

**Re: Handling of Searches of Detainees
New Police Guidelines**

Position Paper of the Hong Kong Bar Association

New Police Guidelines

1. The Secretary for Security informed the Legislative Council in June 2008 that new arrangements would be in force from 1 July 2008 on the handling of searches of detainees in police custody. The arrangements are embodied in the following documents:
 - (a) Revised Police General Order (“PGO”) 49-04;
 - (b) Revised Police Force Procedures Manual (“FPM”) 49-04;
 - (c) New ‘Custody Search Form’ (Pol. 1123); and
 - (d) New ‘Guidelines on the Searching of Detained Persons’.
2. The key revisions of PGO/FPM 49-04 concern the role of the Duty Officer (“DO”) in determining the ‘scope’ or level of search required. This will be determined on a case by case basis, based on the prevailing circumstances and may take into consideration the following factors (which are not exhaustive):
 - (a) The nature of the offence committed;
 - (b) The criminal record of the detainee;
 - (c) The level of violence exhibited during the offence and upon arrest;
 - (d) The demeanour following the arrest and during case processing;
 - (e) Any suicidal tendency exhibited;
 - (f) Any previous history of self-harm;
 - (g) Any other behavioural characteristics displayed; and
 - (h) Any other relevant factors.
3. Based on his determination, the DO will instruct a search involving on of the following:

- (a) “Non-removal of clothing” – a pat-down search including emptying of pockets and search of handbag;
 - (b) “Removal of clothing” – removal of coat, trousers, shirt, blouse and the search of those items;
 - (c) “Removal of underwear” – search of and request for removal of clothing usually worn to cover the private parts.
4. The DO (or an authorized deputy) must explain to the detainee the reason for and the scope of the search to be conducted. A new ‘Custody Search Form’ (Pol. 1123) is to be completed for each and every search and served on the detainee. The new form, somewhat similar to the Pol. 153 ‘Notice to Persons in Custody’ is to be read by or read over to the detainee. It sets out the reason for and the scope of the search and provides details of how the search is to be conducted. It permits a detainee to note any ‘concerns’ he might have with regard to the search before being invited to sign in acknowledgement. The Police copy of the forms will be retained for a period of 2 years.
5. The DO (or an authorized deputy) must also record details of each search in the Force Communal Information Computer System (“FCIS”). This includes details of any ‘concerns’. A number of guideline examples of input to the FCIS were provided to members of the Legislative Council.

The Bar Association’s General Views on the New Police Guidelines

6. The new Police Guidelines require, for the first time, that a designated officer is to justify the scope and conduct of a search based on objective and identifiable criteria. His determination is therefore accountable in the sense that any search which is disproportionate or not commensurate to the factors available for consideration might be considered excessive. For the first time, these factors must be explained and recorded both in a document served upon the detainee and in the FCIS. For the first time, any objection or concern can be recorded.
7. Whilst PGO/FPM are internal arrangements and not guidelines comparable to key provisions of the Secretary for Security’s Rules on Questioning Suspects and Recording of Statements “having the force of law”, they

nonetheless provide criteria against which Police conduct may be judged. As such, the arrangements represent an attempt to reflect the functions Police officers discharge and the need to provide safeguards to protect the rights of detained persons and prevent arbitrary or abusive searches.

8. The Bar Association appreciates that certain members or sectors of the public have raised concerns about the new arrangements, especially on the question of whether they would be used as ‘an administrative and procedural veil for continued abuse of detainees by arbitrary searches’.
9. This position paper sets out the Bar Association’s views on the new arrangements and will address the said public concerns, especially with regard to the determination of the Commissioner of Police (“the Commissioner”) that every person in police custody is to be searched every time he or she enters a detention facility maintained by the police.
10. Before dealing with specific matters, it will be desirable to preface our observations with these general comments. The Police are empowered under a framework of statutes (including sections 50(6), 54(1) (c) and 54(2)(c) of the Police Force Ordinance (Cap. 232)) to search for anything that might represent evidence of an offence or danger to an officer.
11. The Police also have a duty to ensure that no person detained in custody represents a danger to himself or others, including possession of articles which the detainee may use to commit further offences.
12. From the materials available to us, it appears that the said public concerns are directed not at any legislative provision but on the manner in which Police powers are or may be executed.

The Bar Association’s Views on the Commissioner’s Determination to conduct search every time a person in police custody enters a police detention facility

13. The Commissioner has made it explicit that all persons detained in police custody must be searched each time he or she is to enter a police detention facility. This represents an order that mandates searches in every custody case. However, the power to search is exactly that: A power to be exercised according to the prevailing circumstances, as a matter of discretion. A PGO

advising when a search needs to be made preserves discretion. On the other hand, an order that mandates searches removes discretion altogether and is on the face unreasonable.

