

***EXTRACT***

**立法會**  
***Legislative Council***

LC Paper No. CB(2) 1798/98-99  
(These minutes have been seen by  
the Administration)

Ref : CB2/PL/SE/1

**LegCo Panel on Security**

**Minutes of meeting held on Thursday, 11 February 1999  
at 2:30 pm in Conference Room A of the Legislative Council Building**

- Members present** : Hon James TO Kun-sun (Chairman)  
Hon Albert HO Chun-yan  
Hon LEE Cheuk-yan  
Dr Hon LUI Ming-wah, JP  
Hon CHEUNG Man-kwong  
Hon Gary CHENG Kai-nam  
Hon Andrew CHENG Kar-foo
- Member attending** : Hon LAW Chi-kwong, JP
- Members absent** : Hon Mrs Selina CHOW LIANG Shuk-ye, JP (Deputy Chairman)  
Hon David CHU Yu-lin  
Hon Howard YOUNG, JP
- Public Officers attending** : Item III  
Mr Raymond WONG  
Deputy Secretary for Security 1  
  
Mr Philip CHAN  
Principal Assistant Secretary for Security E  
  
Mr Gordon FUNG  
Assistant Commissioner of Police (Crime)  
Hong Kong Police Force  
  
Mr Harry BLUD

Assistant Commissioner of Police (Service Quality) (Designate)  
Hong Kong Police Force

Mr MAK Man-poon  
Acting Assistant Commissioner of Police (Service Quality)  
Hong Kong Police Force

Item IV

Mr Raymond WONG  
Deputy Secretary for Security 1

Mr Philip CHAN  
Principal Assistant Secretary for Security E

Mr Gordon FUNG  
Assistant Commissioner of Police (Crime)  
Hong Kong Police Force

Dr Betty LAW  
Senior Chemist  
Government Laboratory

Item V

Ms Mimi LEE  
Principal Assistance Secretary for Security (Narcotics)

Mr Carlos LEUNG  
Assistant Director of Social Welfare (Youth and Training)  
Social Welfare Department

Dr Cindy LAI  
Assistant Director of Health (Special Health Services) (Atg)  
Department of Health

Item VI

Mr Stephen FISHER  
Deputy Director of Administration

Mrs Apollonia LIU  
Assistant Director of Administration

Mr Thomas CHAN  
Director of Corruption Prevention, ICAC

Mr Wallace LAU  
Assistant Secretary for Financial Services

Mr Michael LAM  
Government Counsel  
Law Drafting Division  
Department of Justice

**Clerk in attendance** : Mrs Sharon TONG  
Chief Assistant Secretary (2)1

**Staff in attendance** : Miss Betty MA  
Senior Assistant Secretary (2) 1

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**IV. Taking of intimate and non-intimate sample**  
(LC Paper No. CB(2) 1257/98-99(03))

Briefing by the Administration

23. DS/S(1) said that the purpose of the information paper was to seek members' views on the proposed legislation on the taking of intimate and non-intimate samples. There was no statutory provision governing the taking of intimate or non-intimate samples at present. The proposals were drawn up on the basis of the recommendations of the Law Reform Commission and the further study of the recommendation by the Inter-departmental Working Group. The use of DNA analysis had become a very effective tool used by the law enforcement agencies. The degree of interference was relatively low when taking a non-intimate sample by means of buccal swab. In addition to the written consent given by the suspect, prior judicial authorization was required for the taking of intimate samples. For the taking of non-intimate samples, judicial authorization would not be required. To avoid the abuse of power by the Police, the authorization by an officer at the rank of Superintendent or above, who had reasonable grounds for suspecting the person's involvement in a serious arrestable offence for which the term of imprisonment was five years or more, was required for taking intimate and non-intimate samples. Moreover, the suspect would be clearly informed of the grounds for taking the sample and the authorization being given. He stressed that the legislative proposal would be able to strike a balance between the need for effective law enforcement and the protection of rights of individuals.

