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

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.

Details

To reconsider on how to draw a proper line in requiring the taking of a buccal swab from a person convicted of a serious arrestable offence after the commencement of the Bill and the storing of such DNA data in the DNA database to be set up.

2. The storing of DNA information in a database for investigation of any offence has proved to be a successful tool for crime investigation overseas. The information provides for key evidence leading to the early identification, arrest and prosecution of repeat violent and sex offenders, and exoneration of the innocent. After giving careful consideration and in view of the effectiveness of the DNA database as demonstrated by overseas experience, we consider that the proposed thresholds for taking samples from convicted persons and storing of the DNA information are appropriate.

To advise on whether the relevant groups and organisations concerning the welfare of prisoners and ex-prisoners have been consulted on the Bill; and if so, the details of their views.

3. The proposals in the Bill are mainly based on the recommendations of an Interdepartmental Working Group on the Law Reform Commission Report on Arrest. Public comment was invited on the Working Group's recommendations in late 1996.

To consider making reference to the actual imprisonment term of a convicted person on the application of the proposed section 59E of Police Force Ordinance (PFO).

4. Experience indicates that the actual sentence does not necessarily or fully reflect the seriousness of the crime committed. The threshold of sentencing counts on a number of factors, including the circumstances of the case, the health condition of the person, family background as well as other mitigating factors relevant to the case before the court. They often include matters unrelated to the seriousness of the offence committed. Irrespective of the level of sentencing, the conviction has to be of a serious offence.

To consider members' suggestion that the process of sample taking should be recorded in order to ensure that the samples are taken according to procedures.

5. Videotaping is resource intensive. It will be difficult to cope with. It may result in the undesirable movement of suspects and unnecessary delay. The sample taking process is simple and quick. It should be conducted with the minimum of inconvenience to the persons whose samples have to be taken. Internal guidelines will be issued to officers concerned prescribing the steps to be taken in recording the sample taking process.

To consider providing explicitly in the Bill to empower the taking of samples by medical practitioners and dentists.

6. The proposed section 59C of the PFO provides that a non-intimate sample may only be taken by, amongst others, a registered medical practitioner. This provision already empowers medical practitioners to obtain such samples. Members' concern may be that to take samples from a person without his/her consent may be against the professional ethics of the medical practitioners who may therefore refuse to take the sample. Hence the suggestion to include explicit provision to empower the taking of samples by medical practitioner/dentists where consent is withheld.

7. A registered dentist can only take a dental impression which is an intimate sample where the subject has consented. We therefore do not consider that there is a need to empower the dentist as suggested. In the case of non-consensual taking of non-intimate

samples, section 59C permits a trained police officer to take non-intimate samples. We also envisage that the use of force may be necessary in such non-consensual cases but only police officers, not any other person, are allowed to use reasonable force under section 59C for the purpose of taking samples. It is therefore reasonable to expect that most of the non-consensual cases will be handled by police officers. In view of the above, there is no need for an explicit provision in this regard.

To confirm whether the internal guidelines on the procedures of taking samples would be made public.

8. The Police, ICAC and Customs & Excise have no objection to making available the internal guidelines to the Security Panel of the Legislative Council when they have been drawn up. However, the guidelines can only be formulated after the proposals in the Bill are consolidated and finalised. Consideration has to be given to the timing for releasing the guidelines.

To provide information about the difficulties encountered in the judicial warrant system and procedures for obtaining judicial authorisation in urgent cases in Canada.

9. We are seeking the assistance of our contacts in the police force of Canada. Their response is still awaited. The required information will be forwarded immediately to the Bills Committee if it is received before the resumption of Second Reading debate.

On proposed section 10, for the avoidance of doubt, to amend the drafting to the effect that in any investigation of section 10 offence or corruption-related offence committed …… . Similar amendments be made to the relevant provisions in Part II – Amendments to the Dangerous Drugs Ordinance (DDO).

10. The proposed CSA is not necessary since section 10E(1)(a) already qualifies that the person from whom sample is to be taken must be "dealt with and detained pursuant to section 10A", which is a procedure after the arrest under section 10 of ICACO.

