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**Report of the Bills Committee on
Drug Trafficking and Organized Crimes (Amendment) Bill 2000**

Purpose

This paper reports on the deliberations of the Bills Committee on Drug Trafficking and Organized Crimes (Amendment) Bill 2000.

Background

2. The Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) and the Organized and Serious Crimes Ordinance (Cap. 455) provide for, amongst others, the tracing, restraining and confiscation of proceeds derived from drug trafficking, organized crimes or specified offences, as well as the criminalization of dealing with the proceeds of drug trafficking or other indictable offences. The two Ordinances mirror each other in their confiscation and anti-money laundering provisions.

3. According to the Administration, the effectiveness of certain provisions of the two Ordinances warrant further enhancement in the light of changing circumstances. A working group comprising law enforcement agencies, financial and professional legal bodies was formed by the Government in 1998 to improve the quantity and quality of suspicious transaction reporting. The working group agreed that one of the major obstacles to such reporting was the small number of convicted money laundering cases, which in turn discouraged people from reporting those transactions. The Administration has further pointed out that operational experience has also revealed that legislation in certain areas requires tightening up to enhance its effectiveness.

The Bill

4. The Bill makes a number of proposals to increase the effectiveness of the Hong Kong's anti-money laundering legislation. These proposals include -

- (a) to amend the requirement of notifying an absconded defendant along the line that "reasonable steps should be taken to ascertain that person's whereabouts";

- (b) to repeal section 4(4) of the Drug Trafficking (Recovery of Proceeds) Ordinance to allow an assumption provision, i.e. all property held by the defendant since conviction for a drug trafficking offence, or which has passed through the defendant's hands in the last six years, comes from drug trafficking, to be applied to defendants who have been convicted of a money laundering offence;
- (c) to require the Court to fix a period within which a defendant is to pay the amount under a confiscation order;
- (d) to amend the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance to allow for the making of restraint or charging orders in relation to property of a person who has been arrested for a drug trafficking offence or a specified offence, and released on bail;
- (e) to balance the power referred to in (d) above by requiring 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;
- (f) to require the holder of any realizable property which is subject to a restraint or charging order to provide a statement in writing as to the value of the property, and to introduce penal provisions for breaching a restraint or charging order;
- (g) to create a new offence of dealing with property if having reasonable grounds to suspect that the property in whole or in part represents a person's proceeds from drug trafficking or an indictable offence, and to increase the maximum penalty for the money laundering offence in existing section 25(1) of both Ordinances from 14 to 20 years; and
- (h) to change the test for requiring a disclosure under section 25A(1) of both Ordinances from "knows or suspects" to "knows or has reasonable grounds to suspect", and to increase the custodial sanction for a contravention of section 25A(1) of the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance from three to 12 months.

The Bills Committee

5. At the House Committee meeting on 3 November 2000, members agreed that a Bills Committee should be formed to study the Bill. The membership list of the Bills Committee is in **Appendix I**.

6. Under the chairmanship of Hon James TO, the Bills Committee has held 15 meetings with the Administration to discuss the Bill. The Hong Kong Society of Accountants, the Hong Kong Trustees Association, the Hong Kong Bar Association, the Hong Kong Association of Banks, the Law Society of Hong Kong and the Hong Kong Federation of Insurers have made submissions to the Bills Committee on the Bill.

Deliberations of the Bills Committee

7. The main deliberations of the Bills Committee are summarized in the following paragraphs.

A new offence of dealing with property if having reasonable grounds to suspect that that property represents proceeds of drug trafficking or indictable offences

8. Under existing section 25 of the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance, it will be 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 an indictable offence.

9. According to the Administration, past operational experience reveals that in most cases, it is difficult to prove the mental element of "knows" or "has reasonable grounds to believe" under section 25 of the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance. 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. The Administration has also provided information on a number of actual prosecution cases and explained to the Bills Committee the operational difficulties to prove the mental elements of "knows", "reasonable grounds to believe" (section 25) and "suspect" (section 25A).

10. The Administration proposes to add a new offence to section 25 of both Ordinances. Under the proposed provision, it will be an offence for a person to deal with property if he has "reasonable grounds to suspect" that the property in whole or in part represents a person's proceeds of drug trafficking or an indictable offence. The burden of proof beyond reasonable doubt remains unchanged for the new offence. The Bill also proposes to increase the maximum penalty for the money laundering offence in existing section 25(1) of both Ordinances from 14 to 20 years (section 10 of Schedule 1 and section 9 of Schedule 2 to the Bill).

11. The Administration has informed the Bills Committee that coinciding with the development in Hong Kong, the Cabinet Office in the United Kingdom (UK) has also issued a report in June 2000 covering a full umbrella of issues on recovering the proceeds of crime. The UK, through its own experience, has come to the conclusion that even with the mental element of "suspect", the law enforcement agency is having difficulties in putting forward prosecutions. The UK Cabinet Office has therefore proposed that the test for all money laundering offences should be simplified, and this

will be achieved by extending all money laundering offences to cover circumstances under which the defendant has "reasonable grounds to suspect". The Bills Committee has made reference to information provided by the Administration on overseas anti-money laundering regimes. Members note that similar mental element of "having reasonable grounds to suspect" is being used in Australia and the UK is proposing to adopt similar lower mental element.

12. Members have expressed reservation as to whether the magnitude of money laundering problem in Hong Kong and urgency of the matter warrants the proposed changes at the present stage. In view of the wide implications and complexity of proposals of using the mental element of "having reasonable grounds to suspect", members have also queried the need for Hong Kong to legislate ahead of UK, knowing that the relevant UK Bill is being scrutinized by the House of Commons at that time.

13. The Administration has responded that while there is no internationally accepted method to estimate the magnitude of money laundering, it is certain that crime proceeds, either seen in individual case or in aggregate, represent extremely large amount of money that can penetrate into existing legitimate financial/economic networks. In considering why the Administration should act against money laundering, apart from security reasons, one should take into account the contaminating effect money laundering activities have on legal financial transactions, the adverse effects on a jurisdiction's tax collection and public expenditure, and capability of criminal proceeds breeding other crimes, etc.

14. The Administration has informed members that 15 countries and territories had been labelled as non-cooperative countries or territories in June 2000 for the deficiencies in their systems in combating money laundering. In view of the low conviction rate of money laundering offences, Hong Kong must have an effective anti-money laundering regime in order to maintain its status as an international financial centre.

