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政府總部
香港下亞厘畢道



GOVERNMENT SECRETARIAT
LOWER ALBERT ROAD
HONG KONG

本函編號 OUR REF: SBCR 1/2801/07 Pt. 6

來函編號 YOUR REF:

Tel: 2810 2632
Fax : 2810 7702

By Fax
(Fax no.: 2509 0775)

17 July 2008

Mr Raymond Lam
Clerk to Subcommittee
Legislative Council
3rd Floor, Citibank Tower
3 Garden Road
Hong Kong

Dear Mr Lam,

**Panel on Security
Subcommittee on Police's Handling of Searches of Detainees**

Thank you for your letter dated 16 July 2008. We set out below the Administration's response to the various issues raised at the meetings of the Subcommittee held on 14 and 16 July 2008

Suggestions and requests raised at the Sub-committee meetings

2. Members made a number of comments and suggestions during the Sub-committee meetings on the Force's latest arrangements on the search of detainees. The Police confirm that that they would consider the following ideas in their further review on the handling of searches of detainees –

- further fine-tuning the procedures, the Guidelines and / or the "Custody Search Form" (Pol. 1123) to –
 - give a clearer indication that searches involving removal of underwear should only be conducted in very restrictive circumstances;

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- include in the revised Police General Orders / Force Procedural Manual references to the relevant provisions of the Basic Law and international conventions regarding the protection of human rights in respect of detainees;
- better reflect detainees' rights in voicing objection to the reasons for and/or the scope of the search when being so informed by the Duty Officers;
- clarify that the detainees are invited, not requested, to sign on Pol. 1123;
- require the authorizing officer to record on Pol. 1123 more detailed justifications for conducting a search involving removal of underwear;
- clarify whether searches must be immediately conducted upon arrest;
- modify the wording of para. 11(b) of the Force Procedural Manual 49-04 to make it non-discriminatory against female detainees;
- include typical search procedures in the guidelines; and
- define more clearly what "detained in police custody" means;
- providing more information to the public on the procedures in conducting a pre-detention search;
- arranging exchange sessions between the Police officers and the human rights concern groups / Legislative Council members, with a view to enhancing the officers' awareness of human rights concerns;
- allowing the process of the searches to be video-taped if the detainee so requests;
- introducing additional procedures or measures when conducting searches on those classes of detainees who require special care or attention (for example, minors, mentally disabled, transsexuals); and
- exploring the use of infra-red equipment in assisting the conduct of pre-detention searches.

Other requests and suggestions

3. As requested by Members during the Sub-committee meeting on 16 July 2008, please find attached at **Annex A** a duty list of the Duty

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Officers. The Administration's response to other requests and suggestions raised by Members during the Sub-committee discussion are set out at **Annex B**.

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

Yours sincerely,



(Apollonia Liu)
for Secretary for Security

Annex A**Duties of a Duty Officer**

During each shift, a Duty Officer will ensure that:

REPORTS

- (a) All reports received in person, by telephone, by fax and by email are properly recorded in the Communal Information System (CIS), registers and books, and the appropriate follow-up action initiated.
- (b) Prompt and courteous attention is to be given to all reports and complaints from members of public.

REPORT ROOM

- (c) No unauthorised person should be allowed to enter or loiter inside the Report Room.
- (d) Only police officers attending to official matters may enter the report room. Officers in plainclothes should display their warrant cards.
- (e) Report Room staff are familiar with relevant Police General Order (PGO), Force Procedures Manual (FPM), Headquarters Orders, Standing Orders, Actions Cards especially in relation to Report Room, Prisoners, Bail and Property.

ARRESTED / DETAINED PERSONS

- (f) The arrest of any person is lawful and the charge is supported by credible evidence.
- (g) The detainee is served with a Pol.1123 in accordance with PGO/FPM 49 so he/she is aware of the reasons for conducting a search of him/her.
- (h) Duty of Care is shown to all detained persons (including those on Special Watch) in respect of cell conditions, access by legal advisors / interpreters, food / drink, health and hygiene.
- (i) The detention and movement of detained persons should be in accordance with PGO/FPM 49 and any relevant Standing Orders.
- (j) Cells and Temporary Holding Areas are to be inspected in accordance with PGO/FPM 49 with an appropriate record made of such a check.

MONEY / BAIL / PROPERTY

- (k) All money, bail and property entrusted to his/her care is kept secured and in accordance with the provisions contained in PGO/FPM 30, 47 and 49.
- (l) Bail is granted where permissible and summons action is taken where appropriate.
- (m) Case and found property is recorded and securely kept before handing over to the property clerk or regional dangerous drugs police constable. Any discrepancies should be immediately brought to the attention of his / her supervising officer.