14. The Commissioner seeks to justify the each time search requirement on the basis that it is impossible for the Police to be totally certain that the detainee did not get hold of any items during the period outside the facility which the detainee could use to harm himself or others.
15. The Commissioner's determination exposes a systematic practice which might not be justified in many of the individual cases. The question is whether the precaution adopted by the Commissioner meets the proportionality test, *viz.*, whether the each time search requirement is proportionate, in the sense of bearing a rational connection with the purpose(s) (which must be legitimate themselves) sought to be achieved through the requirement and being the least intrusive means for achieving those purposes. In short, a right balance has to be struck between the competing considerations of human dignity, prevention and detection of crime and custodian responsibility. In this connection, it should be noted that the Commissioner has not sanctioned routine strip searching of all persons detained in police custody. Rather he left the determination of the scope of the search with the DO with instructions on the factors to be taken into account. On the other hand, there have been complaints that strip searching was required routinely of some categories of persons who had to be detained night after night in police custody.
16. The Commissioner's determination can be contrasted with the position taken in the United Kingdom under the Police and Criminal Evidence Act 1984 ("PACE 1984"). Searches by a constable of persons in detention at a police station can take place only under the authority of PACE 1984. Section 54 of PACE 1984 provides for a duty of the custody officer (performing a role comparable to the DO in the Hong Kong context) at a police station to ascertain and record everything that an arrested person has with him. The arrested person may be searched if the custody officer considers it necessary to enable him to carry out that duty and to the extent that the custody officer considers necessary for that purpose. The custody officer is empowered to seize and retain anything but if the things are clothes or personal effects, that may only be seized if the custody officer believes that the person from whom

they are seized may use them to cause injury, to damage property, to interfere with evidence or to assist his escape or if the custody officer has reasonable grounds for believing that they may be evidence relating to an offence.

17. The notes for guidance to the exercise of the powers under section 54 of PACE 1984 emphasize that these provisions do not require every detainee to be searched, for example, if it is clear a person will only be detained for a short period and is not to be placed in a cell.
18. PACE 1984 is supplemented by codes of practice for constables. Code of Practice C Annex A deals with intimate and strip searches. Strip search is a search involving the removal of more than outer clothing including shoes and socks. A strip search may take place only if it is considered necessary to remove an article which a detainee would not be allowed to keep, and the officer reasonably considers the detainee might have concealed such an article. Strip searches shall not be routinely carried out if there is no reason to consider that articles are concealed.
19. Thus, the Code of Practice C under PACE 1984 has the protection of limiting strip searches only for the objective of removing an article that a detainee would not be allowed to keep and the custody officer reasonably considers the detainee might have concealed.
20. There is an additional dimension. The Administration and the Commissioner have been analyzing the matter of the handling of searches of persons in police detention in terms of personal liberty, integrity and privacy.
21. It appears that the Administration and the Commissioner have not addressed adequately the prohibition in Article 3 of the Hong Kong Bill of Rights of inhuman or degrading treatment or punishment.
22. There are cases of the European Court of Human Rights dealing with how a strip search may become inhuman or degrading treatment or punishment. The Court affirms that a search carried out in an appropriate manner with due respect for human dignity and for a legitimate purpose may be compatible with Article 3 of the European Convention on Human Rights (which prohibits torture and other inhuman or degrading treatment or

punishment). However, where the manner in which a search is carried out has debasing elements which significantly aggravate the inevitable humiliation of the procedure, the article will be engaged. The following are examples that the Court had held to have engaged the article: (a) where a prisoner was obliged to strip in the presence of a female officer, his sexual organs and food touched with bare hands; (b) where a search was conducted before four guards who derided and verbally abused the prisoner; (c) where the search has no established connection with the preservation of prison security and prevention of crime or disorder.

23. Two other cases should be mentioned in greater detail. In *Wainwright v United Kingdom* (App 12350/04, 26 Sep 2006), civilians visiting a close relative in prison were strip searched on the ostensible reason of preventing circulation of dangerous drugs within prison. In holding that the strip search was inhuman or degrading treatment or punishment, the Court emphasized that the application of the highly invasive and potentially debasing procedure of a strip search to persons who are not convicted prisoners or under reasonable suspicion of having committed a criminal offence must be conducted with rigorous adherence to procedures and all due respect to their human dignity.
24. In *Van der Ven v Netherlands* (App 50901/99, 4 Feb 2003), a prisoner was subject to a regime involving *inter alia* systematic strip search of the prisoner for a long term without convincing security needs. The Court indicated in that case that detention in a high security prison facility be it on remand or following a criminal conviction in itself raises an issue of inhuman or degrading treatment or punishment. The Court's task is limited to examining the personal situation of the applicant who has been affected by the regime concerned. Nonetheless, the prohibition of inhuman or degrading treatment or punishment requires the States to ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured. The applicant in that case was strip-searched prior to and following an "open" visit as well as after visits to the clinic, the dentist's surgery or the hairdresser's. In addition, there was a strip search during the weekly cell

inspection for a period of three and a half years. The Court found the weekly strip searches as applied for the said duration diminished his human dignity and must have given rise to feelings of anguish and inferiority capable of humiliating and debasing the applicant and thus found a violation of the said prohibition.

The Bar Association's Suggestion on determination of search requiring removal of underwear

25. The Bar Association suggests that it is worth exploring the feasibility of providing a person in police custody who is to be subject to a search requiring removal of underwear a mechanism of an immediate internal review by an officer of at least chief inspector or superintendent rank not related to the investigation or performance of police function that led to that person being in police custody.
26. The Bar Association considers that the suggested internal review mechanism is an additional safeguard that can be readily administered since according to the new arrangements, the DO is required to record in FCIS particulars of each search determination, including matters of 'concerns' and how he reached his determination to require most intrusive of searches.

Hong Kong Bar Association
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