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Paper for the House Committee meeting on 15 June 2001

**Report of the Bills Committee on
Immigration (Amendment) Bill 2000**

Purpose

This paper reports on the deliberations of the Bills Committee on Immigration (Amendment) Bill 2000.

Background

2. Under the Immigration Ordinance (Cap. 115), a person of Chinese nationality born outside Hong Kong to a parent who at the time of his birth was a Hong Kong permanent resident by virtue of his Chinese citizenship is a Hong Kong permanent resident. He may exercise his right of abode in Hong Kong after he has established his status as permanent resident by applying for a Certificate of Entitlement (C of E), unless he already holds a valid Hong Kong Special Administrative Region (HKSAR) passport or permanent identity card.

3. An applicant for a C of E is required by the Director of Immigration (D of Imm) to submit such proof as may be specified to establish his claimed parentage that would entitle him to permanent resident status. According to the Administration, children born out of wedlock, compared to those born within, are less likely to be able to provide sufficient documentary evidence to substantiate their parentage claims.

The Bill

4. The Bill seeks to empower the D of Imm to require genetic tests to be conducted to establish claimed parentage in applications for C of E if the D of Imm is not satisfied with the documentary proof submitted.

The Bills Committee

5. At the meeting of the House Committee on 20 October 2000, Members agreed that a Bills Committee be formed to study the Bill. The membership list of the Bills Committee is in **Appendix I**.

6. Under the chairmanship of Hon Ambrose LAU Hon-chuen, the Bills Committee has held eight meetings with the Administration. The Bills Committee has met with representatives from the Hong Kong DNA Chips Limited and an expert in the field of statistical forensic DNA. The Bills Committee has also considered submissions from the Hong Kong Bar Association and the Law Society of Hong Kong.

Deliberations of the Bills Committee

7. The Bills Committee has studied in detail the provisions of the Bill and the draft Gazette notice concerning the genetic test procedure and fee for the test. The main deliberations of the Bills Committee are summarised below.

Genetic test procedure

8. Under the new section 2AB(7)(a) as proposed in the Bill, the D of Imm may require an applicant for a C of E and his claimed parent to undergo a genetic test conducted in the manner as the D of Imm may specify by notice in the Gazette if the D of Imm is not satisfied with the documentary proof submitted.

9. According to the proposed genetic test procedure as set out in the draft Gazette notice, where an applicant for a C of E is residing in the Mainland, officers of the Exit-entry Administration Division of the Guangdong Provincial Public Security Department will be responsible for taking the tissue specimens of the applicant and his mother (or father) residing in the Mainland, and the test will be conducted by the Criminal Technology Division of the Guangdong Provincial Public Security Department, the designated laboratory for conducting such tests in the Mainland. The Immigration Department (ImmD) will be responsible for taking the tissue specimens of the applicant's father (or mother) residing in Hong Kong and the test will be conducted by the Government Laboratory.

10. As regards C of E applicants residing in places other than the Mainland, namely, Macau, Taiwan or overseas countries, the Administration has advised that those

applicants whose claimed parentage is in doubt will be required to come to Hong Kong to have their tissue specimens taken by the ImmD and tested by the Government Laboratory.

11. Some members have expressed concern about the proposed genetic test procedure. These members are worried that the testing of tissue specimens of an applicant and his claimed parent by two laboratories in two places may give rise to possible errors of wrongly rejecting a true parentage or wrongly confirming a claimed parentage. These members have pointed out that it is an international practice that genetic tests of the tissue specimens of the members of the same family unit are conducted by the same laboratory. They are also concerned about the reliability and accuracy of the test results, as the designated laboratory in the Mainland is not an internationally-accredited laboratory for conducting genetic tests. They have questioned why tissue specimens taken by the Mainland authorities could not be sent to Hong Kong for the genetic tests so as to eliminate human errors and other variations due to conducting tests in two laboratories.

12. Some other members, however, consider that the proposed arrangement of the genetic tests being conducted in two places is appropriate under the principle of "one country, two systems". Such an arrangement would also facilitate the monitoring of the testing process by both sides. If the genetic tests are to be carried out in one place, it would either be necessary to arrange the family members of applicants living in the Mainland to come to Hong Kong for the genetic tests or for the tissue specimens taken in the Mainland to be sent to Hong Kong for the tests. In the former situation, complicated immigration procedures would be involved. In the latter situation, the tissue specimens might be subject to variations during transit.

13. The Administration has explained that although single-lab testing is an example of a good process, it is not the only reliable method. Conducting genetic tests in two places is one of the viable options in terms of technology. Human errors and variations may occur regardless of whether the tests are conducted by one laboratory or collaboratively by two. The Administration has stressed that the comprehensive quality assurance measures in place would ensure that errors and variations are immediately detected, rectified and minimised to the extent that they do not affect the outcome of the analysis. Furthermore, the built-in cross-checking mechanism will help to detect and rectify errors on either side.

