

立法會
Legislative Council

LC Paper No. CB(2) 2529/99-00
(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 Monday, 8 May 2000 at 10:45 am
in Conference Room B of the Legislative Council Building**

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

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 : Mr Raymond LAM
Senior Assistant Secretary (2)5

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

Action

I. Meeting with the Administration

(LC Paper Nos. CB(2) 1633/99-00(01), CB(2)1704/99-00(02), (03) and CB(2) 1878/99-00(01))

Use of voluntary system for the taking of samples

Members noted that the issue of "use of voluntary system for the taking of samples" was discussed at the last meeting on 28 April 2000 and it was agreed that discussion on the issue be re-opened when Miss Emily LAU was present.

2. Miss Emily LAU expressed reservations about providing for the volunteering of samples in the Bill. She expressed concern that there might be situations where a person was pressured to volunteer a sample for DNA analysis, if the provision was enacted. She suggested that a provision should be added in the Bill to prohibit the Administration from appealing to any person for volunteering his sample for DNA analysis. The Chairman said that the Administration should make an undertaking that it would not call upon people to volunteer their samples for DNA analysis.

3. Principal Assistant Secretary for Security E (PAS(S)E) responded that the Administration had undertaken at a previous meeting that it would not call upon people to volunteer their samples for DNA analysis. She stressed that there would be sufficient checks and balances on the storage and use of information in the DNA database. A person who volunteered his sample had to give his authorization for the taking of a sample to a Police officer of the rank of superintendent or above. She pointed out that the United States (US), the United Kingdom (UK) and the Australia had all operated a mechanism for the volunteering of samples. She suggested that the Administration could state in its speech at the resumption of Second Reading debate on the Bill that the Administration would not appeal to people for volunteering their samples for DNA analysis. Nevertheless, she undertook to consider the suggestion of Miss Emily LAU of adding such a provision to the Bill.

4. Mr CHENG Kai-nam considered that a person should not be deprived of the right to volunteer his sample for proving his innocence. He said that the Innocence Project in the US could also be regarded as an appeal to the public to volunteer their

Adm

Action

samples.

Adm 5. The Chairman recalled that he had requested the Administration to provide newspaper cuttings about citizens in a small town in Australia volunteering to provide their samples for DNA analysis to assist the investigation of a rape case. PAS(S)E said that the Administration would provide the newspaper cuttings shortly. Senior Assistant Legal Adviser (SALA) said he had read that the small town concerned had a small population and most of the residents of the town had provided their samples on a voluntary basis.

Human rights implications of the Bill

6. At the invitation of the Chairman, PAS(S)E briefed members on the Administration's paper on human rights implications of the Bill.

7. Miss Emily LAU asked whether judicial authorization was required for the taking of non-intimate samples in overseas countries. Referring to the Administration's paper entitled "Comparison between the Bill and overseas legislation", PAS(S)E said that in the UK, the taking of an intimate or non-intimate sample required the approval of a superintendent of police. The taking of a non-intimate sample did not require consent from the suspect while the taking of an intimate sample required the consent of the suspect. In Canada, the taking of a body sample required the approval of a Provincial Court Judge on ex-parte application by the police. Assistant Secretary for Security E added that in South Australia, the taking of a body sample required no consent from the suspect. The taking of a sample under non-intrusive procedure required the approval of a senior police officer, while the taking of a sample under intrusive procedure required judicial authorization. In New Zealand, the taking of a sample of blood required judicial authorization but did not require consent from the suspect.

