

立法會
Legislative Council

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(These minutes have been seen by
the Administration and cleared with
the Chairman)

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

**Minutes of meeting
held on Wednesday, 15 March 2000 at 9:00 am
in the Chamber 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

Mr YU Koon-hing
Group Head (Drug Investigation)
Customs Drug Investigation Bureau

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

Action

I. Meeting with the Administration
(LC Paper Nos. CB(2) 1000/99-00(03) and CB(2) 1282/99-00(01))

Forensic application of non-intimate samples

At the invitation of the Chairman, Senior Chemist (Biochemical Sciences B) (SC(BSB)) briefed members on the forensic application of non-intimate samples.

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

2. SC(BSB) said that samples under the category were mainly bloodstains found on the exposed part of the body of a person. She explained that in violent crimes where there was heavy blood-shedding, it was not uncommon for the blood of the victim to be stained on the hands or the face of a suspect. By taking a swab of the bloodstain, DNA analysis could be performed to provide the necessary evidence.

3. The Chairman asked about the method of taking a sample of bloodstain from the body of a suspect. SC(BSB) said that a cotton bud would usually be used to take a sample of bloodstain. The Chairman asked the Administration to consider explicitly requiring that a sample of bloodstain on the body of a suspect should be taken with the use of a cotton bud only. He said that if the method of taking any non-intimate sample was intrusive, the court would be less likely to accept the admission statement made by the suspect. PAS(S)E assured members that adequate training and guidelines would be issued to law enforcement officers designated for the taking of samples.

Action

4. The Chairman asked whether dandruff was a type of sample taken from any part of a person's body other than his private part. SC(BSB) responded that dandruff was usually taken from the clothes rather than the body of a person. Nevertheless, DNA information derived from dandruff could offer significant forensic evidence.

5. The Chairman said that the taking of a swab from many parts of a body, such as armpit, navel, foot sole or the upper part of a person's leg was intrusive. Consideration should therefore be given to classifying samples taken from these parts of the body as intimate samples.

6. The Chairman considered that the decision of whether samples should be taken from a suspect for forensic analysis might be left to the court. He requested the Administration to consider requiring judicial authorization for the taking of certain types of non-intimate samples in situations where the suspect did not give consent, and the need of making it mandatory for the taking of certain types of samples when the suspect refused to give consent but judicial authorization was obtained. SC(BSB) cautioned that if judicial authorization was to be required for the taking of non-intimate samples, some important evidence on a suspect's body might have been washed away by the time judicial authorization was granted.

Adm

7. Principal Assistant Secretary for Security E (PAS(S)E) said that consideration had been given to the idea in the drafting of the Bill. It was noted that even with the authorization of the court, there were difficulties for medical practitioners and forensic dentists to take a blood sample or dental impression from a suspect respectively if the suspect refused to give consent. Chief Superintendent of Police(Crime Support) (CSP(CS)) added that the Administration had considered the possibility of adopting the practice in some other jurisdictions of issuing a court order requiring a person to give an intimate sample, such as a blood sample. This was however unlikely to be feasible in Hong Kong because medical practitioners and dentists in Hong Kong were very unwilling to take a blood sample and dental impression even if an order was issued by the court but the suspect refused to give consent.

8. Mrs Selina CHOW asked whether there were practical difficulties in the taking of non-intimate samples from suspects. PAS(S)E responded that as the Bill provided that the taking of a non-intimate sample from a suspect should be made by a law enforcement officer trained for the purpose, she did not envisage any practical difficulties in the taking of non-intimate samples.

9. Miss Emily LAU asked whether the taking of samples in other jurisdictions were made only with the consent of the suspect. CSP(CS) responded that he had conducted some research into the issue and noticed that there had been substantial changes in the past five to 10 years. In a number of states in the United States, it was mandatory to take a blood sample from persons imprisoned. The Chairman pointed out that in response to members' request at a previous meeting, the Administration was preparing a paper on similar legislation in overseas countries.

Action

A sample taken from a nail or from under a nail

10. Miss Emily LAU asked whether there were difficulties in the taking of a sample from a nail or from under a nail if the suspect struggled in the process. SC(BSB) said that to her knowledge, such a sample was taken by forensic pathologists using a small toothpick rather than by cutting the nail of a suspect. Although the Bill empowered a law enforcement officer to use such force as was reasonably necessary to take a non-intimate sample from a suspect, she believed that very mild force would be used in the taking of a sample from a nail or under a nail if the suspect was not cooperative.