14. The Administration has also explained that the proposed arrangement is made as a matter of procedure on the basis of co-operation between the HKSAR Government and the Mainland authorities. The issuance of a C of E is solely within the responsibility of the D of Imm and the D of Imm may, in doubtful cases, require by way of a genetic test proof of parentage in order to issue a C of E to an applicant. The Administration has also explained that C of E holders who are Mainland residents need a One-way Permit to enter Hong Kong to exercise their right of abode. As the issuance of a One-way Permit is solely within the responsibility of the Mainland authorities, the Mainland authorities may, in doubtful cases, require by way of a genetic test proof of parentage in order to

issue a One-way Permit to a Mainland resident. The Administration considers that the proposed arrangement is in the interest of the applicants as the results of the prescribed genetic test will be accepted by both the HKSAR Government and the Mainland authorities for the purpose of their respective processing of C of E and One-way Permit applications.

15. As regards members' concern about the reliability and accuracy of the genetic test results, the Administration has informed members that the Government Laboratory is accredited by the American Society of Crime Laboratory Directors for forensic serology and DNA analysis. Such accreditation status covers the full scope of forensic DNA analysis of which parentage testing is only a part.

16. The Administration has also pointed out that although the Criminal Technology Division of the Guangdong Provincial Public Security Department is not an internationally-accredited laboratory, it will adopt the same technology and procedure as that used by the Government Laboratory which meet international accreditation standard in conducting genetic tests. Both laboratories will also adopt comprehensive quality assurance measures to ensure the reliability and accuracy of test results. The Government Laboratory and the Mainland authorities will exchange the test data and analytical results in respect of an application for comparison and verification before coming to a conclusion. If any incompatibility is detected in the cross-checking process, each side will examine the cause of the discrepancy through traceable records that are kept in accordance with the operating procedures. In the view of the Administration, this built-in monitoring mechanism ensures the reliability and accuracy of the genetic test results and provides safeguards against fraud and abuses. The proposed procedure under which the genetic tests will be conducted in two places will not in any way adversely affect the accuracy of the test results. The test results will be as accurate as if the tests were conducted in one place.

Fee for the test

17. The Bill also seeks to empower the D of Imm to charge a fee for the genetic test. Under the new section 2AB(11) as proposed in the Bill, the D of Imm may, with the approval of the Financial Secretary, specify the amount of the fee charged for the genetic test by notice published in the Gazette.

18. The Administration has explained that a fee for the genetic test will be charged on a full cost-recovery basis. For C of E applicants residing in the Mainland, an estimated fee of HK\$2,600 at 2000-01 price level per application will be charged for the genetic test conducted in Hong Kong for the applicant's claimed parent. The proposed fee level is calculated based on an estimated caseload of 3 000 per year and will be adjusted to 2001-02 price level. The Administration has assured members that the genetic test will be carried out in a cost-effective manner so that the fee will be kept at a reasonable level. Fee reduction or waiver will be considered where justified on a case by case basis. The fee payable for the test conducted in the Mainland for the applicant and, where applicable, his claimed parent shall be paid to the Mainland authorities as specified by

the Mainland authorities. The Mainland side will charge a fee in the region of RMB1,000 per person for the genetic test which is also determined on the basis of full recovery of costs.

Gazette notice on the genetic test procedure and fee for the genetic test

19. Members note that the proposed section 2AB(12) in the Bill specifies that the Gazette notice in respect of the genetic test procedure and the fee for the test as referred to in the proposed sections 2AB(7)(a) and 2AB(11) respectively is not subsidiary legislation.

20. Some members have pointed out that the Criminal Technology Division of the Guangdong Provincial Public Security Department, being the designated laboratory in the Mainland, is not an internationally-accredited laboratory and that the Personal Data (Privacy) Ordinance does not apply to the Mainland authorities. In order that the public would have confidence in the proposed procedure, these members consider that the Gazette notice in respect of the genetic test procedure should be subsidiary legislation so that any change in the procedure will be subject to the scrutiny of the Legislative Council. In addition, they are of the view that the Gazette notice on the fee for the test should also be subsidiary legislation so that any increase in fee will be subject to the scrutiny of the Legislative Council.

21. The Administration has stressed that the designated laboratory in the Mainland will adopt the same technology and procedure as used by the Government Laboratory. Measures will be in place to closely monitor the procedure. Pamphlets on the procedure will be distributed and each applicant will be informed of the procedure and his rights and responsibilities if he is asked to take the test.

22. As regards the question of personal privacy, the Administration has confirmed that the Personal Data (Privacy) Ordinance is binding on the HKSAR Government. The Gazette notice will also clearly state that the tissue specimen taken will be used solely for the purpose of verification of the applicant's claimed parent and child relationship in connection with his application for a C of E. The specimen will be retained for a period not longer than necessary for such purpose.

