

立法會
Legislative Council

LC Paper No. CB(2) 2507/99-00
(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, 3 April 2000 at 1:00 pm
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

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) 1380/99-00(01))

Members continued to discuss the Administration's paper on the circumstances under which DNA information would be stored, destroyed and who might use information in the DNA database.

Destruction of DNA samples and DNA information

2. The Chairman recalled that the Administration was requested at the previous meeting 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. He asked about the Administration's response on the suggestion.

3. Senior Chemist (Biochemical Sciences B) (SC(BSB)) responded that although the suggestion was viable from a technical point of view, it was practically inappropriate to implement the suggestion. DNA analysis involved a series of steps and the addition of chemicals in the treatment of samples. For hygiene reasons and the fact that the Government Laboratory did not have information about the person from whom a sample was taken, it was not practical to deliver the sample to the person concerned. Principal Assistant Secretary for Security E (PAS(S)E) said that the destruction of samples was dealt with in proposed section 59H of the Police Force Ordinance (Cap. 232) (PFO), which provided for the destruction of samples as soon as practicable when a suspect was not charged, charged but the charge was withdrawn, discharged before conviction or acquitted of an offence on appeal. It was therefore not possible to deliver a sample to the suspect concerned since the sample would have already been destroyed. She added that the destruction of DNA information would be made in the same way as that for other personal information. The Chairman requested the Administration to consider informing the suspect in writing that the DNA sample and information had been destroyed. PAS(S)E agreed to look into the suggestion.

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Use of DNA information for other purposes

4. As regards the use of DNA information in the DNA database, the Chairman said that it should be expressly provided in the Bill that the use of information in the DNA database was confined to the analysis of DNA information using polymerase chain reaction technique. He expressed concern that future technology might advance to such a stage that some form of "genetic personality profiling", such as the analysis of a person's sexual orientation or anti-government inclination, might be possible even only with the information in the DNA database.

5. PAS(S)E responded that as provided in the Bill, the taking of a sample 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. It was thus not permissible under the Bill to take a sample from a person merely for curiosity or for the purpose of analyzing his sexual orientation. She added that proposed section 59D of PFO provided that DNA information could not be used for purposes other than the investigation of any offence. Senior Government Counsel (SGC) added that proposed section 59G(2)(i) of PFO provided that no person should use any information stored in the DNA database except for the purpose of forensic comparison with any other DNA information in the course of investigation of any offence.

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6. The Chairman requested the Administration to consider adding a provision in the Bill to prohibit the analysis of DNA information for other purposes, such as "genetic testing" or "genetic personality profiling".

Binding effect of proposed section 59G of PFO on the State

7. The Chairman asked whether proposed section 59G of PFO would be binding on State Organs. SGC responded that there was no provision in the Bill which expressly excluded it from binding on State Organs. SC(BSB) added that the Bill did not provide for the exchange or disclosure of information in the DNA database to any organization or third party. Providing such information to any party, including State Organs or the Social Welfare Department, would be a criminal offence under the Bill. Chief Superintendent of Police (Crime) (CSP(C)) added that under proposed section 59G(2)(i), no person should have access to any information stored in the DNA database unless for forensic comparison in the course of investigation of any offence by a police officer or an officer of the Independent Commission Against Corruption (ICAC).

8. The Chairman considered that the phrase "No person shall have access" would not be binding on State officials if the Bill itself was not binding on the State. He added that the Interpretation and General Clauses Ordinance (Cap. 1) had already been amended to the effect that an Ordinance would not be binding on the State unless there was an express provision setting out its binding effect on the State. In this connection,

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Senior Assistant Legal Adviser (SALA) drew members' attention to the provision in section 66 of Cap. 1 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". The Chairman requested the Administration and SALA to examine the viability of adding a provision in the Bill setting out that the provisions on DNA database would bind the State.

Overseas experience

9. In response to Miss Emily LAU, PAS(S)E said that the Administration was preparing a comparison of the Bill and similar legislation in about four overseas countries.

Issue of providing defendants with the statutory right to request service from the Government Laboratory

10. Mr Albert HO asked whether it was permissible under the Bill for a defendant or his lawyer to provide a sample to the Government Laboratory and request the latter to carry out DNA analysis and forensic comparison with DNA information in the relevant case. He said that there seemed to be no provision in the Bill which dealt with this situation.

11. SGC said that in the drafting of the Bill, attention had been focussed on the investigating power of police officers and officers of ICAC. Consideration had not been given to whether a defendant could request the Government Laboratory to carry out such analysis and forensic comparison. SC(BSB) said that if there was a specific criminal case, the Government Laboratory would be required under the law to disclose DNA information relevant to the case to both the prosecution and the defendant concerned. She said that the Government Laboratory had entertained similar requests in the past. If a request was unrelated to crime, the Government Laboratory could exercise its discretion in deciding whether or not to accept the request. PAS(S)E added that the situation would be dealt with as in the case of other evidence. In this connection, SALA said that it was a principle in law that no one had the exclusive right to any evidence or witness.

