

Monday, November 23, 1992

Law Reform Commission Proposes New Concepts to Arrest Law

The Law Reform Commission has recommended the introduction of a number of new concepts to the law governing police powers of arrest and detention aimed at maintaining a fair and proper balance between law and order and the liberty of the subject.

The Commission's proposals are broadly based on the United Kingdom Police and Criminal Evidence Act 1984 (PACE) with some modifications to suit the local environment.

The Secretary of the Law Reform Commission, Mr Stuart Stoker, said today (Monday) the Commission believed that Hong Kong would benefit from the introduction of clear legislation, easily understood and accessible by both the Police and the public at large.

The proposals include the designation of special Police stations for detaining suspects, the introduction of a procedure to review a person's detention, a definition of arrestable and serious arrestable offences, and classification of materials subject to legal privilege and materials to which the Police cannot gain access without following special procedures.

The Commission has also recommended that the power to establish a road check should be allowed in relation to an arrestable offence and that the existing power of the Police to carry out random identity checks without the need for any suspicion should be retained in order to control illegal immigration.

On detention of suspects, the Commission has proposed a detailed set of provisions setting out the periods for which a person may be detained before or after charge.

The publication today of the Law Reform Commission's report on arrest follows almost four years' work by a sub-committee under the chairmanship of Mr Justice Penlington.

The sub-committee's report was itself the subject of detailed consideration by the Commission.

The following are the key provisions of the Law Reform Commission's proposals:

1. Designated Police stations

Only those Police stations which have proper accommodation and facilities are to be designated as stations to which persons whose detention will last more than six hours must be taken.

2. Custody officers

Every designated Police station must have at least one custody officer of the rank of sergeant or above not directly involved in the investigation of the related offence. The custody officer will keep a detailed written record of such matters as the grounds for detention and decide whether or not a person's continued detention is justified.

3. Review officers

Periodic reviews of a person's detention must be carried out by a review officer. In the case of a person who has been arrested and charged, the review officer is the custody officer. Where the arrested person has not yet been charged, the review officer must be an officer of at least the rank of inspector not directly involved in the investigation.

4. Arrestable offences

The Law Reform Commission prefers to retain the existing definition of arrestable offence which is that it is an offence for which the sentence is fixed by law or for which a person may be sentenced to imprisonment for more than 12 months. Anyone may arrest without warrant any person who is in the act of committing or has committed an arrestable offence.

5. Serious arrestable offence

Where a serious arrestable offence is involved, the Police will be able to exercise more extensive powers, such as extended detention, the taking of intimate samples and delay in permitting access to legal advice. The Commission proposes that a serious arrestable offence should be defined as one for which a sentence of imprisonment of five years or more can be imposed, plus a number of additional specific offences. The Law Reform Commission has suggested that these additional specific offences should be identified by the administration in consultation with law enforcement agencies.

6. Items subject to legal privilege

Items subject to legal privilege include communications between a lawyer and his client and any documents or communications in connection with legal

proceedings. These materials cannot be seized by the Police.

7. Excluded material

Excluded material includes all personal records relating to a person's health, spiritual counselling or personal welfare; human tissue or fluid taken for diagnosis or medical treatment; and journalistic material in the form of documents or records. The Police cannot gain access to excluded material unless they follow a special procedure, which requires them to make an inter partes application to a judge for an order that the person in possession of the material produce the material or give the police access to it.

8. Special procedure material

Special procedure material includes, firstly, journalistic material which is not "excluded material" and, secondary, material acquired or created in the course of any trade, business, profession or other occupation which is held subject to an express or implied undertaking to hold it in confidence, or subject to a statutory restriction on disclosure. Broadly speaking, this category of material would cover such things as employment records or details of bank accounts, and film taken by a journalist of a non-confidential nature.

Access to special procedure material requires police to make an inter partes application to a judge for an order by satisfying the court that there are reasonable grounds for believing that a serious arrestable offence has been committed and that there is special procedure material on the premises which is likely to be of substantial value to the investigation and to be relevant evidence. In addition, the police have to show that they have tried other methods of obtaining the material and that granting access is in the public interest, having regard to the likely benefit to the investigation and the circumstances under which the material is held.

9. Road checks

The Commission has recommended that the power to establish a road check should be allowed in relation to an arrestable offence and that a road check be authorised by an officer of the rank of chief inspector or above. The Commission thinks it desirable that the police should, for instance, be able to establish road checks to assist in the identification of illegal immigrants.

The Commission further recommends that the existing power of the police to stop vehicles under the Road Traffic Ordinance should be preserved but that the law be amended to make it clear that it gives power to stop only for purposes related to offences under the Road Traffic Ordinance.

10. Identity checks

In view of the need to enforce the requirement to carry proof of identity, the Commission recommends that the existing power under the Immigration Ordinance which allows the Police to carry out random identity checks without the need for any suspicion should be retained.

The Commission, however, feels that the individual's criminal record should not be automatically available to the Police officer making a random identity check. As a safeguard against abuse of the power, the Commission recommends that the Police should be required to keep a written record of any identity checks.

11. Detention

Under the current law in Hong Kong, there is no clear legislative statement of the time limits governing the detention of persons by the Police. The Commission recommends the adoption of the PACE provisions setting out the periods for which a person may be detained before or after charge.

Broadly, a person should not be allowed to be detained for more than 24 hours without being charged. An officer of superintendent rank or above should be able to authorise detention up to 36 hours provided he has reasonable grounds for believing that : 1) continued detention is necessary to secure or to preserve evidence, or to obtain evidence by question him; 2) the offence is a serious arrestable offence; and 3) the investigation is being carried out diligently and expeditiously.

Further period of detention up to a total of 96 hours should be able to be authorised by a magistrates' court following a hearing at which detained person is present.

The Commission suggests the adoption of a provision that where a person has been charged he must be brought before a magistrates' court as soon as is practicable and in any event not later than the first sitting after he is charged with the offence.

Law Reform Report on Arrest Welcomed

The Acting Secretary for Security, Mr Ian Strachan, today (Monday) welcomed the publication of the report on arrest prepared by the Law Reform Commission.

“This is the product of four years of hard work by the sub-committee set up by the Law Reform Commission to consider this important issue,” he said.

“I am very grateful to the members of the sub-committee.”

Mr Strachan said the report had made a large number of detailed recommendations which he would need to consider carefully, together with the Police Force and the Attorney General’s Chambers.

He could not say how long this would take, but pointed out that this was an important issue and would be given priority.

“Our aim must be to ensure that the Police continue to have adequate powers to fight crime and that these powers contain the necessary safeguards against abuse,” Mr Strachan said.