements stated that a search must be conducted on all persons to be detained. Some Members considered that this would widen the Police's power to conduct searches on detainees.

2. In the review on the searches of detainees conducted earlier this year, the Police have revisited the need to search a detained person prior to his detention. At common law, the Police have a duty to take all reasonable measures to ensure that detainees do not escape or assist others

to do so, do not injure themselves or others, do not destroy or dispose of evidence and do not commit further crime. It is lawful for the Police to take such reasonable measures as are necessary to carry out these duties. In this connection, the Police are of the view that it is necessary to search each and every person prior to his being detained in a Temporary Holding Area (THA) or police cell for the above-mentioned purpose. The scope of each search, however, would be case specific and should be no more than what is rational and proportionate to achieve the purpose. Legal advice confirms that the search of a detained person, if properly conducted, with the scope of the search on each occasion to be determined having regard to the prevailing circumstances and on a case-by-case basis, would not be an unlawful or arbitrary interference with the detainee's privacy or personal integrity as the purpose of the search is legitimate.

3. To enhance transparency and for clarity, the new arrangements now make clear the reasons for such searches to be conducted (i.e. for Police officers to properly discharge their statutory functions, and to fulfil the Force's duty of care to persons detained in custody and to ensure the safety of others who may come into contact with them). They also emphasize that the Duty Officer should determine the scope of the searches on a case-by-case basis, based upon the prevailing circumstances. The new arrangements also provide various other new safeguards in respect of the requirements to respect the rights of the detained persons and to prevent arbitrary searches, and hence are a significant improvement over the previous practice.

Issue 2: Some Members considered that the mandatory requirement that a detained person would be searched again upon his return to the THA/cell if he is removed from the THA/cell during the detention would allow subsequent search(es) to be arbitrarily conducted on a detained person.

4. Notwithstanding that a Police officer would likely be closely supervising a detainee for the full period that the latter was away from the THA or cell (as the case may be), it would be difficult (if not impossible) for the officer to be totally certain that the detainee did not get hold of any items during the period which the detainee could use to harm himself or others. To fulfil the Force's duty of care to the detained person and to ensure the safety of others who may come into contact with him, it is necessary for the Police to search the detainee again before his return to the THA or cell. However, the Duty Officer has a duty to ensure, having regard to the circumstances of the case (including the fact that the detainee had already been searched before his initial admission to the detention facility, the

place(s) that the detainee had visited when he was away from the THA or cell, etc.), that the scope of such search is proportionate to the circumstances.

5. As explained in the Annex to our letter to the Clerk to Panel of 9 April 2008, it is already an existing requirement to record the reasons for temporary removal of a detainee from a THA or cell under the detained person movement record in the Force's Communal Information System (CIS). This provides a strong safeguard against possible abuse of the movement procedure by, say, moving a detained person in and out of the THA or cell purely to increase the number of searches to be conducted on the person, thereby using such searches as a punitive measure against the person.

Issue 3: The new arrangements stated that the Duty Officer will determine the scope of the search on a case-by-case basis, based upon the prevailing circumstances. Some Members suggested that there should be an independent monitoring mechanism on searches conducted on detained persons (for example, to allow lawyers or Justices of Peace to witness such searches) to prevent possible abuse of power by the Police.

6. There are already multiple safeguards built into the new arrangements to prevent any possible abuse. In particular, before a search is carried out, the detained person should be informed that he may raise any concern(s) about the search to the Duty Officer, and any concerns raised by the detained person will be considered by the Duty Officer who will duly document these concerns in the CIS and reconsider the scope of the search. The Duty Officer's decision, together with his reasoning and/or any other actions taken, will be final and conveyed to the detained person and recorded in the CIS record for that detained person. Should a detained person feel aggrieved by the search, he/she may make a formal complaint to the Complaints Against Police Office.

7. A proper balance needs to be struck between addressing the concerns of the person to be searched and the Police's proper performance of their duty. The arrangements provided for in the revised procedures strike the proper balance required. The Duty Officer will also consider requests for the presence of a detainee's lawyer during a search on a case-by-case basis and having regard to the prevailing circumstances. A relevant factor to be considered is that no unreasonable delay or hindrance will be caused to the process of investigation or the administration of justice if the request is acceded to.

Issue 4: The new arrangements stated that the Duty Officer will determine the scope of all searches on detainees, including those involving removal of underwear. Some Members suggested that a more senior officer (e.g. the most senior officer in the police station) should be responsible for authorizing any search involving removal of underwear.

8. As explained in the Annex to our letter to the Clerk to Panel of 9 April 2008, the Police remain of the view that it is appropriate for the Duty Officer of a police station to authorize a search on a detainee involving the removal of underwear. This is because the Duty Officer of a police station is the officer authorized by the Commissioner of Police to be in charge of any person taken into the custody of the Police. The Duty Officer of a police station is normally at the station sergeant rank and has many years of police experience.

9. It is important to note that the work of Duty Officers (including their handling of the searches of detained persons) is not unsupervised. The Operation Support Sub-unit Commanders (at Inspector rank) are required to review all cases entered into CIS by Duty Officer(s) of their respective unit to ensure that the Force orders and procedures are being adhered to. This allows supervisory officers to access the full details of all cases and incidents, if necessary, so that they could ensure that appropriate action had been taken. This also allows supervisory officers to exercise supervision over the handling of all types of incidents dealt with by officers under their command, including the handling of detained persons.

Issue 5: Under the new arrangements, a copy of the "Custody Search Form" (which sets out the rights and entitlements of persons to be searched whilst detained in police custody) will be served on the detained person prior to a search being conducted. Some Members were of the view that the form failed to spell out the rights of the detained person clearly and fully; it was also pointed out that the description of its contents as "rights" was misleading.

10. As explained at the meeting, the "Custody Search Form" (Pol. 1123) is purposefully designed to address specifically the rights and entitlements of persons to be searched whilst detained in police custody. There is a separate form ("Notice to Persons under Investigation by, or Detained in the Custody of, the Police" (Pol. 153)) for informing the detained persons in detail their rights during their detention. Given the difference in nature between the two forms, we prefer to keep them separate. However, the

Police could consider suitable improvements to this new form (Pol. 1123) to make it clear that it concerns mainly the rights of detainees regarding a search and the detailed arrangements of the search, and to remind the detainees to refer to Pol. 153 in respect of their other rights during their detention.

11. I should be grateful if you would bring the above to the attention of Members.

Yours sincerely,



(Apollonia Liu)

for Secretary for Security