11. The proposed amendment to the Dangerous Drugs Ordinance (DDO) is also unnecessary since the proposed definition of

"serious arrestable offence" under s.54AA of the Ordinance include only those in relation to dangerous drugs.

On proposed section 10E(2) and 10E(4), to replace the word "involvement" by "committing". Similar amendments be made to the relevant provisions in other parts of the Bill.

12. It is proposed that the word "involvement" should be retained so as to cover also the planning stage of a serious arrestable offence. However, it may be possible to replace "involvement" with "involvement in the commission", modelled on the New Zealand and Canadian legislation. This will, to certain extent, narrow down the application of the provision although the use of extra words may cause complication at trial and appeal.

On proposed section 10E(3), to spell out the circumstances under which oral authorization would be given for the taking of non-intimate sample. If an oral authorization has been given, inform the suspect the name of the officer giving such authorization. Where an authorization is given in writing, provide a copy of the authorization to the suspect.

13. Section 10(3) of ICACO will be amended to the effect that authorization should be made in writing as far as practicable, and if it is not practicable, oral authorisation could be given but it has to be confirmed in writing. Similar amendments will be made to the DDO and PFO.

14. Operational details in presenting a copy of the authorisation to the person, and informing the person of the name of the authorising officer if authorisation is given orally, will be included in the administrative guidelines, instead of the legislation.

On proposed section 10E(4)(e), to consider recording the process of taking samples if force is being used during the process.

15. Our position is similar to our response in paragraph 5 above.

To consider providing expressly in the Bill that the court would have the power to order for producing evidence in respect of the DNA information in any proceedings for any such offence as referred to in proposed section 59G(2)(i); or to make an undertaking to mention

during the resumption of the Second Reading debate of the Bill that the court would have such power.

16. The enactment of the Bill will not impinge upon the rights conferred by Article 16 of the BORO and Article 19 of the ICCPR. A defendant may therefore continue to submit his sample and request the Government Laboratory to analyse unless the request to use the DNA database falls outside the prescribed uses in the proposed section 59G of the PFO. The existing common law duty of disclosure which covers DNA information will also apply.

17. The Department of Justice has advised that it is undesirable to include an express provision in the Bill giving the court the power to compel production of evidence of DNA information stored in the DNA database as it is objectionable for a court to be involved in the prosecution or defence in criminal proceedings by ordering production of evidence.

18. Moreover, it is a general principle of legal policy that the law should be consistent. An express statutory provision on ordering the use of DNA information where no such provision exists in respect of other evidence would be contrary to the consistency principle.

To consider the need for a provision for the use of forensic examination results for the purpose of coroner's inquest or inquiry.

19. Where a coroner is unable to identify a deceased, use of the DNA database may facilitate identification if DNA information may be obtained from the corpse and the deceased's DNA information has been stored in the DNA database following his conviction of any serious arrestable offence or where he has given his DNA information voluntarily. The corpse in such circumstances would have no fingerprints, no teeth (for dental records) and no other identifying particulars. The reference to the DNA database therefore may only be of assistance in identifying a deceased where all other means have failed. This, in our view, is unlikely. That said, we have no objection in principle of making the database available for use by a coroner. This may assist him to discharge one of his duties (to determine the identity of the deceased) under the Coroners Ordinance, Cap. 504. However, given the little time left for scrutiny of the Bill, there is not sufficient time to consult the coroner and obtain his views on the proposal.

To review the drafting of proposed section 10G(1) to cater for the situation where approval has been obtained from the Operations Review Committee that investigation of a case should not be proceeded with or a suspect has been informed in writing that the investigation of the case in which he relates has been completed, the sample and DNA information derived therefrom should be destroyed.

20. The proposed section 10G(1) of the ICAC Ordinance only provides a maximum period for retention of a non-intimate sample and its related record, subject to extension permissible under subsection (2). Any period of retention which is shorter than 12 months is acceptable. There may be various trigger points for decisions to be made to destroy a sample and its related record, where its further retention is considered unnecessary or inappropriate. In response to Members' suggestion, the ICAC has decided that, as an administrative measure, where the Operations Review Committee has approved to terminate an investigation within 12 months, procedures will be established to have the sample and its related record destroyed as soon as thereafter.

Advice Sought

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

Security Bureau
10 June 2000

[A4_036.doc]