

Executive Summary of LRC Report on Arrest

Background

1. The publication today of the Law Reform Commission's report on Arrest follows almost four years' work by a sub-committee of the Commission under the chairmanship of Mr Justice Penlington. The sub-committee's report was itself the subject of detailed consideration by the Commission, resulting in the final report now published.

2. The Commission's terms of reference were broadly "to examine the existing law and practice governing the powers and duties of police and other public officers and of private citizens relating to ... stopping ... and searching persons; entry search and seizure; arrest and detention; [and] questioning and treatment of persons held in police custody." The Commission were specifically asked by their terms of reference to consider whether the provisions of Parts I to VI, section 78 and Part XI of the United Kingdom Police and Criminal Evidence Act 1984 ("PACE") should be adopted in Hong Kong, with or without modification.

3. The terms of reference have naturally shaped both the way in which the Commission approached its task and the format of the final report. Essentially, the report consists of a section by section examination of those parts of PACE identified in the terms of reference, coupled with an outline of the existing Hong Kong law in each area. In broad terms, the Commission concludes that the PACE provisions are sensible and recommends their adoption in Hong Kong. In a few areas, the Commission recommends that the PACE provisions should be modified to take account of the different circumstances of Hong Kong.

Overview of PACE

4. The provisions of PACE are based on the recommendations of the 1981 Royal Commission on Criminal Procedure. The then Home Secretary, Leon Brittan, said in 1984 that:

"The Government's aim has throughout been to ensure that the police have the powers they need to bring offenders to justice, but at the same time to balance those powers with new safeguards to ensure that these powers are used properly and only where and to the extent that they are necessary."

PACE is intended to strike a satisfactory balance between police powers and the rights of the suspect. In effect, the Act aims to give the police the powers they need to investigate crime, but accompanies these with appropriate safeguards.

5. One of the criticisms levelled at the pre-PACE law in England and Wales governing police powers for the investigation of crime was that it was unclear and antiquated. The Law Reform Commission concludes in its report that the concerns which led to a critical re-examination of police powers and practices in England and elsewhere are equally applicable to Hong Kong. The Commission believes that Hong Kong would benefit from the introduction of a code, clearly setting out the law, which was readily accessible and easily understood by both the police and the public at large. The new provisions should maintain a fair and proper balance between law and order and the liberty of the subject.

The key provisions of PACE and the LRC's proposals

6. PACE introduced a number of new concepts to the law on arrest. The main ones are explained below, together with a description of the most significant recommendations of the LRC's report:

(i) "Designated police stations"

7. Only those stations which have proper accommodation and facilities are "designated" as stations to which persons whose detention will last more than 6 hours must be taken. The standards required are laid down in one of the Codes issued in pursuance of the Act. The LRC recommends that as many police stations as possible be designated in order to minimise the occasions on which arrested persons have to be moved away from their residential community.

(ii) "Custody officers"

8. Every designated police station must have at least one custody officer. A custody officer must be of the rank of sergeant or above and must not be involved in the investigation of the offence for which the individual has been detained. The custody officer's function is to ensure that the terms of the Act and Codes are complied with in relation to persons detained. He must keep a detailed written record, known as the custody record, in relation to each detained person. This record will include details of such matters as the grounds for detention (sections 37(4) and 38(3)) and for further detention (section 42(5)). The custody officer must decide whether or not a person's continued detention is justified. If detention is no longer justified in terms of the Act, he must arrange for the person detained to be released (section 37(2)).

(iii) "Review officers"

9. 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 (section 40(1)(a)). Where the arrested person has not yet been charged, the review officer must be an officer of at least the rank of inspector who has not been directly involved in the investigation (section 40(1)(b)). The first review must be carried out not more than six hours after detention was first authorised. The second review must be not later than nine hours after the first, and any subsequent reviews must be at intervals of not more than nine hours (section 40(3)). A record of each of these reviews must be made in the custody record. The purpose of the review officer is to ensure that a person independent of the investigation reviews the grounds for continued detention at regular intervals.

(iv) "Arrestable offences"

10. The LRC differs from PACE in its recommendation on this. PACE provides that an arrestable offence is one for which the sentence is fixed by law (such as murder), for which a person may be sentenced to imprisonment for 5 years or more, and certain additional specific offences. The LRC prefer to retain the definition of arrestable offence in section 3 of the Interpretation and General Clauses Ordinance (Cap 1) 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 an arrestable offence, or has committed such an offence, or whom he has reasonable grounds for suspecting to be committing such an offence, or to have committed such an offence.

(v) "Serious arrestable offence"

11. A "serious arrestable offence" is defined in two ways in section 116 of PACE. Firstly, certain listed offences are always categorised as serious. These include offences such as murder, treason, rape, kidnapping, etc. Additionally, however, any arrestable offence can be treated as a serious arrestable offence if it is likely to cause:

- (a) serious harm to the state or public order;
- (b) serious interference with the administration of justice or with the investigation of offences or of a particular offence;
- (c) death;

- (d) serious injury;
- (e) substantial financial gain to any person; or
- (f) serious financial loss to any person.

