Hong Kong Bar Association's response
on Drug Trafficking and Organized Crimes (Amendment) Bill 2000

Proposed Changes to Legislation Making Provision for Confiscation Orders

1. The Legco brief dated 18.10.2000 advises Legco members of proposed amendments to the *Drug Trafficking (Recovery of Proceeds) Ordinance, Cap. 405* ('DTROPO') and the *Organized and Serious Crimes Ordinance, Cap. 455* ('OSCO'). The amendments are said to be called for because experience has shown that it is necessary to 'tighten up' the legislation in some areas: see paragraphs 5-6 of brief.

2. Paragraph 18 of the brief says that *The Department of Justice advises that the Bill does not conflict with those provisions of the Basic Law carrying no human rights implications*. We take that to mean that it is the view of the DOJ that the Bill is wholly compatible with the property protection provisions of the Basic Law.

3. Paragraph 22 of the brief says that the new measures *are unlikely to affect normal business activities.*

4. Paragraph 23 of the brief says that a number of bodies have been consulted, including the HKBA. It says that these bodies are generally supportive of the changes.

What the two Ordinances do

5. Both ordinances enable courts to make confiscation orders where a person has benefited from drug-trafficking (DTROPO) or serious crime (OSCO) and to realise property held by convicted persons to satisfy such orders. They rely heavily on powers given to courts to make restraint and charging orders before a conviction. Third parties are affected by the legislation because property in which they may have an interest can be made the subject of a restraint order.

6. The court's jurisdiction to make orders restraining the use of property is civil in nature and orders made under two ordinances closely resemble *Mareva* injunctions. *RHC Orders 115* (DTROPO) and *117* (OSCO) govern applications for restraint orders.

Relevant Provisions of the Basic Law

7. The proposals affect property rights first and foremost. These are protected by *Articles 6* and *105*.

Previous Consultation

8. In January 1999 the Special Committee on Criminal Law and Procedure expressed misgivings about some of the proposals. The Bar Council endorsed these and the Security Bureau was so advised by a letter from the Chairman.

Present Concerns

9. The Special Committee's concerns that were adopted and expressed in January 1999 have not been met. The Bill contains provisions that are problematic. Because those concerns relate to legal policy issues and not to the technicalities of the proposed legislation they are best explained now by reference to Paragraph 6 of the Legco Brief which sets out the legal policy arguments for change.

Paragraph 6(a):Confiscation Orders

10. Under the present law if a person against whom a confiscation order absconds and his exact whereabouts are not known then the police must, before applying for a confiscation order, show to the court that all reasonable steps have been taken to give notice of the confiscation proceedings to him: see *s. 3 DTROPO (2) (c) (ii) (B)* and *s.8(3)(c) (I) (B)(II) OSCO*. Its is said that *it is impracticable to notify a person whose whereabouts are not known* and that there is therefore a need for *clarification*. The brief does not identify any particular problems.

11. The Bill (*Schedules 1* and *II* ,*Clause 3*) replaces the requirement of attempted notification of confiscation proceedings with the simple requirement to take reasonable steps to ascertain the whereabouts of the abscondee.

12. The purpose of the confiscation proceedings is to secure a penal order that may lead to the realisation of property in which the abscondee and third parties have an interest. It seems wrong to us that penal orders can be made, and property rights extinguished, without the person seeking a confiscation order at least attempting to notify persons who may be affected in a manner that is consistent with his knowledge, albeit it may be very limited, of his or her whereabouts.

13. The police would easily discharge the burden of showing that they have taken reasonable steps to bring proceedings to the attention of the abscondee if, as in civil cases involving property rights, they depose to the fact that they are not sure of a person's exact whereabouts but have, for example, left notices of the proceedings at his last known address or have advertised the fact of the proceedings in a newspaper published in Hong Kong. We simply do not see what the practical problem is. (We note that there is no suggestion that the law relating to giving notice to persons known to be outside Hong Kong and whose exact whereabouts are not known should be changed: see *S.3(2)(c) (ii) DTROPO* and the comparable provisions in *OSCO*.)

Paragraph 6(b): Assessing the Proceeds of Drug Trafficking

14. It is proposed that the power of the court to make assumptions about property held by convicted drug traffickers be extended to cover persons convicted of drug money laundering offences. It is said that *From an anti-money laundering point of view, such an assumption should also apply to persons convicted of drug money laundering offences since they would most likely hold large amounts of proceeds from drug trafficking*. There is currently a statutory obstacle to making such assumptions this in the form of *s.4(4) DTROPO*. It says that the assumptions do not apply in money laundering cases.