23. In the view of the Administration, the genetic test procedure and the fees for the genetic test are operational and administrative matters. Some of the procedural arrangements involved are highly technical. Publications by way of a Gazette notice is appropriate and sufficient for compliance by applicants. Enactment of subsidiary legislation on the procedure will unnecessarily complicate the legislative provisions. As regard fee levels, they will be set on a full cost-recovery basis and hence there would not be any question of over-charging. It is therefore not necessary for the Gazette notice made pursuant to the proposed sections 2AB(7)(a) and 2AB(11) to be subsidiary legislation.

24. Some members remain of the view that the Gazette notice in respect of the genetic test procedure and the fee for the genetic test should be subsidiary legislation. Two members propose that amendments be moved by the Bills Committee to this effect. As there were divided views among members, a vote was taken on whether the Bills Committee should move the amendments. Four members voted in favour of the Bills Committee moving an amendment to the effect that the Gazette notice in respect of the genetic test procedure should be subsidiary legislation, one member voted against and one member abstained from voting. As regards whether the Bills Committee should move the amendment to the effect that the Gazette notice in respect of the fee for the genetic test should be subsidiary legislation, four members voted in favour of it while two members abstained from voting.

Power of D of Imm to draw adverse inferences from failure to undergo genetic testing

25. The Bill also empowers the D of Imm to draw adverse inferences from the failure of a C of E applicant or his claimed parent to undergo the prescribed genetic test as he considers proper. This is provided in the proposed section 2AB(8) of the Immigration Ordinance. Some members have expressed reservations about the need for the proposed provision. These members have pointed out that as the burden of proof is on the applicant and the D of Imm is empowered to determine whether a C of E should be issued to an applicant, the proposed provision is unnecessary. Moreover, there may be many reasons, such as family reasons or a high fee charged for the genetic test, that could result in the failure of an applicant or his claimed parent to undergo the genetic test. It would not be fair to an applicant if an adverse inference is drawn on him merely because he or his claimed parent refuses to undergo the prescribed genetic test. The D of Imm may at the most conclude from such failure that there is insufficient evidence to substantiate the claimed parentage.

26. The Administration has pointed out that the proposed section 2AB(7)(a) provides for a genetic test procedure to be specified by the D of Imm, while the proposed section 2AB(9) requires the D of Imm to inform a person who is required to undergo a genetic test of the provision of the proposed section 2AB(8). The Administration has explained that there is a need for a procedure for the prescribed genetic test, otherwise there will be no control over the integrity of the test procedure and the accuracy of the test results. If an applicant or his claimed parent refuses to undergo a genetic test, or if the specified procedure is not followed, the D of Imm may draw an inference from the non-compliance. The D of Imm will consider the reasons for refusal or failure to comply with the specified procedure and will only draw an adverse inference where appropriate. The proposed section 2AB(8) makes it clear to applicants that those who choose not to take the prescribed genetic test, including those who undergo a genetic test on their own may result in adverse inferences being drawn by the D of Imm.

27. However, having considered members' concern, the Administration has agreed to amend the proposed section 2AB(8) to the effect that the D of Imm may draw any inference from the failure of an applicant or his claimed parent to undergo the prescribed genetic tests as he considers proper based on the circumstances and facts of the

individual case. The inference may be positive, neutral or adverse as is proper in the circumstances of the case.

28. Members have sought clarification on whether, under the Bill, an applicant is allowed to submit results of genetic tests conducted by another laboratory as evidence for claimed parentage.

29. The Administration has advised that if an applicant or his claimed parent is required to undergo a prescribed genetic test, and if he accepts it, that test can only be a test conducted in the manner specified by the D of Imm. The Bill, however, does not have the effect of preventing an applicant or his claimed parent from refusing to undergo the prescribed genetic test or preferring a similar test by another laboratory. The applicant will be informed of the possibility of an inference being drawn by the D of Imm from a refusal to submit himself to the prescribed genetic test. The D of Imm would not refuse to consider any application submitted with documentary evidence to support a claimed parentage which may include the result of a self-arranged test. He would consider, among other things, the reasons for not taking the prescribed genetic tests, the integrity of the test procedure as well as the accuracy and reliability of the test results obtained through a self-arranged procedure, albeit by an accredited laboratory, and draw an appropriate inference. The inference may be any inference, adverse or otherwise, depending on the facts and circumstances of the case. An applicant who is aggrieved by the decision of the D of Imm can lodge an appeal to the Immigration Tribunal. Under the Immigration Regulations, the Immigration Tribunal may consider any matter which appears to it to be relevant to any ground of appeal permitted by the Immigration Ordinance and may receive and consider any evidence which appears to it to be relevant to the issues before it notwithstanding that the evidence would not be admissible in a court of law. Therefore, the Immigration Tribunal may receive and consider the results of genetic test obtained through a self-arranged procedure as well as draw any inference which it may consider appropriate from a failure to undergo the prescribed genetic test when requested to do so by the D of Imm.

