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Paper for the Panel on Security

Report of the Subcommittee on Police's Handling of Searches of Detainees

Purpose

This paper reports on the deliberations of the Subcommittee on Police's Handling of Searches of Detainees (the Subcommittee).

The Subcommittee

2. On 5 October 2007, the Police arrested a group of 15 protesters who attempted to stop the demolition work at Lee Tung Street in Wan Chai. It was subsequently reported that the Police had conducted searches on the protesters involving the complete removal of clothing when the latter were detained in the police station, after the departure of their lawyers. Arising from the allegations made by those persons arrested in the Lee Tung Street case, the Panel on Security (the Panel) held a number of meetings to discuss the Police's practices regarding the handling of searches of detainees.

3. At its meeting on 4 December 2007, the Panel decided to appoint a subcommittee to study issues relating to the Police's practices in handling searches of detainees. The Subcommittee was put on the waiting list for activation pursuant to the House Committee's decision on 14 December 2007. In the interim, the Panel discussed the outcome of the Police's stage one review on the handling of searches of detainees at its meeting on 4 March 2008. On 27 June 2008, the Administration provided the Panel with the finalized documents relating to the Police's new arrangements for the handling of searches of detainees to be implemented from 1 July 2008. These documents comprised revised provisions in the Police General Orders (PGO) and the Force Procedures Manual (FPM), a Custody Search Form and the Guidelines on the Searching of Detained Persons (the Guidelines). The Panel further discussed the subject at its meeting on 8 July 2008 and decided that the Subcommittee should be activated.

4. The terms of reference and the membership of the Subcommittee are in **Appendices I and II** respectively.

5. Under the chairmanship of Hon James TO, the Subcommittee has held three meetings with the Administration between 14 and 17 July 2008, including one meeting with 13 organizations. In addition, the Subcommittee has considered a submission from one other organization. A list of organizations which have given views to the Subcommittee is in **Appendix III**.

Deliberations of the Subcommittee

The requirement to search all detainees

6. The new arrangements for searches of detainees confirm that a search will be conducted on all persons to be detained in police custody. Members are concerned that this would widen the Police's power to conduct searches on detainees. To better protect the privacy, human rights and dignity of detainees, members are of the view that whether a search should be conducted on a detainee should be determined on a case-by-case basis having regard to the prevailing circumstances. The scope of search should be no more than what is rational and proportionate.

7. The Administration has advised that at common law, the Police has 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. The Administration has also advised that its legal advice has confirmed that it is lawful for the Police to take such reasonable measures as are necessary to carry out these duties, and that the search of a detainee, 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 considered arbitrary interference with the detainee's privacy or personal integrity as the purpose of the search is legitimate.

8. The Administration has explained that under the new arrangements, a search of a detainee may involve non-removal of clothing, removal of clothing or removal of underwear. The scope of each search is case specific and should be no more than what is rational and proportionate to achieve the purpose referred to in paragraph 7 above under the prevailing circumstances. Under the new arrangements for the searches of detainees, a search involving removal of underwear should not be conducted routinely, but only in circumstances with strong justification.

9. Members have asked the Administration to explain the legal grounds on which the decision to conduct searches on all detainees is based, and whether the "reasonable suspicion" test has to be applied in deciding whether to conduct a search.

10. The Administration has replied that the "reasonable suspicion" test is not a factor when determining whether a detainee should be searched prior to detention. At common law, the Police has a duty of care towards detainees and has 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 judgment in *Lindley v Rutter* [1981] QB 128. The Administration is of the view that a search of each and every person prior to his being detained in a Temporary Holding Area (THA) or detention cell is a reasonable measure for the above-mentioned purposes. 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. Members has noted that the court pointed out in *Lindley v Rutter* that "What can be never justified is the adoption of any particular measures without regard to all the circumstances of the particular case".

