

Comparison between the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405),
the Organized and Serious Crimes Ordinance (Cap. 455) and the Drug Trafficking
and Organized Crimes (Amendment) Bill 2000

Section numbering	Existing Legislation	Proposed Amendments	Justifications for Amendments
Sections 2 and 7 of Schedule 1 and sections 2 and 6 of Schedule 2	<p><u>Cases in which restraint orders may be made</u></p> <p>Under section 2(11) of <u>Cap. 405</u> and section 2(15) of <u>Cap. 455</u>, a restraint order cannot be applied against a person who has been arrested for a drug trafficking offence or a specified offence, and released on bail.</p>	<p>A restraint order may be applied against a person who has been arrested for a drug trafficking offence or a specified offence, where appropriate, and released on bail. To balance this power, there will be a requirement that the court must be satisfied before making such a restraint or charging order that in the circumstances of the case, there is reasonable cause to believe that charges will be brought against that person after further investigation.</p>	<p>Under existing legislation, a restraint order cannot be issued in respect of a person who has been arrested and released on bail. During the lengthy period when evidence is being gathered and the person is released on bail, that person, knowing that he is under investigation and that his property may be restrained in the future, will naturally seek to dispose of, transfer or conceal his property.</p>
Section 3 (a) of Schedules 1 and 2	<p><u>Confiscation orders</u></p> <p>Section 3(2)(c)(ii)(B) of <u>Cap. 405</u> and section 8(3)(c)(i)(B)(II) of <u>Cap. 455</u> :</p> <p>“a person whose exact whereabouts are not known, reasonable steps have been taken to give notice of those proceedings to that person; and”</p>	<p>The requirement of notifying an absconded defendant be revised along the line that “reasonable steps should be taken to ascertain that person’s whereabouts”.</p>	<p>In the case of an application for a confiscation order against an absconded person whose exact whereabouts are not known, the prosecution has to try to ascertain that person's whereabouts and give him notice of proceedings.</p> <p>It is only when such attempts fail that the</p>

			<p>person's whereabouts will be accepted as unknown. At the operational level, it may be impracticable to notify a person whose whereabouts are not known and it is considered that this requirement requires clarification. The proposed amendment provides clarity in the legislation.</p>
<p>Section 3(b) of Schedules 1 and 2</p>	<p>The present legislation prohibits the making of a confiscation order against an absconded or dead person whose proceedings were instituted before amendments were introduced to Cap. 405 and Cap. 455 in 1995.</p>	<p>In the case of offences which gave rise to applications for confiscation orders against dead or absconded persons, to specify that such offences include offences previously specified in Schedule 1 to the Drug Trafficking (Recovery of Proceeds Ordinance (Cap. 405) or Schedule 1 or 2 to the Organized and Serious Crimes Ordinance (Cap. 455)</p>	<p>As a result of the 1995 amendments to Cap. 405 and Cap. 455, under section 3 of Cap. 405 and section 8 of Cap. 455 an application for a confiscation order may be made in respect of a dead or absconding person against whom proceedings have been instituted for a “drug trafficking offence” or “specified offence” defined respectively in section 2 of Cap. 405 and Cap. 455 respectively. “Drug trafficking offence” is defined to include offences in Schedule 1 to Cap. 405 whereas “specified offence” is defined to include offences in Schedules 1 and 2 to Cap. 455. The schedules contain a number of offences but do not include the former offence of “possession for the purpose of unlawful trafficking” under section 7 of the Dangerous Drugs Ordinance (Cap. 134) and the previous section 25 of Cap. 405, i.e., “assisting another to retain the benefit of drug trafficking”. There are still cases where persons were charged with section 7 of Cap. 134 and then absconded. Since the offence is not included in the existing Schedule 1 to Cap. 405, without the proposed amendments, applications for confiscation</p>