8. In response to the Chairman, PAS(S)E said that the process of taking a buccal swab had not been demonstrated to the Privacy Commissioner for Personal Data (Privacy Commissioner). Miss Emily LAU said that consideration should be given to adopting the practice in Canada, where there was better protection of human rights. Referring to paragraph (a) of the letter dated 3 May 2000 from the Privacy Commissioner, she further said that the Privacy Commissioner maintained the view that judicial authorization should be required at least for the non-consensual taking of a non-intimate sample. She suggested that the Privacy Commissioner should be invited to attend a meeting of the Bills Committee, if necessary. PAS(S)E said that the Administration had examined the issue in detail in the drafting stage of the Bill. The intrusiveness of taking a buccal swab was very low and thus judicial authorization was considered not necessary. Miss LAU said that the Privacy Commissioner should be invited to visit the Government Laboratory and the process of the taking of a buccal swab should be demonstrated to him. She expressed doubt about whether the Privacy Commissioner had been informed of the Administration's concern that some important

Action

samples under the fingernail of a suspect might have been washed away by the time judicial authorization was granted. PAS(S)E responded that although the Privacy Commissioner had not visited the Government Laboratory, he had been provided with the paper issued to the Legislative Council Panel on Security in February 1999. She said that a non-intimate sample was not limited to a buccal swab. She agreed to explain the intrusiveness of each kind of non-intimate samples to the Privacy Commissioner and invite him to visit the Government Laboratory.

Adm

9. The Chairman asked about the number of search warrants issued by the court in a year. Chief Superintendent of Police (Crime Support) (CSP(CS)) responded that while he did not have such information on hand, he estimated that the number was in the region of a few thousands. He said that the issue of judicial authorization had been considered in depth in the drafting of the Bill. Adequate safeguards had been established for the taking of a non-intimate sample from a suspect. The taking of a buccal swab from a suspect would require the approval of a Police officer of the rank of superintendent or above. It 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 Administration had agreed to members' request at a previous meeting to record such reasonable grounds in writing. He stressed that the taking of a buccal swab would be made by officers who had received training for the purpose. Consideration was being given to establishing a mechanism for witnessing the process of taking a buccal swab.

10. Mr Albert HO said that adequate checks and balances should be established for the taking of a sample. There should be a mechanism for independent scrutiny of Police power in the taking of samples. If the purpose for which samples were taken would not be defeated due to delays arising from judicial authorization, there was no reason why judicial authorization should not be required. He further said that to his knowledge, there were duty magistrates on duty outside office hours. If judicial authorization could be granted within a few hours, the preservation of samples should not be a problem. The Chairman said that there were provisions in the existing legislation, such as the Organized and Serious Crimes Ordinance (Cap. 455), which provided for the preservation of evidence by Police officers in urgent situations.

11. Miss Emily LAU asked why there was no information on US in the Administration's paper comparing the Bill and overseas legislation. PAS(S)E said that legislation in US usually differed from one State to another. In response to members' request at a previous meeting, the Administration was gathering information on legislation in respect of sample taking in some typical States of US. Miss LAU requested the Administration to provide information on the requirement for judicial authorization for the taking of samples from suspects in US. She also requested the Administration to provide information about the difficulties encountered in the judicial warrant system and procedures for obtaining judicial authorization in urgent cases in Canada. She said that the Administration could write to the Canadian Consulate General in Hong Kong for such information.

Adm

Action

12. PAS(S)E said that an agent of the Federal Bureau of Investigation (FBI) of US would visit the Government Laboratory shortly to exchange their experience. A short meeting could be arranged to share the experience of the FBI agent, if members so wished. Senior Chemist (Biochemical Sciences B) added that the exchange of experience was only a technical one. Nevertheless, a meeting could be arranged, if members so wished.

13. The Chairman asked about the major reason for not requiring judicial authorization in the Bill for taking non-intimate samples. PAS(S)E responded that as advised by the Administration at a previous meeting, the estimated number of convicted persons from whom a buccal swab would be taken was about 4 000 a year. This would have substantial resource implications for the court. She added that the requirement of judicial authorization for taking intimate samples had already created additional workload on the court. She stressed that sufficient safeguards on the taking of an intimate sample had already been provided for in the Bill.

14. The Chairman said that consideration could be given to requiring judicial authorization for the taking of samples only if consent was not given by the person concerned. CSP(CS) responded that an intimate sample was not confined to a buccal swab. If judicial authorization was required for cases in which a suspect did not give consent, a guilty person might use this as a means to delay sample taking. If a person was suspected to be involved in a serious arrestable offence, the court was very unlikely to refuse giving judicial authorization. He stressed that there was already checks and balances in the taking of a non-intimate sample, such as the requirement of 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.