Rank of officers who may authorize a search involving removal of underwear

11. The new arrangements retain the previous practice for a Duty Officer of a police station (DO) to determine the scope of search on a detainee. Members are concerned that in view of the heavy workload of a DO and the requirement for the scope of search to be determined having regard to a number of factors referred to in FPM as well as the fact that the officer-in-charge of a case may be of a higher rank than a DO, a higher-ranking officer, such as the most senior ranking officer in a police station, should be responsible for authorizing any search involving complete removal of clothing.

12. The Administration has advised that a DO is the most appropriate officer to authorize a search of a detainee and determine the scope of search. A DO is normally of Station Sergeant rank and has substantial knowledge of police work as well as ample field experience. He is the officer-in-charge of any person taken into the custody of the Police and is accountable for his decision on the scope of search on a detainee. The decision of a DO in respect of the search of a detainee for the fulfilment of the Police's duty of care to detainees and to ensure the safety of others who may come into contact with them is independent and should not be influenced by any other police officers.

13. The Administration has also pointed out that the work of DOs is not unsupervised. Operation Support Sub-unit Commanders are required to review all cases entered into the Police's Communal Information System (CIS) by the DOs of their respective units to ensure that relevant orders and procedures are adhered to.

14. Members find the Administration's argument not convincing. They consider that a police officer at the rank of Chief Inspector of Police or above should also possess many years of police experience. Members remain of the view that a higher-ranking officer, such as the most senior ranking officer in a police station, should be responsible for authorizing any search involving complete removal of clothing so as to enhance public confidence in the mechanism and accountability. They also suggest that the Administration should clearly set out in PGO and FPM the criteria for conducting searches involving complete removal of clothing, and the requirement that a search involving complete removal of clothing should be conducted only when it is inevitable and strictly necessary.

15. Members also suggest that forums or exchange sessions between DOs and Legislative Council Members should be arranged to enhance DOs' awareness of human rights concerns.

Independent mechanism for monitoring search of detainees involving complete removal of clothing

16. Under the new arrangements, at least two police officers of the same gender as the detainee will be present during a search. Members are of the view that there should be an independent mechanism for monitoring searches involving complete removal of clothing so as to prevent abuse of power by police officers. Such a type of search should be allowed to be conducted in the presence of a third party, such as a lawyer, Justice of the Peace, clergyman, family member of the detainee or the most senior ranking officer in a police station, if the detainee so prefers. Members also suggest that the process of search should be video-recorded, if the person being searched so requests, to better protect a detainee from abuse of power by police officers in the process of search.

17. The Administration has responded that if a legal representative is at the police station when a detainee is to be searched, and if the detainee so requests, the DO may allow the legal representative to be present during the search as long as there is no undue hindrance to the detention process.

18. The Administration has also pointed out that multiple safeguards have been built into the new arrangements to prevent any possible abuse during a search. Before a search is carried out, the detainee is informed that he may raise any concerns about the search to the DO, who will in turn document the concerns in CIS and reconsider the scope of search. The DO's decision, together with his reasoning and any other actions taken, will be conveyed to the detainee and recorded in CIS. Any detainee aggrieved by the search could lodge a complaint with the Complaints Against Police Office. In view of members' concern, the Administration will consider allowing the process of search to be video-recorded, if the detainee so requests.

19. Members are concerned that some detainees could not afford the service of lawyers. They remain of the view that a Justice of the Peace, family member of the detainee, clergyman or the most senior ranking officer in a police station should be allowed to be present during the conduct of searches involving complete removal of clothing.

Procedures for conducting a search of a detainee

20. To facilitate members' understanding of the procedures for search of a detainee, members have requested the Administration to provide a copy of the Police's training materials on the procedures for conducting a search on a detainee. Noting that the Division of Criminal Justice of the State of New Jersey in the United States of America has uploaded the Strip Search and Body Cavity Search Requirements and Procedures for Police Officers onto its website, members have suggested that more information on the procedures for the search of a detainee should be uploaded onto the Police's website for access by members of the public.

