

立法會
Legislative Council

LC Paper No. CB(2) 2511/99-00
(These minutes have been seen by
the Administration and cleared with
the Chairman)

Ref : CB2/BC/29/98

**Bills Committee on
Dangerous Drugs, Independent Commission Against Corruption
and Police Force (Amendment) Bill 1999**

**Minutes of meeting
held on Wednesday, 8 March 2000 at 10:45 am
in Conference Room B of the Legislative Council Building**

Members present : Hon James TO Kun-sun (Chairman)
Hon Mrs Selina CHOW LIANG Shuk-ye, JP
Hon CHENG Kai-nam, JP
Hon Emily LAU Wai-hing, JP

Member absent : Hon Albert HO Chun-yan

Public Officers attending : Miss Eliza YAU
Principal Assistant Secretary for Security E

Miss Angela LEE
Assistant Secretary for Security E

Mr J M H BICKNELL
Chief Superintendent of Police, Crime Support
Hong Kong Police Force

Dr LAW Man-ye, Betty
Senior Chemist (Biochemical Sciences B)

Ms Carmen CHU
Senior Government Counsel

Clerk in attendance : Mrs Sharon TONG
Chief Assistant Secretary (2)1

Staff in attendance : Mr LEE Yu-sung
Senior Assistant Legal Adviser

Mr Raymond LAM
Senior Assistant Secretary (2)5

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I. Meeting with the Administration
(LC Paper Nos. CB(2) 1000/99-00(02) and (03))

Procedures on how samples were taken from crime scenes and suspects for forensic analysis and the steps taken to ensure the chain of evidence

At the invitation of the Chairman, Senior Chemist (Biological Sciences B) (SC(BSB)) briefed members on the procedures for the taking of samples from crime scenes and suspects for forensic analysis and the steps taken to ensure preservation of the chain of evidence.

2. Referring to paragraph 10 of the letter dated 13 July 1999 from the Legislative Council (LegCo) Legal Service Division to the Administration, which suggested the Administration to consider putting in provisions to empower some independent third party to check whether any guidelines of the Government Laboratory had not been followed, Miss Emily LAU asked why the Administration replied in its letter of 5 August 1999 that there was no need to have such a provision.

3. Senior Assistant Legal Adviser (SALA) explained that the suggestion was made because there was no independent third party to monitor the protection of samples against tampering. He pointed out that the Administration had replied in its letter of 5 August 1999 that there was no need to have a provision on checking by a third party. It stated that strict guidelines would be drawn up to ensure the proper handling of the DNA database. Any person who contravened the guidelines would be subject to disciplinary action and would possibly be liable to prosecution.

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4. SC(BSB) said that there were strict guidelines and procedures within the Government Laboratory on the handling of samples for forensic analysis. These guidelines and procedures were an integral part of the quality system of the Government Laboratory, which had received international accreditation by the American Society of Crime Laboratory Directors (ASCLD) in 1996. She informed members that the accreditation was made after a seven-person ASCLD accreditation team comprising representatives from the United States, Australia, Japan, New Zealand and Europe had conducted a full scale inspection of the procedures and records of the Government Laboratory. This international accreditation was subject to review once every five years. She added that it was a requirement of ASCLD that biennial auditing be made on the process of DNA analysis. The previous audit, which lasted for one week, was made in 1998 by experts from Singapore. The audit covered areas such as the checking of case files and work flow, whether procedures complied with international standards, whether analyses were scientifically supported and validated. Although the audit team was not designated by ASCLD, the latter had to be informed of the audit team chosen.

5. The Chairman asked whether surprise checks were carried out by the accreditation team or audit team. SC(BSB) responded that surprise visits could not be made by external experts since all records of the Government Laboratory were confidential before they were presented to the court. She added that the legal representatives of defendants sometimes visited the Government Laboratory to understand its procedures. The Chairman considered that inspections by the legal representatives of defendants might not be comprehensive enough.

6. The Chairman asked whether the inspection and auditing by a third party on the Government Laboratory was allowed under the Bill. Principal Assistant Secretary for Security E (PAS(S)E) said that as the Government Laboratory had a responsibility to maintain and preserve its system, inspections and auditing were allowed under the Bill. Senior Government Counsel (SGC) added that consideration had not been given in the law drafting process to the inspection and auditing by a third party. Nevertheless, she took the view that these were allowed under proposed section 59G(2)(iv) of the Police Force Ordinance (Cap. 232) (PFO), which provided for a person to access information stored in the DNA database for the purpose of administering the DNA database.

