

立法會
Legislative Council

LC Paper No. CB(2) 2533/99-00
(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, 22 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 CHENG Kai-nam, JP
Hon Emily LAU Wai-hing, JP
- Member absent** : Hon Mrs Selina CHOW LIANG Shuk-ye, 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

Mr Carmel CHOW
Principal Investigator
Independent Commission Against Corruption

Mr SHAM Ka-fai
Acting Chief Investigator
Independent Commission Against Corruption

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

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. LS 133, CB(2) 2037/99-00(01) and CB(2) 2064/99-00(01))

At the invitation of the Chairman, Senior Assistant Legal Adviser (SALA) briefed members on the operation of the Bill in relation to data protection principle 3 (Principle 3) in Schedule 1 to the Personal Data (Privacy) Ordinance (Cap. 486) (PDPO) and whether the provisions in the Bill would have the effect of implied repeal of the relevant provisions of PDPO.

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2. The Chairman asked whether the use of DNA information of a suspect for the investigation of any offence was in contravention of PDPO. He also asked whether PDPO required that there had to be reasonable grounds for suspecting a person's involvement in an offence before his DNA information could be used for the investigation of the offence. SALA said that Principle 3 was mainly related to the consent of a person from whom a sample was taken. There was no indication of express or implied requirement for reasonable grounds for suspecting a person's involvement in an offence before the DNA information could be used. He added that at common law, DNA information could be produced as evidence in court as long as it was relevant and was not obtained unfairly.

3. Principal Assistant Secretary for Security E (PAS(S)E) said that the views of the Department of Justice, the Senior Assistant Legal Adviser of the Legislative Council (LegCo) Secretariat and the Privacy Commissioner for Personal Data (Privacy Commissioner) all indicated that the use of DNA information obtained from a suspect for the investigation of any offence was exempted from Principle 3 by virtue of section 58(2) of PDPO. She added that under general prosecution procedures, all information possessed by the prosecution should be made available to the defence. Proving the innocence of a person could assist the Police in the detection of crime. However, this usually involved a forensic comparison between the DNA information of a suspect and information obtained from exhibits seized at the crime scene rather than information in the DNA database.

4. Mr Albert HO asked whether the defence could have access to information in the DNA database by virtue of the exemption under section 58(2) of PDPO from Principle 3 to prove his innocence. He also asked about the actions a person could take if a request for access to the database was refused by the Police. SALA said that the exemption from Principle 3 was mainly related to law enforcement by law enforcement agencies. However, proving the innocence of a person might in a wider sense fall within the scope of investigation. The Chairman said that if a person had reasonable grounds for obtaining such information, he could first make a request to the Police. If the Police refused to such a request, he could raise the issue with the prosecution or bring it to the attention of the court. SALA added that a person could also apply for a judicial review. Chief Superintendent of Police (Crime Support) (CSP(CS)) said that the Police would not disclose a person's DNA information in the DNA database to a third party unless consent was given by the person from whom the sample was taken.

5. Miss Emily LAU asked how requests for service of the Government Laboratory were made by defendants in the past. Senior Chemist (Biochemical Sciences B) (SC(BSB)) said that requests for service were made directly by defendants to the Government Laboratory in the past. The Chairman expressed doubt about whether such direct request would still be permissible after the Bill was passed, as the Government Laboratory would maintain the DNA database on behalf of the Commissioner of Police. Miss LAU asked whether the Police would carry out

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investigation upon the request of a defendant. CSP(CS) said that each case would have to be dealt with on its merits. If there was a claim that another person was present at a crime scene, a forensic comparison between the DNA information of the person and that of exhibits seized would be taken up by the Police as part of the investigation process.

6. The Chairman asked whether a person who volunteered his sample could request the Government Laboratory to carry out a forensic comparison between his DNA information and the DNA information of exhibits seized from crime scenes. Senior Government Counsel (SGC) said that the Bill did not provide that the volunteer had the right to request comparison with DNA information of exhibits seized from crime scenes. CSP(SC) pointed out that there was no provision in the Bill compelling that such a request must be acceded to or otherwise. He said that if a claim consistently made by a person was obscured by the Police, there could be serious consequences when the matter was brought to the court.

7. Miss Emily LAU asked whether a person could have access to information in the DNA database for producing evidence in legal proceedings. SALA said that from a practical point of view, the defence could ask the court to summon the production of that piece of evidence. He added that there was no provision in the Bill which prohibited such an order by court. The Chairman said that there might be a problem if the defence did not know which piece of information it required. SALA said that the court might not issue an order if it considered the request a "fishing expedition".

8. Mr Albert HO asked whether it was permissible under the proposed section 59G of the Police Force Ordinance (Cap. 232) (PFO) for the court to make an order for providing information stored in the DNA database for the purpose of producing evidence in legal proceedings. SGC said that although the Bill did not expressly provide such an authority, there was no provision in the Bill which excluded such power of the court, if any. SALA said that the court had the authority to order the production of evidence as long as it was relevant to the case. SC(BSB) added that following the comparison of a suspect's DNA information with that of exhibits, a comparison would always be made between the information in the DNA database and that of exhibits.

