

立法會
Legislative Council

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the Administration)

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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, 19 January 2000 at 8:30 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
- Member absent** : Hon Emily LAU Wai-hing, JP
- Public Officers attending** : Mr Raymond WONG
Deputy Secretary for Security 1
- Mr Tony LAM
Principal Assistant Secretary for Security E (Atg)
- 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

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

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

Referring to correspondences between the Legislative Council (LegCo) Legal Service Division and the Administration, which were tabled at the meeting, Mr Albert HO asked why officers of the Independent Commission Against Corruption (ICAC) needed the power to take non-intimate samples. Deputy Secretary for Security 1 (DS for S1) responded that the ICAC also needed to take non-intimate samples from suspects for forensic comparison with DNA information obtained from evidence relating to the crime e.g. DNA obtained from saliva on a sealed envelope containing bribe money.

2. Mr Albert HO said that he was not convinced about the need of ICAC officers to take non-intimate samples from suspects. He suggested that representatives of ICAC be invited to explain the justification and rationale for ICAC officers to take non-intimate samples from suspects.

(Post-meeting note : The papers tabled at the meeting were subsequently circulated to members vide LC Paper No. CB(2) 918/99-00 on 20 January 2000.)

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3. Mr CHENG Kai-nam asked about the investigation power of ICAC as provided under the ICAC Ordinance (Cap. 204). Senior Government Counsel (SGC) said that she had not examined the scope of power of ICAC in drafting the Bill. Senior Assistant Legal Adviser (SALA) said that the Administration had stated in its reply to the LegCo Legal Service Division that ICAC needed the power to take non-intimate samples for the purposes of confirming or disproving the involvement of a person in a serious arrestable offence under section 10 of ICAC Ordinance. Members agreed that representatives of ICAC should be invited to explain the need for taking non-intimate samples from suspects at the next meeting.

4. Members agreed that correspondences between the LegCo Legal Service Division and the Administration would be circulated to them if the latter's reply to the former was not satisfactory or if the issues were not purely technical.

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5. The Chairman asked about the statistics on the number of persons convicted of serious arrestable offences. DS for S1 undertook to provide the information after the meeting. He added that in 1998, 40 422 persons were arrested for such offences.

6. The Chairman expressed concern that the Police might arrest persons to undertake DNA analysis for investigation of undetected cases. He asked about the circumstances under which samples would be taken from a suspect for DNA analysis. DS for S1 said that samples would be taken from suspects for DNA analysis only if authorized by a Police officer at the rank of Superintendent or above who had reasonable grounds to suspect a person's involvement in a serious arrestable offence. It was also a requirement for the taking of a sample that the Police officer should have reasonable grounds to believe that the sample would tend to confirm or disprove the suspect's involvement in the crime. He added that the sample and DNA profile of a suspect would be destroyed if the suspect was not convicted or not charged.

7. The Chairman asked about the details of operation of the proposed DNA database (the database). DS for S1 responded that under proposed section 59G (1) of the Police Force Ordinance (Cap. 232) (PFO), the database would be maintained by the Government Chemist on behalf of the Commissioner of Police (CP). Senior Chemist (Biochemical Sciences B) (SC(BSB)) said that there was currently no DNA database. However, the Government Laboratory was keeping a few hundred DNA information relating to cases which had not yet been detected. It was also keeping exhibits seized from the crime scenes of a few hundred cases on which DNA tests had not yet been taken because no suspect had been arrested. She said that subject to the contents of the Bill, forensic comparison could be automatically made between the DNA information of samples obtained from the crime scene (including that of unsolved cases) and all DNA information in the database.

8. Chief Superintendent of Police (Crime Support) (CSP(CS)) said that officers responsible for taking non-intimate samples, such as a buccal swab, would be specifically trained. After the swab had been taken, it would be sealed in a sterile

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tube uniquely labelled using an adhesive bar-code and sent to the Government Laboratory for analysis.

9. SC(BSB) said that under current arrangements, forensic comparison between the DNA profile of a suspect and that of a sample seized in relation to a specific crime was only made upon the request of the Police. After passage of the Bill, computerized forensic comparison could be automatically made between the DNA information of a sample seized from a crime scene and all DNA information in the database. DS for S1 said that the Administration had already redeployed resources for the computerized forensic comparison. He added that although about 40 000 persons were arrested for serious arrestable offences in 1998, DNA tests might need to be performed on 30 000 persons only. Due to limitation of resources, the DNA database would be developed progressively. There might only be a few thousand records instead of 30 000 records in the database initially. CSP(CS) added that in view of limited resources, the DNA profiles of robbers, burglars and persons who committed sexual crimes would first be kept in the database. Overseas experience indicated that these persons were usually associated with serious crimes, especially serious sexual offences.

