

**A note for the 8th Bills Committee meeting on
Dangerous Drugs, ICAC, and Police Force (Amendment) Bill 1999
to be held on 7.4.2000**

Comparison between the Bill and Overseas Legislation

Purpose

The purpose of this paper is to provide Members with information on overseas legislation in respect of the taking of intimate and non-intimate samples.

Background

2. At the previous Bills Committee meetings, Members have requested information on the overseas legislation regarding the taking of samples by law enforcement agencies. Members were interested in knowing how our Bill compares with similar laws adopted by other countries.

Details

3. We have looked into the relevant legislation adopted in United Kingdom, Canada, South Australia and New Zealand. The relevant legislation include –

- (a) the Police and Criminal Evidence Act 1984 in the United Kingdom (as amended in 1994);
- (b) the Canadian Criminal Code C-46 in Canada (as amended in

- 1995);
- (c) the Criminal Law (Forensic Procedures) Act 1998 in South Australia, and
 - (d) the Criminal Investigations (Blood Sample) Act 1995 in New Zealand.

4. We would like to draw Members' attention that unlike our Bill which covers various kinds of intimate and non-intimate samples, the legislation adopted in New Zealand only cover the taking of blood sample.

5. For Members' easy reference, the basic elements of these legislation as compared with those set out in our Bill are summarised in the table attached at Annex. A copy of the relevant extracts of the overseas legislation has been deposited with the LegCo Secretariat.

Advice Sought

6. Members are invited to note the content of this paper.

Security Bureau

6 April 2000

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**Comparison between the Dangerous Drugs, ICAC and Police Force (Amendment) Bill 1999
with relevant Overseas Legislation**

	<u>Hong Kong</u> <i>Dangerous Drugs, ICAC and Police Force (Amendment) Bill 1999</i>	<u>United Kingdom</u> <i>Police and Criminal Evidence Act 1984 (amended 1994)</i>	<u>Canada</u> <i>Canadian Criminal Code C-46 (amended 1995)</i>	<u>South Australia</u> <i>Criminal Law (Forensic Procedures) Act 1998</i>	<u>New Zealand</u> <i>Criminal Investigations (Blood Samples) Act 1995</i>
<i>Intimate Samples</i>	<ul style="list-style-type: none"> ● Blood, semen or any other tissue fluid ● urine, or pubic hair, a dental impression ● a swab taken from person's body orifice other than the mouth or from a private part of a person's body <p>(s.10E of ICACO¹, s.3 of PFO²)</p>	<ul style="list-style-type: none"> ● same as our proposals (except that the reference to private part is not made) <p>(s.65 – amended 1994)</p>	<ul style="list-style-type: none"> ● There is no delineation of intimate and non-intimate sample ● the Act authorises the plucking of individual hairs, the taking of buccal swab and the taking of blood <p>(s.487.06)</p>	<ul style="list-style-type: none"> ● forensic procedures are classified into intrusive and non-intrusive. There is no delineation of intimate and non-intimate samples ● intrusive forensic procedure means an intimate forensic procedure, or a forensic procedure involving intrusion into a person's mouth; or the taking of a sample of blood ● intimate forensic procedure means a forensic procedure that involve exposure of, or contact with, the genital or anal area, the buttocks or , in the case of a female, the breasts <p>(s.3)</p>	<ul style="list-style-type: none"> ● there is no delineation of intimate and non-intimate sample as the Act is for the taking of blood sample only

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<i>Non-intimate Samples</i>	<ul style="list-style-type: none"> ● hair other than pubic hair ● a sample taken from a nail or from under a nail ● a swab taken from any part other than a private part of a person's body including mouth but not any other body orifice ● saliva ● an impression of any part of a person's body other than the identifying particulars described in section 59(6) of the Police Force Ordinance (those identifying particulars are fingerprints, palm-prints, sole-prints and toe-prints) <p>(s.10E of ICACO, s.3 of PFO)</p>	<ul style="list-style-type: none"> ● same as our proposals (except that the reference to the identifying particulars in section 59(6) of the Police Force Ordinance is not made) <p>(s.65 – amended 1994)</p>	<ul style="list-style-type: none"> ● There is no delineation of intimate and non-intimate samples ● the Act authorises the plucking of individual hairs, the taking of buccal swab and the taking of blood <p>(s.487.06)</p>	<ul style="list-style-type: none"> ● non-intrusive forensic procedure means a forensic procedure other than an intrusive forensic procedure (s.3) 	<ul style="list-style-type: none"> ● there is no delineation of intimate and non-intimate sample as the Act is for the taking of blood sample only

