

立法會
Legislative Council

LC Paper No. CB(2) 2505/99-00
(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, 27 March 2000 at 10:45 am
in the Conference Room A 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) 1282/99-00(01) and CB(2) 1380/99-00(01))

Proposed section 59G(2)(iv) of the Police Force Ordinance

Members continued to discuss the Administration's proposal to narrow down proposed section 59G(2)(iv) of the Police Force Ordinance (Cap. 232) (PFO). Principal Assistant Secretary for Security E (PAS(S)E) explained the Administration's proposal regarding proposed section 59G(2)(iv) of PFO. She informed members that legal advice confirmed that the drafting of proposed section 59G(1) of PFO would allow software and hardware improvements to address problems such as the year 2000 compliance problem.

2. Mrs Selina CHOW expressed concern that the specified purposes as set out in paragraph 2 of the Administration's paper might not cover all purposes required in the effective administration of the DNA database. She said that proposed section 59G(2)(iv) of PFO might be amended along the line of "for the purposes of this Ordinance".

3. PAS(S)E said that as the Bill involved amendments to different provisions in existing legislation, the drafting along the line of "for the purposes of this Ordinance" might widen the scope of the proposed section and render it unclear.

Action

4. Referring to paragraph 8 of the Administration's paper, Senior Assistant Legal Adviser (SALA) said that the phrase "other purposes ancillary and incidental to the above" in the latest version of proposed section 59G(2)(iv) provided sufficient flexibility in dealing with unforeseeable circumstances. He added that further legislative amendments could be introduced if the proposed section was found to be inadequate in the future.

5. Referring to clause 5 of the Bill, the Chairman asked whether the term "genetic information" in the definition of "DNA information" was sufficiently narrow to prohibit the analysis of DNA information using techniques other than polymerase chain reaction (PCR) technique. SC(BSB) responded that use of information in the DNA database was governed by the term "forensic analysis", which had no particular restriction on the technology used for analysis, in the definition of "DNA information".

6. The Chairman said that the term "forensic analysis" was not specific enough. Consideration should be given to restricting the use of DNA information in the DNA database to forensic comparison using PCR technique. SC(BSB) responded that the issue had been discussed at a previous meeting and the Administration had undertaken to notify the Legislative Council (LegCo) Panel on Security if there were fundamental changes to the technology used in forensic DNA analysis which could easily allow DNA information derived therefrom to be used for purposes not envisaged before. The Chairman said that if a restriction was not imposed in the Bill, the Administration could simply notify LegCo of new techniques but disregard any views expressed by LegCo. He said that the restriction should either be set out in the relevant principal legislation or subsidiary legislation.

7. PAS(S)E responded that a change in the technology for DNA analysis might be so gradual that there were different views about whether a change had taken place. The purposes for which a type of technology might achieve could also be widened as technology developed. She said that it was fundamental to set out the purposes in the Bill. The Chairman reiterated that the current drafting of the Bill was not specific enough. He requested the Administration to consider specifying in the Bill the technology used in forensic DNA analysis. PAS(S)E agreed to consider the suggestion.

Adm

Storage, destruction and use of DNA information in the DNA database

8. At the invitation of the Chairman, PAS(S)E briefed members on the Administration's paper setting out the circumstances under which DNA information would be stored, destroyed and who might use information in the DNA database. She informed members that under proposed section 10G of the Independent Commission Against Corruption (ICAC) Ordinance (Cap. 204), a sample taken under proposed section 10E of the ICAC Ordinance would be destroyed if the person was acquitted of the offence on appeal.

Action

9. Mr Albert HO asked whether DNA information not obtained properly from a suspect and ruled inadmissible by the court could be stored in the DNA database if the suspect was convicted for other circumstantial evidence. PAS(S)E responded that under proposed section 59G of PFO, only DNA information obtained in accordance with the provisions in the Bill could be stored in the DNA database. Senior Government Counsel (SGC) added that a sample not taken in accordance with the provisions in the Bill could not be kept by the Administration.

10. On the question of whether the court could order the destruction of such a sample, SALA said that the Bill had not set out how such a situation should be dealt with. He drew members' attention that it was a common law principle that even if a piece of evidence had been obtained improperly, it was admissible in court, although the court had the discretion whether or not to admit it.

