

**立法會**  
**Legislative Council**

LC Paper No. CB(2)1977/00-01  
(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 third meeting  
held on Friday, 16 March 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-ye, JP  
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
- Members Absent** : Dr Hon David LI Kwok-po, JP  
Hon Bernard CHAN
- 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 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. Confirmation of minutes**  
[LC Paper No. CB(2)1095/00-01]

The minutes of the meeting held on 8 February 2001 were confirmed.

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**II. Meeting with the Administration**

[LC Paper Nos. CB(2)1073/00-01(01) to (07) and CB(2)1100/00-01(01)]

2. Members noted that in response to the points raised by members at the last meeting, the Administration had provided the following papers on -

- (a) The need for the proposed mental element of "having reasonable grounds to suspect" [LC Paper No. CB(2)1073/00-01(01)];
- (b) Overseas anti-money laundering regimes [LC Paper No. CB(2)1073/00-01(02)];
- (c) Judgment of Case II in Annex I to LC Paper No. CB(2)820/00-01(01) [LC Paper No. CB(2)1073/00-01(03)];
- (d) Response to a member's proposals in respect of disclosure offence [LC Paper No. CB(2)1073/00-01(04)]; and
- (e) Response to the submission of the Hong Kong Bar Association [LC Paper No. CB(2)1073/00-01(05)].

3. Members further noted the submissions of the Law Society of Hong Kong [LC Paper No. CB(2)1100/00-01(01)] and the Hong Kong Federation of Insurers [LC Paper No. CB(2)1110/00-01(01)] respectively. At the Chairman's request, a copy of the headnote of R. v Hall [LC Paper No. CB(2)1073/00-01(06)] provided by the Legal Service Division on the mental element of "having reasonable grounds to believe" was also forwarded for members' consideration.

4. The Bills Committee's discussion on the Administration's paper on the need for the proposed mental element of "having reasonable grounds to suspect" is summarised in paragraphs 5-27.

Need for the proposed mental element of "having reasonable grounds to suspect"

5. At the invitation of the Chairman, Commissioner for Narcotics (C for N) briefed members on the paper [LC Paper No. CB(2)1073/00-01(01)]. C for N stressed that the magnitude of money laundering was impossible to quantify. With the presence of large-scale crime syndicates, many serious and organized crimes were interlinked and increasingly transcended national boundaries. There were macro-economic and micro-economic reasons which justified the Administration's action against money laundering. The former included the contaminating effect money laundering activities had on legal financial transactions, the adverse effects on a jurisdiction's tax collection and public expenditure and increased prudential

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and systematic risks. The latter included control by criminals of legitimate business, and capability of criminal proceeds breeding other crimes. She said that the current legislative proposals in respect of section 25 and section 25A of Cap. 405 and Cap. 455 was one step to strengthen the capabilities of Hong Kong's anti-money laundering regime by making the law more effective. The Administration would also take other measures to combat money laundering activities .

6. The Chairman observed that the Administration's argument for introducing the proposed mental element of "having reasonable grounds to suspect" was primarily based on the low number of prosecutions and convictions versus the large number of investigations, given the magnitude of money laundering in Hong Kong. He opined that the Bills Committee needed to make reference to similar figures in overseas countries such as the United States (US) in order to determine whether the Administration's reasoning on this point was correct. The Chairman cautioned that the low number of prosecutions and convictions might be due to other reasons e.g. inadequate manpower and investigation problems rather than the ineffectiveness of existing anti-money laundering legislation.

7. C for N responded that the Central Registry of Drug Abuse was established in Hong Kong in 1972 to record information about drug abusers and relevant trends. However, there was no similar mechanism in the US or other countries owing to the issue of confidentiality. It was therefore not easy to gather relevant and reliable information for comparison. She pointed out that the Financial Action Task Force on Money Laundering, a pre-eminent inter-governmental body tasked to make recommendations on international standards and best practices in countering money laundering had already tried in 1999 to explore an internationally accepted method to quantify money laundering, but had not come up with any conclusion.

8. As the Administration could not provide relevant figures for comparison, the Chairman specifically asked how many out of the 2 778 investigations of money laundering between 1996 and 2000 could not be prosecuted because of the failure to prove the mental element of "having reasonable grounds to believe". He opined that it would facilitate the Bills Committee's consideration if the Administration was able to give a rough figure.

9. Chief Superintendent of the Narcotics Bureau of the Hong Kong Police Force (CS/NB) recalled that the Department of Justice (D of J) had not proceeded with the prosecution of about 50 to 100 among the 2 778 investigations on the grounds that there were difficulties to prove the mental element of "having reasonable grounds to believe". However, D of J might not always inform the Police of the actual reason for not taking prosecution action. CS/NB further pointed out that the Police had already screened out a large number of cases on the

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same ground before sending them to D of J for prosecution action. Senior Assistant Director of Public Prosecutions (SAD/PP) supplemented that from his experience, D of J refused to take prosecution action on many cases because of insufficient evidence to satisfy the threshold in existing legislation and hence the prospects for conviction were too dim.