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Offences for which DNA profiles can be taken	<ul style="list-style-type: none"> all serious arrestable offences, namely an offence for which a person may be sentenced to imprisonment for a term not less than 5 years (s.54AA(2) & (8) of DDO³, s.10E(2) & (8) of ICACO, s.3, s.59A(2), 59C(2), 59E(1) of PFO) 	<ul style="list-style-type: none"> any recordable offence committed after the Act came into force, and any offence committed before that time if it is in Schedule 1 to the Act (i.e. sexual and violence offences) and is still in prison or was detained under the Mental Health Act (s.62 and s.63) recordable offences are those offences for which convictions may be recorded in national police records 	<ul style="list-style-type: none"> effectively all those offences involving violence and sexual assault (s.487.04) 	<ul style="list-style-type: none"> any criminal offence (s.4) <i>criminal offence means:</i> any offence except a summary offence that is not punishable by imprisonment, or that is capable of being expiated (s.3) 	<ul style="list-style-type: none"> indictable offence (s.5) indictable offence to have the same meaning as it has in the Summary Proceedings Act 1957 (s.2)
Legal provision to establish DNA Database	<ul style="list-style-type: none"> Yes (s.59G(1)) to be maintained by the Government Chemist on behalf of the Commissioner of Police 	<ul style="list-style-type: none"> no explicit provision sample taken from suspect can be compared with records held by or on behalf of the police or held in connection with or as a result of an investigation of an offence (s.63A(1)) 	<ul style="list-style-type: none"> no explicit provision on establishment of DNA database in the Criminal Code C-46 	<ul style="list-style-type: none"> Yes (s.49) established by the Commissioner of Police 	<ul style="list-style-type: none"> Yes (s.25) maintained by or on behalf of the Police

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Authority to take a body sample	<ul style="list-style-type: none"> ● <i>non-intimate sample with no consent:</i> Superintendent of Police/Senior Commission Against Corruption Officer ● <i>intimate sample:</i> magistrate but consent still required (s.10E(1) of ICACO, s.59C(1), 59E(1) of PFO) 	<ul style="list-style-type: none"> ● <i>non-intimate sample with no consent:</i> Superintendent of Police (s.63 and s.63A) ● <i>intimate sample with consent:</i> Superintendent of Police (s.62) 	<ul style="list-style-type: none"> ● a Provincial Court Judge on ex-parte application by police (s.487.05) 	<ul style="list-style-type: none"> ● <i>non-intrusive procedure with no consent:</i> interim or final order of a senior police officer (of or above the rank of inspector) (s.7 & s.18(4)) ● <i>intrusive procedure with no consent:</i> interim order of a magistrate/ final order of the Magistrate Court (s.7 & s.18(2) & (3)) 	<ul style="list-style-type: none"> ● either the person consents to the taking of blood sample or the blood sample is taken without consent under a suspect compulsion order issued by the court (Part II)
Who may take samples	<ul style="list-style-type: none"> ● <i>intimate (other than dental or urine):</i> registered medical practitioner (s.59A(6) of PFO) ● <i>intimate (dental):</i> registered dentist (s.59A(6) of PFO) ● <i>intimate (urine):</i> police/C&E officer of the same sex as the person (s.54AA(7) of DDO, s.59A(6) of PFO) 	<ul style="list-style-type: none"> ● <i>intimate (other than dental):</i> registered medical practitioner ● <i>intimate (dental):</i> registered dentist (s.62(9)) ● <i>non-intimate:</i> not restricted 	<ul style="list-style-type: none"> ● a peace officer or a person under the direction of the peace officer, who are trained or experienced in obtaining a bodily substance by means of an investigation procedure (s.487.05) 	<ul style="list-style-type: none"> ● medical practitioner, or ● a person qualified as required by the law and regulations to carry out forensic procedures of the relevant type e.g. has received suitable training (including police officer) (s.33) 	<ul style="list-style-type: none"> ● medical practitioner, or ● registered nurse if the person from whom the blood sample will be taken agrees (s.49)

