

立法會
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Legislative Council
Bills Committee on Drug Trafficking
and Organized Crimes (Amendment) Bill 2000

Minutes of meeting
held on Monday, 20 November 2000 at 10:45 am
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
Dr Hon David LI Kwok-po, JP
Hon NG Leung-sing
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 IP Kwok-him, JP
- Members Absent** : Hon Margaret NG
Hon Bernard CHAN
Hon WONG Sing-chi
- Public Officers Attending** : Mrs Clarie LO
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 Gareth WILLIAMS
Superintendent, Narcotics 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

Mrs Eleanor CHOW
Senior Assistant Secretary (2)7

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I. Election of Chairman

Mr James TO was elected Chairman of the Bills Committee.

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II. Meeting with the Administration

(LegCo Brief (File Ref: NCR 3/1/8(G) Pt.27), LC Paper Nos. LS 15/00-01, CB(2) 263/00-01(02), (03) and 305/00-01(01))

Introduction

2. Commissioner for Narcotics (C for N) said that anti-money laundering legislations were crucial to combat drug trafficking and serious crimes. As such, the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) and Organized and Serious Crimes Ordinance (Cap. 455) were under constant review with a view to improving the anti-money laundering regime, upholding justice and maintaining Hong Kong's status as an international financial centre. Notwithstanding its high commendation on Hong Kong's effort to improve the anti-money laundering regime, the Financial Action Task Force on Money Laundering had pointed out in its comprehensive evaluation reports in 1994 and 1998 that Hong Kong had yet to work on two areas. First, the small number of cases convicted and secondly, the difficulty in securing evidence of mens rea.

3. C for N further said that a working group comprising law enforcement agencies, financial regulators and professional bodies had been set up since 1998 to improve the quantity and quality of suspicious transaction reporting. Specifically, operational experience had revealed that legislation in certain areas required tightening up. The major objectives of the Bill were to -

- (a) enhance the effectiveness of the confiscation and anti-money laundering provisions. The proposed amendments relating to confiscation orders, restraint orders and charging orders were mainly technical in nature;
- (b) create in section 25(1A) a new offence of dealing in property if having "reasonable grounds to suspect" that the property in whole or in part represented a person's proceeds of drug trafficking or an indictable offence; and
- (c) to change the test for requiring a disclosure under section 25A(1) of both Ordinances from "knows or suspects" to "knows or has reasonable grounds to suspect".

4. C for N explained that the concept of the proposed amendments could be found in similar ordinances in the UK, Australia and New Zealand. The proposed amendments sought to tighten up the anti-money laundering provisions bearing in mind the different interests of the community. She further said that financial institutions might be indirectly affected by the proposed amendments and might wish

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to consider updating their code of practice with a view to providing suitable guidelines to their members. The success of the legislation relied on the concerted effort of the government, the law enforcement agencies, the public and professional bodies.

5. Principal Assistant Secretary for Security (Narcotics) (PAS/S) briefed members on the detailed proposed amendments as set out in paragraphs 8 to 14 of the LegCo Brief.

Adm 6. The Chairman said that the Administration should provide a table setting out the rationale for the making of the existing provisions now proposed to be amended, and the reasons why they needed to be amended in order to facilitate future discussion.

7. The Chairman invited members to raise questions on policy issues of the Bill and asked the Administration to respond accordingly. The gist of discussion is summarized in the following paragraphs.

Section 25

"Reasonable grounds to believe" vs. "reasonable grounds to suspect"

8. C for N explained that under existing section 25 of Cap. 405 and Cap. 455, it would be an offence for a person to deal with property if he knew or had reasonable grounds to believe that the property represented the proceeds of a drug trafficking or an indictable offence. However, past operational experience revealed that in most cases, it was difficult to prove these two mental elements. Owing to the existing narrow coverage of the legislation, prosecutions and convictions were few, despite a relatively large number of investigations in the past few years. The Administration therefore proposed to add a new offence to section 25 of both Ordinances. Under the proposed provision, it would be an offence for a person to deal with property if he had "reasonable grounds to suspect" that the property in whole or in part represented a person's proceeds of drug trafficking or an indictable offence. The burden of proof beyond reasonable doubt remained unchanged for the new offence.

