

**THE LAW REFORM COMMISSION OF HONG KONG**

**REPORT ON ARREST**

**[TOPIC 25]**

**AUGUST 1992**

# THE LAW REFORM COMMISSION OF HONG KONG

## REPORT ON ARREST

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## **ACKNOWLEDGEMENT**

**In the sections of this report which discuss the significance of the provisions of the Police and Criminal Evidence Act 1984, the Law Reform Commission has relied in large part on the annotations to the Act by Professor M.D.A. Freeman in Volume 4 of the 1984 "Current Law Statutes Annotated," published by Sweet and Maxwell. Professor Freeman's annotations constitute much of the material contained in the "Overview" and "Significance of the Section" passages in Chapters 3 to 7 and Chapter 10.**

**The Commission acknowledges with gratitude the permission given by Professor Freeman and Sweet and Maxwell to reproduce Professor Freeman's work in this report.**

# Chapter 1

## Introduction

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### Terms of Reference

1.1 In April 1986 a sub-committee of the Law Reform Commission was appointed under the chairmanship of Mr Justice Fuad to codify the law governing the powers of police officers to arrest and detain members of the public and the rights and duties of those arrested or detained. That sub-committee was not, however, asked to consider or to recommend amendments to the existing law. The sub-committee reached the conclusion that it would be a fruitless exercise merely to restate the law in a code if this only served to retain the existing inadequacies of the law in another form. The sub-committee's Report stated:

*"We assume that the purpose of the exercise is not codification for the sake of the codification but codification with a view to rationalisation, clarification and general improvement."*<sup>1</sup>

1.2 The Fuad sub-committee considered that it was outside its terms of reference to attempt such an exercise. It recommended that there be a thorough review of the whole area of law relating to the powers of police and other law enforcement officers.

1.3 As a result of the Fuad recommendations, on 28 November 1988, under powers granted by the Governor in Council on 15 January 1980, the Attorney General and the Chief Justice referred the following matters to the Law Reform Commission:

*"To examine the existing law and practice governing the powers and duties of police and other public officers and private citizens relating to:*

- (a) stopping, requesting proof of identity of and searching persons;*
- (b) entry, search and seizure;*
- (c) arrest and detention;*
- (d) questioning and treatment of persons held in police custody;*

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<sup>1</sup> Preliminary Report of the Sub-committee on Arrest and Detention, the Law Reform Commission of Hong Kong, 1987 ("the Fuad Report"), at page 19.

(e) *the release of a suspect on bail by the police and other non-judicial public officers, before charge;*

(f) *the disposition of seized property;*

*To examine the rights and duties of a person stopped, questioned, detained, searched, arrested, cautioned, interrogated or charged by a police officer, a public officer or a private citizen;*

*To make recommendations thereon and in particular to make recommendations as to whether all or any of the provisions contained in Parts I to VI, section 78 and Part XI of the Police and Criminal Evidence Act 1984 and the Codes of Practice thereunder, should be adopted in Hong Kong, with or without modification.*

*To produce a draft code relating to these matters.”*

## **Sub-committee membership**

1.4 In December 1988 the Law Reform Commission appointed a sub-committee under the chairmanship of Mr Justice Penlington to consider the present law and to make proposals to the Law Reform Commission for reform. The membership of the sub-committee was:

The Hon Mr Justice Penlington (Chairman)	Justice of Appeal
The Hon Mr Justice O'Connor (Retired November 1990)	Judge of the High Court
Mr Wilfred CHAN Siu-yuen JP	Managing Director, Wilfred Chan Management Consultants Ltd
Mr Grenville Cross QC	Deputy Crown Prosecutor, Attorney General's Chambers
Mr Bernard Gunston JP	Solicitor, Partner in Hampton Winter and Glynn
Mr Alan HOO AC	Barrister
Mr James S Main CPM	Assistant Commissioner Police Study Team Royal Hong Kong Police Force

Mr Peter SO Lai-yin QPM CPM	Director of Management and Inspection Services, Royal Hong Kong Police Force
Mr Leslie L SUNG OBE JP	Solicitor, Partner in Lo and Lo
Professor Raymond Wacks	Head of Department of Law, University of Hong Kong
Miss Alice YUK Tak-fun (Resigned September 1990)	Director, Yang Memorial Social Service Centre

1.5 Mr Michael Darwyne, then a Senior Crown Counsel in the Attorney General's Chambers, served as the Secretary to the sub-committee from December 1988 to October 1990. Mr Alastair K Maxwell, Senior Crown Counsel, acted as sole Secretary from November 1990 to January 1991 and joint Secretary from January 1991 with Mr Kevin Osborn, Crown Counsel.

## Meetings

1.6 The sub-committee met for the first time on 15 December 1988 and, between then and 7 March 1992 when it met for the last time, it held a total of 44 meetings. The sub-committee's report was presented to the Commission at its meeting on 24 March 1992 and discussed at a series of five meetings from April to June 1992. This Commission Report was finally agreed at our meeting on 28 July 1992. The Commission wishes to place on record its appreciation of the dedication and efforts of the members and secretaries of the sub-committee in their work on this difficult reference over a prolonged period.

## Scope of deliberations

1.7 We have reviewed the existing law pursuant to our terms of reference. This has involved a consideration of every Hong Kong Ordinance containing one or more of the powers referred in our terms of reference. These Ordinances were some 50 in number. While the most significant provisions were to be found in the Police Force Ordinance, the Immigration Ordinance and the Prevention of Bribery Ordinance, many other ordinances contain peripheral reference to powers of arrest given to other law enforcement agencies. One such example is the Telecommunication Ordinance.

1.8 We found that the existing provisions and Codes of Conduct of the various law enforcement agencies are separate and differ in certain aspects. In addition, most of the Codes of Conduct are confidential. We have taken the view that, in the interests of clarity and accessibility, our recommendations should be of uniform application to all enforcement

agencies. We concede, however, that some agencies may need to retain their existing powers. We believe that it is for those agencies to make a case for the retention of their powers in cases where those powers fall outside the general framework we propose. We note that in some cases the legislation governing the arrest powers of non-police agencies contain provisions to transfer arrested persons to police custody. Care will need to be taken to ensure that any legislation resulting from this Report's recommendations adequately takes account of these interacting provisions.

## **Method of work**

1.9 Our terms of reference specifically directed us to consider the provisions of the English Police and Criminal Evidence Act 1984 (hereinafter referred to as "PACE") and in particular Part I to Part II, section 78 and Part XI. In addition, we were required to consider the Codes of Practice promulgated under PACE and to recommend whether the Codes and the provisions of the Act should be brought into force in Hong Kong, and if so, with what, if any, modifications. Excluded from our consideration were Parts VII and VIII (which relate to evidence, with the exception of section 78 which was to be considered), Part IX (police complaints and discipline) and Part X (police organisation in England and Wales). Section 78 provides power for a court to exclude evidence obtained by unfair means. That section has been the subject of much debate in England.

1.10 The method adopted both by the Commission and the sub-committee was to review PACE and the Codes of Practice<sup>2</sup> on a section-by-section basis. This Report follows closely the chapter chronology of PACE, and highlights where appropriate suggested modifications to particular sections of the Act thought necessary by the Commission for Hong Kong's particular circumstances.

1.11 A particular aspect of PACE which is not applicable in Hong Kong are the references throughout PACE to the Prevention of Terrorism Act 1989 and to terrorism generally (see section 65 of PACE for a definition of "the terrorism provisions" and "terrorism" in PACE). The 1989 Act does not apply in Hong Kong and for that reason we do not comment on those PACE provisions in which there is a reference to terrorism.

## **Bill of Rights Ordinance**

1.12 We have been conscious of the need to ensure that any recommendations we make are not in conflict with the Bill of Rights Ordinance and we have considered the PACE provisions in the context. Where we believe that a provision in PACE may cause difficulties, we have referred to

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<sup>2</sup> "Codes of Practice"(as used in this Report) refer to the Codes issued by the Home Secretary under PACE and approved by Parliament. The reference to the Codes in this Report is to the revised Codes issued on 1 April 1991

this in our discussion of the particular section and have taken account of this in our recommendation.

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## Chapter 2

# The background to PACE and its relevance to Hong Kong

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### Introduction

2.1 Before the introduction of PACE in England and Wales in 1984, a series of expert committees had examined the law governing police powers for the investigation of crime and had concluded that the law was unclear and antiquated. It had developed piecemeal since the establishment of professional police forces in the nineteenth century. This varied law was supplemented by:

- (a) rules of guidance as to the admissibility of confessions provided by the Lord Chief Justice in consultation with the judiciary (known as the “Judges’ Rules”)
- (b) national administrative guidance in the form of Home Office Circulars; and
- (c) local administrative guidance in the form of standing orders issued within each police force.

2.2 The result was patchy legal obligations and powers for the police and local variations in powers. For instance, some police forces had wide stop and search powers while others were tied to a few narrow powers. It was with the aim of placing police powers on a proper statutory footing that the Royal Commission on Criminal Procedure<sup>1</sup> was set up in 1977.

### The Philips Report

2.3 The English Criminal Law Revision Committee in its Eleventh Report (1972)<sup>2</sup> expressed the view that improvements over many years in criminal procedure justified the removal of certain safeguards which, it believed, unduly favoured the defendant and had given rise to the perception among the public that criminals were getting the better of the police. In response, they proposed to restrict the detainee’s right to silence. The debate on the Eleventh Report ended in stalemate but the issue of police powers and safeguards for those held by the police came to the fore again in

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<sup>1</sup> The Royal Commission on Criminal Procedure, Cmnd 8092, 1981 Chairman: Sir Cyril Philips (hereinafter referred to as the “Philips Commission” or the “Philips Report” as the case may be)

<sup>2</sup> London HMSO Cmnd 4991.

1977 when the enquiry by Sir Henry Fisher into the Maxwell Confait case<sup>3</sup> revealed abuses by the police of the Judges' Rules which were intended to protect people in police detention. The Report by Sir Henry was the immediate catalyst to the setting up of the Royal Commission on Criminal Procedure which looked into the law and procedure governing the whole prosecution process, including detention. The Philips Report stressed the need for tighter restrictions on the use of arrest and detention and for fairness, clarity and accountability in procedures at police stations.

2.4 The members of the Philips Commission comprised a wide range of persons with experience not only of criminal law and police procedure but also of attitudes towards the police. A vast amount of material was placed before the Commission, and its Report runs to well over 200 pages. Several aspects of criminal procedure were explored and recommendations were made, in some cases, for radical changes. The Philips Report was then the subject of considerable public discussion and lengthy parliamentary debate, in particular in the House of Lords where such eminent lawyers as Lord Hailsham (then Lord Chancellor), Lord Donaldson, Lord Fraser, Lord Edmund-Davies, Lord Elwyn-Jones and Lord Scarman contributed to the debate.

2.5 The Philips Report highlighted numerous problems with the then existing law. The police powers were inconsistent and full of anomalies: the police could stop and search a person for wildlife but not for offensive weapons; they could obtain a warrant to search when they suspected an offence under the Theatres Act but not to search for a murder weapon; they could arrest for gaming in the street, but not for indecent assault on a woman. The existing situation was itself not conducive to police morale in that police powers had been introduced piecemeal, were themselves inconsistent or based on no intelligible principle, and prevented the police from carrying out their essential duty of controlling crime.

2.6 The Philips Report's recommendations can be summarised as follows. They proposed that any new law governing police powers should meet the standards of fairness, openness and workability:

- (a) "Fairness" led to the conclusion that reasonable suspicion should be the threshold for the exercise of police powers and that certain powers (eg to obtain a warrant to search for evidence) should only be available in respect of more serious offences.
- (b) "Openness" led to an emphasis in the Philips Report on the written recording of the reasons for exercising powers.

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<sup>3</sup> "Report of an Inquiry by the Honourable Sir Henry Fisher into the Circumstances Leading to the Trial of Three Persons Arising out of the Death of Maxwell Confait and the Fire at 27 Doggett Road London SE6", London HMSO HC 90. Three youths had been convicted of offences relating to Confait's murder on the basis of their confessions. These confessions were subsequently found to be false and the convictions were overturned. Sir Henry Fisher's report called for the strengthening of the caution and for it to be more strictly enforced.

- (c) “Workability” produced recommendations for the rationalisation of the law, such as the proposal of a single power to arrest without warrant for all imprisonable offences and of a uniform stop and search power to replace the variety of specific statutes.

2.7 The Philips Report examined in detail police powers of arrest, search and detention of the citizen, and recommended that these be streamlined. The Report recommended a power of detention after arrest for the purpose of questioning, but also recommended that the right of silence in the face of such questioning be retained. It proposed that the treatment of those detained for questioning be more rigorously regulated by statute and a code of practice. Part I to V of the Police and Criminal Evidence Act correspond closely to the suggestions of the Philips Commission.

## **The Runciman Commission**

2.8 The decision of the Court of Appeal in March 1991 to quash the convictions of “the Birmingham Six”, six men who had been convicted of the murder arising from two bomb explosions in Birmingham in November 1974, prompted the Home Secretary to announce the setting up of a Royal Commission on Criminal Justice, chaired by Lord Runciman (“the Runciman Commission”). The Commission’s terms of reference were “to examine the effectiveness of the criminal justice system in England and Wales in securing the conviction of those guilty of criminal offences and the acquittal of those who are innocent, having regard to the efficient use of resources”. The Commission were asked in particular to examine the conduct of police investigations and their supervision by senior police officers.

2.9 It is possible that the Runciman Commission may recommend amendments to PACE. We do not think it right that we should endeavour to anticipate what those changes might be and we have therefore examined the existing provisions of PACE purely on the basis of their suitability as drafted for application to Hong Kong’s circumstances.

## **Police and Criminal Evidence Act 1984**

2.10 PACE and the associated Codes of Practice reflect many of the recommendations of the Philips Report. The Act represents the first legislative attempt to enact a comprehensive code of police powers and practices in relation to the investigation of crime. PACE was 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. The Act came into force on 1 January 1986. The Act establishes a regime of legal rights for suspects detained by the police. The provisions of the Act cover all stages of the investigative process from the commission of the crime to trial.

2.11 One of PACE's main objectives was to strike a satisfactory balance between police powers and adequate protection for the arrested person. The Home Secretary stated in 1984:

*"The Governments' 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."*<sup>4</sup>

2.12 The Act has now been in force for over 6 years. Despite fears that it would give the police excessive powers at the expense of the subject or that it would unduly hamper police powers and stretch their resources, it would seem that the Act has been largely successful in striking a balance between realistic police powers and adequate protection for those subject to arrest or detention.

## **Calls for change in other jurisdictions**

2.13 It is safe to say that the concerns which led to PACE are causing demands for similar changes in most common law jurisdictions at this time. A good example can be found in the New South Wales Law Reform Commission Report on "Police Powers of Detention and Investigation After Arrest" (1990). The Commission proposes a package of legislative and procedural reforms to bring the conduct of criminal investigation under the Rule of Law. The Executive Summary states:

*"The Commission believes that the broad common law principles and discretions affecting criminal investigation, as applied in practice, do not meet the needs of modern society. The common law fails to provide police with a realistic opportunity to complete their investigations in some circumstances, while failing to set acceptable limits on police powers and practices in other cases. Despite the law's stated concern with the liberty of the individual, the common law fails in practice to secure meaningful rights and safeguards for persons in police custody."*

2.14 At page XII the Summary continues:

*"The Commission's recommendations aim to provide police with clear, detailed and comprehensive rules of procedure under which to operate. These rules will give police sufficient powers to do their jobs effectively while at the same time protecting the fraught position of persons in police custody. This new regime will serve to increase public confidence in the integrity of police*

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<sup>4</sup> Leon Brittan, in the Foreword to the First Edition of "The Police and Criminal Evidence Act 1984" by Michael Zander, reprinted in the Second Edition (Sweet and Maxwell, 1990).

*practices and evidence, and have the further benefit of reducing delays and costs in the criminal justice system.”*

2.15 It is clear that these proposed reforms would be similar in scope to those brought about by the introduction of PACE in England. Similar reforms have been mooted in Canada, where the then Minister of Justice, Senator Jacques Flynn, said in 1979:

*“... I believe that the time has come to undertake a fundamental review of the Criminal Code. The Code has become unwieldy, very difficult to follow and outdated in many of its provisions. It has come to deal with questions which, I believe, do not belong to criminal law. We must be aware of the limits of the criminal law role in dealing with purely local or temporary problems.”<sup>5</sup>*

He went on to say that:

*“The Law Reform Commission has, in many of its reports, urged that our criminal laws be modernized, that we stop tinkering with the Code. Provisional Attorneys General have urged that we develop a new Code. I agree.”<sup>6</sup>*

In New Zealand the Law Commission is currently examining the law relating to criminal procedure.

2.16 We believe that the concerns which have led to a critical re-examination of police powers and practices in all of these jurisdictions are equally applicable to Hong Kong. In our view, 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. Such a code would also fit more easily within the context of a regime which now includes a Bill of Rights.

2.17 We would echo here the words of the Fuad Report when advocating the introduction of comprehensive new provisions dealing with police powers and procedures. The Report stated (at page 24):

*“These new rules and codes of practice, needless to say, need not be viewed as representing the imposition of a harsh, new regime of arrest and detention, nor, for that matter, of unduly relaxing the powers of the police. Rather they could maintain a fair and proper balance between law and order and the liberty of the subject, but at the same time would constitute a code which clearly stated what the law is, was readily accessible and easily understood by police and the public at large.”*

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<sup>5</sup> Quoted in “Recodifying Criminal Law”, Report No. 30 of the Law Reform Commission of Canada, Volume 1, at page 2.

<sup>6</sup> Idem.

2.18 We agree entirely with the objectives set out by the Fuad sub-committee but there are certain areas where it is by no means easy to see where the balance is to be struck between the liberty of the subject on the one hand and the requirement on the other, which undoubtedly has much public support, for the police to have sufficient powers to maintain law and order at a high level.

## **Hong Kong – Criminal law**

2.19 The criminal law of Hong Kong is closely modelled on that of England. It was inevitable therefore that some of the concerns leading to the establishment of the Philips Commission would be manifested in Hong Kong and that the impact of the reforms implemented by PACE would be of significance for the criminal law of Hong Kong. Those concerns were reflected in the reference to the Law Reform Commission in 1988 which has culminated in this report.

## **Hong Kong – The Police**

2.20 A police force was formed in Hong Kong in 1842, the year after the founding of the Territory, with a strength of 35 men for a population of some 12,000 inhabitants. From its early years, and in respect of some duties until the 1960's, it added to the traditional police services the duties of fire-fighting, guarding prisons, immigration and customs. In 1969, in recognition of its role during the 1967 disturbances, the Force was honoured by the granting of the title "Royal Hong Kong Police Force" (RHKPF) by Her Majesty the Queen.

2.21 As at 1<sup>st</sup> January 1992 the establishment of the Force stood at 27,245, with a strength of 26,438 regular officers. With a population approaching 5.76 million, this provides a police-to-population ratio of 1:219, which compares favourably with other major cities internationally: London, 1:248; New York, 1:284; Tokyo, 1:286; Bangkok, 1:330; and Singapore, 1:380. Whilst differences in law mean that comparisons cannot be exact, the reported crime rate (crime per 100,000 population) in Hong Kong of 1,541 also compares favourably with other cities: London, 11,642; New York, 8,637; Tokyo, 1,930; Bangkok, 1,160; and Singapore, 1,507 (statistics for 1990).

2.22 Relations between the police and the community have passed through several phases in recent years, and the increasing importance of community awareness, involvement and co-operation is reflected in a large and active Police Public Relations Bureau which places a good deal of emphasis on relationship with the youth of Hong Kong. A vigorous crime prevention programme aimed at increasing public awareness of how to avoid becoming the victim of crime balances traditional watch and ward duties on the street.

2.23 Complaints against police officers have, since 1974, fallen under the jurisdiction of the Complaints Against Police Office (“CAPO”) which has seen inevitable fluctuations in the number of complaints it receives from members of the public. Complaints are monitored by the Police Complaints Committee, an independent body comprising leading legislators and Justices of the Peace personally appointed by the Governor. Statistics show an annual increase in complaints in the first decade of CAPO’s operation, followed by a brief decline, a peak of 4,532 in 1986, and thereafter a general drop to a figure of 3,152 in 1991.

2.24 The Independent Commission Against Corruption (“ICAC”) was established on February 5, 1974 following the publication of the report of a commission of inquiry into corruption in Hong Kong. Its powers are set out in the Independent Commission Against Corruption Ordinance (Cap 204). It is independent of the police and has special powers to deal with offences involving corruption. It is our recommendation that the constraints imposed by the Hong Kong equivalent of PACE would apply to the ICAC in the same manner as to other agencies with law enforcement roles.

## **The expense associated with reform**

2.25 Since the passage of PACE, senior police officers in England have criticised the Act as providing inadequate powers of investigation, while at the same time placing great demands on limited police manpower by provisions such as those which impose a requirement to keep meticulous custody records. The enactment of PACE in Hong Kong would undoubtedly require some increase in police manpower in order to comply with its provisions. We have taken account in our deliberations of the need to ensure that scarce resources are not used unnecessarily. We have therefore examined with a critical eye in particular those provisions requiring the keeping of records to avoid the maintenance of records which may be of little or no value in protecting members of the public from the possible abuse of powers. In our view, however, the question of resource allocation is one for the Government. We have therefore made our recommendations as to what we considered to be in the public interest and it will be for the executive to allocate necessary resources.

## **The framework of PACE**

2.26 PACE is divided into eleven parts. We have not been required to consider parts VII, VIII (with the exception of section 78), XI and X. We set out in the following paragraphs a brief outline of the relevant parts of the Act. This will serve as an introduction to the Act which will be analysed more closely in the following chapters, each of which will deal with one part of PACE.

### ***Part I of PACE (Chapter 3)***

2.27 Part I follows closely the recommendations of the Philips Commission on powers of stop and search. It enables the police, on reasonable suspicion, to stop and search a person in a public place for stolen goods, offensive weapons or instruments for housebreaking or similar purposes. It was felt in England that these powers were necessary to help the police to control street crime and burglary. The power to search for stolen goods was already available in London and certain other parts of England. The Philips Commission recommended a number of safeguards which are incorporated in PACE. The constable must state his name and the purpose of the search; he must give his grounds for searching if asked; he must not subject people to personal searches in the street; and he must, where practicable, make a record of the search and his grounds for it.

### ***Part II of PACE (Chapter 4)***

2.28 This part deals with police powers of entry, search and seizure. It places on a statutory basis the common law powers of the police to enter premises without a warrant; it provides new powers for the police to enter and search premises for evidence of serious arrestable offence under a search warrant, with a special and more rigorous procedure for evidence held on a basis of confidence; it places beyond doubt the ability of the police to search premises for relevant evidence in relation to a serious arrestable offence; it introduces important additional safeguards governing the issue and execution of all search warrants; and it provides clearly for what articles the police may seize in the course of a lawful search. This part of PACE has clarified the law on powers of entry search and seizure and allows those responsible for the issue of warrants to have more informed control over their issue.

### ***Part III (chapter 5)***

2.29 Part III of PACE is designed to rationalise the power of arrest. The previous law had developed piecemeal, was inconsistent (giving a power of summary arrest for some offences and for others no power of arrest at all) and confusing. The existing category of "arrestable offence" was retained in PACE on the basis that it was familiar to the police and generally gave the right results in practice. Broadly, an "arrestable offence" comprises offences carrying a statutory liability to at least five years imprisonment. All other offences fall into a general category and all specific statutory powers of arrest are repealed. The police are not able to arrest anyone reasonably suspected of an offence in the general category (section 25) unless certain specific conditions are met. They are, however, able to resort to arrest if it is impossible to proceed to prosecute by way of summons or if arrest is necessary to prevent some immediate mischief. The power of the police to search the immediate surroundings when they have arrested a person is placed on a statutory basis.

### ***Part IV of PACE (Chapter 6)***

2.30 Part IV deals with detention. It replaces the uncertainty which existed as to how long the police could detain someone they had arrested before bringing him before the court, with a new comprehensive scheme for detention. It defines the conditions that must be satisfied for detention to be lawful, sets clear time limits on lawful detention and makes a designated uniformed officer at each police station responsible for all matters concerning the detention and treatment of detained persons. There is an absolute limit of 36 hours on detention without charge except in the case of serious arrestable offences. In such cases, detention may be extended on the authority of a magistrate's court for a further 36 hours (which can be extended for up to another 36 hours provided the total period of detention without charge does not exceed 96 hours). At this point the detained person may appear and be legally represented.

### ***Part V of PACE (Chapter 7)***

2.31 Part V relates to the treatment, questioning and identification of persons suspected of crime. It restates and develops the existing statutory right of a detained person to have the fact of his arrest notified to someone he chooses. It also establishes clearer and stricter criteria governing the ability of the police to override that right. It creates, for the first time, a statutory recognition of the right of a detained person to obtain legal advice, and strictly limits the circumstances in which the exercise of that right by a detained person may be delayed. This is a substantial new safeguard. This part also sets out clear criteria for compulsory fingerprinting and the taking of bodily samples such as blood or saliva. It introduces arrangements for the supervision and authorization of such fingerprinting.

### ***Part VI of PACE (Chapter 8)***

2.32 This part empowers the Secretary of State to issue codes of practice for the treatment, questioning and identification of persons suspected of crime. These replaced the Judges' Rules and place clear and comprehensive duties on the police. The codes are admissible in court proceedings and are enforceable through the police disciplinary procedures.

### ***Part VII of PACE (Chapter 9)***

2.33 Part VII deals with the admissibility of evidence obtained during police questioning. It complements corresponding provisions in Code C. The admissibility of confession evidence is placed on clear and defensible principles. We were not required to deal with this part except in so far as it affects a consideration of section 78 of PACE which deals with the exclusion of unfairly obtained evidence. That section must be read with section 76

(which deals with confessions) and section 82(3) which guarantees the continued availability of common law discretion.

***Part VIII of PACE (Chapter 10)***

2.34 This is a miscellaneous section dealing with a number of supplementary issues and providing general interpretation of concepts in PACE. The most important of these is the definition of “serious arrestable offence”.

## Chapter 3

### Powers to stop and search Part I of PACE – Sections 1 to 7

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#### I Existing law in Hong Kong

3.1 Our discussion of the existing law on stop and search necessarily involves the consideration of a variety of Ordinances which contain “stop” powers, starting with the identity check under section 17 of the Immigration Ordinance (Cap 115) (“the ID check”) which because of differing circumstances in Hong Kong has no counterpart in England. We then provide examples of the “stop” powers in a variety of other Ordinances, such as the Police Force Ordinance, the Dangerous Drugs Ordinance and the Public Order Ordinance. Finally, we examine the law relating to road checks.

##### (a) *The ID check – The Immigration Ordinance (Cap 115)*

3.2 Existing law gives a police officer a wide power to stop persons to demand proof of identity. Such a power can be exercised subjectively, at random and without a requirement of reasonable suspicion. The law is set out in section 17 of the Immigration Ordinance (Cap 115). Subsection (2) reads:

*“A person who is required by subsection (1) to have with him proof of his identity shall on demand produce it for inspection by:*

- (a) any police officer*
- (b) any immigration officer or immigration assistant; or*
- (c) any person or member of a class of persons authorised for the purpose by the Governor by order published in the Gazette,*

*who is in uniform or who produces, if required to do so, documentary identification officially issued to him as proof of his appointment as a police officer, immigration officer, immigration assistant or, as the case may be, person authorised under paragraph (c).*

*Information available to the police after the “stop”*

3.3 We consider here the sources of information about an individual which are available to the police when making an ID check and the authority for obtaining that information. Two computerised sources of information are used by the police, known by the acronyms of “EPONICS” (standing for Enhanced Police Operational Nominal Index Computer System) and “ICIS” (Immigration Central Index System). Under EPONICS, the police have access to information on the person stopped as to:

- (a) his prior criminal convictions, if any;
- (b) whether there is an outstanding court-issued warrant of arrest in respect of the person stopped;
- (c) whether the person is reported missing;
- (d) whether the person is thought to be violent.

The EPONICS check can be accomplished in a matter of a few seconds and is faster than the ICIS check. An ICIS check will reveal the individual’s immigration details.

3.4 It is not entirely clear whether it is police practice to carry out a computer check on every occasion on which an identity check is made. It is believed that an EPONICS check would be made on every occasion but that an ICIS check might depend on individual factors such as the likeness of the photograph on an ID card to the person stopped. It could be argued that to allow the EPONICS information to be obtained on a random ID check emasculates the requirement for “reasonable suspicion” which is at present built in to some of Hong Kong’ statutes (see the discussion later in this chapter). In fact, the ID check provisions of the Immigration Ordinance when used in conjunction with some of the broader existing stop and search powers described below might give rise to the conclusion that the police can justify **any** stop and search (**ex post facto** if necessary). For example, an initial stop and search could be explained on the basis of a random ID check and that the suspect’s behaviour **after** the stop gave rise to reasonable suspicion.

3.5 It could be argued that the practice of random stops without a requirement of reasonable suspicion could be a violation of Article 14 of the Bill of Rights Ordinance which deals with protection of privacy, etc (see also Article 5 of the Bill of Rights Ordinance).

**(b) stop and search proper – Hong Kong Ordinances**

*The Police Force Ordinance (Cap 232)*

3.6 Section 54 of the Police Force Ordinance now reads as follows<sup>1</sup>:

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<sup>1</sup> Under the previous section 54, a Hong Kong court had held that an officer with an *intuitive* suspicion may lawfully stop and search under section 54, although he may arrest and detain only where that is “necessary” (*Attorney General v Kong Chung-Shing* [1980] HKLR 533).

*“(1) If a police officer finds any person in any street or other public place, or on board any vessel, or in any conveyance, at any hour of the day or night, who acts in a suspicious manner, it shall be lawful for the police officer -*

- (a) to stop the person for the purpose of demanding that he produce proof of his identity for inspection by the police officer;*
- (b) to detain the person for a reasonable period while the police officers enquires whether or not the person is suspected of having committed any offence at any time; and*
- (c) if the police officer considers it necessary to do so -*
  - (i) to search the person for anything that may present a danger to the police officer; and*
  - (ii) to detain the person during such period as is reasonably required for the purpose of such a search.*

*(2) if a police officer finds any person in any street or other public place, or on board any vessel, or in any conveyance, at any hour of the day or night, whom he reasonably suspects of having committed or of being about to commit or intending to commit any offence, it shall be lawful for the police officer -*

- (a) to stop the person for the purpose of demanding that he produce proof of his identity for inspection by the police officer;*
- (b) to detain the person for a reasonable period while the police officer enquires whether or not the person is suspected of having committed any offence at any time;*
- (c) to search the person for anything that is likely to be of value (whether by itself or together with anything else) to the investigation of any offence that the person has committed, or is reasonably suspected of having committed or of being about to commit or of intending to commit; and*
- (d) to detain the person during such period as is reasonably required for the purpose of such a search.*

(3) *In this section, 'proof of identity' has the same meaning as in section 17B of the Immigration Ordinance (Cap 115)."*

3.7 Section 55 reads as follow:

*"It shall be lawful for any police officer to stop, search and detain any .... vehicle... in or upon which there is reason to suspect that anything stolen or unlawfully obtained may be found and also any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained ..."*

*Public order ordinance (Cap 245)*

3.8 Section 33 of the Public Order Ordinance reads as follow:

*"(a) Any person who, without lawful authority or reasonable excuse, has with him in any public place an offensive weapon shall be guilty of an offence ...*

*(b) Any police officer may stop and search any person in a public place in order to ascertain whether or not that person has been guilty of an offence against this section."*

3.9 Section 49 provides that:

*".... a police officer, for the purpose of preventing or detecting any offence, may require any person to give his correct name and address and produce any paper in his possession by which he can be identified, and any person who fails to comply with any such requirement shall be guilty of an offence..."*

*Dangerous Drugs Ordinance (Cap 134)*

3.10 Section 52(1) reads:

*"Any police officer ... may:-*

*(a) stop, board and search any ..... vehicle .... if he has reason to suspect that there is therein an article liable to seizure.*

*(b) stop and search any person, and search the property of any person, if:*

*(i) he has reason to suspect that such person has in his actual custody an article liable to seizure;*

- (ii) *such person is found in any ... vehicle .. in which an article liable to seizure is found.”*

*Firearms and Ammunition Ordinance (Cap 238)*

3.11 Section 41 and 42 provide:

*“41. For the purposes of this Ordinance a police officer or a member of the Customs and Excise Service may: -*

*(a) stop and search any person, and search the property of any person, if: -*

- (i) such person is arriving in or about to depart from Hong Kong;*

- (ii) the officer or member has reasonable ground for suspecting that such person has any arms or ammunition or imitation firearm in his possession; or*

- (iii) such person is found in any vessel, vehicle, train, aircraft, premises or place in which any arms or ammunition or imitation firearm are found.*

*42. (1) Where a police officer or a member of the Customs and Excise Service has reasonable ground for suspecting that any arms or ammunition or imitation firearms are in a vehicle in a public place or that a vehicle in any place is being or is about to be used in connexion with the commission of an offence under Section 18 or 19 he may:*

- (a) search the vehicle, and for that purpose may require the person driving or in control of it to stop the vehicle;*

- (b) on any such occasion, seize and detain:-*

- (i) any arms or ammunition or imitation firearm which he may find and in connexion with which he has reasonable grounds to suspect that an offence under this Ordinance has been, is being or is about to be committed; and*

- (ii) any thing which appears to him to be or to contain evidence that such an offence, or an attempt thereat, has been committed.*

*(2) A police officer or a member of the Customs and Excise Service may enter any place for the purpose of exercising any power conferred by subsection (1).”*

**(c) Road checks**

**(1) Stops where no suspicion is required**

3.12 By virtue of sections 43(1)(a) and 60 of the Road Traffic Ordinance (Cap 374), the police can stop a vehicle and require the production of a driving licence by the driver. Section 43(1)(a) provides:

*“A police officer ... may require the production for examination of the driving licence of any person: -*

*(a) who is driving a motor vehicle on a road.”*

3.13 Section 60 provides:

*“ A person driving a motor vehicle or rickshaw on a road and a person riding a bicycle or tricycle on a road shall stop the same on being so required by a police officer in uniform, or traffic warden in uniform, and any person who fails to do so commits an offence and is liable to a fine of \$2,000.”*

**(2) Stops where reasonable suspicion is required**

3.14 Section 43(1)(b) to (d) of the Road Traffic Ordinance also permit an officer to require production of a driving licence of any person:

*“(b) whom he reasonably suspects to have been the driver of a motor vehicle involved in an accident on a road; or*

*(c) whom he reasonably suspects to have committed an offence under this Ordinance or to have contravened the Fixed Penalty (Traffic Contravention) Ordinance; or*

*(d) whom he has reasonable cause to believe has knowingly made a false statement for the purpose of obtaining the grant of the driving licence.”*

**(3) Random road checks**

3.15 In addition to the above powers, the police can impose random road checks by stopping all cars at a particular place with a view to containing crime. The authorities relied on by the police for this practice appear to include section 60 of the Road Traffic Ordinance (Cap 374) quoted above, together with Regulation 5 of the Road Traffic (Traffic Control) Regulations (Cap 374), which allows the police to erect signs on any road for a period not exceeding 72 hours. The signs can include “Police Road Block.”

3.16 Regulation 5 states:

*“(1) The Commissioner of Police may cause to be erected or placed on or near any road a temporary traffic sign for a period not exceeding 72 hours.*

*(2) Temporary traffic signs erected or placed under subregulation (1)-*

*(a) for indicating to traffic -*

*(i) information on diversions from, or alternative traffic routes;*

*(ii) information on routes which may conveniently be followed on the occasion of a sports meeting, exhibition or other public gathering; or*

*(iii) warning of an obstruction or of a hazard;*

*(b) for indicating to vehicular traffic any prohibition, restriction or requirement of a temporary nature; or*

*(c) pending the erection of any permanent traffic sign, for indicating to traffic the purpose which such a permanent sign will indicate,*

*may be of such size, colour and type as the Commissioner of Police considers appropriate.”*

3.17 It is open to argument whether the present statutory authority on which the police rely as justification for the setting up of a roadblock is sufficient to permit interference with the public's right to travel freely from place to place. In this context, we note that freedom of movement is guaranteed under the Bill of Rights.

## **II Overview of Part I of PACE**

3.18 Part I of PACE (sections 1 to 7) contains two areas of particular importance: the stop and search power proper of the police and the road check provision. There is, however, no ID check in England and we shall examine the question of ID checks separately.

### **(1) Stop and search**

3.19 Under PACE, the police are given the power to stop and search any person or vehicle found in a public place for stolen or “prohibited” articles and to detain a person or vehicle for the purpose of such a search. An article

is “prohibited” if it is either an offensive weapon or it is “made or adapted for use” in connection with burglary, theft, taking a motor vehicle without authority or obtaining property by deception. An offensive weapon is defined as “any article made or adapted for use for causing injury to persons or intended by the person having it with him for such use by him or by some other person”. Procedural safeguards are set out in section 2. These relate to “stop and search” powers both in the Act and elsewhere. Before searching a person or vehicle the officer must state his station and the object of his proposed search. If he is not in uniform he must produce documentary evidence that he is a police officer. Whether in uniform or not, he must also give his grounds for conducting the search, though only if he is asked to do so. The procedural safeguards apply only to searches. They need not be complied with if the stop does not lead to a search.