10. The Chairman said that it would be questionable if the DNA profile of a person convicted of stealing a chocolate bar from a supermarket was to be kept in the database. As the criminal record of the person would be removed in three years' time, their DNA information should also be deleted at the same time. SC(BSB) said that according to surveys conducted in the United Kingdom and New Zealand, about 90% of criminals of serious offences were progressive criminals. Many persons who committed serious sexual offences were found to have previously convicted lesser crimes. She added that a criminal convicted of rapes in Tuen Mun was found to have committed many lesser offences before he committed serious sexual offences. CSP(CS) added that the DNA analysis of a suspect who stole a chocolate bar might reveal that he was the suspect of three rape cases. The Chairman expressed concern that the scope of application of DNA analysis might be too wide.

11. The Chairman said that the issue of when samples would be taken for DNA analysis should be further examined. He requested the Administration to provide a paper on overseas experience regarding the probability of persons convicted of lesser offences to commit more serious offences in future.

12. Referring to proposed section 59G(1) of PFO, SALA said that DNA information which could be stored in the database included -

- (a) An intimate or non-intimate sample taken from a person pursuant to proposed sections 59A or 59C of PFO if the person had been subsequently convicted of any serious arrestable offence;
- (b) A non-intimate sample taken from a person pursuant to proposed section

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10E of the ICAC Ordinance if the person had been subsequently convicted of any serious arrestable offence;

- (c) A non-intimate sample of buccal swap taken from a person pursuant to proposed section 59E of PFO; and
- (d) A non-intimate sample taken from a person who volunteered to provide the sample under proposed section 59F of PFO.

13. The Chairman asked whether DNA information would be obtained from persons already convicted of serious arrestable offence and currently serving their sentences. DS for S1 said that DNA information would only be obtained from all persons convicted of serious arrestable offence after the Bill was passed.

14. Mr CHENG Kai-nam asked about the circumstances where DNA information would be destroyed. DS for S1 said that the circumstances under which samples and DNA information would be destroyed were set out in proposed section 59H of PFO and proposed section 10G of the ICAC Ordinance. As regards a suspect whose sample was taken under proposed sections 59A or 59C of PFO, or under proposed section 10E of the ICAC Ordinance, his DNA information would be retained if he was convicted. If he was not convicted or not charged, the DNA information derived from the sample would be destroyed. The sample taken from a suspect for DNA analysis would be destroyed 12 months from the date on which the sample was taken or as soon as practicable after the conclusion of all proceedings relating to the conviction, whichever was the earlier.

15. As regards whether DNA information of persons would be destroyed when they had died, SC(BSB) said that DNA information would still be kept in the database even when the person from whom a sample was taken for DNA analysis died. She added that the identity card numbers of persons to which the DNA information related would not be kept in the database, as identity card numbers were not supplied by the Police to the Government Laboratory.

16. The Chairman expressed concern that future DNA technology might advance to such a stage that some form of "genetic testing" or "genetic personality profiling" might be possible even with the DNA information obtained. He considered that relevant provisions in the Bill should be narrowed down to restrict the use of DNA information in the database to forensic comparison using polymerase chain reaction (PCR) technique. SC(BSB) said that DNA information in the database would be used for forensic comparison only. The Chairman said that there might be fundamental changes to the technology used in forensic DNA analysis which could easily allow the information derived therefrom to be used for purposes which had not been envisaged before. Mr CHENG Kai-nam asked whether information such as the conduct of a person or parentage could be derived from the database. SC(BSB) said that such comparison was currently not possible. There was only a very remote possibility of

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verifying parentage. Moreover, such comparison would also necessitate the use of samples, which should have been destroyed after conclusion of proceedings.

17. DS for S1 pointed out that proposed section 59G(2)(b)(i) provided that information stored in the database could only be used for forensic comparison with any other DNA information in the course of an investigation of an offence by an officer of the Police or ICAC. Mrs Selina CHOW said that the provision was already adequate in dealing with various circumstances under which information stored in the database could be used. SALA said that DNA information stored in the database could only be accessed for the purposes as set out under proposed section 59G(2) of PFO.

18. The Chairman said that consideration could be given to confining the use of DNA information in the database to forensic comparison using PCR technology. He was concerned that DNA technology might in the future be developed to a stage when information other than DNA profiles could be derived from the database. Mrs Selina CHOW said that consideration might be given to revising proposed section 59G(2)(b)(iv) along the line of "administering the DNA database for the purpose of the above subsections". She considered that as a matter of principle, the Bill should spell out the purpose rather than the method of investigation of crimes. Mrs CHOW requested the Administration to review the drafting of proposed section 59G(2)(b)(iv) of PFO so as to restrict access to or use of information stored in the database for specific purposes in respect of administering the database.

