A Note for the 10th Bills Committee Meeting on the Dangerous Drugs, ICAC and Police Force (Amendment) Bill 1999 to be held on 28 April 2000

The Human Rights Implications of the Bill

PURPOSE

This paper informs Members how the human rights angle is addressed by our proposals in the Bill.

BACKGROUND

2 At the 3rd Bills Committee meeting held on 28.2.2000, some Members advised that the Administration should reconsider the Privacy Commissioner's suggestion in respect of the non-consensual taking of non-intimate samples. It should require prior judicial authorisation to ensure that the rights of the subjects are properly safeguarded. Members have also enquired whether the Administration has taken on board the other comments of the Privacy Commissioner on the Bill during its drafting.

DETAILS

Prior Judicial Authorisation for Taking of Samples

3 Under our current proposal, the taking of intimate samples requires both the consent from the subject and judicial authorisation. Non-intimate samples can be taken, with or without the subject's consent, if the following conditions are fulfilled –

(a) the person is dealt with or detained pursuant to section 10A of the ICAC Ordinance (Cap.204), is in police detention, or is in custody

on the authority of a magistrate or court; and

(b) an ICAC officer of the rank of Senior Commission Against Corruption Officer or above, or a police officer of the rank of Superintendent or above, authorises the taking of the sample.

The above proposals are in line with the recommendations by the Law Reform Commission (LRC) made in its Report on Arrest.

4 In fact, the issue of whether there is a need for prior judicial authorisation for the taking of non-intimate sample if no consent is given by the person concerned has been thoroughly considered by the Administration during the drafting stage of the Bill. We note that the then Working Group formed to study the LRC Report (the WG) suggested in 1996 to introduce the mechanism of judicial authorisation in view of the potential intrusiveness of non-consensual taking of non-intimate samples. However, we considered that with the rapid technological advancement, we should review the need for such a mechanism.

5 The forensic DNA analysis has advanced tremendously in the past few years. Instead of requiring a relatively large amount of samples (usually blood), a buccal cell sample obtained by a swab from the inside of the cheek part of the mouth of a person is now sufficient for the purpose of forensic DNA analysis. This means that we will increasingly rely on the taking of a buccal swab for crime investigation purposes. The process of taking of buccal swab is entirely painless, quick, with relatively low degree of interference and is able to produce a full DNA profile using sophisticated analytical instruments. It is misleading and factually incorrect for the Hong Kong Human Rights Monitor to say in its written representation, which was

tabled at the 3rd Bills Committee meeting on 28.2.2000, that the taking of a non-intimate sample of buccal swab means "to have a finger forcibly inserted into their (the persons whose sample will be taken) mouth". Moreover, it is stipulated in the proposed section 59C(6) of the Police Force Ordinance that the buccal swab can only be taken by a registered medical practitioner, police officers or public officer working in the Government Laboratory who has received training for the purpose.

6 Overseas countries, including United Kingdom and the United States, also classify buccal swab as a kind of non-intimate sample. This, to a certain extent, reflects the widely accepted fact that the taking of a non-intimate sample of buccal swab is relatively non-intrusive. We do not agree with the Hong Kong Human Rights Monitor's allegation that our proposal is "a serious erosion of liberty". The Bill has already provided the statutory conditions under which non-intimate samples can be taken. In addition to those statutory conditions, we will also devise strict internal guidelines to govern the procedures of the taking of samples.

7 In view of its non-intrusiveness and the importance of enhancing the capability of our law enforcement agencies in investigating crimes, we consider that prior judicial authorisation should not be needed for the taking of non-intimate samples of buccal swab. We have also explained in the previous Bills Committee meeting that, for the taking of some other non-intimate samples in certain circumstances, it is important to have the samples taken timely and efficiently, for example, when the material from which a sample is to be taken may be destroyed by the subject easily. Such scenario may not allow the time to seek judicial authorisation before taking the samples. Nonetheless, we appreciate Members' concern regarding the taking of some of the non-intimate samples, such as armpit hair, without

consent. We are now reconsidering the issue of the classification of intimate and non-intimate samples and will revert to the Committee in due course.

