

Submissions on the Drug Trafficking and Organized Crimes (Amendment) Bill 2000 by the Criminal Law & Procedure Committee of The Law Society of Hong Kong

The Society's Criminal Law & Procedure Committee has reviewed the various proposals under the Bill to amend the provisions of the Drug Trafficking (Recovery of Proceeds) Ordinance ("Cap. 405") and the Organized and Serious Crimes Ordinance ("Cap. 455") and has the following comments:

The Effect of the Proposed Amendments on Cap. 455 in General

The Committee understands that the proposed amendments under the Bill are made with a view to tighten the local anti-money laundering legislation. However, members note with concern the extremely wide ambit of the Organized and Serious Crimes Ordinance in that a relatively minor offence can be interpreted as an "*organized crime*" thus empowering the authorised person to trigger all the additional ancillary power given to it under the proposed amendments in the Bill. The failure of Cap. 455 and the Bill to distinguish the more from the less serious offences would also result in the final product being a trap for the innocent.

The Committee would urge the Administration to revisit the various proposed amendments under the Bill in the light of the wide ambit of Cap. 455.

Section 2(11) of Cap.405 and Section 2(15) of Cap. 455

These two corresponding Sections respectively define the circumstances when proceedings for offences under Cap. 405 and 455 are, for the purpose of the two Ordinances, considered to have been instituted in Hong Kong. Three circumstances are set out under the existing definition, namely, when a magistrate issues a warrant or summons in respect of an offence; when a person is charged with an offence after being taken into custody without a warrant; or when an indictment is preferred by the direction or with the consent of a judge. The proposed amendment is to extend that definition by including a fourth circumstance, i.e., when a person has been arrested for the offence and released on bail.

The Committee understands that the intention behind the proposed amendments is to enable the law enforcement bodies to apply for the appropriate court orders to prevent the dissipation or concealment of property by a person *who has been arrested for any offences under the two Ordinances and released on bail*. Under the relevant provisions of the two Ordinances, the court may make various orders such as confiscation order, restraint order and charging order against a person but only when "*proceedings have been instituted*". A person who has been arrested, released on bail but not yet charged would thus, under the present state of law, be able to dispose, transfer or conceal his property.

The Committee notes that various court orders available under the 2 Ordinances, in particular, the restraint orders can be a major disturbance to the life of an innocent person and is concerned that the proposed amendment would considerably widen the scope for making such court orders. While the existing definition of institution of proceedings requires that either formal step have been taken by the Judiciary or failing which that a person has at least been formally charged, the added circumstance merely requires the arrest of a person without any formal charging.

The Committee believes that if the relevant law enforcement agency has sufficient evidence, a charge should ensue fairly promptly. The Committee does not support the proposed amendment unless the Administration has more justifiable grounds for extending the present definition of "*institution of proceedings*".

Section 5(9) of Cap. 405 and Section 10((9) of Cap. 455

The Bill proposes to add a new subsection (9) to Section 5 of Cap. 405 and Section 10 of Cap. 455 respectively to put it beyond doubt that allegations in statements submitted by the prosecutor to the court under those 2 sections in relation to absconded defendants may be treated as accepted. The proposed new subsection (9) reads: "*For the avoidance of doubt, it is hereby declared that an allegation may be accepted under this section, and may always have been so accepted, whether or not subsection (7)(b) is applicable to the defendant, and subsection (3) shall be construed accordingly*".

The Committee recommends the deletion of the words "*and may always have been so accepted*" as these words allow no objection to be raised whatsoever.

Sections 25 and 25A both respectively of Cap. 405 and Cap.455

The Bill proposes to create a new offence relating to "*dealing with property*" under Section 25 of both Ordinances where there are "*reasonable grounds to suspect*" that the property represents proceeds of drug trafficking or an indictable offence. A further proposal is made to change the test for requiring a disclosure of knowledge or suspicion that certain property represents proceeds of, or is used in connection with drug trafficking or an indictable offence from "*knows or suspects*" to "*knows or having reasonable grounds to suspect*".