3.20 There is a duty on an officer who makes a search to make a written record of it unless it is not practicable to do so. If it is not reasonably practicable to make such a record at the time, it must be done as soon as practicable after the completion of the search. The record must include the object of the search, the grounds for making it, the date, time and place, whether anything, and if so what, was found, and whether any injury to a person or damage to property appears to have resulted from the search. The record is to include the name of the person searched (“but a constable may not detain a person to find out his name”) and the name of the constable making the search. Persons searched are entitled to a copy of the record, if one has been made, provided they ask for it within 12 months. Owners of vehicles, and persons in charge of vehicles at the time of a search, are similarly entitled to a copy of the search record if one exists.

3.21 Chief Constables’ annual reports are to contain information about the number of searches and the total number of persons arrested in consequence of searches.

## **(2) Road checks**

3.22 The Act gives the police increased powers to set up road blocks. The previous law (section 159 of the Road Traffic Act 1972) neither mentioned the purpose for which the power might be used nor gave any power to search a vehicle. Section 4 of PACE enables a road block to be authorised by an officer of the rank of superintendent or by an officer of any rank in a case of urgency. Amongst the reasons for setting up a road block is reasonable suspicion that a person suspected of having committed a “serious arrestable offence” is, or is about to be, in the area in which vehicles would be stopped if the road check was authorised.

3.23 Authorisation can only be given for seven days at a time but this can be renewed by an officer of the rank of superintendent or above “from time to time” by specifying a further period not exceeding seven days.

3.24 Every authorisation of a road check must specify the name of the authorising officer, the purpose of the check and the locality to which it relates. Where a vehicle is stopped in a road check, the person in charge of the vehicle is entitled to obtain a written statement of the purpose of the check, if he applies within twelve months.

3.25 The road checks provision gives the police no power to search any vehicle in a road block. Powers to do this are found in the existing law and now also in section 1 of PACE (see above).

### III The ID check

3.26 As we saw at paragraph 3.2 above section 17(2) of the Immigration Ordinance (Cap 115) gives a police officer the power to carry out a random ID check in Hong Kong. There is no obligation under the law of England and Wales for the individual to carry with him proof of identity and consequently there is no equivalent police power to carry out an ID check. Since PACE does not deal with this issue, we consider here the question of the ID check before examining the PACE provisions on stop and search section by section.

3.27 In Hong Kong, the requirement to carry an identity card originally arose from the necessity to combat the problem posed by illegal immigrants. That problem still exists and the requirement continues to be relevant. If the requirement to carry proof of identity is to be enforced, it is necessary that the police should retain powers to enable them to demand production of a person's proof of identity. **We are unanimously of the view that the existing power contained in section 17(2) of Cap 115 remains necessary and should be retained.**

3.28 We considered with great care what information should be available to the police on such a "stop" in addition to the immigration details. We took the view that it would be unrealistic to prohibit the police when making an ID check from obtaining information under the EPONICS system as to whether:

- (1) there was in existence an arrest warrant for the person stopped;  
or
- (2) (for the protection of the police officer) the person stopped was likely to be violent.

We did not consider that other information (such as the individual's previous convictions) should be available to a police officer on an ID check. The purpose of an ID check is to ascertain that proper proof of identity is being carried. The individual's previous criminal record can have no relevance to that question and should not be automatically available to the police officer making the check.

3.29 We have concluded that there should be a power to carry out random identity card checks, but that the information available to the police officer making such a check should be restricted to that described in the previous paragraph. However, as a safeguard against abuse of the power we believe that a requirement should be imposed on the police to keep a written record of any ID checks. This would make it possible to monitor the exercise of the power to carry out random identity card checks and, where necessary, it would enable disciplinary action to be taken in the event of abuse of those powers.

3.30 There now follows a discussion of the PACE provisions relating to the other types of “stop”: the stop and search proper based on reasonable suspicion and road checks.

## IV Section-by-section review of Part I of PACE

### Section 1

*“Power of constable to stop and search persons, vehicles etc.*

1. (1) *A constable may exercise any power conferred by this section -*

(a) *in any place to which at the time when he proposes to exercise the power the public or any section of the public has access, on payment or otherwise, as of right or by virtue of express or implied permission; or*

(b) *in any other place to which people have ready access at the time when he proposes to exercise the power but which is not a dwelling.*

(2) *Subject of subsections (3) to (5) below, a constable -*

(a) *may search -*

(i) *any person or vehicles;*

(ii) *anything which is in or on a vehicle, for stolen or prohibited articles or any article to which subsection (8A) below applies; and*

(b) *may detain a person or vehicle for the purpose of such a search.*

(3) *This section does not give a constable power to search a person or vehicle or anything in or on a vehicle unless he has reasonable grounds for suspecting that he will find stolen*

*or prohibited articles or any article to which subsection (8A) below applies.*

*(4) If a person is in a garden or yard occupied with and used for the purposes of a dwelling or on other land so occupied and used, a constable may not search him in the exercise of the power conferred by this section unless the constable has reasonable grounds for believing -*

- (a) that he does not reside in the dwelling; and*
- (b) that he is not the place in question with the express or implied permission of a person who resides in the dwelling.*

*(5) If a vehicle is in a garden or yard or other place occupied with and used for the purposes of a dwelling or on other land so occupied and used a constable may not search the vehicle or anything in or on it in the exercise of the power conferred by this section unless he has reasonable grounds for believing -*

- (a) that the person in charge of the vehicle does not reside in the dwelling; and*
- (b) that the vehicle is not in the place in question with the express or implied permission of a person who resides in the dwelling.*

*(6) If in the course of such a search a constable discovers an article which he has reasonable grounds for suspecting to be a stolen or prohibited article (or an article to which subsection (8A) below applies), he may seize it.*

*(7) an article is prohibited for the purposes of this Part of this Act if it is -*

- (a) an offensive weapon; or*
- (b) an article -*
  - (i) made or adapted for use in the course of or in connection with an offence to which this sub-paragraph applies; or*
  - (ii) intended by the person having it with him for such use by him or by some other person.*

*(8) The offences to which subsection (7)(b)(i) above applies are -*

- (a) *burglary;*
- (b) *theft;*
- (c) *offences under section 12 of the Theft Act 1968 (taking motor vehicle or other conveyance without authority); and*
- (d) *offences under section 15 of that Act (obtaining property by deception).*

(8A) *This subsection applies to any article in relation to which a person has committed, or is committing or is going to commit an offence under section 139 of the Criminal Justice Act 1988.*

(9) *In this Part of this Act*

*“offensive weapon” means any article -*

- (a) *made or adapted for use for causing injury to persons; or*
- (b) *intended by the person having it with him for such use by him or by some other person.”*

(1) *The significance of the section*

3.31 The Commission accepted as a starting point for the discussion of Part I or PACE that the police force must have some powers to stop and, if necessary, search persons on the street. What was at issue was the extent of those powers and the conditions under which the police should be able to exercise them. It was recognised that there were three basic situations in which police exercised powers of stop. These were as follows:

- (1) the identity card check (already discussed earlier in this chapter);
- (2) what might be called the watch and ward function, when the police stopped and *searched* those suspected of criminal activity, and
- (3) the random road check

3.32 The power of a constable to stop and search persons and vehicles is contained in section 1 of PACE. Under PACE, the constable must have reasonable grounds for suspecting that he will find stolen or prohibited articles or any article to which subsection (8A) of section 1 applies. The requirement of reasonable grounds for suspicion is critical to the

operation of this power (There is no random stop and search power under PACE).

(2) *Our recommendations*

3.33 **We are attracted to the PACE provisions on stop and search on the basis of reasonable suspicion of possession of stolen or prohibited articles and we recommend that similar provisions should be adopted in Hong Kong.** PACE introduces the power to stop on reasonable suspicion of the commission (in the past, present or future) of an arrestable offence by a suspect. The requirement of reasonable suspicion will mean that the police officer has to have actually suspected the offence or possession of stolen articles on reasonable grounds. Those grounds must be known to him at the time of the stop or search.

3.34 **As a safeguard against abuse, we recommend the following records should be kept for *both* ID checks and stops proper. When a police officer stops a person (either for the purpose of asking for his identification or for a stop and search on reasonable suspicion) he should be required by the Ordinance itself (not the Codes of Practice) to state:**

- (1) **his legal authority;**
- (2) **the type of stop he was conducting;**
- (3) **the grounds for doing so, when these were required.**

3.35 **Where a stop and search proper is carried out, we believe that the police officer should be able to have access to *all* the information which can currently be made available under the EPONICS system (see paragraph 3.3 above).**

3.36 In summary, for a stop and search proper, there must be:

- (1) reasonable suspicion
- (2) that a person in a public place
- (3) has committed, is about to commit or intends to commit any arrestable offence, or
- (4) has on his person or in his possession
  - (i) any article which is stolen; or
  - (ii) any article of which possession is prohibited by law.

3.37 We discuss the definition of arrestable offence in a later chapter. It is sufficient at this stage to say that we have concluded that the definition

should remain that contained in section 3 of the Interpretation and General Clauses Ordinance (Cap 1): “an offence for which the sentence is fixed by law or for which a person may under or by virtue of any law be sentenced to imprisonment for a term exceeding 12 months, and an attempt to commit any such offence.”

3.38 The subject of road checks is discussed after the text of section 4 of PACE.

## **Section 2**

### *“Provisional relating to search under section 1 and other powers*

2. (1) *A constable who detains a person or vehicle in the exercise -*

(a) *of the power conferred by section 1 above; or*

(b) *of any other power*

(i) *to search a person without first arresting him; or*

(ii) *to search a vehicle without making an arrest,*

*need not conduct a search if it appears to him subsequently -*

(i) *that no search is required; or*

(ii) *that a search is impracticable.*

(2) *If a constable contemplates a search, other than a search of an unattended vehicle, in the exercise -*

(a) *of the power conferred by section 1 above; or*

(b) *of any other power, except the power conferred by section 6 below and the power conferred by section 27(2) of the Aviation Security Act 1982 -*

(i) *to search a person without first arresting him;*

(ii) *to search a vehicle without making an arrest,*

*it shall be his duty, subject to subsection (4) below, to take reasonable steps before he commences the search to bring to the attention of the appropriate persons -*

(i) *if the constable is not in uniform, documentary evidence that he is a constable; and*

- (ii) *whether he is in uniform or not, the matters specified in subsection (3) below,*

*and the constable shall not commence the search until he has performed that duty.*

(3) *The matters referred to in subsection (2)(ii) above are -*

- (a) *the constable's name and the name of the police station to which he is attached;*
- (b) *the object of the proposed search;*
- (c) *the constable's grounds for proposing to make it; and*
- (d) *the effect of section 3(7) or (8) below, as may be appropriate.*

(4) *A constable need not bring the effect of section 3(7) or (8) below to the attention of the appropriate person if it appears to the constable that it will not be practicable to make the record in section 3(1) below.*

(5) *In this section "the appropriate person" means -*

- (a) *if the constable proposes to search a person, that person; and*
- (b) *if he proposes to search a vehicle, or anything in or on a vehicle, the person in charge of the vehicle.*

(6) *On completing a search of an unattended vehicle or anything in or on such a vehicle in the exercise of any such power as is mentioned in subsection (2) above a constable shall leave a notice -*

- (a) *stating that he has searched it;*
- (b) *giving the name of the police station to which he is attached;*
- (c) *stating that an application for compensation for any damage caused by the search may be made to that police station; and*
- (d) *stating the effect of section 3(8) below.*

(7) *The constable shall leave the notice inside the vehicle unless it is not reasonably practicable to do so without damaging the vehicle.*

(8) *The time for which a person or vehicle may be detained for the purposes of such a search in such time as is reasonably required to permit a search to be carried out either at the place where the person or vehicle was first detained or nearby.*

(9) *Neither the power conferred by section 1 above nor any other power to detain and search a person without first arresting him or to detain and search a vehicle without making an arrest is to be construed -*

(a) *as authorising a constable to require a person to remove any of his clothing in public other than an outer coat, jacket or gloves; or*

(b) *as authorising a constable not in uniform to stop a vehicle.*

(10) *This section and section 1 above apply to vessels, aircraft and hovercraft as they apply to vehicles.”*

(1) *The significance of the section*

3.39 Section 2 sets out the procedural safeguards relating to stop and search powers, both under PACE and under any other statutory provisions. The procedural safeguards apply only to searches. They need not be complied with if the stop does not lead to a search.

(2) *Our recommendations*

3.40 It is an essential element of the PACE regime that police powers are subject to supervisory controls. In the case of section 2, the procedural safeguards ensure that the police do not carry out arbitrary searches of persons or vehicles. The requirement that the police officer identify himself (by notice in the case of an unattended vehicle) enables his actions to be scrutinised. **The rationale of this section is of equal relevance in Hong Kong if the PACE regime is implemented and we therefore recommend the adoption here of provisions in similar terms.**

### **Section 3**

#### *“Duty to make records concerning searches*

3. (1) *Where a constable has carried out a search in the exercise of any such power as in section 2(1) above, other than a search -*

(a) *under section 6 below; or*

(b) *under section 27(2) of the Aviation Security Act 1982,*

*he shall make a record of it in writing unless it is not practicable to do so.*

(2) *If -*

(a) *a constable is required by subsection (1) above to make a record of a search; but*

(b) *it is not practicable to make the record on the spot,*

*he shall make it as soon as practicable after the completion of the search.*

(3) *The record of a search of a person shall include a note of his name, if the constable knows it, but a constable may not detain a person to find out his name.*

(4) *If a constable does not know the name of a person whom he has searched, the record of the search shall include a note otherwise describing that person.*

(5) *The record of a search of a vehicle shall include a note describing the vehicle.*

(6) *The record of a search -*

(a) *shall state -*

(i) *the object of the search;*

(ii) *the grounds for making it;*

(iii) *the date and time when it was made;*

(iv) *the place where it was made;*

(v) *whether anything, and if so what, was found;*

(vi) *whether any, and if so what, injury to a person or damage to property appears to the constable to have resulted from the search; and*

(b) shall identify the constable making it.

(7) If a constable who conducted a search of a person made a record of it, the person who was searched shall be entitled to a copy of the record if he asks for one before the end of the period specified in subsection (9) below.

(8) If -

(a) the owner of a vehicle which has been searched or the person who was in charge of the vehicle at the time when it was searched asks for a copy of the record of the search before the end of the period specified in subsection (9) below; and

(b) the constable who conducted the search made a record of it,

the person who made the request shall be entitled to a copy.

(9) The period mentioned in subsection (7) to (8) above is the period of 12 months beginning with the date on which the search was made.

(10) The requirements imposed by this section with regard to records of searches of vehicles shall apply also to records of searches of vessels, aircraft and hovercraft.”

(1) *The significance of the section*

3.41 Section 3 provides a further safeguard against arbitrary and discriminatory searches by requiring police officers to keep records of each search.

(2) *Our recommendations*

3.42 **Section 3 provides a further means of control of searches by the police and, as with section 2, should be supported as a part of the PACE regime which balances necessary police powers with procedural safeguards.**

## **Section 4**

“Road checks

4. (1) *This section shall have effect in relation to the conduct of road checks by police officers for the purpose of ascertaining whether a vehicle is carrying -*

- (a) *a person who has committed an offence other than a road traffic offence or a vehicles excise offence;*
- (b) *a person who is witness to such an offence;*
- (c) *a person intending to commit such an offence; or*
- (d) *a person who is unlawfully at large.*

(2) *For the purposes of this section a road check consists of the exercise in a locality of the power conferred by section 163 of the Road Traffic Act 1988 in such a way as to stop during the period for which its exercise in that way in that locality continues all vehicles or vehicles selected by any criterion.*

(3) *Subject to subsection (5) below, there may only be such a road check if a police officer of the rank of superintendent or above authorises it in writing.*

(4) *An officer may only authorise a road check under subsection (3) above -*

- (a) *for the purpose specified in subsection (1)(a) above, if he has reasonable grounds -*
  - (i) *for believing that the offence is a serious arrestable offence; and*
  - (ii) *for suspecting that the person is, or is about to be, in the locality in which vehicles would be stopped if the road check were authorised.*
- (b) *for the purpose specified in subsection (1)(b) above, if he has reasonable grounds for believing that the offence is a serious arrestable offence;*
- (c) *for the purpose specified in subsection (1)(c) above, if he has reasonable grounds -*
  - (i) *for believing that the offence would be a serious arrestable offence; and*

(ii) *for suspecting that the person is, or is about to be in the locality in which vehicles would be stopped if the road check were authorised;*

(d) *for the purpose specified in subsection (1)(d) above, if he has reasonable grounds for suspecting that the person is, or is about to be, in that locality.*

(5) *An officer below the rank of superintendent may authorise such a road check if it appears to him that it is required as a matter of urgency for one of the purposes specified in subsection (1) above.*

(6) *If an authorisation is given under subsection (5) above, it shall be the duty of the officer who gives it -*

(a) *to make a written record of the time at which he gives it; and*

(b) *to cause an officer of the rank of superintendent or above to be informed that it has been given.*

(7) *The duties imposed by subsection (6) above shall be performed as soon as it is practicable to do so.*

(8) *An officer to whom a report is made under subsection (6) above may, in writing, authorise the road check to continue.*

(9) *If such an officer considers that the road check should not continue, he shall record in writing -*

(a) *the fact that it took place; and*

(b) *the purpose for which it took place.*

(10) *An officer giving an authorisation under this section shall specify the locality in which vehicles are to be stopped.*

(11) *An officer giving an authorisation under this section, other than an authorisation under subsection (5) above -*

(a) *shall specify a period, not exceeding seven days, during which the road check may continue; and*

(b) *may direct that the road check -*

(i) *shall be continuous; or*

(ii) *shall be conducted at specified times, during that period.*

(12) *If it appears to an officer of the rank of superintendent or above that a road check ought to continue beyond the period for which it has been authorised he may, from time to time, in writing specify a further period, not exceeding seven days, during which it may continue.*

(13) *Every written authorisation shall specify -*

(a) *the name of the officer giving it;*

(b) *the purpose of the road check; and*

(c) *the locality in which vehicles are to be stopped.*

(14) *The duties to specify the purposes of a road check imposed by subsection (9) and (13) above include duties to specify any relevant serious arrestable offence.*

(15) *Where a vehicle is stopped in a road check, the person in charge of the vehicle at the time when it is stopped shall be entitled to obtain a written statement of the purpose of the road check, if he applies for such a statement not later than the end of the period of twelve months from the day on which the vehicle was stopped.*

(16) *Nothing in this section affects the exercise by police officers of any power to stop vehicles for purposes other than those specified in subsection (1) above."*

(1) *The significance of the section*

3.43 While random road checks are not generally permitted under PACE, they are allowed in certain circumstances. They can be authorised when a person wanted in connection with a serious arrestable offence is in the area and also when it is reasonably thought that a serious arrestable offence might be committed in a defined area during a specified period. There are safeguards: the authorisation must specify the ground, the period covered, the locality to which the road block relates and the name of the authorising officer.

3.44 The Act divides road checks under section 163 of the Road Traffic Act 1988 into those involving serious arrestable offences (for which the special rules of section 4 are applicable) and any other checks. The section 4 road check is permitted to see if a vehicle is carrying:

- (a) someone who has committed a “serious arrestable offence”<sup>2</sup>;
- (b) a witness to such an offence;
- (c) someone intending to commit such an offence; or
- (d) an escaped prisoner (s.4(1)).

3.45 Authorisation may only be given where it is reasonably suspected:

- (a) that a person suspected of having committed a serious arrestable offence or who is unlawfully at large is, or is about to be, in the locality; or
- (b) where the search is for someone intending to commit a serious arrestable offence, that he is or is about to be in the locality (s.4(4)(c)(ii)).
- (c) when the road check is for potential witnesses, only that the offence is a serious arrestable one.

Authorisation can only be given for seven days at a time but this can be renewed in writing from time to time for a further 7 day period (sections 4(11) and (12)).

3.46 Every authorisation of a road check must specify the ground, the period covered, the locality to which it relates and the name of the authorising officer. It must also mention the serious arrestable offence in question (sections 4(10), (13) and (14)). Where a vehicle is stopped the person in charge of the vehicle is entitled to a written statement of the reason for the road check if he asks for it within 12 months (section 4(15)), but there is no requirement that he be told of this right. Road checks which are not under section 4 may nevertheless be legitimate by virtue of section 163 of the Road Traffic Act 1988 (See Lodwick v. Saunders [1985] 1 WLR 382).

(2) *Our recommendations*

**3.47 We take the view that, combined with the safeguards provided by section 5 of PACE outlined below, PACE’s provisions on road checks are acceptable and we recommend their adoption. However, we depart from section 4 of PACE in one important regard. The power to establish a road check under PACE is only permitted in relation to a “serious arrestable offence”. We have concluded that in Hong Kong road checks should be allowed in relation to an “arrestable offence”, which (as we pointed out at para 3.37) is defined in Cap 1 as “an offence for which the sentence is fixed by law or for which a person may under or by virtue of any law be sentenced to imprisonment for a term**

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<sup>2</sup> See section 116 of PACE for the relevant definition.

exceeding 12 months, and an attempt to commit such an offence. To limit the police power to initiate road checks to serious arrestable offences would, for instance, prevent the police from establishing checks in relation to the taking of a conveyance without authority, an offence under section 14 of the Theft Ordinance (Cap 210) attracting 3 years imprisonment, and one of particular prevalence in Hong Kong. Equally, we think it desirable that the police should be able to establish road checks to assist in the identification of illegal immigrants.

3.48 The existing powers in Hong Kong in relation to road checks, as noted above, are found in Hong Kong's Road Traffic legislation. **We have concluded that the power of the police to stop vehicles provided 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 relating to offences under the Road Traffic Ordinance. We considered the question of statutory powers other than the Road Traffic Ordinance which might authorise road checks. We agree that in general these powers should not be incompatible with section 4 of PACE.**

3.49 We note that section 4(3) requires the officer authorising the road check to be of the rank of superintendent or above. **We think that this is too restrictive in Hong Kong's particular circumstances and we recommend that the requirement should be for an officer of the rank of chief inspector or above to authorise the check.**

## **Section 5**

### *"Report of recorded searches and of road checks"*

5. (1) *Every annual report -*

(a) *under section 12 of the Police Act 1964; or*

(b) *made by the Commissioner of Police of the Metropolis,*

*shall contain information -*

(i) *about searches recorded under section 3 above which have been carried out in the area to which the report relates during period to which it relates; and*

(ii) *about road checks authorised in that area during that period under section 4 above.*

(2) *The information about searches shall not include information about specific searches but shall include -*

- (a) *the total numbers of searches in each month during the period to which the report relates -*
    - (i) *for stolen articles;*
    - (ii) *for offensive weapons or articles to which section 1(8A) above applies, and*
    - (iii) *for other prohibited articles;*
  - (b) *the total number of persons arrested in each such month in consequence of searches of each of the descriptions specified in paragraph (a)(i) to (iii) above.*
- (3) *The information about road checks shall include information -*
- (a) *about the reason for authorising each road check; and*
  - (b) *about the result of each of them.”*

(1) *The significance of the section*

3.50 The Chief Constable’s annual report must contain information about the use of powers of stop and search and road checks. This provides a safeguard by making the exercise of such powers subject to the independent scrutiny of the police authority.

(2) *Our recommendations*

3.51 **We see no reason why a similar safeguard should not be desirable in the Hong Kong context and recommend that a similar obligation should be imposed on the Commissioner of Police.**

## **Section 6**

*“Statutory undertakers etc*

6. (1) *A constable employed by statutory undertakers may stop, detain and search any vehicle before it leaves a goods area included in the premises of the statutory undertakers.*

(2) *In this section -*

*“goods area” means any area used wholly or mainly for the storage or handling of goods.*

(3) *For the purposes of section 6 of the Public Stores Act 1875, any person appointed under the Special Constables Act 1923 to be a special constable within any premises which are in the possession or under the control of British Nuclear Fuels Limited shall be deemed to be a constable deputed by a public department and any goods and chattels belonging to or in the possession of the British Nuclear Fuels Limited shall be deemed to be Her Majesty's Stores.*

(4) *In the application of subsection (3) above to Northern Ireland, for the reference to the Special Constables Act 1923 there shall be substituted a reference to paragraph 1(2) of Schedule 2 to the Emergency Laws (Miscellaneous Provision) Act 1947."*

(1) *The significance of the section*

3.52 The purpose of section 6 is to make special provision for constables employed by a statutory undertaker to stop, search and detain for the purpose of searching any vehicle before it leaves part of the undertaker's premises used for the storage and handling of goods. A "statutory undertaker" is defined in section 7(3) of PACE as "persons authorised by any enactment to carry on any railway, light railway, road transport, water transport, canal, inland navigation, dock or harbour undertaking." The term would, for instance, include British Rail.

3.53 The aim of the section was to enable statutory undertakings to check lorries leaving their premises as a means of combating pilfering. There is no requirement that the constable making the stop and search have any reasonable suspicion that the vehicle is carrying stolen or prohibited goods and such searches can therefore be carried out on a random or routine basis. There is no power to search the person.

(2) *Our recommendations*

3.54 A key element of section 6 is that it relates to constables *employed by the statutory undertaker*. In the United Kingdom, there are a number of specialist police forces employed by statutory undertakers. There are no such forces in Hong Kong. **While bodies such as the Mass Transit Railway Corporation would fall within the definition of a "statutory undertaker" in section 7(3), the policing arrangements in Hong Kong differ from those in England and we do not therefore think that the PACE approach is appropriate in this regard. Furthermore, we are not aware of complaints of pilfering on a scale which would justify the introduction of a power of stop and search such as that contained in section 6.**

## **Section 7**

### *“Part I - supplementary*

7. (1) *The following enactments shall cease to have effect -*

- (a) *section 8 of the Vagrancy Act 1824;*
- (b) *section 66 of the Metropolitan Police Act 1839;*
- (c) *section 11 of the Canals (Offences) Act 1840;*
- (d) *section 19 of the Pedlars Act 1871;*
- (e) *section 33 of the Country of Merseyside Act 1980; and*
- (f) *section 42 of the West Midlands Country Council Act 1980.*

(2) *There shall also cease to have effect -*

- (a) *so much of any enactment contained in an Act passed before 1974, other than -*
  - (i) *an enactment contained in a public general Act; or*
  - (ii) *an enactment relating to statutory undertakers, as confers power on a constable to search for stolen or unlawfully obtained goods; and*
- (b) *so much of any enactment relating to statutory undertakers as provides that such a power shall not be exercisable after the end of a specified period.*

(3) *In this Part of this Act “statutory undertakers” means person authorised by any enactment to carry on any railway, light railway, road transport, water transport, canal, inland navigation, dock or harbour undertaking.”*

(1) *The significance of the section*

3.55 This section repeals certain statutory provisions giving a constable stop and search powers which are now superseded by section 1 of PACE.

(2) *Our recommendations*

**3.56 A similar provision will be necessary in Hong Kong once the relevant provisions have been identified.**

## Chapter 4

### Powers of entry, search & seizure Part II of PACE – Sections 8 to 23

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#### I Existing law in Hong Kong

4.1 The existing law relating to police powers of entry, search and seizure is contained for the most part in section 50 of the Police Force Ordinance (Cap 232). The rights to treat one's home as one's castle is impinged upon in a number of ways: the police can enter premises to gather evidence of a serious crime, to apprehend a criminal accused of a serious crime or to prevent a serious crime being committed.

##### **(1) Entry and search by consent**

4.2 In the absence of an indication to the contrary, such as a sign, a police officer has an implied licence to enter private property to make enquiries of the occupier. This implied licence can be revoked by the occupier by clear words. Once the licence is revoked, the police officer must leave the property or else he becomes a trespasser (unless he has any other lawful authority to enable him to remain).

4.3 A police officer, like any individual, may enter and search private property at the invitation of the occupier. The invitation is at the absolute discretion of the occupier and remains so even though a police officer maintains that he has sufficient grounds to apply for a warrant. The occupier can insist that the warrant be obtained and produced.

##### **(2) Entry to search**

4.4 With some statutory exceptions (eg section 52 of the Dangerous Drugs Ordinance) a police officer requires a warrant in order to enter private property. The warrant is issued by a judicial officer (a magistrate) who must be satisfied that the grounds for the police officer's entry have been made out.

4.5 Section 50(7) of the Police Force Ordinance (Cap 232), recently amended<sup>1</sup>, provides the police officer with his power to enter and search premises and is expressed in broad terms. The police officer must swear an oath before a magistrate that there is reasonable cause to suspect that the premises contain newspapers, books, documents,

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<sup>1</sup> Police Force (Amendment) Ordinance No 57 of 1992

articles, or chattels which are likely to be of value to the investigation of any offence. If the magistrate is so satisfied then he can issue his warrant to the police officer authorising him to enter, by force if necessary, the property and to conduct a search.

4.6 The new section 50(7) of the Police Force Ordinance (Cap 232) reads as follows:

*“(7) Whenever it appears to a magistrate upon the oath of any person that there is reasonable cause to suspect that there is in any building, vessel (not being a ship of war or a ship having the status of a ship or war) or place any newspaper, book or other document, or any portion or extract therefrom, or any other article or chattel which is likely to be of value (whether by itself or together with anything else) to the investigation of any offence that has been committed, or that is reasonably suspected to have been committed or to be about to be committed or to be intended to be committed, such magistrate may be by warrant directed to any police officer empower him with such assistance as may be necessary by day or by night -*

- (a) to enter and if necessary to break into or forcibly enter such building, vessel or place and to search for and take possession of any such newspaper, book, or other document or portion of or extract therefrom or any such other article or chattel which may be found therein; and*
- (b) to detain, during such period as is reasonably required to permit such a search to be carried out, any person who may appear to have such newspaper, book or other document or portion thereof or extract therefrom or other article or chattel in his possession or under his control and who, if not so detained, might prejudice the purpose of the search.”*

4.7 This power remains wide and permits the right to violate property even if the person is only reasonably suspected of having committed a minor offence.

### **(3) Entry to arrest or prevent crime at common law**

4.8 The statutory grant of a power of arrest does not carry with it the right to enter private property to effect that arrest. If the police officer trespasses to effect the arrest, the arrest becomes unlawful. However, if the police officer is in hot pursuit of a criminal who has committed a serious crime or witnesses a serious crime being committed on private property, such as a murder, it is impractical to expect a police officer to obtain a warrant before taking urgent action.

4.9 The common law recognizes the right of a person, which would include a police officer, to enter private property, by force if necessary, without a warrant, for the following purposes:

- (a) to prevent a murder;
- (b) if a felony had been committed and the felon had been followed to the property;
- (c) if a felony is about to be committed and would be committed unless prevented.

**(4) Statutory entry to arrest**

4.10 Sections 50(3) (recently amended<sup>2</sup>) and (4) of the Police Force Ordinance grant the police statutory power to enter to effect an arrest. Subsections (3) and (4) reads as follows:

*“ (3) If any police officer has reason to believe that any person to be arrested has entered into or is in any place the person residing in or in charge of such place shall on demand of that police officer allow him free ingress thereto and afford all reasonable facilities for search therein.*

*“ (4) If ingress to such place cannot be obtained under subsection (3) it shall be lawful in any case for a person acting under a warrant and in any case in which a warrant may issue but cannot be obtained without affording the person to be arrested an opportunity of escape from a police officer, to enter such place and search therein and in order to effect an entrance into such place to break open any outer or inner door or window of any place whether that of the person to be arrested or of any other person if, after notification of his authority and purpose and demand of admittance duly made, he cannot otherwise obtain admittance.”*

4.11 A person “to be arrested” is defined in the recently amended section 50(1) of the Police Force Ordinance which reads as follows:

*“ (1) It shall be lawful for any police officer to apprehend any person who he reasonably believes will be charged with or whom he reasonably suspects of being guilty of -*

- (a) any offence for which the sentence is fixed by law or for which a person may (on a first conviction for that offence) be sentenced to imprisonment; or*

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<sup>2</sup> Police Force (Amendment) Ordinance No 57 of 1992.

(b) *any offence, if it appears to the police officer that service of a summons is impracticable because -*

(i) *the name of the person is unknown to, and cannot readily be ascertained by, the police officer;*

(ii) *the police officer has reasonable grounds for doubting whether a name given by the person as his name is his real name;*

(iii) *the person has failed to give a satisfactory address for service; or*

(iv) *the police officer has reasonable grounds for doubting whether an address given by the person is a satisfactory address for service.*

(1A) *A police officer may exercise the power to apprehend a person under subsection (1) without any warrant for that purpose and whether or not he has seen any offence committed.*

(1B) *It shall be lawful for any police officer to apprehend any person whom he reasonably suspects of being liable to deportation from Hong Kong."*

#### **(5) Seizure of property when no arrest is made**

4.12 The recently amended section 50(6) of the Police Force Ordinance gives power to police officers to seize and take into their possession relevant property when an arrest has been made. In such a situation a police officer may search the suspect and take possession of any property found on his person or about the place when he was arrested and which the officer reasonably suspects to be of value to the investigation of any offence that the person has committed or is reasonably suspected of having committed.

4.13 The powers to detain property mentioned above are dependent upon an arrest having been made or a particular person being liable to an arrest. A police officer may be aware that a crime has been committed but there is no suspect liable to arrest (or even no suspect at all). It may be necessary for the officer, in the course of his investigations, to take possession of and detain property pending the arrest of a suspect. In this situation the police have no authority to seize such property. It is odd that the police have no lawful power to seize articles used in a crime, such as a murderer's knife, if no arrest has been effected.

4.14 If the police are able to obtain lawful possession of the property, the common law gives them a power to detain the property. The police may

detain any property if a serious offence has been committed, the property is material evidence to prove the commission of the offence, and the possessor of the property is implicated in the offence, or if the refusal to give up the property is quite unreasonable.

## **II Overview of Part II of PACE**

### **(1) Entry with a search warrant**

4.15 PACE gives a justice of the peace on application from a constable power to issue a search warrant, where he is satisfied that there are reasonable grounds for believing that a “serious arrestable offence”<sup>3</sup> has been committed and relevant evidence, not being evidence held on a confidential basis, is to be found there. The applicable conditions must be any of the following:

- (a) that it is not practicable to communicate with any person entitled to grant entry to the premises, or;
- (b) if it is, it is not practicable to communicate with any person entitled to grant access to the evidence, or
- (c) entry to the premises will not be granted unless a warrant is produced, or
- (d) the purpose of the search may be “frustrated or seriously prejudiced” unless immediate entry can be secured (s.8(3)).

4.16 This power does not apply where the material is subject to legal privilege, is “excluded” material or “special procedure” material. Clarification of those terms is provided in the appropriate discussion of sections 10 to 14 of the Act. Special provision is made for access to excluded material and special procedure material in Schedule 1 of PACE. On application from a constable a circuit judge may order that such material be produced to a constable “for him to take away” or the officer may be given access to it within seven days of the order or such longer period as the order may specify.

4.17 The Act also lays down some safeguards with regard to search warrants (sections 15 and 16). An application for a search warrant must specify:

- (a) the ground for making the application,
- (b) the statutory authority covering the claim,
- (c) the premises which it is desired to enter and search and,

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<sup>3</sup> See s.116 of PACE.

- (d) (so far as is practicable) the articles or persons to be sought.

4.18 The application must be supported by an information in writing. The constable must answer on oath any question put by the justice of the peace or circuit judge. Each warrant is to authorise an entry on one occasion only. It must specify:

- (a) the name of the person applying for it,
- (b) the date of issue,
- (c) the statutory authority under which it is issued,
- (d) the premises to be searched, and
- (e) so far as is practicable, the articles or persons to be sought.

4.19 Entry and search under a warrant must be within a month from the date of its issue (s.16(3)). It must be at a “reasonable hour” unless it appears to the constable executing it that there are “grounds for suspecting that the purpose of the search may be frustrated on an entry at a reasonable hour”. Where the occupier of the premises is present, the constable must produce a copy of the warrant and give a copy to him. Where he is not present, a copy must be left “in a prominent place on the premises” (s.16(7)). A search is only to extend as far as is required for the purpose for which the warrant was issued.

## **(2) *Entry and search without a warrant***

### ***(i) Entry for purpose of arrest***

4.20 The police are empowered to enter and search any premises for the purpose of executing a warrant of arrest or warrant of commitment for arresting a person for an arrestable offence<sup>4</sup> as well as certain public order offences; for recapturing a person unlawfully at large; and for “saving life or limb or preventing serious damage to property” (s.17(1)). The power of search is limited to the extent that is reasonably required for the purpose of which the power is exercised. The statutory provision in s.17 replaces all rules of the common law under which a constable has power to enter premises without a warrant but does not affect any power to deal with or prevent a breach of the peace.

### ***(ii) Entry and search after arrest***

4.21 The police are given the power to enter and search any premises occupied or controlled by a person under arrest for an arrestable offence, if the constable has reasonable grounds for suspecting there is on

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<sup>4</sup> See section 24 of PACE.

the premises evidence relating to that offence or to some other arrestable offence which is connected with or similar to that offence. This reverses English case law<sup>5</sup>. An officer of the rank of inspector or above must give written authorisation of the entry and search, though this procedure can be circumvented if the presence of the person at a place other than a police station is necessary for the effective investigation of the offence.

### **(3) Seizure**

4.22 The law on seizure of articles is changed by s.19 of the 1984 Act. At common law, where the search is under warrant, the police may seize anything they find which is or which they reasonably believe to be covered by the warrant<sup>6</sup>. If not under warrant they may seize evidence where:

- (a) it implicates the owner or occupier in the offence for which the search is conducted<sup>7</sup>;
- (b) it implicates the owner or occupier in some other offence;
- (c) it implicates other persons in the same offence for which the search was conducted;
- (d) it is taken from someone innocent of involvement in the case where his refusal to hand over the article is wholly unreasonable.

