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17 November 2000

Ms. Flora Tai,
Clerk to the Bills Committee on the
Drug Trafficking and Organised
Crimes (Amendment) Bill 2000
3/F, Citibank Tower,
3 Garden Road,
Hong Kong.

Dear Ms. Tai,

Drug Trafficking and Organised Crimes (Amendment) Bill 2000

When we were first given sight of the draft of the above Bill, we raised certain concerns on it. These were subsequently conveyed to the Legislative Council when the Bill

--- was previously introduced. A further copy of our earlier letter is attached.

More recently we have met with the Commissioner for Narcotics, representatives of the police, Financial Services Bureau and other relevant government departments to discuss our concerns. While we found the discussion to be useful, it did not resolve the doubts the Society has over the implications of the proposals, in particular in relation to sections 25 and 25A of the two Ordinances (Schedule 1, paragraphs 10 and 11 and Schedule 2, paragraphs 9 and 10 of the Bill).

The Bill makes various amendments to sections 25 and 25A of the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organised and Serious Crimes Ordinance. Amongst the changes to section 25, a new subsection (1A) is added which makes it an offence if a person, having reasonable grounds to suspect property represents any person's proceeds of drug trafficking/an indictable offence, deals with that property. Under the changes to section 25A, the offence of knowing or suspecting [that any property represents the proceeds of a relevant offence, or was used in connection with, or is intended to be so used, and not reporting this to an authorised person] is amended to become the offence of knowing or having reasonable grounds to suspect.....

There are two main difficulties that we have with the above provisions. Firstly, altering the standard of proof required for a conviction under sections 25 and 25A will mean that the subjective mental state of the accused will play little part in establishing that person's guilt. This could mean that persons who would not have committed any offence under the law as it now stands because they harbour no suspicions about a certain set of circumstances, may well be liable to be convicted in future. This is especially the case in relation to section 25A which currently relies exclusively on a subjective test.

Secondly, because of the very broad scope of the Organised and Serious Crimes Ordinance and the failure of the Bill to distinguish the more serious from the less serious offences, unlike e.g. the equivalent legislation in England, the amended Ordinance is likely to become a trap for the innocent and unwary. The implications for accountants and other professionals are likely to be even greater because the courts may have a lower threshold of tolerance for any ignorance on their part.

As regards the first point, in our meeting with the Government representatives, it was made clear to us that there was a problem with obtaining convictions against persons whom the police were fairly sure actually suspected that certain proceeds were connected with an indictable offence, e.g. the spouse or relatives of a drug trafficker with a previous criminal record. However, we believe that by introducing the new offence of “having reasonable grounds to suspect”, this would mean that persons who were for example simply being naïve or credulous, which may often be the case with those who are close to the principal offender and subject to his or her influence, could in future be convicted even though those persons genuinely did not suspect that certain property was the proceeds of a relevant offence.

In other words, this change in the law will not only make it easier to convict persons who would be guilty of an offence under the existing law, which is purportedly its aim, but it would also bring into the net persons who would not currently be guilty of any offence. We have grave doubts as to the justification for this.

In relation to the second point, as we have indicated, the scope of the two Ordinances is very wide. Although the discussion often tends to centre around drug trafficking, which is clearly a very serious crime, in fact the legislation encompasses all indictable offences, including those committed abroad which would also be indictable offences had they been committed in Hong Kong. There will be hundreds of such offences. These may include such things as tax-related offences and offences under the Companies Ordinance or its overseas equivalents. It is quite conceivable therefore that a person will not be suspicious that certain proceeds relate to a relevant offence, primarily because he or she is not aware that the activities involved constituted an indictable offence. Whilst this lack of knowledge of the law may be an acceptable excuse for a lay person, it is not at all clear whether it would be held to be so for a professional, such as an in-house accountant, or senior financial officer, particularly in relation to Hong Kong law. Although extreme or wilful ignorance of the commonly-known might arguably be legitimate grounds for culpability, we would not accept that a person should be at risk of prosecution simply because he or she has a lower level of awareness or general knowledge than might be desirable in his or her position; but this could well be one of the consequences of the Bill.

In our meeting with the Government representatives, and in a subsequent letter to the Chairman of our Legal Committee from the Commissioner for Narcotics, it was suggested that the provisions in question are similar to those under the equivalent UK legislation, the Drug Trafficking Act 1994. Our understanding of the UK position, however, is that the standard of proof required is generally knowledge or suspicion, i.e. the existing subjective standard under section 25A of the two Ordinances. The higher standard of “having reasonable grounds for suspicion”, on the other hand, applies only to the exceptional or more extreme cases of money laundering relating to terrorism and the offences of concealing or transferring.