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	<ul style="list-style-type: none"> ● <i>non-intimate:</i> registered medical practitioner, police officer or public officers working in the Government Laboratory who has received training for that purpose (s.10E(6) of ICACO, s.59C(6) of PFO) 				
<i>Destruction of samples</i>	<ul style="list-style-type: none"> ● <i>destroy after 12 months (or longer if period extended):</i> if person not charged with any offence ● <i>destroy as soon as practicable:</i> <ul style="list-style-type: none"> ➢ when a person is charged but all charges are withdrawn; or ➢ when a person is discharged by court before conviction on ALL offences; or acquitted of all offences at trial or on appeal, or ➢ if a person is convicted, after the conclusion of all proceedings, or ➢ after DNA information has been obtained from non-intimate sample taken pursuant to s.59E or 59F, or 	<ul style="list-style-type: none"> ● <i>destroyed as soon as practicable if:</i> <ul style="list-style-type: none"> ➢ the person is cleared of that offence ➢ it is decided that the person shall not be prosecuted for that offence ➢ the person is not suspected of having committed the offence <p>(s.64)</p>	<ul style="list-style-type: none"> ● <i>destroy forthwith after:</i> it is established that the crime scene sample was not from that person, or the person is acquitted of the designated offence ● <i>destroy after 12 months (or longer if period extended):</i> if the person is discharged, if information charging the person is dismissed or withdrawn, or if the proceeding against the person is stayed <p>(s.487.09)</p>	<ul style="list-style-type: none"> ● <i>destroy as soon as practicable if:</i> <ul style="list-style-type: none"> ➢ sample is obtained under an interim order which is not confirmed ➢ proceeding was not commenced within 2 years and no extension was given ➢ proceeding is discontinued ➢ sample is decided to be inadmissible ➢ person is acquitted of the offence <p>(s.43)</p>	<ul style="list-style-type: none"> ● <i>destroy after 12 months (or longer if extended):</i> if person is not charged ● <i>destroy as soon as practicable:</i> if the person is charged but the charge is withdrawn, the person is acquitted of the offence or the conviction is quashed ● <i>destroy as soon as practicable after the expiry of the appeal period:</i> if the person is convicted but the offence is not a relevant offence <p>(s.60)</p>

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	<ul style="list-style-type: none"> ➤ when a person under s.59F(5) withdraw his authorisation and the sample has not been analysed (s.59H of PFO) 				
<i>Destruction of forensic examination results from samples taken from suspects</i>	<ul style="list-style-type: none"> ● <i>destroy after 12 months (or longer if period extended):</i> if person not charged with any offence ● <i>destroy as soon as practicable:</i> <ul style="list-style-type: none"> ➤ when a person is charged but all charges are withdrawn; or ➤ when a person is discharged by court before conviction on ALL offences; or acquitted of all offences at trial or on appeal, or ➤ when a person under s.59F(5) withdraw his authorisation (s.59H of PFO) 	Not provided in the Act	<ul style="list-style-type: none"> ● destroy together with the samples (s.487.09) 	<ul style="list-style-type: none"> ● <i>destroy as soon as practicable if:</i> <ul style="list-style-type: none"> ➤ forensic material is obtained under an interim order which is not confirmed ➤ proceeding was not commenced within 2 years and no extension was given ➤ proceeding is discontinued ➤ forensic material is decided to be inadmissible ➤ person is acquitted of the offence (s.43)	<ul style="list-style-type: none"> ● <i>destroy after 12 months:</i> if person is not charged ● <i>destroy as soon as practicable:</i> if the person is charged but the charged is withdrawn or the person is acquitted of the offence or the conviction is quashed ● <i>destroy as soon as practicable after the expiry of the appeal period:</i> if the person is convicted but the offence is not a relevant offence (s.60)