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19. Mr Albert HO considered that regardless of how the method of DNA analysis was restricted in legislation, the restriction could be easily bypassed through a rearrangement of information in the database. The Chairman considered that the Administration should give an undertaking that it would inform the Legislative Council Panel on Security of any fundamental changes to the technology used in forensic DNA analysis which could easily allow the DNA information derived therefrom to be used for purposes which had not been envisaged before. DS for S1 said that such an undertaking could be made, if members so wished. He reiterated that it had been clearly set out in the Bill that information stored in the database could only be used for crime investigation purpose.

20. Referring to proposed section 59G of PFO, Mr Albert HO asked about the persons who could use the DNA information in the database. He asked whether defendants, defendant's lawyers or the person to whom the DNA information related could use the DNA information in the database. DS for S1 said that proposed section 59G(2)(iii) provided that the person from whom the DNA information related to might have access to the information in the database. Mrs Selina CHOW said that there seemed to be a discrepancy between the English text of "No person shall" and the Chinese text of "任何人不得" in proposed section 59G(2) of PFO. Mr Albert HO added that the construction of "no person shall have access to ... except ... for the purposes of ..." in proposed section 59G(2) might mean that "any person may have access to ... for the purposes of ...". SALA said that reading the subclause as a

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whole, there was no discrepancy between the meaning of "No person shall" and "任何人不得". He added that the apparent purpose of proposed section 59G(2)(b)(ii) and (iii) was to allow the defendant or his lawyer to obtain DNA information for the defence. Other persons could have no access to the DNA information. His view was confirmed by DS for S1.

21. Mr Albert HO said that it might be possible under proposed section 59G(2) for a defendant or his lawyer to request or compel the Government Chemist to provide a third party's DNA information stored in the database for the purpose of defending in court proceedings. His view was shared by Mrs Selina CHOW. SALA said that the wording suggested that the DNA information could only be used in the case under investigation, as proposed section 59G(2)(b)(ii) referred to the producing of evidence in any proceedings for "any such offence", which was the offence as referred to in subsection (i). Thus the defendant could only obtain his own DNA information for the purpose of defending that case in court. SGC said that "the DNA information" in proposed section 59G(2)(b)(ii) referred to any DNA information in the database. Mr CHENG Kai-nam said that if this was the case, the word "該" should not appear before "DNA資料" in the proposed section 59G(2)(b)(ii). The Chairman said that it might be necessary to set out the circumstances under which DNA information could be provided to the defendant.

22. The Chairman considered that if five different DNA samples were identified at a crime scene, it might be possible for the defendant to request for summoning the Government Chemist to provide the DNA information of the four other samples to the court for proving that he was not the only suspect. A person accused of murdering his wife might claim that a boyfriend of his wife was the murderer and requested for summoning the DNA information of the boyfriend. SC(BSB) said that such a scenario would be very unlikely, as comparison of relevant DNA information should already have been made and disclosed to the defendant by the time the case was brought to the court. CSP(CS) added that if a person arrested of murdering his wife claimed that his wife was murdered by her boyfriend, the Police would not complete the investigation until it had fully investigated the allegation. That might include locating the boyfriend of the person's wife, in which case the Police would be able to know whether he had previously been sampled for other offence. If the boyfriend's DNA information was not in the database, a sample would be obtained in accordance with the relevant provisions.

23. The Chairman said that in extreme cases, the defendant might say that the DNA information of samples obtained from the crime scene could belong to another person. The defendant might appoint an expert to verify the accuracy of the forensic comparison of DNA information conducted by the Government Laboratory. He requested the Administration to provide a paper on the operation of proposed section 59G of PFO on the database, including circumstances under which DNA information would be stored or used, and how a defendant or person to whom the information related could use the information in the database.

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24. In response to Mr CHENG Kai-nam, SGC said that DNA information derived from volunteered samples would be destroyed if the person to whom the information related notified CP to withdraw his DNA information from the database. DS for S1 said that persons who voluntarily provided samples for DNA analysis were usually repeated offenders. The Chairman requested the Administration to provide information on overseas experience regarding the deletion of DNA information from the database. DS for S1 said that as he could recall, there were no such provisions on deletion of DNA information for the database in the relevant legislation of the UK, Australia and Canada. Nevertheless, he agreed to examine if such information was available.

25. The Chairman suggested that the Administration should look into the possible problem of tampering of evidence in the laboratory.

III. Date of next meeting

26. Members agreed that the next meeting would be held on 2 February 2000 at 10:45 am to continue discussion with the Administration.

(Post-meeting note : The meeting on 2 February 2000 was aborted in the absence of a quorum and the next meeting was scheduled for 28 February 2000 at 10:45 am.)

27. There being no other business, the meeting ended at 10:35 am.

Legislative Council Secretariat
10 May 2000