10. The Chairman wondered whether there would be a tremendous increase in the number of cases that could be prosecuted if the mental element of "having reasonable grounds to suspect" was used. SAD/PP responded that he could assure members that if the proposed mental element was used, there would be more cases that could be prosecuted. At the same time, it would be a significant deterrent to money laundering activities.

11. Miss Margaret NG said that the Administration's main justification for introducing the proposed mental element was the low number of prosecutions and convictions versus the large number of investigations. She held the view that it was illogical to argue that a certain proportion of money laundering cases must be involved in those 2 778 investigations and there must be proportionate numbers of prosecutions and convictions. Miss NG expressed concern that based on such a faulty reasoning, the Administration proposed to cast the net too wide and as a result innocent persons would be unnecessarily caught.

Constitution of the mental element of "having reasonable grounds to believe"

12. Miss Margaret NG said that she did not agree with the Administration's analysis that the mental element of "having reasonable grounds to suspect" constituted objective and subjective components. She opined that the proposed mental element imposed a statutory duty on a person to suspect if a certain set of objective circumstances came to his knowledge. That person might well be liable for conviction even if he genuinely did not suspect.

13. C for N referred members to paragraph 9 of the Administration's response to the submission of the Hong Kong Bar Association issued vide LC Paper No. CB(2)1073/00-01(05). Members noted that the Bar Association was concerned that the proposed amendment to section 25A would mean that a person firmly believed that the property was "clean" would be liable to be sent to goal if it turned out that his belief was wrong. C for N said that the Administration did not agree with the Bar Association's observation. The Administration took the view that if a person honestly believed that the property was clean, a court would have a doubt that he had a reasonable suspicion about the connection of the property to crime. The person would not be prosecuted in the first place. Miss NG did not agree with the Administration's view. She pointed out that there was no room in the legislation for the court to have a doubt that the person had a reasonable suspicion.

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14. C for N responded that as in the case of HKSAR v Shing Siu Ming [1999], the Court of Appeal had explained the meaning of the mental element of "having reasonable grounds to believe" under section 25(1)(a) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405). The mental element required proof that there were grounds that a common sense, right-thinking member of the community would consider sufficient to lead a person to believe that the person assisted was a drug trafficker or had benefited from drug trafficking. That was the objective element. It must also be proved that those grounds were known to the defendant. That was the subjective element.

15. Miss Margaret NG argued that even if the objective and subjective components co-existed, the person might not link the two together and therefore harboured no suspicion. She said that she failed to see the need to amend the existing legislation. Miss NG cautioned that there was no statutory defence that the person could prove on balance of probability that he really did not suspect.

16. Miss Margaret NG pointed out the Hong Kong Association of Banks had expressed similar concern in its letter of 24 November 2000 [LC Paper No. CB(2)1073/00-01(07)]. According to the Association of Banks, the proposed new offences based on "reasonable grounds to suspect" would create an objective test, which would catch the innocent who did not have a guilty mind. In addition, they would impose criminal sanction on a failure to rise to the standard of a reasonable man (in other words, for negligence), when front-line bank staff had to deal with a large volume of cash transactions on a daily basis which was not reasonable and was undesirable.

17. Mrs Selina CHOW said that while she appreciated the Administration's concern that existing legislation failed to catch a lot of criminals of money laundering, careful consideration must be made to ensure that no innocent person would be held criminally responsible simply because he failed the objective test.

18. The Chairman said that other common law countries must have faced similar problems when they tried to apply mental element of the same sort in law. At Miss Margaret NG's suggestion, the Chairman requested the Administration to provide information on the Australian experience about the application of the mental element of "ought reasonably to know" to facilitate the Bills Committee's further deliberation. In this connection, Miss NG pointed out that the criterion in the Australian Proceeds of Crime Act 1987 was not entirely objective because it was referring to a particular person's standard instead of a reasonable person's standard.

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Provision of a statutory defence

19. Mr Martin LEE pointed out that under the proposed amendments, the offence would be proven by the prosecution by establishing certain circumstances known to the accused. Members of the jury were asked to apply this objective test to see whether conclusion could be drawn that the accused "had reasonable grounds to suspect" that the money or property had derived from an illicit source. There would be a risk of convicting someone who genuinely did not suspect. In his view, conceivable harm would be created to the community if there was no statutory defence for the accused to prove that he genuinely did not suspect.