4.23 The Act extends previous law. It provides that where a constable is searching premises under statutory powers or with the consent of the occupier he may seize any article (other than items which the constable has reasonable grounds for suspecting to be subject to legal privilege) if he reasonably believes:

- (a) that it has been obtained “in consequence of the commission of an offence”, or;
- (b) that it is evidence in relation to an offence which he is investigating or any other offence,

provided that in either case (a) or (b) above the constable reasonably believes that it is “necessary” to seize it in order to prevent it being “concealed, lost, damaged, altered or destroyed” (s.19(2), (3)).

4.24 The power is not limited even to serious arrestable offences. The police may now seize evidence implicating anyone in any crime.

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<sup>5</sup> McLorie v. Oxford [1982] 3 WLR 423.

<sup>6</sup> Chic Fashions (West Wales) Ltd v. Jones [1968] 2 QB 299.

<sup>7</sup> Ghani v Jones [1969] 3 All ER 1700.

4.25 Section 20 of the Act extends the powers of seizure to computerised information. Section 21(3) makes provision for persons who had custody or control of a seized article immediately before the seizure to have access to it under the supervision of a constable. The same section also provides the police with power to photocopy seized items. Finally, section 22(1) provides that articles seized may be retained so long as is necessary.

### **III Section-by-section review of Part II of PACE**

#### **Section 8**

*“Power of the justice of peace to authorise entry and search of premises*

8. (1) *If on an application made by a constable a justice of the peace is satisfied that there are reasonable grounds for believing -*

- (a) that a serious arrestable offence has been committed; and*
- (b) that there is material on premises specified in the application which is likely to be of substantial value (whether by itself or together with other material) to the investigation of the offence; and*
- (c) that the material is likely to be relevant evidence; and*
- (d) that it does not consist of or include items subject to legal privilege, excluded material or special procedure material; and*
- (e) that any of the conditions specified in subsection (3) below applies,*

*he may issue a warrant authorising a constable to enter and search the premises.*

*(2) A constable may seize and retain anything for which a search has been authorised under subsection (1) above.*

*(3) The conditions mentioned in subsection (1)(e) above are -*

- (a) that it is not practicable to communicate with any person entitled to grant entry to the premises;*

- (b) *that it is practicable to communicate with a person entitled to grant entry to the premises but it is not practicable to communicate with any person entitled to grant access to the evidence;*
- (c) *that entry to the premises will not be granted unless a warrant is produced;*
- (d) *that the purpose of a search may be frustrated or seriously prejudiced unless a constable arriving at the premises can secure immediate entry to them.*

(4) *In this Act “relevant evidence”, in relation to an offence, means anything that would be admissible in evidence at a trial for the offence.*

(5) *The power to issue a warrant conferred by this section is in addition to any such power otherwise conferred.”*

(1) *The significance of the section*

4.26 Section 8 is concerned with the authorisation of the police to search premises, not necessarily after an arrest and not with the consent of the owners, for the gathering of evidence.

4.27 The previous law was unsatisfactory, as was illustrated in Ghani v Jones<sup>8</sup>. Justices of the Peace had a range of powers to issue search warrants but there were many major omissions, such as the absence of a power to issue a search warrant in relation to murder.

4.28 With regard to search warrants, Code of Practice B provides that the officer should check the accuracy of the information and not act on anonymous information without corroboration; that he should obtain information about articles and premises; and that he should consider the effect on community relations by consultation with the local police community liaison officer.

4.29 There was concern in Parliament that a provision such as section 8 would enable the police to enter the homes of innocent persons who were wholly unrelated to the crime, and to search, in some cases without prior warning to the owner. For this reason, the Philips Commission recommended (at paragraph 3.45) that applications be made to a circuit judge instead of a magistrate, and that the power exist only in relation to “grave offences” (paragraph 3.42). PACE, however, permits an application to a magistrate who is to be satisfied of evidence of a “serious arrestable offence” on the premises.

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<sup>8</sup> Ghani v. Jones [1969] 3 All ER 1700.

4.30 There has been criticism that “the judicial hurdle of the warrant application is no more than a stepping stone. Magistrates see the “information from a reliable source’ as an impenetrable barrier beyond which they cannot or will not go<sup>9</sup>.”

4.31 In England, warrants are in fact relied on only in a minority of searches conducted by the police. The police instead rely on other powers, such as the power to enter premises without a warrant to arrest a person suspected of having committed an arrestable offence and the power to search the premises on which a person is arrested.

4.32 The wording of section 8(1)(b) (“that there is material on premises ... which is likely to be of substantial value”) is designed to prevent “fishing expeditions”. The reference in section 8(1)(d) to “legal privilege”, “excluded material” and “special procedure material” is explained further in sections 10 to 14 of PACE, and (in the last two cases) is to complex new concepts introduced by PACE.

(2) *Our recommendations*

4.33 **We believe a magistrate in Hong Kong (rather than a justice of the peace) should have the authority to issue search warrants subject to the stringent requirements contained in section 8 of PACE e.g. that the evidence sought is likely to be of substantial value to the investigation and is likely to be relevant.** Section 8 is moreover restricted to “serious arrestable offences” and this affords protection to the rights of occupiers of property. For this reason, **we recommend this section be adopted.**

## **Section 9**

### *“Special provisions as to access*

9. (1) *A constable may obtain access to excluded material or special procedure material for the purposes of a criminal investigation by making an application under Schedule 1 below and in accordance with that Schedule.*

(2) *Any Act (including a local Act) passed before this Act under which a search of premises for the purposes of a criminal investigation could be authorised by the issue of a warrant to a constable shall cease to have effect so far as it relates to the authorisation of searches -*

(a) *for items subject to legal privilege; or*

(b) *for excluded material; or*

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<sup>9</sup> Lidstone, *Magistrates the Police and Search Warrants*, [1984] Crim LR 449 at pp. 452-53.

- (c) *for special procedure material consisting of documents or records other than documents.”*

(1) *The significance of the section (and following related sections)*

4.34 PACE introduces special safeguards to protect certain categories of evidence, mainly of a confidential and legal nature. Section 9 deals with the problem of access by the police to excluded material or special procedure material, and must be read in conjunction with Schedule 1 of the Act.

4.35 It is necessary to go into some detail regarding the innovations of the Act, and for the sake of convenience all related topics (sections 10 to 14 and Schedule 1 of the Act) are dealt with here.

4.36 The categories of evidence subject to special safeguards against police search on the obtaining of a search warrant are:

- (a) Items subject to legal privilege (section 10 of PACE: These can never be seized and the definition follows the existing legal categories and includes communications between a solicitor and the client when giving legal advice together with the attendant documents, and communications and documents in connection with legal proceedings, such as reports and letters from experts.
- (b) Excluded material (sections 11 to 13 of PACE): Excluded material is generally immune from police scrutiny, although it can be taken on a special warrant<sup>10</sup>. It includes all personal records which a person has acquired or created in the course of any trade, business, profession or other occupation or for the purposes of any paid or unpaid office and which he holds in confidence. These records are defined in section 12 as relating to health, personal welfare and spiritual counselling: for example, hospital records, probation officers' reports, the records of priests and organisations like the Samaritans. Also included are medical samples, human tissue or fluids; and journalistic material if that material is a document or a record.

In all cases of excluded material the item must have been acquired or created in confidence; material cannot acquire the status of confidentially at a later stage. Proof of confidentiality is either by an express or implied undertaking or a statutory requirement.

- (c) Special procedure material (section 14): Special procedure material has a restricted but easier access<sup>11</sup>. It includes other

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<sup>10</sup> See Schedule 1 to PACE.

<sup>11</sup> See Schedule 1 to PACE.

items of a confidential nature such as commercial correspondence or accounts, and also personal records not kept by the caring professions (for examples, bank accounts and employment records). They have to be acquired in the course of any trade, business or profession. It also includes journalistic material which does not already come under the previous head and is not held subject to a confidence.

*Special search provisions for the above types of evidence*

*(a) Items subject to legal privilege*

4.37 These are absolutely protected. There is no procedure for gaining access to these or for seizing them and if found during a search such material must be left alone.

*(b) Excluded material*

4.38 A magistrate cannot issue a search warrant under section 8 for excluded material (nor for special procedure material). Access to excluded material is generally not permitted. Warrants will not be available for obtaining records from priests, etc. These are exceptions, however, where the material could have been the subject of a search warrant under a pre-PACE status. In these cases, application can be made to a circuit judge for a production order rather than a search warrant on proving a set of access conditions.

*(c) Special procedure material*

4.39 These materials (such as bank records) are dealt with in a similar fashion to excluded material, but can be obtained under a more relaxed set of access conditions<sup>12</sup>.

*The access conditions in Schedule 1 to PACE*

4.40 In general, the hearing for a production order will be based on the access conditions set out in Schedule 1. Either of two sets of conditions can be used to obtain access to special procedure material. However, a production order for special procedure will usually be obtained by proving the first set. This is that there are reasonable grounds for believing:

- (i) that a serious arrestable offence has been committed;
- (ii) that special procedure material is on the premises;
- (iii) that it is likely to be of substantial value to the investigation;

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<sup>12</sup> Unlike excluded material, access is not limited to circumstances where access was available via a statute pre-PACE.

- (iv) that relevant other methods of obtaining the material have been tried or were bound to fail;
- (v) that it is in the public interest, having regard to the benefit likely to accrue to the investigation and to the circumstances under which the person in possession of the material holds it, that the material should be produced (ie that the public interest overrides the interest of the individual).

4.41 To gain access to excluded material, only the second set of access conditions can be used, namely that there are reasonable grounds for believing:

- (i) that special procedure material or excluded material is on the premises;
- (ii) that a search warrant could have been authorised for such material but for section 9(2);
- (iii) that such a warrant would have been appropriate.

4.42 Thus, the main criteria for access under the second set of conditions (and therefore the only criteria for excluded material) is that there is a statute over and above the Act which could have been used but for section 9(2) (this section forbids magistrates to issue a warrant for this type of material).

#### *The application*

4.43 This is an **inter partes** application on oath before the judge. The constable will need the authority of a superintendent to make the application, and notice will need to be served on the person specified.

#### *Warrants upon non-compliance with a production order*

4.44 There are complications in the issue of search warrants on non-compliance with a production order.

4.45 If a warrant could have been issued under a statute by a magistrate but for section 9(2) (ie under the second set of access conditions), then a search warrant can be issued for failure to comply with a production order. This applies to excluded material and certain special procedure material for which apart from the Act a search could be authorised under another statute.

4.46 However, as no warrant can be issued under a statute for most special procedure material, in the vast majority of cases failure to comply with a production order (ie one issued against special procedure material under the first set of access conditions) will not result in a search warrant. The only remedy is contempt of court.

(2) *Our recommendations*

4.47 Because of the inter-related nature of these sections, our recommendations relate to all of sections 9 to 14 and are referred to immediately following the text of section 14. There follows the texts of sections 10 to 14.

**Section 10**

*“Meaning of “Items subject to legal privilege”*

10. (1) *Subject to subsection (2) below in this Act “items subject to legal privilege” means -*

- (a) *communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;*
- (b) *communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and*
- (c) *items enclosed with or referred to in such communications and made -*
  - (i) *in connection with the giving of legal advice; or*
  - (ii) *in connection with or in contemplation of legal proceedings and for the purposes of such proceedings,*

*when they are in the possession of a person who is entitled to possession of them.*

(2) *Items held with the intention of furthering a criminal purpose are not items subject to legal privilege.”*

(1) *The significance of the section*

4.48 General comment on this section has already been made under section 9.

## Section 11

### "Meaning of "excluded material"

11. (1) *Subjects to the following provisions of this section, in this Act "excluded material" means -*

- (a) *personal records which a person has acquired or created in the course of any trade, business, profession or other occupation or for the purposes of any paid or unpaid office and which he holds in confidence;*
- (b) *human tissue or tissue fluid which has been taken for the purposes of diagnosis or medical treatment and which a person holds in confidence;*
- (c) *journalistic material which a person holds in confidence and which consists -*
  - (i) *of documents; or*
  - (ii) *of records other than documents.*

(2) *A person holds material other than journalistic material in confidence for the purposes of this section if he holds it subject -*

- (a) *to an express or implied undertaking to hold it in confidence; or*
- (b) *to a restriction on disclosure or an obligation of secrecy contained in any enactment, including an enactment contained in an Act passed after this Act.*

(3) *A person holds journalistic material in confidence for the purposes of this section if -*

- (a) *he holds it subject to such an undertaking, restriction or obligation; and*
- (b) *it has been continuously held (by one or more persons) subject to such an undertaking, restriction or obligation since it was first acquired or created for the purposes of journalism."*

(1) *The significance of this section*

4.49 We have already commented generally on this section under section 9. We would only add at this point that the law on confidentiality is both uncertain and complex.

4.50 Confidence may be express or implied (this is recognised by s.11(2)). In most cases it is likely to be implied. It is not clear whether the general law relating to confidence applies to this section. If it does, then confidence cannot attach to information already in the public domain (Schering Chemicals v. Falkman [1982] QB 1) unless the information could only be discovered after considerable research.

## **Section 12**

### *“Meaning of “personal records”*

12. *In this Part of this Act “personal records” means documentary and other records concerning an individual (whether living or dead) who can be identified from them, and relating -*

- (a) to his physical or mental health;*
- (b) to spiritual counselling or assistance given or to be given to him;*
- (c) to counselling or assistance given or to be given to him, for the purposes of his personal welfare, by any voluntary organisation or by any individual who -*
  - (i) by reason of his office or occupation has responsibilities for his personal welfare; or*
  - (ii) by reason of an order of a court, has responsibilities for his supervision.”*

(1) *The significance of the section*

4.45 General comment on this section has already been made under section 9.

## **Section 13**

### *“Meaning of “journalistic material”*

13. (1) *Subject to subsection (2) below, in this Act “journalistic material” means material acquired or created for the purposes of journalism.*

(2) *Material is only journalistic material for the purposes of this Act if it is in the possession of a person who acquired or created it for the purposes of journalism.*

(3) *A person who receives material from someone who intends that the recipient shall use it for the purposes of journalism is to be taken to have acquired it for those purposes.*"

(1) *The significance of the section*

4.52 This section defines journalistic material. Journalistic material, it will be seen, is defined as material acquired or created for the purposes of journalism. Journalism itself is not further defined. The Act rather strangely separates the profession of journalist from others.

## **Section 14**

### *"Meaning of "special procedure material"*

14. (1) *In this Act "special procedure material" means -*

- (a) *material to which subsection (2) below applies; and*
- (b) *journalistic material, other than excluded material.*

(2) *Subject to the following provisions of this section, this subsection applies to material, other than items subject to legal privilege and excluded material, in the possession of a person who -*

- (a) *acquired or created it in the course of any trade, business, profession or other occupation or for the purpose of any paid or unpaid office and*
- (b) *holds it subject -*
  - (i) *to an express or implied undertaking to hold it in confidence; or*
  - (ii) *to a restriction or obligation such as is mentioned in section 11(2)(b) above.*

(3) *Where material is acquired -*

- (a) *by an employee from his employer and in the course of his employment; or*
- (b) *by a company from an associated company,*

*it is only special procedure material if it was special procedure material immediately before the acquisition.*

(4) *Where material is created by an employee in the course of his employment, it is only special procedure material if it would have been special procedure material had his employer created it.*

(5) *Where material is created by a company on behalf of an associated company, it is only special procedure material if it would have been special procedure material had the associated company created it.*

(6) *A company is to be treated as another's associated company for the purposes of this section if it would be so treated under section 302 of the income and Corporation Taxes Act 1970."*

(1) *The significance of the section*

4.53 General comment on this section has already been made under section 9.

4.54 An additional comments relates to one limb of the definition of special procedure material, viz, "journalistic material, other than excluded material" (section 14(1)(b)). This would be journalistic material which does not qualify as excluded material under s.11(1)(c). Given the very wide meaning of "document" (see above under s.11(1)) the only things that could possibly be covered are disguises and the like. For example, a rapist wears a mask. It finds its way into the hands of a journalist. The mask is journalistic material (see section 13) and therefore special procedure material.

(2) *Our recommendations on sections 10 to 14*

4.55 Section 8(d) referred to various types of evidence: items subject to legal privilege; excluded material; and special procedure material. As noted, **we agree with the approach adopted in section 8. The sections following section 8 (sections 9 to 14):**

- (a) **reinforce present law by preventing the disclosure of privileged documents;**
- (b) **set out procedures for obtaining or attempting to obtain excluded or special procedure material (e.g. film held by journalists) which for policy reasons is not to be made available through the normal procedure of an application to a magistrate for a warrant (but rather requires an inter partes application before a judge).**

4.56 **We have reviewed these complicated provisions and believe that the safeguards they provide represent an improvement on the existing law in Hong Kong. We accordingly recommend that the**

**scheme which these sections reflect (including the underlying definition provisions, sections 12 and 13) be adopted in its entirety.**

## **Section 15**

### *“Search warrants - safeguards*

15. (1) *This section and section 16 below have effect in relation to the issue to constables under any enactment, including an enactment contained in an Act passed after this Act, of warrants to enter and search premises, and an entry on or search of premises under a warrant is unlawful unless it complies with this section and section 16 below.*

(2) *Where a constable applies for any such warrant, it shall be his duty -*

(a) *to state -*

(i) *the ground on which he makes the application; and*

(ii) *the enactment under which the warrant would be issued;*

(b) *to specify the premises which it is desired to enter and search; and*

(c) *to identify, so far as is practicable, the articles or persons to be sought.*

(3) *An application for such a warrant shall be made ex parte and supported by an information in writing.*

4) *The constable shall answer on oath any question that the justice of the peace or judge hearing the application asks him.*

(5) *A warrant shall authorise an entry on one occasion only.*

(6) *A warrant -*

(a) *shall specify -*

(i) *the name of the person who applies for it;*

(ii) *the date on which it is issued;*

(iii) *the enactment under which it is issued; and*

- (iv) *the premises to be searched; and*
- (b) *shall identify, so far as is practicable, the articles or person to be sought.*
- (7) *Two copies shall be made of a warrant.*
- (8) *The copies shall be clearly certified as copies.”*

(1) *The significance of the section*

4.57 This section has to be read together with section 16 and Code of Practice B (which provides guidelines on the execution of warrants). Our recommendations again appear, therefore, after the last relevant section, section 16. Sections 15 and 16 apply to all search warrants. An entry on, or a search of, premises which does not comply with this section and section 16 is unlawful. The application is *ex parte* and must be supported by an information in writing which must state the ground for the application, the Act under which it is to be issued, the premises to be searched and the articles or persons to be sought. The constable must answer questions on oath. The warrant itself can only authorise entry on one occasion and must specify the name of the applicant, date of issue, Act under which it is issued and premises to be searched and, in so far as is practicable, the articles or person sought.

## **Section 16**

### *“Execution of warrants*

16. (1) *A warrant to enter and search premises may be executed by any constable.*

(2) *Such a warrant may authorise persons to accompany any constable who is executing it.*

(3) *Entry and search under a warrant must be within one month from the date of its issue.*

(4) *Entry and search under a warrant must be at a reasonable hour unless it appears to the constable executing it that the purpose of a search may be frustrated on an entry at a reasonable hour.*

(5) *Where the occupier of premises which are to be entered and searched is present at the time when a constable seeks to execute a warrant to enter and search them the constable -*

- (a) shall identify himself to the occupier and, if not in uniform, shall produce to him documentary evidence that he is a constable;
- (b) shall produce the warrant to him; and
- (c) shall supply him with a copy of it.

(6) Where -

- (a) the occupier of such premises is not present at the time when a constable seeks to execute such a warrant; but
- (b) some other person who appears to the constable to be in charge of the premises is present,

subsection (5) above shall have effect as if any reference to the occupier were a reference to that other person.

(7) If there is no person present who appears to the constable to be in charge of the premises, he shall leave a copy of the warrant in prominent place on the premises.

(8) A search under a warrant may only be a search to the extent required for the purpose for which the warrant was issued.

(9) A constable executing a warrant shall make an endorsement on it stating -

- (a) whether the articles or persons sought were found; and
- (b) whether any articles were seized, other than articles which were sought.

(10) A warrant which -

- (a) has been executed; or
- (b) has not been executed within the time authorised for its execution, shall be returned -
  - (i) if it was issued by a justice of the peace, to the clerk to the justices for the petty sessions area for which he acts; and
  - (ii) if it was issued by a judge, to the appropriate officers of the court from which he issued it.

(11) *A warrant which is returned under subsection (10) above shall be retained for 12 months from its return -*

- (a) *by the clerk to the justices, if it was returned under paragraph (i) of that subsection; and*
- (b) *by the appropriate officer, if it was returned under paragraph (ii).*

(12) *If during the period for which a warrant is to be retained the occupier of the premises to which it relates asks to inspect it, he shall be allowed to do so."*

(1) *The significance of the section*

4.58 This section deals with the conduct of searches and is largely self-explanatory. In executing a search warrant under subsection (1), section 117 of PACE permits the police to use reasonable force if necessary. Code B lists three situations where force is necessary:

- (i) where access has been refused;
- (ii) where it is impossible to communicate with the occupier so as to obtain access;
- (iii) where to alert the occupier would frustrate the object of the search or endanger the officer or other persons.

4.59 Under subsection (8), a search is only authorised to the extent required for the purpose of the search. Any further search is unlawful and would give rise to an action in trespass. The extent of the search required must depend on the articles concerned. For example, a search for stolen jewellery or money would merit a fuller search than one for articles which are less easy to hide, such as a television set. As far as documents are concerned, in Reynolds v. Commissioner of Police of the Metropolis (Times, August 4, 1984) it was stated: "To do a detailed examination of the house would have required several police officers there for some days and caused disturbance to the householder". The police had to be "broadly selective". They were not entitled to seize every document they could lay their hands on but were entitled to take documents which they reasonably believed were (in this case) forged or would be of evidential value.

4.60 The Code stresses (paragraph 5.7) that a search may not continue once all the things specified in the warrant have been found or the officer in charge is reasonably satisfied that they are not on the premises. The code (paragraph 5.8) stresses that the search must be conducted with "due consideration" for the property and may be used where this is necessary because the cooperation of the occupier cannot be obtained or is insufficient for the purpose. The lawfulness of the use of force must be judged objectively (see Swales v. Cox [1981] 1 QB 849).

(2) *Our recommendations on sections 15 and 16*

4.61 **The contents of sections 15 and 16 seem eminently sensible to us in reinforcing the sanctity of private property.** To some extent, they reflect existing law and they are subject to the umbrella protection afforded by section 8 that the evidence sought must be likely to be of substantial value and to be relevant. **We recommend the adoption of these sections.**

### **Section 17**

#### *“Entry for purpose of arrest etc*

17. (1) *Subject to the following provisions of this section, and without prejudice to any other enactment, a constable may enter and search any premises for the purpose -*

- (a) *of executing -*
  - (i) *a warrant of arrest issued in connection with or arising out of criminal proceedings; or*
  - (ii) *a warrant of commitment issued under section 76 of the Magistrates’ Court Act 1980;*
- (b) *of arresting a person for an arrestable offence;*
- (c) *of arresting a person for an offence under -*
  - (i) *section 1 (prohibition of uniforms in connection with political objects) ... of the Public Order Act 1936;*
  - (ii) *any enactment contained in section 6 to 8 or 10 of the Criminal Law Act 1977 (offences relating to entering and remaining on property);*
  - (iii) *s.4 of the Public Order Act 1986 (fear or provocation of violence);*
- (d) *of recapturing a person who is unlawfully at large and whom he is pursuing; or*
- (e) *of saving life or limb or preventing serious damage to property.*

(2) *Except for the purpose specified in paragraph (e) of subsection (1) above, the powers of entry and search conferred by this section -*

- (a) *are only exercisable if the constable has reasonable grounds for believing that the person whom he is seeking is on the premises; and*
- (b) *are limited, in relation to premises consisting of two or more separate dwellings, to powers to enter and search -*
  - (i) *any parts of the premises with the occupiers of any dwelling comprised in the premises use in common with the occupiers of any other such dwelling; and*
  - (ii) *any such dwelling in which the constable has reasonable grounds for believing that the person whom he is seeking may be.*

(3) *The powers of entry and search conferred by this section are only exercisable for the purposes specified in subsection (1)(c)(ii) above by a constable in uniform.*

(4) *The power of search conferred by this section is only a power to search to the extent that is reasonably required for the purpose for which the power of entry is exercised.*

(5) *Subject to subsection (6) below, all the rules of common law under which a constable has power to enter premises without a warrant are hereby abolished.*

(6) *Nothing in subsection (5) above affects any power of entry to deal with or prevent a breach of the peace."*

(1) *The significance of the section*

4.62 Searches can always be carried out with permission. The real problem comes when consent is not available and the search must be made without permission. Here the Act has in essence codified previous police practice. Section 17, which is mainly concerned with searching for people, deals with entry and search without a search warrant or permission and gives the following powers.

4.63 Under section 17(1) a constable may enter premises:

- (a) to execute a warrant of arrest;
- (b) to arrest a person for an arrestable offence;

- (c) to arrest for illegal conduct at a public meeting, or offensive behaviour likely to cause a breach of the peace (unchanged from the previous law under sections 1, 4 and 5 of the Public Order Act 1986, or the offences relating to law under sections 6, 7, 8 and 10 of the Criminal Law Act 1977). Common Law powers for entry to prevent a breach of the peace (Thomas v. Sawkins [1935] 2 KB 249) are preserved by section 17(6);
- (d) in hot pursuit of a person unlawfully at large;
- (e) to save life or limb or prevent serious damage to property.

4.64 Common law powers of entry without warrant other than for breach of the peace are abolished (section 17(5)).

4.65 To exercise any of the powers under the Act, the test of reasonableness is paramount. This means that the search must be on reasonable grounds and that the constable believes the person he is seeking is on the premises. It can also include a search for items reasonably connected with the entry. To some degree this incorporates the tests that Lord Denning laid down in Ghani v. Jones [1970] 1 QB 693 that there is no general right for the police to go on “fishing expeditions” and to ransack a person’s house simply to see if he is there or if he may have committed some crime or other. A search for persons cannot reasonably be said to authorise a minute search of the house. The test is objective: the entry and search would be illegal, even if the policeman had an honest belief that he could search in the way he did, if the court considered that there were no objective reasonable grounds on which to justify the search. The Code of Practice goes further. Even when the police have a right to enter, the Code stipulates that they should generally seek permission first, unless the premises are unoccupied or there are reasonable grounds to believe that to alert the occupier would frustrate the search. The police should usually identify themselves and state the purpose of the search.

4.66 There remain in existence a range of statutory powers other than those contained in PACE giving entry. These include such disparate statutes as the Gaming Acts, the Misuse of Drugs Act 1971 and the Wild Life and Countryside Act 1984. The provisions contained in these Acts are in no way affected.

(2) *Our recommendations*

4.67 **A safeguard against abuse of the powers of entry contained in section 17 is provided in the requirement that entry is subject to a test of reasonableness. We favour this approach and recommend the adoption of this section.**

**Section 18**

“Entry and search after arrest

18. (1) Subject to the following provisions of this section, a constable may enter and search any premises occupied or controlled by a person who is under arrest for an arrestable offence, if he has reasonable grounds for suspecting that there is on the premises evidence other than items subject to legal privilege, that relates -

- (a) to that offence; or
- (b) to some other arrestable offence which is connected with or similar to that offence.

(2) A constable may seize and retain anything for which he may search under subsection (1) above.

(3) The power to search conferred by subsection (1) above is only a power to search to the extent that is reasonably required for the purpose of discovering such evidence.

(4) Subject to subsection (5) below, the powers conferred by this section may not be exercised unless an officer of the rank of inspector or above has authorised them in writing.

(5) A constable may conduct a search under subsection (1) above -

- (a) before taking the person to a police station; and
- (b) without obtaining an authorisation under subsection (4) above,

if the presence of that person at a place other than a police station is necessary for the effective investigation of the offence.

(6) If a constable conducts a search by virtue of subsection (5) above, he shall inform an officer of the rank of inspector or above that he has made the search as soon as practicable after he has made it.

(7) An officer who -

- (a) authorises a search; or
- (b) is informed of a search under subsection (6) above,

shall make a record in writing -

- (i) of the grounds for the search; and

(ii) *of the nature of the evidence that was sought.*

(8) *If the person who was in occupation or control of the premises at the time of the search is in police detention at the time the record is to be made, the officer shall make the record as part of his custody record.”*

(1) *The significance of the section*

4.68 Search of premises after arrest under section 18 moves from search for people to search for things.

4.69 The police are given the power to enter and search any premises occupied or controlled by a person under arrest for an arrestable offence if the constable has reasonable grounds for suspecting that there is on the premises evidence relating to that offence or to some other arrestable offence which is connected with or similar to that offence. This reverses the decision in McLorie v. Oxford [1982] 3 WLR 423. An officer of the rank of inspector or above must give written authorisation of the entry and search, though the procedure can be circumvented if the presence of the person at a place other than a police station is necessary for the effective investigation of the offence.

4.70 There is some doubt about the meaning of “similar offence”. It is a matter for conjecture, for instance, whether burglary and deception are similar offences, or deception and criminal damage.

(2) *Our recommendations*

4.71 **Section 18 contains a broad power for the police to search for evidence following an arrest, subject to the safeguard in section 18(1) that the search must be on reasonable grounds. We believe that with this safeguard the section should be supported.**

## **Section 19**

### *“General power of seizure*

19. (1) *The powers conferred by subsection (2), (3), and (4) below are exercisable by a constable who is lawfully on any premises.*

(2) *The constable may seize anything which is on the premises if he has reasonable grounds for believing -*

(a) *that it has been obtained in consequence of the commission of an offence; and*

(b) *that it is necessary to seize it in order to prevent it being concealed, lost, damaged, altered or destroyed.*

(3) *The constable may seize anything which is on the premises if he has reasonable grounds for believing -*

(a) *that it is evidence in relation to an offence which he is investigating or any other offence; and*

(b) *that it is necessary to seize it in order to prevent the evidence being concealed, lost, altered or destroyed.*

(4) *The constable may require any information which is contained in a computer and is accessible from the premises to be produced in a form in which it can be taken away and in which it is visible and legible if he has reasonable grounds for believing -*

(a) *that -*

(i) *it is evidence in relation to an offence which he is investigating or any other offence; and*

(ii) *it has been obtained in consequence of the commission of an offence; and*

(b) *that it is necessary to do so in order to prevent it being concealed, lost tampered with or destroyed.*

(5) *The powers conferred by this section are in addition to any power otherwise conferred.*

(6) *No power of seizure conferred on a constable under any enactment (including an enactment contained in an Act passed after this Act) is to be taken to authorise the seizure of an item which the constable exercising the power has reasonable grounds for believing to be subject to legal privilege.”*

(1) *The significance of the section*

4.72 Most of the powers of search that have been discussed are limited either by the terms of the warrant, or by the relevant statutory provision (under section 17 to effecting an arrest, or under section 18 to searching for evidence of the crime), and the limits on search are emphasised in the Code of Practice. However, the powers of seizure are very wide: not only may the police seize the item for which they are searching under the specific powers they are using, but they can also seize anything else they find provided this comes within the wide general grounds specified in section 19.

4.73 Section 19 empowers a constable, provided he is lawfully on the premises either under a warrant or by one of the other powers, to seize anything he reasonably believes to be evidence of a criminal offence. This can be either the particular offence being investigated or any other offence. The power to seize it must be on the grounds that otherwise it may be concealed, lost, damaged, altered or destroyed.

4.74 This applies to all material, even excluded or special procedure material. Only legally privileged material remains protected. Of course, under most of the powers of entry, and under the Code of Practice, the police can only search to the extent that is reasonably necessary. They should not therefore be seen carrying away whole bundles of evidence and files in the hope that something may turn up (see Reynolds v. Commissioner of Metropolitan Police [1984] 3 All ER 649).

(2) *Our recommendations*

4.75 **The general power of seizure conferred on the police officer by section 19 is controlled by the safeguard that the constable must be lawfully on the premises and that he must have reasonable grounds for believing the existence of the circumstances described in subsections (2) to (4). We believe these safeguards lead to a workable compromise between police powers and the rights of the individual and we recommend adoption of a provision in similar form.**

## **Section 20**

### *“Extension of powers of seizure to computerised information*

20. (1) *Every power of seizure which is conferred by an enactment to which this section applies on a constable who has entered premises in the exercise of a power conferred by an enactment shall be construed as including a power to require any information contained in a computer and accessible from the premises to be produced in a form in which it can be taken away and in which it is visible and legible.*

(2) *This section applies -*

- (a) *to any enactment contained in an Act passed before this Act.*
- (b) *to sections 8 and 18 above;*
- (c) *to paragraph 13 of Schedule 1 to this Act; and*
- (d) *to any enactment contained in an Act passed after this Act.”*

(1) *The significance of the section*

4.76 The Act extends the power of seizure to computerised information. The police are given the power to require any information contained in a computer and accessible from the premises to be produced “in a form in which it can be taken away and in which it is visible and legible” (section 20(1)).

4.77 Our recommendations in relation to sections 20 to 22 are to be found after section 22.

**Section 21**

*“Access and copying*

21. (1) *A constable who seizes anything in the exercise of a power conferred by any enactment, including an enactment contained in an Act passed after this Act, shall, if so requested by a person showing himself -*

- (a) *to be occupier of premises on which it was seized; or*
- (b) *to have had custody or control of it immediately before the seizure,*

*provide that person with a record of what he seized.*

(2) *The officer shall provide the record within a reasonable time from the making of the request for it.*

(3) *Subject to the subsection (8) below, if a request for permission to be granted access to anything which -*

- (a) *has been seized by a constable; and*
- (b) *is retained by the police for the purpose of investigating an offence,*

*is made to the officer in charge of the investigation by a person who had custody or control of the thing immediately before it was so seized or by someone acting on behalf of such a person the officer shall allow the person who made the request access to it under the supervision of a constable.*

(4) *Subject to subsection (8) below, if a request for a photograph or copy of any such thing is made to the officer in charge of the investigation by a person who had custody or*

*control of the thing immediately before it was so seized, or by someone acting on behalf of such a person, the officer shall -*

- (a) allow the person who made the request access to it under the supervision of a constable for the purpose of photographing or copying it; or*
- (b) photograph or copy it, or cause it to be photographed or copied.*

*(5) A constable may also photograph or copy, or have photographed or copied, anything which he has power to seize, without a request being made under subsection (4) above.*

*(6) Where anything is photographed or copied under subsection (4)(b) above, the photograph or copy shall be supplied to the person who made the request.*

*(7) The photograph or copy shall be so supplied within a reasonable time from the making of the request.*

*(8) there is no duty under this section to grant access to, or to supply a photograph or copy of, anything if the officer in charge of the investigation for the purposes of which it was seized has reasonable grounds for believing that to do so would prejudice -*

- (a) that investigation;*
- (b) the investigation of an offence other than the offence for the purposes of investigating which the thing was seized; or*
- (c) any criminal proceedings which may be brought as a result of -*
  - (i) the investigation of which he is in charge; or*
  - (ii) any such investigation as it mentioned in paragraph (b) above."*

*(1) The significance of the section*

4.78 The occupier or person who had custody and control can request a record of all items seized (which must be provided within a reasonable time) and must also be allowed access to the seized items and to have photographs or copies made of the items. The police can refuse access and photocopying if there are reasonable grounds to believe it would prejudice the investigation of the offence or any criminal proceedings.

## Section 22

### “Retention

22. (1) *Subject to subsection (3) below, anything which has been seized by a constable or taken away by a constable following a requirement made by virtue of section 19 or 20 may be retained so long as necessary in all the circumstances.*

(2) *Without prejudice to the generality of subsection (1) above-*

(a) *anything seized for the purposes of a criminal investigation may be retained, except as provided by subsection (4) below, -*

(i) *for the use as evidence at a trial for an offence; or*

(ii) *for forensic examination or for investigation in connection with an offence; and*

(b) *anything may be retained in order to establish its lawful owner, where there are reasonable grounds for believing that it has been obtained in consequence of the commission of an offence.*

(3) *Nothing seized on the grounds that it may be used*

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(a) *to cause physical injury to any person;*

(b) *to damage property;*

(c) *to interfere with evidence; or*

(d) *to assist in escape from police detention or lawful custody,*

*may be retained when the person from whom it was seized is no longer in police detention or the custody of a court or is in the custody of a court but has been released on bail.*

(4) *Nothing may be retained for either of the purposes mentioned in subsection (2)(a) above if a photograph or copy would be sufficient for that purpose.*

(5) *Nothing in this section affects any power of a court to make an order under section 1 of the Police (Property) Act 1987.”*

(1) *The significance of the section*

4.79 Section 22 empowers the police to retain evidence for as long as is necessary, provided a photograph or copy would not be sufficient for their purposes. In particular, evidence can be retained for forensic investigation or, if stolen, in order to establish the rights of the owner.

