

**A note for the Bills Committee on  
Dangerous Drugs, ICAC and Police Force (Amendment) Bill 1999**

**Administration's Response on the Issue of  
Binding Effect of the Bill**

**Purpose**

This paper sets out the Administration's response to Members' suggestion that the proposed section 59G of the Police Force Ordinance should bind the State.

**Background**

2. At the Bills Committee on 29 May 2000, Members discussed the paper entitled '*Administration's Response to some Legal Issue raised by the Bills Committee*'. Members requested the Administration to reconsider the need to add a binding provision on the State regarding the proposed section 59G of the Police Force Ordinance, which governs the access to, disclosure and use of the information in the DNA database.

**The need for an express provision to apply section 59G of the Police Force Ordinance to the State**

3. We have carefully considered the need to include in the Bill an express provision to apply the proposed section 59G of the Police Force Ordinance to the State. Our conclusion is that this is not necessary. As explained in our earlier paper on legal issues, the proposed section clearly stipulates that any person who accesses to, discloses or uses any information stored in the DNA database for purposes other than those specified in the section commits an offence. The criminal offence provision applies to every individual, including state officials in the HKSAR. Any unauthorised access to the database or unauthorised use of the DNA information will be undertaken physically by individuals, that is, a contravention of the proposed section 59G could only be committed by individuals. The present drafting of the proposed section therefore provides adequate coverage to catch all persons responsible for any contravention.

**The question of 'acts of state'**

4. Some Members have argued for the inclusion of a binding clause in the Bill, citing concerns that should it be proven that an illegal use

of DNA information was authorised by the state as ‘acts of state’, the HKSAR courts would have no jurisdiction over such cases under Article 19 of the Basic Law (BL19) which provides that the courts of the HKSAR shall have no jurisdiction over acts of state such as defence and foreign affairs.

5. First, we must emphasize that the binding effect of a criminal sanction is a separate matter from BL19. The coverage of a criminal offence is a matter of policy, having regard to the particular mischief that is being addressed. On the other hand, the lack of jurisdiction of the HKSAR courts over ‘acts of state’ is a matter of constitutional law, as provided in BL19.

6. As explained in paragraph 3 above, we are convinced that the coverage of the proposed section 59G, as it is, is adequate for the purpose.

7. Regarding the question of ‘acts of state’, we would like to clarify that an act authorised by the state or the conduct of a state official is not necessarily an ‘act of state’ as defined under BL 19. The ‘acts of state’ referred to in BL 19 is a narrow concept which cover matters such as defence and foreign affairs. The mere fact that a particular act is conducted by a state official, or conducted with the authorisation of the state does not necessarily mean that it is itself an ‘act of state’ over which courts of HKSAR have no jurisdiction. For example, the conduct of a state official who carried out hacking with authorisation from the state could still amount to an offence, since no ‘acts of state’ might have been involved. Even if the example does involve an ‘act of state’, that does not necessarily mean that the obtaining of the DNA is itself an ‘act of state’.

8. The position is that irrespective of whether a piece of legislation contains an express provision to bind the State, in the unlikely event that ‘acts of state’ are involved, the HKSAR courts will have no jurisdiction over such acts by virtue of BL19. That is, even if an ordinance includes such an express binding clause, it does not place ‘acts of state’ under the jurisdiction of the HKSAR courts. The BL19 argument is thus irrelevant to the consideration as to whether such a binding clause should be included in a Bill.

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

**Security Bureau**  
**9 June 2000**