20. The Chairman drew members' attention that according to section 81(3) of the Australian Proceeds of Crime Act 1987 [Annex II to LC Paper No. CB(2)1073/00-01(02) referred], a person should be taken to engage in money laundering if he knew, or ought reasonably to know, that the money or other property was derived or realized, directly or indirectly, from some form of unlawful activity. Where a person was charged with an offence against this section, it was a defence under section 82(2) to the charge if the person satisfied the court that he or she had no reasonable grounds for suspecting that the property referred to in the charge was derived or realized, directly or indirectly, from some form of unlawful activity.

21. SAD/PP reiterated that "having reasonable grounds" was an objective component while "to suspect" was a subjective component that must be linked to the property which was connected with the crime. The Administration had to look into the objective component i.e. various facts of a case such as the volume of the transaction vis-a-vis employment status of the person as well as the subjective component i.e. the person's relation with the alleged criminal.

22. In the light of members' grave concern that innocent person would be caught, the Chairman asked whether the Administration would consider providing a statutory defence for the person to prove that he genuinely did not suspect although a reasonable person should have suspected. Mr Martin LEE pointed out that under section 25A(6)(a) of the Drug Trafficking (Recovery of Proceed) Ordinance (Cap. 405), "it is a defence to prove that he did not know or suspect that the disclosure concerned was likely to be prejudicial". The Chairman remarked that the then government at least took the potential unfairness into consideration and included this statutory defence in the legislation.

23. Mr Eric LI said that as the legislature had the responsibility to protect all innocent persons, he had reservation on the proposed statutory defence because the burden of proof would be shifted from the prosecution to the accused. He would prefer to spend more time on the education and issue of guidelines among the

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professional bodies. In addition, the development of anti-money laundering legislation of other countries should also be monitored to see whether any lessons could be learnt. He would not accept the proposed legislative amendment even if the statutory defence was included.

24. Mr Eric LI asked whether special consideration should be made to the people who were suffering from mental illness or the minor when the Administration was applying the proposed mental element in money laundering legislation. SAD/PP responded that the people who were suffering from mental illness or the minor would not be probably prosecuted as it would not be in public interest to do so. In his experience, no person suffering from mental illness had ever been investigated.

25. In response to the Chairman's suggestion, SAD/PP asked whether it would be acceptable to the Bills Committee if section 25(1) of Cap. 405 was amended by replacing the mental element of "having reasonable grounds to believe" with "having reasonable grounds to suspect" and building in a statutory defence.

Adm 26. Miss Margaret NG said that it would be very difficult for members to give an immediate indication to the Administration at this stage. Mrs Selina CHOW shared the view. She requested the Administration to put forward possible proposals to address the Bills Committee' concern that adopting a lesser mental element of "having reasonable grounds to suspect" might cast the net too wide that an innocent who genuinely did not suspect might still be caught to facilitate members' further deliberation.

27. Mr Martin LEE was of the view that the Administration should revamp its legislative proposals when considering possible amendments to section 25(1) of Cap. 405 and 455. He said that the Administration was originally proposing to the Bills Committee two different mental elements with two different offences carrying two different types of sentences. It needed to consider the penalty level if only the existing mental element was amended. He considered that the advantage of following the Australian model was that it had two offences with two mental elements and two penalties. Mr LEE also said that the two-tier system originally proposed in the Bill was unacceptable to him because very little difference could be drawn between them. Even a lawyer would have difficulty to draw the distinction between the mental elements of "having reasonable grounds to believe" and "having reasonable grounds to suspect" basing on the same facts, let alone members of the jury.



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Defence for the disclosure defence

28. C for N briefed members on the Administration's proposals in respect of disclosure offence [LC Paper No. CB(2) 1073/00-01(04)]. The existing section 25A of the two Ordinances required that when a person "know or suspect" that any property represented any person's proceeds of drug trafficking or indictable offence, he should as soon as it was reasonable for him to disclose that knowledge or suspicion. In view of members' concern at the last meeting about the change of mental element of section 25A might unduly catch innocent persons, she said that the Administration had proposed provision of a defence for those who had followed the requirements of anti-money laundering guidelines stipulated by their respective regulators. The proposal, in the form of a Committee Stage amendment, was in Annex to LC Paper No. CB(2)1073/00-01(04).

29. Mr Eric LI said that he welcomed the Administration's proposed provision which would at least serve as an additional protection to the professionals and those employees working according to the code of practice. However, those employees who were not professionals or their trades did not have any code of practice would not be protected. In his view, the proposal still had its limitation. He needed to consult relevant professional bodies before formulating his view.

**III. Date of next meeting**

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

*(Post-meeting note: The next meeting was subsequently scheduled for Friday, 4 May 2001 at 4:00 pm.)*

31. The meeting ended at 5:40 pm.

Legislative Council Secretariat

29 June 2001