

立法會
Legislative Council

LC Paper No. CB(2)139/01-02
(These minutes have been
seen by the Administration)

Ref : CB2/BC/3/00

**Bills Committee on
Drug Trafficking and Organized Crimes (Amendment) Bill 2000**

**Minutes of fourth meeting
held on Friday, 4 May 2001 at 4:00 pm
in Conference Room A of the Legislative Council Building**

- Members Present** : Hon James TO Kun-sun (Chairman)
Hon Martin LEE Chu-ming, SC, JP
Hon Eric LI Ka-cheung, JP
Hon NG Leung-sing
Hon Margaret NG
Hon Mrs Selina CHOW LIANG Shuk-yee, JP
Hon Bernard CHAN
Hon Ambrose LAU Hon-chuen, JP
Hon Abraham SHEK Lai-him, JP
Hon Henry WU King-cheong, BBS
Hon WONG Sing-chi
Hon IP Kwok-him, JP
- Member Absent** : Dr Hon David LI Kwok-po, JP
- Public Officers Attending** : Mrs Claire LO, JP
Commissioner for Narcotics
- Ms Mimi LEE
Principal Assistant Secretary for Security (Narcotics)

Mr M C BLANCHFLOWER
Senior Assistant Director of Public Prosecutions
Department of Justice

Mr Geoffrey FOX
Senior Assistant Law Draftsman
Department of Justice

Mr John WONG
Senior Government Counsel
Department of Justice

Mr Henrique KOO
Chief Superintendent, Narcotics Bureau
Hong Kong Police Force

Mr Garth WILLIAMS
Superintendent, Narcotics Bureau
Hong Kong Police Force

Mr Stephen Barry TARRANT
Superintendent, Organized Crime and Triad Bureau
Hong Kong Police Force

Ms Diana WONG
Group Head (Financial Investigation)
Customs and Excise Department

Clerk in Attendance : Miss Flora TAI
Chief Assistant Secretary (2)2

Staff in Attendance : Mr Stephen LAM
Assistant Legal Adviser 4

Miss Yvonne YU
Senior Assistant Secretary (2)7

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I. Meeting with the Administration

[Paper Nos. CB(2)1266/00-01(01) and (02) and CB(2)1423/00-01(01)]

At the invitation of the Chairman, the Commissioner for Narcotics (C for N) briefed members on the paper [Paper No. CB(2)1423/00-01(01)].

Statutory defence for the dealing offence

2. C for N said that under the existing legislative proposals, the burden and standard of proof for conviction of money laundering would not be changed. The onus of proof would still lie totally with the prosecution. It would not be easy to convict a person of the new money laundering offence under proposed section 25(1A) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) and Organized and Serious Crimes Ordinance (Cap. 455). However, having considered members' concerns on the possibilities that an innocent person who genuinely did not suspect might be caught by the proposed legislation, the Administration proposed to build in a defence provision to provide that in proceedings against a person for an offence under section 25(1A) (the dealing offence), it was a defence to prove that he did not suspect the property he dealt with in whole or in part directly or indirectly represented any person's proceeds of drug trafficking or indictable offence and in all circumstances of his case, it was reasonable that he did not so suspect. The proposal, in the form of a Committee Stage amendment (CSA) was in the Annex. Senior Assistant Law Draftsman (SALD) explained that proposed section 25(3A)(a) was actually a subjective test. The criterion referred to the mental element of a particular person in that particular circumstances, rather than the mental element of a reasonable person in the circumstances of the case.

3. Mr Eric LI said that while he appreciated the Administration's effort to address members' concern, the CSA would have an effect of shifting the burden of proof from the prosecution to the accused. The Administration had already recognised that it was difficult for the prosecution to prove that a person did suspect because of the difficulty in proving the mental element. By the same token, it would also be difficult for the accused to prove that he did not suspect. Senior Assistant Director of Public Prosecutions (SAD/PP) pointed out that it was difficult for the prosecution to prove what was in the mind of the accused. Only that person himself would know what was in his mind and there should not be any impossibility that he could not prove that he did not suspect.