9. Miss Emily LAU suggested providing expressly in the Bill that the court would have the power to order the production of evidence in respect of DNA information in legal proceedings as referred to in the proposed section 59G(2)(ii) of PFO. The Chairman shared the same view. He said that such an express provision would be necessary given that the prosecution might refuse a court order by virtue of other legislation, such as PDPO. Mr Albert HO suggested that the Administration could alternatively make an undertaking to state in its speech during the resumption of Second Reading debate on the Bill that the court would have such a power. PAS(S)E agreed to look into the suggestion. She cautioned that the addition of such a provision might result in other legislation which did not have such a provision

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becoming unclear in this respect.

10. The Chairman said that the Administration should consider restricting the use of DNA information obtained from a suspect to be used for the investigation of any serious arrestable offence rather than any offence. He said that this was more appropriate since the DNA information concerned was obtained on the basis of suspicion of a person's involvement in a serious arrestable offence. He added that he could not subscribe to the view that a person who committed an offence had a higher probability of committing other offences. He said that as resources were limited, the Police should concentrate its resources on the investigation of serious arrestable offences.

11. CSP(CS) said that if investigation revealed that a person was not involved in a serious arrestable offence but a less serious offence, it would be very inappropriate for the Police to ignore the latter offence merely because it was not a serious arrestable one. He added that the requirement in the Bill for the taking of a sample was more stringent than that in the United Kingdom (UK), where a sample could be taken for the investigation of any recordable offence. Under the Bill, 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. PAS(S)E added that the proposal only involved the use of a kind of technology not available in the past to assist in the detection of past cases.

12. The Chairman said that if the Administration insisted on its views, some members might propose Committee Stage amendments to the Bill in relation to the issue.

13. 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 the Australia. In Canada, the 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 an offence in respect of which a blood sample was taken. As regards the practice in the United States, Assistant Secretary for Security E said that DNA and other forensic information was released only to law enforcement agencies for identification purpose in California. In New York, DNA records were released to law enforcement agencies for identification purposes in connection with the investigation of the commission of one or more crimes. There was a lack of clarity about the use of DNA information for investigation of other offences in New York. There was also a lack of details on the investigation of other offence in the relevant legislation in Sweden. PAS(S)E added that the practice in overseas countries could only serve as reference only, as circumstances differed from one place to another. The Administration had considered confining the use of DNA information to the

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investigation of past serious arrestable offences. However, the idea was not adopted in view of the practical problem that it might not be possible for the DNA information to be used for the prosecution of an offence which was subsequently found to be not a serious arrestable one.

14. CSP(CS) said that the objective of establishing a DNA database was to facilitate the detection of crime through comparison.

15. The Chairman expressed concern about how the proposals in the Bill would operate in practice. He said that he was inclined to be more cautious at the initial stage to restrict the use of DNA information to investigate serious arrestable offences only to prevent possible abuse.

16. Mr Albert HO suggested that the Administration should consider adding a provision in the Bill to provide for the use of forensic examination results for the purpose of a coronial inquest or inquiry, as was the case in South Australia. PAS(S)E responded that the issue of coronial inquest or inquiry was outside the scope of the Bill. She also expressed doubt about the need for such a provision. Nevertheless, she would look into the suggestion of Mr HO.

Adm

17. Members then continued to examine the Bill clause-by-clause.

*Part III - Amendments to the Independent Commission Against Corruption (ICAC)
Ordinance*

Proposed section 10F - Limitations on use of samples and results of forensic analysis

18. Regarding the proposed section 10F(1)(a) of the ICAC Ordinance, Principal Investigator of ICAC (PI/ICAC) said that the offences for which a person might be arrested under section 10 of the ICAC Ordinance included non-corruption related offences.

19. Referring to the letter dated 3 May 2000 from the Privacy Commissioner, Miss Emily LAU said that the Privacy Commissioner considered that a provision should be added to prohibit the use of samples and information derived therefrom 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. PAS(S)E responded that the proposed section 59H(1) of PFO had already provided for the destruction of DNA information as soon as practicable after a person was not charged, discharged before conviction or acquitted on appeal. Nevertheless, she would consider the suggestion of Miss LAU.

Adm

20. PAS(S)E informed members that arrangements had been made for the Privacy Commissioner to visit the Government Laboratory in the short future. Miss LAU requested the Administration to inform members of any views expressed by the Privacy Commissioner in the visit.

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II. Date of next meeting

21. Members agreed that further meetings be scheduled for 27 May 2000 at 11:00 am and 2 June 2000 at 8:30 am to continue discussion with the Administration.
22. There being no other business, the meeting ended at 12:53 pm.

Legislative Council Secretariat
19 July 2000