9. Senior Assistant Director of Public Prosecutions (SAD/PP) explained that while the vast majority of the provisions of the Drug Trafficking (Recovery of Proceeds) Bill 1989 were modeled on equivalent legislation in the UK, there were a few departures. One of them was the mental element of the offences in question. In the UK ordinance, the mental element was "know or suspect". Under section 25(1) of both Ordinances, the mental element was "know or reasonable grounds to believe". Over the last 11 years, it had not been difficult in the majority of cases to prove that

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the person dealt with the property. The primary obstacle in putting forward prosecution was proving the mental element of "reasonable grounds to believe".

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10. SAD/PP further said that coincide with the development in Hong Kong, the Cabinet Office in the UK also brought out a report in June 2000 covering a full umbrella of issues on recovering the proceeds of crime. The UK through its own experience had come to the conclusion that even with the mental element of "suspect", they were having difficulties in putting forward prosecutions. Between 1994 and 1998, there were 33 775 drug trafficking convictions, yet there were only 204 prosecutions for money laundering. The Cabinet Office in the UK proposed that the test for all money laundering offences should be simplified and this would be achieved by extending all money laundering offences to cover circumstances under which the defendant had "reasonable grounds to suspect". It was significant that the UK experience mirrored that of Hong Kong and both were approaching the matter in the same manner. SAD/PP said that he would provide for members' reference an extract of the UK report in respect of recovering proceeds of crime.

11. In response to the Mr Martin LEE's enquiry, C for N said that since 1996, there were 2 680 investigations on money laundering, of which only 61 prosecutions were called for. Of the 61 cases, there were 36 convictions involving 43 persons and the majority was related to self-laundering. SAD/PP supplemented that the operational difficulties lied in proving the mental element of "knowing" or "reasonable grounds to believe". The greatest difficulty in enforcing section 25(1) was that very close friends or relatives of a criminal could have all sorts of excuses that they did not know the source of property.

12. Chief Superintendent of Narcotics Bureau (CS/NB) cited an example. A man who had no steady job was convicted of drug trafficking. He had a huge sum of money in his bank account which was jointly opened with his wife and there were a number of big transactions over the years. While it was difficult to prove that the wife had "reasonable grounds to believe" the money represented any proceeds of crime, it was possible to put forward a prosecution against the wife if the mental element was reduced to "reasonable grounds to suspect".

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13. Mr Martin LEE opined that it was very difficult to distinguish the concepts of "reasonable grounds to believe" and "reasonable grounds to suspect". He said that as LegCo Members had decided that "reasonable grounds to believe" was the appropriate mental element for relevant provisions when they studied the Drug Trafficking (Recovery of Proceeds) Bill 1989, he remained to be convinced that it was proper to introduce the amendment. Mr LEE suggested that the Administration should provide further elaboration on the argument for creating such a new offence.

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14. SAD/PP responded that members should bear in mind that when Cap. 405 was enacted in 1989, there was no operational experience in implementing the provision. Experience of the last 11 years had proven inadequacies of the provisions as presently worded.

Adm 15. The Chairman said that it would be helpful to members if the Administration could provide actual prosecution cases to illustrate the operational difficulties in proving the mental elements of "knowing", "reasonable grounds to believe", and "suspecting". In addition, the Administration should also give examples of operational experience with relevant rulings if available (including cases in overseas countries) to illustrate the differences between proving the mental elements of "reasonable grounds to believe", of "reasonable grounds to suspect" and of "suspecting".

