

立法會
Legislative Council

LC Paper No. CB(2) 159/00-01

(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 Friday, 16 June 2000 at 8:30 am
in the Chamber 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

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

Further Committee Stage amendments (CSAs) to be moved by the Administration

At the invitation of the Chairman, Principal Assistant Secretary for Security E (PAS(S)E) briefed members on the Administration's paper tabled at the meeting.

(Post-meeting note : The paper tabled at the meeting was issued to absent members vide LC Paper No. CB(2) 2390/99-00(01) on 19 June 2000.)

Replacement of the word "involved" with "committed"

2. PAS(S)E informed members that as advised by the Prosecutions Division of the Department of Justice (D of J), section 89 of the Criminal Procedure Ordinance (Cap. 221) (CPO) provided that "any person who aids, abets, counsels or procures the commission by another person of any offence shall be guilty of the offence". In view of this, the Administration had drafted a CSA to replace "involvement" with "commission of the offence by". Chief Superintendent of Police (Crime Support) added that the Police was very concerned about the proposed CSA, as it might result in more challenges during cross examination before the court against the frame of mind of the authorizing officer at the time of giving authorization.

3. Miss Emily LAU expressed support for the draft CSA. She said that even if the Police could prove the involvement of a person in an offence, it did not necessarily mean that the person could be charged for the offence. CSP(CS) said that the issue would depend on whether the person could give a reasonable explanation.

4. The Chairman said that the draft CSAs would probably make law enforcement officers more cautious in giving authorization for the taking a non-intimate sample. He expressed support for the CSAs.

5. PAS(S)E informed members that besides the draft CSAs as set out in the

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Administration's paper, another CSA would be moved to amend the word "involved" in proposed section 54AA(4)(a) of the Dangerous Drugs Ordinance (Cap. 134) to "committed". Corresponding amendments would also be made to other parts of the Bill.

Providing that information in the DNA database could be used for purposes under the Coroners Ordinance (Cap. 504)

6. PAS(S)E said that in response to members' request at recent meetings, a CSA had been incorporated to provide that information in the DNA database could be used for purposes under the Coroners Ordinance.

7. The Chairman asked whether "holding an inquest" included the investigation process before hearings by the Coroner's Court. Senior Assistant Legal Adviser (SALA) said that the use of "holding an inquest" in the CSA should be adequate for covering the investigation process before court hearings. PAS(S)E shared the same view. Nevertheless, she undertook to re-examine the wordings to ensure that they covered the use of the DNA database in the investigation process.

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Issue of binding effect of the Bill on the State

8. PAS(S)E informed members that the Administration had reconsidered the issue and maintained the view that there was no need to expressly provide in the Bill that it was binding on the State. It had no plans to consult the Central People's Government on the binding effect of the Bill on the State.

9. Miss Emily LAU asked whether the Bill would be in contravention of Article 22 of the Basic Law (BL22) if it was not binding on the State. SALA said that under the common law, if a piece of legislation was binding on every individual and an individual would be liable criminally for an offence regardless of the organization he worked in. He also pointed out that BL22 provided that "All offices set up in the Hong Kong Special Administrative Region by departments of the Central Government, or by provinces, autonomous regions, or municipalities directly under the Central Government, and the personnel of these offices shall abide by the laws of the Region.", the drafting would mean that the Article would not cover offices set up outside the territory of the Hong Kong Special Administrative Region (HKSAR).

10. Referring to section 66(1) of the Interpretation and General Clauses Ordinance (Cap. 1), Miss Emily LAU asked whether it provided that a piece of legislation would not be binding on the State if it was not expressly provided so. SALA said that it was the case, and that if there was no such express provision, section 66(1) of Cap. 1 could be seen as providing the legislature or the Government with an option whether to expressly provide whether a piece of legislation should bind the State. Miss Emily LAU commented that the previous amendment to section 66 of Cap. 1 was in contravention of BL22.

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11. The Chairman said that certain diplomats and members of the former Sino-British Joint Liaison Group enjoyed immunity from prosecution in HKSAR. He asked whether such immunity was enjoyed by State officials. SALA said that he did not have such information on hand and could find out if necessary.

12. In response to Miss Emily LAU's question on whether a State organ would commit an offence for ordering its official to access the DNA database, SALA said that as there was no express provision to make the Bill binding on the State, the State organ might not contravene the Bill in making such an order. However, any person who disclosed, used or accessed information in the DNA database other than for the four purposes as set out in the proposed section 59G(2) of the Police Force Ordinance (PFO) would commit an offence under the Bill. Thus, the person executing the order would commit an offence. He added that at common law, officers acting in the course of duty were liable criminally if their acts had infringed the criminal law. Performance of duty or execution of superior orders was not a defence.