12. Mr Albert HO reiterated that there was no provision in the Bill that allowed a defendant or his lawyer to provide a sample to the Government Chemist and request it to carry out DNA analysis and forensic comparison with the relevant DNA information related to the criminal case. He considered that even an administrative undertaking in this respect would not be adequate. An enabling provision for this purpose should be added to the Bill. He said that a man accused of raping a woman might be able to provide other samples obtained from the crime scene, such as from a curtain or other clothes, to prove that he had previous sexual relationships with the woman in the past. The man might not have the right under the Bill to obtain DNA information for

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forensic comparison which would be useful for substantiating his case.

13. CSP(C) said that the example quoted by Mr Albert HO was related to the thoroughness of investigation by the Police. He said that if there was a claim that other evidence or information was available, the Police had to investigate into the claim regardless of whether it was related to DNA information or other evidence. To proceed in an imbalanced manner would lead to serious problems when the matter was referred to the Department of Justice for prosecution. It would also be subject to serious criticism by the court. The Chairman said that the Police could choose not to believe in the claim. He considered that a defendant should be allowed to make such a request especially given that it was related to the innocence of a person suspected of committing a serious arrestable offence. CSP(C) assured members that if an allegation was reasonable, the Police would try its best to carry out investigation. It would try to investigate every allegation from both sides before making the prosecution.

14. SALA said that under proposed section 59F of PFO, a person who had attained the age of 18 years could voluntarily give an authorization to a police officer to take a non-intimate sample from him for the purposes set out under proposed section 59G(2) of PFO, which included producing evidence in court proceedings. However, this applied to non-intimate samples only.

15. The Chairman said that even where a defendant could provide a sample to the Government Laboratory and request it to carry out DNA analysis, the Government Laboratory might not be able to carry out forensic comparison on the sample, as proposed section 59G(2)(i) only provided for forensic comparison in the course of investigation of any offence by a police officer or officer of the ICAC. He added that under proposed section 59G(1) of PFO, the DNA database would be maintained by the Government Laboratory on behalf of the Commissioner of Police (CP). He expressed concern that the Police had already been delegated authority on a wide range of matters. He considered that the DNA database should belong to an independent third party, such as the Government Laboratory, rather than the Police. Mr Albert HO added that if the Police decided not to give consent for access to the DNA database, it would not be possible to carry out forensic comparison between the DNA information of the sample provided by the defendant and information in the DNA database.

16. PAS(S)E responded that the issue might be dealt with under proposed section 59G(2)(ii) of PFO, which provided for the use of information stored in the DNA database for producing evidence in proceedings. She added that the DNA database would not belong to the Police. It would be maintained by the Government Laboratory on behalf of CP since the Police was involved in the investigation of most criminal cases and the keeping of all criminal records. CSP(C) added that results of forensic comparison would mostly be kept in the criminal records, which was currently maintained by CP. The Chairman expressed doubt about whether there was a close relationship between DNA information and criminal records. SC(BSB) said that the

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DNA database would not store any personal particulars which could identify the person from whom the sample was taken. Reference to the records kept by the Police would therefore be necessary to identify the case to which the information was related. SALA said that although the DNA database belonged to CP, it was a principle in law that no one had the exclusive right to any evidence or witness. Therefore, if the defendant or his lawyer was aware of any evidence relevant to the case, they were entitled to make an application to summon the person concerned to give such evidence or produce such record in court.

17. Mr CHENG Kai-nam said that the Police would usually need to use information in the DNA database since it had a need to establish cases of crime. He added that there might be a need to set out more clearly that the DNA database would not belong to the Police.

18. Mr CHENG Kai-nam asked whether approval from CP would be needed for the forensic comparison of a sample provided by a defendant with the DNA information of other samples related to the case. SC(BSB) responded that under the existing situation where there was no DNA database, forensic comparison of a sample provided by a defendant with the DNA information of other samples relevant to the case would not require approval from CP. Mr CHENG Kai-nam pointed out that under the Bill, the DNA database would be maintained by the Government Chemist on behalf of CP. SC(BSB) said that the provision that the Government Chemist would maintain the DNA database on behalf of CP might not necessarily mean that approval of CP would be required for forensic comparison with information in the DNA database. PAS(S)E added that the Bill did not set out that the DNA database was subject to the exclusive use of CP or that approval from CP would be required for forensic comparison with information in the DNA database. The Chairman expressed concern that the drafting of the provision would provide CP with the ultimate power of deciding whether to allow forensic comparison with information stored in the DNA database. In extreme cases, CP might prohibit forensic comparison with information in the DNA database even though the request for comparison was a reasonable and lawful one. He said that the provision should be deleted if it had no particular purpose. Mr Albert HO shared the same view. PAS(S)E agreed to look into the issue.

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19. In response to the Chairman, SC(BSB) said that there were both local and overseas laboratories which provided DNA analysis similar to those provided by the Government Laboratory. However, she had no information about the professional standard of these local laboratories. Miss Emily LAU said that the court might not accept the results of forensic comparison provided by a laboratory other than the Government Laboratory. Mr Albert HO asked whether DNA analysis results provided by a local laboratory other than the Government Laboratory had previously been presented before a court in Hong Kong. SC(BSB) responded that while she was not aware of whether such information was presented in criminal cases, she was aware that such information had been presented in civil cases.

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II. Date of next meeting

20. Members noted that the following meeting had been scheduled for 7 April 2000 at 4:30 pm to continue discussion with the Administration.

21. There being no other business, the meeting ended at 2:30 pm.

Legislative Council Secretariat

22 June 2000