16. SAD/PP said that the UK experience had shown that it was very difficult to prove what was in a person's mind. The phrase "reasonable grounds to suspect" would have the advantage of including an objective element. He quoted a statement by the Court of Appeal that "the phrase 'having reasonable grounds to believe' contained subjective and objective elements. It requires 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 is the objective element. It must also be proved that those grounds were known to the defendant. That is the subjective element".

17. In response to Mr Martin LEE's question about the target of the proposed provisions, C for N clarified that the proposed amendment was not targeted at professional bodies. She explained that the provision would apply to any person who committed an offence under that section. Experience had shown that in most cases it was the drug trafficker's close friends and relatives who had "reasonable grounds to suspect" that the property they dealt with was proceeds of crime. The Department of Justice would decide whether to prosecute such a person under section 25(1) or proposed section 25(1A), depending on the nature of the case.

Penalty level under section 25(1) and 25(1A)

18. SAD/PP said that having regard to the background of section 25(1) and its effect, the Administration took the approach to retain the existing provision but increase the penalty from a maximum imprisonment of 14 years to 20 years, and to add in section 25(1A) a provision to reduce the mental element to "reasonable grounds to suspect" with a corresponding reduction in the penalty which was proposed to be a maximum imprisonment of 5 years.

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19. Mr Martin LEE expressed concern that the Bill was introducing a novel concept into the criminal law whereby the standard of proof had a bearing on the level of penalty. In other words, an offence that was difficult to prove carried a higher penalty whereas one that was easier to prove carried a lighter penalty. He questioned whether this concept was in use in any criminal law in any part of the common law jurisdictions.

20. SAD/PP explained that the Administration had considered two approaches to tighten up the legislation. It could either propose an amendment to existing section 25(1) to replace "reasonable grounds to believe" with "reasonable grounds to suspect", or retain section 25(1) and add new section 25(1A) as proposed in the Bill. The Administration would consider adopting the first option if members found the proposal acceptable.

21. C for N supplemented that section 25(1) was basically targeted at the professional money launderers while proposed section 25(1A) was to deal with close friends and relatives of drug traffickers. If the penalty in section 25(1) was imposed on proposed section 25(1A), it might be too draconian. PAS/S added that taking into account the fact that the mental element of "reasonable grounds to suspect" was a new addition to the existing "reasonable grounds to believe", and having regard to public acceptability of the proposal and that the former represented a lighter mental element, the Administration considered that a lighter penalty for the former was appropriate.

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22. Mr Martin LEE said that he did not see the need for proposed section 25(1A), unless the Administration could give convincing examples in common law jurisdictions in which the standard of proof rather than seriousness of the offence should determine the level of penalty; and if not, the justification for doing so from the perspective of legal policy.

23. Mrs Selina CHOW shared Mr Martin LEE's view. She expressed concern that by setting different penalty levels according to the standard of proof would complicate the matter. As a result, further disputes would arise in legal proceedings.

Section 25A

"Reasonable grounds to suspect" vs. "suspect"

24. C for N said that under section 25A of both Ordinances, where a person knew or suspected that any property represented any person's proceeds of, or was used in connection with, drug trafficking or an indictable offence, he must disclose that knowledge or suspicion, together with any matter on which that knowledge or suspicion was based, to an authorized officer. The level of mens rea was not

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consistent with that in section 25(1) of both Ordinances. The Bill proposed to change the test for requiring a disclosure from "knows or suspects" to "knows or has reasonable grounds to suspect".

25. SAD/PP cited an example in the UK to illustrate the difficulty to enforce the disclosure of knowledge or suspicion that property represented proceeds of crime. A law firm had been involved with the setting up of an offshore company which was used by criminals of drug trafficking for money laundering. The law firm argued that it did not need to make any disclosure given that it did not enquire into its clients' affairs, it neither "knew or suspected" that the company was involved in money laundering. To tighten up legislation on money laundering offence, the Cabinet Office of the UK advocated the test of "reasonable grounds to suspect" instead of just "knows or suspects".

