

立法會
Legislative Council

LC Paper No. LS133/99-00

**Paper for the meeting of the Bills Committee on the
Dangerous Drugs, Independent Commission Against
Corruption and Police Force (Amendment) Bill 1999
to be held on 22 May 2000**

The Bills Committee has noted that the proposed amendments to the Police Force Ordinance (Cap. 232) enables intimate and non-intimate samples to be taken from a person for suspicion of involvement in a serious arrestable offence. The proposed amendments also provide that DNA information derived from these samples could be used in the investigation of any offence. At the meeting of the Bills Committee on 8 May 2000, members asked for a paper on data protection principle 3 in Schedule 1 to the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO"), and asked the Legal Service Division to advise whether provisions in the Bill would have the effect of implied repeal of the relevant provisions of the PDPO.

Relevant provisions of the Personal Data (Privacy) Ordinance

2. Under the PDPO, personal data means any data :-
- (a) relating directly or indirectly to a living individual;
 - (b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and
 - (c) in a form in which access to or processing of the data is practicable.

Under this definition DNA information would be personal data.

3. Principle 3 provides that personal data shall not, without the express consent of the data subject given voluntarily, be used for any purpose other than the purpose for which the data were to be used at the time of the collection of the data, or a directly related purpose. Section 58(2) of PDPO provides for exemption from principle 3 in law enforcement situations if the following two conditions were met :-

- (a) the use of the data is for, inter alia, the prevention and detection of crime, or the apprehension, prosecution or detention of offenders; and
- (b) the application of the provisions of principle 3 would likely to prejudice such matters.

Whether the use of DNA information to investigate all offences is or is not the purpose for which the data were to be used at the time of the collection, or whether it is a directly related purpose, is a matter for the Privacy Commissioner for Personal Data and ultimately the court to decide. However, even if investigation of all offences was considered a departure from the original purpose so that consent is required, the exemption in section 58(2) would apply since the departure would fall within the two conditions specified therein.

4. Members may also wish to note that even if there was no consent from the suspect to use his DNA information for investigation, at common law the information may still be produced as evidence in court so long as it is relevant and is not obtained unfairly.

5. Also, should members come to a view that the use of DNA information taken for one offence should only be used in the investigation of that offence or a class of offences (such as serious arrestable offences), this intention should clearly be expressed in the drafting of the Bill. There is a UK Court of Appeal decision in which it was held that unless the statute specifically restrict the use to the investigation in connection with which the sample was obtained, the sample could be used as evidence in another offence.

Whether there is implied repeal

6. There is a principle in statutory interpretation that where a later enactment does not expressly repeal an earlier enactment which it has power to override, but the provisions of the later enactment are contrary to those of the earlier, then the later by implication repeals the earlier. The test of whether there has been an implied repeal is whether the provisions of a later enactment are so inconsistent with, or repugnant to, the provisions of an earlier enactment that the two cannot stand together¹. Applying this test, we have not detected any provision in the Bill which would have the effect of an implied repeal of the data protection principles.

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19 May 2000

(Ref. LS/B/95/98-99)

¹ Bennion, F.A.R., *Statutory Interpretation* (2nd ed.), Butterworths, pp.204-5