15. The Administration has further pointed out that the 40 Recommendations of the Financial Action Task Force on Money Laundering (FATF) have been regarded as the most comprehensive international standards and best practices to counter money laundering. FATF has recently suggested that further lowering the level of *mens rea* should be considered, if the money laundering offence is to be effectively prosecuted. As Hong Kong is a member of FATF, the current proposal of adopting the mental element of "having reasonable grounds to suspect" is in line with the direction the FATF is heading for in strengthening anti-money laundering legislation in member jurisdictions.

16. Hon Margaret NG considers that the Administration's main justification for introducing the proposed mental element is the small number of prosecutions and convictions versus the large number of investigations. She has pointed out that it is illogical to argue that there must be a certain proportion of money laundering cases in a number of investigations, and there must be a proportionate number of prosecutions

and convictions resulting from these investigations. She is concerned that the Administration has come to the conclusion that the existing legislation has deficiencies simply because the number of prosecutions and convictions is small. On the basis of such a faulty reasoning, the Administration may have sought to cast the net so wide that innocent persons will be unnecessarily caught.

17. The Administration has stressed that given the requirements to prove the linkage between the action of dealing with the proceeds of drug trafficking or other indictable offence, and the knowledge or grounds for suspicion that the proceeds involved are proceeds of drug trafficking or indictable offence, the Bill will not catch those merely careless people who are unintentionally involved in transactions of the proceeds of drug trafficking or indictable offence.

18. In the light of members' concern that innocent people who are unintentionally involved in transactions of the proceeds of drug trafficking or indictable offence and genuinely do not suspect about the transaction may be caught by the proposed legislation, the Administration has proposed to build in a defence provision for the money laundering offence to the effect that in proceedings against a person for an offence under section 25(1A), it is a defence to prove that he did not suspect the property he dealt with in whole or in part directly or indirectly represented any person's proceeds of drug trafficking or indictable offence and in all circumstances of his case, it was reasonable that he did not suspect.

19. Some members, including Hon Martin LEE, Hon Eric LI and Hon Margaret NG, have reservations about the statutory defence proposed by the Administration for the money laundering offence because it will have the effect of shifting the burden of proof from the prosecution to the accused. They consider that the requirement for the accused to prove that he did not suspect is already adequate. These members stress that it is unnecessary for the Administration to consider whether a person genuinely suspected or not as the final decision should be vested with the Court.

20. Members note that clause 11 of the United Nations (Anti-Terrorism Measures) Bill requires a person to make a report if he knows or has reasonable grounds to suspect that property is terrorist property. As a similar mental element is adopted, the Bills Committee has suggested that members should consider the views expressed on the United Nations (Anti-Terrorism Measures) Bill when discussing the Administration's proposals in respect of adopting the mental element of "having reasonable grounds to suspect".

21. The Administration has informed the Bills Committee that during the deliberation of the Bills Committee on United Nations (Anti-Terrorism Measures) Bill, it is agreed that clause 11 will be amended to require a person to make a report if he know or suspects that property is terrorist property. In the light of the new development and the grave concerns expressed by members, the Administration has agreed to withdraw its proposals of creating a new offence of dealing with property if having reasonable grounds to suspect that the property in whole or in part represents a person's proceeds from drug trafficking or an indictable offence, and as part of the

package, it will also withdraw the proposed increase in maximum penalty for the money laundering offence. The Administration will move Committee Stage amendments (CSAs) to such effect.

Applying the mental element of "having reasonable grounds to suspect" to offences related to undisclosed suspicious transactions (section 25A)

22. Under section 25A of the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance, where a person knows or suspects that any property represents any person's proceeds of, or was used in connection with, drug 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 authorised officer.

23. According to the Administration, the level of *mens rea* in section 25A of the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance is not consistent with that in section 25(1) of both Ordinances. The Bill proposes to change the test for requiring a disclosure from "knows or suspects" to "knows or has reasonable grounds to suspect". The Bill also proposes to increase the custodial sanction for a contravention of section 25A(1) of the two Ordinances from three to 12 months (section 11 of Schedule 1 and section 10 of Schedule 2).

24. Some members express objection to the proposal of using the mental element of "having reasonable grounds to suspect" for the disclosure of suspicious transaction offence under section 25A. They have pointed out that the proposal will mean that persons who will not have committed any offence under the current law may be convicted because they harbour no suspicion about a certain set of circumstances, and the subjective mental state of the defendant will play little part in establishing that person's guilt. These members consider that the proposed section 25A will impose a statutory duty on a person to suspect if a certain set of circumstances comes to his knowledge, but the elements constituting "reasonable grounds to suspect" are not clear. They have also pointed out that the mental element of "having reasonable grounds to suspect" was adopted in the Drug Trafficking (Recovery of Proceeds) Bill which was introduced into the Legislative Council (LegCo) in 1989, but was amended as "having reasonable grounds to believe" when the Bill was enacted. They request that the Administration must provide strong justification to convince members that a change is necessary.

25. The Administration has reiterated that section 25A as presently worded is not working as evidenced by the fact that in the past 11 years, there has been only one successful prosecution. The only conviction essentially came from the defendant's own admission. The proposed amendment has the advantage of introducing an objective element of "reasonable grounds". The Administration has stressed that criminalizing the offence of failure to report suspicious transaction on the basis of the mental element of "knowing or having reasonable grounds to suspect" has been or will shortly be adopted in some overseas countries.

26. The Administration also does not agree that the mental element constituting "reasonable grounds to suspect" is not clear. The Administration has explained to members that the mental element of "having reasonable grounds to suspect" contains both subjective and objective elements, as follows -

- (a) subjective element -- requires proof that those grounds were known to the defendant; and
- (b) objective element -- requires proof that there were grounds that a common sense, right-thinking member of the community would consider as sufficient to lead a person to suspect that the property in whole or in part represented any person's proceeds of drug trafficking or an indictable offence. The Joint Financial Intelligent Unit also publishes on its website a list of suspicious transaction indicators to aid the identification of such transactions.

27. The Administration has explained that whether there are sufficient evidence to charge a person will depend upon a combination of pieces of evidence. There is a combination of objective factors, such as the volume of the transaction, frequency, etc., which should alert the person of a suspicious transaction and to make a report. There is also circumstantial evidence, such as the person's relation with the alleged criminal, the employment status of the alleged criminal, etc. which should form part of the decision to lay charges against that person. Although each piece of evidence may not lead a person to suspect, the combination of it should give a common person reasonable grounds to suspect. With the phrase "reasonable grounds to suspect", there must be in existence facts which to a reasonable man should suspect and those facts are known to that person. Hence, there are objective and subjective elements involved.

28. Hon Margaret NG does not agree with the Administration's analysis that the mental element of "having reasonable grounds to suspect" constitutes objective and subjective components. She considers that even if the objective and subjective components co-exist, the person may not link the two together and therefore harbours no suspicion. Hon Margaret NG stresses that there is no statutory defence that the person can prove on balance of probability that he really did not suspect.