12. The significance of the concept of the serious arrestable offence is that it is only in relation to such offences that the police are able to exercise certain of the more extensive powers under PACE, such as extended detention, the taking of intimate samples, delay in permitting access to legal advice, etc. The LRC recommends that 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 LRC has not sought to identify these offences in its report and suggests this is a matter best left for the Administration in consultation with the police and other law enforcement agencies. The Commission points out that certain offences are viewed by the public as more serious than the sentence applicable to them would suggest. They suggest as an example the offence of taking a conveyance without authority, contrary to section 14 of the Theft Ordinance (Cap 210), for which the penalty is 3 years imprisonment.

(vi) "Items subject to legal privilege"

13. PACE introduced three separate categories of evidence: items subject to legal privilege; excluded material; and special procedure material. The powers of seizure which the police have differ according to the category of evidence with which they are dealing. The LRC favours the adoption of the PACE provisions without modification and suggests that these represent an improvement on the existing law in Hong Kong.

14. "Items subject to legal privilege" are defined in section 10 and includes communications between a lawyer and his client and any documents or communications in connection with legal proceedings. This material cannot be seized by the police

(vii) "Excluded material"

15. This is defined in section 11. It includes any of the following material which a person holds in confidence:

- (a) all personal records relating to a person's health, spiritual counselling or personal welfare which were acquired or created in the course of a trade, business, profession or other occupation;

- (b) human tissue or fluid taken for diagnosis or medical treatment; and
- (c) journalistic material in the form of documents or records. Journalistic material means material acquired or created for the purposes of journalism.

16. The police cannot gain access to excluded material unless they follow the special procedures laid down in Schedule 1 to the Act. This 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.

(viii) "Special procedure material"

17. This is defined in section 14 as journalistic material which is not excluded material and material (other than excluded material or material subject to legal privilege) 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. The journalistic material covered by this category would include such items as film taken by a journalist of a non-confidential nature.

18. Access to special procedure material can be gained in the same way as to excluded material, or by satisfying the court that there are reasonable grounds for believing that:

- (a) a serious arrestable offence has been committed;
- (b) there is special procedure material on the premises;
- (c) the material is likely to be of substantial value to the investigation;
and
- (d) the material is likely to be relevant evidence.

In addition, the police have to show that they have tried other methods of obtaining the material (or that any attempt was bound to fail) 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.

(ix) Road checks

19. PACE allows the police to establish road checks where a a serious

arrestable offence is involved. Checks must be authorised by an officer of the rank of superintendent or above.

20. The LRC recommends following the PACE provisions on road checks but differs from them in two important aspects. Firstly, the LRC recommends that the power to establish a road check should be allowed in relation to an arrestable offence and not restricted to serious arrestable offences. The LRC consider that a limitation of the power of the police to initiate road checks to serious arrestable offences would be too restrictive. The LRC think it desirable that the police should, for instance, be able to establish road checks to assist in the identification of illegal immigrants. The LRC further recommends that the power of the police to stop vehicles which is at present contained in section 60 of the Road Traffic Ordinance (Cap 374) should be preserved but that the section should be amended to make it clear that it gives power to stop only for purposes related to offences under the Road Traffic Ordinance.

21. The second point on which the LRC differ from the PACE recommendations is that they think the requirement under section 4(3) of PACE that a road check be authorised by an officer of the rank of superintendent or above is too restrictive. The LRC recommend that the requirement should be for authorisation by an officer of the rank of chief inspector or above.

(x) Identity checks

22. As the LRC points out, there is no obligation under United Kingdom law for an individual to carry with him proof of identity. There is consequently no equivalent police power to carry out an identity check. In Hong Kong, the requirement to carry an identity card originally arose from the need to control illegal immigration. The LRC argue that if the requirement to carry proof of identity is to be enforced, the police must have powers to enable them to require production of a person's proof of identity. The Commission therefore recommend that the existing power contained in section 17(2) of the Immigration Ordinance (Cap 115) which allows the police to carry out random identity checks without the need for any suspicion should be retained. They add, however, 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 LRC recommend that the police should be required to keep a written record of any identity checks.

(xi) Detention

23. One of the criticisms of the pre-PACE law in England, and of current Hong Kong law, is that there is no clear legislative statement of the time

limits which apply on detention. PACE introduces a detailed set of provisions setting out the periods for which a person may be detained before or after charge. The LRC recommends the adoption of all these provisions.

24. Broadly, a person is not allowed to be detained for more than 24 hours without being charged (section 41 of PACE). An officer of superintendent rank or above can authorise detention up to 36 hours (ie for a further 12 hours) provided he has reasonable grounds for believing that:

- (a) continued detention is necessary to secure or preserve evidence or to obtain evidence by questioning him;
- (b) the offence is a serious arrestable offence; and
- (c) the investigation is being carried out diligently and expeditiously.

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

25. Section 46 of PACE provides 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. The LRC recommend the adoption of this provision and point out that it provides for stringent time limits for bringing a charged person to court, and establishes much needed certainty.