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Discussion

*Authorization from the court for taking samples*

24. Noting from the examples of successful use of DNA profiling set out in the Annex of the information paper, Mr CHEUNG Man-kwong said that DNA analysis was apparently mostly used in serious offences such as murder and rape. Thus, he considered that the decision on taking an intimate sample could be rested with the court regardless of the imprisonment term of the offence committed by the suspect. DS/S(1) clarified that under the legislative proposal, the taking of samples was determined on the basis of the imprisonment term of the offence in question, i.e. the offence must be a serious arrestable offence for which the term of imprisonment was five years or more. Prior authorization from the court should be obtained in respect of the taking of intimate samples owing to its relatively high degree of interference to the suspect. He pointed out that from a practical point of view, the suspect, if he was the culprit, would likely refuse to consent to the taking of samples to avoid being identified. Given the wide application of DNA profiling, it would be time consuming and impose a great burden on the court if judicial authorization was required for each case. This would also delay the investigation of crimes. It was estimated that about 5 000 non-intimate samples would be collected at the first year upon the enactment of the legislation.

25. Mr CHEUNG Man-kwong opined that should there be some prima facie evidence to support the commission of a serious offence, the court should be empowered to decide on whether intimate samples should be taken from the suspect even if the suspect refused to do so. Mr Albert HO shared Mr CHEUNG's view. He added that the judicial authorization should be obtained in respect of taking intimate samples only when it was absolutely necessary and critical to do so. Under such restrictive scenario, the number of cases for judicial authorization would be reduced.

*Necessity for the taking of intimate samples*

26. In response to the Chairman's enquiry about the differences between a DNA profile given by intimate and non-intimate samples, DS/S(1) said that the analysis of DNA material extracted from intimate and non-intimate samples would give a similar DNA profile of the subject. Senior Chemist /Government Laboratory (SC/ Govt Lab) added that it was not necessary to take an intimate sample from a suspect so as to compare with the intimate sample obtained at the crime scene.

27. The Chairman and Mr CHEUNG Man-kwong asked about the

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rationale for the taking of intimate samples if the DNA profiling results obtained from non-intimate samples would suffice for the analysis. PAS/S(E) responded that the legislative proposal should be able to deal with the future need for the taking of intimate samples. Otherwise, there would be a lack of legal basis when such a need arose. There was indeed a need for the taking of intimate samples, such as a sample of urine was required by the Customs and Excise Department to substantiate whether a person had stored drug inside his body. Moreover, DNA samples kept by the Government Laboratory in respect of outstanding cases were mostly intimate samples obtained by old methods. He said that the legislative intent was to provide more protection to the suspect when the technique with a relatively high degree of interference was adopted for the taking of samples. DS/S(1) added that strict procedures would be laid down.

28. Mr Albert HO asked whether intimate samples could be taken if the suspect refused to cooperate. SC/Govt Lab said that an intimate sample must be taken by a medical practitioner. According to medical advice, the taking of a sample of blood from a person would be dangerous if he refused to do so.

29. Dr LUI Ming-wah asked whether a sample of hair could be used for DNA profiling as it was usually found at a crime scene. PAS/S(E) said that the non-intimate samples taken by means of buccal swab would be more reliable because a sample of hair might be contaminated. SC/Govt Lab said that under the existing DNA profiling technology used in Hong Kong, a sample of hair must consist of hair follicles. DNA profile could be obtained from a sample of hair by other DNA profiling technology which was not adopted in Hong Kong. Consideration was being given to introducing technology in this field. She added that the taking of a hair sample was more intrusive.

