The Bar Association's Comments on the Immigration (Amendment) Ordinance Bill 2000

1) The purpose of this Bill is to enable the Director of Immigration (DOI) to specify a genetic test procedure by Notice in the Government Gazette in respect of a person claiming permanent resident status (PRS) on the basis of birth to a permanent resident where DOI is not satisfied that the person making the claim has such status. The Bill also empowers DOI to charge a fee for the test.

2) Genetic testing involves making a comparison between genetic material from a person whose identity is not in issue and a sample from a person whose identity is in issue. If the samples do not match then this will prove a lack of identity between the persons sampled. If there is a match then this enables an expert to determine an approximate number of similar genetic profiles that are similar. It might be that a profile is found in 1 person in every 100,000. Genetic testing does not prove identity but may go a long way to establishing it.

3) There is nothing controversial about the use of genetic tests to determine PRS. In the Right of Abode ("ROA") litigation in 1997-1999 some of the test applicants relied on DNA tests to establish at the outset the fact of parentage by a parent who had PRS.

4) The Bill requires genetic testing to be performed in a manner specified by the DOI. In practice would mean DNA testing carried out on the Mainland by an organ of the PSB. Quality control would, however, be the responsibility of DOI.

5) If the applicant or the claimed parent refuses to undergo such tests then the Bill allows the DOI to draw adverse inferences from the fact of refusal.

6) The Bar sees that there are several legal policy problems with the Bill. They are:

a) The Bill enables the DOI to draw adverse inferences from the fact of the claimant refusing to undergo genetic testing and from the person who the claimant says is a

birth parent. Although it may be possible to draw an adverse inference from a claimant refusing to undergo testing it is illogical to draw an adverse inference against the claimant based solely on the fact of refusal by the claimed birth parent to undergo testing. This is because no law requires a person to submit to genetic testing. The claimed birth parent, in declining to be tested, is only doing that which the law permits and, unlike the claimant, gets no personal advantage from the test. In fact the claimed birth parent may have selfish motives in refusing to undergo testing because if the test throws up a match it would mean that person having to assume parental responsibilities in the HKSAR, including the obligation to pay maintenance, that might not otherwise arise. In this respect the Bill runs contrary to both common sense and ordinary experience. The fact of refusal by a claimed birth parent might, together with other evidence, tend to prove that a claim is probably true. It is odd that DOI cannot draw a positive inference from the fact of refusal in these circumstances for the new provision only enables "adverse" inferences to be drawn. It would make more sense, if claimed birth parents are to be included in the provision, to omit the word "adverse".

b) It is unusual to find in legislation relating to administrative decision-making, where strict rules of evidence do not apply, provision that directly governs the decision-maker's assessment of relevant facts. Decision-makers routinely make decisions based on the drawing of inferences, adverse or otherwise. The reasonableness of those decisions based on the drawing of inferences may be the subject of an application for judicial review. If real the intention behind the "adverse inferences" clause is to encourage persons claiming PRS to make use of Government facilities for genetic testing then that can be achieved in other ways. These would include publicizing the excellence of the facilities and/or making sure that they are cheaper and better than commercial alternatives.

c) The Bill puts a premium on the claimant being tested by a body specified by DOI in order to establish a fact in issue. If a person refuses to be tested (perhaps because he or she has no confidence in the testing system on the Mainland because he or she believes it is corrupt) DOI may only draw adverse inferences

from the fact of refusal notwithstanding the fact that he may believe there is something in what the claimant says. . Normally, where a fact is in issue in an administrative decision-making process a person can prove (or disprove) that fact by any means at his disposal. It appears wrong as a matter of legal policy to give a person who has an interest in the outcome of the issue the power to require that a fact be proved in a particular way.

d) Related to (c), the Bill appears to encourage the DOI to ignore or discount genetic testing by another person. A person claiming PRS may have his or her claim backed up by a reputable independent tester but the Bill appears to enable DOI to draw adverse inferences from the fact of the refusal of the claimant to use Government testing

e) The Bill does not refer to the fact that there is a right of appeal against an adverse determination by DOI. *S.2AD (2)* of the *Immigration Ordinance, Cap. 115* provides that an applicant for a certificate of entitlement aggrieved by a decision of the DOI not to issue the certificate may appeal against the decision to the ("IT"). *S. 2AD(6)* further provides that on an appeal where the IT determines that *on the facts of the cases as it find them* the appellant is a permanent resident, it shall allow the appeal. If the IT determines that *on the facts of the cases it finds them* the appellant is not a permanent resident, it shall dismiss the appeal. However, there is no comparable legislative provision that says that the Immigration Tribunal may draw adverse inferences on the same facts. The promoter of the Bill should be asked to say whether it is his or her view that the provision indirectly governs the IT's decision-making process so that the IT is entitled to draw the same adverse inferences on appeal. (It may be the case that the Secretary for Security takes the view that the adverse inference drawn by DOI is a "fact" for this purpose.)

f) It appears wrong that claimants should bear the costs of genetic testing whatever the result. The claim to PRS is based on facts. PRS status is not something that is in the gift of the DOI. It appears that a claimant might submit to Government

genetic testing and the result show that DOI has made a "wrong call" on the evidence he has rejected. Or it might be that the claimant submits to the test but later relies on testing from an independent source and goes before the IT and succeed there. It seems contrary to notions of fairness that in these circumstances the claimant should have to bear the costs of the Government testing.

g) It also seems wrong for the legislature to approve DOI fixing a fee on a full cost recovery basis without having some idea about how many persons are likely to be required to undergo genetic testing each year. If the numbers are small then the fees may be prohibitively high. (Paragraph 23 of the Legco Brief puts the total cost of establishing the new scheme at about $30 million with additional recurrent costs.) Exemption from the fee in individual cases would depend on the sympathetic exercise of administrative discretion under *s.39A Public Finance Ordinance, Cap. 39*. It is arguably better that Legco should fix the fee at a modest level (or say that there is no fee) than have the situation where the costs are such that individuals have to have recourse to the exercise of administrative discretion as a matter of routine.

7) Some of these comments and criticisms may have constitutional implications under *Article 24 BL* because, arguably, they may actually inhibit the right of persons to establish PRS. As the Security Branch takes the view that there are no constitutional objections to the Bill its representative should be invited to say why this is so in the light of the above observations.

Dated 15th November 2000