

立法會
Legislative Council

LC Paper No. CB(2) 2534/99-00
(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, 29 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-yee, 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-yee, 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

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I. Meeting with the Administration
(LC Paper No. CB(2) 2064/99-00(01))

At the invitation of the Chairman, Principal Assistant Secretary for Security E (PAS(S)E) briefed members on the Administration's paper entitled "Administration's responses to some legal issues raised by the Bills Committee".

Admissibility in court of DNA information not obtained properly

2. The Chairman said that the United Kingdom (UK) and the United States (US) differed substantially in respect of the admissibility of information obtained improperly. He asked how the court would determine whether a piece of evidence was admissible.

3. Senior Assistant Legal Adviser (SALA) said that in making such a decision, the court would have regard to the relevance of the evidence and whether the evidence had been obtained unfairly. Under the common law, the court had the discretion to exclude a piece of evidence if it had been obtained unfairly. He added that in UK, there was a precedent in which the medical record of a rapist, which was obtained from a medical practitioner without the rapist's consent, was admitted as evidence in court.

4. The Chairman asked whether there was any difference in the admissibility of evidence obtained improperly and illegally. SALA said that the court could at common law admit evidence even if it was obtained by theft.

5. Miss Emily LAU asked about the difference between setting out and not setting out in the Bill that DNA information not obtained in accordance with the Bill was inadmissible in court. SALA said that if a requirement was not set out in the Bill, the court would follow common law principles in determining the admissibility of a piece of evidence. If a requirement was set out in the Bill, the court would follow the requirement in the legislation when determining the admissibility of a piece of evidence.

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6. PAS(S)E said that the Administration had consulted the Department of Justice on the issue and was advised that there was a need to maintain consistency between different pieces of legislation. The Bill had already provided clear and ample safeguards on the taking of samples. The Administration had undertaken to develop administrative guidelines on the proper procedure for sample taking. The admissibility of a piece of evidence would usually depend on the circumstances of each case.

7. Mr CHENG Kai-nam considered that DNA information was not much different from other evidence and therefore should not be treated differently. If it could provide strong evidence about whether a person had committed an offence, it should not be prohibited from being presented before the court. The Chairman said that as DNA information offered very strong evidence, law enforcement officers might be inclined to obtain such information improperly.

8. In response to Miss Emily LAU's question about the checks and balances in the existing legal system on the admissibility of evidence obtained improperly, PAS(S)E said that the court would have regard to legal principles and precedents. SALA added that in exercising its discretion, the court would also seek to ensure fairness to the suspect and avoid abuse of its discretion.

9. The Chairman said that it was a common law principle that an admission statement given involuntarily by a suspect was not admissible in the court. He suggested that the issue of admissibility of evidence obtained improperly should be referred to the Law Reform Commission for follow-up.

Adm

Providing defendants with the statutory right to request service from the Government Laboratory

10. Miss Emily LAU asked whether there were legislative provisions providing defendants with the statutory right to request service from the relevant government laboratory in overseas countries.

11. PAS(S)E responded that she was not aware of such a provision in the relevant legislation of overseas countries. CSP(CS) said that the addition of such a provision might have resource implications. A defendant could also use this right to delay a trial through keep on requesting the Government Laboratory to perform various analyses. He added that where claims of a reasonable nature were made to the Police, the Police would usually investigate into the claims.

12. Miss Emily LAU said that she would not insist on the addition of such a provision in the Bill, if similar provisions were not found in relevant overseas legislation. She suggested that the Administration should undertake to state in its speech during the resumption of Second Reading debate on the Bill that reasonable

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Adm requests by defendants for service by the Government Laboratory would be entertained. PAS(S)E agreed to look into the suggestion.

Binding effect of the Bill on the State

13. The Chairman asked about the binding effect of the Bill on the State. He drew members' attention that the Administration had yet to revert to the relevant Panel of the Legislative Council on whether the Personal Data (Privacy) Ordinance (Cap. 486) should bind the State.

