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Mr Raymond Lam
Clerk to LegCo Panel on Security
Legislative Council
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Dear Mr Lam,

Follow up to the Panel meeting held on 27 October 2008

At the Panel meeting held on 27 October 2008, Members requested the Administration to provide a written response on a number of issues relating to the Police's undercover operations against vice activities and the handling of searches of detainees by the Police. We set out below the Administration's response to the issues raised by Members.

Number of occasions on which police officers obtained approval to receive limited sexual service during undercover operations against vice activities from July to September 2008

The information requested involves sensitive law enforcement information and may compromise the ongoing operations of the Police against vice activities. The information provided below is given on a one-off basis just to illustrate, as Members requested, that police officers do not seek approval to receive limited sexual service on a regular basis.

During the three months from July to September 2008, there was only one occasion on which a police officer was given approval by his senior to receive masturbation service, as a form of limited sexual service¹, for the purpose of an undercover operation against vice activities. In the event, the police officer completed the operation without actually receiving any masturbation service.

Legal advice relating to anti-vice undercover operations

In a note submitted to the Panel in September 2006 (LC Paper No. CB(2)3021/05-06(01) at Annex A), the Administration had explained why, in some cases having regard to the elements of crime that need to be proved by the prosecution before the court, there could be a strong operational need for an undercover police officer to act like normal customers and to receive some form of sexual services offered to them. In gist, this is to enable a police officer posing as customer to maintain his cover until he has collected sufficient evidence to secure successful prosecution against the suspected offender. The extent and form of such sexual service would be restricted to that as required by operational need and police officers engaging in the undercover operations are required to strictly comply with the relevant internal guidelines.

Therefore, depending on the operational circumstances, masturbation would be involved for the purpose of collecting evidence in an undercover operation in some instances to avoid blowing the cover of the undercover officer. That being the case, each case requiring a police officer to receive masturbation service during an undercover operation should have strong justifications and these cases are rare after all.

Level III searches conducted on detainees by police officers from July to September 2008

Members requested information on the nature of offences involved for those detainees subject to a level III search during July to September 2008, the number of complaints received against searches conducted on detainees by police officers during the same period, and a breakdown of the level III searches conducted on detainees by police officers during the same period (in particular those involving complete removal of underwear).

¹ If it is essential for the undercover officer to actually receive some limited form of sexual service in order to maintain his cover, the extent of this shall be restricted to that as required by operational need. Sexual intercourse and oral sex are strictly forbidden.

On the nature of offences involved for detainees subject to a level III search from July to September 2008, a breakdown is at **Annex B**. As at 1 December 2008, the Complaints Against Police Office has received one complaint that is alleged to involve a level III search and none concerning level I and level II searches conducted on detainees during the said period.

The Communal Information System (CIS) in the police force is unable to provide a breakdown of level III searches conducted on detainees during the said period into those involving complete removal of underwear and those involving only partial removal of / looking into the underwear. The Police will consider the feasibility of enhancing the CIS to facilitate future retrieval of information on searches involving complete removal of underwear.

With the incorporation of new functions in the CIS, starting from early January 2009, the Police will be able to retrieve statistics on level I, level II and level III custody searches more readily from the CIS, together with the nature of offences involved.

Random checking of records of level III searches conducted on detainees by police officers

Members suggested that the Police should consider assigning an officer of at least Assistant Commissioner of Police rank to random check records of level III searches conducted on detainees by police officers during the period from July to September 2008 to ascertain whether those searches were properly conducted.

Under the new guidelines which took effect from 1 July 2008, a Duty Officer will determine the scope of a search to be conducted on a detainee on a case-by-case basis, based upon the prevailing circumstances. A search involving removal of underwear will only be carried out in restrictive circumstances on the instruction of a Duty Officer in accordance with revised PGO's 49-04 (8) and (9). All searches conducted on detainees, regardless of the scope of the search, will be recorded in the CIS.

Under the prevailing arrangement, the immediate supervisor of the Duty Officers (usually at Senior Inspector rank) are required to review all cases entered into the CIS twice per shift to ensure that they are appropriately dealt with, including the compliance of searches on

detainees with the new guidelines. The current arrangements have provided appropriate safeguards to prevent arbitrary searches on detainees and to ensure that police officers handling such searches respect the rights and dignity of the detainees.

Response to the Hong Kong Bar Association's position paper on the Police's practices in handling searches of detainees

A copy of the reply issued by the Commissioner of Police to the Hong Kong Bar Association on the latter's position paper is at **Annex C**.