			orders against the absconded persons cannot be brought. The proposed section 3(17) of Cap. 405 and the proposed section 8(10) of Cap. 455 will enhance the comprehensiveness of the confiscation mechanism, as they will apply to any future repeal of offences from Schedule 1 of Cap. 405 or Schedule 1 or 2 to Cap. 455.
Section 4 of Schedule 1	<p><u>Assessing the proceeds of drug trafficking</u></p> <p><u>Cap. 405</u> currently gives the court the power to assume that all property held by the defendant since conviction of a drug trafficking offence, or which has passed through the defendant's hands in the last six years, comes from drug trafficking. It then falls to the defendant to show the contrary.</p> <p>Section 4(4) of <u>Cap. 405</u> currently prohibits the court from applying the assumption in cases of persons convicted of drug money laundering.</p> <p>Section 4(4) of <u>Cap. 405</u> :</p> <p>“Subsections (2) and (3) do not apply if the only drug trafficking offence in respect of which the defendant is to be sentenced is an offence under section 25.”</p>	Section 4(4) of <u>Cap. 405</u> be repealed.	<p>The Drug Trafficking (Recovery of Proceeds) Ordinance was modelled upon the UK’s Drug Trafficking Offences Act 1986. When the Drug Trafficking Offences Act 1986 was enacted, the UK Parliament evidently excluded drug money laundering from the scope of the assumptions because it regarded the latter as a lesser offence than drug trafficking offences. This view, however, is no longer held by UK court, e.g. the judge in <u>R v Greenwood case</u> (1995) 16 Cr App R(S) 614 (CA) commented that “those who launder money from drugs are nearly as bad as those who actually deal in them. It is merely one step along the line.”</p> <p>Apart from the above, the UK Proceeds of Crime Act 1995 gave the courts the power to make the assumption where defendants are convicted of a very wide range of serious or lucrative non-drug crimes, but the drug trafficking legislation has not been updated in line to remove the exemption for drug money</p>

	<p>Section 4(2) of <u>Cap. 405</u> :</p> <p>“The Court of First Instance or the District Court, as the case may be, may, for the purpose of determining whether the defendant has benefited from drug trafficking and, if he has, of assessing the value of his proceeds of drug trafficking, make the following assumptions, except to the extent that the defendant (or, in the case of a defendant who has died, his personal representative on his behalf) shows that any of the assumptions are incorrect in his case.”</p> <p>Section 4(3) of <u>Cap. 405</u> :</p> <p>“Those assumptions are-</p> <p>(a) that any property appearing to the court-</p> <p>(i) to have been held by him at any time-</p> <p>(A) since his conviction; or</p> <p>(B) where section 3(1)(a)(ii) is applicable, since the application was made for a confiscation order in his case, as the case may be; or</p> <p>(ii) to have been transferred to him at any time since the beginning of the period of 6 years ending when the proceedings were instituted against him, was received by him, at the earliest time at which he appears to the court to have held it, as his</p>		<p>laundering offences. The UK Working Group on Confiscation of Crimes considered that this represents a significant gap in the drug trafficking confiscation legislation, which should be rectified at the first opportunity.</p> <p>From an anti-money laundering point of view, such assumption should also apply to persons convicted of a drug money laundering offence since it is precisely such persons who are likely to hold a large amount of proceeds of drug trafficking.</p> <p>It will be in the public interest if the assets of a person who is convicted of money laundering can be confiscated, as these assets are highly likely to be proceeds of drug trafficking or other indictable offence. At present, Cap. 455 allows the court to apply such assumption to persons convicted of money laundering under that Ordinance, but Cap. 405 does not allow the court to do the same. Our proposal will bring Cap. 405 in step with Cap. 455.</p>
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	<p>proceeds of drug trafficking;</p> <p>(b) that any expenditure of his since the beginning of that period was met out of his proceeds of drug trafficking; and</p> <p>(c) that, for the purpose of valuing any property received or assumed to have been received by him at any time as his proceeds of drug trafficking, he received the property free of any other interests in it.”</p>		
<p>Section 5 of Schedule 1 and section 4 of Schedule 2</p>	<p>The existing <u>Cap. 405</u> and <u>Cap. 455</u> as amended in 1995, empowers the court to issue a confiscation order against a deceased or absconded defendant on a civil standard of proof. The existing section 5 of <u>Cap. 405</u> and section 10 of <u>Cap. 455</u>, whereby a prosecutor may tender a statement to the court to include matters relevant to determining whether a deceased or absconding defendant could have been convicted of the drug trafficking offence and whether the defendant has benefited from drug trafficking, is not clear enough for achieving this objective.</p>	<p>To add a provision to put it beyond doubt that allegation in statements submitted by the prosecutor to the court in relation to absconded defendants may be treated as accepted.</p> <p>Section 5 of <u>Cap. 405</u> and section 10 of <u>Cap. 455</u> are to be amended by adding:</p> <p>“(9) 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.”</p>	<p>Due to the unclear drafting of the existing legislation, the court has different interpretations on whether it can determine</p> <p>(a) whether an absconded person could have been convicted of a drug trafficking offence;</p> <p>(b) his benefit from drug trafficking; and</p> <p>(c) the value of his proceeds on the basis of a section 5 of Cap. 405 or section 10 of Cap. 455 statement.</p> <p>To make it clear that while the Court may take into account a statement tendered by the prosecutor in determining whether an absconding or dead defendant could have been convicted in respect of a drug trafficking offence or a specified offence, it must nevertheless be satisfied on the balance of probabilities that such statement constitutes proof for the purpose of section 3 of Cap. 405 and section 8 of Cap. 455.</p>