11. Mr Albert HO considered that the Bill should expressly prohibit the storage and production in the court of DNA information obtained not in accordance with the provisions of the Bill. Miss Emily LAU shared the same view. She asked whether it was legally permissible for requirements under a piece of legislation to differ from that under the common law. Mr CHENG Kai-nam expressed doubt about whether there was such a need. SALA said that it was legally in order to have a statutory provision different from a common law rule.

12. PAS(S)E said that if samples were taken other than in accordance with the Bill, the admissibility of evidence related to the sample would be subject to challenge and criticism by the court. Chief Superintendent of Police (Crime Support) (CSP(CS)) added that the defendant could always challenge any evidence, including DNA information. At members' request, PAS(S)E agreed to consider the suggestion of providing expressly in the Bill that DNA information taken in contravention of the Bill should be inadmissible in court. She said that if some DNA information obtained not in accordance with the provisions in a piece of legislation was admitted as evidence by the court, the court would probably have done so in the interests of justice.

13. Mr Albert HO said that there were currently two schools of thoughts in the world on the issue. Some countries, such as the United States, insisted adherence to the exclusionary rule. In other countries, such as the United Kingdom (UK), the discretion was left to the court. He said that a sample taken from the body of a suspect differed from other exhibits in that it was available from the body of the suspect at any time. If the rules on the taking of samples were not set out explicitly in legislation, a sample could be presented to the court without the need to explain how it had been obtained. He considered that it should be provided expressly in the Bill that DNA information not obtained properly should be inadmissible in court and that any sample taken improperly should be destroyed. The Chairman requested the Administration to consider the suggestions of Mr HO. Miss Emily LAU said that reference might be made to the practices in overseas countries.

Adm

Adm

Action

14. The Chairman said that the drafting of proposed section 59A of PFO seemed to provide that a magistrate could give approval to the taking of an intimate sample from a person without holding a court hearing. Referring to paragraph 3(b) of Schedule 2 in clause 8 of the Bill, SALA said that a magistrate could conduct a court hearing to determine whether approval should be given or not if he considered it necessary in the interests of justice to do so. SGC confirmed that in the drafting of the relevant provisions, it was intended that approval could be given by a magistrate without holding a hearing in simple cases. A hearing could be held to consider more complicated cases, if a magistrate considered it necessary. The Chairman said that the arrangement was similar to that in respect of a search warrant.

15. Miss Emily LAU expressed concern about the provisions in the Bill for a person to volunteer his samples for DNA analysis, as some people might be forced to volunteer their samples. She asked whether the volunteering of samples was allowed in other countries. PAS(S)E responded that the volunteering of samples was allowed in the United Kingdom. Miss LAU said that UK might not be a good example in the protection of human rights. Mr Albert HO said that consideration could be given to add a provision in the Bill to prohibit the calling upon of other persons to volunteer their samples.

16. The Chairman expressed concern about the requirement in the Bill for a person who volunteered a sample to give an authorization to a Police officer of the rank of superintendent or above for the taking of the volunteered sample. He considered that an authorization should be given to the Government Laboratory or a third party in the absence of the Police.

17. Mr CHENG Kai-nam said that prohibiting a person from volunteering his sample was also a deprivation of the person's rights. He said that anyone forced to volunteer his sample could bring it to the attention of the court. PAS(S)E said that as with admission statements, a person could bring to the knowledge of the court that his sample was not given voluntarily. She added that an authorization had to be signed by the volunteer and accepted by the Police officer of the rank of superintendent or above. She said that as the DNA database belonged to the Police, an authorization was therefore to be made to the Police. The authorization would be accepted by the Police if it was in the interests of justice to do so. Guidelines would be drawn up on the acceptance and taking of volunteered samples.

18. Mr CHENG Kai-nam asked whether there were currently guidelines on the taking of statements and fingerprints, and whether these guidelines could apply to the taking of DNA samples. CSP(CS) responded that there were established guidelines and procedures on the handling of suspects. The Police had put a lot of effort in this area in the past few years. The taking of a non-intimate sample would only be carried out by a Police officer trained for the purpose. Upon the passage of the Bill, guidelines would be issued on the taking of samples. Miss Emily LAU cautioned that the taking of samples differed from the taking of other exhibits in that there were also

Action

volunteered samples.