Comments from the Privacy Commissioner for Personal Data (PC)

8 We consulted the Privacy Commissioner (PC) in the process of drafting our Bill and had taken on board most of the suggestions raised by the PC where appropriate. With the agreement of the Office of the PC, a copy of the PC's relevant letter is attached. These suggestions include –

(a) including in the interpretation of the "appropriate consent" of person under the age of 18 years, both the consent of that person and of his parent/guardian. This is to safeguard the rights of the minor by preventing the occurrence of the situation where the parent consents to the taking of sample against the will of the minor;

(b) including provisions in the Bill allowing the person concerned to have access to the DNA information which relates to himself/herself;

(c) including in the proposed section 10G of the ICAC Ordinance and the proposed section 59H of the Police Force Ordinance a maximum period of 12 months, unless extended, regarding the disposal of samples and records for cases in which a decision has been made not to charge the suspect;

(d) including in the Bill provisions requiring the destruction of original

samples and records other than DNA information relating to persons convicted of serious arrestable offence;

(e) making it clear in the proposed section 59G that the access to the DNA database and the disclosure or use of the DNA information in the database will be restricted "to the extent necessary" for the specified purposes; and

(f) including in the proposed section 59D(3) and 59G(3) an imprisonment sanction, on top of the fine penalty, to better deter unauthorised use of samples, forensic analysis results and DNA information.

9 All of the above seek to uphold the rights of individuals by introducing a stricter control on the access to, disclosure, use and disposal of the samples, records and DNA information taken under the proposed legislation and enhance better privacy protection.

10 Regarding the PC's suggestion that non-consensual taking of non-intimate samples should require prior judicial approval, our position has been explained in paragraphs 4 to 7.

11 The objective of the Bill is to provide the law enforcement agencies with the statutory power to obtain body samples from suspects for crime investigation purpose, subject to the appropriate safeguards as proposed in the Bill. While it is important to enhance our enforcement capability for the benefit of the general public, there is no dispute that it is equally important that the rights of individuals are safeguarded. As indicated in the Legislative Council Brief on the Bill, the Department of

Justice advises that the proposals as set out in the Bill are consistent with the human rights provisions of the Basic Law. The use of DNA information of a suspect for general investigation of undetected crime is also a practice adopted by overseas countries including the United Kingdom, United States and Australia, which are also State Parties to the International Covenant of Civil and Political Rights. We consider that it is justifiable in the wider public interest to provide such power in view of the law enforcement needs for combating crime and upholding the public safety of Hong Kong.

ADVICE SOUGHT

12 Members are invited to note the content of the paper.

Security Bureau
17 April 2000

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個人資料私隱專員公署的信頭
Letterhead of Office of the Privacy Commissioner for Personal Data

Our Ref: PCO 2/8
Your Ref: SBCR 11/2801/88 pt. 21

21 May 1999

Secretary for Security
Government Secretariat
Lower Albert Road
Hong Kong

Attn: Mr Raymond H C Wong

By Fax : 2810-7702

Dear Raymond,

Police Force, Dangerous Drugs and
Independent Commission against Corruption (Amendment) Bill

Thank you for your letter to Mr Stephen Lau enclosing a copy of the above-captioned Bill ("the Bill") for our comments. Mr. Lau has asked me to reply on his behalf.

Our comments and queries on the Bill are set out in the attachment to this letter. Please note that they are given pursuant to the statutory duty of the Privacy Commissioner for Personal Data to examine proposed legislation that, may affect privacy in relation to personal data and to report his findings to the party proposing the legislation (section 8(1)(d) of the Personal Data (Privacy) Ordinance refers). As we consider such legislation from the general perspective of its impact on privacy in relation to personal data, our comments and queries cover policy, as well as strictly legal, matters.

If you have any queries concerning the contents of the attachment, please do not hesitate to contact the undersigned.

Yours sincerely,

(Robin McLeish)
for Privacy Commissioner
for Personal Data

Encl.
c.c. SHA (Attn: Mr Ng Hon Wah) (w/encl.)

Attachment

Police Force, Dangerous Drugs and
Independent Commission against Corruption (Amendment) Bill
(4th Working Draft)

(a) The definition of "appropriate consent"

We note that, in respect of a minor, pursuant to this definition consent for the taking of the various types of samples covered by the Bill means the consent of his or her parent or guardian. We query the acceptability of this, particularly in relation to older minors. Under the proposal, the situation could arise whereby a parent's consent is given contrary to the wishes of the minor who is perfectly able to understand the implications of withholding consent. In our view, it would not be acceptable for a sample to be taken on this basis.

(b) The taking of a non-intimate sample without the consent of the person from whom the sample is to be taken

As a general matter in regard to the relevant articles of the ICCR, a legal requirement of prior judicial approval is considered to provide appropriate protection from the possible abuse of investigative powers by law enforcement bodies (see, for example, the discussion in paragraph 7.53 of the Law Reform Commission report on arrest, August 1992). Having regard to this, we consider that at the very least the non-consensual taking of non-intimate samples should require prior judicial approval, as recommended by the relevant Government Working Group in this case (paragraph 8 of your paper to the LegCo Panel on Security dated 11 February 1999 refers). This is particularly so given that such samples include a swab from the mouth, the taking of which is, in our view, not significantly less intrusive than the taking of an intimate sample, for which prior judicial approval is required under the Bill. We note that the said recommendation was not accepted mainly because of practical concerns about the possible number of applications for approvals that might arise if such a requirement

were imposed (para. 14 of the above-mentioned paper refers). However, without further detailed supporting information we are not convinced that such a requirement would create an unmanageable situation.