<p>Section 6 Schedule 1 and section 5 of Schedule 2</p>	<p><u>Application of procedure for enforcing confiscation orders</u></p> <p>Section 8(1)(a) of <u>Cap. 405</u> and section 13(1)(a) of <u>Cap. 455</u> :</p> <p>“the court shall also make an order fixing a term of imprisonment which the defendant is to serve if any of the amount which he is liable to pay under the confiscation order is not duly paid or recovered”</p>	<p>The application of procedure for enforcing confiscation order is to be amended to require the court to specify a period, which is less than 6 months from the issue of the order, for the defendant to pay under that order.</p> <p>Section 8 of <u>Cap. 405</u> and section 13 of <u>Cap. 455</u> are to be amended: “(a) by repealing subsection (1)(a) and substituting-</p> <p>(a) the court shall also make an order-</p> <p>(i) subject to subsection (1A), fixing the period within which the amount he is liable to pay under the confiscation order shall be duly paid; and</p> <p>(ii) fixing a term of imprisonment which the defendant is to serve if any of that amount is not duly paid within that period (including paid by way of being recovered); and;</p> <p>(b) by adding-</p> <p>(1A) The court shall not under subsection (1)(a)(i) fix a period longer than 6 months unless it is satisfied that there are special circumstances which justify it doing so.”</p>	<p>The proposed amendment ensures that the defendant will pay a confiscation order within a reasonable period. It provides a fixed date by which time the defendant can positively indicate his intention to satisfy the confiscation order. If he has not done so by that date then the Secretary for Justice can take steps to realise the defendant’s property to satisfy the order. It is in the public interest that confiscation orders are satisfied in order to deprive defendants of their proceeds of crime.</p> <p>In the Third Report of the UK’s Home Office on Working Group on Confiscation issued in 1998, it was mentioned that it was not uncommon for judges to grant a period of item of anywhere up to three years to pay a confiscation order even though assets might be readily available in a defendant’s bank account. This created unwelcome and unnecessary delays in the enforcement process and is contrary to the purpose of the confiscation legislation which was to deprive offenders of the proceeds of their crime. The Working Group agreed that the granting of up to six months time to pay is reasonable in cases where properties such as houses or other high value items have to be sold.</p>
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<p>Sections 8 and 9 of Schedule 1, sections 7 and 8 of Schedule 2 and section 3(b)(ii) and (iii) of Schedule 3</p>	<p><u>Restraint orders and charging orders</u></p> <p>There is no relevant provision under existing legislation.</p>	<p>Penal provisions be introduced to <u>Cap. 405</u> and <u>Cap. 455</u> to deter people from knowingly dealing with any realizable property in contravention of a restraint or charging order. It is proposed that a person who commits such an offence should be liable on conviction upon indictment to a fine of \$500,000 or to the value of the realisable property the subject of the restraint order or charging order concerned which has been dealt with in contravention of that order, whichever is the greater, and to imprisonment for 5 years, and on summary conviction to a fine of \$250,000 and to imprisonment for 2 years.</p>	<p>At present, there is no penal provision in Cap. 405 or Cap. 455 for breaching a restraint or charging order. It is not a satisfactory situation that Cap. 405 and Cap. 455 contain no sanction against a person who breaches a restraint or charging order.</p>
	<p>Under section 10 of <u>Cap. 405</u> and section 15 of <u>Cap. 455</u>, there is no requirement on any institutions or persons holding any realizable property that is the subject of a restraint or charging order to provide information as to the value of the property.</p>	<p>Section 10 of <u>Cap. 405</u> and section 15 of <u>Cap. 455</u> be amended to require a holder of any realizable property that is the subject of a restraint or charging order to provide relevant documents and a statement in writing as to the value of the property. The penalty for breaching the requirement will be a fine at level 5 and to imprisonment for 1 year.</p>	<p>The court must have such information for monitoring the enforcement of the orders, and for making confiscation orders.</p> <p>The proposed provision will mainly be used to request banks to provide current balance in an account that is the subject of a restraint order, which is intended to operate expeditiously and with minimal cost.</p> <p>Other assets in question may include valuation of properties on bank mortgage, bonds and securities, etc, within the financial institutions' purview. The provision as currently drafted allows the person, who is required to provide</p>