The United Nations Committee Against Torture hearing held in November 2008

Members enquired about the composition of the HKSARG team for the recent hearing of the United Nations Committee Against Torture. The team was led by the Deputy Solicitor General and comprised other representatives from the Constitutional and Mainland Affairs Bureau, the Security Bureau and the Department of Justice.

Yours sincerely,



(Apollonia Liu)

for Secretary for Security

c.c.

CP (Attn : Mr A. Kerrigan)
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For information

LEGISLATIVE COUNCIL PANEL ON SECURITY

**Supplementary information on
Police's undercover operations against vice activities**

Purpose

This note sets out the Administration's response to the issues raised in the submission from Professor Simon Young to Zi Teng dated 3 April 2006. It also provides the information related to massage establishments requested by Members at the meeting held on 4 April 2006.

Submission from Professor Simon Young

2.. Four major issues were raised by Professor Simon Young in his submission. The Administration's response is set out in the following paragraphs.

Issue 1: Is it necessary for undercover agents to receive sexual services in order to gather sufficient evidence for prostitution-related offences under investigation?

3. Professor Young is of the view that it is unnecessary for undercover agents to receive sexual services in order to gather sufficient evidence for prosecuting certain prostitution-related offences¹.

4. The Administration does not share Professor Young's views. Given the nature of the illegal activities that anti-vice operations are targeting at, there could, in some cases, be a strong operational need for the Police officer posing as customer to receive some form of sexual service from a prostitute so as to maintain his cover to collect the necessary evidence to secure successful prosecution against the offenders. The circumstances in question could include the following -

- (a) Among others, one of the major purposes of undercover operations against vice activities is to ascertain whether

¹ As mentioned in paragraph 1 on the second page of Professor Young's submission to Zi Teng dated 3 April 2006. The offences include sections 4(1) and 13(1) of the Massage Establishments Ordinance (Cap. 266), as well as sections 137(1), 139(1), 143(1), 144(1), 145(1) and 147(1) of the Crimes Ordinance (Cap. 200).

and, if so, what offences are being committed inside the relevant premises (which could be vice establishments or massage establishments), as well as to collect the necessary evidence to prove the commission of the offences. In this regard, it should be noted that mere sex talk is not sufficient to prove the existence of vice activities. From a legal perspective, as often prostitutes would not testify for the prosecution against those who run the vice business, what the prostitutes say to the undercover Police officer (save for admission of their own guilt under caution) is not evidence of the truth of the content. So even if a prostitute tells the undercover Police officer that "A" is her boss, this information amounts to hearsay and cannot be used as evidence against "A". The conversation between the Police officer and the prostitute could only be used to prove the nature of the business that the prostitute is engaged in and the type of activities the premise is related to. Hence, it might sometimes be necessary for the undercover Police officer to go along to receive some form of services offered to him, be it massage (which often include massaging the intimate part of his body) or sexually-related, in order to stay undercover and to collect more concrete evidence to prove a criminal offence relating to vice or massage establishments.

- (b) In order to secure successful prosecution against the offenders (be it the keeper, manager, assistant manager or licensee, etc.) for such offences, the undercover Police officer would need to collect concrete evidence to prove the different roles played by all those who are involved in the vice activity/business. As the law stands, for all offences (save for section 147(1) of the Crimes Ordinance (Cap. 200)) mentioned by Professor Young in his submission (see footnote 1), it must be proved that the premises (i.e. a 'vice-establishment' as defined under section 117(3) of Cap. 200, or a 'massage establishment' as defined under section 2 of the Massage Establishment Ordinance (Cap. 266)) where the vice or massage activities are carried out are kept or used for such purposes, i.e. over a period of time or at least not for a single incident. So, there is a need to prove an element of continuity in the vice or massage business

(see for example *HKSAR v MA Pik-ki* HCMA 950 of 2003 per McMahon J on 'kept or used', *R v CHEUNG Yuet-pang* [1991] 1 HKC 569 per Sears J on 'habitual prostitution' regarding offence under section 137(1) of Cap. 200). Hence, it would be necessary for the undercover agents to act like normal customers and to receive some form of sexual services offered to them, or else they may not be able to maintain their cover long enough to collect sufficient evidence against the persons concerned.