29. Some members are also concerned that professionals, such as accountants and lawyers, will be sued by their clients for breaching the rule of confidentiality if they have made disclosure to the Police. They consider that the disclosure of suspicious transaction offence will impose an unreasonable burden on financial institutions, especially their frontline staff who need to handle numerous transactions every day in their work. These members have pointed out that the proposed amendments may bring drastic change to the relationship of a professional and his client, given that the professional will have to question his client, if he detects a possible suspicious activity. The duty to report will also pose significant intrusions to the traditional solicitor-client relationship.

30. The Administration has pointed out that section 25A(3) presently gives the protection that any disclosure should not be treated as a breach of any restriction upon the disclosure of information imposed by contract or rule of conduct and should not render the person who made it liable in damages.

31. Hon Eric LI and Hon NG Leung-sing are concerned that the current statutory defence is inadequate in protecting the banks and their staff. They have pointed out that under the proposed amendment, a person has to make the disclosure only if he has reasonable grounds to suspect. The widening of the scope of disclosure will bring about the problem of possible breaching of contract between the banks and their clients. The Administration has proposed to further amend section 25A to make it clear that the Court may consider the defendant's observance or non-observance of the guidelines issued by regulatory bodies, among others, in the proceedings for an offence under section 25A. Hon Eric LI welcomes the Administration's proposed statutory defence because it will at least serve as an additional protection to the professionals and those employees working according to the code of practice. However, he has pointed out that those employees who are not professionals or their trades do not have any code of practice will not be protected.

32. Hon Eric LI has expressed concern that although the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance tend to centre around serious crimes, it actually encompasses indictable offences of a less serious nature, including those committed abroad which will also be indictable offences have they been committed in Hong Kong. He has pointed out that it is beyond an average person's capability to understand the implications of the proposed section 25A. Hon Eric LI is worried that it is quite conceivable that a person will not suspect that certain proceeds relate to a relevant offence, primarily because he is not aware that the activities involved constitute an indictable offence.

33. Hon Eric LI has further pointed out that the higher standard of "having reasonable grounds for suspicion" in the UK legislation applies only to exceptional or extreme cases of money laundering relating to terrorism and to conspiring parties who are involved in concealing or transferring the proceeds of drug trafficking of another party. He also refers to the relevant UK Cabinet Office Report which clearly states that safeguards are needed to ensure that the powers to compel persons to produce documents, answer questions, etc are invoked in a way proportionate to the criminality under investigation. Given the wide implications of the proposed section 25A, Hon Eric LI questions whether the Administration has taken into consideration the principle of proportionality when drafting the law.

34. Having considered members' views, the Administration has agreed to withdraw its proposals of changing the test for requiring a disclosure under section 25A(1) of the Drug Trafficking (Recovery of Proceeds) Ordinance and Organized and Serious Crimes Ordinance to "knows or has reasonable grounds to suspect", and increasing the custodial sanction for a contravention of section 25A(1) of the two Ordinance. The Administration will move CSAs to such effect.

35. Notwithstanding that the Administration has agreed to withdraw its proposals in respect of the disclosure of suspicious transactions offence, some members have expressed concern that a legal representative is required under section 25A of the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance, as presently worded, to disclose privileged communication. Members note that similar concern about legal privilege has been raised by some members of the Bills Committee on the United Nations (Anti-Terrorism Measures) Bill.

36. The Administration has stressed that sections 25A respectively of the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance do not alter the common law position governing legal privileges. Moreover, the right to confidential legal advice is guaranteed under Article 35 of the Basic Law. The Administration, however, has agreed to move a CSA on legal professional privilege, having regard to the one which will be proposed on the same subject in the context of the United Nations (Anti-Terrorism Measures) Bill.

37. In the light of the decision of the Bills Committee on the United Nations (Anti-Terrorism Measures) Bill on the subject, members have agreed that the Administration will move a CSA to add a general provision to section 2 of the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance along the line that nothing in these two Ordinances, except relevant provisions relating to legal professional privilege, shall require any disclosure of privileged communication, and to define privileged communication along the line of existing relevant provisions in these two Ordinances. Members stress that nothing should affect the legal professional privilege currently protected under these two Ordinances.

Cases in which restraint orders and charging orders may be made

38. Under existing legislation, a restraint or charging order cannot be issued in respect of a person who has been arrested and released on bail. The Administration has pointed out that during the period when evidence is being gathered and the person is released on bail, that person, knowing he is under investigation and his property may be restrained in the future, will naturally seek to dispose of, transfer or conceal his property. As a result, there may be no property available to satisfy a confiscation order if one is made in his case.

39. The Bill proposes to amend section 9 of the Drug Trafficking (Recovery of Proceeds) Ordinance and section 14 of the Organized and Serious Crimes Ordinance (section 7 of Schedule 1 and section 6 of Schedule 2 to the Bill) to allow for the making of restraint or charging orders in relation to property of a person who has been arrested for a drug trafficking offence or a specified offence, and released on bail. To balance this power, the Court is required to be satisfied before making such a restraint or charging order that, in the circumstances of the case, there is reasonable cause to believe that the defendant may be charged with the offence after further investigation.

40. Some members query why it is not practicable to restrain the property of a person under investigation by means of a holding charge. The Administration has explained that the purpose of a holding charge is not to prevent property from dissipating. Moreover, once a holding charge is laid, the prosecution is under the criminal court time schedule to initiate proceedings as soon as possible. In case of a large quantity of exhibits, the prosecution may not be able to initiate proceedings in time and is forced to release the defendant. The Administration has also pointed out that there is adequate protection to any person affected by the restraint/charging order because he can apply to the Court to have the order lifted and seek compensation. The Administration has confirmed that it may take about six months or longer to complete the necessary work for complicated cases, and an inter partes hearing will be held to consider an application for a restraint/charging order.

41. Members appreciate that there is a need to prevent the person who has been arrested and released on bail from dissipating the property. They, however, note that the ground for making an arrest can be very low, i.e. "there is reasonable suspicion that the person has committed an offence". To protect the property's right of a person who should be presumed innocent before any conviction, members consider that it is necessary to strike a right balance by raising the threshold for invoking the power to restrain the property of a person who had been arrested and released on bail. They have pointed out that it will be very difficult to make a successful application to lift the order because the proposed threshold, i.e. "there is reasonable cause to believe that the defendant may be charged with the offence after further investigation is carried out", is very low. Members have requested the Administration to consider the feasibility for the Court to apply a threshold to make a restraint order for a limited period of time, and to apply a higher threshold if that period of time is to be extended.