11. Senior Assistant Legal Adviser (SALA) informed members that it was an offence under the Dangerous Drugs Ordinance (Cap. 134) for a person to refuse allowing a law enforcement officer to take a sample from his nail or under his nail. He pointed out that the Bill did not provide that such an act would amount to a criminal offence. It only provided that a police officer might use such force as was reasonably necessary for the purposes of taking or assisting in the taking of a non-intimate sample from a person.

12. The Chairman said that there were reports that a suspect might be detained overnight if he did not cooperate. He expressed concern that the provision for the use of reasonable force in the taking of non-intimate samples from a suspect who refused to give consent might be abused. A sample might be scraped from the head or under the nail of a suspect who refused to cooperate. He said that the scraping of the part of a person's finger under the nail was one of the most common torture in the old days. In this connection, SALA said that there were separate provisions against torture in the Hong Kong Bill of Rights Ordinance (Cap. 383) and other local legislation. Any law enforcement officer who tortured a suspect would be liable to prosecution.

13. PAS(S)E said that suspects would usually be cooperative if law enforcement officers were empowered to take non-intimate samples. She said that it would be an offence for a law enforcement officer to use excessive force in taking a sample. CSP(CS) said that a sample taken from under a suspect's nail could yield very useful information especially in murder cases. It would not be in the interest of justice if a suspect could refuse the taking of such a sample. He stressed that the taking of this kind of sample would be carried out by Police officers who were trained to do so. Miss Emily LAU said that if the same logic was applied, a sample of blood could also be taken without a suspect's consent. PAS(S)E said that the taking of a blood sample was more intrusive than the taking of a buccal swab or a sample from under the nail. The Chairman asked the Administration to consider issuing internal guidelines on the taking of each type of sample.

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A sample of hair other than pubic hair

14. The Chairman asked whether a sample of hair was taken by way of cutting.

Action

SC(BSB) responded that a sample of hair could be taken by way of cutting if it was to be used for examination of morphology of hair. If DNA analysis was required, the hair had to be pulled out from the head or the body of a person. The Chairman said that a person might feel painful if a sample of hair was pulled from the head or body. He considered that if a buccal swab could provide sufficient sample for DNA analysis, there should not be a need for the Bill to provide for the taking of a hair sample. SC(BSB) said that the examination of hair morphology or composition of dyestuff might sometimes serve forensic comparison purposes. The information obtainable from a sample of hair was therefore not confined to DNA information. She agreed to consider setting out in the Bill that a sample of hair should only be taken by way of a cutting of hair.

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Saliva

15. SC(BSB) said that in a sexual crime where a victim was forced to kiss the suspect, a swab taken from the face of the suspect might provide significant forensic evidence.

16. The Chairman asked why it would be necessary to take a person's saliva given that a buccal swab could provide sufficient DNA information. SC(BSB) said that saliva samples could be required for blood grouping for comparison with results previously obtained. The Chairman requested the Administration to consider specifying in the Bill that the taking of saliva samples was for unsolved crimes only.

Adm

17. Mr Albert HO asked how saliva would be taken from a suspect who refused to cooperate. CSP(CS) said that it would be very difficult to do so in practice. Under such circumstances, the Police would try to persuade the suspect to cooperate. The Chairman said that as saliva could be taken from a person at any time, consideration should be given to classifying saliva as an intimate sample if a reasonable amount of force was required to take such sample from a suspect who refused to cooperate. PAS(S)E agreed to consider the suggestion.

Adm

An impression of any part of a person's body other than the identifying particulars described in section 59(6) of the Police Force Ordinance (Cap. 232)(PFO)

18. In response to the Chairman, SC(BSB) said that there was no statistical indication on the exclusiveness of an impression of any part of a person's body other than the identifying particulars described in section 59(6) of PFO. Nevertheless, an impression of the appropriate body part of a suspect could be used for forensic comparison. She said that in cases where there had been fierce fighting, an impression in blood of a person's forearm could sometimes be left at the scene.

19. The Chairman asked whether an impression of a suspect's ear had been admitted as evidence before the court in the past. CSP(CS) responded that an impression of a suspect's ear had been admitted as evidence before a court in the

Action

United Kingdom, although there was no such precedent in a court of Hong Kong.

20. The Chairman said that he had heard of the taking of a three dimensional impression of the ear of a suspect by making a mould of the suspect's ear. He considered the process intrusive and said that the taking of such an impression should be avoided if the exclusiveness of the impression was not very high. It might be more appropriate to focus on the taking of samples for DNA analysis, the information derived from which was very exclusive. SC(BSB) said that caution should be taken to avoid restricting the Bill to DNA analysis, which was only one of the techniques used in forensic examination. She said that there might be substantial development in other techniques of forensic examination in the future. The Chairman said that legislation should be enacted to address the prevailing situation of the society. As the taking of both intimate and non-intimate samples from suspects would involve a lot of contact with a suspect, the taking of a sample should be avoided if information derived from the sample would not be very useful.