While the Committee appreciates the importance of a strong regulatory framework for the prevention of money laundering, it is of the view that the proposed amendments pose a number of difficulties for practitioners who undertake work on behalf of their clients. The Committee is soliciting the views of its members and liaising with other professional bodies on the proposals in this regard and will need further time to consider the possible impacts of these proposed amendments upon the Society at large and members' practice. However, it does have the preliminary concerns on these proposed amendments as stated below.

The Committee notes that it is a common practice for solicitors to deal with clients' money involving the creation of trusts or in setting up of companies, etc. By adopting the test of "*reasonable ground to suspect*" as an additional mental element of the Section 25 offence and as the test for disclosure under Section 25A, the proposed amendments have, in effect, imposed an extremely onerous duty upon a solicitor. A solicitor would have to decide, on a case-by-case basis, whether a "*reasonable person*" has "*reasonable grounds to suspect*" that certain property is related to drug trafficking and an indictable offence and if so, make a report to the appropriate authority. This duty to disclose is extremely onerous when one considers that the proposed legislation encompasses all indictable offences, including those committed abroad (which would also be indictable offences have they been committed in Hong Kong). The test of "*reasonable grounds*" could also be affected by the culture or religious belief of the clients and the solicitor concerned. A solicitor would have breached the statutory duty to disclose under Section 25A and committed an offence under Section 25 even if he *honestly* entertains no suspicions about his clients' activities.

These proposals will also create difficulties for solicitors in practice in the light of the solicitor's professional duty of confidentiality towards his clients. A solicitor is required under its professional Code of Practice to hold in strict confidence all information concerning the business and affairs of his client acquired in the course of the professional relationship and not to divulge confidential information unless disclosure is expressly or impliedly authorized by the client or required by law or unless the client has expressly or impliedly waived the duty. The duty of confidentiality owed by solicitors to their clients extends far beyond that of, for example, bankers. Solicitors are subject to disciplinary proceedings if they breach that duty.

The disclosure requirement created by Section 25A, in particular, is in direct conflict with a solicitor's duty of confidentiality. While Section 25A(3) of both Ordinances expressly exempts any disclosure under that section from being regarded as constituting a breach of any rule of conduct, the solicitors will still have practical difficulties as he weighs his statutory duty to disclose with his professional duty of confidentiality to the clients. It is to be noted that even in cases where disclosure is required by law, a solicitor will still be obliged by his professional duty not to divulge more information than is required.

Furthermore, the Society has, after discussion with the Commissioner of Police, issued guidance to its members on the subject on 8 September 1997 by way of a Circular (See Circular 97-280 attached). The emphasis of such Guidance is to encourage members to be suspicious. However, the effect of the amendment would mean that the very act of being suspicious would require a solicitor to make a report notwithstanding that he may be able to eliminate any suspicion by making reasonable inquiry. Given the emphasis of the Society's advice to encourage solicitors to suspect, it would mean that compliance with the Guide would inevitably put them in the position that they would have to make a report, failing which they would have committed an offence. The Committee believes that this is quite unworkable in practice. It would be quite difficult, if not impossible, for any practitioner to avoid the breach of either statutory duty to disclose or duty of confidentiality to the client.

The Committee would stress that observation of professional confidentiality by lawyers is a fundamental right of citizens and an essential duty of lawyers that they may not abdicate. It is indispensable for the Rule of Law and for the proper functioning of justice. The temptation of confusing the role of authorities in prosecution with that of lawyers constitutes a step backward in the democratic organisation of the Society. The Committee would urge the Administration to defend the foundation of the Rule of Law and the individual rights of citizens uncompromisingly.

The maximum penalties for money laundering offence under Section 25(3)(a) and for failure to report suspicious transactions under Section 25A(7) are proposed to be increased from 14 to 20 years and from 3 to 12 months respectively.

The Committee believes that further information should be supplied by the Administration on the nature of cases that have been brought before the Hong Kong courts under Section 25(3)(a) where the term of imprisonment would have exceeded 14 years and the number of actual prosecutions on Section 25A(7) to support their petition for increased penalties.