STATION MATTERS

- (n) Arms and ammunition are stored, issued and returned in accordance with PGO/FPM 16 and any relevant Standing Order.
- (o) Police vehicles under his control are used in accordance with PGO/FPM 18 and any relevant Standing Order.
- (p) All matters pertaining to the security of the police station, the station compound, vehicles parked in the compound and associated buildings are dealt with according to the relevant Standing Order.

OTHER MATTERS

- (q) He/She should not leave the report room for meal / refreshment breaks until he/she is properly relieved by another officer. The relieving officers should be thoroughly briefed on all relevant matters.
- (r) An officer taking over as Duty Officer should check that the number and status of detained persons, bail, property and money is correct. Also that all matters, reports and complaints are being properly attended to.
- (s) He/she personally keeps all keys to cells, safes and property cabinets.
- (t) Upon reporting off duty a record must be made in CIS relating to (not exclusively): Miscellaneous Case Summary Reports, Bail and Report Room Handover Register, Case Property Register, Safe Register, Case Exhibits, Bailee Reporting.
- (u) All staff are aware of and practice Occupational Safety and Health principles especially when handling detained persons and dangerous exhibits / items.

Annex B**Administration's Response to Requests and Suggestions
raised by Members of the Subcommittee on
Police's Handling of Searches of Detainees
of the Legislative Council Panel on Security**

- (a) The common law on which the Commissioner of Police's decision to search all persons to be detained in police custody was based, and whether the Duty Officer should adopt the "reasonable suspicion" test in deciding whether to conduct a search**

As explained in the Annex to our letter to the Clerk to the Security Panel of 9 April 2008, the "reasonable suspicion" test is not a factor when determining whether a detainee should be searched prior to 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. This is confirmed by the Queen's Bench Division in *Lindley v Rutter* [1981] QB 128¹. It is lawful for the Police to take such reasonable measures as are necessary to carry out these duties. Searches on each and every person prior to his being detained in a Temporary Holding Area (THA) or police cell are reasonable measures for the above-mentioned purposes. The basis of such action is not reasonable suspicion, but such suspicion (if any) would be taken into account in deciding the scope of the search.

¹ The case concerns a standing instruction of the chief constable of a police station in the United Kingdom to remove the brassiere from every female prisoner for her own protection lest she used the brassiere to hang herself. The court held as follows: "*It is the duty of the courts to be ever zealous to protect the personal freedom, privacy and dignity of all who live in these islands. Any claim to be entitled to take action which infringes these rights is to be examined with very great care. But such rights are not absolute. They have to be weighed against the rights and duties of police officers, acting on behalf of society as a whole. It is the duty of any constable who lawfully has a prisoner in his charge to take all reasonable measures to ensure that the prisoner does not escape or assist others to do so, does not injure himself or others, does not destroy or dispose of evidence and does not commit further crime such as, for example, malicious damage to property. This list is not exhaustive, but it is sufficient for present purposes. What measures are reasonable in the discharge of this duty will depend upon the likelihood that the particular prisoner will do any of these things unless prevented. That in turn will involve the constable in considering the known or apparent disposition and sobriety of the prisoner. What can never be justified is the adoption of any particular measures without regard to all the circumstances of the particular case.*"

2. In this connection, the Police are of the considered view that it is necessary to search each and every person prior to his being detained in a THA or police cell for the above-mentioned purposes, in order for Police officers to properly discharge their statutory functions and fulfill the Force's duty of care to persons detained in custody and to ensure the safety of others who may come into contact with the detainees. The scope of each search would, however, be case specific and should be no more than what is rational and proportionate to achieve the purpose under the prevailing circumstances. 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.

(b) To provide for reference the Police officers' training materials on how a pre-detention search should be conducted

3. Given all searches (whether they are for criminal investigation or pre-detention checking) are conducted in the same manner, the Police's considered view is that disclosure of training materials, which contain details of how searches are to be conducted, would reveal the Force's operational tactics and would undermine the prevention and detection of crime. However, as undertaken in paragraph 2 of the main letter, the Force will consider including the typical search procedures in the guidelines (which will be made public).

(c) Whether the Police had ever required the detainees to adopt certain insulting or degrading postures or perform unnecessary acts during searches, and whether such requirements would contravene the new arrangements

4. Due to limitation in the recording of searches of detainees conducted in the past, the Police are unable to confirm whether any detainee was required to adopt certain postures or perform certain acts during searches conducted by the Police.