7. Mrs Selina CHOW asked about the measures adopted by the Government Laboratory in ensuring that established guidelines were followed. She also asked whether there were spot checks on compliance with the guidelines. SC(BSB) responded that since the Bill had not yet been enacted, the guidelines were not yet drawn up. Although no spot checks were made, results obtained from DNA analysis were examined by two different chemists and validated by a third chemist before a report was produced. The transfer of exhibits was conducted in the presence of two persons, one as the “issuing officer” and the other as the “receiving officer”. Every movement of exhibits submitted into the Government Laboratory was recorded in full details. The requirements were even more stringent than those laid down by ASCLD.

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8. Miss Emily LAU said that the Privacy Commissioner for Personal Data (Privacy Commissioner) should have the power to inspect the procedures in the Government Laboratory, as DNA information was a kind of personal information. She suggested that the Administration should consider explicitly providing the Privacy Commissioner with the power.

9. The Chairman considered that it might be more appropriate for the Ombudsman to carry out inspections. He asked whether the Ombudsman was allowed to carry out investigations into the Government Laboratory upon receipt of a complaint against the Government Laboratory. He also asked whether the Administration would consider adding an enabling provision in the Bill to allow the Ombudsman to carry out surprise checks on the Government Laboratory. SALA said that the Ombudsman Ordinance (Cap. 397) had provided for the Ombudsman to carry out an investigation into an action upon the receipt of a complaint or, where there was no complaint, if he was of the opinion that any person might have sustained injustice in consequence of maladministration.

10. The Chairman asked whether the Ombudsman was allowed to initiate investigations into the Government Laboratory even when no complaint was received. SALA said that it would be necessary to examine the jurisdiction of the Ombudsman before an answer could be provided. Miss Emily LAU said that the Ombudsman might only be allowed to carry out investigations into cases relating to maladministration. The inspections carried out by the third party as proposed in the LegCo Legal Service Division's letter of 13 July 1999 was however not confined to maladministration.

11. PAS(S)E said that the Government Laboratory was one of the organizations under the purview of the Ombudsman. The Ombudsman therefore had jurisdiction over the Government Laboratory and could investigate into cases of maladministration of the Government Laboratory. The inspection of procedures of the Government Laboratory by the audit team and the legal representatives of the defendant also helped in monitoring the procedures adopted in the Government Laboratory. She agreed to consider the suggestion of empowering the Ombudsman to inspect the procedures in the Government Laboratory and conduct surprise checks. SGC said that in the drafting of the Bill, consideration had not been given to inspections and surprise checks by the Ombudsman. Apparently, the Ombudsman was not empowered to do so under the Bill. An examination of the Ombudsman Ordinance would be necessary before a definite answer could be provided. The Chairman requested the Administration to consider empowering the Ombudsman to inspect the procedures in the Government Laboratory and conduct surprise checks.

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12. The Chairman asked about the length of time for which DNA information of samples obtained from a crime scene but not matching that of the suspect would be

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kept. SC(BSB) said that the DNA information of samples obtained from a crime scene would be kept permanently. Samples or exhibits obtained from crime scenes would be kept as far as possible at a temperature below -80 °C. The Chairman considered that samples and exhibits submitted for forensic analysis should not be destroyed before the relevant case was brought before the Court of Final Appeal.

13. Miss Emily LAU expressed concern about the possible tampering of samples. She asked whether the names of the persons concerned could be found on exhibits submitted to the Government Laboratory for forensic analysis. She also asked whether the officer who received exhibits would conduct the analysis. SC(BSB) responded that all exhibits submitted to the Government Laboratory were sealed and did not carry any personal particulars. All exhibits were allocated unique laboratory reference numbers and were stored under lock or seal. In most cases, the receiving officer was not the officer who would conduct the analysis. The transfer of exhibits was conducted in the presence of two persons, one as the issuing officer and the other as the receiving officer. Every movement of exhibits submitted into the laboratory was fully accounted for and traceable. Results obtained from DNA analysis were examined by two different staff of the Government Laboratory and validated by another staff. Although the procedures adopted were not drawn up with the specific aim of preventing laboratory personnel from tampering samples, they offered checks and balances for minimizing the chance of tampering.