42. Members also note that the proposed amended provision will not apply to a person who has been arrested for a drug trafficking offence or a specified offence, and has refused bail. Hon James TO, the Chairman of the Bills Committee, has expressed concern that the person may refuse bail in order to avoid his property being restrained or charged. He has suggested that the proposed amended provision should cover the scenario where a defendant has been arrested but refused bail.

43. In the light of members' views, the Administration has agreed to move CSAs to section 7 of Schedule 1 and section 6 of Schedule 2 to the effect that the Court would be given the discretion to set an expiration date for a restraint order or charging order for a person who has been arrested and released on bail or refused bail, having regard to the circumstances of the case, if the Court is satisfied that there is reasonable cause to believe that the defendant may be charged with the offence after further investigation is carried out, and the Court may order an extension of the restraint order or charging order if it is satisfied that there is reasonable cause to believe that the defendant will be charged with the offence after further investigation is carried out.

44. For the sake of providing adequate protection to the person who has been arrested and released on bail or refused bail, the Administration has further agreed to specify the conditions of "not later than is reasonably necessary for the purposes of

the investigation concerned" and "not later than 6 months after the date on which that order is made" for the Court of First Instance to consider an application for imposing a restraint order or charging order, or extending such order.

45. Members have expressed concern whether there is adequate mechanism to seek compensation if the person under investigation is subsequently acquitted or not charged. The Administration has informed the Bills Committee that according to Order 115 rule 5(1) of the Rules of the High Court, a third party who considers that he is aggrieved by a restraint order or a charging order can apply to the Court to discharge or vary the order. Under section 27 the Drug Trafficking (Recovery of Proceeds) Ordinance and section 29 of the Organized and Serious Crimes Ordinance, if an investigation is initiated against a person and no proceedings are instituted against him, or proceedings are instituted but do not result in his conviction, the Court may, on application by a person who held property which was realizable property, order compensation to be paid to the applicant if it deems appropriate.

46. Members have also expressed concern as to whether the right to legal representation of a defendant whose assets are subject to a restraint order will be duly protected. They query whether the defendant can use part of his assets for payment of legal expenses, and whether the receipt of such payment by a legal representative will amount to money laundering.

47. The Administration has assured members that the right of a restraint order application respondent to legal expenses is provided for under the Rules of the High Court (Cap. 4 sub. leg.). The Administration has explained that a respondent may also apply for legal expenses prior to the inter partes hearing before a judge in chambers. A respondent who makes an application under Order 115 or Order 117 of the Rules of the High Court is required to prove on balance of probabilities that he has exhausted all other assets save for those under restraint and that the amount he asked for is "reasonable". The Court will, after considering the foregoing two criteria, decide whether funds from the restrained assets should be set aside for legal expenses.

48. The Administration has further explained that an applicant whose assets are subject to a restraint order will undergo the same means tests as any other applicants who apply for criminal legal aid. The restrained assets will also be taken into account in the computation of his financial resources. If his financial resources exceed the relevant threshold, provided the Director of Legal Aid is satisfied that it is desirable in the interests of justice to grant legal aid, the Director may exercise his discretion to do so.

49. As regards the position of the legal representative, the Administration has explained that the position in relation to a legal representative in receiving payment/money from a respondent whose assets are subject to a restraint order is the same as any ordinary person. The mere act of receiving payment/money is not an offence unless at the time of receiving the payment/money, the legal representative knows or has reasonable grounds to believe that the payment/money represents proceeds of drug trafficking or of an indictable offence.

Confiscation orders

50. 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. It is only when such attempts have failed that the person's whereabouts will be accepted as unknown. The prosecution is still required by legislation to take reasonable steps to give notice of those proceedings to that person. The Administration considers that it is impracticable at the operational level to attempt to notify a person whose whereabouts are not known, therefore, it is considered that this requirement needs clarification.

51. The Bill proposes to amend section 3 of the Drug Trafficking (Recovery of Proceeds) Ordinance and section 8 of the Organized and Serious Crimes Ordinance (section 3 of Schedules 1 and 2 to the Bill) to revise the requirement of notifying an absconded defendant along the line that "reasonable steps should be taken to ascertain that person's whereabouts".

52. At members' suggestion, the Administration has agreed to move a CSA to add a deemed service provision of publishing the notice of the confiscation proceedings in a Chinese language newspaper and an English language newspaper of wide circulation. The Administration has confirmed that the proposal of a deemed service provision will be incorporated as a step to ascertaining the abscondee's whereabouts, in addition to the requirements under Order 65 rule 5(1)(d) of the Rules of the High Court.

53. Some members have suggested that in order to ensure fairness, the Administration should consider empowering the Court to order the mode of substituted service on the basis of individual circumstances. The Administration has agreed to move a CSA to give the Court the discretion to specify the additional step that should be taken in relation to giving notice of a confiscation order proceeding to a person who has absconded.

54. Members note that 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 the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance. The Bill also proposes to add a new subsection to section 3 and section 8 of the two Ordinances respectively to specify that, in the case of offences which give rise to applications for confiscation orders against absconded or dead persons, such offences include offences previously specified in Schedule 1 to the Drug Trafficking (Recovery of Proceeds) Ordinance or Schedule 1 or 2 to the Organized and Serious Crimes Ordinance.

Assessing the proceeds of drug trafficking

55. The Drug Trafficking (Recovery of Proceeds) Ordinance currently gives the Court the power to assume that all property held by the defendant since conviction for 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. According to the Administration, 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. The Organized and Serious Crimes Ordinance allows the Court to apply the assumption convicted of money laundering under that Ordinance but section 4(4) of the Drug Trafficking (Recovery of Proceeds) Ordinance currently prohibits the Court from applying the assumption to persons convicted of drug money laundering. The Bill proposes to repeal section 4(4) of the Drug Trafficking (Recovery of Proceeds) Ordinance (section 4 of Schedule 1 to the Bill).

56. Members have made reference to the case *Re Lau Koon-chiu [1990]1HKC377* which concerns the assumptions in section 4 of the Drug Trafficking (Recovery of Proceeds) Ordinance and section 9 of the Organized and Serious Crimes Ordinance, which are nearly the same. The judge in the case held that in considering what property ought to be confiscated, the Government gets assistance in establishing what payments or rewards were so received from the assumption in section 4(3) of the Drug Trafficking (Recovery of Proceeds) Ordinance. The Administration has explained that the Court should be reluctant to release any property from restraint, and certainly not property received within the six year period (i.e. the presumptions) until the proceedings are concluded. Consequently, the Government can apply the presumptions in section 4 of the Drug Trafficking (Recovery of Proceeds) Ordinance for the application of a restraint order. The Court can only determine whether such presumptions are rebutted at the confiscation stage.