We were referred by the Government representatives to section 49 of the Drug Trafficking Act 1994 in particular. This deals with concealing or disguising property which is the proceeds drug trafficking, or converting it, or removing it from the jurisdiction “for the purpose of assisting any person to avoid prosecution for a drug trafficking offence or the making or enforcement of a confiscation order”. In other words it involves an element of complicity. This may be contrasted with “dealing” with property under the two Ordinances in Hong Kong, which, under section 2, could be merely receiving or acquiring the property, and no element of complicity is required to be proved.

We hope that the concerns that we have outlined above are sufficiently clear to the Bills Committee and that the Committee will take them into account in its consideration of the Bill.

If you require any further information, please do not hesitate to call me.

Yours sincerely,

PETER TISMAN
DEPUTY DIRECTOR
(PROFESSIONAL PRACTICES)
HONG KONG SOCIETY OF ACCOUNTANTS

PMT/ay
Encl.

c.c. Mr. Eric Li (2827 5086)

BY FAX AND BY POST
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4 November 1999

Miss Christina Chong,
Narcotics Division,
Security Bureau,
23/F, Queensway Government Offices,
High Block,
Queensway, Hong Kong.

Dear Miss Chong,

**Drug Trafficking and Organised Crimes
(Amendment) Bill 1999**

We spoke on the telephone a week or so ago, regarding the above draft Bill, part of which was recently passed to us for comment by the Financial Services Bureau. We have not however, received any explanatory materials and we are therefore not entirely clear about the intention behind the amendments.

As I mentioned to you when we spoke, a meeting of our Legal Committee was scheduled for the end of last week. Coincidentally, the Committee has been considering consolidating the advice given to the Society's members in relation to the Drug Trafficking and Organised Crimes Ordinances in a revised Technical Bulletin.

At the meeting, members of the Legal Committee expressed concern regarding the proposals contained in paragraphs 12 and 13 of Schedule 1, and 11 and 12 of Schedule 2, in particular the latter paragraphs in the respective schedules.

These provisions add a new offence, under section 25 of the two ordinances, of dealing in property having reasonable grounds to suspect that it directly or indirectly represents the proceeds of drug trafficking or of an indictable offence. Secondly, they alter the threshold for the reporting requirement under section 25A, from "suspecting" to "having reasonable grounds to suspect".

The concern is that the proposals appear to replace the existing subjective test with a new objective test to determine whether a person is liable to be convicted of a serious criminal offence. If so, this represents a fundamental shift of responsibility from the law enforcement agencies to the accused person. In relation to section 25A, for example, currently it must be proved beyond a reasonable doubt that a person accused of failing to report did in fact know or suspect that the property represented the proceeds of a crime covered by the legislation. The proposals could be interpreted to mean that, in future, provided that a jury believed that there were reasonable grounds for suspicion, then an accused person who failed to report would be guilty of an offence, whether or not he actually suspected anything, that is regardless of whether or not he had any subjective basis for reporting.

This appears to introduce a concept akin to criminal negligence in this part of the law and it would put professional advisers in an invidious position. The Committee also noted that there are no statutory defences proposed in the legislation.

It is, however, also possible to interpret the changes as an attempt to give greater assurance to persons who might find themselves in a reporting situation. It might be that the proposed amendments are intended to introduce greater certainty as to the trigger point for reporting under s25A. If this the case, then we would still be concerned that the Draft Bill does not achieve certainty but potentially creates uncertainty. As drafted, it is arguable that a professional adviser, for example, who harbours suspicions will be less likely to report these because he will need to assure himself first that his grounds are reasonable. If there is any doubt about whether they are objectively reasonable, then he may well be reluctant to make a report for fear of being sued by his client for an unwarranted breach of confidentiality or, possibly, defamation.

To sum up, therefore, we are unclear as to how the proposed changes to section 25 and, in particular, section 25A, are to be interpreted. While access to the explanatory and background materials might have made this clearer, as a matter of principle it would still be undesirable to introduce amendments into the law that could be ambiguous. Secondly, under any of the specific interpretations that appear to be possible, we foresee difficulties for professional advisers with these provisions.

Please note that these are the initial views of our Legal Committee as, given the time constraints, we have not been able to refer the matter to the Society's Council.

If you have any questions on the above, please do not hesitate to contact me.

Yours sincerely,

PETER TISMAN
DEPUTY DIRECTOR
(PROFESSIONAL PRACTICES)
HONG KONG SOCIETY OF ACCOUNTANTS

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c.c. Financial Services Bureau (Attn: Mr. Raymond Wu)