(c) The notices given prior to the taking of the samples

We note that these notices do not cover all the matters that a data user is required to inform an individual of when collecting personal data from the individual of which he or she is the subject (see data protection principle 1(3) in Schedule 1 of the Personal Data (Privacy) Ordinance "the Ordinance"). For example, there is no reference to the fact that DNA information obtained from the sample may be transferred to the Government Chemist or to the individual's rights of access and correction with respect to personal data. Accordingly, notwithstanding the giving of the notices provided for in the Bill, separate notices would need to be given to persons from whom samples are taken in compliance with the notification provisions of the Ordinance referred to above.

(d) Destruction of samples/record of analysis/DNA information where the person from whom the samples are taken is not charged, or is acquitted etc.

We note that the draft Bill contains alternative provisions on the destruction of such samples. Of the two sets of provisions, we prefer the provisions that set a maximum limit on such retention of 12 months, as they afford greater protection for the persons concerned against retention of such material for longer than is necessary to fulfil the purpose for which the samples are taken.

(e) Destruction of samples/record of analysis other than DNA information where the person from whom the sample is taken is convicted of a "serious arrestable offence"

We note that with respect to a person who is not charged with, or is acquitted of, a serious arrestable offence etc., provision is made requiring the destruction of the above-mentioned material as well as any DNA information. On the other hand, for a person who is

convicted of a serious arrestable offence, while provision is made for the retention of DNA information, the Bill is silent on what should become of the original sample and any other analysis of that sample. Presumably, it is assumed that on or before such conviction this other material will be destroyed. To prevent unnecessary retention of such material, we would prefer that an express requirement to this effect be included in the Bill.

(f) Use of sample/information derived from analysis of samples/DNA information

We query the provision allowing for the samples covered by this Bill, and information derived from them, to be used in relation to any offence (any dangerous drugs-related offence in the amendments to the Dangerous Drugs Ordinance), prior to the person concerned being convicted of a serious arrestable offence. Given that such samples and information are obtained on the basis of suspicion of involvement in a "serious arrestable offence", their use at that time should in our view be confined to investigation etc. in relation to such an offence. We also note that such a restriction would reduce any temptation to obtain samples for use in an investigation of an offence that is not a serious arrestable offence without the necessary suspicion of the subject's involvement in a serious arrestable offence.

We consider that provision should be added to the Bill to provide for a prohibition on the use of samples and information derived from them between the time of a decision not to charge the person from whom the sample has been taken, or he or she is acquitted etc., and the destruction of the sample. As things stand, it appears that such samples or information may be used in the intervening period for the investigation of some other offence. However, this would be contrary to what we take to be the spirit of the relevant provisions of the Bill.

(g) Use of information stored in the DNA database for administering the database (proposed section 59G(2)(b)(iii) of the Police Force Ordinance refers)

We consider the provision allowing for access to information stored in the DNA database for "administering" the DNA database to be too broad. There are a variety of database administration activities for which there is no requirement to access the information contained in the database being administered. Provision should therefore be made in the Bill restricting access to the information in the database for the purpose of administrative activities to those activities for which such access is *necessary*. Similarly, any disclosure or use of the said information for administering the database should be strictly limited to that which is *necessary* for carrying out this function. This may include removing identifying information prior to use or disclosure.

(h) Penalty for contravention of proposed sections 59G(1) and 59G(2) of the Police Force Ordinance, as provided for in proposed section 59G(3):

We consider the penalty provided for, a fine at level 4, to be too low. In our view, an imprisonment sanction should be provided for to better deter unauthorized access to and use of the information in the DNA database. This would assist compliance with the requirements of the Ordinance to protect personal data from such acts (data protection principle 4 in Schedule 1 refers).

(i) Disclosure of information stored in the DNA database to law enforcement bodies outside Hong Kong

It appears that the proposed section 59G(2) of the Police Force Ordinance would, in effect, prohibit the disclosure of information in the DNA database to an overseas law enforcement body for any of its law enforcement purposes. Please confirm that our understanding is correct.

(j) Drafting Points

(i) Proposed Seventh Schedule in the Dangerous Drugs Ordinance: para. (3)(a) insert “is” after “he”; lines are missing from paras. 3(a)(ii)(A) and 3(a)(ii)(B).

(ii) Proposed section 59A(7) of the Police Force Ordinance: if this is retained, we suggest that a comma be inserted before “if” to avoid possible misunderstanding of its meaning.

Office of the Privacy Commissioner for Personal Data
May 1999