57. The Administration has stressed that application of the assumption to persons convicted of drug money laundering offences is very useful in the enforcement actions against drug money laundering activities. In addition, the assumption under the Organized and Serious Crimes Ordinance cannot apply to a person if he engaged in drug money laundering activities on his own. Members raise no objection to the Administration's proposal.

Issue of a confiscation order against a deceased or absconded defendant on a civil standard of proof

58. The Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance empower the Court to issue a confiscation order against a deceased or absconded defendant on a civil standard of proof. According to the Administration, the existing section 5 of the Drug Trafficking (Recovery of Proceeds) Ordinance and existing section 10 of the Organized and Serious Crimes Ordinance, whereby a prosecutor may tender a statement to the Court to include matters relevant to determining whether a deceased or absconded 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.

59. The Bill proposes 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 (section 5 of Schedule 1 and section 4 of Schedule 2 to the Bill). At members' suggestion, the Administration has agreed that the proposed amendments in section 5 of Schedule 1 and section 4 of Schedule 2 to the Bill should also cover the situation where the defendant has died. The Administration will move CSAs to such effect.

Application of procedure for enforcing confiscation orders

60. The Administration has explained to the Bills Committee that sometimes a Court will specify in the Certificate of Sentence the period in which the defendant has to pay under a confiscation order, but sometimes it will not. The payment of confiscated assets may be unduly delayed if the period of payment is not specified. The Bill proposes to require the Court to fix a period within which a defendant is to pay the amount under a confiscation order by amending section 8 of the Drug Trafficking (Recovery of Proceeds) Ordinance and section 13 of the Organized and Serious Crimes Ordinance (section 6 of Schedule 1 and section 5 of Schedule 2 to the Bill).

61. Some members have queried the justifications for the proposed amendments and requested the Administration to explain the inadequacies of section 8(1)(a) of the Drug Trafficking (Recovery of Proceeds) Ordinance and section 13(1)(a) of the Organized and Serious Crimes Ordinance.

62. The Administration has explained that section 6 of Schedule 1 and Section 5 of Schedule 2 to the Bill amends section 8(1)(a) of the Drug Trafficking (Recovery of Proceeds) Ordinance and section 13(1)(a) of the Organized and Serious Crimes Ordinance respectively to give the Court the power to fix a period within which a defendant is to pay the amount under a confiscation order. The Administration has further pointed out that in some cases when the property involved is cash or assets readily available, the setting of a time limit for payment will help discharge the order effectively and efficiently. Apart from this, the purpose of the amendment is to provide clearer guideline to the court and to ensure consistency in judiciary interpretations. To illustrate the need for the amendment, the Administration has cited the case of *R v Kong Kwong-por (Re: DCCC No. 587 of 1996)* as an illustration where the Court did not think it had the power to stipulate a timeframe for the payment of a confiscation order. Members raise no further queries on the Administration's proposal.

Restraint orders and charging orders

63. At present, there is no penal provision in the Drug Trafficking (Recovery of Proceeds) Ordinance or the Organized and Serious Crimes Ordinance for breaching a restraint or charging order. Currently, there is also no requirement for 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. The Administration considers it unsatisfactory that there is currently an absence of sanction in the same laws against a person who breaches a restraint or charging order,

and the Court does not have information as to the value of the property to monitor the enforcement of the orders, and for making confiscation orders.

64. The Bill proposes to amend sections 10 and 11 of the Drug Trafficking (Recovery of Proceeds) Ordinance and sections 15 and 16 of the Organized and Serious Crimes Ordinance (sections 8 and 9 of Schedule 1, sections 7 and 8 of Schedule 2, section 3(b)(ii) and (iii) of Schedule 3 to the Bill). The amended provisions require the holder of any realizable property which is subject to a restraint or charging order to provide a statement in writing as to the value of the property, and introduce penal provisions for breaching a restraint or charging order.

65. Members consider that the Administration should not make use of the professional service of a holder of the realizable property by requiring him to provide an assessment of the value of the property. They stress that a person should not be required to incur extra cost or spend extra time in providing information about the value of a property under a restraint or charging order. The Administration has agreed to move CSAs to the effect that the requirement to provide a written statement on the value of property subject to a restraint order or charging order under the amended sections 10 and 11 of the Drug Trafficking (Recovery of Proceeds) Ordinance and the amended sections 15 and 16 of the Organized and Serious Crimes Ordinance will be removed, and the person so requested by an authorised officer will only be required to deliver to the latter documents, or copies of documents or any other information in his possession or control.

66. Under section 25A(3) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) in respect of disclosure of knowledge or suspicion that property represents proceeds, etc. of drug trafficking, a disclosure shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract or by any enactment, rule of conduct or other provision, and shall not render the person who made it liable in damages for any loss arising out of the disclosure or any act done or omitted to be done in relation to the property concerned in consequence of the disclosure.

67. At the suggestion of the Legal Adviser to the Bills Committee, the Administration has agreed to move CSAs to add protection provisions similar to those currently provided for under section 25A(3) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) to sections 10 and 11 of the Drug Trafficking (Recovery of Proceeds) Ordinance, sections 15 and 16 of the Organized and Serious Crimes Ordinance and sections 10 and 11 of new Schedule 2 to the Drug Trafficking (Recovery of Proceeds) (Designated Countries and Territories) Order. Members note that the discussion about the protection of legal privilege under paragraphs 35, 36 and 37 above also applies to these protection provisions. Members have agreed that the Administration should take this into account when finalizing the CSAs to be moved to the Bill for the protection of legal privilege.

68. Members note that under section 14C of the Prevention of Bribery Ordinance (POBO) (Cap. 201), if a person does not comply with a restraint order issued by the

Court, he will be guilty of an offence and will be liable on conviction to a fine of \$50,000 or to the value of the property disposed of or otherwise dealt with, whichever is greater, and to imprisonment for one year. Hon James TO has expressed concern that the proposed penalties for non-compliance with restraint orders and charging orders under the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance may not be appropriate as POBO was reviewed in 1997 but no amendment was proposed to the relevant penalty provision at that time.

69. The Administration has explained that under sections 8 and 9 of Schedule 1, sections 7 and 8 of Schedule 2 and section 3(b)(ii) and (iii) of Schedule 3 to the Bill, it is proposed that the maximum penalty for non-compliance with a restraint order or a charging order is a fine of \$500,000 and imprisonment of five years. The Administration has stressed that the proposed penalty is borne out of careful consideration that drug trafficking and money laundering are serious crimes, and restraint and charging orders are to stop criminals from disposing of, transferring or concealing their illicit proceeds. The Administration considers that the deliberate violation of an order is a serious matter and the proposed penalty duly reflects the gravity of such offence, as well as gives the necessary deterrent effect.