26. Mr Eric LI asked whether the proposed amendment was intended to trigger more reporting. If so, he questioned the need for the proposed amendment given that the statistics given by the Police during its meeting with the Hong Kong Society of Accountants (HKSA) on 8 November 2000 indicated that it was not short of reports, although it might be short of convictions.

27. CS/NB said that since 1997 the Police had received 20 666 reports related to money laundering of which 20 454 reports were made by financial institutions, 5 were reported by accountants and 6 were reported by lawyers. Among these suspicious transaction reports, 2 415 were further investigated for money laundering offence. Since 1989 there had been one prosecution for a person for failing to report a suspicious activity. The proof of that essentially came from his own admission. The person had been told directly that the money deposited to his bank account that he opened on behalf of the other person was proceeds of drug trafficking.

28. Mrs Selina CHOW said that she did not accept Mr Eric LI's contention that because the amendment would invite more reports, the law should not be amended. She saw nothing wrong with receiving more reports. The fact that there was only one conviction indicated that the law at its present form was creating difficulties for the proper implementation of the legislative intent. It was obvious that the balance was not right and there was a need for legislative amendments.

29. Mr Eric LI said that the HKSA supported the merit of the Bill but found it difficult to accept the proposed amendment. Proposed section 25A would mean that the subjective mental state of the defendant would play little part in establishing that person's guilt. This could mean that persons who would not have committed any offence under the current law might well be convicted in future because they harboured no suspicion about a certain set of circumstances. Mr Henry WU expressed similar concerns. He said that brokers might not know what should be

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considered suspicious and it was difficult for them to ask their clients about the source of their money.

30. SAD/PP responded that with the phrase "reasonable grounds to suspect", there must be in existence facts which to a reasonable man should suspect and those facts were known to that person. There were objective and subjective elements involved.

31. Mrs Selina CHOW said that in her view, section 25A did not make sense because it was not possible to prove a person actually "suspected" that any property represented proceeds of crime. She believed the proposed amendment would help prosecution because "reasonable grounds" were facts which could be proved. When certain facts were presented to a reasonable person, irrespective of one's profession, he would decide whether he should suspect that certain property represented proceeds of crime.

32. Mr Eric LI said that although the legislation centred on serious crime, it actually encompassed all indictable offences, including those committed abroad which would also be indictable offences had they been committed in Hong Kong. There would be hundreds of such offences. They might include such things as tax-related offences and offences under the Companies Ordinances and its overseas equivalents. It was quite conceivable that a person would not be suspicious that certain proceeds related to a relevant offence, primarily because he was not aware that the activities involved had constituted an indictable offence. He expressed concern that an innocent person with an untrained legal mind would be easily trapped by the proposed amendment. In this connection, Mr Eric LI informed members that it was the HKSA's understanding that the higher standard of "having reasonable grounds for suspicion" in the UK legislation applied only to exceptional or extreme cases of money laundering relating to terrorism. He requested the Administration to provide relevant provisions of the equivalent UK legislation and their scope of application.

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33. C for N said that the court would take into account a reasonable person, including his working experience, qualification, etc, to decide whether that person should have "reasonable grounds to suspect" that certain property represented any person's proceeds of crime. The crime must be either drug trafficking or any other indictable offence defined under Cap. 455. There was already a defense provision in sections 25(2) and 25A(2) in both Ordinances. She added that for professionals, the court would take into consideration whether the person had followed the code of practice of his profession. SAD/PP supplemented that the Administration had given presentation to the HKSA on the enforcement of anti-money laundering legislations and he understood that HKSA had also issued guidelines to its members.

34. To facilitate members' discussion, the Chairman requested the

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ALA Administration and the Assistant Legal Adviser to provide a legal opinion on whether the phrase "reasonable grounds to suspect" involved subjective and objective elements.