			<p>the statement as to the value of the property, or “documents...in his possession or control which may assist the authorized officer to determine the value of the property” to decide whether it is practicable, i.e. <u>reasonable</u>, to do so. Depending on the circumstances of the case, the person can submit a statement only, or documents, or both, and he will only commit an offence if he gives a wrong value of the concerned property knowingly.</p>
<p>Sections 10(a), (b) and (d), 11(b) and 13 of Schedule 1 and sections 9(a), (b) and (d), 10(b) and 11 of Schedule 2</p>	<p><u>Dealing with property known or believed, etc. to represent proceeds of a drug trafficking/indictable offence</u></p> <p>Section 25 of <u>Cap. 405</u> and <u>Cap. 455</u> :</p> <p>A person commits an offence if, knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person's proceeds of drug trafficking or an indictable offence, he deals with that property.</p>	<p>A provision be added to section 25 of the two Ordinances to provide that a person commits an offence if, having reasonable grounds to suspect that any property represents any person’s proceeds of drug trafficking or indictable offences, he still deals with that property.</p> <p>It is also proposed that a person who commits an offence under this new section should be liable on conviction upon indictment to a fine of \$1 million and to imprisonment for 5 years, or on summary conviction to a fine of \$250,000 and to imprisonment for 2 years.</p>	<p>Existing section 25 of Cap. 405 and Cap. 455 makes it an offence for a person to deal with property if he knows or has reasonable grounds to believe that the property represents the proceeds of a drug trafficking or 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.</p> <p>The current proposal is not a Hong Kong invention. Our current proposal is very close to section 82 of the Australia’s Proceeds of Crimes Act 1987, an extract of which is at Annex I.</p>

			In the UK, it was recently recommended in a report in respect of recovery of crime proceeds prepared by the Cabinet Office Performance and Innovation Unit that consideration should be given to simplifying money laundering offences in the relevant UK law, so as to remove obstacles weighting the test unacceptably in the defendants' favour. In this connection, it is recommended that the Home Office should consider whether this can be achieved by extending all money laundering offences to cover circumstances in which the defendant "has reasonable grounds to suspect".
Section 10 (c) of Schedule 1 and section 9 (c) of Schedule 2	A person who commits an offence under section 25(1) of <u>Cap. 405</u> and <u>Cap.455</u> is liable – (a) on conviction upon indictment to a fine of \$5,000,000 and to imprisonment for 14 years; or (b) on summary conviction to a fine of \$500,000 and to imprisonment for 3 years.	The maximum term of imprisonment in section 25(3)(a) of <u>Cap. 405</u> and <u>Cap. 455</u> be increased from 14 years to 20 years.	The proposed amendment will further deter people from dealing with property known or believed to represent proceeds of a drug trafficking, or indictable offence, and reflect the gravity of the offence. It is in line with Australia's Proceeds of Crime Act 1987.
Section 11 of Schedule 1 and section 10 of Schedule 2	<u>Disclosure of knowledge or suspicion that property represents proceeds, etc, of a drug trafficking or indictable offence</u> Section 25A of <u>Cap. 405</u> and <u>Cap.455</u> : Where a person knows or suspects that any property represents any person's	Section 25A(1) of the two Ordinances should be altered from "knows or suspects" to "knows or has reasonable grounds to suspect". The maximum	Under section 25A of Cap. 405 and Cap.455, where a person knows or suspects that any property represents any person's proceeds of, or was used in connection with, drug

