

**A Note for the 13<sup>th</sup> Bills Committee Meeting on the  
Dangerous Drugs, ICAC and Police Force (Amendment) Bill 1999  
to be held on 22 May 2000**

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**Administration's Responses to some Legal Issues  
raised by the Bills Committee**

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**Introduction**

This paper informs Members of the Administration's Response on some legal issues raised at the previous Bills Committee meetings. These issues include -

- (a) admissibility in court of the DNA information taken in contravention of the Bill;
- (b) providing the defendants the statutory right to request service from Government Laboratory for forensic comparison; and
- (c) binding effect of the bill on the State.

**Admissibility in court of the DNA information not obtained properly**

2. Members suggested that consideration should be given to specify in the Bill that DNA information not obtained in accordance with the Bill should be inadmissible in court.

3. Under the common law system, whether a piece of evidence is admissible is always a matter for the court to decide. The defence can always challenge any evidence sought to be adduced as evidence in court by the prosecution, including the admissibility of the evidence. If the defendant is of the view that the DNA information used in the crime

investigation is derived from samples taken unlawfully, he can challenge the admissibility of such evidence in court. There are long-established practices providing checks and balances in our legal system which have stood the test of time. We do not see a need to treat DNA information differently.

4. The Bill has already provided clear and ample safeguards on the taking of samples. We have also undertaken to develop administrative guidelines to set out the proper procedures for the sample taking process. These statutory safeguards and administrative guidelines will ensure that samples are taken in accordance with the provisions set out in the Bill. In those cases where samples are taken other than in accordance with the Bill, the admissibility of evidence related to the sample will no doubt be subject to strong challenge and the court will be in a position to take a view on the issue.

**Providing the defendants the statutory right to request service from Government Laboratory**

5. Members have suggested in earlier Bills Committee meetings that a provision should be added to the Bill to provide the defendant with the right to request the Government Laboratory to provide forensic analysis services so as to enable him/her to obtain information (e.g. DNA information or results of forensic comparison) which will be useful for the preparation of his case.

6. Under our current legal system, the burden of proof to establish

a case against the defendant beyond reasonable doubt is upon the prosecution. Police officers are well-trained in determining what items and/or samples need to be collected from the crime scene for forensic analysis for the purpose of crime investigation. The objective is to facilitate an early identification and prosecution of the offender. In the light of this, if a defendant suggests that forensic analysis of a certain items might help clarify the identity of the culprit or would be useful to his defence, we consider that having due regard to all the circumstances of the case it may be reasonable to entertain such a request.

7. The Government Laboratory has in fact entertained similar requests for service from defendants in the past and this has been explained at the earlier Bills Committee meetings.

8. If an enabling clause is to be added in the Bill to provide the defendant with the right to request services of the Government Laboratory, we are concerned that such a provision may greatly increase the number of forensic analyses required of the Government Laboratory, some of which may not be genuinely needed or may not really help to investigate the crime. This will not only have resource implications for the Police and Government Laboratory, but more importantly, may cause delay in the investigation of other crimes the solving of which rely heavily on the forensic analysis results. If the Government Laboratory were to decline those requests which are considered superfluous, this would bring about unnecessary legal proceedings.

9. In view of the above, we are not in favour of an specific provision in the Bill providing the defendants with a statutory right to require the Government Laboratory to conduct forensic analysis on their behalf. However, assistance will be provided if the service would genuinely help to solve the case or are needed by the defence to prove or substantiate his case.

**Binding Effect of the Bill on the State**

10. The proposed section 59G(2) of the Police Force Ordinance provides that no person shall have access to any information stored in the DNA database or disclose or use any such information except for the specified purposes as follows –

- (i) forensic comparison with any other DNA information in the course of an investigation of any offence by Police or the ICAC;
- (ii) producing evidence in respect of the DNA information in any proceedings for any such offence;
- (iii) making the information available to the person to whom the information relates; and
- (iv) administering the DNA database.

Any other uses except for the above four purposes are prohibited. The proposed section 59G(3) stipulates that any person contravening the section 59G(2) commits a criminal offence and, if convicted is liable to a maximum fine of \$25,000 and imprisonment for six months.

11. It was asked at an earlier meeting whether there is a need to add a binding provision on the State in order to make it clear that a State official will also commit an offence if he/she contravenes the proposed section 59G of the Police Force Ordinance, i.e. use the DNA information in the database for purposes other than those allowed under this proposed section in the Bill.

12. Department of Justices advises that given the present draft of the proposed section 59G(2), there is no need for any express binding provision. Under the current proposal, **any person** who gains access to the DNA database or discloses or uses any such information except for the specified purposes will commit an offence. Criminal offences which apply to any person apply to all individuals in HKSAR including, State officials. It is no defence to a criminal offence to prove that the act was authorised by a superior government official. In the light of this, it is unnecessary to include an express binding provision in respect of the proposed section 59G.

### **Advice Sought**

13. Members are invited to note the content of the paper.

**Security Bureau**  
**19 May 2000**