The Criminal Law & Procedure Committee
The Law Society of Hong Kong
15 March 2001

THE

LAW SOCIETY
OF HONG KONG

Index Reference:

香港律師會 Solicitors

1403 SWIRE HOUSE · 11 CHATER ROAD · CENTRAL · HONG KONG
TELEPHONE: 2846 0500 FAX: 2845 0387 E-MAIL: sg@hklsoc.org.hk DX-009100 Central I

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LAW SOCIETY

Money Laundering - Guidance Notes For Solicitors

1. The attached Guidance Notes have been developed by the Guide Working Party in consultation with the Commissioner of Police to make solicitors aware of the implications for them of the money laundering provisions of the *Drug Trafficking (Recovery of Proceeds) Ordinance* and the *Organised and Serious Crimes Ordinance*.
2. It should be noted that the "compliance officer" and the "reporting officer" can be the same person and may be appointed from within the ranks of existing suitable staff, and may even include the appointment of a sole practitioner by himself.
3. Solicitors should also be aware of the minimum retention periods for files as set out in Circular 313/93(PA) and contained in Volume 1 of "The Hong Kong Solicitors' Guide to Professional Conduct":
 - (a) files relating to all categories of conveyancing matters should be retained for not less than 15 years;
 - (b) tenancy files should be retained for a minimum of 7 years from expiration of the tenancy;
 - (c) closed files should be retained for a minimum of 7 years; and
 - (d) files relating to criminal cases can usually be destroyed at the conclusion of 3 years from expiration of any appeal period.

However firms should exercise their own judgment in deciding what is a suitable period in any particular case.

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GUIDANCE NOTES - MONEY LAUNDERING

A. THE SUBSTANTIVE LAW

1. The law in relation to money laundering is contained in the following Ordinances:

- the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405)
- the Organised and Serious Crimes Ordinance (Cap. 455)

These Ordinances were substantially amended in July 1995 and introduced new criminal offences designed to prevent those who seek to launder the proceeds of drug trafficking or indictable offences from being able to use legitimate professional services for this purpose. The legislation contains important exceptions to the solicitor's normal duty of confidentiality to clients and to the duty to disclose relevant information to a client. Please refer to sections 25 and 25A of both Ordinances.

2. All solicitors should be aware of the money laundering provisions in these Ordinances and the need to comply with them. If they do not, they may commit criminal offences by -

- assisting someone known or suspected to be laundering money generated by ~~drug trafficking or any indictable offence;~~
- telling clients or anyone else that they are under investigation for an offence of money laundering; or
- failing to report a suspicion of money laundering.

3. ~~The money laundering legislation does not require solicitors to be suspicious of clients without cause, or to detect money laundering, but solicitors should be aware of the legislation, be alert to any unusual circumstances, and make further enquiries of their clients where appropriate.~~

dealing (defined in section 2 of both Ordinances)

4. It is an offence under section 25 (1) of both Ordinances for any person to deal with any property if that person knows or has reasonable grounds to believe that the property in whole or in part directly or indirectly represents the proceeds of drug trafficking or of an indictable offence. *Dealing is punishable on conviction on indictment by a maximum of 14 years' imprisonment and fine* (section 25(3) of both Ordinances).

It is a defence that the person concerned reported his knowledge or suspicions at the first available opportunity to an authorised officer, or, in the case of an employee of a solicitors' firm, to the appropriate person in accordance with the firm's internal reporting procedure.

Failure to report

5. It is an offence under both Ordinances for any person who acquires knowledge or a suspicion of money laundering not to report that knowledge or suspicion to an authorised officer or, in the case of an employee of a solicitors' firm, to the appropriate person in accordance with the firm's internal procedure as soon as is reasonably practical after the information came to his attention. *Failure to report knowledge or suspicion is punishable by imprisonment of 3 months and fine.* Under section 25A(3) of both Ordinances disclosure in these circumstances does not constitute a breach of confidentiality or privilege.

disclosure to client or other person ("tipping off")

7. Under section 25A(5) of both Ordinances it is an offence if, knowing or suspecting that a disclosure has been made, he discloses to any other person any matter which is likely to prejudice any investigation which might be conducted following that first-mentioned disclosure. *The maximum punishment on conviction for this "tipping off" offence is 3 years' imprisonment and a fine of \$500,000.* (See section 25A(8) of both Ordinances).
8. It is a defence to the "tipping off" offence that the person concerned proves that he neither knew nor suspected that this was likely to be prejudicial to the investigation, or that he had lawful authority or reasonable excuse to do so. See section 25A(6) of both Ordinances.