	<p>proceeds of, or was used in connection with, drug trafficking or an indictable offence, he must disclose that knowledge or suspicion.</p> <p>A person who contravenes section 25A(1) commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 3 months.</p>	<p>custodial sanction for a contravention of section 25A(1) of the two Ordinances should increase from 3 months to 12 months.</p>	<p>trafficking or an indictable offence, he must disclose that knowledge or suspicion, together with any matter on which that knowledge or suspicion is based, to an authorized officer. The level of mens rea is not consistent with that in section 25(1) of the two Ordinances. The present section 25A requires the prosecution to prove that the “suspicion” surrounding “dealing” must relate the “dealing” to drug trafficking (Cap. 405) or an indictable offence (Cap. 455). Without this link to crime an essential element of the offence is missing and the prosecution will inevitably fail. In the proposed amendment to section 25(1) and section 25A, this need to prove a link to crime is retained. Similar provision can be found in overseas jurisdictions, e.g. section 22(1) of the New Zealand’s Financial Transactions Reporting Act 1996(Annex II). Furthermore, the existing penalty level of the offence does not reflect the gravity of the offence for failing to disclose suspicious transactions.</p>
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Section 82**82 Possession etc. of property suspected of being proceeds of crime**

- (1) A person who, after the commencement of this Act, receives, possesses, conceals, disposes of or brings into Australia any money, or other property, that may reasonably be suspected of being proceeds of crime is guilty of an offence against this section punishable, upon conviction, by:
- (a) if the offender is a natural person—a fine not exceeding \$5,000 or imprisonment for a period not exceeding 2 years, or both; or
 - (b) if the offender is a body corporate—a fine not exceeding \$15,000.
- (2) Where a person is charged with an offence against this section, it is a defence to the charge if the person satisfies the court that he or she had no reasonable grounds for suspecting that the property referred to in the charge was derived or realised, directly or indirectly, from some form of unlawful activity.

Financial Transactions Reporting Act 1996 009
 III: Obligation to Report Suspicious Transactions
 Obligation to Report Suspicious Transactions
 22 Offences

22. Offences---(1) Every financial institution commits an offence against this section who, in any case where---

(a) A transaction is conducted or is sought to be conducted through that financial institution; and

(b) That financial institution has reasonable grounds to suspect---

(i) That the transaction or, as the case requires, the proposed transaction is or may be relevant to the investigation or prosecution of any person for a money laundering offence; or

(ii) That the transaction or, as the case requires, the proposed transaction is or may be relevant to the enforcement of the Proceeds of Crime Act 1991,---

fails, in contravention of section 15 (1) of this Act, to report that transaction or, as the case requires, that proposed transaction to the Commissioner as soon as practicable after forming that suspicion.

(2) Every financial institution who commits an offence against subsection (1) of this section is liable to a fine not exceeding,---

(a) In the case of an individual, \$20,000;

(b) In the case of a body corporate, \$100,000.

(3) Every person commits an offence and is liable to a fine not exceeding \$10,000 who, in making a suspicious transaction report,---

(a) Makes any statement that the person knows is false or misleading in a material particular; or

(b) Omits from any statement any matter or thing without which the person knows that the statement is false or misleading in a material particular.

(4) Every person commits an offence who,---

(a) For the purpose of obtaining, directly or indirectly, an advantage or a pecuniary gain for that person or any other person; or

(b) With intent to prejudice any investigation into the commission or possible commission of a money laundering offence,---

contravenes any of subsections (1) to (3) of section 20 of this Act.

(5) Every person commits an offence who,---

(a) Being an officer or employee or agent of a financial institution; and

(b) Having become aware, in the course of that person's duties as such an officer or employee or agent, that any investigation into any transaction or proposed transaction that is the subject of a suspicious transaction report is being, or may be, conducted by the Police; and

(c) Knowing that he or she is not legally authorised to disclose the information; and

(d) Either---

(i) For the purpose of obtaining, directly or indirectly, an advantage or a pecuniary gain for that person or any other person; or

(ii) With intent to prejudice any investigation into the commission or possible commission of a money laundering

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Offences

...discloses that information to any other person.

(6) Every person who commits an offence against subsection (4) or subsection (5) of this section is liable to imprisonment for a term not exceeding 2 years.

(7) Every person who knowingly contravenes any of subsections (1) to (3) of section 20 of this Act commits an offence and is liable,---

(a) In the case of an individual, to imprisonment for a term not exceeding 6 months or a fine not exceeding \$5,000:

(b) In the case of a body corporate, to a fine not exceeding \$20,000.

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