15. It is unsatisfactory to propose the repeal of a statutory prohibition on making assumptions in this type of case purely on the 'hunch' of those proposing change. *S.4(4) DTROPO* embodies the legal policy current when *DTROPO* was enacted nearly 12 years ago. There was obviously a good reason then for not applying the assumptions in these cases. At the very least those proposing change should do so by explaining the legislative history of the prohibition and showing why it is no longer good policy.

16. We suspect that the prohibition reflects common sense. When a person launders money for a drug trafficker he provides a service fir which he will obtain a benefit. We assume though that the bulk of the proceeds will be returned to the drug-trafficker in the form of a laundered asset. When *DTROPO* was enacted the legislature must have taken the view that it would be very unusual indeed for a money-launderer's entire assets to be comprised entirely of laundered proceeds. The assumptions would therefore have no basis in fact. The legislature may well have been mindful of the fact that institutions, such as banks, are sometimes used to launder money. They thought, presumably, that public policy was not well served by having bankers and other financial institutions go the trouble of rebutting assumptions that obviously would not apply to them.

Paragraph 6 (c): Application of Procedure for Enforcing Confiscation Orders

17. We have no objection to a provision that spells out that judges have to fix a time in which a person must comply with a confiscation order.

Paragraph 6(d): Cases in which Restraint Orders and charging orders can be made

18. At present a restraint order or a charging order can only be made when criminal proceedings have been instituted or when a court is satisfied that a person will be charged with an offence and there is reasonable cause to suspect that he has benefited. See *s.9(1)* and *(2) DTROPO* and *s. 14(1)* and *(2) OSCO*. This means that property rights can only be affected once the police have decided that there is

enough evidence to bring charges or a judge is satisfied that a person will be charged.

19. The proposal is to confer jurisdiction on the court to freeze assets when the police are still investigating offences but when there is insufficient evidence to bring charges and in circumstances when criminal proceedings may well not be brought at all. In future the court may make restraint orders and charging orders if satisfied that *in all the circumstances of the case, there is reasonable cause to believe that the defendant <u>may be charged</u> with the offence after further investigation is carried out*: see *Section 7, Schedule 1* and *Section 6* of *Schedule 2* (emphasis added).

20. Interference with property rights on the basis of suspected criminal offences when there is insufficient evidence to charge is, obviously, a very serious matter. More so when as is the case, the police are not required to compensate persons affected if criminal proceedings are not later brought. (In this respect the provisions of *Article 105 Basic Law* are to the point if the right to compensation for the deprivation of property extends, as it arguably does, to losses incurred as a result of property being temporarily frozen.)

21. This proposed amendment runs counter to the legal policy implicit in the freezing provisions in both ordinances. This is that the power to restrain property against the possibility of a confiscation order being made later on is a draconian power and that interference with property rights can only be justified if criminal proceedings have also been started, or will definitely be started, and will be conducted expeditiously. See *s. 9(4) DTROPO* and *s. 14(4) OSCO* in this respect. These provisions require a court to discharge restraint orders made earlier on the basis of a court being satisfied that a person will be charged when it appears that proceedings have not been instituted in a reasonable time.

22. It seems wrong to dilute the protection the law customarily affords property rights on account of unspecified difficulties in conducting police investigations. The answer seems to us to be that police officers should not seek to invoke the powers of the court unless and until they have sufficient cause to make arrests or can

satisfy a court that proceedings will be started soon and within in a specified time. (In cases where restraint orders are sought before the commencement of proceedings *RHC Order115 r.3(2)(e)* (DTROPO) and *O. 117 r.4(2)(e)* (OSCO) require the police to depose to when it is intended to institute proceedings. These rules would become superfluous if the proposed amendments went through for there would be no need to provide the court with a proposed timetable for the commencement of criminal proceedings.)

Paragraph 6(e): Restraint Orders and Charging Orders

23. It is said that there is no penal provision in the ordinances to penalize individuals for breaching restraint and charging orders. It is also said that there is no requirement for third parties holding realizable property being required to provide information about the value of restrained property.

24. We are surprised at the proposal for the creation of a new offence without any discussion of the civil consequences of a person disobeying a court order. It is a fact that if a person disobeys an order of the court requiring him or her to deal with property in a particular way then, if he or she disobeys the order, a civil contempt is committed. See *RHC Order 52* generally.

