

Drug Trafficking and Organized Crimes (Amendment) Bill 2000Dealing with property known or believed to represent the proceeds of drug trafficking or indictable offences

1. Contrary to the assertion contained in paragraph 5 of the paper, careless and gullible people do get mixed up in criminal activities of one kind or another. Their carelessness or gullibility may be the reason why criminals use them to further their own ends. However, save for regulatory offences, legal policy does not require laws that impose criminal (as opposed to civil) sanctions on account of carelessness or gullibility.
2. The remarks of Seagrott J. reproduced at paragraph 5 of the paper are not to be understood as him saying that in every money laundering case it must be obvious that the scheme is criminal. Rather, the judge is saying that knowing participation in a money-laundering scheme (i.e. a scheme concerning the handling of money not legitimately and honestly acquired) is criminal. That is uncontroversial.
3. The last sentence of paragraph 7 of the paper cannot be reconciled with paragraph 6. If a set of circumstances are known to D and they lead a *common sense, right-thinking member of the community* to consider them as sufficient to lead a person to suspect that property represented the proceeds of drug trafficking or an indictable crime, then D may be convicted of an offence even though D may have genuinely discounted the possibility that the property was tainted.
4. The CSA does not appear to change things. If the accused is stupid or naïve it is very unlikely that he can he prove that *it was reasonable that he did not suspect that the property represented. . . etc?*

Disclosure of knowledge or suspicion that property represents proceeds of drug trafficking

5. The reasoning behind paragraphs 8 and 9 on this topic does not persuade us. We stand by our previous comments on this proposal. If the requisite state of mind is

not subjective then a person could be convicted even though he had a positive belief, not a reasonable belief, that property was 'clean'.

6. The CSA proposing that regulatory and professional guidelines may be taken into account does not appear a good idea. This is because the dealing with money and property is not a regulated activity or a professional obligation in itself, although the actors in a particular case may well, depending on their status, be subject to regulation or to a code of conduct.
7. We doubt the wisdom of including any reference to an employer's set of guidelines. The source of a power to regulate or to make provision for standards of conduct is likely to be a public law power. The legality and rationality of guidelines or codes of conduct may be subject to judicial review. However the relation between employer and employee is governed by contract. An employer's guidelines may be unreasonable. It appears contrary to legal policy to make criminal liability depend, potentially, on the exercise of a private law power that arises from the employer-employee relationship.
8. In cases involving persons who are in a regulated activity or who are governed by a professional code of conduct, we think that any relevant guidelines or code could be proved in evidence in the ordinary way. There may well be a case for the court being able to refer to guidelines where an activity is regulated subject and the accused is subject to the scheme of regulation.

Confiscation Order

9. We stand by our previous comments on this subject.

Assessing the Proceeds of Drug Trafficking

10. The Administration has now supplied the legal policy justification for the proposed amendments, previously lacking by reference to legislative developments in a comparable scheme. We see now that there are grounds for change.

Cases in which restraint orders and charging orders will be made

11. We are pleased to see that the Administration accepts that constitutional issues arise here. We agree that the principle of proportionality is involved when police powers are used to interfere with property rights. See generally Chapter 6 of *The Right to Property in Commonwealth Constitutions* by Allen (C.U.P.) 2000.
12. We do not think that reference to similar powers under the *Prevention of Bribery Ordinance, Cap. 201* are very helpful. That law was enacted many years ago when there was no constitutional right to property.
13. We accept that constitutional property clauses frequently make the distinction between confiscation and seizure. However, constitutional issues nonetheless will arise when police powers are used to seize property that is not later confiscated.
14. The problem, as we see it, is that although police powers may be used to seize property so that it might later be used to satisfy a confiscation order, if the property is not confiscated and it depreciates in value because it has been 'blighted' by the temporary suspension of powers of ownership, then there appears to be a strong case for saying that compensation should lie as of right. As paragraph 19 (c) of the Administration's paper makes clear, no such right exists in the existing schemes.
15. The case for automatic compensation seems to be particularly strong in the case where a man is charged but the case is later dropped so that the person in question has never had an opportunity to contest the allegation of criminality in a court of law.
16. We are concerned that the Administration appears to regard as normal the situation where a person is arrested and released on police bail while investigations continue. The purpose of arrest is to establish a means for bringing a person before the court: see R v. Hughes (1879) 4 QBD 614. Powers of arrest should not be exercised with a view to facilitating further inquiries or questioning. See *Halsbury's Laws of Hong Kong Vol. 9 'Criminal Law and Procedure'* at 130.070.

17. The person arrested can decline police bail and by doing so require the police to both bring him before a magistrate and start criminal proceedings or release him. We find it odd therefore to found a seizure power on a state of affairs that depends on the person whose property may be affected making a choice whether to accept an offer of bail or to decline it. We also wonder whether if the proposed new provision became law the police, when offering bail to a suspect in respect of a relevant offence, will inform him that if he accepts the offer he may have his property frozen until such time as criminal proceedings may be started.
18. We remain unpersuaded about the need for this new power. We see it as being a source of injustice.

Restraint Order and Charging Orders

19. We do not understand the claim in paragraph 20 that *Contempt of court is a civil proceeding, which normally entails lighter punishment*. A comparison is being made but it is impossible to say with what.
20. The purpose of contempt proceedings is to prevent interference in the due administration of justice. See *Hong Kong Civil Procedure 2001* 52/1/4. See also remarks of Lord Edmund Davies in *A-G v. Leveller Magazine Ltd.* [1979] AC 440 at 460A-C approving the definition provided by Lord Clyde in an earlier case: *The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice*.
21. The legislature has chosen to use the civil procedures of the CFI to secure assets for the purpose of confiscation. It seems logical to let those procedures be protected by the existing jurisdiction and not to create a new criminal offence which will be triable by a magistrate or a District Judge. We do not see how legal policy is served if CFI judges make orders and then inferior judges and magistrates later deal with the issue of non-compliance. It would be bizarre to have magistrates rule on jurisdictional issues such as whether the conditions precedent to the making of an order had been met in the CFI. We wonder if the judges of the CFI have been consulted about this erosion of their jurisdiction.
22. It appears to us that the creation of a new offence is undesirable for another reason. The purpose of contempt proceedings is not so much to punish for disobedience

but to ensure that there is no interference with the due administration of justice. If the due administration of justice absolutely calls for an court order to be obeyed the CFI has power to commit a person to prison until such time as he or she complies with the order: see *Hong Kong Civil Procedure* 52/1/6.

23. We can think of situations where a person might be prepared to disobey a court order knowing that he or she only risked a fixed term of imprisonment when, if an indefinite term was a possibility for as long as they were in contempt, they would comply with the order.

Hong Kong Bar Association
7th June 2001.