(2) *Our recommendations on sections 20 to 22*

4.80 **Sections 20 to 22 are ancillary to the general power of seizure established in section 19. We think that the objectives of these sections are clear and sensible and we recommend the adoption of similar provisions in Hong Kong.**

**Section 23**

*“Part II - interpretation*

23. *In this Act -*

*“premises” includes any place and, in particular, includes -*

- (a) *any vehicle, vessel, aircraft or hovercraft;*
- (b) *any offshore installation; and*
- (c) *any tent or movable structure; and*

*“offshore installation” has the meaning given to it by section 1 of the Mineral Workings (Offshore Installations) Act 1971.”*

(1) *Our recommendations*

4.81 **As part of our overall recommendation to adopt the scheme formulated by PACE, it follows that we favour the adoption of the relevant ancillary provisions such as this one relating to “interpretation”. The only modification required relates to “offshore installation” which is defined in PACE by reference to a United Kingdom statute which does not apply in Hong Kong.**

## Chapter 5

### Powers of arrest

### Part III of PACE – Sections 24 to 33

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#### I. Existing law in Hong Kong

5.1 Part III of PACE deals with the power of arrest, rather than the question of what in law constitutes an arrest. The latter question is a matter of common law and an issue of fact. In Hong Kong, two methods of arrest are available to the police (leaving aside the power at common law to arrest a person causing a breach of the peace):

- (1) Arrest without a warrant
- (2) Arrest with a warrant

#### (1) *Arrest without a warrant*

5.2 The general power of a police officer to arrest a person without a warrant in Hong Kong is contained in the recently amended section 50(1) of the Police Force Ordinance<sup>1</sup>. It provides that a police officer may arrest a person who is reasonably suspected of having committed an offence for which the sentence is fixed by law, or an “imprisonable” offence<sup>2</sup>. The concept of a reasonable suspicion, which comes from the common law, protects a citizen from arbitrary arrest. The test is an objective one.

5.3 Amended section 50(1) of the Police Force Ordinance reads:

“ (1) *It shall be lawful for any police officer to apprehend any person who [sic] he reasonably believes will be charged with or whom he reasonably suspects of being guilty of -*

(a) *any offence for which the sentence is fixed by law or for which a person may (on a first conviction for that offence) be sentenced to imprisonment; or*

(b) *any offence, if it appears to the police officer that service of a summons is impracticable because -*

(i) *the name of the person is unknown to, and cannot readily be ascertained by, the police officer;*

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<sup>1</sup> The Police Force Ordinance (Cap 232) has been amended by the Police Force (Amendment) Ordinance, No. 57 of 1992.

<sup>2</sup> See amended section 1(1)(a) of the Police Force Ordinance.

- (ii) *the police officer has reasonable grounds for doubting whether a name given by the person as his name is his real name;*
- (iii) *the person has failed to give a satisfactory address for service; or*
- (iv) *the police officer has reasonable grounds for doubting whether an address given by the person is a satisfactory address for service.*

*(1A) A police officer may exercise the power to apprehend a person under subsection (1) without any warrant for that purpose and whether or not he has seen any offence committed.*

*(1B) It shall be lawful for any police officer to apprehend any person whom he reasonably suspects of being liable to deportation from Hong Kong".*

## **(2) Arrest with a warrant**

5.4 In this case, the police officer acts pursuant to a warrant for an arrest issued under a quasi-judicial order (such as that made by a magistrate). The warrant commands a police officer to arrest a specified person (named in the warrant) and to bring him before a magistrate in order that he may be dealt with in accordance with the law. Once a warrant is issued any police officer can execute the warrant as soon as the suspect is located. The police officer has no need to form a reasonable suspicion that the suspect has committed an offence.

### ***The purposes for which the arrest power may be used***

5.5 The arrest power may be used for three purposes:

- (1) as a means of initiating the prosecution process;
- (2) to compel the suspect to accompany the police officer to the police station to assist with further inquiries; or
- (3) to prevent further crime being committed (eg where the suspect is threatening a breach of the peace).

## II Overview of Part III of PACE

5.6 Before the introduction of PACE, in England and Wales an arrest was lawful if a warrant had been issued by a magistrate or if there was a reasonable suspicion that an “arrestable offence” had been, was being or was about to be committed (ie in effect the existing law in Hong Kong). The concept of “arrestable offence” is retained in PACE. It covers not only all offences (not, as before, just statutory ones) which are punishable with more than 5 years imprisonment but also a collection of miscellaneous statutory offences which were not previously arrestable (section 24(1)(c)). Section 25 (which is a new provision) allows a constable (but not a private citizen) to arrest for a non-arrestable offence in certain specified circumstances as follows:

- (1) The relevant person fails to give a credible name and address (section 25(3)(b));
- (2) Preventive arrest (section 25(3)(d)); or
- (3) Protective arrest (section 25(3)(e)).

5.7 Part III of PACE is a reflection of the desire of the Philips Commission “to restrict the circumstances in which the police can exercise the power to deprive a person of his liberty to those in which it is genuinely necessary .... and to simplify, clarify and rationalise the existing statutory powers of arrest.”<sup>3</sup>

5.8 One recommendation of the Royal Commission was that all imprisonable offences become arrestable offences. This was not adopted in PACE. Accordingly, the basic principle for arrest without warrant remains whether the offence carries a sentence of five years or more (section 24(1)(b)). In addition, PACE adds some offences that were not previously arrestable. Section 2 of the Criminal Law Act 1967 had excluded certain serious common law offences from the concept of “arrestable offence” because these offences were not derived from any enactment. PACE rectifies this omission and offences such as kidnapping, attempting to pervert the course of justice, conspiring to defraud and false imprisonment now become arrestable offences. The Act also makes certain other offences arrestable which had not hitherto been arrestable, though some had carried powers of arrest (see section 24(2)). The list includes offences under Official Secrets Acts 1911 and 1920; indecent assault on a woman, causing prostitution of women, procuration of a girl under 21 (Sexual Offences Act 1956, sections 14, 22, 23); taking a motor vehicle without authority (section 12(1) of the Theft Act 1968) and going equipped for stealing (section 25(1) of the Theft Act 1968).

5.9 Additional powers of arrest are provided for in section 25. All non-arrestable offences carry the power of arrest where a constable has reasonable grounds for suspecting that an offence has been committed or is

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<sup>3</sup> Philips Report at page 44.

being committed or attempted if it appears that a summons is “impracticable or inappropriate” because of the existence of a “general arrest condition” (section 25). The arrest conditions are that:

- (1) the name and address of the suspect is unknown and cannot be readily ascertained; or
- (2) it is reasonably believed that the name and address given are false; or
- (3) the address is not a satisfactory address for service; or
- (4) there are reasonable grounds for believing the arrest is necessary to prevent the suspect causing physical harm to himself or someone else, suffering physical injury, causing loss of or damage to property, committing an offence against public decency or causing an unlawful obstruction of the highway.

It is also permissible where the constable has reasonable grounds for believing that arrest is necessary to protect a child or “other vulnerable person” from the suspect. A person arrested must be told he is under arrest and the grounds of his arrest, even though one or both of these facts is “obvious” (section 28(5)).

5.10 PACE extends the fingerprinting powers of the police (see section 61). In line with this, section 27 grants the police a power to arrest without warrant for fingerprinting a person convicted of a “recordable” offence (ie. an offence for conviction of which a record is kept in national police records) who has not at any time been in police detention for the offence, has not had his fingerprints taken and has refused to go to a police station to have his prints taken.

5.11 PACE makes it clear that when persons “assisting with an investigation” voluntarily attend a police station, they are “entitled to leave” at will unless placed under arrest (section 39). This puts into statutory form (as the Royal Commission recommended in paragraph 3.97) what has always been the law. Although the law has now been clarified, its value in practice may be doubted. Will the average person “helping the police with their enquiries” realise that he is at liberty to go?

5.12 A duty is imposed on the police to take an arrested person to a police station “as soon as practicable after the arrest” (section 30(1)) but they need not do so where the presence of the arrested person “elsewhere” is necessary “to carry out such investigations as it is reasonable to carry out immediately” (section 30(1)). In such a case the reasons for the delay must be recorded when the arrested person first arrives at the police station (section 30(11)).

5.13 Powers of search on arrest are set out in section 32. This both confirms and extends the common law. There is now power to search the

arrested person for evidence relating to the offence and for articles which might be used to assist an escape from police detention and to search premises in which the arrest took place. Anything found may be seized and retained if the constable has “reasonable grounds” for believing that it might be used to assist an escape or that it is “evidence of an offence or has been obtained in consequence of the commission of an offence” (section 32(9)).

### **III Section-by-section review of Part III of PACE**

#### **Section 24**

*“Arrest without warrant for arrestable and other offences*

24. (1) *The powers of summary arrest conferred by the following subsections shall apply -*

- (a) *to offences for which the sentence is fixed by law;*
- (b) *to offences for which a person of 21 years of age or over (not previously convicted) may be sentenced to imprisonment for a term of five years (or might be so sentenced but for the restrictions imposed by section 33 of the Magistrates’ Court Act 1980); and*
- (c) *to the offences for which subsection (2) below applies,*

*and in this Act “arrestable offence” means any such offence.*

(2) *The offences to which this subsection applies are -*

- (a) *offences for which a person may be arrested under the customs and excise Acts, as defined in section 1(1) of the Customs and Excise Management Act 1979;*
- (b) *offences under the Official Secrets Act 1911 and 1920 that are not arrestable offences by virtue of the term of imprisonment for which a person may be sentenced in respect of them;*
- (c) *offences under section 14 (indecent assault on a woman), 22 (causing prostitution of women) or 23 (procurement of girl under 21) of the Sexual Offences Act 1956;*
- (d) *offences under section 12(1) (taking motor vehicle or other conveyance without authority etc) or 25(1) (going equipped for stealing, etc) of the Theft Act 1968; and*
- (e) *offences under section 1 of the Public Bodies Corrupt Practices Act 1889 (corruption in office) or section 1 of*

*the Prevention of Corruption Act 1906 (corrupt transactions with agents).*

*(3) Without prejudice to section 2 of the Criminal Attempts Act 1981, the powers of summary arrest conferred by the following subsections shall also apply to the offences of -*

- (a) conspiring to commit any of the offences mentioned in subsection (2) above;*
- (b) attempting to commit any such offence;*
- (c) inciting, aiding, abetting, counselling or procuring the commission of any such offence,*

*and such offences are also arrestable offences for the purposes of this Act.*

*(4) Any person may arrest without a warrant -*

- (a) anyone who is in the act of committing an arrestable offence;*
- (b) anyone whom he has reasonable grounds for suspecting to be committing such an offence.*

*(5) where an arrestable offence has been committed, any person may arrest without a warrant -*

- (a) anyone who is guilty of the offence;*
- (b) anyone whom he has reasonable grounds for suspecting to be guilty of it.*

*(6) Where a constable has reasonable grounds for suspecting that an arrestable offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds for suspecting to be guilty of the offence.*

*(7) A constable may arrest without a warrant -*

- (a) anyone who is about to commit an arrestable offence;*
- (b) anyone whom he has reasonable grounds for suspecting to be about to commit an arrestable offence.”*

(1) *The significance of the section*

5.14 This Section 24 provides for a power of “summary arrest” in respect of the arrestable offences defined in the section. A “summary arrest” means arrest without warrant. The section widens the meaning of arrestable offence to include a number of specific additional offences. The powers of arrest in section 24 are not subject to the restrictions set out in section 25 (see section 25(6)). They can be used even when it would be practicable to proceed by way of summons. Subsections (4) and (5) contain the citizen’s power of arrest. They are also available to constables but are unnecessary in view of the wider powers available to the constable under subsections (6) and (7).

(2) *Our recommendations*

5.15 In general we take the view that the PACE provisions on arrest achieve a sensible balance between the powers necessary to enable the police to fulfil their duties and the right of citizens to be free from the prospect of arbitrary arrest. The detailed provisions on record keeping will serve as a useful safeguard against abuse.

5.16 We considered at length the appropriateness of the definition of “arrestable offence” for Hong Kong. We came to the view that a period of five years was too high. We were conscious of the definition of “arrestable offence” in section 3 of the Interpretation and General Clauses Ordinance (Cap 1) which is as follows:

*“arrestable offence” means an offence for which the sentence is fixed by law or for which a person may under or by virtue of any law be sentenced to imprisonment for a term exceeding 12 months, and an attempt to commit any such offence.”*

5.17 We considered the Arrest sub-committee’s proposal for a period of two years. We believe, however, that a period of two years would create difficulty. It would mean that there would be two definitions of “arrestable offence”: one in Cap 1 based on 12 months; and one in the Hong Kong equivalent of PACE based on 2 years. **We take the view that in the interests of consistency and clarity it would be appropriate to adhere to the existing Cap 1 definition of “arrestable offence” and we so recommend.** In addition, specifically with regard to road checks (section 4 of PACE), it would be difficult to have a test for road checks based on offences carrying two years or more while retaining the existing Cap 1 definition for other purposes.

## **Section 25**

*“General arrest conditions*

25. (1) *Where a constable has reasonable grounds for suspecting that any offence which is not an arrestable offence has been committed or attempted, or is being committed or attempted, he may arrest the relevant person if it appears to him that service of a summons is impracticable or inappropriate because any of the general arrest conditions is satisfied.*

(2) *In this section, “the relevant person” means any person whom the constable has reasonable grounds to suspect of having committed or having attempted to commit the offence or of being in the course of committing or attempting to commit it.*

(3) *The general arrest conditions are -*

- (a) *that the name of the relevant person is unknown to, and cannot be readily ascertained by, the constable’*
- (b) *that the constable has reasonable grounds for doubting whether a name furnished by the relevant person as his name is his real name;*
- (c) *that -*
  - (i) *the relevant person has failed to furnish a satisfactory address for service; or*
  - (ii) *the constable has reasonable grounds for doubting whether an address furnished by the relevant person is a satisfactory address for service;*
- (d) *that the constable has reasonable grounds for believing that arrest is necessary to prevent the relevant person -*
  - (i) *causing physical harm to himself or any other person;*
  - (ii) *suffering physical injury;*
  - (iii) *causing loss of or damage to property;*
  - (iv) *committing an offence against public decency; or*
  - (v) *causing an unlawful obstruction of the highway;*
- (e) *that the constable has reasonable grounds for believing that arrest is necessary to protect a child or other vulnerable person from the relevant person.*

(4) *For the purposes of subsection (3) above an address is a satisfactory address for service if it appears to the constable -*

- (a) *that the relevant person will be at it for a sufficiently long period for it to be possible to serve him with a summons; or*
- (b) *that some other person specified by the relevant person will accept service of a summons for the relevant person at it.*

(5) *Nothing in subsection (3)(d) above authorises the arrest of a person under sub-paragraph (iv) of that paragraph except where members of the public going about their normal business cannot reasonably be expected to avoid the person to be arrested.*

(6) *This section shall not prejudice any power of arrest conferred apart from this section.”*

(1) *The significance of the section*

5.18 This section gives the police a general power of arrest for any non-arrestable offence if at least one of the general arrest conditions in subsection (3) is satisfied. It allows a constable (but not a private citizen) to arrest for a non-arrestable offence if certain requirements are satisfied.

(2) *Our recommendations*

5.19 This section is a necessary adjunct to section 24 in that it enables a constable to arrest for any non-arrestable offence in certain defined situations. Under the old law a constable might have no form of recourse against a person who committed a non-arrestable offence, and whose name and address was unknown. The constable often had to choose between making an unlawful arrest or allowing the offender to walk away scot-free. If the offender fails to provide a satisfactory name and address so that a summons may be served, he may be arrested. **We believe this provision is appropriate to Hong Kong and we recommend its adoption.**

## **Section 26**

*“Repeal of statutory powers of arrest without warrant or order*

26. (1) *Subject to subsection (2) below, so much of any Act (including a local Act) passed before this Act as enables a constable -*

- (a) *to arrest a person for an offence without a warrant; or*

- (b) *to arrest a person otherwise than for an offence without a warrant or an order of a court.*

*shall cease to have effect.*

(2) *Nothing in subsection (1) above affects the enactments specified in Schedule 2 to this Act.”*

(1) *The significance of the section*

5.20 This section repeals all other statutory powers of the police to arrest summarily (including in England those under local Acts) except those specifically preserved by Schedule 2 of the Act. The Schedule lists 21 statutes which contain powers authorising a constable to arrest without warrant or court order for offences not serious enough to be arrestable offences (and thus to fall within section 24) and yet for which it is thought that there ought to be a power of arrest unfettered by the general arrest conditions of section 25. In England the statutes included the Children and Young Persons Act 1969, sections 28(2) and 32 (child in need of care and protection or absent from such care); Child Care Act 1980, section 16 (child absent from local authority care); Mental Health Act 1983, section 136 (power to arrest mentally disordered person to take him to a place of safety); Criminal Justice Act 1972, section 34 (power to take a person arrested for drunkenness to a detoxification centre) and Bail Act 1976, section 7 (person in breach of bail condition or likely to breach bail).

(2) *Our recommendations*

5.21 If this section of PACE is adopted it would follow that existing statutory powers of arrest without warrant or order should cease to have effect. It would be necessary to consider the contents of a schedule equivalent to Schedule 2 of PACE. The 21 statutes listed in Schedule 2 would provide a useful starting-point.

## **Section 27**

*“Fingerprinting of certain offenders*

27. (1) *If a person -*

(a) *has been convicted of a recordable offence;*

(b) *has not at any time been in police detention for the offence; and*

(c) *has not had his fingerprints taken -*

- (i) *in the course of the investigation of the offence by the police; or*
- (ii) *since the conviction;*

*any constable may at any time not later than one month after the date of the conviction require him to attend a police station in order that his fingerprints may be taken.*

(2) *A requirement under subsection (1) above -*

- (a) *shall give the person a period of at least 7 days within which he must so attend; and*
- (b) *may direct him to so attend at a specified time of day or between specified times of day.*

(3) *Any constable may arrest without warrant a person who has failed to comply with a requirement under subsection (1) above.*

(4) *The Secretary of State may be regulations make provision for recording in national police records convictions for such offences as are specified in the regulations.*

(5) *Regulations under this section shall be made by statutory instrument and shall be subject to annulment in pursuance of a resolution of either House of Parliament.”*

(1) *The significance of the section*

5.22 Section 27 is concerned with the situation where a person has been convicted of a recordable offence, has not been in police detention for that offence, and did not have his fingerprints taken in the course of the investigation by the police or since the conviction (so that he was not given a custodial sentence). Such a situation is likely to occur quite rarely and this section provides for it. It provides that such a person may, at any time not later than one month after the date of the conviction, be required by any constable to attend a police station so that his fingerprints may be taken. Section 27 creates a new power of arrest in order that a person's fingerprints may be taken.

(2) *Our recommendations*

5.23 Although the power to require a person who has been convicted of a recordable offence to attend a police station to have his fingerprints taken will rarely be invoked (because fingerprints will generally be taken from a person prior to conviction), the power is useful to have in reserve to enable the police to maintain complete and accurate records. **We support the thinking behind the section and recommend its adoption.**

## Section 28

### *“Information to be given on arrest*

28. (1) *Subject to subsection (5) below, when a person is arrested otherwise than by being informed that he is under arrest, the arrest is not lawful unless the person arrested is informed that he is under arrest as soon as is practicable after his arrest.*

(2) *Where a person is arrested by a constable subsection (1) above applies regardless of whether the fact of the arrest is obvious.*

(3) *Subject to subsection (5) below, no arrest is lawful unless the person arrested is informed of the ground for the arrest at the time of, or as soon as is practicable after, the arrest.*

(4) *Where a person is arrested by a constable, subsection (3) above applies regardless of whether the ground for the arrest is obvious.*

(5) *Nothing in this section is to be taken to require a person to be informed -*

(a) *that he is under arrest; or*

(b) *of the ground for the arrest,*

*if it was not reasonably practicable for him to be so informed by reason of his having escaped from arrest before the information could be given.”*

### (1) *The significance of the section*

5.24 This section attempts to set out the requirements for a valid arrest. Arrest consists of physical restraint of the person being arrested with the intention, which must be made known to the person, of subjecting him to the criminal process. Words suffice if they “were calculated to bring to the accused’s notice, and did bring to the accused’s notice, that he was under compulsion and thereafter submitted to that compulsion” (per Lord Parker C.J. in Alderson v. Booth [1969] 2 Q.B. 216). Where an arrest is made by physical seizure, words indicating that the person is under arrest should accompany the seizure. This common law rule is confirmed by section 28(1), but the common law is modified by requiring, where the arrest is effected by a constable, that the person arrested must be informed that he is under arrest irrespective of the fact that it is obvious.

5.25 The common law also required that the person arrested be told the reasons for the arrest (Christie v. Leachinsky [1947] A.C. 573). This section confirms the common law rule (section 28(3)), but modifies it in respect of arrest by a constable by requiring that information regarding the ground for the arrest be furnished regardless of whether or not it is obvious (section 28(4)). As under the common law, there is no requirement to inform a person that he is under arrest or of the ground for his arrest, if it was not reasonably practicable to do so because he escaped from arrest before the information could be given (section 28(5)).

(2) *Our recommendations*

5.26 **The section gives statutory force to the common law rule which protects the citizen against arbitrary arrest and abuse of the arrest power by the police. The justification for giving the common law rule statutory recognition is clear and the principle behind the section is relevant to the Hong Kong situation. We support its adoption.**

**Section 29**

*“Voluntary attendance at police station etc*

29. *Where for the purpose of assisting with an investigation a person attends voluntarily at a police station or at any place where a constable is present or accompanies a constable to a police station or any such other place without having been arrested -*

- (a) *he shall be entitled to leave at will unless he is placed under arrest;*
- (b) *he shall be informed at once that he is under arrest if a decision is taken by a constable to prevent him from leaving at will.”*

(1) *The significance of the section*

5.27 This section deals with voluntary attendance at a police station. A person who, for the purposes of assisting with an investigation, attends voluntarily at a police station or at any other place where a constable is present or accompanies a constable to a police station without having been arrested, is entitled to leave at will unless placed under arrest. If placed under arrest, he must be informed immediately a decision is taken by a constable to prevent him leaving at will.

(2) *Our recommendations*

5.28 It will often be to the advantage of both the police and persons who can assist with an investigation that those persons attend voluntarily at a police station. If the investigation reveals that the person assisting has not committed an offence then no arrest needs to take place. There are also advantages for the police in the practice of allowing suspects to “assist with their enquiries” voluntarily for the strictures on detention do not apply so long as the suspect attends voluntarily or has accompanied a constable to the station without having been arrested. Section 29 provides an important safeguard to enable someone who has attended a police station voluntarily to leave at any time unless placed under arrest. **The provision is a sensible one and we recommend its adoption.**

**Section 30**

*“Arrest elsewhere than at police station*

30. (1) *Subject to the following provisions of this section, where a person*

- (a) *is arrested by a constable for an offence; or*
- (b) *is taken into custody by a constable after being arrested for an offence by a person other than a constable;*

*at any place other than a police station he shall be taken to a police station by a constable as soon as practicable after the arrest.*

(2) *Subject to subsections (3) and (4) below, the police station to which an arrested person is taken under subsection (1) above shall be a designated police station.*

(3) *A constable to whom this subsection applies may take an arrested person to any police station unless it appears to the constable that it may be necessary to keep the arrested person in police detention for more than six hours.*

(4) *Subsection (3) above applies -*

- (a) *to a constable who is working in a locality covered by a police station which is not a designated police station; and*
- (b) *to a constable belonging to a body of constables maintained by an authority other than a police authority.*

(5) *Any constable may take an arrested person to any police station if -*

(a) *either of the following conditions is satisfied -*

(i) *the constable has arrested him without the assistance of any other constable and no other constable is available to assist him;*

(ii) *the constable has taken him into custody from a person other than a constable without the assistance of any other constable and no other constable is available to assist him; and*

(b) *it appears to the constable that he will be unable to take the arrested person to a designated police station without the arrested person injuring himself, the constable or some other person.*

(6) *If the first police station to which an arrested person is taken after his arrest is not a designated police station he shall be taken to a designated police station not more than six hours after his arrival at the first police station unless he is released previously.*

(7) *A person arrested by a constable at a place other than a police station shall be released if a constable is satisfied, before the person arrested reaches a police station, that there are no grounds for keeping him under arrest.*

(8) *A constable who releases a person under subsection (7) above shall record the fact that he has done so.*

(9) *The constable shall make the record as soon as is practicable after the release.*

(10) *Nothing in subsection (1) above shall prevent a constable delaying taking a person who has been arrested to a police station if the presence of that person elsewhere is necessary in order to carry out such investigations as it is reasonable to carry out immediately.*

(11) *Where there is delay in taking a person who has been arrested to a police station after his arrest, the reasons for the delay shall be recorded when he first arrives at a police station.*

(12) *Nothing in subsection (1) above shall be taken to affect -*

- (a) *paragraphs 16(3) or 18(1) of Schedule 2 to the Immigration Act 1971;*
- (b) *section 34(1) of the Criminal Justice Act 1972; or*
- (c) *paragraph 5 of Schedule 3 to the Prevention of Terrorism (Temporary Provision) Act 1984 or any provision contained in an order under section 13 of the Act which authorises the detention of persons on board a ship or aircraft.*

*(13) Nothing in subsection (9) above shall be taken to affect paragraph 18(3) of Schedule 2 to the Immigration Act 1971.”*

*(1) The significance of the section*

5.29 This section deals with an arrest at a place other than a police station and the procedure to be adopted in such cases. Basically, the arrested person should be taken to a police station by the constable as soon as practicable after the arrest. However, an exception is provided by section 30(10) which provides that the constable may delay taking him to the police station if his presence elsewhere is “necessary in order to carry out such investigations as it is reasonable to carry out immediately”. Delay in taking the arrested person to a police station has a number of adverse effects on his rights, particularly the right to notify someone of his arrest and to see a solicitor. For this reason, section 30(11) provides that the reasons for any delay shall be recorded in writing when the arrested person first arrives at a police station.

*(2) Our recommendations*

5.30 **Because the PACE regime places great importance on the rights which come into operation on arrival at a police station this section is important in placing an obligation on the police to comply with its terms. It contains important safeguards and would be equally relevant in Hong Kong.**

**Section 31**

*“Arrest for further offence*

31. *Where -*

(a) *a person -*

(i) *has been arrested for an offence; and*

- (ii) *is at a police station in consequence of that arrest;  
and*
- (b) *it appears to a constable that, if he were released from that arrest, he would be liable to arrest for some other offence.*

*he shall be arrested for that other offence.”*

(1) *The significance of the section*

5.31 This section must be read together with section 41(4). There are elaborate provisions and restrictions on periods of detention. These could easily be circumvented if the period of detention began anew each arrest for a succession of offences. Section 31 (and section 41(4)) prevents this. It provides that where a person has been arrested for one offence and is at a police station in consequence and it appears to a constable that, if he were released from that arrest, he would be liable to arrest for some other offence, he must be arrested for that other offence. Section 41(4) provides that the time from which the period of detention in respect of the second offence is to be calculated is the time from which detention in respect of the first offence was calculated.

(2) *Our recommendations*

5.32 **The restrictions on periods of detention are an important safeguard against arbitrary detention by the police. The objective of this section is to ensure that the provisions are not circumvented. They are therefore important and relevant to Hong Kong and we recommend they be adopted.**

## **Section 32**

*“Search upon arrest*

32. (1) *A constable may search an arrested person, in any case where the person to be searched has been arrested at a place other than a police station, if the constable has reasonable grounds for believing that the arrested person may present a danger to himself or others.*

(2) *Subject to subsection (3) to (5) below, a constable shall also have power in any such case -*

(a) *to search the arrested person for anything -*

- (i) *which he might use to assist him to escape from lawful custody; or*

- (ii) *which might be evidence relating to an offence; and*
- (b) *to enter and search any premises in which he was when arrested or immediately before he was arrested for evidence relating to the offence for which he has been arrested.*

(3) *The power to search conferred by subsection (2) above is only a power to search to the extent that is reasonably required for the purpose of discovering any such thing or any such evidence.*

(4) *The powers conferred by this section to search a person are not to be construed as authorising a constable to require a person to remove any of his clothing in public other than an outer coat, jacket or gloves.*

(5) *A constable may not search a person in the exercise of the power conferred by subsection (2)(a) above unless he has reasonable grounds for believing that there is evidence for which a search is permitted under that paragraph on the premises.*

(6) *A constable may not search premises in the exercise of the power conferred by subsection (2)(b) above unless he has reasonable grounds for believing that there is evidence for which a search is permitted under that paragraph on the premises.*

(7) *In so far as the power of search conferred by subsection (2)(b) above relates to premises consisting of two or more separate dwellings, it is limited to a power to search -*

- (a) *any dwelling in which the arrest took place or in which the person arrested was immediately before his arrest; and*
- (b) *any parts of the premises which the occupier of any such dwelling uses in common with the occupiers of any other dwellings comprised in the premises.*

(8) *A constable searching a person in the exercise of the power conferred by subsection (1) above may seize and retain anything he finds, if he has reasonable grounds for believing that the person searched might use it to cause physical injury to himself or to any other person.*

(9) *A constable searching a person in the exercise of the power conferred by subsection (2)(a) above may seize and*

*retain anything he finds, other than an item subject to legal privilege, if he has reasonable grounds for believing -*

- (a) that he might use it to assist him to escape from lawful custody; or*
- (b) that it is evidence of an offence or has been obtained in consequence of the commission of an offence.*

*(10) Nothing in this section shall be taken to affect the power conferred by paragraph 6 of Schedule 3 to the Prevention of Terrorism (Temporary Provisions) Act 1984.”*

*(1) The significance of the section*

5.33 The first matter which a constable will consider following an arrest is whether he should search the person whom he has arrested. Section 32 confers a right to carry out such a search in certain circumstances. The search is to be made at the time of the actual arrest (ie. at the scene of the arrest). If a person is arrested at a place other than a police station, the police may search the premises where the arrest takes place regardless of whether or not they are owned or occupied by the suspect. The police can only search to the extent that is reasonably required for the purpose of discovering evidence. The section is complementary to section 18. Search of persons arrested at a police station and of persons detained following an arrest is governed by sections 54 and 55.

*(2) Our recommendations*

5.34 **The section is designed to provide the police with powers necessary to protect persons endangered by an arrested person, including no doubt the constable himself. The search cannot be arbitrary as the constable must apply an objective test in establishing that the person being arrested presents a danger to others. It should be adopted in Hong Kong and we so recommend.**

**Section 33**

*“Execution of warrant not in possession of constable*

33. (1) *In section 125 of the Magistrates’ Courts Act 1980*

*-*

- (a) in subsection (3), for the words “arrest a person charged with an offence” there shall be substituted the words “which this subsection applies”;*
- (b) the following subsection shall be added after that subsection -*

*“(4) The warrants to which subsection (3) above applies are-*

- (a) a warrant to arrest a person in connection with an offence;*
- (b) without prejudice to paragraph (a) above, a warrant under section 186(3) of the Army Act 1955, section 186(3) of the Air Force Act 1955, section 105(3) of the Naval Discipline Act 1957 or Schedule 5 to the Reserve Forces Act 1980 (desertion etc);*
- (c) a warrant under -
  - (i) section 102 or 104 of the General Rate Act 1967 (insufficiency of distress);*
  - (ii) section 18(4) of the Domestic Proceedings and Magistrates’ Courts Act 1978 (protection of parties to marriage and children of family); and*
  - (iii) section 55, 76, 93 or 97 above”.**

*(1) The significance of the section*

5.35 Warrants to arrest for an offence, and certain other warrants listed in this section, need not be in the possession of the constable at the time of the arrest. They must be shown to the person arrested on demand as soon as practicable.

*(2) Our recommendations*

5.36 The constable must have power to arrest a person for an offence irrespective of whether or not he is in possession of a warrant to arrest at the time of the arrest. **To achieve that end, section 33 is necessary and we recommend its adoption.**

## Chapter 6

### Detention provision

### Part IV of PACE – Sections 34 to 52 of PACE

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#### I. Existing law in Hong Kong

6.1 Under section 52 of the Police Force Ordinance (Cap 232), a prisoner detained in police custody must be brought before a magistrate “as soon as practicable”. There is no statutory limit on the length of time that police may hold a prisoner after arrest. Generally “as soon as practicable” is interpreted to mean the next day on which the court will sit. On Monday holidays, there is normally one magistrate sitting in court in each police land region to deal with prisoners in custody. In cases where the suspect is hospitalised, the magistrate can transfer his court to the hospital.

6.2 The recently amended<sup>1</sup> section 52(1) reads as follows:

*“52 (1) Whenever any person apprehended with or without a warrant is brought to the officer in charge of any police station or a police officer authorised in that behalf by the Commissioner, it shall be lawful of such officer to inquire into the case and unless the offence appears to such officer to be of a serious nature or such officer reasonably considers that the person ought to be detained, to discharge the person upon his entering into a recognizance, with or without sureties, for a reasonable amount, to appear before a magistrate or to surrender for service of a warrant of arrest and detention or for discharge at the time and place named in the recognizance; but where such person is detained in custody he shall be brought before a magistrate as soon as practicable, unless within 48 hours of his apprehension a warrant of his arrest and detention under any law relating to deportation is applied for, in which case he may be detained for a period not exceeding 72 hours from the time of such apprehension. Every recognizance so taken shall be of equal obligation on the parties entering into the same and shall be liable to the same proceedings for the estreating thereof as if the same had been taken before a magistrate.”*

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<sup>1</sup> Police Force (Amendment) Ordinance, No 57 of 1992, Section 4.

## II. Overview of Part IV of PACE

6.3 Part IV of the Act deals with detention of suspects at designated police stations (this is defined in section 35). It contains some of the most controversial provisions in the Act, including detention without charge for up to 96 hours (in section 44).

### ***Detention – conditions and duration***

#### *(1) Custody Officers*

6.4 The Act provides that there should be one or more custody officers at each designated police station (s.36(1)) of at least the rank of sergeant (s.36(3)), i.e. an officer of relatively low rank. The duties of the custody officer are set out in section 37. He is to determine whether he has before him “sufficiently evidence to charge” the suspect. He may detain him for such period (qualified by time limits in sections 41 to 44) as is necessary to enable him to do so. (The meaning of “sufficient evidence” is to be found in the Code of Practice on the Treatment and Questioning of Suspects.) If the custody officer determines that he does not have sufficient evidence, the arrested person is to be released, unless the custody officer has “reasonable grounds for believing that the suspect’s detention without being charged is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him” (s.37(2)). If the custody officer has reasonable grounds for so believing, he may authorise the person arrested to be kept in police detention. As soon as practicable a written record of grounds for the detention must be made in the presence of the person arrested. The suspect must be told the grounds for his detention unless he is incapable of understanding what is said to him, violent or likely to become violent, or in urgent need of medical attention.

6.5 Section 38 prescribes the duties of the custody officer with respect to persons who have been charged and requires their release by him unless:

- (1) their name or address cannot be ascertained or the custody officer has reasonable grounds for believing that the name or address furnished is false; or
- (2) he has reasonable grounds for believing that the detention of the person arrested is necessary for his own protection or to prevent his causing physical injury to any other person or causing loss of or damage to property; or
- (3) he has reasonable grounds for believing that the person arrested will fail to appear in court to answer to bail or that his detention is necessary to prevent him from interfering with witnesses or otherwise obstructing the course of justice.

6.6 In the case of an arrested juvenile, there is an additional ground that the juvenile ought to be detained in his own interests.

6.7 The custody officer has a duty to ensure that all detainees are “treated in accordance with the Act and any code of practice issued under it” and all matters required to be recorded in custody records are in fact recorded s.39(1)).

(2) *Review of police detention*

6.8 Provision is made for reviews of police detention by the custody officer (or where there has been no charge, by an officer of the rank of inspector or above who has not been directly involved in the investigation.) The first review is to take place within 6 hours of the detention being authorised; the second not later than 9 hours after the first; and subsequent reviews at intervals of not more than 9 hours (s.40(3)). Reviews may be postponed, however, if “it is not practicable to carry out the review at that time”. It may, more particularly, be postponed if the detainee is being questioned and the review officer is satisfied that “an interruption of the questioning for the purpose of carrying out the review would prejudice the investigation” or if at the time no review officer is “readily available” (s.40(4)). If a review is postponed, it must be carried out as soon as practicable. Before determining whether to authorise a person’s continued detention the review officer must give the detainee, unless he is asleep, or “any solicitor representing him who is available at the time of the review” the opportunity to make representations, either orally or in writing, to him about the detention (s.40(12), (13)). The review officer is not, however, obliged to hear oral representations from a detainee whom he considers unfit to make such representations by reason of his condition or behaviour (s.40(14)).

(3) *Limits on periods of detention without charge*

6.9 The Act provides a complex, detailed scheme of time limits in the case of detention without charge (see sections 41, 42 and 43). The existing law was unsatisfactory: there were no clear time limits within which a detainee had either to be released or brought before a court. The Royal Commission sought to remedy this by a new rule that the police should not be able to hold a suspect for more than 24 hours without charging him unless a magistrates’ court had approved further detention after a full hearing in private at which the suspect would be entitled to be present and to be legally represented. The Commission also proposed that the power to hold someone for more than 24 hours should only apply to persons suspected of grave offences. The Act recognises the need to impose time limits but does not embody the Royal Commission’s proposals.

6.10 Section 41 states that in general a person shall not be kept in police detention for more than 24 hours without being charged. Detailed rules are provided for calculations for this period of time. The 24 hours limit in section 41 is subject to exceptions set out in sections 42 and 43. Section

42 provides that where an officer of superintendent rank or above has reasonable grounds for believing that:

- (1) detention is necessary to secure or preserve evidence or obtain evidence by questioning the detainee;
- (2) the offence in question is a “serious arrestable offence;
- (3) the investigation is being conducted “diligently and expeditiously”,

he may authorise detention for 36 hours.

6.11 Where such authorisation takes place the detainee must be informed of the grounds for his continued detention and those grounds must be recorded in that person’s custody record (s.42(5)). Once again, representations (oral or written) may be made by the detainee (unless he is deemed unfit to do so) or his solicitor. The detainee may also exercise the right to have someone informed (see section 56) and to seek legal advice (see section 58) and must be informed that he has these rights (s.42(9)(b)(i)).