13. Miss Emily LAU said that as BL22 provided that all offices set up in HKSAR by State organs had to abide by the laws of HKSAR, the Bill should expressly provide that it was binding on the State. PAS(S)E responded that there was no conflict between the application of the criminal offence provision in the Bill to every individual and the provisions in BL22.

14. The Chairman said that even if the Liaison Office of the Central People's Government in the HKSAR was found to possess some information belonging to the DNA database, it could choose not to return the information if there was no express provision to bind the State. PAS(S)E said that the recovery of such information could be made by way of civil procedures. SALA said that under BL22, both the Liaison Office of the Central People's Government in the HKSAR and its officials had to abide by the laws of Hong Kong.

15. SALA said that section 66(1) of Cap. 1 provided that a piece of legislation would be binding on the State if the binding effect was expressly provided or if it was binding by necessary implication. He added that the test of "necessary implication" was that if the implementation of an Ordinance would be totally frustrated by being inapplicable to the State, the Ordinance would bind the State by necessary implication. The Chairman said that under such a definition, the Bill seemed to be not binding on the State by necessary implication. He asked the Administration to confirm whether the Bill was binding on the State by necessary implication. PAS(S)E said that the Administration had consulted D of J, which stated that the issue was a controversial and new one. As there was no precedent relating to the issue and the circumstances might vary from one case to another, it would be inappropriate to speculate what the view of the court would be on the issue. She added that D of J considered that the proposed section as presently drafted had provided adequate coverage to catch all persons responsible for any contravention. There was no need for an express

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provision to make the Bill binding on the State.

16. The Chairman said that the Administration was irresponsible to say that it was up to the court to determine whether the Bill was binding on the State by necessary implication. He considered that legislation should not be unclear in respect of its binding effect. PAS(S)E responded that the Administration was not irresponsible. She said that she could not identify any loophole in the proposed legislation.

17. The Chairman said that he would move CSAs to expressly provide that the Bill would be binding on the State. Miss Emily LAU expressed support for the proposal. SALA said that the CSA could be made by the addition of a binding provision to the proposed section 59G of PFO, which set out the requirements on the use, disclosure of and access to information in the DNA database. In giving the Administration's initial response, PAS(S)E said that the Administration was opposed to the Chairman's proposal, as it was not needed.

18. In response to Miss Emily LAU's question on whether provisions about "any person" could be found in the two existing pieces of legislation which expressly provided for its binding effect on the State, SALA said that such a provision was not found in the two existing pieces of legislation.

Issue of whether the court would have the power under the Bill to order for producing evidence in any proceedings

19. Senior Government Counsel (SGC) said that the Prosecutions Division of D of J had been consulted on the issue and had confirmed that the court had the power to order for the production of evidence in any proceedings. SALA added that both CPO and the Magistrates Ordinance (Cap. 227) provided that a judge could order the production of evidence, if he considered it necessary.

Restrictions on the use of samples and results of forensic analysis

20. The Chairman said that the provision in the Bill for the use of samples and DNA information derived therefrom for investigation of any offence should be narrowed down to the investigation of any serious arrestable offence. He put the proposal to vote. As one member expressed support for and one member opposed to the proposal, the Chairman concluded that there were divided views on the issue and therefore he would move CSAs to this effect in his own name. In this connection, CSP(CS) said that the proposal would create practical difficulties for the Police. It might result in circumstances where investigation revealed that the offence was not a serious arrestable one and thus the DNA information could not be used as evidence in the prosecution of the person found to have committed the offence. The Chairman said that this was in line with the requirement in the Bill that the trigger point for the taking of a sample had to be a serious arrestable offence, which meant that a sample could not be taken if the offence was not a serious arrestable one.

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Way Forward

21. The Chairman concluded that subject to the CSAs to be moved by the Administration, the Bills Committee supported the resumption of Second Reading debate on the Bill at the Council meeting of 26 June 2000. A verbal report would be made to the House Committee at its meeting in the afternoon, followed by a written report in the following week. He reminded members that the deadline for giving notice of CSAs would be the midnight of the same day.

22. There being no other business, the meeting ended at 9:56 am.

Legislative Council Secretariat

19 September 2000