30. The Chairman opined that if non-intimate samples were able to give a DNA profile of a suspect, the Administration might consider introducing the proposed legislation in two phases. As the first phase, the Administration might consider obtaining non-intimate samples by taking a buccal cell sample from a suspect. Should the taking of samples prove to be effective and no complaints be lodged against any allegation of abuse of power by the law enforcement officers, the Administration might further consider extending the application to the taking of intimate samples. The taking of intimate samples might be mandatory if it was proved to be necessary and critical for the investigation of serious crimes.

*Overseas experience*

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31. Mr CHENG Kai-nam enquired whether the Administration had made reference to overseas legislation on the taking of intimate and non-intimate samples. DS/S(1) said that DNA profiling technology had advanced tremendously in the recent years, and hence overseas legislation in this regard varied greatly. The legislative proposal was drafted on the basis of the legislation in the United Kingdom (UK). Under the UK legislation on the taking of non-intimate samples, no consent from the suspect was required. While in some countries, such as Canada, judicial authorization was required for the taking of various bodily samples irrespective of whether consent was given by the suspect. As regards the legislation in New Zealand and Australia, the judicial authorization was required when the suspect refused to cooperate. He pointed out that the Administration had also examined the scope of overseas legislation. For example, the legislation on taking DNA samples in Australia was applicable to offences which were liable to an imprisonment term over five years.

*DNA database*

32. In response to Mr Andrew CHENG, PAS/S(E) said that there would be no separate database for storing intimate and non-intimate samples. He pointed out that DNA material extracted from intimate and non-intimate samples would give a DNA profile of the subject in the form of a series of numbers that was highly specific to a person. To avoid doubts on the technique chosen for sampling taking, he said that the Administration might consider spelling out clearly in the proposed legislation that non-intimate samples would be relied on the taking of buccal swab along the inside of the cheek part of the mouth of the subject.

33. Referring to para. 17(j) of the information paper, Mr Andrew CHENG asked for the rationale for taking non-intimate sample from a person who was already convicted. PAS/S(E) said that DNA profiles would be stored in a DNA database to assist in the detection and investigation of crimes in future. The rationale was the same as that for keeping records of fingerprinting. SC/Govt Lab added that experience from Australia and New Zealand showed that about 90% of sex offenders had previous convictions for lesser but still serious crimes. If their DNA profiles were stored in a database at the time they had committed a less serious offence, they could be easily identified when they committed sexual offences.

34. Mr CHEUNG Man-kwong enquired about the application of DNA database in overseas countries. ACP/Crime said that DNA profiles had been stored in DNA database in UK two years ago. SC/Govt Lab

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supplemented that the target groups of DNA database varied in different countries in the light of their respective legislation. In some countries, when a person was suspected for involving in a serious arrestable offence, he was subject to the taking of DNA samples. While in some countries, DNA sample was taken from a person once he was convicted.

35. The Chairman opined that the proposal to take non-intimate sample from a person who was already convicted and to store the profiles in DNA database for future reference should be handled with due care in order not to intrude one's privacy. Mr CHEUNG Man-kwong commented that the proposal set out in para.17(j) of the information paper was too aggressive. The Administration had to take into account the acceptance of the general public on the legislative proposal.

*Criteria for samples taking*

36. Mr Andrew CHENG said that under the proposed legislation, a sample could be taken from a suspect if he was suspected for committing an offence for which the term of imprisonment was five years or more. Since a number of crimes would be liable to an imprisonment term of over five years, he had reservation about whether an imprisonment term of five years was an appropriate criterion for determining the need for taking intimate or non-intimate samples. He enquired whether consideration would be given to confining the application to specific types of offences, such as crimes related to sex and violence. He also requested the Administration to include a list of crimes for which the term of imprisonment was five years or more when introducing the bill. PAS/S(E) said that the Administration might consider spelling out in the proposed legislation the commission of specific crimes which were subject to the taking of intimate and non-intimate samples.

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37. The Chairman said that members generally supported the proposal for the taking of non-intimate sample by buccal swab. He asked the Administration to consider the views of members.

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Legislative Council Secretariat

1 April 1999