Drafting of proposed section 2AB(7)(a)

30. The proposed section 2AB(7)(a) provides that the D of Imm may require an applicant or his claimed parent to undergo a genetic test conducted in the manner as the D of Imm may specify by the notice in the Gazette. At the request of some members, the Administration has agreed to amend the phrase in the proposed section 2AB(7)(a) "may require" to "may request" to accord it closely with its Chinese counterpart "可要求".

31. Some members have pointed out that the proposed section 2AB(7)(a) as presently drafted could be interpreted as an applicant or his claimed parent must undergo the genetic test in the manner as specified by the D of Imm, and cannot take a self-arranged test. These members consider that an applicant or his claimed parent should not be restricted to undergo a genetic test in the manner as specified. A member proposes that the Bills Committee should move an amendment to the proposed section 2AB(7)(a) to the effect that in establishing the claimed parentage, the D of Imm may request an

applicant or his claimed parent to undergo a genetic test and the D of Imm is allowed to specify the manner of a genetic test, but without requiring the genetic test to be conducted only in the manner specified. Although there are divided views among members, the member's proposal of the Bills Committee moving the amendment is supported by the majority of members.

32. The Administration remains of the view that if an applicant or his claimed parent is requested to undergo a prescribed genetic test, that test can only be a test conducted in the manner as specified by D of Imm. The proposed section 2AB(7)(a) as presently drafted is appropriate. Nevertheless, the Administration will move an amendment to the Chinese version of the proposed section to improve its drafting to better tie in with the English version.

Committee Stage amendments (CSAs)

33. As explained in paragraphs 27, 30 and 32 above, the Administration would move amendments to the Bill. The Administration would also move minor amendments to the proposed section 2AB(9). A copy of the draft CSAs to be moved by the Administration is in **Appendix II**.

34. As explained in paragraphs 24 and 31 above, the Chairman of the Bills Committee would, on behalf of the Bills Committee, move amendments to the Bill. A copy of the draft CSAs to be moved by Chairman of the Bills Committee is in **Appendix III**.

Recommendation

35. The Bills Committee recommends that subject to the CSAs to be moved by the Administration and the Chairman of the Bills Committee respectively, the Second Reading debate of the Bill be resumed at the Council meeting on 27 June 2001.

Advice Sought

36. Members are invited to support the recommendation of the Bills Committee at paragraph 35 above.

Council Business Division 2
Legislative Council Secretariat
12 June 2001

**Bills Committee on
Immigration (Amendment) Bill 2000**

Membership list

Chairman Hon Ambrose LAU Hon-chuen, JP

**Members Hon Cyd HO Sau-lan
 Hon Margaret NG
 Hon James TO Kun-sun
 Hon Andrew WONG Wang-fat, JP
 Hon Howard YOUNG, JP
 Hon LAU Kong-wah
 Hon Audrey EU Yuet-mee, SC, JP**

(Total : 8 Members)

Clerk Mrs Sharon TONG LEE Yin-ping

Legal Adviser Mr Arthur CHEUNG

Date 2 January 2001

IMMIGRATION (AMENDMENT) Bill 2000

COMMITTEE STAGE

Amendments to be moved by the Secretary for Security

| <u>Clause</u> | <u>Amendment Proposed</u> |
|---------------|--|
| 2(b) | <p>(a) In the proposed section 2AB (7)(a) -</p> <p>(i) by deleting everything after "一項" and substituting "按處長以憲報公告指明的方式進行的基因測試，以確立所聲稱的父母子女關係；及"；</p> <p>(ii) by deleting "require" and substituting "request".</p> <p>(b) In the proposed section 2AB (8), by deleting "such adverse inferences" and substituting "any inference".</p> <p>(c) In the proposed section 2AB(9), by deleting "requires" and substituting "requests".</p> |

IMMIGRATION (AMENDMENT) BILL 2000

COMMITTEE STAGE

Amendments to be moved by Hon Ambrose LAU Hon-chuen, JP

| <u>Clause</u> | <u>Amendment Proposed</u> |
|---------------|---|
| 2(b) | <p>(a) In the proposed section 2AB(7)(a) -</p> <p>(i) by adding ", which may be" after "test";</p> <p>(ii) by adding "as subsidiary legislation" after "published".</p> <p>(b) In the proposed section 2AB(11), by adding "as subsidiary legislation" after "published".</p> <p>(c) In the proposed section 2AB(12) -</p> <p>(i) by deleting ", (7)(a)";</p> <p>(ii) by deleting "or (11)".</p> |