- (c) In cases where the Police are targeting at the syndicates behind the illegal activities (i.e. those who are involved in the operational control or management – including those running, keeping, managing and/or owning the business), apart from proving that vice activities do take place inside the premises, it is also necessary to prove that the people concerned know that vice/illegal activities are taking place within their premises. However, the controllers of these syndicates do not show up as often as the staff (who are often used as foot soldiers or frontiers) or prostitutes. As a result, it becomes necessary for undercover Police officers to visit the premises more than once or even over a period of time in order to collect sufficient evidence to press charges against the "big bosses" behind these syndicates. In the process, the undercover Police officers would have to continue acting as normal customers and receive some form of sexual services in order to succeed in the operation.

5. It is also relevant to note that there are a number of vice-related offences, for example, those under Part XII of Cap. 200 (from sections 129 to 147B) and Cap. 266, apart from the ones referred to by Professor Young. Different offences require different elements to be proved. It is only reasonable to allow the Police to plan their operation with a reasonable degree of flexibility so that the necessary evidence could be gathered to allow subsequent prosecutions of any offences uncovered during such operations.

6. The Police remind their undercover officers before each and every operation the extent and form of the sexual service the latter could receive during operation shall be restricted to that as required by

operational needs. In particular, sexual intercourse and oral sex are strictly forbidden and this is clearly stated in the Police internal guidelines governing anti-vice operations. All officers engaging in these undercover operations are required to strictly comply with the guidelines.

Issues 2 and 3: Is the receipt of sexual services by undercover agents illegal? Can the practice of receiving sexual services ultimately jeopardize the criminal investigation?

7. Professor Young has pointed out in his submission that the receipt of consensual sexual services by undercover officers is not illegal if it does not involve a girl under the age of 16, or if the undercover officer does not intend to enjoy free service from the outset. Professor Young is also of the opinion that the receipt of sexual services during undercover operations might be regarded as Police entrapment, thus jeopardizing the criminal investigations.

8. It is important to distinguish between Police incitement which results in the commission of an offence and undercover Police investigation which is an essential tool in the investigation of certain types of crime, and which is necessary if the Police are to do their work properly (see *HKSAR v HEUNG Yu-nam* [1997] 3 HKC 632 at 639, CA). Case law has clearly established that if an offence is one which the offender would not have committed had he/she known that the person approaching him/her or drawing him/her in was a policeman, and that is the only reason he/she would have refrained from its commission, that is not an entrapment situation (see *R v LIU Chun-fai* [1987] HKLR 1032, CA). So, if what an undercover Police did was to infiltrate a criminal enterprise and thereafter played some role in it to investigate and gather evidence, such conduct would not in itself constitute entrapment (see *R v SIU Yuen-fong and another* [2002]4 HKC 692, at 711, Stock J). We therefore do not consider that undercover Police operations against vice activities amount to entrapment.

Issue 4: By receiving sexual services, has the undercover agent breached any ethical standards (either according to those of the Hong Kong or other international standards)?

9. Professor Young has raised concerns on the ethical aspect of undercover operations against vice activities. As previously explained, undercover agents engaging in anti-vice operations are performing their professional duties in collecting evidence, which is an important step in crime investigation and detection. All such operations are closely

supervised to ensure that they are properly conducted in accordance with the law and established Police guidelines.

Information Related to Massage Establishments

10. In 2005, 1 085 and 88 persons were arrested in relation to the offences of “keeping a vice establishment” (section 139 of Cap. 200) and “operating an unlicensed massage establishment” (section 4(1) of Cap. 266) respectively. For the former offence, 903 persons were charged and 848 persons convicted; for the latter offence, 135 persons were charged and 127 persons convicted.² However, we do not maintain statistics on cases involving a complete course of masturbation, nor the type of persons prosecuted (and hence the details of the cases related thereto).

11. A Member asked for the statements of the cases discussed at the meeting held on 4 April 2006. However, as the statements concerned are related to Police undercover operations and contain operational tactics, it would not be appropriate to disclose them for public scrutiny. Moreover, as the statements were prepared solely for the purpose of the cases concerned, it would not be appropriate for the Administration to release them to parties other than those related to the cases in question.

**Security Bureau
September 2006**

² Persons prosecuted / convicted in 2005 might not be arrested in the same year. Moreover, there might be changes to the offences in question when they were finally charged (as compared to the offences for which these persons were arrested). Hence, it might not be appropriate to make direct comparison between the number of arrested persons, and the number of persons prosecuted and convicted quoted above.