14. The Chairman asked whether the staff of the Government Laboratory who carried out forensic examination of a sample could know about the case to which the sample was related. SC(BSB) said that it was necessary for the staff who carried out the forensic examination to know about the background of the case concerned. Otherwise, resources might be wasted on unnecessary examination of samples which belonged to a victim. She added that all exhibits were stored under lock and sealed. It was necessary to have the relevant key and break the seal before samples could be tampered. She stressed that there had never been any successful challenge against the procedures of the Government Laboratory. A defendant's legal representative from the United Kingdom had even said that the Government Laboratory's operations was the best he had ever seen. She invited members to visit the Government Laboratory to understand its operations and work flow.

15. The Chairman asked whether there had been allegations about selective taking of samples from crime scenes. SC(BSB) said that no allegation of this nature had been received in respect of cases involving the deployment of Scientific Evidence Officers of the Government Laboratory. Chief Superintendent of Police(Crime Support) (CSP(CS)) said that he did not know of any such cases. Some defendants and their legal representatives had used this as a defence in the court. He assured members that Police officers had received training on the seizing of exhibits from the crime scene. Photographs were taken at most of the crime scenes.

16. Miss Emily LAU asked whether a buccal swab would always be taken from a

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suspect arrested at the crime scene. SC(BSB) said that the taking of a buccal swab from a suspect would require reasonable grounds to suspect a person's involvement in a serious arrestable offence and to believe that the sample would tend to confirm or disprove the suspect's involvement in the crime. She added that in some cases, the analysis of DNA information was not necessary.

17. Miss Emily LAU expressed concern that a buccal swab would be taken from all persons convicted of a serious arrestable offence. The Chairman said that the issue might be considered at a future meeting.

Forensic application of intimate and non-intimate samples

18. At the invitation of the Chairman, SC(BSB) briefed members on the possible forensic application of intimate and non-intimate samples as provided for in the Bill.

19. Referring to paragraph 4 of the Administration's paper, the Chairman asked about the number of cases of unsolved crimes for which blood grouping or a less advanced DNA technique had previously been used and no crime stain materials remained for further analysis. SC(BSB) responded that such information was not available, as the Government Laboratory was not informed of the outcome of cases.

20. The Chairman said that the taking of a sample of blood, semen or any other tissue fluid, urine or pubic hair was more intrusive than the taking of a buccal swab. He questioned whether the taking of these samples should be provided for in the Bill. SC(BSB) responded that a buccal swab would be sufficient for providing DNA information of a person for forensic comparison purpose. A sample of blood or semen was usually necessary for DNA analysis using the less advanced DNA technique used in the past. Providing for the taking of these kinds of samples in the Bill would assist in the detection of unsolved crimes for which blood grouping or a less advanced DNA technique had previously been used and no crime stain materials remained for further analysis. She stressed that the taking of a sample of blood, semen or any other tissue fluid, urine or pubic hair would require the consent of the person from which a sample was taken.

21. In response to Miss Emily LAU, SC(BSB) said that it was possible in forensic analysis to confirm whether a sample of hair was a pubic hair or a head hair. The Chairman said that although a pubic hair could not be taken without a suspect's consent, a pubic hair left by a suspect could be collected for analysis without the need to seek the suspect's consent. CSP(CS) responded that under such circumstances, there was a need to establish a chain of evidence. There was also the possibility of contamination of the sample concerned. SALA said that such a situation seemed not contemplated in the Bill, which was related to the taking of samples from the body of a person.

Dental impression

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22. The Chairman asked about the uniqueness of a dental impression. SC(BSB) responded that the dental impression of a person was highly unique. It was sometimes used to verify the identity of a person who was totally burnt. The Chairman requested the Administration to provide a paper explaining the following in detail -

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- (a) the extent to which a dental impression was unique;
- (b) who was responsible for the comparison of a dental impression of a suspect with the bite mark from a crime scene; and
- (c) whether the techniques and procedures in the forensic analysis of dental impressions had achieved international accreditation status.