Amendments to the Mutual Legal Assistance in Criminal Matters Ordinance

70. The Administration has informed the Bills Committee that the amendments proposed in the Bill call for consequential amendments to the Mutual Legal Assistance in Criminal Matters Ordinance (Cap 525) which contains similar restraint, charging and confiscation provisions. The Administration will move a CSA to add a new Schedule to the Bill setting out the consequential amendments to the Mutual Legal Assistance in Criminal Matters Ordinance. The Administration will also move a CSA to revise the long title of the Bill to take into account the consequential amendments made to the Mutual Legal Assistance in Criminal Matters Ordinance.

71. Hon James TO has pointed out that while he does not disagree with the proposed amendments to the Mutual Legal Assistance in Criminal Matters Ordinance, he has doubts as to whether the proposed amendments should be considered as consequential amendments. The Administration has explained that it considers the proposed amendments to the Ordinance purely consequential because the amendments to the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance are proposed in the Bill after the Administration has considered all the policy implications of the relevant provisions. As the Mutual Legal Assistance in Criminal Matters Ordinance contains similar restraint, charging and confiscation provisions, consequential amendments to the Ordinance are required.

72. Members note that as the Mutual Legal Assistance in Criminal Matters Ordinance contains restraint and charging provisions, amendments arising from the discussion about the protection of legal privilege should also be made to the Ordinance (Paragraphs 35, 36, 37 and 67 refer).

Miscellaneous amendments

73. Members note that the Administration proposes to rectify an oversight when section 25 of the Drug Trafficking (Recovery of Proceeds) Ordinance and section 25 of the Organized and Serious Crimes Ordinance were introduced in 1995 by amending the descriptions at paragraphs 15 and 16 of Schedule 1 to the Organized and Serious Crimes Ordinance from "assisting another to retain the benefit of drug trafficking" and "assisting a person to retain proceeds of indictable offence" to "dealing with property known, believed or suspected to represent proceeds of drug trafficking" and "dealing with property known, believed or suspected to represent proceeds of indictable offence" respectively.

74. Hon James TO has expressed reservations that the amendments are proposed as miscellaneous amendments because they present a change in substance. The Administration has explained that the Bill which seeks to introduce various miscellaneous amendments to the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance do not have a major theme. Hon James TO remains of the view that it is improper as a matter of legislative proceedings to introduce the amendments proposed by the Administration as miscellaneous amendments.

Committee Stage amendments

75. Apart from the CSAs as discussed above, the Administration has proposed some textual amendments to ensure the consistency of the Chinese and English version of the proposed amended provisions. A full set of the CSAs to be proposed by the Administration is in **Appendix II**. The Bills Committee has not proposed any amendments.

Consultation with the House Committee

76. The Bills Committee reported to the House Committee on 28 June 2002. The House Committee did not raise objection to the resumption of the Second Reading debate on the Bill on 10 July 2002. The Bills Committee also obtained the House Committee's support to seek the President's permission for the deadline for giving notice of CSAs to be extended to 3 July 2002.

**Bills Committee on
Drug Trafficking and Organized Crimes (Amendment) Bill 2000**

Membership List

Chairman	Hon James TO Kun-sun
Members	Hon Martin LEE Chu-ming, SC, JP Hon Eric LI Ka-cheung, JP Dr Hon David LI Kwok-po, GBS, JP Hon NG Leung-sing, JP Hon Margaret NG Hon Mrs Selina CHOW LIANG Shuk-ye, GBS, JP Hon Bernard CHAN, JP Hon Ambrose LAU Hon-chuen, GBS, JP Hon Abraham SHEK Lai-him, JP Hon Henry WU King-cheong, BBS, JP Hon WONG Sing-chi Hon IP Kwok-him, JP (Total : 13 Members)
Clerk	Miss Flora TAI Yin-ping
Legal Adviser	Mr Stephen LAM Ping-man
Date	2 July 2002

DRUG TRAFFICKING AND ORGANIZED CRIMES (AMENDMENT) BILL 2000

COMMITTEE STAGE

Amendments to be moved by the Secretary for Security

<u>Clause</u>	<u>Amendment Proposed</u>
Long title	By adding ", and to consequentially amend the Mutual Legal Assistance in Criminal Matters Ordinance" after "Crimes Ordinance".
New	By adding - "5. Consequential amendments to Mutual Legal Assistance in Criminal Matters Ordinance - (Schedule 4) The Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) is amended as specified in Schedule 4."
Schedule 1, section 2	By deleting the section and substituting - "2. Interpretation Section 2 is amended - (a) in subsection (11), by adding - "(aa) when a person has been arrested for the offence and released on bail or has

refused bail;";

(b) by adding -

"(14) Subject to subsection (15), nothing in this Ordinance shall require the disclosure of any items subject to legal privilege within the meaning of section 22.

(15) Subsection (14) shall not prejudice the operation of sections 20, 21 and 22."."

Schedule 1,
section 3

By deleting paragraph (a) and substituting -

"(a) by repealing subsection (2)(c)(ii)(B) and substituting -

"(B) subject to subsection (2A), a person whose exact whereabouts are not known -

(I) reasonable steps have been taken to ascertain the person's whereabouts (including, if appropriate, a step mentioned in paragraph (a), (b) or (c) of rule 5(1) of Order 65 of the Rules of the High Court (Cap. 4 sub. leg.)); and

(II) notice of those proceedings, addressed to that person, has been published in a Chinese language newspaper, and an English language newspaper, circulating generally in Hong Kong; and”;

(aa) by adding -

“(2A) Where subsection (2)(c)(ii)(B) is applicable, and notwithstanding that the court is satisfied as mentioned in that subsection that actions have been taken, the court may, if it is satisfied that it is in the interests of justice to do so, require that notice of the proceedings mentioned in that subsection be given to the person mentioned in that subsection in such additional manner as the court may direct.”;

(ab) by repealing subsection (9)(b)(ii) and substituting -

“(ii) subject to subsection (9A), a person whose exact whereabouts are not known -

- (A) reasonable steps have been taken to ascertain the person's whereabouts (including, if appropriate, a step mentioned in paragraph (a), (b) or (c) of rule 5(1) of Order 65 of the Rules of the High Court (Cap. 4 sub. leg.)); and
- (B) notice of those proceedings, addressed to that person, has been published in a Chinese language newspaper, and an English language newspaper, circulating generally in Hong Kong." ;

(ac) by adding -

"(9A) Where subsection (9)(b)(ii) is applicable, and notwithstanding that the court is satisfied as mentioned in that subsection that actions have been taken, the court may, if it is satisfied that it is in the interests of justice to do so, require that notice of the proceedings mentioned in that subsection be given to the person mentioned in that subsection in such additional manner as the court may direct." ;".