19. Mr CHENG Kai-nam asked whether there were established procedures for the handling of complaints against forced volunteering of samples for DNA analysis. CSP(CS) responded that the existing procedures for the handling of complaints were very comprehensive. As regards keeping suspects apart in questioning, it was governed by internal regulations about care and custody of suspects. There were however occasions when suspects were kept in isolation from each other when there was a possibility that they might tip-off other wanted persons. He stressed that proposed section 59F of PFO would apply to volunteers who were non-suspects. He said that if no provision was made for the volunteering of samples, Police officers and households at a crime scene would not be able to volunteer their samples for exclusion purpose when there was suspected contamination of samples.

20. The Chairman said that if the volunteering of samples was intended for non-suspects only, the process of volunteering should be made to an officer of the Government Laboratory rather than a Police officer. Miss Emily LAU said that if the volunteering of samples was only intended for exclusion purpose, DNA information should not be kept in the DNA database. CSP(CS) stressed that the DNA information of volunteers could not be stored without their authorization. Such authorization could also be withdrawn at any time by the volunteer. He said that a known repeated offender with criminal record might wish to exonerate himself from future inquiry by the Police by volunteering a sample. The Chairman said that the issue might be considered again when the Administration's paper on practices in overseas countries was discussed.

21. Referring to paragraph 4 of the Administration's paper, the Chairman questioned whether DNA information should be taken from a person convicted of a serious arrestable offence regardless of the sentence. He considered that consideration should be given to the actual imprisonment term of a convicted person on the application of proposed section 59E of PFO. PAS(S)E agreed to consider the suggestion.

Adm

22. Miss Emily LAU said that the Administration had not adopted the suggestions of an inter-departmental working group to study the Law Reform Commission's "Report on Arrest" (the Working Group) and a number of suggestions made by the Privacy Commissioner for Personal Data (Privacy Commissioner), including the suggestion that the use of samples obtained on the basis of suspicion of a person's involvement in a serious arrestable offence should not be used for the investigation of other offences.

23. PAS(S)E responded that the issue would be addressed in a paper under preparation by the Administration on the human rights implications of the Bill. She said that the Administration had consulted the Privacy Commissioner in the drafting of the Bill and had taken on board most of the suggestions made by the Privacy

Action

Commissioner. As regards the Privacy Commissioner's suggestion that non-consensual taking of non-intimate samples should require judicial authorization, the Administration considered that judicial authorization should not be required as the intrusiveness of the taking of a buccal swab was low. She added that the suggestion of requiring judicial authorization for non-consensual taking of non-intimate samples was also the only recommendation of the Working Group not adopted in the Bill.

24. Referring to paragraph 6 of the Administration's paper, the Chairman asked whether information in the DNA database would be permanently kept in the DNA database. He asked whether the Administration would consider destroying the DNA information of a person convicted of a serious arrestable offence after a certain period of time.

25. PAS(S)E responded that DNA information differed from criminal records in that it was only information which could facilitate the investigation of crimes. SC(BSB) added that the DNA database would not contain any personal information. It would only contain bar codes used for identification purpose. The personal information of suspects would only be kept by the Police.

26. The Chairman expressed concern that although a person with a criminal record would be clear of the record after a certain period of time, an employer might verify whether a job applicant had previously been convicted of a serious arrestable offence by requiring the job applicant to obtain proof of whether his DNA information was stored in the DNA database. PAS(S)E responded that as the DNA database also contained information of samples provided voluntarily, the process would not confirm whether a person had previously been convicted of a serious arrestable offence.

Adm

27. Referring to paragraph 7 of the Administration's paper, the Chairman asked the Administration to consider adopting the arrangements for the destruction of fingerprints, i.e. a fingerprint was either destroyed or returned to the person from whom the fingerprint was taken if the person so preferred, for the destruction of DNA samples.

II. Date of next meeting

28. Members agreed that two further meetings be scheduled for 3 April 2000 at 1:00 pm and 7 April 2000 at 4:30 pm to continue discussion with the Administration.

29. There being no other business, the meeting ended at 12:42 pm.

Legislative Council Secretariat

22 June 2000