25. Legco should not countenance the creation of a new criminal offence which substantially overlaps with the court's civil contempt jurisdiction to enforce its own orders without first being satisfied that the civil jurisdiction is inadequate or that something in the two ordinances ousts it. Even if prepared to countenance a new criminal offence, Legco should be careful to ensure that there is no possibility of a person being prosecuted for the new offence and for contempt on the same set of facts.

26. The policy behind the proposal requiring a person holding property having to provide a value judgment about the value of that property on pain of committing a criminal offence is not, we think, sufficiently explained. It is impossible therefore to say whether this power is really necessary. We only note that a provision that makes it an offence not to pass a value judgment on the value of property is

fraught with problems. What happens if the prosecution, with the benefit of other information, disputes the accuracy of the enforced valuation?

Paragraph 6(f): Dealing With Property known or believed to represent the proceeds of drug-trafficking or indictable offences

27. It is said that it has been difficult to establish that a person dealing with tainted proceeds has the necessary *mens rea*. That is to say that he knew or had reasonable grounds to believe that the proceeds were tainted. It is proposed that the *DTROPO* and *OSCO* be amended to include new, lesser offences that would enable a conviction to be secured if it is established that reasonable grounds for suspicion existed at the time of the dealing.

28. This means that a person could be convicted of the offence even though he genuinely believed that he was dealing with something other than the proceeds of drug-trafficking or of other indictable offences. This new offence will be punishable with up to 5 years imprisonment. It is also proposed to raise the maximum penalty for laundering offences from 14 to 20 years. It is said that this is in line with penalties for comparable offences elsewhere.

29. When *DTROPO* was enacted in 1989 the option of creating a laundering offence with a lesser *mens rea* must have been considered and rejected as a legal policy option. (Indeed, the Bar Association objected then to a proposal that was floated then that would have enabled a conviction to be secured if the prosecution could show that property had been handled when there were grounds for suspicion only.) The legislature then did not want to see people being sent to gaol simply for making a bad judgment call when dealing with property that later turned out to be tainted. The same policy considerations must have applied when *OSCO* was enacted a few years later.

30. It may well be difficult to prosecute these kind of cases successfully but that is not necessarily a bad thing. The underlying objective behind the law at present is to ensure that the courts do not send careless or gullible people to prison who do not

belong there. Handling stolen property is also a crime but so long as a person does not know or believe that the property is in fact stolen property he commits no offence. No one seriously suggest that the *mens rea* for that offence should be changed so as to make it easier to prosecute.

31. No thought appears to have been given on how this proposal will affect institutions that handle assets that could be tainted proceeds. In 1989 the banks and deposit taking institutions were consulted about the impact of the proposed money-laundering legislation and they devised internal procedures to spot suspect transactions. Legco members should be told what guidance banks and deposit-takers will be expected to give staff in the changed circumstances.

32. The proposal to increase the penalty of the main offence from 14 years to 20 years needs to be considered in the light of the argument for creating a new offence. The usual justification for increasing a penalty for a criminal offence is that it can be shown that a pattern of convictions over a number of years demonstrates that the offence is on the increase. In these circumstances it can be inferred that the penalty for the offence does not deter. However, in this case there has been no pattern of successful prosecutions set against an increase in the number of offences committed. On the contrary, the difficulty in prosecuting the offence is the justification for creating a new offence that is easier to prove but which carries a maximum penalty of only 5 years imprisonment

Paragraph 6(g): Disclosure of Knowledge or Suspicion that property represents proceeds of drug trafficking or indictable offences.

It is an offence for a person knowing or suspecting that property is tainted not to disclose that knowledge or suspicion to the proper authorities. It is an offence punishable with 3 months imprisonment.

33. The proposal is to change the *mens rea* and to raise the penalty. It will be an offence not to disclose if a person knows or has reasonable grounds to suspect that property is tainted. Such a person could go to gaol for 12 months

34. This means that a person who firmly believes that property is “clean” is liable to be sent to gaol if it turns out that his belief was wrong and there was other evidence that would have put the proverbial “reasonable man” on alert to the possibility that the property could be tainted.

35. This proposal suffers from the same flaws as that discussed above relating to the new money-laundering offence which is that making it easier to prosecute certain offences and increasing penalties does not always serve the wider public interest and may even run counter to it.

15th February 2001