Schedule 1,
section 5

In the proposed section 5(9), by deleting "subsection (7)(b)" and substituting "subsection (7)(a) or (b)".

Schedule 1,
section 7

(a) In paragraph (a)(ii), in the proposed section 9(1)(ba), by adding "subject to subsection (1A)," before "if".

(b) By adding -

"(aa) by adding -

"(1A) Subject to subsection (1B), where a power conferred on the Court of First Instance by section 10(1) or 11(1) is exercisable only on the ground mentioned in subsection (1)(ba), then the Court of First Instance shall specify a date on which any restraint order or charging order arising from that ground shall expire, being a date -

(a) subject to paragraph (b), not later than is reasonably necessary for the purposes of the investigation concerned mentioned in subsection (1)(ba);
and

(b) in any case, not later than 6 months after the date on which that order is made.

(1B) The Court of First Instance may extend a restraint order or charging order mentioned in subsection (1A) -

(a) on the ground only that the Court of First Instance is satisfied that the defendant will be charged with the offence concerned after further investigation is carried out;

(b) subject to paragraph (c), not longer than is reasonably necessary for the purposes of that investigation; and

(c) in any case, for not more than 6 months."."

(c) By deleting paragraph (b).

Schedule 1,
section 8

(a) In the proposed section 10(12), by deleting everything after "to do so" and substituting ", documents, or copies of documents, or any other information (in whatever form), in his possession or control which may assist the authorized officer to determine the value of the property.".

(b) By adding after the proposed section 10(13) -

"(13A) A disclosure made in order to comply with a requirement under subsection (12) -

(a) shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract or by any enactment, rule of conduct or other provision;

(b) shall not render the person who made it liable in damages for any loss arising out of -

(i) the disclosure;

(ii) any act done or omitted to be done in relation to the

property concerned in
consequence of the
disclosure.”.

- (c) In the Chinese text, by deleting the proposed
section 10(16) and substituting -

“(16) 任何人犯第(15)款所訂的罪行 -

- (a) 一經循公訴程序定罪，可處監禁5年及罰款，罰款
額為\$500,000或屬有關限制令的標的而在違反該限
制令的情況下被處理的可變現財產的價值，兩者以
款額較大者為準；或
- (b) 一經循簡易程序定罪，可處罰款\$250,000及監禁2
年。”。

Schedule 1,
section 9

- (a) In the proposed section 11(9), by deleting
everything after “to do so” and substituting
“, documents, or copies of documents, or any other
information (in whatever form), in his possession or
control which may assist the authorized officer to
determine the value of the property.”.

- (b) By adding after the proposed section 11(10) -

“(10A) A disclosure made in order to comply
with a requirement under subsection (9) -

- (a) shall not be treated as a breach
of any restriction upon the
disclosure of information

imposed by contract or by any enactment, rule of conduct or other provision;

(b) shall not render the person who made it liable in damages for any loss arising out of -

(i) the disclosure;

(ii) any act done or omitted to be done in relation to the property concerned in consequence of the disclosure."

(c) In the Chinese text, by deleting the proposed section 11(13) and substituting -

"(13) 任何人犯第(12)款所訂的罪行 -

(a) 一經循公訴程序定罪，可處監禁5年及罰款，罰款額為\$500,000或屬有關抵押令的標的而在違反該抵押令的情況下被處理的可變現財產的價值，兩者以款額較大者為準；或

(b) 一經循簡易程序定罪，可處罰款\$250,000及監禁2年。"。"

Schedule 1,
sections 10,
11 and 13(b)

By deleting the sections.

Schedule 2,
section 2

By deleting the section and substituting -

"2. Interpretation

Section 2 is amended -

(a) in subsection (15), by adding -

"(aa) when a person has been
arrested for the offence
and released on bail or
has refused bail;"

(b) by adding -

"(18) Subject to subsection
(19), nothing in this Ordinance
shall require the disclosure of
any items subject to legal
privilege.

(19) Subsection (18) shall
not prejudice the operation of
sections 3, 4 and 5."."

Schedule 2,
section 3

By deleting paragraph (a) and substituting -

"(a) by repealing subsection (3)(c)(i)(B)(II) and
substituting -

"(II) subject to subsection (3A), a person
whose exact whereabouts are not
known, reasonable steps have been
taken to ascertain the person's
whereabouts (including, if
appropriate, a step mentioned in

paragraph (a), (b) or (c) of rule 5(1) of Order 65 of the Rules of the High Court (Cap. 4 sub. leg.) and notice of those proceedings, addressed to that person, has been published in a Chinese language newspaper, and an English language newspaper, circulating generally in Hong Kong; and”;

(aa) by adding -

“(3A) Where subsection (3)(c)(i)(B)(II) is applicable, and notwithstanding that the court is satisfied as mentioned in that subsection that actions have been taken, the court may, if it is satisfied that it is in the interests of justice to do so, require that notice of the proceedings mentioned in that subsection be given to the person mentioned in that subsection in such additional manner as the court may direct.”;

(ab) by repealing subsection (7C)(b)(ii) and substituting -

“(ii) subject to subsection (7D), a person whose exact whereabouts are not known -

- (A) reasonable steps have been taken to ascertain the person's whereabouts (including, if appropriate, a step mentioned in paragraph (a), (b) or (c) of rule 5(1) of Order 65 of the Rules of the High Court (Cap. 4 sub. leg.)); and
- (B) notice of those proceedings, addressed to that person, has been published in a Chinese language newspaper, and an English language newspaper, circulating generally in Hong Kong." ;

(ac) by adding -

"(7D) Where subsection (7C)(b)(ii) is applicable, and notwithstanding that the court is satisfied as mentioned in that subsection that actions have been taken, the court may, if it is satisfied that it is in the interests of justice to do so, require that notice of the proceedings mentioned in that subsection be given to the person mentioned in that subsection in such additional manner as the court may direct." ;".

Schedule 2,
section 4

In the proposed section 10(9), by deleting "subsection (7)(b)" and substituting "subsection (7)(a) or (b)".

Schedule 2,
section 6

(a) In paragraph (a)(ii), in the proposed section 14(1)(ba), by adding "subject to subsection (1A), before "if".