5. The new guidelines not only set out the general requirements concerning how searches on detainees should be conducted; more stringent requirements in respect of searches where clothing is to be removed (including removal of underwear) are stipulated. The guiding principle to be observed by all officers is that every search should be conducted with

proper regard to the privacy and dignity of the detained person, and Duty Officers will make every practicable effort to minimize embarrassment to the detained person in the search process.

6. The Duty Officer who authorized the searches needs to justify the manner in which the search was carried out (including why the detainee was requested to adopt a certain posture during a search). In particular, the Duty Officer must justify his decision if he requires a detained person to perform a specific act during the search, e.g. extending his arms to check if any article is concealed in his armpit or keeping the legs apart to check if any dangerous drugs might be concealed in the groin area. The Duty Officer's decision and the acts required will be recorded in the Force's Communal Information System. If the Duty Officer suspects that the detained person has concealed dangerous drugs in a body cavity, he must inform his Divisional Commander who will then decide whether to issue an authorization for an intimate search by a medical practitioner under the Dangerous Drugs Ordinance.

(d) Whether Police officers would be punished if they were found to be not complying with the new procedures under the Police General Orders, the Force Procedure Manual or the Guidelines

7. It is clearly stated in Regulation 3(e) of the Police (Discipline) Regulations (Cap. 232A) that 'contravention of police regulations, or any police orders, whether written or verbal' is one of the disciplinary offences under the Ordinance. In actual operation, the Police General Orders (PGO) is considered as written orders which officers must comply with, while the Force Procedural Manual (FPM) and the Guidelines are meant to explain the internal police procedures in a more detailed way. The recurrent or blatant disregard of such orders/manual would render an officer liable to disciplinary action.

(e) Whether a Police officer who is subject to complaint case could be promoted during the period of investigation

8. In conducting a promotion exercise, the promotion selection board will first assess an officer's core competency, performance and potential so as to select the most suitable candidates for promotion. The Force will also assess the officer's conduct, discipline and integrity so as to ensure the officer is of a high degree of honesty and integrity. In case the officer is involved in a complaint case, the Force will look into the nature of the complaint and the facts of the incident, and review whether there is any

evidence to suggest that the officer's conduct, discipline or integrity might be in doubt, before making a final decision whether the officer is to be promoted.

(f) The Police to consider allowing a third party (e.g. lawyers, JPs, priests, friends/relatives of the detainees) to be present during the conduct of pre-detention searches

9. As set out in paragraphs 6 and 7 of our letter to the Clerk to Panel of 11 July 2008, there are already multiple safeguards built into the new arrangements to prevent possible abuse during the searches. However, if a legal representative is present at the time when a detainee is to be searched, and if the detainee so requests, the Duty Officer may also allow the legal representative to be present during the search as long as there is no undue hindrance to the detention process.

(g) Request for a higher-ranking officer to authorize / to be present during the conduct of searches involving removal of underwear

10. As explained in our earlier letter of 11 July 2008, the Police remain of the view that the Duty Officer of a police station is the most appropriate officer to authorize a search on a detainee involving the removal of underwear. This is because the Duty Officer is designated for cell matter, and is required to account for his decision on the scope of searches. The Duty Officer is normally of Station Sergeant rank who has substantial knowledge of police work and ample field experience.

(h) Deputations requested the Police to suspend the operation of FPM49-04(7) and paragraph 23 of the Guidelines (on prosecution against detainee who refuses to be searched) until the legal position of the provisions is clear

11. As explained at the meeting on 16 July 2008, legal advice has confirmed that if a detained person refuses to cooperate in a search after suitable advice, depending on circumstances, he **might** be liable to prosecution. In considering whether a detainee should be prosecuted, all relevant factors will be taken into account, including his mental condition and how serious the breach is. If necessary, legal advice will be sought on a case-by-case basis prior to prosecution.

(i) **Allegation that the victim of a robbery case was being requested to lift up her clothes and to have photographs of her body taken during the Police's investigation**

12. Where a victim has suffered an assault, photographic evidence will assist in the prosecution of the offence. In this type of case, it is possible that Police officers will seek the consent of the victim for photographs to be taken of his/her injuries for evidential purposes.

13. We appeal to any party who feels aggrieved by any Police action to lodge a complaint with the Complaints Against Police Office and provide detailed information to the Police so that the Police could follow up the case accordingly.

(j) **Applying special considerations to detainees who have special requests concerning dress code as required by their faith / custom**

14. The current Guidelines allow a detained person to retain head-dress if he / she is required by his / her faith or custom to wear it, except during the period when he / she is not under close supervision. Any request made by a detainee for the retention of a certain item of clothing or article under such circumstances is to be considered by the Duty Officer on a case-by-case basis. However, hard or sharp subjects are not allowed to be brought into the cell under any circumstances.