4. Mr Eric LI disagreed with the Administration's argument. He was of the view that even if an accused knew what he was thinking, it was still difficult for him to prove with evidence that he did not suspect. SALD responded that the accused should not be allowed to invoke the statutory defence by simply making a

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declaration. He should be required to explain why he did not suspect in the circumstances of his particular case.

5. Miss Margaret NG said that the statutory defence proposed by the Administration could be divided into two limbs. An accused was not only required to prove that he genuinely did not suspect, but also to prove that in all the circumstances of his case, it was reasonable that he did not so suspect. In her views, the effect of the proposed amendment was the same as that of the original provision as an innocent person would still be caught by the proposed legislation even if he genuinely did not suspect. Miss NG queried why the second limb was necessary.

6. C for N explained that it was very dangerous for the Administration to accept a statutory defence simply by requiring an accused to declare that he did not suspect. It was justified for the accused to provide his reasonable grounds explaining why he did not suspect. For example, the Court was likely to accept some specific reasons, such as the personal problems or illness of a banking staff that made him overlook and did not suspect that the money he dealt with was related to the proceeds of drug trafficking.

7. Miss Margaret NG reiterated that the requirement under proposed section 25(3A)(a) which required the accused to prove that he did not suspect was already adequate. She stressed that it was unnecessary for the Administration to consider whether a person genuinely suspect or not as the final decision should be vested with the court.

8. SAD/PP explained that there was a precedent for a defence provision with two limbs. Under section 25(2) of Cap. 405 and Cap. 455, it was a defence to prove that -

- (a) he intended to disclose to an authorized officer such knowledge, suspicion or matter; and
- (b) there was reasonable excuse for his failure to make such a disclosure.

This statutory defence provision also had two limbs, which was similar to the proposed defence provision. The first limb was concerned about the mental element whereas the second limb was about reasonableness.

9. Miss Margaret NG disagreed that the statutory defence under section 25(2) of Cap. 405 and Cap. 455 was a precedent. She opined that the two limbs under section 25(2) of the two Ordinances and the proposed defence provision were actually concerning two different things. They could be considered equivalent

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unless the second limb of the statutory defence under section 25(2) was that he intended to do so in all reasonable circumstances of his case.

10. Mr Martin LEE proposed to look at the problem from the point of view of public policy. If an accused had already proved on balance of probabilities and accepted by the jury that he did not suspect, it was ridiculous for the Administration to punish such person just because of his foolishness or on the basis of legal technicality. Even if the jury considered that there were reasonable grounds for the accused to suspect, the Administration still should not punish such person as a matter of public policy provided that he genuinely did not suspect. If the Administration included the second limb in the statutory defence, the accused who genuinely did not suspect might still be caught under the proposed legislation.

11. Mr Ambrose LAU said that he agreed in principle with the views expressed by Miss Margaret NG and Mr Martin LEE. He asked the Administration to clarify whether the first limb and the second limb were related to only one issue or whether they were about two different issues.

12. SAD/PP responded that when an accused came before the jury, it was very natural for the jury or the prosecution to consider why he did not suspect. If the Administration did not include the second limb in the statutory defence, such question would become irrelevant. The accused could simply declare that he did not suspect regardless of whether there were justifiable reasons to suspect. Miss Margaret NG argued that if an accused could not prove to the satisfaction of the jury that he did not suspect, he would definitely fail to invoke the statutory defence under proposed section 25(3A)(a).

13. Mr Eric LI reiterated that he had strong reservation on the proposed statutory defence because the burden of proof would be shifted from the prosecution to the accused. It was also necessary for him to consult relevant professional bodies before taking any position on the matter.

14. The Chairman pointed out that the crux of the matter was whether the Administration considered that there would be a loophole if the second limb was deleted or whether it considered that the person, who genuinely did not suspect, should still be punished because it was reasonable for him to suspect in the circumstances of his case. He requested the Administration to put forward revised proposal to address Bills Committee's concern that an innocent person who genuinely did not suspect might still be caught by the proposed CSAs. At Miss Margaret NG's suggestion, the Chairman also requested the Administration to provide explanation on the application of relevant principles of proportionality and reasonableness if it considered deleting the second limb i.e. "it was reasonable that he did not so suspect in all circumstances of his case" from the proposed statutory defence.