B. SOLICITORS' DUTIES

1. The duty to pass on information to the client which is relevant to the retainer (principle 8.03 of "The Hong Kong Solicitors' Guide to Professional Conduct") is overridden by the statutory prohibition created by the "tipping off" offence, and is one of the exceptional circumstances where the duty does not apply.
2. Subject to any relevant defence a solicitor is effectively prohibited from passing on information to the client concerning any matter which is likely to prejudice an investigation.

3. Consequently, where a solicitor knows or suspects that a client is involved in money laundering and a report is made, the solicitor should consider whether the trust and confidentiality necessary between solicitor and client is so affected that the retainer should be terminated. There is no necessary objection to a solicitor continuing to act. Whether or not the solicitor feels able to do so will depend upon all the circumstances. Advice may be sought from the Guidance Committee.
4. Should the solicitor consider that the retainer be terminated and that he is unable by virtue of the offences created by sections 25A(5) of both Ordinances to give the true reasons for the termination, he should consider informing the client that the reason is that a conflict of interest has arisen between himself and the client. See paragraph A.7 above.
5. In circumstances where to disclose the reason for ceasing to act for the client in Court proceedings would possibly result in the commission of an offence under section 25A(5) of either Ordinance, the solicitor should inform the Court of the possible conflict of interest between himself and the client but should not elaborate further.

C. PRACTICE INFORMATION

1. All solicitors need to be aware of the legislation relating to money laundering. Conveyancing solicitors in particular need to be aware that the purchase and sale of properties may be used as a method of laundering the proceeds of crime. A solicitor who knows or suspects that this may be happening will need to consider the provisions of the relevant legislation.
2. Can you spot a money laundering transaction? The signs to watch for are:
 - **UNUSUAL SETTLEMENT REQUESTS** - Settlement by cash of any large transaction involving the purchase of property or other investment should give rise to caution. Payment by way of third party cheque or money transfer where there is a variation between the account holder, the signatory and a prospective investor should give rise to additional enquiries.
 - **UNUSUAL INSTRUCTIONS** - Care should always be taken when dealing with a client who has no discernible reason for using the firm's services, eg clients with distant addresses who could find the same service nearer their home base; or clients whose requirements do not fit into the normal pattern of the firm's business and could be more easily serviced elsewhere.
 - **LARGE SUMS OF CASH** - Always be cautious when requested to hold large sums of cash in your client account, either pending further instructions from the client or for no other purpose than for onward transmission to a third party.

● **THE SECRETIVE CLIENT** - A personal client who is reluctant to provide details of his identity. Be particularly cautious about the client you do not meet in person.

● **SUSPECT TERRITORY** - Caution should be exercised whenever a client is introduced by an overseas bank, other investor or third party based in countries where the production of drugs or drug trafficking may be prevalent.

● **POWER OF ATTORNEY** - Care should always be taken when dealing with a client who has no apparent reason for authorising a third party to deal with property on his behalf by way of creating a power of attorney or trust.

● **SUSPECT PERSONALITY** - Caution should be exercised whenever a client is known or suspected to be a triad, drug trafficker or criminal or is introduced by a known or suspected triad, drug trafficker or criminal.

3. Principals in private practice should consider what procedures should be instituted, given the nature of their practice, to facilitate compliance with the legislation. The following steps are recommended:

- appointment of a compliance officer to ensure compliance with internal money laundering procedures;
- initial and continuing training for staff in the requirements of the money laundering legislation and in the recognition and handling of suspicious transactions;
- establishment of internal reporting procedures, including the appointment of a reporting officer as the "appropriate person" (who could be the same person as the compliance officer);
- establishment of procedures for obtaining and keeping for a minimum period satisfactory evidence of clients' identity when appropriate;
- establishment of procedures for keeping records of transactions for a minimum period when appropriate.

4. Reports for the purposes of section 25A of both Ordinances may be made to the Joint Financial Intelligence Unit, 16/F West Wing, Police Headquarters, Arsenal Street, Wanchai, Hong Kong or GPO Box 6555. Enquiries can be made on the JFIU Hotline 2866 3366.

The information contained in these Guidance Notes has been endorsed by the Commissioner of Police.

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