21. The Administration has replied that training is provided to police officers on the conduct of searches of persons to familiarize them with the relevant principles and procedures. Officers are instructed on the classification of different types of searches, the procedural steps for conducting a search and other specific operational issues that should be taken into account in conducting searches. Classroom teaching is supplemented by practical instruction. However, given that all searches are conducted in the same manner, the Police consider that the disclosure of training materials, which contain details of how searches are to be conducted, would reveal the Police's operational tactics and hence undermine its prevention and detection of crime. The Administration will consider the suggestion of providing more information on the procedures of the search of detainees to the public.

Use of equipment to assist police officers in the conduct of searches

22. Members are of the view that the complete removal of clothing during a search should be minimized. They suggest that the Police should explore the possibility of acquisition of equipment to assist police officers in the conduct of searches, with a view to minimizing the need for searches involving complete removal of clothing and providing better protection for the privacy, human rights and dignity of detainees. Members noted that the police of the United Kingdom are reported to deploy infrared devices to assist police officers in the conduct of searches.

23. The Administration has advised that 120 metal detectors have recently been procured by the Police for assisting police officers in conducting searches on

detainees. The Police will explore the use of infra-red equipment in the conduct of search of detainees.

Search of detainees with special needs

24. Under the new arrangements, a uniformed serviceman is allowed to retain such items of uniform and equipment as may be necessary to enable him to appear properly dressed before the court. Members have asked whether similar considerations could be given to detainees who have special requests concerning dress code, such as the wearing of head-dress, as required by their religion. Members consider that additional procedures or measures should be adopted when conducting searches on detainees who require special care or attention, such as minors, the mentally disabled or transsexuals.

25. The Administration has advised that the Guidelines allow a detainee to retain his head-dress, if the wearing of such a head-dress is required by his faith or custom, except during the period when the detainee is not under close supervision. Any request from a detainee for the retention of a certain item of clothing or article is to be considered by DO on a case-by-case basis. Under no circumstances should a detainee be allowed to carry any hard or sharp object in the cell for safety reason. At the request of members, the Administration has agreed to consider spelling out this point explicitly in FPM and consider introducing additional procedures or measures for searches of detainees who require special care or attention, such as minors, the mentally disabled and transsexuals.

Whether a detainee can be required to adopt certain postures or to perform certain acts during a search

26. Members have expressed concern about whether a detainee could be required to adopt certain insulting or degrading postures or perform unnecessary acts during a search, and whether police officers who require a detainee to do so would be in contravention of the new arrangements.

27. The Administration has responded that each search should be conducted with proper regard to the privacy and dignity of the detainee. DOs will make every practicable effort to minimize embarrassment to the detainee in the search process. The DO who authorizes a search needs to justify the manner in which the search is carried out, including why the detainee is requested to adopt a certain posture during a search. In particular, the DO must justify his decision if he requires a detainee to perform a specific act during the search. The DO's decision and the acts required will be recorded in CIS.

28. Members request the Administration to consider spelling out explicitly in PGO and FPM that any request for a detainee to adopt a certain posture during a search should be subject to the necessity and proportionality tests.

Consequences of violation of the requirements under the Police General Orders, Force Procedures Manual or the Guidelines on the Searching of Detainees

29. Members are concerned that PGO, FPM and the Guidelines may not be legally binding on police officers. They have asked whether there is any punishment for police officers who violate the requirements under the new arrangements.

30. The Administration has pointed out that "contravention of police regulations, or any police orders, whether written or verbal" is one of the disciplinary offences under the Police (Discipline) Regulations (Cap. 232A). PGO are considered as written orders with which police officers must comply, while FPM and the Guidelines seek to explain the internal police procedures in a more detailed way. The recurrent or blatant disregard of PGO or FPM would render an officer liable to disciplinary actions.

Need for search of a detainee after his return to a temporary holding area or detention cell

31. The new arrangements retain the existing requirement that if a detainee is removed from a THA or detention cell for any reason, he will be searched on his return prior to being detained again in a THA or detention cell. Members are concerned that this may mean subsequent searches are conducted arbitrarily without regard to the circumstances of the particular case.