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Statutory defence for the reporting offence 25A(3)

15. Members noted that having regard to member's concerns on proposals concerning section 25A (reporting offence), the Administration had further refined the CSAs to make it clear that the court might consider the defendant's observance or non-observance of the guidelines issued by regulatory bodies, among others, in the proceedings for an offence under section 25A. C for N stressed that the Administration was ready to discuss with the regulatory bodies on the issue of the guidelines in order to enhance the awareness of having to combat anti-money laundering activities.

16. Mr NG Leung-sing expressed his worry that the proposed amendment to section 25A(1) would bring to an adverse consequence of an increase in the civil claims from the clients against the banks. Under the proposed amendment, the mental element of "having reasonable grounds to suspect" was used as the threshold for the disclosure requirement, the banks and their relevant staff would become more sensitive in making the disclosure in order not to be caught by the proposed legislation. This would inevitably affect the mutual trust between the banks and their clients. Under current legislation, a person could make a disclosure on the grounds that he simply suspected that the property represented proceeds of drug trafficking. However, under the proposed legislation, the clients would query whether the banks had reasonable grounds to make the disclosure.

17. In response to the worry expressed by Mr NG Leung-sing, C for N said that the existing legislation had already provided statutory defence to protect the persons who make the disclosure. Under section 25A(3)(a), "a disclosure referred to in subsection (1) shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract or by any enactment, rule of conduct or other provisions". SALD supplemented that the proposed amendment did not bring about any practical changes to the existing disclosure made by the banks and other relevant sectors. However, some of the existing guidelines issued by the various regulatory professional bodies would need to be amended or updated.

18. Mr NG Leung-sing was not satisfied with the Administration's response, saying that the current statutory defence mentioned by the Administration was inadequate in protecting the banks and the staff. Under the proposed amendment, a person had to make the disclosure only if he had reasonable grounds to suspect. The widening of the scope of disclosure would bring about the problem of possible breaching of contract between the banks and the clients. He suggested the Administration to consider whether it could make any amendment to section 25A(3) in order to adequately protect the banking staff and other relevant professionals from possible liabilities arising from the disclosure. Mr Martin LEE

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shared his view.

Scope of the indictable offence

19. C for N briefed members on the Administration's responses to the submissions of the Law Society of Hong Kong and the Hong Kong Federation of Insurers which had been issued vide Paper No. CB(2)1266/00-01(01) and (02) respectively. Members noted that the Law Society of Hong Kong had expressed concern about the wide ambit of the Organised and Serious Crimes Ordinance in that a relatively minor offence could be interpreted as an "organized crime".

20. Miss Margaret NG did not agree with the Administration's stance that the "organized crime" under section 2 of the Organized and Serious Crimes Ordinance must be a very serious crime. She pointed out that under section 25A, a person dealing with any property that in whole or in part directly or indirectly represented any person's proceeds of an indictable offence would already fall within the scope of "organized crime". In addition, the organized crime under Schedule 1 was very broad and it was also very difficult for a person to make a judgement as to whether an unlawful act was an organized crime or not. She would follow up on the matter when the Law Society of Hong Kong had provided a further response.

21. Principal Assistant Secretary for Security (Narcotics) responded that it might not be the suitable time to consider whether there was a need to revise the scope of the indictable offences. The Administration's task in hand was to seek the most appropriate portfolio to strengthen the capabilities of Hong Kong's anti-money laundering regime for Hong Kong. She pointed out that the scope of indictable offences in Hong Kong was not wide as compared with many overseas countries. To further limit the scope might represent a "back-tracking" in legislation.

22. The Chairman said that while the Law Society of Hong Kong should have voiced such a concern when Cap. 405 and Cap. 455 were enacted, the Bills Committee should consider the concern given the fact that the Bill proposed to lower the level of mens rea and to increase the penalty level of the offence. He added that he did not consider it a rollback in legislation if the application of the proposed disclosure requirement and penalty level was limited to certain offences instead of all indictable offences.

II. Date of next meeting

23. Members agreed that the Clerk would liaise with the Administration on the date of the next meeting.

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(*Post meeting note* : The next meeting was subsequently scheduled for Wednesday, 4 July 2001 at 8:30 am.)

24. The meeting ended at 5:20 p.m.

Legislative Council Secretariat

10 October 2001