35. Mr Eric LI expressed concern about the uncertainty in law, given that the court would decide on a case-by-case basis whether a reasonable person had "reasonable grounds to suspect" certain property was related to money laundering. He further pointed out that since the guidelines issued by the HKSA had no legal standing, an accountant could not claim immunity even if he had complied with the guideline. The HKSA was also concerned that professionals such as accountants and lawyers would be sued by their clients for breaching the rule of confidentiality if they had made disclosure to the police.

36. SAD/PP explained that section 25A(3) presently gave the protection that any disclosure should not be treated as a breach of any restriction upon the disclosure of information imposed by contract or rule of conduct and should not render the person who made it liable in damages.

Adm 37. The Chairman said that the professionals were concerned that they were not protected by their code of practice, not to mention that some profession did not even have their own code. He asked the Administration whether it would render assistance to those profession which had yet to have their own code relating to disclosure of knowledge or suspicion of money laundering. He added that the Administration should consider means to promote awareness of the new legislation, if passed.

Adm 38. Mr Eric LI suggested that a defence provision should be added to the Bill to give protection to a professional who had acted in compliance with the code of practice if that code of practice was drawn up in consultation with the Administration. He asked the Administration whether specific exclusion of liability provision could be included to protect professionals from civil liability for disclosing information of their clients.

39. Members noted that Hon Eric LI had written to Secretary for Security requesting the following information -

- (a) a detailed account of local and overseas legislation which was relevant to section 25A of Cap. 405 and Cap. 455; and
- (b) the respective numbers of cases reported and investigated , as well as the respective numbers of prosecutions and successful prosecutions instituted under the two Ordinances as at the date.

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At the Chairman's suggestion, the Administration undertook to provide the requisite information to the Bills Committee for members' reference.

Suspicious transaction reporting

40. C for N said that a Suspicious Transaction Reporting Working Group had been formed since 1998 to review among other things the circumstances under which a report should be made, the operation of suspicious transaction reporting and the updating of relevant guidelines of the professional bodies.

41. Superintendent of Narcotics Bureau (S/NB) said that the Police had proposed a four-step approach for professionals to detect suspicious transactions. The four steps were -

- (a) identify suspicious activity indicators. Experience showed that engagement in money laundering activities had certain characteristics. For instance, large and frequent cash transactions, involvement in certain entities such as shelf companies, incoming remittance which was structured below overseas threshold of reporting, etc. In fact, the Hong Kong Association of Banks had issued guidelines to educate its members so that when a transaction did bear some of the characteristics, front-line staff would spot them and take appropriate action;
- (b) question where appropriate and where practicable the person who was carrying out the transaction which bore the characteristics. This step involved raising questions to the person to find out the reasons for the transaction, the source and destination of the transaction, etc;
- (c) review the background of the person. When encountering a suspicious transaction, a financial institution should check on the background of the customer through his account transactions and other available information; and
- (d) review the first three steps above. If no reasonable legitimate explanation was found, one should make a report to the police.

42. S/NB said that the proposed amendment would not significantly increase the liability of any person who made an honest mistake. In the circumstances where an inexperienced or innocent person missed the first step and there was no evidence that he knew what he missed was a transaction involving the proceeds of crime, the police would not even bother to investigate him. The proposed amendment would

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only increase the chances of prosecutions for people who deliberately missed the indicators that they knew they should report.

43. Mr Henry WU said that given that money laundering usually involved a large sum of cash transaction, it might pose less problem to front-line brokers who usually dealt with small accounts. However, he expressed concern about major brokers and supporting staff who dealt with big accounts might miss the indicators of suspicious transactions. He said that he needed to consult his constituency before giving further views.

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44. The Chairman requested the Administration to provide more information on the indicators of suspicious transaction relating to money laundering. The Chairman also requested the Administration to provide an analysis on the relationship between suspicious transaction indicators and the mental element of "reasonable grounds to suspect".

III. Way forward

45. Members agreed to schedule the next meeting after the Administration had responded to the points raised by members.

46. The meeting ended at 12:50 pm

Legislative Council Secretariat
4 January 2001