32. The Administration has advised that notwithstanding that a detainee will likely be closely supervised by a police officer for the full period when the detainee is taken outside a THA or detention cell, it will be difficult for the police officer to be totally certain that the detainee does not get hold of any items during the period with which the detainee could harm himself or others. To fulfil the Police's duty of care to the detainee and to ensure the safety of others who may come into contact with the detainee, it is necessary for the Police to search the detainee again before his return to a THA or detention cell. However, the scope of search will be decided upon the prevailing circumstances and available information.

33. The Administration has also advised that police officers are required to record the reasons for the temporary removal of a detainee from a THA or detention cell under the detainee's movement record in CIS. This provides a strong safeguard against possible abuse of the movement procedure by, say, moving a detainee in and out of THA or cell purely to increase the number of searches to be conducted, thereby using such searches as a punitive measure against the person.

Other revisions to the Police General Orders, Force Procedures Manual, the Guidelines on the Searching of Detainees and the Custody Search Form

34. To better protect the rights of detainees in the process of search and prevent possible abuse of power, members have suggested and the Administration has agreed to consider the following revisions to PGO, FPM, the Guidelines and the Custody Search Form -

- (a) to give a clearer indication that searches involving complete removal of clothing should only be conducted in very restrictive circumstances;
- (b) to include references to the relevant provisions of the Basic Law and international conventions regarding the protection of human rights in respect of detainees in PGO and FPM;
- (c) to better reflect a detainee's right in raising objection to the scope of search when being so informed by DOs;
- (d) to make it clear that it is not mandatory for a detainee to sign on the Custody Search Form;
- (e) to require the authorizing officer to record in the Custody Search Form more detailed justifications for conducting a search involving removal of underwear;
- (f) to allow a male detainee to retain his underwear, as is the case for a female detainee;
- (g) to include typical search procedures in the guidelines;
- (h) to clarify the meaning of "persons to be detained in police custody";
- (i) to spell out clearly that only persons whose presence is necessary for conducting a search are allowed to be present during a search; and
- (j) to spell out explicitly the requirement for police officers to keep accurate record of all searches.

Conclusion

35. The Subcommittee concludes that the new arrangements for the search of detainees have not struck a proper balance between ensuring the safety of detainees and preventing possible abuse of power. It urges the Administration to

further improve the arrangements to enhance the protection of the rights of detainees and safeguard them from possible abuse of power, especially unreasonable and unnecessary searches involving complete removal of clothing.

Recommendation

36. The Subcommittee recommends that the issues raised by the Subcommittee should be followed up by the Panel in the next term.

Advice Sought

37. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 2
Legislative Council Secretariat
25 July 2008

Appendix I

Panel on Security

Subcommittee on Police's Handling of Searches of Detainees

Terms of Reference

To study issues relating to the Police's practices in handling searches of detainees, and to make recommendations to the Panel where necessary.

Panel on Security

Subcommittee on Police's Handling of Searches of Detainees

Membership list

Chairman	Hon James TO Kun-sun
Members	Hon Margaret NG Hon WONG Yung-kan, SBS, JP Hon Audrey EU Yuet-mee, SC, JP Hon LEUNG Kwok-hung (Total : 5 Members)
Clerk	Mr Raymond LAM
Legal Adviser	Mr LEE Yu-sung
Date	14 July 2008

Subcommittee on Police's Handling of Searches of Detainees

A. Organizations which have given oral representation to the Subcommittee

1. Hong Kong Human Rights Monitor
2. Justice and Peace Commission of the Hong Kong Catholic Diocese
3. Civil Human Rights Front
4. Migrant Support Network
5. JJJ Association
6. Zi Teng
7. Hong Kong Christian Institute
8. The Association for the Advancement of Feminism
9. Action for REACH OUT
10. A Group of Citizens Who Concern About the Democratize of Town Planning, But Unjustifiably Detained, Molted and Suppressed by the Police
11. Midnight Blue
12. Civil Right Action Group
13. Hong Kong Domestic Workers General Union

B. Organization which has provided written submission only

Society for Community Organization