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<i>Use of forensic examination results</i>	<ul style="list-style-type: none"> ● for the purposes of forensic comparison and interpretation in the course of an investigation of any offence or in any proceedings for any such offence ● in case the results are of forensic DNA analysis, they can be used for purposes of s.59G(1) and (2) of PFO (s.59D of PFO) 	<ul style="list-style-type: none"> ● for comparison with all profiles on database for investigation or prosecution of offences allowed under the Act (s.63A(1)) (added in 1994) 	<ul style="list-style-type: none"> ● for the purposes of an investigation of the designated offence or any other designated offence in respect of which a warrant was issued or in any proceedings for such an offence (s.487.08(2)) 	<ul style="list-style-type: none"> ● for the purpose of criminal investigation or proceedings for any criminal offence (s.47) ● for making the information available to the person concerned (s.40) ● for the purpose of a coronial inquest or inquiry (s.47) <p>[results will become inadmissible if the sample should have been destroyed]</p>	<ul style="list-style-type: none"> ● for the purpose of investigation of the offence in respect of which the blood sample was taken (s.5)

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<i>Access to DNA database</i>	<ul style="list-style-type: none"> ● <i>access is allowed for the purposes of:</i> <ul style="list-style-type: none"> ➤ forensic comparisons for investigation purposes ➤ producing evidence for proceedings on offences ➤ providing the information to the person to whom it relates ➤ administering the database (s.59G(2) of PFO) 	<p>The country has stringent data privacy laws.</p> <p>These cover the misuse of ALL Government data and impose heavy penalties for unauthorised access and misuse by those who are otherwise authorised to access the data for legitimate purposes.</p>	<p>The country has stringent data privacy laws.</p> <p>These cover the misuse of ALL Government data and impose heavy penalties for unauthorised access and misuse by those who are otherwise authorised to access the data for legitimate purposes.</p>	<ul style="list-style-type: none"> ● for the purpose of criminal investigation ● for making the information available to the person concerned ● for administering the database ● for investigation by the Ombudsman/ Police Complaints Authority (s.50(1)) 	<ul style="list-style-type: none"> ● for forensic comparison in the course of criminal investigation by the Police ● for making the information available to the person to whom the information relates ● administering the DNA databank (s.27)

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<i>Offences and penalties for unlawful access or improper use of the data on the database</i>	<ul style="list-style-type: none"> ● offence punishable by fine at level 4 and imprisonment for 6 months <i>(s.59G(3) of PFO)</i> 	<ul style="list-style-type: none"> ● not defined in the Act but would, if on a computerised database, be covered by the UK Data Protection Act ● the Data Protection Act sets down a fine on summary conviction not to exceed the statutory maximum (amount not known) and for a fine following conviction on indictment (amount not known) 	<ul style="list-style-type: none"> ● guilty of an offence punishable on summary conviction <i>(s.487.08(3))</i> 	<ul style="list-style-type: none"> ● reckless disclosure of results: A\$10,000 or 2 years' imprisonment <i>(s.47)</i> ● reckless publication of results: A\$5000 or 1 year imprisonment <i>(s.48)</i> 	<ul style="list-style-type: none"> ● <i>the following are offences under the Act</i> <ul style="list-style-type: none"> ➤ knowingly falsifies any DNA profiles on the databank ➤ knowingly provide false information with the intent that it should be stored on databank ➤ without authorisation, adds or deletes from the databank ➤ gains or attempts to gain access to the databank in contravention of the Act ➤ gains or attempts to gain access to or uses a blood sample in contravention of the Act ● Conviction on indictment to imprisonment for a term not exceeding 3 years <i>(s.77(2))</i>

Note: ¹ ICACO refers to Independent Commission Against Corruption Ordinance

² PFO refers to Police Force Ordinance

³ DDO refers to Dangerous Drugs Ordinance