A swab taken from a person's body orifice other than the mouth or from a private part of a person's body

23. Miss Emily LAU asked why a buccal swab taken from the inside of a person's mouth was regarded as a "非體內樣本". She pointed out that the Hong Kong Human Rights Monitor (HKHRM) had also stated in its submission to the Bills Committee that a buccal swab taken from the inside of a person's mouth should be classified as a "體內樣本". She said that the Administration should reconsider the Chinese translation of "non-intimate sample" and provide a written response to the submission from HKHRM.

24. SGC said that the terms "intimate sample" and "non-intimate sample" were not found in other local legislation. The Chinese translation of "體內樣本" and "非體內樣本" were chosen since they were easy to understand and their meanings were close to the respective English terminology. She welcomed members to propose other Chinese translation for the terms. She added that the classification of "intrusive procedure" and "non-intrusive procedure" were used in Australia. The terms used in the Bill were based on those used in the relevant legislation in the United Kingdom. The Chairman requested the Administration to reconsider the Chinese translation of "non-intimate sample".

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25. Mr CHENG Kai-nam said that the classification proposed in the Bill was mainly based on whether consent from the suspect was required in the taking of samples. He was inclined to not requiring the consent of a suspect in the taking of a buccal swab from inside the mouth of a suspect. He considered that it was more intrusive to take a swab from a person's body orifice other than a person's mouth. SC(BSB) said that a swab taken from a person's body orifice other than a person's mouth, such as a nostril, was an intimate sample because the taking of the sample could easily cause harm to the suspect concerned. She stressed that the taking of such a sample would be made only if it was suspected that a swab taken from the suspect's body orifice could contain bodily material from another person.

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A sample of hair other than pubic hair

26. SC(BSB) informed members that similarities or dissimilarities in the characteristics exhibited by the hairs and the chemical composition of the dyestuff had a high corroborative value.

27. Miss Emily LAU said that a sample of hair should be classified as non-intimate only if it was a head hair. It should not be "a sample of hair other than pubic hair" as proposed in the Bill. The taking of other samples of hair, such as armpit hair or leg hair, was intrusive and therefore these samples should be classified as intimate samples. The Chairman requested the Administration to consider defining a sample of head hair as a non-intimate sample and a sample of other hair as an intimate sample.

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A swab taken from any part other than a private part of a person's body including the mouth but not any other body orifice

28. SC(BSB) explained that in violent crimes where there was heavy bloodshedding, it was not uncommon for the blood from the victim to be stained on the hands or the face of a suspect. By taking a swab of the bloodstain on the hand or face of a suspect, DNA analysis could be performed to provide the necessary evidence.

29. Miss Emily LAU considered that the taking of a sample from certain parts of a person's body, such as armpit or the upper part of a person's leg, was very intrusive and therefore the sample should not be classified as non-intimate sample.

30. SC(BSB) responded that although the taking of non-intimate samples would not require the consent of the suspect, it still required reasonable grounds to suspect a person's involvement in a serious arrestable offence and to believe that the sample would tend to confirm or disprove the suspect's involvement in the crime. The Chairman said that it might be necessary to require judicial authorization for the taking of non-intimate samples. Miss Emily LAU said that, alternatively, the consent of the suspect concerned should be sought for the taking of non-intimate samples. PAS(S)E cautioned that an important sample on a suspect's body might have been washed away by the time judicial authorization was granted.

31. The Chairman asked whether the Police was currently empowered to take a swab from the bloodstain on a suspect's body. CSP(CS) said that consent from the suspect was preferred for the taking of such a sample. If a sample was taken without consent from the suspect, a complaint by the suspect against the taking of such a sample might jeopardize the entire prosecution. However, the Police could seize the clothes worn by the suspect for forensic examination if bloodstains were found on his clothes.

II. Date of next meeting and visit to the Government Laboratory

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32. Members agreed that the next meeting be scheduled for 15 March 2000 at 9:00 am to continue discussion with the Administration. They also agreed that a visit would be made to the Government Laboratory to understand its operation on 27 March 2000 from 2:30 pm to 4:30 pm.

33. There being no other business, the meeting ended at 12:50 pm.

Legislative Council Secretariat
30 May 2000