6.12 Further detention is authorised where a magistrates’ court (consisting of 2 or more justices sitting in a closed court (s.45(1)) is satisfied that there are reasonable grounds for believing such further detention is justified (s.43(1)). The grounds of justification are the same as listed above. The period stated in a warrant of further detention is to be such as the court thinks fit, having regard to the evidence before it (s.43(11)). The period is not to be longer than 36 hours or end later than 96 hours after the relevant time (s.43(12)). Where an application is refused, no further application is permitted unless it is supported by “evidence which has come to light since the refusal” (s.43(17)). Where a magistrates’ court issues a warrant of further detention expiring less than 96 hours after the relevant time, a constable may seek an extension of the period of warrant of further detention. The court may grant an extension for such period as it thinks fit, but this shall not be longer than 36 hours or end later than 96 hours after the relevant time (ss.44(1), (2), (3)).

### ***Miscellaneous provisions relating to detention***

6.13 The Act also contains various other miscellaneous provisions on detention (sections 46 to 52). Those provisions are commented on in this Report after the verbatim text of the Act.

## **III Section-by-section review of Part IV of PACE**

### ***Section 34***

#### **“Limitations on police detention**

34. (1) *A person arrested for an offence shall not be kept in police detention except in accordance with the provisions of this Part of this Act.*

(2) *Subject to subsection (3) below, if at any time a custody officer-*

(a) *becomes aware, in relation to any person in police detention, that the grounds for the detention of that person have ceased to apply; and*

(b) *is not aware of any other grounds on which the continued detention of that person could be justified under the provisions of this Part of this Act,*

*it shall be the duty of the custody officer, subject to subsection (4) below, to order his immediate release from custody.*

(3) *No person in police detention shall be released except on the authority of a custody officer at the police station where his detention was authorised or, if it was authorised at more than one station, a custody officer at the station where it was last authorised.*

(4) *A person who appears to the custody officer to have been unlawfully at large when he was arrested is not to be released under subsection (2) above.*

(5) *a person whose release is ordered under subsection (2) above shall be released without bail unless it appears to the custody officer -*

(a) *that there is need for further investigation of any matter in connection with which he was detained at any time during the period of his detention; or*

(b) *that proceedings may be taken against him in respect of any such matter, and if it so appears, he shall be released on bail.*

(6) *For the purposes of this Part of this Act a person arrested under section 6(5) of the Road Traffic Act 1988 is arrested for an offence."*

(1) *The significance of the section*

6.14 In this part of our Report, we consider not only the impact of section 34 but of related sections because the scheme for detention provided by the Act should be considered as a whole. Likewise, our *main*

recommendations are contained *en masse* immediately after comment on section 41, for the same reason.

6.15 The Philips Report stated at paragraph 3.95 that “the law on the permitted period for which a suspect may be kept in custody after arrest without being charged or brought before a court is uncertain in its effect but such detention is allowed by the law, and is common police practice”. The Report quoted statistics to the effect that “about three-quarters of suspects are dealt with in six hours or under and about 95 per cent within 24 hours” (paragraph 3.96). The Report’s proposals were designed “to bring greater certainty .., to provide continuous and accountable review of the need to retain a suspect in custody, and in the case of longer periods of detention to ensure that some form of outside and independent scrutiny of the police discretion is possible” (paragraph 3.104). The Report’s criteria for detention (that it is necessary to secure or preserve evidence or obtain it by questioning) is adopted by the 1984 Act. The Report’s recommendation was that 24 hours from the time an arrested person arrives at the police station should be the maximum period of ordinary detention without charge. However, though the Philips Report recommended that detention beyond 24 hours should be allowed only for “grave offences” and with the authority of a magistrates’ court, the Act substitutes the concept of “serious arrestable offences” (thus widening the scope) and allows a police officer of the rank of superintendent or above to authorise detention for up to 12 hours beyond the initial 24 hours, if there are reasonable grounds for believing that such detention is necessary to secure or preserve evidence, or obtain by questioning (other conditions which must be met are considered below). This means, of course, that the police may detain for 36 hours without charge and with no review by outside elements of their decisions. In addition, a magistrates’ court may issue a warrant of further detention, authorising detention without charge for up to 36 hours and that warrant can be extended by the court for up to 36 hours. However in no case may the period of detention exceed 96 hours. There are two reasons why the Act departed from the Royal Commission’s recommended scheme. It was thought that it would increase the magistrates’ courts’ workloads if applications to detain beyond 24 hours had to be brought to them. And, secondly, the possible 36 hours of police detention on their authority coincides with the period of time a detainee may be denied access to a solicitor. The police certainly believe, and the Government accepted their belief, that there are cases where it is necessary to deny a detainee access to a solicitor.

(2) *Our recommendations*

6.16 **With this section commences the scheme of detention provided by the Act.** It provides in the first instance that no one will be detained except in accordance with the scheme of detention. This section by itself does not raise any matters warranting specific debate. With sections such as this (a small part of an overall scheme) we will confine our recommendation to commenting on anything which we believe *would* be objectionable in Hong Kong. **We approve section 34 as a part of the**

**scheme.** (The main thrust of our recommendations on this Part of PACE are dealt with after section 41 of PACE.)

### **Section 35**

#### *“Designated police stations*

35. (1) *The chief officer of police for each police area shall designate the police stations in his area which, subject to section 30(3) and (4) above, are to be the stations in that area to be used for the purpose of detaining arrested persons.*

(2) *A chief officer’s duty under subsection (1) above is to designate police stations appearing to him to provide enough accommodation for that purpose.*

(3) *Without prejudice to section 12 of the Interpretation Act 1978 (continuity of duties) a chief officer -*

(a) *may designate a station which was not previously designated; and*

(b) *may direct that a designation of a station previously made shall cease to operate.”*

(1) *The significance of the section*

6.17 This section creates the concept of the designated police station. In England, the chief officer of police for each area is to designate police stations appearing to him to provide enough accommodation for the purpose of detaining arrested person. Designated police stations will have custody officers (in other police stations a custody officer’s functions can be performed by any officer: see s.36(7)).

(2) *Our recommendations*

6.18 **It is appropriate that Hong Kong should have designated police stations in view of the fact that some existing police stations are inadequate for the purposes envisaged in these proposals. We therefore recommend adoption of this section. We believe 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.**

### **Section 36**

#### *“Custody officers at police stations*

36. (1) *One or more custody officers shall be appointed for each designated police station.*

(2) *A custody officer for a designated police station shall be appointed -*

- (a) *by the chief officer of police for the area in which the designated police station is situated; or*
- (b) *by such other police officer as the chief officer of police for that area may direct.*

(3) *No officer may be appointed a custody officer unless he is of at least the rank of sergeant.*

(4) *An officer of any rank may perform the functions of a custody officer at a designated police station if a custody officer is not readily available to perform them.*

(5) *Subject to the following provisions of this section and to section 39(2) below, none of the functions of a custody officer in relation to a person shall be performed by an officer who at the time when the function falls to be performed is involved in the investigation of an offence for which that person is in police detention at that time.*

(6) *Nothing in subsection (5) above is to be taken to prevent a custody officer -*

- (a) *performing any function assigned to custody officers -*
  - (i) *by this Act; or*
  - (ii) *by a code of practice issued under this Act;*
- (b) *carrying out the duty imposed on custody officers by section 39 below;*
- (c) *doing anything in connection with the identification of a suspect; or*
- (d) *doing anything under sections 7 and 8 of the Road Traffic Act 1988.*

(7) *Where an arrested person is taken to a police station which is not a designated police station, the functions in relation to him which at a designated police station would be the functions of a custody officer shall be performed -*

- (a) *by an officer who is not involved in the investigation of an officer for which he is in police detention, if such an officer is readily available; and*
- (b) *if no such officer is readily available, by the officer who took him to the station or any other officer.*

(8) *References to a custody officer in the following provisions of this Act include references to an officer other than a custody officer who is performing the functions of a custody officer by virtue of subsection (4) or (7) above.*

(9) *Where by virtue of subsection (7) above an officer of a force maintained by a police authority who took an arrested person to a police station is to perform the functions of a custody officer in relation to him, the officer shall inform an officer who -*

- (a) *is attached to a designated police station; and*
- (b) *is of at least the rank of inspector,*

*that he is to do so.*

(10) *The duty imposed by subsection (9) above shall be performed as soon as it is practicable to perform it.”*

(1) *The significance of the section*

6.19 In England, all designated stations will have one or more custody officers. Custody officers are not involved in the actual investigation of the offence, but their duty is to ensure that those in detention are correctly treated in accordance with the Act and the Codes (s.39(1)(a)), both as regards conditions and questioning and charging. They also have to keep a complete written record known as the custody record of all arrested persons. (s.39(1)(b)). The custody record will replace the “detained persons’ register” or domestic sheet, which was criticised as not being an accurate record of all that happened at the police station. The custody record is designed to change this. This entries in this record may reach 400 or more. It is worth a mention that the custody officer has no responsibility for what happens to a suspect before arrival at the station or for anything that may take place in the police car.

(2) *Our recommendations*

6.20 The concept of the “custody officer” is a crucial element introduced by PACE in the whole regime of detention. The officer’s duties and responsibilities have been thoroughly discussed in the Overview Section of this Chapter (see paragraph 6.4). **We recommend the adoption of section 36.**

## **Section 37**

### *“Duties of custody officer before charge*

37. (1) *Where*
- (a) *a person is arrested for an offence -*
    - (i) *without a warrant; or*
    - (ii) *under a warrant not endorsed for bail; or*
  - (b) *a person returns to a police station to answer to bail*

*the custody officer at each police station where he is detained after his arrest shall determine whether he has before him sufficient evidence to charge that person with the offence for which he was arrested and may detain him at the police station for such period as is necessary to enable him to do so.*

(2) *If the custody officer determines that he does not have such evidence before him, the person arrested shall be released either on bail or without bail, unless the custody officer has reasonable grounds for believing that his detention without being charged is necessary to secure preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him.*

(3) *If the custody officer has reasonable grounds for so believing, he may authorise the person arrested to be kept in police detention.*

(4) *Where a custody officer authorises a person who has not been charged to be kept in police detention, he shall, as soon as is practicable, make a written record of the grounds for the detention.*

(5) *Subject to subsection (6) below, the written record shall be made in the presence of the person arrested who shall at that time be informed by the custody officer of the grounds for his detention.*

(6) *Subsection (5) above shall not apply where the person arrested is, at the time when the written record is made -*

- (a) *incapable of understanding what is said to him;*
- (b) *violent or likely to become violent; or*

(c) *in urgent need of medical attention.*

(7) *Subject to section 41(6) below, if the custody officer determines that he has before him sufficient evidence to charge the person arrested with the offence for which he was arrested, the person arrested -*

(a) *shall be charged; or*

(b) *shall be released without charge, either on bail or without bail.*

(8) *Where -*

(a) *a person is released under subsection (7)(b) above; and*

(b) *at the time of his release a decision whether he should be prosecuted for the offence for which he was arrested has not been taken.*

*it shall be the duty of the custody officer so to inform him.*

(9) *If the person arrested is not in a fit state to be dealt with under subsection (7) above, he may be kept in police detention until he is.*

(10) *The duty imposed on the custody officer under subsection (1) above shall be carried out by him as soon as practicable after the person arrested arrives at the police station or, in the case of a person arrested at the police station, as soon as practicable after the arrest.*

(11) *Where -*

(a) *an arrested juvenile who has arrested without a warrant is not released under subsection (2) above, and*

(b) *it appears to the custody officer that a decision falls to be taken in pursuance of section 5(2) of the Children and Young Persons Act 1969 whether to lay an information in respect of an offence alleged to have been committed by the arrested juvenile,*

*it shall be the duty of the custody officer to inform him, and if it is reasonably practicable to do so, his parent or guardian, that such a decision falls to be taken and to specify the offence.*

(12) *It shall also be the duty of custody officer -*

- (a) *to take such steps as are practicable to ascertain the identity of a person responsible for the welfare of the arrested juvenile; and*
- (b) *if -*
  - (i) *he ascertains the identity of any such person; and*
  - (ii) *it is practicable to give that person the information which subsection (11) above requires the custody officer to give to the arrested juvenile,*

*to give that person the information as soon as practicable to do so.*

*(13) For the purposes of subsection (12) above the persons who may be responsible for the welfare of an arrested juvenile are -*

- (a) *his parent or guardian; and*
- (b) *any other person who has for the time being assumed responsibility for his welfare.*

*(14) If it appears to the custody officer that a supervision order, as defined in section 11 of the Children and Young Persons Act 1969, is in force in respect of the arrested juvenile, the custody officer shall also give the information to the person responsible for the arrested juvenile's supervision, as soon as it is practicable to do so.*

*(15) In this Part of this Act -*

*“arrested juvenile” means a person arrested with or without warrant who appears to be under the age of 17 and is not excluded from this Part of this Act by sections 52 below;*

*“endorsed for bail” means endorsed with a direction for bail in accordance with section 117(2) of the Magistrates’ Courts Act 1980.”*

*(1) The significance of the section*

6.21 This section details the duties of the custody officer before charge, comments as to which have already appeared above (see paragraph 6.4).

6.22 In addition to opening a custody record the custody officer is required under section 37(1) to decide (usually by speaking to the investigating officer) whether he has before him sufficient evidence to charge

the suspect with the offence for which he was arrested. The next stage in the detention process depends upon whether or not it is decided to charge the suspect.

6.23 If a suspect is not to be charged the general rule under section 37(2) is that he should be released without bail unless it appears to the custody officer that there is a need for further investigation or that proceedings, may be taken against the suspect, in which case the release is to be on bail (section 34) e.g. a person suspected of being in possession of a small amount of cannabis can be released on bail pending analysis of the substance.

6.24 Inevitably there are cases where the custody officer is not in a position to charge a suspect but equally will not wish to release that person. To cover these cases section 37(2) provides that a suspect need not be released if the custody officer has reasonable grounds for believing that detention without charge is necessary:

- (a) to secure or preserve evidence relating to an offence for which the suspect is under arrest, or
- (b) to obtain such evidence by questioning him.

6.25 The police have thus been given a statutory right to detain a suspect for questioning, but it should be noted that there is no provision in the Act that questions must be answered. There may therefore be cases where a detained person will be advised to refuse to answer questions and to make this clear from the outset. The police will then be in the position of having to decide whether the grounds for detention still exist and, if so, for how long they will continue to do so.

6.26 If a suspect is to be detained without charge, then the grounds of detention should be noted in the custody record in the presence of the suspect who should be informed of the grounds (s.37(5)). This duty will not apply if the suspect is incapable of understanding, violent, or in urgent need of medical attention (s.37(6)); but the grounds of detention must, in any event, be given before questioning.

## (2) *Our recommendations*

6.27 **Section 37, and sections 38 and 39, deal with the responsibilities of the custody officer which are set out in the sections in considerable detail.** There is nothing that we would add to what we have already said in the Overview of this Part (see paragraph 6.4 above). **The sections should be adopted as part of the overall scheme of detention.**

### **Section 38**

#### *“Duties of custody officer after charge*

38. (1) *Where a person arrested for an offence otherwise than under a warrant endorsed for bail is charged with an offence, the custody officer shall order his release from police detention, either on bail or without bail, unless -*

(a) *if the person arrested is not an arrested juvenile -*

(i) *his name or address cannot be ascertained or the custody officer has reasonable grounds for doubting whether a name or address furnished by him as his name or address is his real name or address;*

(ii) *the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary for his own protection or to prevent him from causing loss of or damage to property; or*

(iii) *the custody officer has reasonable grounds for believing that the person arrested will fail to appear in court to answer to bail or that his detention is necessary to prevent him from interfering with the administration of justice or with the investigation of offences or of a particular offence;*

(b) *if he is an arrested juvenile -*

(i) *any of the requirements of paragraph (a) above is satisfied; or*

(ii) *the custody officer has reasonable grounds for believing that he ought to be detained in his own interests.*

(2) *If the release of a person arrested is not required by subsection (1) above, the custody officer may authorise him to keep in police detention.*

(3) *Where a custody officer authorises a person who has been charged to be kept in police detention he shall, as soon as practicable, make a written record of the grounds for the detention.*

(4) *Subject to subsection (5) below the written record shall be made in the presence of the person charged who shall at that time be informed by the custody officer of the grounds for his detention.*

(5) *Subsection (4) above shall not apply where the person charged is, at the time when the written record is made -*

- (a) *incapable of understanding what is said to him;*
- (b) *violent or likely to become violent; or*
- (c) *in urgent need of medical attention.*

*(6) Where a custody officer authorises an arrested juvenile to be kept in police detention under subsection (1) above, the custody officer shall, unless he certifies that it is impracticable to do so, make arrangements for the arrested juvenile to be taken into the care of a local authority and detained by the authority, and it shall be lawful to detain him in pursuance of the arrangements.*

*(7) A certificate made under subsection (6) above in respect of an arrested juvenile shall be produced to the court before which he is first brought thereafter.*

*(8) In this Part of this Act "local authority" has the same meaning as in the Children and Young Persons Act 1969."*

*(1) The significance of the section*

6.28 This section details the custody officer's duties after charge. Once charged there are no reasons, relating to investigation, for detaining him further. Accordingly, the section provides that he shall be released from police detention, either on bail or without bail, unless there are grounds for detention after charge.

6.29 When the suspect is charged (and this may be on arrival at the police station if the custody officer is satisfied that there is already sufficient evidence available) section 38 comes into operation.

6.30 Section 38(1) provides that when a person is charged with an offence the custody officer must, subject to certain exceptions, order the release of the accused (either on bail or without bail). The exceptions are that:

- (a) the name or address of the accused cannot be ascertained; or
- (b) the custody officer has reasonable grounds for doubting whether a name or address given is correct; or
- (c) the custody officer has reasonable grounds for believing that:
  - (i) the detention of the accused is necessary for his own protection or to prevent him from causing physical injury to any other person or from causing loss or damage to property; or

- (ii) the accused will fail to appear in court to answer bail; or
- (iii) detention is necessary to prevent him from interfering with the administration of justice or with the investigation of offences.

6.31 If it is decided that any of these grounds apply the accused should be informed of them and a note made in the custody records (s.38(3)-(4)).

(2) *Our recommendations*

6.32 See our comment above on section 37.

### **Section 39**

#### *“Responsibilities in relation to person detained*

39. (1) *Subject to subsection (2) and (4) below, it shall be the duty of the custody officer at a police station to ensure -*

- (a) *that all persons in police detention at that station are treated in accordance with this Act and any codes of practice issued under it and relating to the treatment of persons in police detention; and*
- (b) *that all matters relating to such persons which are required by this Act or by such codes of practice to be recorded are recorded in the custody records relating to such persons.*

(2) *If the custody officer, in accordance with any code of practice issued under this Act, transfers or permits the transfer of a person in police detention.*

- (a) *to the custody of a police officer investigating an offence for which that person is in police detention;*
- (b) *to the custody of an officer who has charge of that person outside the police station*
  - (i) *the custody officer shall cease in relation to that person to be subject to the duty imposed on him by subsection (1)(a) above; and*
  - (ii) *it shall be the duty of the officer to whom the transfer is made to ensure that he is treated in accordance with the provisions of this Act and of*

*any such codes of practice as are mentioned in subsection (1) above.*

*(3) If the person detained is subsequently returned to the custody of the custody officer, it shall be the duty of the officer investigating the offence to report to the custody officer as to the manner in which this section and the codes of practice have been complied with while that person was in his custody.*

*(4) If an arrested juvenile is transferred to the care of a local authority in pursuance of arrangements made under section 38(7) above, the custody officer shall cease in relation to that person to be subject to the duty imposed on him by subsection (1) above.*

*(5) It shall be the duty of a local authority to make available to an arrested juvenile who is in the authority's care in pursuance of such arrangements such advice and assistance as may be appropriate in the circumstances.*

*(6) Where -*

*(a) an officer of higher rank than the custody officer gives directions relating to a person in police detention; and*

*(b) the directions are at variance -*

*(i) with any decision made or action taken by the custody officer in the performance of a duty imposed on him under this Part of this Act; or*

*(ii) with any decision or action which would but for the directions have made or taken by him in the performance of such a duty,*

*the custody officer shall refer the matter at once to an officer of the rank of superintendent or above who is responsible for the police station for which the custody officer is acting as custody officer."*

*(1) The significance of the section*

6.33 This section provides that it is the duty of the custody officer at a police station to ensure that all persons in police detention at that station are treated in accordance with this Act and the Code of Practice relating to the treatment of persons in police detention. If the custody officer transfers the person to the custody of an investigating officer, it is the duty of the officer to whom the transfer is made to ensure that he is treated in accordance with the provisions of this Act and the Codes.

(2) *Our recommendations*

6.34 See our comment above on section 37.

## **Section 40**

### *“Review of police detention*

40. (1) *Reviews of the detention of each person in police detention in connection with the investigation of an offence shall be carried out periodically in accordance with the following provisions of this section -*

- (a) *in the case of a person who has been arrested and charged, by the custody officer, and*
- (b) *in the case of a person who has been arrested but not charged, by an officer of at least the rank of inspector who has not been directly involved in the investigation.*

(2) *The officer to whom it falls to carry out a review is referred to in this section as a “review officer”.*

(3) *Subject to subsection (4) below -*

- (a) *the first review shall be not later than six hours after the detention was first authorised;*
- (b) *the second review shall be not later than nine hours after the first;*
- (c) *subsequent reviews shall be at intervals of not more than nine hours.*

(4) *A review may be postponed -*

- (a) *If, having regard to all the circumstances prevailing at the latest time for it specified in subsection (3) above, it is not practicable to carry out the review at that time;*
- (b) *without prejudice to the generality of paragraph (a) above -*
  - (i) *if at that time the person in detention is being questioned by a police officer and the review officer is satisfied that an interruption of the questioning for the purpose of carrying out the*

*review would prejudice the investigation in connection with which he is being questioned; or*

*(ii) if at that time no review officer is readily available.*

*(5) if a review is postponed under subsection (4) above it shall be carried out as soon as practicable after the latest time specified for it in subsection (3) above.*

*(6) If a review is carried out after postponement under subsection (4) above, the fact that it was so carried out shall not affect any requirement of this section as to the time at which any subsequent review is to be carried out.*

*(7) The review officer shall record the reasons for any postponement of a review in the custody record.*

*(8) Subject to subsection (9) below, where the person whose detention is under review has not been charged before the time of the review, section 37(1) to (6) above shall have effect in relation to him, but with the substitution -*

*(a) of references to the person whose detention is under review for references to the person arrested; and*

*(b) of references to the review officer for references to the custody officer;*

*(9) Where a person to the person has been kept in police detention by virtue of section 37(9) above, section 37(1) to (6) shall not have effect in relation to him but it shall be the duty of the review officer to determine whether he is yet in a fit state.*

*(10) Where the person whose detention is under review has been charged before the time of the review, section 38(1) to (6) above shall have effect in relation to him, but with the substitution of references to the person whose detention is under review for references to the person arrested.*

*(11) Where -*

*(a) an officer of higher rank than the custody officer gives directions relating to a person in police detention;*

*(b) the directions are at variance -*

*(i) with any decision made or action taken by the review officer in the performance of a duty imposed on him under this Part of this Act; or*

- (ii) *with any decision or action which would but for the directions have been made or taken by him in the performance of such a duty.*

*the review officer shall refer the matter at once to an officer of the rank of superintendent or above who is responsible for the police station for which the review officer is acting as review officer in connection with the detention.*

(12) *Before determining whether to authorise a person's continued detention the review officer shall give -*

- (a) *that person (unless he is asleep); or*
- (b) *any solicitor representing him who is available at the time of the review,*

*an opportunity to make representations to him about the detention.*

(13) *Subject to subsection (14) below, the person whose detention is under the review or his solicitor may make representations under subsection (11) above either orally or in writing.*

(14) *The review officer may refuse to hear oral representations from the person whose detention is under review if he considers that he is unfit to make such representations by reason of his condition or behaviour."*

(1) *The significance of the section*

6.35 The review officer is concerned with reviews of continued detention. These must take place after six hours and thereafter at nine-hourly intervals, up to the maximum allowed for detention and questioning. The usual maximum is 24 hours, although it can be extended to 36, 72 or 96 hours. This officer will normally be a different person to the custody officer and he must be of at least inspector rank. Thus, an independent person will review the custody officer's initial decision to detain. The custody officer is however the review officer for a person already charged (s.40(1)(a)).

6.36 By virtue of section 40(1), periodic reviews of detention must be carried out by an inspector who is not directly involved in the investigation. The review officer is required to decide whether or not the suspect should now be charged and, if not, whether the grounds for detention without charge still exist. If the grounds no longer exist then the suspect should be released (on bail or without bail). Whatever the outcome of the review details of it should be noted in the custody record (s.40(8)).

6.37 The times at which reviews should be carried out are contained in section 40(3), namely:

- (1) the first review not later than six hours after detention was first authorised;
- (2) the second review not later than nine hours after the first;
- (3) subsequent reviews at intervals of not more than nine hours.

6.38 Inevitably there will be occasions when it may not be possible to carry out a review in accordance with the strict time limits laid down by the Act. This possibility is recognised by section 40(4), which allows the postponement of a review if:

- (1) having regard to all of the circumstances prevailing at the latest time for it, it is not practicable to carry out the review. This will clearly cover a mass arrest. Reasons for the postponement of a review must be noted in the custody record (s.40(7)).
- (2) the suspect is being questioned and an interruption would prejudice the investigation;
- (3) if no review officer is readily available. This would seem to mean that one is not physically present at the police station and cannot be contacted by telephone.

(2) *Our recommendations*

6.39 **The objective of section 40 is to provide an internal check on unjustified detention of a suspect. We agree with this purpose, which fits in with the overall scheme of detention, and we supported it.**

## **Section 41**

### *“Limits on period of detention without charge*

41. (1) *Subject to the following provisions of this section and to sections 42 and 43 below, a person shall not be kept in police detention for more than 24 hours without being charged.*

(2) *The time from which the period of detention of a person is to be calculated (in this Act referred to as “the relevant time”) -*

(a) *in the case of a person to whom this section applies; shall be -*

- (i) *the time at which that person arrives at the relevant police station, or*
  - (ii) *the time 24 hours after the time of that person's arrest, whichever is the earlier;*
- (b) *in the case of a person arrested outside England and Wales, shall be*
- (i) *the time at which that person arrives at the first police station to which he is taken in the police area in England or Wales in which the offence for which he was arrested is being investigated; or*
  - (ii) *the time 24 hours after the time of that person's entry into England and Wales, whichever is the earlier.*
- (c) *in the case of a person who-*
- (i) *attends voluntarily at a police station; or*
  - (ii) *accompanies a constable to a police station without having been arrested,*

*and is arrested at the police station, the time of his arrest;*

- (d) *in any other case, except when subsection (5) below applies, shall be the time at which the person arrested arrives at the first police station to which he is taken place after his arrest.*

(3) *Subsection (2)(a) above applies to a person if -*

- (a) *his arrest is sought in one police area in England and Wales;*
- (b) *he is arrested in another police area; and*
- (c) *he is not questioned in the area in which he is arrested in order to obtain evidence in relation to an offence for which he is arrested.*

*and in sub-paragraph (i) of that paragraph "the relevant police station" means the first police station to which he is taken in the police area in which his arrest was sought.*

(4) *Subsection (2) above shall have effect in relation to a person arrested under section 31 above as if every reference in it to his arrest or his being arrested were a*

*reference to his being arrested for the offence for which he was originally arrested.*

*(5) If -*

- (a) a person is in police detention in a police area in England and Wales ("the first area"); and*
- (b) his arrest for an offence is sought in some other police area in England and Wales ("the second area"); and*
- (c) he is taken to the second area for the purposes of investigating that offence, without being questioned in the first area in order to obtain evidence in relation to it,*

*the relevant time shall be -*

- (i) the time 24 hours after he leaves the place where he is detained in the first area; or*
- (ii) the time at which he arrives at the first police station to which he is taken in the second area,*

*whichever is the earlier.*

*(6) When a person who is in police detention is removed to hospital because he is in need of medical treatment, any time during which he is being questioned in hospital or on the way there or back by a police officer for the purpose of obtaining evidence relating to an offence shall be included in any period which fails to be calculated for the purposes of this Part of this Act, but any other time while he is in hospital or on his way there or back shall not be so included.*

*(7) Subject to subsection (8) below, a person who at the expiry of 24 hours after the relevant time is in police detention and has not been charged shall be released at that time either on bail or without bail.*

*(8) Subsection (7) above does not apply to a person whose detention for more than 24 hours after the relevant time has been authorised or is otherwise permitted in accordance with section 42 or 43 below.*

*(9) A person released under subsection (7) above shall not be re-arrested without a warrant for the offence for which he was previously arrested unless new evidence justifying a further arrest has come to light since his release."*

(1) *The significance of the section*

6.40 This section lays down the basic rule that a person shall not be kept in police detention without charge for more than 24 hours. The following sections provide for detention to be authorised beyond that time, for 12 hours on the authority of a superintendent (or a rank above this) and further periods on application to a magistrates' court up to an overall maximum of 96 hours.

6.41 In the majority of cases the detention clock will start to run from the time that the suspect arrives at the first police station to which he is taken after his arrest (s.41(2)(d)). If, however, a person is actually arrested at a police station having initially attended on a voluntary basis, time will run from the moment of arrest (s.41(2)(c)).

6.42 The Act also anticipates possible attempts to avoid the 24 hour maximum period of detention. A person who is released at the end of the 24 hour period shall not be re-arrested without a warrant unless new evidence justifying a further arrest has come to light since his release (s.41(9)). (A rather more detailed provision is to be found in section 31. If a person has been arrested for an offence and taken to a police station and it appears to the police that, if he were released, he would be liable to arrest for some other offence, the police are obliged to arrest that person for the other offence. The significance of this from the point of view of detention periods is that the detention clock starts to run from the time of arrest for the first offence (s.41(4)). Thus there should be no possibility of the police releasing a suspect and then immediately re-arresting him for another offence in order to gain a further 24 hours' detention without charge.)

6.43 At the end of a 24 hour period of detention without charge, section 41(7) lays down a basic rule that the suspect is to be released at that time either on bail or without bail. This rule is, however, subject to the proviso that a suspect need not be released if continued detention has been authorised (s.41(8)).

(2) *Our recommendations*

6.44 We deal with sections 41 to 44 in one recommendation here, because these sections form part of a single scheme, containing both time limits on detention and the circumstances permitting extension of those time limits. In England, statistics showed that most suspects were processed within six hours of their arrival at the police station, and that lengthy periods of detention were relatively uncommon. We recognise that Hong Kong circumstances may require additional time for translation, etc. However, **we are satisfied that the Hong Kong police will not be hampered in their operations by the time limits in these sections, and we therefore recommend adoption of the entire "package" in sections 41 to 44.**

## **Section 42**

### *“Authorisation of continued detention*

42. (1) *Where a police officer of the rank of superintendent or above who is responsible for the police station at which a person is detained has reasonable grounds for believing that -*

- (a) the detention of that person without charge is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him;*
- (b) an offence for which he is under arrest is a serious arrestable offence; and*
- (c) the investigation is being conducted diligently and expeditiously, he may authorise the keeping of that person in police detention for a period expiring at or before 36 hours after the relevant time.*

*(2) Where an officer such as is mentioned in subsection (1) above has authorised the keeping of a person in police detention for a period expiring less than 36 hours after the relevant time, such an officer may authorise the keeping of that person in police detention for a further period expiring not more than 36 hours after that time if the conditions specified in subsection (1) above are still satisfied when he gives the authorisation.*

*(3) If it is proposed to transfer a person in police detention to another police area, the officer determining whether or not to authorise keeping him in detention under subsection (1) above shall have regard to the distance and the time the journey would take.*

*(4) No authorisation under subsection (1) above shall be given in respect of any person -*

- (a) more than 24 hours after the relevant time; or*
- (b) before the second review of his detention under section 40 above has been carried out.*

*(5) Where an officer authorises the keeping of a person in police detention under subsection (1) above, it shall be his duty -*

- (a) *to inform that person of the grounds for his continued detention; and*
- (b) *to record the grounds in that person's custody record.*

*(6) Before determining whether to authorise the keeping of a person in detention under subsection (1) or (2) above, an officer shall give -*

- (a) *that person; or*
- (b) *any solicitor representing him who is available at the time when it falls to the officer to determine whether to give the authorisation,*

*an opportunity to make representations to him about the detention.*

*(7) Subject to subsection (8) below, the person in detention or his solicitor may make representations under subsection (6) above either orally or in writing.*

*(8) The officer to whom it falls to determine whether to give the authorisation may refuse to hear oral representations from the person in detention if he considers that he is unfit to make such representations by reason of his condition or behaviour.*

*(9) Where -*

- (a) *an officer authorises the keeping of a person in detention under subsection (1) above; and*
- (b) *at the time of the authorisation he has not yet exercised a right conferred on him by section 56 or 58 below,*

*the officer -*

- (i) *shall inform him of that right;*
- (ii) *shall decide whether he should be permitted to exercise it;*
- (iii) *shall record the decision in his custody record; and*
- (iv) *if the decision is to refuse to permit the exercise of the right, shall also record the grounds for the decision in that record.*

*(10) Where an officer has authorised the keeping of a person who has not been charged in detention under subsection (1) or (2) above, he shall be released from detention, either on bail or without bail, not later than 36 hours after the relevant time, unless -*

- (a) he has been charged with an offence; or*
- (b) his continued detention is authorised or otherwise permitted in accordance with section 43 below.*

*(11) A person released under subsection (10) above shall not be re-arrested without a warrant for the offence for which he was previously arrested unless new evidence justifying a further arrest has come to light since his release.”*

*(1) The significance of the section*

6.45 This section provides for the authorisation of continued detention (that is beyond the 24 hours allowed by section 41) by a police officer of the rank of superintendent or above. He may authorise the keeping of a person in detention for a period of up to 12 hours beyond that provided for by section 41. The officer must have reasonable grounds for believing that three conditions in section 42(1) are satisfied. These are that:

- (1) the detention is necessary to secure or preserve evidence or obtain evidence through questioning (this is the basic ground for detention without charge – see section 37(2));
- (2) the offence is a serious arrestable offence; and
- (3) the investigation is being conducted diligently and expeditiously.

6.46 To prevent the police from detaining a suspect for, say, 36 hours, and then seeking authority retrospectively, section 42(4) provides that no authorisation may be given more than 24 hours after the detention clock started to run. The same subsection also prohibits any authorisation of continued detention being given until approximately 15 hours have passed from the time that detention was first authorised.

6.47 When a suspect has been detained for 36 hours he must be released (on bail or without bail) unless he has been charged or a warrant of further detention has been obtained from a magistrates' court.

*(2) Our recommendations*

6.48 See our comment on section 41.

## **Section 43**

### *“Warrants of further detention*

43. (1) *Where, on an application on oath made by a constable and supported by an information, a magistrates’ court is satisfied that there are reasonable grounds for believing that the further detention of the person to whom the application relates is justified, it may issue a warrant of further detention authorising the keeping of that person in police detention.*

(2) *A court may not hear a application for a warrant of further detention unless the person to whom the application relates -*

- (a) has been furnished with a copy of the information; and*
- (b) has been brought before the court for the hearing.*

(3) *The person to whom the application relates shall be entitled to be legally represented at the hearing and, if he is not so represented, but wishes to be so represented -*

- (a) the court shall adjourn the hearing to enable him to obtain representation; and*
- (b) he may be kept in police detention during the adjournment.*

(4) *A person’s further detention is only justified for the purposes of his section or section 44 below if -*

- (a) his detention without charge is necessary to secure or preserve evidence relating to an officer for which he is under arrest or to obtain such evidence by questioning him;*
- (b) an offence for which he is under arrest is a serious arrestable offence; and*
- (c) the investigation is being conducted diligently and expeditiously.*

(5) *Subject to subsection (7) below, an application for a warrant of further detention may be made -*

- (a) at any time before the expiry of 36 hours after the relevant time; or*
- (b) in a case where -*

- (i) *it is not practicable for the magistrates' court to which the application will be made to sit at the expiry of 36 hours after the relevant time; but*
- (ii) *the court will sit during the 6 hours following the end of that period,*

*at any time before the expiry of the said 6 hours.*

(6) *In a case to which subsection (5)(b) above applies*

-

- (a) *the person to whom the application relates may be kept in police detention until the application is heard; and*
- (b) *the custody officer shall make a note in that person's custody record -*
  - (i) *of the fact that he was kept in police detention for more than 36 hours after the relevant time; and*
  - (ii) *of the reason why he was so kept.*

(7) *If -*

- (a) *an application for a warrant of further detention is made after the expiry of 36 hours after the relevant time and;*
- (b) *it appears to the magistrates' court that it would have been reasonable for the police to make it before the expiry of that period,*

*the court shall dismiss the application.*

(8) *Where on an application such as is mentioned in subsection (1) above; a magistrates' court is not satisfied that there are reasonable grounds for believing that the further detention of the person to whom the application relates is justified, it shall be its duty -*

- (a) *to refuse the application ; or*
- (b) *to adjourn the hearing of it until a time not later than 36 hours after the relevant time.*

(9) *The person to whom the application relates may be kept in police detention during the adjournment.*

(10) *A warrant of further detention shall -*

- (a) *state the time at which it is issued;*
- (b) *authorise the keeping in police detention of the person to whom it relates for the period stated in it.*

*(11) Subject to subsection (12) below, the period stated in a warrant of further detention shall be such period as the magistrate' court thinks fit, having regard to the evidence before it.*

*(12) The period shall not be longer than 36 hours.*

*(13) If it is proposed to transfer a person in police detention to a police area than that in which he is detained when the application for a warrant of further detention is made, the court hearing the application shall have regard to the distance and the time the journey would take.*

*(14) Any information submitted in support of an application under this section shall state -*

- (a) *the nature of the offence for which the person to whom the application relates has been arrested;*
- (b) *the general nature of the evidence on which that person was arrested;*
- (c) *what inquiries relating to the offence have been made by the police and what further inquiries are proposed by them;*
- (d) *the reasons for believing the continued detention of that person to be necessary for the purposes of such further inquiries.*

*(15) Where an application under this section is refused the person to whom the application relates shall forthwith be charged or, subject to subsection (16) below, released, either bail or without bail.*

*(16) A person need not be released under subsection (15) above -*

- (a) *before the expiry of 24 hours after the relevant time; or*
- (b) *before the expiry of any longer period for which his continued detention is or has been authorised under section 42 above.*

*(17) Where an application under this section is refused, no further application shall be made under this section in respect of the person to whom the refusal relates, unless supported by evidence which has come to light since the refusal.*

*(18) Where a warrant of further detention is issued, the person to whom it relates shall be released from police detention, either on bail or without bail, upon or before the expiry of the warrant unless he is charged.*

*(19) A person released under subsection (18) above shall not be re-arrested without a warrant for the offence for which he was previously arrested unless new evidence justifying a further arrest has come to light since his release."*

*(1) The significance of the section*

6.49 This section provides that a magistrates' court, consisting of two or more justices, may issue a warrant of further detention if there are reasonable grounds for believing the detention is justified. A warrant will authorise the keeping of the person in police detention for such period as the court thinks fit not exceeding 36 hours. There is no reason why in a case in which prolonged investigation is anticipated the police should not ignore section 42 and go straight to a magistrates' court within the 24 hours' period. The court may authorise detention for up to 36 hours and extend it to a further 36 hours provided the overall maximum of 96 hours is not exceeded. In other words, the full 96 hours can be obtained without securing the authorisation of a superintendent.