Adm

21. The Chairman requested the Administration to consider whether the taking of an impression of any part of a person's body other than the identifying particulars described in section 59(6) of PFO was necessary and useful for forensic comparison, and whether it included the private part of a person.

Video recording of the taking of samples

22. Miss Emily LAU asked whether the taking of a buccal swab would be carried out at a crime scene if a suspect was arrested at the scene. CSP(CS) responded that as a crime scene was usually confused and there was the possibility of cross contamination, a buccal swab would be taken in a more natural and controlled atmosphere.

23. The Chairman expressed concern that the taking of samples and admission statement were all carried out in a Police station. He said that a Police officer might abuse his power in the taking of non-intimate samples. Upon the complaint of a suspect, the Police officer could claim that reasonable force was used since the suspect refused to cooperate. To prevent abuse of power, he suggested that video recording of the taking of samples from suspects should be made.

24. CSP(CS) said that it was not a usual practice for legislation to stipulate the administrative arrangements. The possibility of video recording of the taking of samples had been considered and it was noted that such an arrangement had wide resource implications. He was inclined to requiring the taking of a sample from a suspect to be carried out in the presence of a duty officer.

Other issues

25. The Chairman asked whether the five types of non-intimate samples as referred

Action

to in the Administration's paper would all be taken from a suspect. SC(BSB) respond that samples would be taken from a suspect only if there was a need to take the sample for analysis. PAS(S)E added that the taking of too many types of samples from a suspect for forensic analysis would be a waste of resources. The Chairman said that this principle should be set out in the guidelines on the taking of samples. He said that the Administration should provide statistics on each type of sample taken during the initial implementation of the Bill. PAS(S)E agreed to consider the suggestions.

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26. Miss Emily LAU recalled that the classification of intimate and non-intimate samples and the appropriateness of their Chinese translation were raised at the last meeting. She requested the Administration to consider redefining "intimate sample" and "non-intimate sample".

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Proposed section 59G(2)(iv) of PFO

27. At the invitation of the Chairman, Assistant Secretary for Security E briefed members on the Administration's proposal to narrow down proposed section 59G(2)(iv) of PFO, which provided for access to and use of information stored in the DNA database under specified purposes.

28. Miss Emily LAU expressed concern that information in the DNA database could be used for producing evidence in any proceedings for any offence. She said that the Privacy Commissioner for Personal Data had queried the provision allowing DNA information to be used in relation to any offence. She questioned whether it was appropriate for the Bill to provide for a person to voluntarily give an authorization to a Police officer of the rank of superintendent or above to take a non-intimate sample from him. She also expressed concern that there might be situations where a person was under pressure to volunteer a sample for DNA analysis.

29. PAS(S)E said that the proposed provision in the Bill only sought to provide a channel for people to volunteer their samples for forensic analysis. The Administration would not call upon any person to volunteer his sample. She said that experience in overseas countries indicated that there was a need for such a channel. SC(BSB) quoted the example that in a remote village, law-abiding residents might wish to volunteer their samples to assist the police's investigation into a particular serious crime.

30. The Chairman said that a victim might call upon certain persons to volunteer their samples for DNA analysis so as to prove their innocence, thus creating pressure for these persons to volunteer their samples.

31. Mr CHENG Kai-nam considered that removing the provision would deprive a person of his right to volunteer a sample to prove his innocence. Mrs Selina CHOW shared the view that a person should be given the right to volunteer a sample.

Action

32. SALA said that the Administration had quoted a case in which a man convicted and imprisoned for a charge of rape and robbery had volunteered his sample for DNA analysis and had successfully used the result to appeal against conviction. The proposed provision had the effect of providing for such situations.

33. In response to the Chairman, Senior Government Counsel said that without a provision allowing a person to volunteer his sample for DNA analysis, there would be no channel to accept a person's request to volunteer his sample under the Bill.

34. Mr Albert HO said that the Administration's paper was unclear as to whether a suspect or a citizen could request the Government Laboratory to carry out forensic comparison. PAS(S)E responded that the issue of who might use the DNA information in the database was separately addressed in another paper provided by the Administration. The issue might be examined when the relevant paper was discussed.

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35. Members requested the Administration to provide overseas experience on the circumstances under which people voluntarily gave consent for the taking of non-intimate samples and storage of their DNA information in the DNA database.

II. Date of next meeting

36. Members agreed that the next meeting be scheduled for 27 March 2000 at 10:45 am to continue discussion with the Administration.

37. There being no other business, the meeting ended at 10:42 am.

Legislative Council Secretariat
9 June 2000