

For information

**Bills Committee on
Road Traffic Legislation (Amendment) Bill 2008**

Introduction

At the meeting of the Bills Committee on 2 May 2008, Members requested the Administration to provide additional information and consider moving some Committee Stage Amendments (CSAs). The information and our response are set out below.

Random Breath Test and Right to Privacy

2. We submitted to the Bills Committee on 30 April a paper (LC Paper No. CB(1)1414/07-08(01)) which sets out the legal basis confirming the provision of a power for the Police to require drivers to provide a breath specimen during a random breath test (RBT) without reasonable suspicion would not be in breach of the provisions on human rights protected by the Basic Law, or compromise the protection against self-incrimination of the person concerned. In another paper (LC Paper No. CB(1)1426/07-08(02)) submitted to the Bills Committee on the same day, we cited the Australian RBT experience, including some legal challenges. As explained in that paper, we are aware of some court cases in Australia against RBT but they were on the manner in which the RBTs were conducted and they were unsuccessful. We do not know of any legal challenges there which concern the right to privacy or privilege against self-incrimination.

3. In response to a Member's further request for court cases in other areas which are analogous to RBTs to show that certain interference with the right of privacy is permissible, we have conducted another round of research. We set out two cases for Members' reference :-

Tsoi Man Hung and anor v Commissioner of Police HCAL 37/2007

4. This is a judicial review case in which the decisions of the Commissioner of Police to take a non-intimate sample of a swab from the mouth of each of the applicants upon their being convicted in the Magistrates' Courts for the offence of possession of dangerous drugs were challenged on the basis that it was an unlawful exercise of the power under section 59E of the Police Force Ordinance, Cap 232. We note that the Court considered that taking the sample of swab was "a painless process". The Court applied the principle of proportionality to see whether the Police taking a sample of a swab from the mouth of a person was a permissible interference to the right of privacy. Chu J said in her judgment at paragraphs 36 and 37 :

"36. In R (S) v Chief Constable of the South Yorkshire Police & R (Marper) v Chief Constable of the South Yorkshire Police, op cit, the House of Lords rejected the challenge that the UK legislation permitting the retention of fingerprint and DNA sample of a person who had not been convicted of an offence was an interference with the right to privacy. It took the view that, even if the taking and retention of DNA samples did amount to interference with the right to respect for private life, the invasion is minimal and is amply justified for the prevention, detection and prosecution of crimes.

37. The reasoning of the House of Lords (which relate to a wider power of retention of DNA information) applies with full force to the present case. Mr King SC made the point that the buccal swab technique involves intrusion into the bodily cavity of the person from whom the sample is to be taken. Nevertheless, it does not detract from the fact that the invasion involved is minimal. The power under section 59E is proportionate to the object of investigation and prosecution of crimes and, to this end, the creation of an effective DNA database."

R v Lo Hon- hin (1993) 3 HKPLR 622

5. In this case, the High Court held in a magistracy appeal that the power conferred by section 17C of the Immigration Ordinance on a police officer to request the production of identity card did not impinge on the right to liberty of movement guaranteed by article 8 of the Bill of Rights or the right not

to be subject to unlawful or arbitrary interference with one's privacy guaranteed by article 14 of the Bill of Rights.

Proposed CSA on section 72A of Cap. 374 – the reference to “court or magistrate”

6. The Bills Committee noted that the Administration had suggested to insert “or magistrate” after the references to “court” in a number of provisions in the Road Traffic Ordinance (Cap. 374) in the Bill but had not suggested similar amendments to section 72A of the same Ordinance where "court" was defined to include a magistrate. Members considered that a consistent approach should be used to avoid confusion. Having regard to Members’ views, we propose to amend Section 72A to achieve consistency by –

- (a) removing the definition of “court”; and
- (b) adding "or magistrate" after each reference to "court" wherever it appears.

Proposed CSA to effect these amendments will be submitted in due course.

Other proposed CSAs

7. We are examining the proposed provisions in relation to the breath test using the pre-screening device, and existing provisions relating to specimens of breath which the court shall use as evidence of the proportion of alcohol in the breath. We will submit our response to the Committee’s suggestions in this regard in due course.

**Transport and Housing Bureau
8 May 2008**