6.50 An application for a warrant of further detention is to be made on oath by a constable and supported by an information. The suspect must be given a copy of the information and be present at the hearing (s.43(2)). The detail required by section 43(14) in the information is extensive, namely:

- (1) the nature of the offence for which the suspect was arrested;
- (2) the general nature of the evidence on which the suspect was arrested;
- (3) details of police enquiries made and to be made; and
- (4) the reasons justifying the continued detention of the suspect.

6.51 The grounds upon which a warrant of further detention may be issued are the same as those upon which a superintendent can authorise continued detention under section 42.

6.52 If the magistrates are satisfied that the grounds for a warrant have been made out, the period of detention authorised by the warrant cannot exceed 36 hours from the time of the order (s.43(12)).

6.53 It is possible, using the same procedure, to apply for an extension of the warrant for a further period not exceeding 36 hours. Further applications can be made until the period of time spent in detention (calculated from when the detention clock started to run) is 96 hours. This is the maximum period of detention without charge. Thereafter the suspect must either be charged forthwith or released (on bail or without bail) (s.43(18)).

(2) *Our recommendations*

6.54 See our comment on section 41.

## **Section 44**

### *“Extension of warrants of further detention*

44. (1) *On an application on oath made by a constable and supported by an information a magistrates’ court may extend a warrant of further detention issued under section 43 above if it is satisfied that there are reasonable grounds for believing that the further detention of the person to whom the application relates is justified.*

(2) *Subject to subsection (3) below, the period for which a warrant of further detention may be extended shall be such period as the court thinks fit, having regard to the evidence before it.*

(3) *The period shall not -*

(a) *be longer than 36 hours; or*

(b) *end later than 96 hours after the relevant time.*

(4) *Where a warrant of further detention has been extended under subsection (1) above, or further extended under this subsection, for a period ending before 96 hours after the relevant time, on an application such as is mentioned in that subsection a magistrates’ court may further extend the warrant if it is satisfied as there mentioned; and subsections (2) and (3) above apply to such further extension as they apply to extensions under subsection (1) above.*

(5) *A warrant of further detention shall, if extended or further extended under this section, be endorsed with a note of the period of the extension.*

(6) *Subsections (2), (3) and (14) of section 43 above shall apply to an application made under this section as they apply to an application made under this section.*

(7) *Where an application under this section is refused, the person to whom the application relates shall forthwith be charged or, subject to subsection (8) below, released, either on bail or without bail.*

(8) *A person need not be released under subsection (7) above before the expiry of any period for which a warrant of further detention issued in relation to him has been extended or further extended on an earlier application made under this section.”*

(1) *The significance of the section*

6.55 This section provides for the extension of warrants of further detention issued under section 43.

(2) *Our recommendations*

6.56 See our comment on section 41.

## **Section 45**

### *“Detention before charge - supplementary*

45. (1) *In section 43 and 44 of this Act “magistrates’ court” means a court consisting of two or more justices of the peace sitting otherwise than in open court.*

(2) *Any reference in this Part of this Act to a period of time or a time of day is to be treated as approximate only.”*

(1) *The significance of the section*

6.57 In England, this section defines magistrates’ court for the purpose of the detention provisions and stresses that reference to a period of time or a time of day is approximate only.

(2) *Our recommendations*

6.58 **Sections 45, 49, 50, 51 and 52 are ancillary to the goal of implementing a scheme of detention. With necessary modification, we believe these sections should be adopted in Hong Kong and we so recommend.**

## **Section 46**

### *“Detention after charge*

46. (1) *Where a person -*

(a) *is charged with an offence; and*

(b) *after being charged -*

(i) *is kept in police detention; or*

(ii) *is detained by a local authority in pursuance of arrangements made under section 38(7) above,*

*he shall be brought before a magistrates’ court in accordance with the provisions of this section.*

(2) *If he is to be brought before a magistrates’ court for the petty sessions area in which the police station at which he was charged is situated, he shall be brought before such a court as soon as is practicable and in any event not later than the first sitting after he is charged with the offence.*

(3) *If no magistrates’ court for that area is due to sit either on the day on which he is charged or on the next day, the custody officer for the police station at which he was charged shall inform the clerk to the justices for the area that there is a person in the area to whom subsection (2) above applies.*

(4) *If the person charged is to be brought before a magistrates’ court for a petty sessions area other than that in which the police station at which he was charged is situated, he shall be removed to that area as soon as is practicable and brought before such a court as soon as is practicable after his arrival in the area and in any event not later than the first sitting of a magistrates’ court for that area after his arrival in the area.*

(5) *If no magistrates’ court for that area is due to sit either on the day on which he arrives in the area or on the next day -*

(a) *he shall be taken to a police station in the area; and*

(b) *the custody officer at that station shall inform the clerk to the justices for the area that there is a person in the area to whom subsection (4) applies.*

(6) *Subject to subsection (8) below, where a clerk to the justices for a petty sessions area has been informed -*

- (a) *under subsection (3) above that there is a person in the area to whom subsection (2) above applies; or*
- (b) *under subsection (5) above that there is a person in the area to whom subsection (4) above applies,*

*the clerk shall arrange for a magistrates' court to sit not later than the day next following the relevant day.*

(7) *In this section "the relevant day" -*

- (a) *in relation to a person who is to be brought before a magistrates' court for the petty sessions area in which the police station at which he was charged is situated, means the day on which he was charged; and*
- (b) *in relation to a person who is to be brought before a magistrates' court for any other petty sessions area, means the day on which he arrives in the area.*

(8) *Where the day next following the relevant day is Christmas Day, Good Friday or a Sunday, the duty of the clerk under subsection (6) above is a duty to arrange for a magistrates' court to sit not later than the first day after the relevant day which is not one of those days.*

(9) *Nothing in this section requires a person who is in hospital to be brought before a court if he is not well enough."*

(1) *The significance of the section*

6.59 A person who is detained after charge should be taken before a magistrates' court as soon as practicable, and in any event no later than the first sitting of a court after he has been charged with the offence (s.46(2)). In England, this rule is modified in those cases where the accused is to appear before a magistrates' court for a petty sessions area other than that in which the charging police station is situated. The duty here is to move the accused to the appropriate area as soon as practicable. On his arrival the police are required to take him before a court as soon as practicable and again not later than the first sitting (s.46(3)).

6.60 If no magistrates' court is due to sit on the day of charge (or arrival as the case may be) or on the following day, the custody officer must inform the clerk to the justices. The clerk is required to arrange for a court to sit on the day after charge unless (in England) that day is a Sunday, Christmas Day or Good Friday. (s.46(8)).

(2) *Our recommendations*

6.61 **We consider this a critical section. It provides for stringent time limits for bringing a charged person to court, and establishes much needed certainty. We are wholeheartedly in favour of its adoption. Where subsection (8) refers to certain holidays, these should be changed to reflect local conditions.**

**Section 47**

*“Bail after arrest*

47. (1) *Subject to subsection (2) below, a release on bail of a person under this Part of this Act shall be a release on bail granted in accordance with the Bail Act 1976.*

(2) *Nothing in the Bail Act 1976 shall prevent the rearrest without warrant of a person released on bail subject to a duty to attend a police station if new evidence justifying a further arrest has come to light since his release.*

(3) *Subject to subsection (4) below, in this Part of this Act reference to “bail” are references to bail subject to a duty -*

(a) *to appear before a magistrate’s court at such time and such place; or*

(b) *to attend at such police station at such time,*

*as the custody officer may appoint.*

(4) *Where a custody officer has granted bail to a person subject to a duty to appear at a police station, the custody officer may give notice in writing to that person that his attendance at the police station is not required.*

(5) *Where a person arrested for an offence who was released on bail subject to a duty to attend at a police station so attends, he may be detained without charge in connection with that offence only if the custody officer at the police station has reasonable grounds for believing that his detention is necessary.*

(a) *to secure or preserve evidence relating to the offence; or*

(b) *to obtain such evidence by questioning him.*

(6) *Where a person is detained under subsection (5) above, any time during which he was in police detention prior to*

*being granted bail shall be included as part of any period which falls to be calculated under this Part of this Act.*

*(7) Where a person who was released on bail subject to a duty to attend at a police station is re-arrested, the provisions of this Part of this Act shall apply to him as they apply to a person arrested for the first time.*

*(8) In the Magistrates' Court Act 1980 -*

*(a) the following section shall be substituted for section 43 -*

*'Bail on arrest*

*43. (1) Where a person has been granted bail under the Police and Criminal Evidence Act 1984 subject to a duty to appear before a magistrates' court, the court before which he is to appear may appoint a later time as the time at which he is to appear and may enlarge the recognizances of any sureties for him at that time.*

*(2) The recognizance of any surety for any person granted bail subject to a duty to attend at a police station may be enforced as if it were conditioned for his appearance before a magistrates' court for the petty sessions area in which the police station named in the recognizance is situated.'; and*

*(b) the following subsection shall be substituted for section 117(3) -*

*“(3) Where a warrant has been endorsed for bail under subsection (1) above -*

*(a) Where the person arrested is to be released on bail on his entering into a recognizance without sureties, it shall not be necessary to take him to a police station, but if he is so taken, he shall be released from custody on his entering into the recognizance; and*

*(b) where he is to be released on his entering into a recognizance with sureties, he shall be taken to a police station on his arrest, and the custody officer there shall (subject to his approving any surety tendered in compliance with the endorsement) release him from custody as directed in the endorsement.”*

*(1) The significance of the section*

6.62 This section deals with bail after arrest. It provides that where a person is released on bail under Part IV of this Act, it is release on bail

granted in accordance with the English Bail Act 1976. Nothing in that Act is to prevent the re-arrest without warrant of a person released on bail subject to a duty to attend at a police station if new evidence justifying a further arrest has come to light since his release.

(2) *Our recommendations*

6.63 The question of bail arises at three stages: after arrest, immediately after the suspect is charged by the police, and finally on his appearance at court. At the first two stages, the decision to bail is made by the police and at the third by the court. Bail at the first stage is known as “police operational bail” while the second is “police court bail”. Police operational bail was not considered in our earlier Report on Bail on the basis that we would examine this in the current reference on Arrest.

6.64 There is some question as to the present legal authority for police operational bail. **We believe, therefore, that police operational bail should be placed on a sound legal footing, and have the following recommendations:**

- (1) **police operational bail should be given a statutory basis;**
- (2) **a person should be required to attend at a police station as often as reasonably required but the police should give so far as possible an indication of the length of the investigation (this could be built in to the guidelines in the relevant Code of Practice for Hong Kong).**
- (3) **the present ICAC condition for bail (that the person report” at such other time(s) thereafter as a Senior Commissioner Against Corruption Officer determines”) should not be adopted, as we believe it is an unacceptable method of achieving the goal set out in (2) above.**

**Section 48**

*“Remands to police custody*

48. *In section 128 of the Magistrates’ Courts Act 1980 -*

- (a) *in subsection (7) for the words “the custody of a constable” there shall be substituted the words “detention at a police station”;*
- (b) *after subsection (7) there shall be inserted the following subsection -*

(8) *Where a person is committed to detention at a police station under subsection (7) above -*

- (a) *he shall not be kept in such detention unless there is a need for him to be detained for the purposes of inquiries into other offences;*
- (b) *if kept in such detention, he shall be brought back before the magistrates' court which committed him as soon as that need ceases;*
- (c) *he shall be treated as a person in police detention to whom the duties under section 39 of the Police and Criminal Evidence Act 1984 (responsibilities in relation to persons detained) relate;*
- (d) *his detention shall be subject to periodic review at the times set out in section 40 of that Act (review of police detention)."*

(1) *The significance of the section*

6.65 Section 128(7) of the Magistrates Courts Act 1980 allowed a magistrates' court to commit a person to the custody of a constable for a period not exceeding three clear days. The subsection did not specify a purpose for such remands. Section 48 amends section 128(7) to permit a magistrates' court to commit a person to "detention at a police station" for a period not exceeding three clear days. A new subsection (section 128(8)) is added to the 1980 Act. This lays down that a person is not to be kept in such detention "unless there is a need for him to be so detained for the purposes of inquiries into other offences" (the most common reason in the past); if kept in such detention, he is to be brought back before the court "as soon as that need ceases"; he is to be treated as a person in police detention; his detention is subject to periodic review as laid down by section 40 (that is, the first review is after 6 hours, the next after 15 hours and then at 9 hours intervals). The review officer must determine whether the need to detain for further enquiries exists.

(2) *Our recommendations*

6.66 This provision requires for its operation the showing of a "need" for detention for the purposes of enquiries into other offences. In addition, when the need ceases, the person must be brought back before a magistrate. **With these safeguards, we believe section 48 is suitable for adoption in Hong Kong.**

**Section 49**

*“Public detention to court towards custodial sentence*

49. (1) *In subsection (1) of section 67 of the Criminal Justice Act 1967 (computation of custodial sentences) for words from “period”, in the first place where it occurs, to “the offender” there shall be substituted the words “relevant period, but where he”.*

(2) *The following subsection shall be inserted after that subsection -*

*“(1A) In subsection (1) above “relevant period” means -*

*(a) any period during which the offender was in police detention in connection with the offence for which the sentence was passed; or*

*(b) any period during which he was in custody -*

*(i) by reason only of having been committed to custody by an order of a court made in connection with any proceedings relating to that sentence or the offence for which it was passed or any proceedings from which those proceedings arose; or*

*(ii) by reason of his having been so committed and having been concurrently detained otherwise than by order of a court.”*

(3) *The following subsections shall be added after subsection (6) of that section -*

*‘(7) A person is in police detention for the purposes of this section -*

*(a) at any time when he is in police detention for the purposes of the Police and Criminal Evidence Act 1984; and*

*(b) at any time when he is detained under section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984.*

(8) *No period of police detention shall be taken into account under this section unless it falls after the coming into force of section 49 of the Police and Criminal Evidence Act 1984.”*

(1) *The significance of the section*

6.67 This section provides that police detention and detention under section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984 is to count towards any custodial sentence. This only applies to periods of detention occurring after this section came into force.

(2) *Our recommendations*

6.68 See our comment under section 45.

## **Section 50**

### *“Records of detention*

50. (1) *Each police force shall keep written records showing on an annual basis -*

(a) *the number of persons kept in police detention for more than 24 hours and subsequently released without charge;*

(b) *the number of applications for warrants of further detention and the results of the applications; and*

(c) *in relation to each warrant of further detention -*

(i) *the period of further detention authorised by it;*

(ii) *the period which the person named in it spent in police detention on its authority; and*

(iii) *whether he was charged or released without a charge.*

(2) *Every annual report -*

(a) *under section 12 of the Police Act 1964; or*

(b) *made by the Commissioner of Police of Metropolis,*

*shall contain information about the matters mentioned in subsection (1) above in respect of the period to which the report relates.”*

(1) *The significance of the section*

6.69 In England, every police force must keep written records on an annual basis. These must deal with:

(1) the number of people kept in police detention for more than 24 hours and released without charge;

- (2) the number of applications for warrants of further detention and the results thereof; and
  - (3) details of warrants of further detention granted, including the period of detention authorised, the time actually spent in custody on the authority of the warrant and whether the suspect was charged or not.
- (2) *Our recommendations*
- 6.70 See our recommendation under section 45

## **Section 51**

### *“Savings*

51. *Nothing in this Part of this Act shall affect -*
- (a) *the powers conferred on immigration officers by section 4 of and Schedule 2 to the Immigration Act 1971 (administrative provisions as to control on entry etc).*
  - (b) *the powers conferred by or by virtue of section 14 of the Prevention of Terrorism (Temporary Provisions) Act 1989 of Schedule 2 to that Act (powers of arrest and detention and control of entry and procedure for removal);*
  - (c) *any duty of a police officer under -*
    - (i) *section 129, 190 or 202 of the Army Act 1955 (duties of governors of prisons and others to receive prisoners, deserters, absentees and persons under escort);*
    - (ii) *section 129, 190 or 202 of the Air Force Act 1955 (duties of governors of prisons and to receive prisoners, deserters, absentees and persons under escort); or*
    - (iii) *section 107 of the Naval Discipline Act 1957 (duties of governors of civil prisons etc); or*
    - (iv) *paragraph 5 of Schedule 5 to the Reserve Forces Act 1980 (duties of governors of civil prisons); or*
  - (d) *any right of a person in police detention to apply for a writ of habeas corpus or other prerogative remedy.”*

(1) *The significance of the section*

6.71 Detention by the statutory authorities listed is not affected by part IV of this Act. These relate to detention of illegal immigrants, persons excluded under terrorism provisions, absentees and deserters from the armed forces. The section also provides that nothing in part IV of this Act affects any right of a person in police detention to apply for a writ of habeas corpus or other prerogative remedy.

(2) *Our recommendations*

6.72 Obviously there will be a need for similar exceptions in Hong Kong. For example, existing section 13D of the Immigration Ordinance (Cap 115) permits detention of Vietnamese refugees. **We recommend that a full review should be carried out to identify the exceptions which will have to be made in Hong Kong.**

## **Section 52**

*“Children*

*52. This Part of this Act does not apply to a child (as for the time being defined for the purposes of the Children and Young Person Act 1969) who is arrested without a warrant otherwise than for homicide and to whom section 28(4) and (5) of that Act accordingly apply.”*

(1) *The significance of the section*

6.73 Part IV of the Act does not apply to a child (i.e. someone under 10 years of age) arrested without warrant for an offence other than homicide. In England, the detention of such children continues to be governed by section 28(4) and (5) of the Children and Young Persons Act. This provides for detention, when necessary, at a community home or other place of safety.

(2) *Our recommendations*

6.74 See our recommendation under section 45.

## Chapter 7

### Questioning and treatment of persons by police Part V of PACE – sections 53 to 65

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#### I Existing law in Hong Kong

7.1 Part V of PACE covers three broad areas which deal with aspects of the questioning and treatment of persons in police custody:

- (1) powers of search;
- (2) the right of the detained person to inform others of his detention and to have access to a solicitor;
- (3) the taking of finger-prints and intimate samples from the detained person.

Part V also deals with the tape-recording of interviews (section 60).

#### ***Powers of search***

7.2 The search of detained persons by the police in Hong Kong is authorised by sections 50 and 54 of the Police Force Ordinance and by section 33 of the Police Order Ordinance. Recently amended section 50(6) of the Police Force Ordinance provides that a police officer may search an arrested person to find evidence of his activities. If any evidence is found the officer may take possession of it.

7.3 The amended section 50(6) reads:

*“ (6) Where any person is apprehended by a police officer it shall be lawful for such officer to search for and take possession of any newspaper, book or other document or any portion or extract therefrom and any other article or chattel which may be found on his person or in or about the place at which he has been apprehended and which the said officer may reasonably suspect to be of value (whether by itself or together with anything else) to the investigation of any offence that the person has committed or is reasonably suspected of having committed:*

*Provided that nothing in this subsection shall be construed in diminution of the powers of search conferred by any particular warrant.”*

7.4 The Royal Hong Kong Police Force Manual notes at paragraph 7.43 that:

*“This early search is important. If the search is not made, and, as examples, the arresting officer is assaulted with a weapon, damage is done to property or further evidence is destroyed, then the arresting officer is at fault.”*

7.5 Section 54 of the Police Force Ordinance (as amended by the Police Force (Amendment) Ordinance No 57 of 1992) reads:

*“54. Power to stop, detain and search*

*(1) If a police officer finds any person in any street or other public place, or on board any vessel, or in any conveyance, at any hour of the day or night, who acts in a suspicious manner, it shall be lawful for the police officer -*

*(a) to stop the person for the purpose of demanding that he produce proof of his identity for inspection by the police officer;*

*(b) to detain the person for a reasonable period while the police officer enquires whether or not the person is suspected of having committed any offence at any time; and*

*(c) if the police officer considers it necessary to do so -*

*(i) to search the person for anything that may present a danger to the police officer; and*

*(ii) to detain the person during such period as is reasonably required for the purpose of such a search.*

*(2) If a police officer finds any person in any street or other public place, or on board any vessel, or in any conveyance, at any hour of the day or night, whom he reasonably suspects of having committed or of being about to commit or of intending to commit any offence, it shall be lawful for the police officer -*

*(a) to stop the person for the purpose of demanding that he produce proof of his identity for inspection by the police officer;*

*(b) to detain the person for a reasonable period while the police officer enquires whether or not the person is suspected of having committed any offence at any time;*

- (c) *to search the person for anything that is likely to be of value (whether by itself or together with anything else) to the investigation of any offence that the person has committed, or is reasonably suspected of having committed or of being about to commit or intending to commit; and*
- (d) *to detain the person during such period as is reasonably required for the purpose of such a search.*

(3) *In this section, “proof of identity” has the same meaning as in section 17B of the Immigration Ordinance (Cap 115)”.*

7.6 By section 33 of the Public Order Ordinance a power is given to stop and search any person in a public place to find out if he has any offensive weapon in his possession. If the person does not wish to be searched in public the officer should, according to Police General Orders, take the person back to a police formation for searching there. A record of the search must be made.

7.7 In so far as searches at a police station are concerned there is no statutory provision in Hong Kong for the search of a person after he arrives at a police station. The practice in Hong Kong is to search an arrested person at the time of his arrest.

7.8 We deal below with other chapters of the Police General Orders as they affect the other broad areas covered by Chapter 7 of PACE.

***The right of the detained person to inform others of his detention and to have access to a solicitor***

7.9 There is no equivalent in Hong Kong to PACE which gives statutory protection to a suspect held in custody. The position in Hong Kong is governed by Chapter 49 of the Police General Orders and the Judges’ Rules. Chapter 49 of the Police General Orders deals with Prisoners and the relevant matters in that chapter are set out here;

Chapter 49 - Prisoners

- 49.01 - arrest and detention of prisoners
- 49.03 - searching of prisoners (special provisions for searching servicemen in uniform and females)
- 49.07 - sick and injured prisoners
- 49.08 - prisoners in hospitals and clinics
- 49.09 - interviews with prisoners in hospital or prison custody
- 49.10 - prisoners sustaining or complaining of injury or ill-treatment

- 49.12 - special provisions for the detention and custody of females
- 49.13 - special provisions for the detention and custody of children under 16 years of age
- 49.14 - the disposal of the children of arrested persons
- 49.15 - meals for prisoners
- 49.16 - visits to and communication with prisoners (including his lawyers)
- 49.17- prisoner's property
- 49.22 - supply of additional necessary clothing to prisoners
- 49.30 - contacting of solicitors by prisoners
- 49.32 - issue of prescribed drugs etc. to prisoners.

7.10 It can be seen that there is provision for visits by lawyers to prisoners and for prisoners to contact solicitors. As noted, these General Orders do not have the force of law and consist rather of internal directions concerning the treatment of detained persons. Their breach, when proved, results only in internal disciplinary action against the offending police officer. While the Judges' Rules, which provide that a person who is to be charged with an offence and a person in custody should be cautioned before being questioned and before volunteering a statement, do not have legislative force they have legal consequences in that a failure by the police to observe their terms will result in the court refusing to allow the improperly obtained confession to be adduced. The Rules have been superseded in England and Wales by Codes of Practice issued pursuant to section 67 of PACE.

### ***The taking of fingerprints and intimate samples***

7.11 The taking of fingerprints is dealt with in Chapter 46 of the Police General Orders and by section 59 of the Police Force Ordinance (Cap 232). We have set out section 59 below in our discussion of section 61 of PACE. We have recommended that some parts of section 59 be incorporated in the Hong Kong equivalent of section 61 of PACE.

7.12 With regard to the taking of intimate samples, there does not appear to be any provision for this either by statute or within Police General Orders. It would seem timely to provide a legislative framework for this area of police practice which has grown in importance and become increasingly sophisticated.

## **II Overview of Part V of PACE**

7.13 This part of PACE relates to the treatment, questioning and identification of persons suspected of crime. It restates and develops the present statutory right of a detained person to have the fact of his arrest notified to someone he chooses. It also establishes clearer and stricter criteria governing the ability of the police to override that right. It creates for the first time a statutory recognition of the right of a detained person to obtain

legal advice, and again strictly limits the circumstances in which the exercise of that right by a detained person may be delayed. It also sets out clear criteria for compulsory fingerprinting and the taking of bodily samples such as blood and saliva. It introduces arrangements for the supervision and authorisation of such fingerprinting. Codes of practice have been issued for the treatment, questioning and identification of persons suspected of crime. They replace the Judges' Rules and place clear and comprehensive duties on the police.

7.14 Other matters covered in Part V are searches of detained persons, including intimate searches and the taking of intimate samples. This part of the Act also places a statutory duty on the Secretary of State to make an order requiring police interviews with suspects to be tape-recorded and to issue a code of practice for such tape-recording.

7.15 Section 53 of PACE repeals existing enactments so far as they authorise a person to be searched at a police station, or to be subjected to an intimate search, and abolishes any rule of common law which authorises such searches. Section 54 provides for the searching of detained persons. Section 55 is another of the more controversial provisions in the Act. It makes special provision with respect to intimate searches of detained persons. It provides that when an officer of the rank of superintendent has reasonable grounds for believing that a person who has been arrested and is in police detention may have concealed on him an article which could be used to cause physical injury to himself or others and which might be so used while he is in police detention or in the custody of a court and that it cannot be found without an intimate search, he may authorise such a search. The search must be undertaken by a registered medical practitioner or registered nurse "unless an officer of at least the rank of superintendent considers that this is not practicable" (section 55(5)), in which case it "shall be carried out by a constable" of the same sex as the person searched (section 55(6), (7)).

7.16 There are powers to seize and retain any article found during an intimate search provided the custody officer believes that the article may:

- (1) cause physical injury;
- (2) damage property;
- (3) interfere with evidence;
- (4) or assist in escape from detention.

or he has reasonable grounds for believing that it may be evidence relating to an offence. There is also power to take "intimate samples" from persons in police detention (section 62). Only a doctor may take an intimate sample, other than urine or saliva. A person who refuses his consent risks the court drawing "such inferences from the refusal as appear proper" and the refusal may be treated as, or as capable of amounting to, corroboration of any

evidence against the person in relation to which the refusal is material (section 62(10)).

7.17 There is also power (section 63) to take non-intimate samples. These require the authorisation of an officer of the rank of superintendent or above, who may only give such authorisation if he has reasonable grounds for suspecting the involvement of the person in a serious arrestable offence and that the sample will tend to confirm or disprove the involvement (section 63(4)). Section 61 provides for the taking of fingerprints of persons suspected or convicted of crime (section 61(3) and (6)).

7.18 The right to have someone informed when arrested, originally in section 62 of the Criminal Law Act 1977, is set out more fully in section 56 of PACE. When a suspect arrives at the police station, he is entitled, if he so requests, to have "one friend or relative or other person who is known to him or who is likely to take an interest in his welfare" told without delay that he is under arrest and his whereabouts.

7.19 Delay is only permissible in the case of serious arrestable offences and only if authorised by an officer of at least the rank of superintendent. The grounds for delay are that there are reasonable grounds for believing that advising the named person of the arrest would lead to:

- (1) interference with or harm to evidence connected with a serious arrestable offence;
- (2) interference with or physical injury to other persons;
- (3) the alerting of others involved in such an offence;

or would hinder the recovery of any property. If delay is authorised the suspect must be told of the fact and of the reasons for it. The reasons must be noted on the custody record. No delay (terrorism cases apart) can be more than 36 hours (section 56(3) and (11)).

7.20 When the grounds for delay cease to apply, the suspect must be asked again whether he still wishes someone to be notified that he is under arrest. If the suspect is moved (to another police station, for example) the right to have someone informed of his whereabouts arises again (section 56(8)). In the case of someone under 17, the existing duty under section 34(2) of the Children and Young Persons Act 1933 to take reasonable steps to inform parents or guardians is reaffirmed (section 57). It is stressed that rights conferred by this section are additional to those in section 56. Where the juvenile is subject to a supervision order, his social worker or the probation officer supervising him is also to be informed as soon as practicable. It is also made clear that where the juvenile is in care of the local authority, "parent" or "guardian" includes the local authority (section 57(8)(a)).

7.21 The law on legal advice for suspects in the police station is strengthened. The Philips Commission thought that a suspect should be informed that he had a right to see a solicitor privately (paragraph 4.87). Section 58 embodies this principle in clear terms.

7.22 If a person makes a request, he must be permitted to consult a solicitor as soon as it is practicable (section 58(4)), and in any case within 36 hours (section 58(5)). Such delay is only permitted where he is in police detention for a serious arrestable offence and an officer of the rank of superintendent or above gives authorisation (section 58(6)). He may do this where he believes exercise of the right:

- (1) will lead to interference with or harm to evidence connected with a serious arrestable offence;
- (2) will lead to interference with or physical injury to other persons;
- (3) will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it; or
- (4) will hinder the recovery of any property obtained as a result of such an offence (section 58(8)).

There are special provisions to deal with persons detained under terrorism provisions (section 58(13)).

7.23 Section 59 amends section 1 of the Legal Aid Act 1982 to enable arrangements to be made for the giving of advice and assistance to detained persons by duty solicitors.

7.24 A statutory duty is imposed on the Secretary of State (section 60) to make an order requiring police interviews with suspects to be tape-recorded and to issue a code of practice for such tape-recording. Code of Practice E has been issued to deal with the tape-recording of interviews.

### **III Section by section review of Part V**

#### **Section 53**

##### *“Abolition of certain powers of constables to search persons*

53. (1) *Subject to subsection (2) below, there shall cease to have effect any Act (including a local Act) passed before this Act in so far as it authorises -*

- (a) *any search by a constable of a person in police detention at a police station; or*
- (b) *an intimate search of a person by a constable,*

*and any rule of common law which authorises a search such as is mentioned in paragraph (a) or (b) above is abolished.*

*(2) Nothing in subsection (1)(a) above shall affect paragraph 6(2) of Schedule 3 to the Prevention of Terrorism (Temporary Provisions) Act 1984.”*

*(1) The significance of the section*

7.25 This part of PACE in general covers a number of issues which are controversial and which potentially impinge on the right of persons to privacy and the inviolability of the individual. It is recognised in certain cases, however, that the police will need statutory authority to carry out searches, particularly intimate searches, subject to proper safeguards. For this reason, we are in broad agreement with the approach to these matters set out in PACE. The PACE provisions lay down clear guidelines as to the circumstances in which strip searches or intimate searches may be carried out. The latter can only be carried out by a registered doctor or nurse. We are also satisfied that the provisions in PACE which establish the right of the detained person to inform others of his detention and to have access to a solicitor are important. These provisions appear to have been working satisfactorily under the PACE regime for some years (PACE came into effect in 1986) and we believe that it is to the benefit of both detained persons and the police that guidelines are now established.

7.26 Section 53 abolishes all statutory and common law powers, including those contained in local Acts, to search a person in police detention at a police station or to carry out an intimate search. An exception is made for offences of terrorism.

*(2) Our recommendations*

7.27 **To ensure that the safeguards set out in PACE are available in every case involving a search by a constable of a person in police detention at a police station, or any intimate search of a person by a constable, all other powers, whether statutory or common law, are abolished. The same principle should be applied in Hong Kong.**

**Section 54**

*“Searches of detained persons*

*54. (1) The custody officer at a police station shall ascertain and record or cause to be recorded everything which a person has with him when he is -*

(a) *brought to the station after being arrested elsewhere or after being committed to custody by an order or sentence of a court; or*

(b) *arrested at the station after having attended voluntarily there or having accompanied a constable there without having been arrested.*

(2) *In the case of an arrested person the record shall be made as part of his custody record.*

(3) *Subject to subsection (4) below, a custody officer may seize and retain any such thing or cause any such thing to be seized and retained.*

(4) *Clothes and personal effects may only be seized if the custody officer -*

(a) *believes that the person from whom they are seized may use them -*

(i) *to cause physical injury to himself or any other person;*

(ii) *to damage property;*

(iii) *to interfere with evidence; or*

(iv) *to assist him to escape; or*

(b) *has reasonable grounds for believing that they may be evidence relating to an offence.*

(5) *Where anything is seized, the person from whom it is seized shall be told the reason for the seizure unless he is -*

(a) *violent or likely to become violent; or*

(b) *incapable of understanding what is said to him.*

(6) *Subject to subsection (7) below, a person may be searched if the custody officer considers it necessary to enable him to carry out his duty under subsection (1) above and to the extent that the custody officer considers necessary for that purpose.*

(7) *An intimate search may not be conducted under this section.*

(8) *A search under this section shall be carried out by a constable.*

(9) *The constable carrying out a search shall be of the same sex as the person searched.”*

(1) *The significance of the section*

7.28 This section (together with section 55 and the Code of Practice) sets out a new scheme for the search of detained persons.

7.29 A distinction is drawn between non-intimate searches (section 54) and intimate searches (section 55). An intimate search is a search consisting of the physical examination of a person's body orifices (see section 118(1)).

7.30 Section 54 does not refer to the purpose of a search. Further, there is no reference, as under the previous law, to reasonableness. A person may be searched if the custody officer considers it necessary to enable him to carry out his duty to ascertain and record everything which a person has with him when he is brought to the station after being arrested or committed to custody by an order or sentence of the court or arrested at the station (see section 54(6) and (1)). Neither the Act nor the Code of Practice states that the police should inform the person concerned of the reasons for the search. However, it has been held (Brazil v. Chief Constable of Surrey [1983] 3 ALL ER 537) that reasons for searches must be given, unless the circumstances make it unnecessary or impracticable to do so. This remains good law. The effect is that if a search is conducted without reasons being given, and it would have been practicable to give reasons, the police are not acting in the execution of their duty, and the search may constitute an assault (or an indecent assault).

