**The Administration's response to a letter dated 8 February 2001 from the Legal Service Division of the Legislative Council Secretariat**

## Response to Item (a)

***What inference, adverse or otherwise, if any, could be drawn if the applicant, whilst refusing to undergo the specified test, undergo a self-arranged test by a properly accredited laboratory?***

The revised Section 2AB(8) of the Bill proposed by the Government in its letter of 12 January 2001 provides that the Director of Immigration may draw any inference from the failure of an applicant or his/her claimed parent to undergo the prescribed genetic test as he considers proper.

Where an applicant submits test results from a non-prescribed genetic test procedure (even though by an accredited laboratory), the Director would still assess and consider, among other things, the integrity of the test procedure as well as the accuracy and reliability of the test results. A proper accreditation (as mentioned in the question) is only one of the considerations to be taken into account. There are also other important considerations such as whether the samples were taken properly, whether the samples tested belong to the parties involved in the application, the authenticity of the document setting out the test results, etc. It is necessary for the applicant to establish a clear chain of evidence in the test procedures to ensure the integrity of the test.

The Director may draw an adverse inference, or any other inference, depending on whether he is satisfied with, among other things, the integrity of the test procedure or the accuracy and reliability of the test results obtained through a self-arranged procedure (albeit by an accredited laboratory), if the applicant maintains his refusal to go through the prescribed genetic test.

## Response to Item (b)

***Is there any need to draw any inference at all if the applicant simply refuses to undergo the specified test without submitting himself to any other test of his own? Would that failure itself not be sufficient to enable the Director to refuse his application for lack of additional evidence to support the application, without the need to draw any inference therefrom, bearing in mind the Director has not been satisfied with the available evidence in the first place?***

The revised Section 2AB(8) of the Bill states that "The Director may draw any inference … … …" (emphasis added). Hence there could be instances where the Director of Immigration decides not to draw any inference.

As a general observation, where an applicant refuses to undergo the prescribed test without submitting himself to any other test or producing further evidence to substantiate his/her claim, it is permissible as a matter of law for the Director to refuse the application under Section 2AB(6)(b) of the Immigration Ordinance without drawing any inference under Section 2AB(8) of the Bill and purely on the basis that he (the Director) is not satisfied with the claimed parentage on the available documentary proof submitted by an applicant. However, at the time when the Director requires an applicant to undergo the prescribed test, he will not know whether or not the applicant will consent or refuse to undergo the prescribed test. This means it is only fair that the Director is still required to inform the applicant (at the time of request under the proposed Section 2AB(9)) of the possibility that an inference may be drawn in the event of refusal. As the detailed circumstances of individual cases differ, the Director will consider all applications on a case by case basis in deciding whether an inference should be drawn.

## Response to Item (c)

***What if the applicant and the claimed parent each prefers testing by a different laboratory or set of laboratories? How would this impact on the inference, if any, to be drawn and on the technical aspects of the separate testing and the results?***

In all cases where the applicant submits test results from a non-prescribed genetic test procedure, before deciding what inference (if at all) should be drawn the Director of Immigration would need to assess and consider, among other things, the integrity of the test procedure as well as the accuracy and reliability of the test results. Such consideration and assessment apply equally to cases involving a single laboratory and those involving more than one laboratory.

In the latter case the Director would also take into account factors pertinent to a “split test” environment. Such factors may include whether the laboratories concerned adopt the same technology and procedures, what measures are in place to ensure compatibility (e.g. cross training of personnel, cross checking of test data and results), etc.

## Response to Item (d)

***If an adverse inference is to be drawn from the failure to undergo the specified test, would the applicant be informed and given an opportunity to make representation?***

Since an applicant will have been informed (as required by the proposed amendment) of the possibility of an inference being drawn by the Director from a refusal to submit himself to the prescribed test, it will be a matter for the applicant to make whatever representation he prefers to convince the Director. The easiest way is for the applicant to give an explanation when interviewed or in writing, after the Director has notified the applicant inviting him to undergo the prescribed test. In the letter from the Director of Immigration to the applicant seeking consent to undertake the prescribed genetic test procedure, the applicant will be invited to give reasons in writing in the event of a refusal. Therefore, in every case where the applicant refuses to undergo the prescribed test, he will have been given an opportunity to explain the reason for such refusal before the Director makes a final decision on the application. The Director will only make a determination on the weight of all the materials before him.