**Level III Searches Conducted on Detainees
from July to September 2008 –
by Nature of Offences Involved**

Nature of offences involved	Percentage of all Level III searches on detainees
(a) possession of dangerous drugs	34.2%
(b) illegal immigrants and overstayers	15.7%
(c) thefts	13.5%
(d) assaults	6.5%
(e) wanted persons	6.3%
(f) others (e.g. robbery, burglary, sexual offences and criminal damage)	23.8%

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8 December 2008.

Mr Rimsky Yuen, SC
Chairman
Hong Kong Bar Association
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Hong Kong.

Dear Mr Yuen,

Handling of Searches of Detainees
New Police Guidelines

I refer to your letter addressed to the Commissioner of Police (the Commissioner) dated 16 October 2008, enclosing the Bar Association's Position Paper regarding the "Handling of Searches of Detainees - New Police Guidelines". I am authorized to reply.

The documents referred to in the Bar Association's position paper, namely revised Police General Orders 49-04, revised section 49-04 of the Force Procedures Manual, the Custody Search Form (Pol. 1123) and the Guidelines on the Searching of Detained Persons relate specifically to persons to be detained in a police Temporary Holding Area (THA) or police cell. The new measures were introduced on 1 July 2008 to better address human rights guaranteed under our law, including Article 28 of the Basic Law, and Articles 6(1) and 14 of the Hong Kong Bill of Rights which have incorporated Articles 10(1) and 17 of the International Covenant on Civil and Political Rights (ICCPR). Further, the enhanced measures make clear a detained person's rights and what treatment he can expect when detained in police custody.

In its position paper, the Bar Association raised concern about the reasonableness of the Commissioner's determination to conduct a search every time a person in police custody enters a police detention facility. In this regard, the Commissioner is of the view that it is necessary to search each and every person prior to his being detained in a THA or police cell to ensure that detainees do not have with them anything which might facilitate their escape, or assist others to do so; anything which might be used to injure themselves or others; any evidence material to an offence which might otherwise be destroyed or disposed of; and any article which might be used to commit a further crime, such that the Force can fulfil its duty of care to persons detained in custody and ensure the safety of others who may come into contact with persons detained in police custody. However, the scope of each search will need to be determined by the officer responsible for the search having regard to the particular circumstances of each case, and the officer will, in all circumstances, be required to justify the scope of the search authorized.

In brief, the prevailing arrangement for the search of detainees in police custody is founded on the principles of necessity and proportionality. Legal advice has confirmed that the search of a detained person in police custody, 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.

Taking account of the suggestions made by some Legislative Councillors following the implementation of the new search guidelines for detainees in police custody, the Police are considering the feasibility of using electronic tools such as hand-held metal detectors to perform certain searches of detainees and are conducting a trial on this.

We would like to emphasize that, as stipulated in the revised Police General Order 49-04(10), "(s)earches of detained persons are never to be used as a punitive measure. In particular, a search involving the removal of underwear should not be conducted routinely but only in circumstances with strong justification." Specific procedural requirements are hence put in place such that searches involving the removal of clothing (including underwear) are carried out under restrictive conditions designed to protect a detained person's human rights. These work to the effect that the responsible police officer should not require a detained person to remove all of his clothes at the same time; that the officer should complete the search as quickly as practicable and allow the detained person to put on his clothing as soon as the search is completed; and that the search should be conducted in an area that provides reasonable privacy, certainly not in view of persons other than those officers involved in the search. The Police management has been closely

monitoring the operation of the revised procedures to ensure their effective implementation and strict compliance by frontline officers, and will continue to do so.

Under the prevailing arrangement, all searches conducted on detainees, regardless of the scope of the search, are recorded in the Force's Communal Information System (CIS). The immediate supervisor of the Duty Officer authorizing a custody search involving removal of underwear is required to review all cases entered into the CIS twice per shift to ensure that they are appropriately dealt with, including the compliance of searches on detainees with the new guidelines.

We wish to point out that if a detainee has any concerns about a search, he may raise them for consideration by the Duty Officer. The Duty Officer's decision, together with his reasoning and/or any other actions taken, will be conveyed to the detained person and recorded in the CIS. Should a detained person feel aggrieved by the search, he may lodge a complaint with the Complaints Against Police Office (CAPO), and CAPO's investigation outcome is subject to the scrutiny of the Independent Police Complaints Council.

I would like to take this opportunity to thank you for sharing with us the Bar Association's position paper.

Yours sincerely,



(Austin Kerrigan)
for Commissioner of Police

c.c. Secretary for Security
Independent Police Complaints Council
The Hon Margaret Ng, Legislative Council Member