(2) *Our recommendations*

7.31 Under the new scheme for the search of detained persons the custody officer must personally ascertain everything a person has with him. The section does not appear to have been the subject of undue controversy or criticism. The effect of the section is that a complete record of everything a person has with him is available. **This is a useful safeguard of relevance to Hong Kong and we recommend the adoption of a similar provision.**

## **Section 55**

*“Intimate searches*

55. (1) *Subject to the following provisions of this section if an officer of at least the rank of superintendent has reasonable grounds for believing -*

- (a) *that a person who has been arrested and is in police detention may have concealed on him any thing which*
  - (i) *he could use to cause physical injury to himself or others; and*
  - (ii) *he might so use while he is in police detention or in the custody of a court; or*
- (b) *that such a person -*
  - (i) *may have a Class A drug concealed on him; and*
  - (ii) *was in possession of it with the appropriate criminal intent before his arrest;*

*he may authorise such a search of that person.*

(2) *An officer may not authorise an intimate search of a person for anything unless he has reasonable grounds for believing that it cannot be found without his being intimately searched.*

(3) *An officer may give an authorisation under subsection (1) above orally or in writing but, if he gives it orally, he shall confirm it in writing as soon as is practicable.*

(4) *An intimate search which is only a drug offence search shall be way of examination by a suitably qualified person.*

(5) *Except as provided by subsection (4) above, an intimate search shall be by way of examination by a suitably qualified person unless an officer of at least the rank of superintendent considers that this is not practicable.*

(6) *An intimate search which is not carried out as mentioned in subsection (5) above shall be carried out by a constable.*

(7) *A constable may not carry out an intimate search of a person of the opposite sex.*

- (8) *No intimate search may be carried out except -*
  - (a) *at a police station;*
  - (b) *at a hospital;*

- (c) *at a registered medical practitioner's surgery; or*
- (d) *at some other place used for medical purposes.*

(9) *An intimate search which is only a drug offence search may not be carried out at a police station.*

(10) *If an intimate search of a person is carried out, the custody record relating to him shall state -*

- (a) *which parts of his body were searched; and*
- (b) *why they were searched.*

(11) *The information required to be recorded by subsection (10) above shall be recorded as soon as practicable after the completion of the search.*

(12) *The custody officer at a police station may seize and retain anything which is found on an intimate search of a person, or cause any such thing to be seized and retained.*

(a) *if he believes that the person from whom it is seized may use it -*

- (i) *to cause physical injury to himself or any other person;*
- (ii) *to damage property;*
- (iii) *to interfere with evidence; or*
- (iv) *to assist him to escape; or*

(b) *if he has reasonable grounds for believing that it may be evidence relating to an offence.*

(13) *Where anything is seized under this section, the person from whom it is seized shall be told the reason for the seizure unless he is*

- (a) *violent or likely to become violent; or*
- (b) *incapable of understanding what is said to him.*

(14) *Every annual report -*

- (a) *under section 12 of the Police Act 1964; or*
- (b) *made by the Commissioner of Police of the Metropolis.*

*shall contain information about searches under this section which have been carried out in the area to which the report relates during the period to which it relates.*

*(15) The information about such searches shall include*

-

- (a) the total number of searches;*
- (b) the number of searches conducted by way of examination by a suitably qualified person;*
- (c) the number of searches not so conducted but conducted in the presence of such a person; and*
- (d) the result of the searches carried out.*

*(16) The information shall also include, as separate items -*

- (a) the total number of drug offence searches; and*
- (b) the result of those searches.*

*(17) In this section -*

*“the appropriate criminal intent” means an intent to commit an offence under -*

- (a) section 5(3) of the Misuse of Drugs Act 1971 (possession of controlled drug with intent to supply to another); or*
- (b) section 68(2) of the Customs and Excise Management Act 1979 (exportation etc with intent to evade a prohibition or restriction);*

*“Class A drug” has the meaning assigned to it by section 2(1)(b) of the Misuse of Drugs Act 1971;*

*“drug offence search” means an intimate search for a Class A drug which an officer has authorised by virtue of subsection (1)(b) above; and*

*“suitably qualified person means -*

- (a) a registered medical practitioner; or*
- (b) a registered nurse.”*

(1) *The significance of the section*

7.32 This section allows what are euphemistically described as “intimate searches” where a superintendent (or superior rank) has reasonable grounds for believing that an arrested person in police detention may have concealed on him a Class A drug or anything he could use to cause physical injury to himself or others, and might so use the item while in police detention.

7.33 At common law, it was not clear whether the police had authority to undertake intimate searches but in practice such searches took place. Intimate searches under PACE are only allowed for Class A drugs or for things which may cause injuries. Accordingly, they are not allowed for such things as money or jewellery (unless this may cause physical injury). If, however, money (for example) is found in the course of a search for a weapon, it may be seized (section 55(12)). An intimate search carried out for vindictive reasons would be unlawful. Code C states (Annex A) that an intimate search should only be carried out if it is the “only practicable means” of removing the object or drug. It adds that the reasons “shall be explained to the person before the search takes place”. The police may use reasonable force to effect an intimate search (section 117) but there is no provision for a medical practitioner to use such force.

(2) *Our recommendations*

7.34 This section is controversial but we consider that it incorporates sufficient safeguards against abuse to render the provision acceptable. Firstly, any search must be authorised by an officer of or above the rank of superintendent. Secondly, that officer must have reasonable grounds for believing that the search is necessary. Thirdly, an intimate search can only be authorised where the authorising officer reasonably believes that the item being searched for cannot be found other than by an intimate search. Finally, some measure of public scrutiny of the way in which the power to search is exercised is provided by the requirement that the Commissioner of Police provide in his annual report statistical details of the searches carried out. **In the light of these safeguards, and conscious of the need to provide the police with the power to carry out intimate searches in certain circumstances, we recommend the adoption of a provision in similar terms to section 55.**

**Section 56**

*“Right to have someone informed when arrested*

56. (1) *Where a person has been arrested and is being held in custody in a police station or other premises, he shall be entitled, if he so requests, to have one friend or relative or other person who is known to him or who is likely to take an interest in his welfare told, as soon as is practicable except to the extent*

*that delay is permitted by this section, that he has been arrested and is being detained there.*

*(2) Delay is only permitted -*

- (a) in the case of a person who is in police detention for a serious arrestable offence; and*
- (b) if an officer of at least the rank of superintendent authorises it.*

*(3) In any case the person in custody must be permitted to exercise the right conferred by subsection (1) above within 36 hours from the relevant time, as defined in section 41(2) above.*

*(4) An officer may give an authorisation under subsection (2) above orally or in writing but, if he gives it orally, he shall confirm it in writing as soon as is practicable.*

*(5) An officer may only authorise delay where he has reasonable grounds for believing that telling the named person of the arrest -*

- (a) will lead to interference with or harm to evidence connected with a serious arrestable offence or interference with or physical injury to other persons; or*
- (b) will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it; or*
- (c) will hinder the recovery of any property obtained as a result of such an offence.*

*(6) if a delay is authorised -*

- (a) the detained person shall be told the reason for it; and*
- (b) the reason shall be noted on his custody record.*

*(7) The duties imposed by subsection (6) above shall be performed as soon as is practicable.*

*(8) The rights conferred by this section on a person detained at a police station or other premises are exercisable whenever he is transferred from one place to another, and this section applies to each subsequent occasion on which they are exercisable as it applies to the first such occasion.*

(9) *There may be no further delay in permitting the exercise of the right conferred by subsection (1) above once the reason for authorising delay ceases to subsist.*

(10) *In the foregoing provisions of this section references to a person who has been arrested include references to a person who has been detained under the terrorism provisions and "arrest" includes detention under those provisions.*

(11) *In its application to a person who has been arrested or detained under the terrorism provisions -*

- (a) *subsection (2)(a) above shall have effect as if for the words "for a serious arrestable offence" there were substituted the words "under the terrorism provisions";*
- (b) *subsection (3) above shall have effect as if for the words from "within" onwards there were substituted the words "before the end of the period beyond which he may no longer be detained without the authority of the Secretary of State"; and*
- (c) *subsection (5) above shall have effect as if at the end there were added "or*
- (d) *will lead to interference with the gathering of information about the commission, preparation or instigation of acts of terrorism; or*
- (e) *by altering any person, will make it more difficult -*
  - (i) *to prevent an act of terrorism; or*
  - (ii) *to secure the apprehension, prosecution or conviction of any person in connection with the commission, preparation or instigation of an act of terrorism."*

(1) *The significance of the section*

7.35 Where a person has been arrested and is being held in custody in a police station or elsewhere, he is entitled to have on friend or relative or other person known to him, or who is likely to have an interest in his welfare, told that he has been arrested and where he is being held. The police, however, have the power to delay the exercise of this right in certain circumstances (see section 56(5)). The right in this section replaces that in section 62 of the Criminal Law Act 1977 which permitted a person in custody to inform one "reasonably named person" of his arrest and whereabouts. This is now repealed (see Schedule 7).

7.36 Delay is only permitted in the case of a person in police detention for a serious arrestable offence. Delay must be authorised by an officer of the rank of at least superintendent. The reasons for authorising delay are listed in section 56(5). In any event, there is entitlement to exercise the right after 36 hours (section 56(3)). The Code states that the right may be suspended only for “as long as necessary” (Annex B, para 4).

(2) *Our recommendations*

7.37 **We consider this to be an important safeguard against arrested persons being held for long periods of time incommunicado. It should be incorporated in the equivalent Hong Kong legislation.**

### **Section 57**

*“Additional rights of children and young persons who are arrested*

*57. The following subsections shall be substituted for section 34(2) of the Children and Young Persons Act 1933 -*

*(2) Where a child or young person is in police detention, such steps as are practicable shall be taken to ascertain the identity of a person responsible for his welfare.*

*(3) If it is practicable to ascertain the identity of a person responsible for the welfare of the child or young person, that person shall be informed, unless it is not practicable to do so -*

*(a) that the child or young person has been arrested;*

*(b) why he has been arrested; and*

*(c) where he is being detained.*

*(4) Where information falls to be given under subsection (3) above, it shall be given as soon as it is practicable to do so.*

*(5) For the purposes of this section the person who may be responsible for the welfare of a child or young person are -*

*(a) his parent or guardian; or*

*(b) any other person who has for the time being assumed responsibility for his welfare.*

(6) *If it is practicable to give a person responsible for the welfare of the child or young person the information required by subsection (3) above, that person shall be given it as soon as it is practicable to do so.*

(7) *If it appears that at the time of his arrest a supervision order, as defined in section 11 of the Children and Young Persons Act 1969, is in force in respect of him, the person responsible for his supervision shall also be informed as described in subsection (3) above as soon as it is reasonably to do so.*

(8) *The reference to a parent or guardian in subsection (5) above is -*

- (a) *in the case of a child in the care of a local authority, a reference to that authority; and*
- (b) *in the case of a child or young person in the care of a voluntary organisation in which parental rights and duties with respect to him are vested by virtue of a resolution under section 64(1) of the Child Care Act 1980, that organisation.*

(9) *The rights conferred on a child or young person by subsections (2) to (7) above are in addition to his rights under section 56 of the Police and Criminal Evidence Act 1984.*

(10) *The reference in subsection (2) above to a child or young person who is in police detention includes a reference to a child or young person who has been detained under the terrorism provisions, and in subsection (7) above "arrest" includes such detention.*

(11) *In subsection (10) above "the terrorism provisions" has the meaning assigned to it by section 65 of the Police and Criminal Evidence Act 1984.' "*

(1) *The significance of the section*

7.38 This section provides additional rights for children and young persons. Where a child or young person is in police detention, the police are to take all practicable steps to ascertain the identity of the person responsible for his welfare. If they ascertain that person's identity, he is to be informed as soon as practicable that the child or young person has been arrested, why, and where he is being detained.

7.39 It should be stressed that the rights in this section are additional to the rights in section 56 but the rights in section 56 may be suspended (for

up to 36 hours): those in section 57 may not. The Code adds (paragraph 3.9) that the appropriate person shall be asked to come to the police station to see the child or young person. It also states (paragraph 11.14) that a juvenile, whether suspected of crime or not, must not be interviewed or asked to provide or sign a written statement in the absence of the appropriate adult, though "in exceptional cases of need" (Annex C, para C1) this may be done.

(2) *Our recommendations*

7.40 Children and young persons are particularly vulnerable in police detention and it is sensible that special safeguards should apply to them. Those safeguards should also be available in Hong Kong and **we recommend the adoption of a provision similar to section 57.**

**Section 58**

*"Access to legal advice*

58. (1) *A person who is in police detention shall be entitled, if he so requests, to consult a solicitor privately at any time.*

(2) *Subject to subsection (3) below, a request under subsection (1) above and the time at which it was made shall be recorded in the custody record.*

(3) *Such a request need not be recorded in the custody record of a person who makes it at a time while he is at a court after being charged with an offence.*

(4) *If a person makes such a request, he must be permitted to consult a solicitor as soon as practicable except to the extent that delay is permitted by this section.*

(5) *In any case he must be permitted to consult a solicitor within 36 hours from the relevant time, as defined in section 41(2) above.*

(6) *Delay in compliance with a request is only permitted -*

(a) *in the case of a person who is in police detention for a serious arrestable offence; and*

(b) *if an officer of at least the rank of superintendent authorises it.*

(7) *An officer may give an authorisation under subsection (6) above orally or in writing but, if he gives it orally, he shall confirm it in writing as soon as is practicable.*

(8) *An officer may only authorise delay where he has reasonable grounds for believing that the exercise of the right conferred by subsection (1) above at the time when the person in police detention desires to exercise it -*

- (a) *will lead to interference with or harm to evidence connected with a serious arrestable offence or interference with or physical injury to other persons; or*
- (b) *will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it; or*
- (c) *will hinder the recovery of any property obtained as a result of such an offence.*

(9) *If delay is authorised -*

- (a) *the person in police detention shall be told the reason for it;*
- (b) *the reason shall be noted on his custody record.*

(10) *The duties imposed by subsection (9) above shall be performed as soon as is practicable.*

(11) *There may be no further delay in permitting the exercise of the right conferred by subsection (1) above once the reason for authorising delay ceases to subsist.*

(12) *The reference in subsection (1) above to a person who is in police detention includes a reference to a person who has been detained under the terrorism provisions.*

(13) *In the application of this section to a person who has been arrested or detained under the terrorism provisions -*

- (a) *subsection (5) above shall have effect as if for the words from "within" onwards there were substituted the words "before the end of the period beyond which he may no longer be detained without the authority of the Secretary of State";*
- (b) *subsection (6)(a) above shall have effect as if for the words "for a serious arrestable offence" there were*

*substituted the words "under the terrorism provisions";  
and*

- (c) subsection (8) above shall have effect as if at the end there were added "or*
- (d) will lead to interference with the gathering of information about the commission, preparation or instigation of acts of terrorism; or*
- (e) by altering any person, will make it more difficult -*
  - (i) to prevent an act of terrorism; or*
  - (ii) to secure the apprehension, prosecution or conviction of any person in connection with the commission, preparation or instigation of an act of terrorism."*

*(14) If an officer of appropriate rank has reasonable grounds for believing that, unless he gives a direction under subsection (15) below, the exercise by a person arrested or detained under the terrorism provisions of the right conferred by subsection (1) above will have any of the consequences specified in subsection (8) above (as it has effect by virtue of subsection (13) above), he may give a direction under that subsection.*

*(15) A direction under this subsection is a direction that a person desiring to exercise the right conferred by subsection (1) above may only consult a solicitor in the sight and hearing of a qualified officer of the uniformed branch of the force of which the officer giving the direction is a member.*

*(16) An officer is qualified for the purpose of subsection (15) above if -*

- (a) he is of at least the rank of inspector; and*
- (b) in the opinion of the officer giving the direction he has no connection with the case.*

*(17) An officer is of appropriate rank to give a direction under subsection (15) above if he is of at least the rank of Commander or Assistant Chief Constable.*

*(18) A direction under subsection (15) above shall cease to have effect once the reason for giving it ceases to subsist."*

(1) *The significance of the section*

7.41 The right set out in this section is arguably the most important protection conferred by PACE. Hitherto, the only “right” recognised was that in the Judges’ Rules that a detainee “should be able to communicate and to consult privately with a solicitor”. The Philips Commission recommended a statutory right, subject to narrowly drawn grounds for denying such a right. Section 58 broadly endorses the proposals. A person arrested and held in custody is given the right (though he must request it), to consult a solicitor privately at any time. If he so requests, he must be permitted to consult a solicitor as soon as is practicable, though this right may be suspended for up to 36 hours if he is in police detention for a serious arrestable offence and a superintendent authorises the suspension. Those detained for offences which are not serious arrestable offences have an unqualified right.

7.42 If the detained person wishes to consult a solicitor but does not know of one he must be informed, where a Duty Solicitor scheme is in operation, of the availability of a Duty Solicitor to provide advice and assistance, and be shown a list of solicitors who have indicated that they are available for the purpose of providing legal advice (Code C paragraph 6.1). The Code also stresses that a person who asks for legal advice “may not be interviewed or continue to be interviewed” until he has received it unless delay can be justified under section 58(8) or that an officer of at least the rank of superintendent has reasonable grounds to believe that to allow access to a solicitor:

- (1) would involve an immediate risk to persons or serious damage to property;
- (2) would cause unreasonable delay to the processes of the investigation;

or the person has given his agreement in writing or on tape that the interview may be commenced at once (Code C para 6.6). The solicitor may remain with his client during the client’s interview (see Code C paragraph 6.8). The solicitor may “only be required to leave the interview if an officer of the rank of superintendent or above considers that by his misconduct he has prevented the proper putting of questions to his client”.

(2) *Our recommendations*

7.43 **This section gives statutory recognition to an important safeguard against abuse, formerly a vague “right” without the force of law. It is an essential component of the PACE regime and for we believe it should be incorporated in Hong Kong legislation.**

**Section 59**

*“Legal aid for persons in police stations*

59. *In section 1 of the Legal Aid Act 1982 (duty solicitors)-*
- (a) *in subsection (1) the following paragraph shall be inserted after paragraph (a) -*
- “  
 (aa) *for the making, by such committees, of arrangements whereby advice and assistance under section 1 of the principal Act is provided for persons*
- (i) *such as are mentioned in section 29 of the Police and Criminal Evidence Act 1984; or*
- (ii) *arrested and held in custody who -*
- (i) *exercise the right to consult a solicitor conferred on them by section 58(1) of the Police and Criminal Evidence Act 1984; or*
- (ii) *are permitted to consult a representative of a solicitor; and”;*
- (b) *in paragraph (b), after the word “representation” there shall be inserted the words “or advice and assistance”;*
- (c) *the following subsection shall be inserted after that subsection -*
- “(1A) A scheme under section 15 of the principal Act which relates to advice and representation at magistrates’ courts may provide that arrangements made under it may be so framed as to preclude solicitors from providing such advice and representation if they do not also provide advice and assistance in pursuance of arrangements made by virtue of a scheme under that section which relates to the provision of advice and assistance for persons such as are mentioned in section 29 of the Police and Criminal Evidence Act 1984 and for persons arrested and held in custody”; and*
- (d) *in subsection (5), for the words “such arrangements as are mentioned in subsection (1) above” there shall be substituted the words “arrangements made under subsection (1) above for the provision of advice and representation at the court.”*

(1) *The significance of the section*

7.44 This section was repealed by the Legal Aid Act 1988, section 45, Schedule 6, as from April 1, 1989.

(2) *Our recommendations*

7.45 In Hong Kong, legal aid in criminal cases is available from the Legal Aid Department subject to a means test and if it is “in the interests of justice”. Legal aid does not at present exist to cover advice to persons in police stations (or, for that matter, for cases in magistrates’ courts) but the Duty Lawyer Scheme goes some way to cover this gap. Originally, the scheme only covered nine scheduled offences. The scheme has now expanded its scope, however, with the advent of the Bill of Rights Ordinance and the provision in Article 11(2)(d) that, in the determination of any criminal charge, the person charged “shall be entitled ..... to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it”. In broad terms, “the interests of justice” are likely to require the provision of legal assistance where an individual’s liberty is at stake. **We think it right that legal advice and representation should be readily available to persons in police custody in the interests of justice and as an important safeguard against abuse and we support the extension of legal aid to persons in police stations in Hong Kong.**

**Section 60**

*“Tape-recording of interviews*

60. (1) *It shall be the duty of the Secretary of State -*

(a) *to issue a code of practice in connection with the tape-recording of interviews of persons suspected of the commission of criminal offences which are held by police officers at police stations; and*

(b) *to make an order requiring the tape-recording of interviews of persons suspected of the commission of criminal offences, or of such descriptions of criminal offences as may be specified in the order, which are so held, in accordance with the code as it has effect for the time being.*

(2) *An order under subsection (1) above shall be made by statutory instrument and shall be subject to annulment in pursuance of a resolution of either House of Parliament.”*

(1) *The significance of the section*

7.46 This section imposes a duty on the Secretary of State to issue a code of practice in connection with the tape-recording of interviews of suspects which take place at police stations and to make a statutory instrument requiring such interviews to be tape-recorded. Code of Practice E has been issued. Tape-recording of interviews has been implemented in England and Wales. Interviews outside police stations are not covered.

(2) *Our recommendations*

7.47 Tape-recording of interviews is seen as an important safeguard against the making of false confessions. The ultimate objective should, in our view, be the video-taping of interviews. **Subject to the availability of resources, we believe that tape-recording and video-taping of interviews should be introduced in Hong Kong.**

### **Section 61**

*“Fingerprinting*

61. (1) *Except as provided by this section no person’s fingerprints may be taken without the appropriate consent.*

(2) *Consent to the taking of a person’s fingerprint must be in writing if it is given at a time when he is at a police station.*

(3) *The fingerprints of a person detained at a police station may be taken without the appropriate consent -*

(a) *if an officer of at least the rank of superintendent authorises them to be taken; or*

(b) *if -*

(i) *he has been charged with a recordable offence or informed that he will be reported for such an offence; and*

(ii) *he has not had his fingerprints taken in the course of the investigation of the offence by the police.*

(4) *An officer may only give an authorisation under subsection (3) (a) above if he has reasonable grounds -*

(a) *for suspecting the involvement of the person whose fingerprints are to be taken in a criminal offence; and*

(b) *for believing that his fingerprints will tend to confirm or disprove his involvement.*

(5) *An officer may give an authorisation under subsection (3)(a) above orally or in writing but, if he gives it orally, he shall confirm it in writing as soon as is practicable.*

(6) *Any person's fingerprints may be taken without the appropriate consent if he has been convicted of a recordable offence.*

(7) *In a case where by virtue of subsection (3) or (6) above a person's fingerprints are taken without the appropriate consent -*

(a) *he shall be told the reason before his finger – prints are taken; and*

(b) *the reason shall be recorded as soon as is practicable after the fingerprints are taken.*

(8) *If he is detained at a police station when the fingerprints are taken, the reason for taking them shall be recorded on his custody record.*

(9) *Nothing in this section -*

(a) *affects any power conferred by paragraph 18(2) of Schedule 2 to the Immigration Act 1971; or*

(b) *applies to a person arrested or detained under the terrorism provisions."*

1) *The significance of the section*

7.48 This section sets finger-printing practice on a firm statutory basis. Hitherto, most fingerprints were taken with consent, though in the absence of this a magistrates' court order could be obtained. PACE permits finger-printing with the written consent of the individual (section 61(1) and (2)). The Act also permits fingerprinting in three other circumstances.

(1) on the authority of an officer of at least the rank of superintendent to confirm or disprove involvement in a criminal offence.

(2) if the suspect has been charged with an offence or informed that he will be reported for such an offence (section 61(3)(b));

(3) if the individual has been convicted but has not had his fingerprints taken. The effect is that all persons detained at police stations who are to be prosecuted may be "routinely" finger-printed.

7.49 We considered the recently amended section 59 of the Police Force Ordinance (Cap 232) which provides as follows:

*“ (1) Where a person has been arrested under the powers conferred by this or any other law, any police officer may take, or cause to be taken under the supervision of a police officer -*

- (a) photographs, finger-prints, palm-prints and the weight and height measurements of that person; and*
- (b) sole-prints and toe-prints of that person if the officer has reason to believe that such prints would help the investigation of any offence.*

*(2) The identifying particulars of a person taken under subsection (1) may be retained by the Commissioner, except that if -*

- (a) a decision is taken not to charge the person with any offence; or*
- (b) the person is charged with an offence but discharged by a court before conviction or acquitted at his trial or on appeal,*

*the identifying particulars, together with any negatives or copies thereof, shall as soon as reasonably practicable be destroyed or, if the person prefers, delivered to that person.*

*(3) Notwithstanding subsection (2), the Commissioner may retain the identifying particulars of a person who -*

- (a) has been previously convicted of any offence;*
- (b) is the subject of a removal order under the Immigration Ordinance (Cap 115).*

*(4) Notwithstanding subsection (2)(a), the Commissioner may retain, until the person attains the age of 17 years, the identifying particulars of a person under the age of 17 years who has been arrested for an offence, who has not been charged with that offence, but who has instead, in accordance with guidelines approved by the Attorney General, been cautioned by a police officer of the rank of superintendent or above as to his future conduct.*

*(5) Where a person is convicted of an offence, any police officer may take or cause to be taken all or any of the*

*identifying particulars of that person whether or not such particulars are already in the possession of the Commissioner, and the Commissioner may retain any identifying particulars so taken unless and until and conviction is set aside on appeal.*

*(6) In this section, “identifying particulars” in relation to a person means photographs, finger-prints, palm-prints, sole-prints, toe-prints and the weight and height measurements of that person.”*

*(2) Our recommendations*

7.50 At first sight, there appears to be a significant difference in approach between section 59 of Cap 232 and section 61 of PACE in that the power to fingerprint is triggered by arrest in the former and charge in the latter. On further examination, however, we are satisfied that the difference is one of emphasis rather than substance. The effect of section 61(3)(a) and (4) of PACE is that an individual can be fingerprinted before charge where an officer of at least the rank of superintendent has reasonable grounds “for suspecting the involvement of [that] person .... in a criminal offence; and for believing that his fingerprints will tend to confirm or disprove his involvement”. In practical terms, there is therefore little difference between the way in which sections 59 and 61 operate.

7.51 Of more significance is the greater powers which section 59 contains, allowing the police to take sole- and toe-prints and weight and height measurements. There are sound operational reasons for giving the police these powers and we do not think they should be lightly given up. **We think it sensible to adopt a consistent approach, and to that end we favour following the PACE model and recommend that provisions similar to section 61 (and to the related section 64) should be adopted but that the key elements of section 59 of the Police Force Ordinance should also be incorporated.**

## **Section 62**

### *“Intimate samples*

62. (1) *An intimate sample may be taken from a person in police detention only -*

(a) *if a police officer of at least the rank of superintendent authorises it to be taken; and*

(b) *if the appropriate consent is given.*

(2) *An officer may only give an authorisation if he has reasonable grounds -*

- (a) *for suspecting the involvement of the person from whom the sample is to be taken in a serious arrestable offence; and*
- (b) *for believing that the sample will tend to confirm or disprove his involvement.*

(3) *An officer may give an authorisation under subsection (1) above orally or in writing but, if he gives it orally, he shall confirm it in writing as soon as is practicable.*

(4) *The appropriate consent must be given in writing.*

(5) *Where -*

- (a) *an authorisation has been given; and*
- (b) *it is proposed that an intimate sample shall be taken in pursuance of the authorisation.*

*an officer shall inform the person from whom the sample is to be taken -*

- (i) *of the giving of the authorisation; and*
- (ii) *of the grounds for giving it.*

(6) *The duty imposed by subsection (5)(ii) above includes a duty to state the nature of the offence in which it is suspected that the person from whom the sample is to be taken has been involved.*

(7) *If an intimate sample is taken from a person -*

- (a) *the authorisation by virtue of which it was taken;*
- (b) *the grounds for giving the authorisation; and*
- (c) *the fact that the appropriate consent was given,*

*shall be recorded as soon as is practicable after the sample is taken.*

(8) *If an intimate sample is taken from a person detained at a police station, the matters required to be recorded by subsection (7) above shall be recorded in his custody record.*

(9) *An intimate sample, other than a sample of urine or saliva, may only be taken from a person by a medical practitioner.*

(10) *Where the appropriate consent to the taking of an intimate sample from a person was refused without good cause, in any proceedings against that person for an offence -*

(a) *the court, in determining -*

(i) *whether to commit that person for trial ; or*

(ii) *whether there is a case to answer; and*

(b) *the court of jury, in determining whether that person is guilty of the offence charged.*

*may draw such inferences, from the refusal as appear proper; and the refusal may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence against the person in relation to which the refusal is material.*

(11) *Nothing in this section affects sections 5 to 12 of the Road Traffic Act 1972.”*

(1) *The significance of the section*

7.52 This section allows the police to take intimate samples from persons in police detention with their consent. Subsection (10) provides that the court may draw an inference from the accused’s refusal “without good cause” to give a sample. We believe that this provision may have Bill of Rights implications. It is at least arguable that the threat of an adverse inference would be sufficient for a court to regard the taking of a sample with formal consent as non-consensual.

7.53 Article 14 of the Bill of Rights (reflecting Article 17 of the International Covenant on Civil and Political Rights (“ICCPR”)) provides a right of privacy, while Article 5 (Article 9 of the ICCPR) guarantees the liberty and security of the person. While an individual can specifically waive these rights, if the “consent” under section 62 is held to be invalid because of the threat of an adverse inference being drawn under subsection (10), then the taking of a sample would be in breach of these provisions of the Bill of Rights. There is Canadian authority to suggest that, unless there are special circumstances, the taking of body samples should be authorised beforehand by a person capable of acting judicially in order to avoid breaching the right to privacy enshrined in Article 17 of the ICCPR.

(2) *Our recommendations*

7.54 We have noted the Bill of Rights difficulties that section 62 may cause. In order to avoid the problems raised by subsection (10) in possibly vitiating consent given to the taking of a sample and to ensure that the right to privacy is not infringed, **we recommend that section 62 be amended to**

provide that prior authorisation from a magistrate should be obtained for the taking of samples in all non-urgent cases. We accept that there may be cases of urgency where prior authorisation is not possible or is impractical (such as where the condition of the body sample alters quickly, as in, for example, the alcohol concentration in blood). In such cases, the taking of samples should be permitted without prior authorisation. Subject to that amendment, we think section 62 should be adopted in its entirety. We note in passing that section 62 can be distinguished from section 55, which deals with intimate searches. In the latter section, there is no provision allowing an adverse inference to be drawn from a refusal to give consent and we do not therefore think that a Bill of Rights difficulty arises.

### **Section 63**

#### *“Other samples*

63. (1) *Except as provided by this section a non-intimate sample may not be taken from a person without the appropriate consent.*

(2) *Consent to the taking of a non-intimate sample must be given in writing.*

(3) *A non-intimate sample may be taken from a person without the appropriate consent if -*

(a) *he is in police detention or is being held in custody by the police on the authority of a court; and*

(b) *an officer of at least the rank of superintendent authorises it to be taken without the appropriate consent.*

(4) *An officer may only give an authorisation under subsection (3) above if he has reasonable grounds -*

(a) *for suspecting the involvement of the person from whom the sample is to be taken in a serious arrestable offence; and*

(b) *for believing that the sample will tend to confirm or disprove his involvement.*

(5) *An officer may give an authorisation under subsection (3) above orally or in writing but, if he gives it orally, he shall confirm it in writing as soon as is practicable.*

(6) *Where -*

- (a) *an authorisation has been given; and*
- (b) *it is proposed that a non-intimate sample shall be taken in pursuance of the authorisation,*

*an officer shall inform the person from whom the sample is to be taken-*

- (i) *of the giving of the authorisation; and*
- (ii) *of the grounds for giving it.*

*(7) The duty imposed by subsection (6)(ii) above includes a duty to state the nature of the offence in which it is suspected that the person from whom the sample is to be taken has been involved.*

*(8) If a non-intimate sample is taken from a person by virtue of subsection (3) above -*

- (a) *the authorisation by virtue of which it was taken; and*
- (b) *the grounds for giving the authorisation,*

*shall be recorded as soon as is practicable after the sample is taken.*

*(9) If a non-intimate sample is taken from a person detained at a police station, the matters required to be recorded by subsection (8) above shall be recorded in his custody record.”*

*(1) The significance of the section*

7.55 This section governs the taking of non-intimate samples. These may be taken with the appropriate written consent or without consent if the person is in police detention for a serious arrestable offence and an officer of the rank of superintendent or above authorises the sample to be taken. The officer must reasonably suspect that the sample will tend to confirm or disprove the person's involvement in such an offence. The procedure to be followed is the same as for intimate samples (see section 62). The provisions for destruction of samples (in section 64) are the same as those for intimate samples (and fingerprints).

7.56 Non-intimate sample means:

- (1) a sample of hair other than public hair;
- (2) a sample taken from the nail or from under a nail;

- (3) a swab taken from any part of a person's body other than a body orifice;
- (4) a footprint or a similar impression of any part of a person's body other than a part of his hand (for example, dental impressions) (section 65).

Finger and palm prints are covered by section 61 (and see section 65).

7.57 The appropriate consent must be given in writing (section 63(2)). The Code of Practice D adds "even if he consents, an officer of the rank of inspector or above must have reasonable grounds to believe that such a sample or impression will tend to confirm or disprove the suspect's involvement in a particular offence" (paragraph 5.4). Reasonable force may be used if necessary (section 117, Code D, paragraph 5.6). If clothing is removed, no person of the opposite sex (other than a doctor or nurse) is to be present, nor anyone else whose presence is unnecessary (Code D, paragraph 5.12).

(2) *Our recommendations*

7.58 **The taking of non-intimate samples is an important aspect of police investigation of crime. Where the infringement of the individual's privacy is concerned, however, we think it important that there are proper safeguards against abuse of the police power. We think that section 63 adequately addresses our concerns in this regard and we recommend the adoption of a provision in Hong Kong in similar terms.**

#### **Section 64**

*"Destruction of fingerprints and samples*

64. (1) *If -*

(a) *fingerprints or samples are taken from a person in connection with the investigation of an offence; and*

(b) *he is cleared of that offence.*

*they must be destroyed as soon as is practicable after the conclusion of the proceedings.*

(2) *If -*

(a) *fingerprints or samples are taken from a person in connection with such an investigation; and*

- (b) *it is decided that he shall be prosecuted for the offence and he has not admitted it and has been dealt with by way of being cautioned by a constable,*

*they must be destroyed as soon as is practicable after that decision is taken.*

(3) *If -*

- (a) *fingerprints or samples are taken from a person in connection with the investigation of an offence; and*
- (b) *that person is not suspected of having committed the offence,*

*they must be destroyed as soon as they have fulfilled the purpose for which they were taken.*

(4) *Proceedings which are discontinued are to be treated as concluded for the purposes of this section.*

(5) *If fingerprints are destroyed, any copies of them shall also be destroyed.*

(6) *A person who asks to be allowed to witness the destruction of his fingerprints or copies of them shall have a right to witness it.*

(7) *Nothing in this section -*

- (a) *affects any power conferred by paragraph 18(2) of Schedule 2 to the Immigration Act 1971; or*
- (b) *applies to a person arrested or detained under the terrorism provisions.”*

(1) *The significance of the section*

7.59 This section provides for the destruction of fingerprints and samples, intimate and non-intimate, and copies of fingerprints if

- (1) the person is cleared of the offence;
- (2) no prosecution is brought and he is not cautioned; or
- (3) they were taken to eliminate suspects and the person is not suspected.

In the case of fingerprints and copies of them the person is to be told that he has a right to witness their destruction. This does not apply to samples.

7.60 Nothing in this section applies to fingerprints and samples taken under the Prevention of Terrorism (Temporary Provisions) Act 1984 or to prints or copies taken under the Immigration Act 1971. The reason for the former exception is national security: the latter is justified by the need to detect illegal immigration.

(2) *Our recommendations*

7.61 The rationale of this section is that fingerprints should be destroyed once they are no longer relevant to the criminal process. It is entirely understandable that, for instance, a person acquitted of an offence should wish to have his fingerprints removed from police records. We referred at paragraph 7.49 to section 59 of the Police Force Ordinance (Cap 232). That section provides for the destruction of fingerprint records where the person is not charged with an offence, or he is acquitted or discharged, or, in the case of a cautioned juvenile, he attains the age of 17 without having been convicted of any offence. **In general, we favour the adoption of the PACE scheme but, in relation to section 64, we note the terms of the existing section 59 of Cap 232 and advise that this should be taken into account when drafting the new Hong Kong provision.**

**Section 65**

*“Fingerprints and samples - supplementary*

65. *In this Part of this Act -*

*“appropriate consent” means -*

- (a) *in relation to a person who has attained the age of 17 years, the consent of that person;*
- (b) *in relation to a person who has not attained that age but has attained the age of 14 years, the consent of that person and his parent or guardian; and*
- (c) *in relation to a person who has not attained the age of 14 years, the consent of his parent or guardian;*

*“fingerprints” includes palm prints;*

*“intimate sample” means a sample of blood, semen or any other tissue fluid, urine, saliva or public hair, or a swab taken from a person’s body orifice;*

*“non-intimate sample” means -*

- (a) *a sample of hair other than public hair,*

- (b) *a sample taken from a nail or from under a nail;*
- (c) *a swab taken from any part of a person's body other than a body orifice;*
- (d) *a footprint or a similar impression of any part of a person's body other than a part of his hand;*

*"the terrorism provisions" means -*

- (a) *section 12(1) of the Prevention of Terrorism (Temporary Provisions) Act 1984; and*
- (b) *any provision conferring a power of arrest or detention and contained in an order under section 13 of that Act; and*

*"terrorism" has the meaning assigned to it by section 14(1) of that Act."*

**(1) The significance of the section**

7.62 This section provides the definitions for this part of PACE.

**(2) Our recommendations**

7.63 **Clearly, the definitions, other than those relating to terrorism, are of relevance to Hong Kong and we recommend the adoption of this section.**

## Chapter 8

### Codes of practice

### Part VI of PACE – sections 66 & 67

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#### I Existing law in Hong Kong

8.1 The Police Force Ordinance (Cap 232) (sections 45, 46 and 47) is the source of the power of the Commissioner of Police to make Police General Orders. These Orders are internal and are made to enable the Commissioner “to administer the police force and to render the police force efficient in the discharge of its duty”. Breach of the Police General Orders will result only in internal disciplinary action against the offending police officer. The Judges’ Rules are concerned principally with the questioning of suspects in lawful custody and (as we are not required to deal with confessions) are mentioned here only for the sake of completeness. By comparison the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, Code C, has replaced the Judges’ Rules and sets out the guiding principles which should direct any investigation. However, the precise status of the PACE Code is not entirely clear. PACE does not appear to contain sanctions for failing to observe the Codes of Practice, apart from making it a disciplinary offence for a police officer to fail to comply with any provision of a Code of Practice (section 67(8)).

#### II Overview of Part VI of PACE

8.2 This Part is concerned specifically with the Codes of Practice which by section 67 of PACE the Home Secretary is required to lay before Parliament for its approval. The subject matter of the Codes is set out in section 66 of PACE. They govern the exercise by the police of their powers of stop and search, the search of premises and the seizure of property, and the detention, treatment, questioning, and identification of persons by the police. The following Codes of Practice have been issued under the Act:

- A - for the exercise by police officers of statutory powers of stop and search;
- B - for the searching of premises by police officers and the seizure of property found by police officers on persons or premises;
- C - for the detention, treatment and questioning of persons by police officers;

- D - for the identification of persons by police officers;
- E - for the tape-recording of interviews.

