

**A Note for the 9th Bills Committee meeting on the
Dangerous Drugs, ICAC and Police Force (Amendment) Bill 1999
to be held 17.4.2000**

**Administration's Response to Outstanding Issues
raised at the previous Bills Committee meetings**

Introduction

This paper sets out the Administration's response to the outstanding issues raised by Members at the previous Bills Committee meetings. The issues include the following –

- (a) impose criminal liability on persons tampered with samples and DNA information;
- (b) consider empowering the Ombudsman to conduct surprise inspections of the Government Laboratory;
- (c) consider issuing guidelines on the procedures for taking samples;
- (d) consider video-recording the taking of certain types of sample; and
- (e) whether the Bill provides for the taking of samples from dead person.

**Imposing criminal liability on persons who tamper with samples and
DNA information**

2. At the first Bills Committee meeting, Members expressed concern on the possibility of persons deliberately interfering with the samples obtained under the Bill. We have explained in detail in a paper submitted to the Committee earlier on the steps to be taken in preserving the chain of evidence [LC Paper No.CB(2)1000/99-00(02)]. Members also visited the Government Laboratory to see how exhibits and samples were handled on 27.3.2000. The law enforcement departments, including Police, ICAC and Custom & Excise Department, will also devise comprehensive internal guidelines on the taking and handling of samples in order to ensure that proper procedures are followed. Such guidelines and regulations will be finalised after the passage of the Bill.

3. Any person who intends to interfere with the sample, the DNA information, or the results of forensic analysis therefrom commits the offence of doing an act tending to pervert the course of justice, and will be liable upon indictment to 7 years imprisonment. The proposed section 54AB of the Dangerous Drug Ordinance, section 10F of the ICAC Ordinance, and sections 59D and 59G of the Police Force Ordinance also stipulate that a person who uses the sample, results of forensic analysis or the DNA information in the database for purposes other than those specified in the provisions commits an offence and is liable on conviction to a maximum fine of \$25,000 and to imprisonment for 6 months. All these will provide safeguards against the samples from being tampered. We note that some Members have suggested to specify in the Bill that falsification of the DNA information and provision of false information with the intent to include such information in the database are illegal. We

are considering the issue with reference to the relevant legislation in New Zealand and will revert to the Bills Committee.

Empowering the Ombudsman to conduct random inspections of the Government Laboratory

4. The power and functions of the Ombudsman are provided for in The Ombudsman Ordinance, Cap.397 (the Ordinance). The functions of the Ombudsman, as set out in section 7 of the Ordinance, are to investigate (whether upon complaint or of her own motion) administrative actions taken by or on behalf of Government departments or public organisations under her purview, whereby certain persons claim to have/may have sustained injustice in consequence of maladministration in connection with those actions.

5. The Government Laboratory is one of the organisations under the purview of the Ombudsman. The Ombudsman therefore already has jurisdiction over the Government Laboratory and can investigate into cases of maladministration in respect of the Government Laboratory. However, the Department of Justice has advised that if there is no allegation of maladministration or if the Ombudsman is not of the opinion that any person may have suffered injustice as a consequence of maladministration, she has no jurisdiction under the Ombudsman Ordinance to undertake an investigation. Conducting random inspections of the Government Laboratory is beyond the prescribed functions of the Ombudsman.

6. Members also suggested including in the Bill an explicit clause

providing for external auditing by experts on the procedures adopted by the Government Laboratory in handling samples for forensic analysis. Such external auditing by experts in the field is in fact being conducted biennially at present. Members were briefed at an earlier meeting on the existing quality audit system of the Government Laboratory. We consider that the Government Laboratory is already subjected to strict inspection. Moreover, no negative findings have ever been found during auditing or during inspections required under the international accreditation programme of the American Society of Crime Laboratory Directors (ASCLD). In view of the technical nature of the forensic analyses, we considered that the Ombudsman may not have the expertise in inspecting the work of the Government Laboratory in this respect.

7. As the Government Laboratory is already subject to vigorous and independent external audit on its professional work, we do not see the need to include an additional provision in the Bill in this respect.

Issuing Guidelines on the Procedures for Taking Samples

8. Members suggested that clear guidelines should be developed to set out in detail proper procedures for the taking of samples. We fully agree with Members' suggestion. Internal guidelines will be developed to ensure that samples are taken in full accordance with the law. They will set out proper procedures to prevent abuse, safeguard the rights of the persons from whom samples are taken and to ensure the admissibility of the information derived from the samples as evidence before the courts.

The guidelines will be promulgated after the Bill has been passed by LegCo.

Recording the Process of Taking of Samples

9. Members suggested that the process of sample taking should be properly recorded in order to ensure that the samples are taken according to appropriate procedures.

10. As explained in paragraph 6, we intend to set out the procedures for taking samples in internal guidelines to be promulgated. These procedures will include the steps to be taken in recording the sample collection process. Some Members suggested that the process should be video-recorded. As not all of the police stations have video facilities, and if there is one, the facility may be in use, we are concerned that this may result in undesirable movement of suspects from one place to another and unnecessary delays in the taking of samples. Our intention is to make the sample taking process as simple and quick as possible and with the least inconvenience to the person whose sample need to be taken. We believe that it would be sufficient for the process of taking samples to be witnessed and properly recorded in writing. For consensual taking of samples, we propose that the witness will be the Duty Officer (usually Station Sergeant) who is responsible for the overall welfare of the detained persons; and for non-consensual cases, the witness to be an officer of Inspectorate rank or above. The rules governing the recording of the sample taking process will be included in the internal guidelines to be developed by the

enforcement agencies.

Whether the Bill provides for the taking of samples from dead persons

11. At the first Bills Committee meeting, Members asked whether a sample, be it intimate or non-intimate, might be taken from a deceased person.

12. The intention of the Bill is to provide for the taking of intimate and non-intimate samples from individuals suspected of involvement in serious arrestable offences or convicted of such offences for forensic analysis for crime investigation purposes. The Bill's application to living individuals is clearly reflected in its provisions, see for example the proposed section 54AA of the Dangerous Drug Ordinance, the proposed section 10E of the ICAC Ordinance and the proposed sections 59A and 59C of the Police Force Ordinance. Only persons who are living are capable of giving consent, are able to write, can be dealt with or detained under statutory provisions, can be informed of that which the provisions require the persons to be told, can be arrested for serious arrestable offences and can consider requests for samples be taken of them by law enforcement officers. It is therefore obvious that the Bill does not provide for the taking of samples from a deceased person.

13. The ultimate goals of empowering enforcement agencies to make use of scientific advances are to identify offenders and to bring the perpetrators of crime before the courts, thereby ensuring public safety in

Hong Kong. Identifying a deceased person does not help in this respect and accordingly, it is not our intention to apply the Bill to dead persons.

14. That said, there may be cases in which it is necessary to collect sample from a corpse in order to compare the results with crime scene stains where such a comparison is considered necessary to fully investigate the circumstances surrounding the death. In such cases, the taking of samples from corpses would be achieved under other provisions, but not this Bill. For example, if a pathologist, when conducting an autopsy for the purpose of the Coroner's Ordinance (Cap.504), is empowered by the Coroner's Ordinance to take samples from a corpse to facilitate his investigation into the cause and circumstances of the death. In cases where the Police need to obtain a sample on or in the deceased for the investigation into a crime, the Police Force Ordinance at present empowers the Police to seize such samples and this is the same as the power for the seizure of all other materials and exhibits for whatever the Police are investigating.

Advice Sought

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

Security Bureau

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