

LAW SOCIETY OF HONG KONG

Position paper on the Immigration (Amendment) Bill 2000

The Law Society supports the enactment of legislation to provide right-of-abode claimants with a cheap and simple system to establish parentage by DNA evidence where there is doubt on the documentary evidence. However, such legislation must contain appropriate provisions to safeguard rights of privacy and to prevent abuse of power.

Under article 24(3) of the Basic Law children born outside Hong Kong with at least one parent who is, by the time of birth, a permanent resident, enjoy the right of abode in Hong Kong. The majority of such children are, or are deemed by law to be, resident in the Mainland of China. They are required by Hong Kong law to obtain Certificates of Entitlement to be affixed to one-way exit permits before they may exercise the right of abode. (There is on-going litigation by some right-of-abode claimants who assert that they are unaffected by the Interpretation issued by the NPCSC on 26 June 1999, and the comments herein may not apply to them and others in similar circumstances depending on the final outcome of that litigation, which at the present state of play is known as Civil Appeals 415, 416 and 417 of 2000).

In considering an application for a Certificate of Entitlement the Director of Immigration has to decide whether, as a matter of fact, a person claiming right-of-abode under article 24(3) of the Basic Law is indeed the child of a Hong Kong permanent resident. In most cases the parentage of the claimant will be demonstrated by documentary evidence, such as a birth certificate, stating the names of the parents. In the absence of any justifiable reason to question the provenance or authenticity of such documents, the documentary evidence should be conclusive.

However there will be cases where the documentary evidence is inconclusive. Many persons born on the Mainland do not have proper birth certificates. Some among them, or their HK permanent resident parent, may have changed their names or other particulars of their identity. In such cases DNA evidence is a useful tool to establish parentage.

Under the present law the onus of proof of any claim to right-of-abode is on the claimant: see section 64 of the Immigration Ordinance (Cap 115). There have already been a number of instances of right-of-abode claimants seeking to discharge this onus with DNA evidence obtained privately. They have faced problems in doing so. First, the chain of evidence may be disputed – it is open to the Director to question whether the blood samples on which the DNA tests are done truly came from the claimant and the HKPR parent. Secondly, such tests can only be obtained privately at high cost – as much as

HK\$10,000. There could also be cases where negative DNA test results suggest infidelity on the part of one of the claimant's parents, resulting in disruption of family life.

It is right for the Government to seek to address these problems by establishing a well-regulated system for obtaining DNA evidence to avoid dispute as to the chain of evidence. The system to be set up should prescribe fees no higher than the ordinary person can afford. Economies of scale should be able to keep the cost low. Privacy must be respected so as to avoid disruption of family life amongst persons who had thought themselves to be blood relatives, but are found not to be.

It is noted that the amending bill would empower the Director to draw adverse inferences from a failure to undergo DNA testing (subsection (8) of the proposed amended section 2AB of the Ordinance). The Law Society has reservations about this proposed provision. The existing law already puts the onus on the claimant to establish his or her right-of-abode. That is sufficient to enable the Director, as trier-of-fact, to reject unproved claims to right-of-abode. There should be no need to empower him to draw adverse inferences not least because such a power might prevent the court, in exercising its supervisory jurisdiction by way of judicial review, to quash the Director's decision of fact on grounds of *Wednesbury* unreasonableness.

Further it is noted that subsection (12) of the proposed amended section 2AB would declare that notice from the Government as to (a) the manner of DNA testing and (b) the cost thereof, is not subsidiary legislation. Such a provision already exists with respect to the manner in which Certificates of Entitlement are to be applied for. Any such provision has the effect of ousting the Legislative Council's scrutiny under section 34 of the Interpretation and General Clauses Ordinance (Cap 1) and is objectionable on that ground.

In the circumstances the Law Society supports the amending bill provided that:

- (a) The Director of Immigration must come to a *reasonable* conclusion that the documentary evidence is insufficient to prove parentage before requiring DNA testing;**
- (b) There are adequate provisions to protect the privacy of persons tested and their family or putative family members;**
- (c) The fees or costs to be prescribed are reasonably affordable to the ordinary person;**
- (d) Subsection (8) of the proposed amending Ordinance ('adverse inferences') should be deleted;**
- (e) Subsection (12) of the proposed amending Ordinance ('not subsidiary legislation') should also be deleted.**

**The Law Society of Hong Kong
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