8.3 There is a helpful statement on the thinking behind the Codes of Practice in a speech by Lord Glenarthur in the House of Lords on 9 December 1985 moving that the Police and Criminal Evidence Act 1984 (Codes of Practice) (No. 1) Order 1985 laid before the House on 30 October be approved. He said in the course of that debate<sup>1</sup>:

*“The law on police powers and procedures has undergone a major process of review and reform, beginning with the Royal Commission on Criminal Procedure in 1978 and ending with the Police and Criminal Evidence Act and the codes issued under it, which we are now debating. The Royal Commission felt that the Judges’ Rules, which it regarded as vague and unspecific, should be replaced by explicit and workable instructions, subject to Parliamentary approval but sufficiently flexible to be able to reflect changing needs and circumstances. It has been our aim to frame the codes in clear and straightforward language which is readily understandable by police and public alike. Their provisions will be binding on the police and breach of them will constitute a disciplinary offence. And the codes will be admissible in evidence in criminal and disciplinary proceedings.*

*I believe the codes represent standards of good professional policing and that this is how they will come to be seen by the police. They have placed a major training task on the police which is now nearing completion and which has provided the opportunity for a fundamental re-examination by all officers of the aims and purposes of policing. So far as recruits are concerned, the training task should be greatly eased in future. There has of course been concern in the service at the burden that will fall on them in learning and operating new procedures and keeping records. We understand the natural apprehension that officers may feel at an apparently major change in the way they will be expected to carry out their work, but as officers become familiar with the new provisions they find that the codes are not as difficult as they feared and that they can make them work effectively. This has been the lesson of those police forces which have carried out trial runs, and I am sure it will be the general experience of the police after 1<sup>st</sup> January.*

*The codes of practice have been designed as a workable, practical scheme. They are not intended to represent an inflexible, unchangeable procedure, and we shall keep their operation under close review to ensure it works as Parliament*

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<sup>1</sup> Parliamentary Debates, House of Lords, (Vol. 469) 9 December 1985, columns 12 and 13.

*has intended. Should the need arise, we shall be ready to propose any changes that we are satisfied are necessary.”*

### **III Section by section review of Part VI or PACE**

#### **Section 66**

##### *“Codes of practice*

*66. The Secretary of State shall issue codes of practice in connection with -*

- (a) the exercise by police officers of statutory powers -
  - (i) to search a person without first arresting him; or*
  - (ii) to search a vehicle without making an arrest;**
- (b) the detention, treatment, questioning and identification of persons by police officers;*
- (c) searches of premises by police officers; and*
- (d) the seizure of property found by police officers on persons or premises.”*

#### *(1) The significance of the section*

8.4 Section 66 provides guidance to the Secretary of State as to the matters to be dealt with under Codes of Practice. The Codes of Practice provide explicit and workable instructions to the police and have been accepted as an important adjunct to PACE. Equally importantly, the Codes of Practice are readily accessible to the public, in contrast to the Police General Orders in Hong Kong which are not made public. The matters dealt with by the Codes of Practice are comprehensive.

#### *(2) Our recommendations*

8.5 **We believe the adoption of Codes dealing with these matters is appropriate to Hong Kong circumstances. If it is found that Codes dealing with other areas of police practice are required then these can be introduced at a later time.** As noted by Lord Glenarthur in his speech the codes are not inflexible or unchangeable and are capable of review and amendment.

8.6 We gave consideration to the advantages and disadvantages of having non-statutory Codes. We concluded that there was a need for the monitoring of the Codes by the Legislative Council or some other independent body. The Codes would be a public document, in keeping with the openness

which is characteristic of the PACE scheme. We think it right that provisions which have a bearing on the interaction between police and citizen should be available for public scrutiny. We are of the view that it would be useful for consideration to be given to the establishment of a working party or committee on the rules to be contained in the Codes of Practice in Hong Kong.

## **Section 67**

### *“Codes of practice - supplementary*

67. (1) *When the Secretary of State proposes to issue a code of practice to which this section applies, he shall prepare and publish a draft of that code, shall consider any representations made to him about the draft and may modify the draft accordingly.*

(2) *This section applies to a code of practice under Section 60 or 66 above.*

(3) *The Secretary of State shall lay before both Houses of Parliament a draft of any code of practice prepared by him under this section.*

(4) *When the Secretary of State has laid the draft of a code before Parliament, he may bring the code into operation by order made by statutory instrument.*

(5) *No order under subsection (4) above shall have effect until approved by a resolution of each House of Parliament.*

(6) *An order bringing a code of practice into operation may contain such transitional provisions or savings as appear to the Secretary of State to be necessary or expedient in connection with the code of practice thereby brought into operation.*

(7) *The Secretary of State may from time to time revise the whole or any part of a code of practice to which this section applies and issue that revised code, and the foregoing provisions of this section shall apply (with appropriate modifications) to such a revised code as they apply to the first issue of a code.*

(8) *“A police officer shall be liable to disciplinary proceedings for a failure to comply with any provision of such a code, unless such proceedings are precluded by section 104 below.*

(9) *Persons other than police officers who are charged with the duty of investigating offences or charging offenders shall in the discharge of that duty have regard to any relevant provision of such a code.*

(10) *A failure on the part*

- (a) *of a police officer to comply with any provision of such a code; or*
- (b) *of any person other than a police officer who is charged with the duty of investigating offences or charging offenders to have regard to any relevant provision of such a code in the discharge of that duty.*

*shall not of itself render him liable to any criminal or civil proceedings.*

(11) *In all criminal and civil proceedings any such code shall be admissible in evidence, and if any provision of such a code appears to the court or tribunal conducting the proceedings to be relevant to any question arising in the proceedings it shall be taken into account in determining that question.*

(12) *In this section "criminal proceedings" includes -*

- (a) *proceedings in the United Kingdom or elsewhere before a court material constituted under the Army Act 1955, or the Air Force Act 1955 or the Naval Discipline Act 1957 or a disciplinary court constituted under section 50 of the said Act of 1957;*
- (b) *proceedings before the Courts-Martial Appeal Court; and*
- (c) *proceedings before the Standing Civilian Court."*

(1) *The significance of the section*

8.7 This section provides the machinery by which the Secretary of State in England may bring Codes of Practice into operation. This is to be done by means of an Order made by Statutory Instrument. Section 67 also makes it a disciplinary offence for a police officer to fail to comply with any provision of a Code (section 67(8)). (No disciplinary proceeding may be commenced where the officer has been convicted or acquitted of a criminal offence which is in substance the same as the disciplinary offence. Such proceedings are precluded by section 104 of PACE.)

(2) *Our recommendations*

**8.8 This section is important in establishing the machinery by which Codes of Practice are to be issued and in setting out the effect of a breach of a part of a Code by the police. We recommend its adoption. It would be necessary for the Hong Kong equivalent of the Secretary of State to place the Codes before the Legislative Council for approval following public consultation.**

## Chapter 9

### Exclusion of unfair evidence (section 78 – contained in Part VIII of PACE)

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#### I Existing law in Hong Kong

9.1 The common law discretion to exclude relevant evidence, as recognised by the House of Lords in *R v. Sang*<sup>1</sup>, took two forms. First, there was a discretion to exclude evidence if its prejudicial effect outweighed its probative value. The Court thus had a discretion, in order to ensure that the accused had a fair trial, to exclude evidence if it would be likely to have a prejudicial effect on the minds of the jury out of proportion to its true evidential value. The discretion was applied *inter alia* to exclude “similar fact” evidence or other pieces of evidence which tended to reveal the defendant’s bad character, or other prejudicial matter.

9.2 In its second form, the common law discretion allowed the court to exclude improperly or unfairly obtained evidence, but only if it was obtained after the commission of the offence. It would seem that the principle underlying this narrowly defined discretion was the rule against self-incrimination, i.e. that a person should not be improperly or unfairly led into providing evidence against himself.

9.3 The discretion in both forms was to be exercised as part of the Judge’s duty to ensure a fair trial. However, it is to be noted that the unfairness arises from different causes in each of the above forms. In the former, it arises because of the admission of prejudicial evidence of little probative value. In the latter, it arises because the defendant has been misled into betraying himself.

#### II Overview relating to section 78 of PACE

9.4 Our terms of reference asked us to consider only section 78 of Part VIII of PACE, section 78 being headed “Exclusion of unfair evidence”. Because, however, other sections in Part VIII deal with subject matter related to section 78, we provide here a discussion of those related sections to the extent necessary. We discuss section 78 itself in the next section.

9.5 Section 82(3) of PACE reads as follows:

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<sup>1</sup> [1980] AC 402.

*“Interpretation of Part VIII*

*82. (3) Nothing in this Part of this Act shall prejudice any power of a court to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion.”*

9.6 The effect of this subsection is to preserve a discretion which existed prior to PACE to exclude evidence. It applies to any evidence including, but not limited to, confessions. Before PACE there were the following discretions to exclude evidence.

- (1) the court’s discretion to exclude evidence obtained from the accused, which was wide; and
- (2) a general discretion to exclude evidence to ensure a fair trial, interpreted quite restrictively so that the only basis on which a court could exclude evidence (other than that obtained from the accused) was if its prejudicial effect outweighed its probative value.

9.7 The effect therefore of subsection 82(3) of PACE is to retain the discretion to exclude any evidence which may not be excluded by sections 76 or 78.

9.8 Section 76 of PACE reads as follows:

**Section 76**

*“Confession*

*76. (1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.*

*(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is presented to the court that the confession was or may have been obtained -*

- (a) by oppression of the person who made it; or*
- (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,*

*the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the*

*court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.*

*(3) In any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in subsection (2) above.*

*(4) The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence -*

*(a) of any facts discovered as a result of the confession; or*

*(b) where the confession is relevant as showing that the accused speaks, writes or expresses himself in a particular way, of so much of the confession as is necessary to show that he does so.*

*(5) Evidence that a fact to which this subsection applies was discovered as a result of a statement made by an accused person shall not be admissible unless evidence of how it was discovered is given by him or on his behalf.*

*(6) Subsection (5) above applies -*

*(a) to any fact discovered as a result of a confession which is wholly excluded in pursuance of this section; and*

*(b) to any fact discovered as result of a confession which is partly so excluded, if that fact is discovered as a result of the excluded part of the confession.*

*(7) Nothing in Part VII of this Act shall prejudice the admissibility of a confession made by an accused person.*

*(8) In this section "oppression" includes torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture)."*

9.9 Briefly, the effect of section 76 is that a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court. The section makes provision for the inadmissibility of confessions in certain circumstances. Under section 76(2), a confession *must* be excluded if it was or may have been obtained by oppression of the person who made it

or in consequence of anything said or done which was likely to render it unreliable.

### III Review of section 78

#### Section 78

##### “Exclusion of unfair evidence

78. (1) *In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.*

(2) *Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.”*

#### (1) *The significance of the section*

9.10 It is now possible to concentrate on the effect of section 78.

9.11 Section 78 gives a statutory discretion to the court to refuse to allow evidence on which the prosecutor proposes to rely if it appears to the court, having regard to all the circumstances (including the circumstances in which the evidence was obtained) that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that it should be excluded.

9.12 It applies to all evidence, including evidence of confessions<sup>2</sup>. As noted above, however, if a confession is obtained by oppression or in unreliable circumstances (or if evidence is required to be excluded by some other rule of law) it must be excluded and there is no discretion not to exclude it (see section 78(2)).

9.13 The discretion under section 78 is very wide and is not limited to illegally or unlawfully obtained evidence. Although the general rule is that illegally obtained evidence is *admissible* as a matter of law, section 78 provides the discretion to exclude it.

9.14 Once evidence has been admitted, section 78 no longer operates, but if the court decides that it should not have been admitted, the discretion to stop the trial or to take other steps necessary to prevent injustice is preserved by section 82(3).

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<sup>2</sup> *R v. Mason*, [1987] 3 All ER 481.

9.15 The English Court of Appeal has declined to lay down general guidelines on section 78 because “circumstances vary infinitely”<sup>3</sup>, but certain patterns are emerging from the cases:

- (1) A confession by a suspect after breach of PACE or the Codes can be ruled inadmissible under section 78, but each case is determined on its own facts<sup>4</sup>.
- (2) Confessions obtained by a trap might be excluded under section 78.
- (3) Confession made in interviews not recorded in accordance with Code C might be excluded.
- (4) The courts have been quick to exclude confessions obtained after access was delayed or denied in breach of the section 58 right of access to a solicitor<sup>5</sup>.

9.16 Section 78 is by no means limited to evidence of confessions. It can be used to exclude any type of evidence e.g. evidence of a breath test was excluded when it followed officers deliberately exceeding their powers by trespassing.<sup>6</sup>

9.17 Conclusions which can be drawn from the foregoing include:

- (1) a confession obtained by oppression or in unreliable circumstances must be excluded (section 76).
- (2) a confession obtained in any other circumstances can be excluded at the discretion of the court so as to ensure a fair trial (section 78).
- (3) any other evidence obtained in any circumstances can be excluded at the discretion of the court so as to ensure a fair trial (section 78).
- (4) evidence not obtained from the accused will be excluded if its prejudicial effect outweighs its probative value<sup>7</sup>.

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<sup>3</sup> R v. Samuel, [1988] 2 All ER 135.

<sup>4</sup> R v. Paris [1989] Crim LR 445.

<sup>5</sup> R v. Absolam [1988] Crim LR 748.

<sup>6</sup> Jit Singh Matto v. DPP [1987] Crim LR 641.

<sup>7</sup> R. v Sang [1980] AC 402, which contains the common law discretion to exclude evidence not affected by section 78; section 78 grants to the court an additional power to exclude prosecution evidence if it appears to the court that its admission “would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it”. This may be wider than the common law discretion but its use in practice will depend upon the attitude of the courts.

(2) *Our recommendations*

9.18 There is some doubt as to whether the statutory discretion in section 78 merely reflects the common law discretion to exclude evidence or is broader than the common law power. Certainly, different language is used in section 78 where it refers to the evidence having “such an adverse effect on the fairness of the proceedings that the court ought not to admit it”.

9.19 **The aim in introducing this section was to have a simple and clear statement of the court’s power to exclude evidence, which was also suitably flexible. We were impressed with the fact that such clarity had been achieved and with the fact that considerable case-law on the section has developed in England. For both these reasons, we recommend the adoption of the section.**

# Chapter 10

## Miscellaneous and supplementary provisions

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### I Existing law in Hong Kong

10.1 Part XI of PACE deals with a variety of miscellaneous matters as well as some important definitions of concepts introduced by PACE. For that reason there is no existing law in Hong Kong to discuss. Whatever law may be discussed for comparative purposes is discussed in the context of the relevant section of PACE.

### II Overview of Part XI of PACE

#### ***Armed forces and customs***

10.2 Section 113 provides that the Secretary of State may extend any provision of the Act relating to investigations by police officers of offences, or to persons detained by the police, to investigations of offences conducted under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957, or to persons under arrest under any of these Acts. A code of practice may be issued to deal, *inter alia*, with tape-recording of interviews, searches of persons and premises and seizure of things found on searches.

10.3 PACE also provides that the Treasury may by order direct that any provision of the 1984 Act relating to the investigation of offences by the police, or to persons detained by the police, is to apply to investigations by Customs and Excise officers of offences which relate to assigned matters (defined in section 1 of the Customs and Excise Management Act 1979) or to persons detained by Customs and Excise officers (section 114(2)(a) of PACE). A special exception to section 14 of PACE is made for Customs and Excise investigations (see section 114(2)(b)(i)).

#### ***Definitions***

10.4 “Serious arrestable offence” is defined in section 116. There are four categories of “serious arrestable offence”. Certain offences listed in Schedule 5 (treason, murder, manslaughter, rape, etc) are “always serious” (section 116(2)). Other offences are serious if their commission has led to consequences listed in section 116(6). The consequences include “serious harm to the security of the State or to public order”, the death or serious injury to any person and, controversially, “serious financial loss to any person”. The controversy hinges on the further definition of serious loss as “serious for

the person who suffers it” (section 116(7)). The theft of a small sum from an old-aged pensioner may thus be a “serious arrestable offence”.

10.5 Section 117 provides that where the Act confers a power on a constable and does not provide that the power may only be exercised with the consent of some person, other than a police officer, the officer may use “reasonable force” in the exercise of the power (section 117).

10.6 The main definition section is section 118.

### ***Commencement***

10.7 Section 121 provides that the Act comes into operation when the Secretary of State by order made by statutory instrument so provides. (The Act came into operation on 1<sup>st</sup> January 1986.) The section also provides that the Secretary of State may appoint different days for different provisions (section 121(1)). Further, the provisions relating to tape-recording of interviews (section 60) may come into force in different areas at different times (section 121(2)). The Secretary of State was also empowered to make such transitional provision as appeared to him “necessary or expedient” (section 121(4)).

### ***Extent***

10.8 The majority of the Act extends only to England and Wales (section 120(1)). Sections 6(1), (2) and (3), 7, 83(2) (so far as it relates to paras 7(1) and 8 of Schedule 4), 108(1), (4), (5), (6), 109, 110, 111, 112(1), 114(1), 119(2) (so far as it relates to section 19 of the Pedlars Act 1871) extend to Scotland.

10.9 Sections 6(3), (4), 83(2) (so far as it relates to para 7(1) of Schedule 4), 112(2) and 114(1) extend to Northern Ireland.

### ***Courts-Martial***

10.10 So far as they relate to proceedings before courts-martial and Standing Civilian Courts and the Courts-Martial Appeal Court, the relevant provisions extend to any place at which such proceedings may be held (section 120(6), (7)). The relevant provisions are those in section 67(1), (12) (so far as it relates to subsection (11)), para VII and VIII of the Act (save paragraph 10 of Schedule 3), section 113(2), (8)-(12) and (13) (so far as it relates to an order under subsection (12)).

## **Armed Forces**

10.11 In addition section 113 extends to any place to which the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 applies (section 120(9)).

### **III Section by section review of Part XI of PACE**

#### **Section 113**

##### *“Application of act to armed forces*

113. (1) *The Secretary of State may by order direct that any provision of this Act which relates to the investigation of offences conducted by police officers or to persons detained by the police shall apply, subject to such modifications as he may specify, the investigations of offences conducted under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 or to persons under arrest under any of those Acts.*

(2) *Section 67(9) above shall not have effect in relation to investigations of an offence under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957.*

(3) *The Secretary of State shall issue a code of practice or a number of such codes, for persons other than police officers who are concerned with enquiries into offences under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957.*

(4) *Without prejudice to the generality of subsection (3) above, a code issued under that subsection may contain provisions, in connection with enquiries into such offences, as to the following matters -*

- (a) *the tape-recording of interviews;*
- (b) *searches of persons and premises; and*
- (c) *the seizure of things found on searches.*

(5) *If the Secretary of State lays before both Houses of Parliament a draft of a code of practice under this section, he may by order bring the code into operation.*

(6) *An order bringing a code of practice into operation may contain such transitional provisions or savings as appear to the Secretary of States to be necessary or expedient in*

*connection with the code of practice thereby brought into operation.*

*(7) The Secretary of State may from time to time revise the whole or any part of a code of practice issued under this section and issue that revised code, and the foregoing provisions of this section shall apply (with appropriate modifications) to such a revised code as they apply to the first issue of a code.*

*(8) A failure on the part of any person to comply with any provision of a code of practice issued under this section shall not of itself render him liable to any criminal or civil proceedings except those to which this subsection applies.*

*(9) Subsection (8) applies -*

- (a) to proceedings under any provision of the Army Act 1955 or the Air Force Act 1955 other than section 70; and*
- (b) to proceedings under any provision of the Naval Discipline Act 1957 other than section 42.*

*(10) In all criminal and civil proceedings any such code shall be admissible in evidence, and if any provision of such a code appears to the court or tribunal conducting the proceedings to be relevant to any question arising in the proceedings it shall be taken into account in determining that question.*

*(11) In subsection (10) above "criminal proceedings" includes -*

- (a) proceedings in the United Kingdom or elsewhere before a court-martial constituted under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 or a disciplinary court constituted under section 50 of the said Act of 1957;*
- (b) proceedings before the Courts-Martial Appeal Court; and*
- (c) proceedings before a Standing Civilian Court.*

*(12) Parts VII and VIII of this Act have effect for the purposes of proceedings -*

- (a) before a court-martial constituted under the Army Act 1955 or the Air Force Act 1955.*
- (b) before the Courts-Martial Appeal Court; and*

(c) *before a Standing Civilian Court,*

*subject to any modifications which the Secretary of State may by order specify.*

*(13) An order under this section shall be made by statutory instrument and shall be subject to annulment in pursuance of a resolution of either House of Parliament.”*

(1) *The significance of the section*

10.12 We have already described the operation of this section in the Overview part of this Chapter (paragraph 10.2). In addition, we note that by virtue of section 113(12) the provisions of the Act relating to documentary evidence (Part VII) and evidence in criminal proceedings (Part VIII) apply to proceedings before a court-martial constituted under the three Armed Services Acts.

10.13 In 1985, the Secretary of State made an order under section 113(1) applying certain provisions of PACE to the Armed Forces (SI 1985 No. 1882). In the following year, a specially drafted Code of Practice for the Service Police was introduced under section 113(3) (SI 1986 No. 307). This Code applies to Service Police in Hong Kong just as it applies to Service Police in the United Kingdom or, indeed, anywhere else in the world. It should be noted in this regard that, by virtue of sections 70 and 99 of the Army Act 1955, a soldier who commits an offence anywhere in the world can be tried by a court-martial and the rules of evidence to be applied will be those which apply in England and Wales. Similar provisions are to be found in relation to the other two services in the Air Force Act 1955 and the Naval Discipline Act 1957.

(2) *Our recommendations*

10.14 Section 113 has little direct relevance to Hong Kong's new legislation on arrest proposed in this report. The United Kingdom's Armed Forces in Hong Kong are subject to United Kingdom legislation. The conduct of those Forces' Service Police is a matter for regulation by the United Kingdom, rather than Hong Kong. **It therefore appears unnecessary to introduce a provision such as section 113 governing the way in which military police in Hong Kong should conduct investigations and we do not recommend its adoption.**

## **Section 114**

*“Application of act to customs and excise*

114. (1) *“Arrested”, “arresting”, “arrest” and “to arrest” shall respectively be substituted for “detained”, “detaining”, “detention” and “to detain” wherever in the customs and excise*

*Acts, as defined in section 1(1) of the Customs and Excise Management Act 1979, those words are used in relation to persons.*

*(2) The Treasury may by order direct -*

*(a) that any provision of this Act which relates to the investigation of offences by police officers or to persons detained by the police shall apply, subject to such modifications as the order may specify, to investigations by officers of Customs and Excise of offences which relate to assigned matters, as defined in section 1 of the Customs and Excise Management Act 1979, or to persons detained by such officers; and*

*(b) that, in relation to investigations of offences conducted by officers of Customs and Excise.*

*(i) this Act shall have effect as if the following section were inserted after section 14 -*

*“Exception for customs and excise*

*14A Material in the possession of a person who acquired or created it in the course of any trade, business, profession or other occupation or for the purpose of any paid or unpaid office and which relates to an assigned matter, as defined in section 1 of the Customs and Excise Management Act 1979, is neither excluded material nor special procedure material for the purposes of any enactment such as is mentioned in section 9(2) above.”; and*

*(ii) section 55 above shall have effect as if it related only to things such as are mentioned in subsection (1)(a) of that section.*

*and*

*(c) that in relation to customs detention (as defined in any order made under this subsection) the Bail Act 1976 shall have effect as if references in it to a constable were references to an officer of Customs and Excise of such grade as may be specified in the order.*

*(3) Nothing in any order under subsection (2) above shall be taken to limit any powers exercisable under section 164 of the Customs and Excise Management Act 1979.*

*(4) In this section “officers of Customs and Excise” means officers commissioned by the Commissioners of*

*Customs and Excise under section 6(3) of the Customs and Excise Management Act 1979.*

*(5) An order under this section shall be made by statutory instrument and shall be subject to annulment in pursuance of a resolution of either House of Parliament.”*

*(1) The significance of the section*

10.15 We have already described the operation of this section in paragraph 10.3 above. In addition, we note that the Treasury may direct that Customs and Excise investigations be exempted from the excluded and special procedure materials set out in section 11 and Schedule 4 of the 1984 Act. Warrants obtained by Customs' officers under Customs' legislation to search for and seize business records would therefore not be subject to the procedure in Schedule 1.

*(2) Our recommendations*

10.16 **We believe the section should be applied in Hong Kong. It will be necessary to give consideration to whether there may be other government departments which should be brought under the section.**

**Section 115**

*“Expenses*

*115. Any expenses of a Minister of the Crown incurred in consequence of the provisions of this Act, including any increase attributable to those provisions in sums payable under any other Act, shall be defrayed out of money provided by Parliament.”*

*(1) The significance of the section*

10.17 The purport of this section is that the extra resources incurred in implementing PACE should be found from moneys provided by Parliament.

*(2) Our recommendations*

10.18 **We do not feel that this section is appropriate to Hong Kong.**

**Section 116**

*“Meaning of “serious arrestable offence”*

116. (1) *This section has effect for determining whether an offence is a serious arrestable offence for the purposes of this Act.*

(2) *The following arrestable offences are always serious -*

- (a) *an offence (whether at common law or under any enactment) specified in Part 1 of Schedule 5 of this Act; and*
- (b) *any of the offences mentioned in paragraphs (a) to (d) of the definition of "drug trafficking offence" in sections 38(1) of the Drug Trafficking Offences Act 1986.*
- (c) *an offence under an enactment specified in Part II of that Schedule.*

(3) *Subject to subsection (4) and (5) below, any other arrestable offence is serious only if its commission*

- (a) *has led to any of the consequences specified in subsection (6) below; or*
- (b) *is intended to lead to any of those consequences.*

(4) *An arrestable offence which consists of making a threat is serious if carrying out the threat would be likely to lead to any of the consequences specified in subsection (6) below.*

(5) *An offence under section 2, 8, 9, 10 or 11 of the Prevention of Terrorism (Temporary Provisions) Act 1989 is always a serious arrestable offence for the purposes of section 56 or 58 above, and an attempt or conspiracy to commit any such offence is also always a serious arrestable offence for those purposes.*

(6) *The consequences mentioned in subsection (3) and (4) above are -*

- (a) *serious harm to the security of the State or to public order;*
- (b) *serious interference with the administration of justice or with the investigation of offences or of a particular offence;*
- (c) *the death of any person;*
- (d) *serious injury to any person;*

- (e) *substantial financial gain to any person; and*
- (f) *serious financial loss to any person.*

(7) *Loss is serious for the purposes of this section if, having regard to all the circumstances, it is serious for the person who suffers it.*

(8) *In this section “injury” includes any disease and any impairment of a person’s physical or mental condition.”*

(1) *The significance of the section*

10.19 This section defines “serious arrestable offence. There are four categories of serious arrestable offence:

- (1) Those offences such as treason, murder, manslaughter, rape, kidnapping and certain sexual and firearms offences as well as hostage-taking and hijacking which are always serious arrestable offences.
- (2) Offences which are serious arrestable offences in respect of powers given to delay notification of arrest (section 56) and access to a solicitor (section 58).
- (3) All other arrestable offences (arrestable offences are defined in section 24) are “serious arrestable offences” only if their commission has led to, or is intended or likely to lead to, any of the following consequences:
  - (a) serious harm to the security of the State or to public order;
  - (b) serious interference with the administration of justice or with the investigation of offences or of a particular offence;
  - (c) the death of any person;
  - (d) serious injury to any person;
  - (e) substantial financial gain to any person; and
  - (f) serious financial loss to any person (section 113(3)(a) and (b), (6)).
- (4) An arrestable offence which consists of making a threat is serious if carrying out the threat would be likely to lead to any of the consequences listed at (3) (for example, a threat to kill).

10.20 The following powers can only be exercised if there are reasonable grounds to believe that the offence in question is a serious arrestable offence:

PACE section

section 4	road checks
section 8	power of J.P. to authorise entry and search of premises
section 9 and Schedule 1	order by circuit judge to produce, or warrant to search for, special procedure material
section 42:	authorisation of continued detention by superintendent
section 43:	issue by magistrates' court of a warrant of further detention
section 44:	extension by magistrates' court of warrants of further detention
section 56:	delay in notifying friend etc of arrest
section 58:	delay in permitting access to legal advice
section 62:	taking intimate sample with consent
section 63:	taking non-intimate sample without consent

(2) *Our recommendations*

10.21 The definition of serious arrestable offence is of great importance to the scheme of the Act. We were concerned that the question whether a situation amounted to an arrestable or serious arrestable offence should be kept as simple as possible, so that the distinction could easily be made by the Police when deciding how to proceed. **We came to the view that for purposes of road checks (section 4 of PACE) it was appropriate to set the level at that of an arrestable offence and not a serious arrestable offence. With regard to the other powers sections 8, 9, 42, 43, 44, 56, 62, 63), we have concluded that the degree to which these powers potentially impinge on the rights of the individual present a strong argument for allowing the exercise of those powers only in relation to serious arrestable offences. We therefore recommend that the powers under sections 8, 9, 42, 43, 44, 56, 62 and 63 should only be exercised if there are reasonable grounds to believe that the offence in question is a serious arrestable offence. The definition of serious**

**arrestable offence we adopt in Hong Kong is that it is an offence for which the term of imprisonment is five years or more, together with a schedule of appropriate additional offences.** We have not attempted to identify here the specific additional offences we have in mind. We think that that is a matter best left for the Administration in consultation with the police and the other law enforcement agencies but we believe that certain offences are viewed by the community as more serious than the sentence applicable to them would suggest. One example would be taking a conveyance without authority, an offence under section 14 of the Theft Ordinance (Cap 210) for which the penalty is 3 years imprisonment. Another offence of peculiar Hong Kong relevance might be road racing under section 55 of the Road Traffic Ordinance (Cap 374) which has potentially serious consequences for other road users but attracts a sentence of less than 5 years.

### **Section 117**

*“Power of constable to use reasonable force*

*117. Where any provision of this Act -*

- (a) confers a power on a constable; and*
- (b) does not provide that the power may only be exercised with the consent of some person, other than a police officer,*

*the officer may use reasonable force, if necessary, in the exercise of the power.”*

*(1) The significance of the section*

10.22 This section enables constables to use reasonable force if necessary in the exercise of powers conferred by PACE. This is in addition to section 3 of the Criminal Law Act 1967 (use of such force as is reasonable to prevent crime and to assist in lawful arrest of offenders, suspected offenders or persons unlawfully at large). This section enables force to be used, for example, in taking fingerprints or searching a person.

*(2) Our recommendations*

10.23 **We consider this section to be acceptable and recommend its adoption.** The amount of force is limited to that which is reasonable in the circumstances.

### **Section 118**

*“General interpretation*

118. (1) *In this Act -*

*“arrestable offence” has the meaning assigned to it by section 24(1) above;*

*“designated police station” has the meaning assigned to it by section 35;*

*“document” has the same meaning as in Part I of the Civil Evidence Act 1968;*

*“intimate search” means a search which consists of the physical examination of a person’s body orifices;*

*“item subject to legal privilege” has the meaning assigned to it by section 10 above;*

*“parent or guardian” means -*

- (a) in the case of a child or young person in the care of a local authority, that authority; and*
- (b) in the case of a child or young person in the care of a voluntary organisation in which parental rights and duties with respect to him are vested by virtue of a resolution under section 64(1) of the Child Care Act 1980, that organisation;*

*“premises” has the meaning assigned to it by section 23 above;*

*“recordable offence” means any offence to which regulations under section 27 above apply;*

*“vessel” includes any ship, boat, raft or other apparatus constructed or adapted for floating on water.*

(2) *A person is in police detention for the purposes of this Act if -*

- (a) he has been taken to a police station after being arrested for an offence or after being arrested under section 14 of the Prevention of Terrorism (Temporary Provisions) Act 1989 or under paragraph 6 of Schedule 5 to that Act by an examining officer who is a constable, or*
- (b) he is arrested at a police station after attending voluntarily at the station or accompanying a constable to it; and -*
  - (a) is detained there; or*

(b) *is detained elsewhere in the charge of a constable, except that a person who is at a court after being charged is not in the police detention for those purposes.*"

(1) *The significance of the section*

10.24 This section sets out the definitions of certain phrases used in PACE.

(2) *Our recommendations*

10.25 **The section is clearly essential to the understanding of the Act and we recommend its adoption.**

### **Section 119**

#### *"Amendments and repeals*

119. (1) *The enactments mentioned in Schedule 6 to this Act shall have effect with the amendments there specified.*

(2) *The enactments mentioned in Schedule 7 to this Act (which include enactments already obsolete or unnecessary) are repealed to the extent specified in the third column of that Schedule.*

(3) *The repeals in Part II and IV of Schedule 7 to this Act have effect only in relation to criminal proceedings."*

(1) *The significance of the section*

10.26 The section provides for consequential changes required by the introduction of PACE.

(2) *Our recommendations*

10.27 **A similar provision will be necessary in Hong Kong to take account of any consequential changes to Hong Kong legislation required by the introduction of the new provisions we have recommended.**

### **Section 120**

#### *"Extent*

120. (1) *Subject to the following provisions of this section, this Act extends to England and Wales only.*

(2) *The following extend to Scotland only -*

*section 108(4) and (5);  
section 110;  
section 111;  
section 112(1); and  
section 119(2), so far as it relates to the provisions of the  
Pedlars Act 1871 repealed by Part VI of Schedule 7.*

(3) *The following extend to Northern Ireland only -*

*section 6(4); and  
section 112(2).*

(4) *The following extend to England and Wales and  
Scotland-*

*section 6(1) and (2);  
section 7;  
section 83(3), so far as it relates to paragraph 8 of  
Schedule 4;  
section 108(1) and (6);  
section 109; and  
section 119(2), so far as it relates to section 19 of the  
Pedlars Act 1871.*

(5) *The following extend to England and Wales,  
Scotland and Northern Ireland -*

*section 6(3);  
section 83(3), so far as it relates to paragraph 7(1) of  
Schedule 4; and section 114(1).*

(6) *So far as they relate to proceedings before  
courts-martial and Standing Civilian Courts, the relevant  
provisions extend to any place at which such proceedings may  
be held:*

(7) *So far as they relate to proceedings before the  
Court-Martial Appeal Court, the relevant provisions extend to  
any place at which such proceedings may be held.*

(8) *In this section: the relevant provisions” means -*

- (a) *subsection (11) of section 67 above;*
- (b) *subsection (12) of that section so far as it relates to  
subsection (11);*
- (c) *Part VII and VIII of this Act except paragraph 10 of  
Schedule 3;*

- (d) *subsection (2), (8) to (11) and (12) of section 113 above; and*
- (e) *subsection (6) of that section so far as it relates to an order under subsection (5).*

*(9) Except as provided by the foregoing provisions of this section, section 113 above extends to any place to which the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 extends.*

*(9A) Section 119(1), so far as it relates to any provision amended by Part II of Schedule 6, extends to any place to which that provision extends.*

*(10) Section 119(2), so far as it relates -*

- (a) to any provision contained in -*

*the Army Act 1955;  
the Air Forces Act 1955;  
the Armed Forces Act 1981, or  
the Value Added Tax Act 1983,*

- (b) to any provision mentioned in Part VI of Schedule 7, other than section 18 of the Pedlars Act 1871,*

*extends to any place to which that provision extends.*

*(11) So far as any of the following -*

*section 115;  
in section 118, the definition of “document”;  
this section;  
section 121, and  
section 122,*

*has effect in relation to any other provision of this Act, it extends to any place to which that provision extends.”*

- (1) The significance of the section*

10.28 This section indicates the jurisdictional extent of the Act's application.

- (2) Our recommendations*

10.29 **Clearly, much of the section is irrelevant to Hong Kong but consideration will need to be given as to what similar provision needs to be made in respect of statutes applying in Hong Kong.**

## **Section 121**

### “Commencement

121. (1) *This Act, except section 120 above, this section and section 122 below, shall come into operation on such day as the Secretary of State may by order made by statutory instrument appoint, and different days may be so appointed for different provisions and for different purposes.*

(2) *Different days may be appointed under this section for the coming into force of section 60 above in different areas.*

(3) *When an order under this section provides by virtue of subsection (2) above that section 60 above shall come into force in an area specified in the order, the duty imposed on the Secretary of State by that section shall be construed as a duty to make an order under it in relation to interviews in that area.*

(4) *An order under this section may make such transitional provision as appears to the Secretary of State to be necessary or expedient in connection with the provisions thereby brought into operation.”*

(1) *The significance of the section*

10.30 The section is self-evident and provides for commencement dates for all, or parts of, the Act.

(2) *Our recommendations*

10.31 **Similar arrangements will be required for Hong Kong.**

## **Section 122**

### “Short title

122. *This may be cited as the Police and Criminal Evidence Act 1984.”*

(1) *The significance of the section*

10.32 This section gives the citation for PACE.

(2) *Our recommendations*

10.33 **This will be a matter for the Draftsman.**

## **The schedules of PACE**

10.34 The Schedule of PACE deal with a variety of matters of procedure and practice incidental to PACE. **We recommend that, with the exception of Schedule 4, they be adopted in Hong Kong as being an integral part of those sections of PACE which we have considered and made recommendations upon.** Schedule 4 raises a separate issue dealing with the setting up of a Police Complaints Authority. The Schedule relates to Part IX of PACE which was not within our terms of reference. We would only observe that there are already existing mechanisms in Hong Kong for dealing with police complaints.