

Drug Trafficking and Organized Crimes (Amendment) Bill 2000
Proposals in respect of disclosure offence

At the Bills Committee meeting on 8 February 2001, a Member suggested the Administration to consider adding a new offence to the existing section 25A of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) and Organized and Serious Crimes Ordinance (Cap. 455) using the mental element of “having reasonable grounds to suspect” and confining the persons to be affected to “conspired parties”, while maintaining the existing disclosure offence with mental elements of “knows or suspects”. This paper sets out the consideration of the Administration regarding this proposal.

Existing disclosure provision

2. The existing section 25A of the two Ordinances requires that when a person “knows or suspects” that any property represents any person’s proceeds of drug trafficking or indictable offence, he shall as soon as it is reasonable for him to do so disclose that knowledge or suspicion. The duty to report arises when the person acquires the knowledge or suspicion. The test is subjective, not objective. This implies that it is the person's knowledge or suspicion, i.e. what he knew or suspected and not what a reasonable person with the information available to the person would have known or suspected. In other words, the evidence must prove what was in the person's mind, not what should have been in their mind. This pure subjective test of the existing legislation has made it extremely difficult to prosecute a person who turns a blind eye to obviously suspicious transaction. Owing to the difficulties in proving the subjective element, the prosecution is only able to prosecute and convict one person under section 25A offence since the section has been in operation in 1995.

3. The Administration considers that the addition of a new disclosure offence as described in paragraph 1 while maintaining existing section 25A will do little to improve the legislation as the problem highlighted in paragraph 2 above will remain unresolved. The suggestion that the new offence should apply to a “conspired party” only

means that the offence could only cover those who have taken part in the money laundering offence. If a person could be proved to be a conspired party in money laundering, the prosecution should already have the enough evidence to charge him under the money laundering offence of section 25. Indeed, the maximum penalty for offences under section 25 (HK\$5 million fine and 14 years' imprisonment) is much higher than that for section 25A (HK\$50,000 fine and 3 months' imprisonment). In other words, section 25 presents a much greater deterrent against money laundering than the proposed additional disclosure offence under section 25A. This is to say, the proposal would not help to achieve the policy objective of penalising those who should report suspicious transactions but refused to do so by turning a blind eye to such responsibility.

4. Apart from the above, it is worth noting that when section 25A was deliberated in the Legislative Council in 1994, it was agreed at the Bill Committees on the Organized and Serious Crimes Bill that "indictable offence", rather than a number of specified offences should be included in section 25A. Limiting the scope of offence under section 25A would represent "backtracking", rather than improving the provision.

5. The Administration is aware of Members' concern about altering the mental element of section 25A from "knows or suspects" to "knows or has reasonable grounds to suspect". As such, the Administration would like to propose, for Members' consideration, a provision for those who have followed the requirements of anti-money laundering guidelines stipulated by their respective regulators. The proposal, in the form of a Committee Stage Amendment, is at Annex.

Security Bureau
March 2001

Proposed CSA to section 11 of Schedule 1 to the Bill

- 11
- (a) In paragraph (e), by deleting the fullstop and substituting a semicolon.
 - (b) By adding -
 - "(f) by adding -
 - "(9) In proceedings for an offence under this section -
 - (a) any provision of a guideline which -
 - (i) was issued or otherwise approved by -
 - (A) the defendant's employer at the material time; or
 - (B) a body representing a profession to which the defendant

belonged at the material time;

- (ii) applied to the defendant at the material time in his capacity as an employee of that employer or as a member of that profession, as the case may be; and
 - (iii) appears to a court to be relevant to a provision of this section alleged to have been contravened, shall be admissible in evidence in the proceedings; and
- (b) the court may give the defendant's observance or non-observance of the guideline such weight in

the proceedings as the court thinks proper in the interests of justice.

(10) In subsection (9) -
"court" () includes a magistrate; "guideline" ()
includes a code of practice."."