14. SALA said that section 66(1) of the Interpretation and General Clauses Ordinance (Cap. 1) provided that "No Ordinance (whether enacted before, on or after 1 July 1997) shall in any manner whatsoever affect the right of or be binding on the State unless it is therein expressly provided or unless it appears by necessary implication that the State is bound thereby." Although there was no express provision to make the Bill binding on the State, whether the Bill had an implied binding effect on the State would be a matter for the court to decide. It might be necessary to examine the circumstances of each case to decide whether there was an implied binding effect. If there was a clear legislative intent that the Bill should bind the State, it would be more desirable for an express binding provision to be added to the Bill.

15. Miss Emily LAU asked whether a piece of legislation would be binding on the State only if consent was given by the State. She said that as the Basic Law provided that Hong Kong residents and other persons in Hong Kong had the obligation to abide by the laws in force in the Hong Kong Special Administrative Region (HKSAR), she questioned why section 66(1) of Cap. 1 provided that no legislation would be binding on the State unless it was binding by express provision or by necessary implication. She questioned how a piece of legislation could be binding on any person but not on the State. Referring to paragraph 12 of the Administration's paper, she asked whether a State official who committed an offence under the proposed section 59G(2) of the Police Force Ordinance (Cap. 232) (PFO) would be arrested.

16. PAS(S)E said that the proposed legislation applied to all individuals in HKSAR, including State officials. Execution of duty or obedience to superior orders is not a defence in a criminal prosecution. If it was proposed that a piece of legislation would be binding on the State, the State should be consulted. The Administration considered that it was not necessary to include an express binding provision, as the purpose of the Bill was for the investigation and detection of crime in Hong Kong.

17. SALA said that if a piece of legislation was not binding on the State but binding on any person, there might be practical difficulties in implementation. Miss Emily LAU asked whether there would be any difficulties in enforcement, especially against State officials, by the Police if the Bill was passed in its present form. CSP(CS) said that if any person was found to have contravened the proposed legislation, the Police would arrest the person concerned.

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SALA 18. In response to the Chairman, SALA said that there were Ordinance which expressly provided that they were binding on the State. The Chairman requested SALA to provide a list of existing legislation which were binding on the State, and a classification of their nature.

19. In response to members' question about the effect of adding an express binding provision to the Bill, SALA said that if there was an express binding provision, the State could not instruct its officials to access information in the DNA database other than for the purposes as specified in the proposed section 59G(2) of PFO.

20. The Chairman said that without an express binding provision on the State, a State official who hacked the DNA database from outside Hong Kong might not be in contravention of the proposed legislation. PAS(S)E said that legal advice had confirmed that as the DNA database was kept within the territory of HKSAR, the situation could be dealt with by the proposed legislation. As the issue might involve cross-boundary crime, it would also be dealt with in the same manner as other cross-boundary crimes. Actions could therefore be taken against the person who hacked the database. She reiterated that the criminal offence provisions in the Bill were adequate as they applied to all individuals in HKSAR. The Administration hoped that the Bill could be passed within the current legislative session, while the binding effect of the proposed legislation on the State could be dealt with under the Administration's comprehensive review on the issue. Miss Emily LAU considered that it should be a fundamental principle that all local legislation should be binding on the State and exemptions should only be considered for individual legislation.

21. The Chairman said that as Article 19 of the Basic Law provided that the courts of HKSAR had no jurisdiction over the acts of State such as defence and foreign affairs. He expressed concern that if a State official was arrested for contravening the proposed section 59G(2) of PFO, the court might not be have the right to adjudicate the case. PAS(S)E responded that the Bill was in no way related to acts of State, which were matters such as defence and foreign affairs.

Adm 22. The Chairman requested the Administration to reconsider the need to add a binding provision on the State.

II. Date of next meeting

23. Members noted that the next meeting had been scheduled for 30 May 2000 at 12:45 pm to continue discussion with the Administration.

24. There being no other business, the meeting ended at 12:35 pm.

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Legislative Council Secretariat
19 July 2000