15. Referring to paragraph (b) of the Privacy Commissioner's letter dated 3 May 2000, Miss Emily LAU drew members' attention that the Privacy Commissioner questioned whether it was appropriate to allow DNA information derived from samples obtained under the Bill to be used for the investigation of any offence. In this connection, SALA said that the point is consistent with the principle under data protection principle 3 (Principle 3) in Schedule 1 to the Personal Data (Privacy) Ordinance (Cap. 486) (PDPO), that was, personal data should 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.

16. Miss Emily LAU expressed concern that the provision in the Bill for the use of DNA information obtained on the basis of suspicion of a person's involvement in a serious arrestable offence for the investigation of any offence might be in contravention of PDPO. The Chairman also expressed concern that the provisions in

Action

the Bill might have the effect of implied repeal of Principle 3. SALA said that he would further consider that point. He added that PDPO also provided for exemption from Principle 3 in law enforcement situations if the use of the data was for, inter alia, the prevention and detection of crime, or the apprehension, prosecution or detection of offenders. CSP(CS) said that the use of DNA information for the investigation of other offences was for the prevention and detection of crime, it was exempted under section 58 of PDPO from the requirements of Principle 3.

SALA 17. Members requested SALA to provide a paper on Principle 3 and whether provisions in the Bill would have the effect of implied repeal of the relevant provisions of PDPO. Members also agreed to seek the Privacy Commissioner's views on whether the exemption provisions in PDPO covered the use of a person's DNA information for investigation of other offences as provided for in the Bill, and if so, the provisions in PDPO under which the exemption would operate. The Chairman said that the Administration should also confirm whether provisions in the Bill would have the effect of implied repeal of the relevant provisions of PDPO.

Clerk

Adm

18. Miss Emily LAU asked whether DNA information taken from suspects were used for the investigation of other offences in other jurisdictions. PAS(S)E responded that DNA information was used for the investigation of any offence in UK and any criminal offence in south Australia. In Canada, DNA information was used for the investigation of any designated offence, which included offences such as sexual assault and causing death by criminal negligence. In New Zealand, DNA information was used for the investigation of the offence in respect of which the blood sample was taken. She said that it would significantly limit the usefulness of the legislative proposals if DNA information obtained from suspects could not be used for the investigation of other offences. CSP(CS) added that DNA information was a very unique indicator of whether a person was involved in an offence. Comparison of the DNA information of a suspect against information in the DNA database about undetected cases was one of the objectives under the Bill. The Chairman considered that such comparison should not be encouraged.

19. Referring to page 3 of the Privacy Commissioner's letter dated 3 May 2000, Miss Emily LAU said that the Privacy Commissioner considered that a provision should be added to the Bill to provide for the use of samples and information derived from them between the time of a decision not to charge the person from whom the sample was taken, or the time when the person was acquitted, and the destruction of the sample. The Chairman requested the Administration to consider adding an express provision in the Bill to prohibit such a comparison. SC(BSB) responded that the proposed section 59H(1) of the PFO had already provided for the destruction of DNA information after a person was not charged, discharged before conviction or acquitted on appeal. It was the Administration's intention that the DNA information of a suspect should not be used during such a period. However, sufficient time had to be allowed for the Government Laboratory to be notified about the destruction of the sample.

Adm

Action

20. In response to Mr Albert HO's question about the time needed for a comparison of DNA information of a suspect against the DNA information of about 1 000 records in the DNA database, SC(BSB) said that such a comparison could usually be completed overnight.

II. Date of next meeting

21. Members noted that two further meetings had been scheduled for 15 and 22 May 2000 at 10:45 am to continue discussion with the Administration. Members agreed that a further meeting of the Bills Committee be scheduled for 29 May 2000 at 10:45 am to continue discussion with the Administration.

22. There being no other business, the meeting ended at 12:40 pm.

Legislative Council Secretariat

12 July 2000