(b) By adding -

"(aa) by adding -

"(1A) Subject to subsection (1B), where a power conferred on the Court of First Instance by section 15(1) or 16(1) is exercisable only on the ground mentioned in subsection (1)(ba), then the Court of First Instance shall specify a date on which any restraint order or charging order arising from that ground shall expire, being a date -

(a) subject to paragraph (b), not later than is reasonably necessary for the purposes of the investigation concerned mentioned in subsection (1)(ba); and

(b) in any case, not later than 6 months after the date on which that order is made.

(1B) The Court of First Instance may extend a restraint order or charging order mentioned in subsection (1A) -

(a) on the ground only that the Court of First Instance is satisfied that the defendant will be charged with the offence concerned after further investigation is carried out;

(b) subject to paragraph (c), not longer than is reasonably necessary for the purposes of that investigation; and

(c) in any case, for not more than 6 months."."

(c) By deleting paragraph (b).

Schedule 2,
section 7

(a) In the proposed section 15(12), by deleting everything after "to do so" and substituting ", documents, or copies of documents, or any other information (in whatever form), in his possession or control which may assist the authorized officer to determine the value of the property.".

(b) By adding after the proposed section 15(13) -

"(13A) A disclosure made in order to comply with a requirement under subsection (12) -

(a) shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract or by any enactment, rule of conduct or other provision;

(b) shall not render the person who made it liable in damages for any loss arising out of -

(i) the disclosure;

(ii) any act done or omitted to be done in relation to the

property concerned in
consequence of the
disclosure.”.

- (c) In the Chinese text, by deleting the proposed
section 15(16) and substituting -

“(16) 任何人犯第(15)款所訂的罪行 -

- (a) 一經循公訴程序定罪，可處監禁5年及罰款，罰款
額為\$500,000或屬有關限制令的標的而在違反該限
制令的情況下被處理的可變現財產的價值，兩者以
款額較大者為準；或
- (b) 一經循簡易程序定罪，可處罰款\$250,000及監禁2
年。”。

Schedule 2,
section 8

- (a) In the proposed section 16(9), by deleting
everything after “to do so” and substituting
“, documents, or copies of documents, or any other
information (in whatever form), in his possession or
control which may assist the authorized officer to
determine the value of the property.”.

- (b) By adding after the proposed section 16(10) -

“(10A) A disclosure made in order to comply
with a requirement under subsection (9) -

- (a) shall not be treated as a breach
of any restriction upon the
disclosure of information

imposed by contract or by any enactment, rule of conduct or other provision;

(b) shall not render the person who made it liable in damages for any loss arising out of -

(i) the disclosure;

(ii) any act done or omitted to be done in relation to the property concerned in consequence of the disclosure."

(c) In the Chinese text, by deleting the proposed section 16(13) and substituting -

"(13) 任何人犯第(12)款所訂的罪行 -

(a) 一經循公訴程序定罪，可處監禁 5 年及罰款，罰款額為\$500,000 或屬有關押記令的標的而在違反該押記令的情況下被處理的可變現財產的價值，兩者以款額較大者為準；或

(b) 一經循簡易程序定罪，可處罰款\$250,000 及監禁 2 年。"。"

Schedule 2,
section 11

By deleting paragraph (b) and substituting -

"(b) by repealing paragraphs 15 and 16 and
substituting -

"15. Drug

Trafficking

(Recovery of

Proceeds)

Ordinance

(Cap. 405)

section

25(1)

dealing with

property

known or

believed to

represent

proceeds of

drug

trafficking

16. Organized and

Serious Crimes

Ordinance

(Cap. 455)

section

25(1)

dealing with

property

known or

believed to
represent
proceeds of
indictable
offence".".

Schedule 3,
section 3

(a) In paragraph (b)(ii) -

(i) in the proposed section 10(12), by deleting everything after "to do so" and substituting ", documents, or copies of documents, or any other information (in whatever form), in his possession or control which may assist the authorized officer to determine the value of the property.";

(ii) by adding after the proposed section 10(13) -

"(13A) A disclosure made in order to comply with a requirement under subsection (12) -

(a) shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract or by any enactment, rule of

conduct or other
provision;

(b) shall not render the
person who made it
liable in damages for
any loss arising out
of -

(i) the
disclosure;

(ii) any act done
or omitted
to be done
in relation
to the
property
concerned in
consequence
of the
disclosure.";

(iii) in the Chinese text, by deleting the
proposed section 10(16) and substituting -

"(16) 任何人犯第(15)款所訂的罪行 -

(a) 一經循公訴程序定罪，可處監禁5年
及罰款，罰款額為\$500,000 或屬有關
限制令的標的而在違反該限制令的情
況下被處理的可變現財產的價值，兩

者以款額較大者為準；或

(b) 一經循簡易程序定罪，可處罰款

\$250,000 及監禁 2 年。";".

(b) In paragraph (b)(iii) -

(i) in the proposed section 11(9), by deleting everything after "to do so" and substituting ", documents, or copies of documents, or any other information (in whatever form), in his possession or control which may assist the authorized officer to determine the value of the property.";

(ii) by adding after the proposed section 11(10) -

"(10A) A disclosure made in order to comply with a requirement under subsection (9) -

(a) shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract or by any enactment, rule of conduct or other provision;

(b) shall not render the person who made it liable in damages for any loss arising out of -

- (i) the disclosure;
- (ii) any act done or omitted to be done in relation to the property concerned in consequence of the disclosure." ;

(iii) in the Chinese text, by deleting the proposed section 11(13) and substituting -

"(13) 任何人犯第(12)款所訂的罪行 -

- (a) 一經循公訴程序定罪，可處監禁5年及罰款，罰款額為\$500,000或屬有關抵押令的標的而在違反該抵押令的情況下被處理的可變現財產的價值，兩者以款額較大者為準；或

(b) 一經循簡易程序定罪，可處罰款

\$250,000 及監禁 2 年。"。".

New

By adding -

"SCHEDULE 4

[s. 5]

CONSEQUENTIAL AMENDMENTS TO MUTUAL
LEGAL ASSISTANCE IN CRIMINAL
MATTERS ORDINANCE

1. **Interpretation**

Section 2 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) is amended by adding -

"(10) Subject to subsection (11), nothing in this Ordinance shall require the disclosure of any items subject to legal privilege within the meaning of section 13.

(11) Subsection (10) shall not prejudice the operation of Part IV."

2. **Enforcement, etc. of external confiscation orders**

Schedule 2 is amended -

(a) in section 7, by adding -

"(11) An authorized officer may, by notice in writing served on a person who holds any realisable property the subject of a restraint

order, require the person to deliver to the authorized officer, to the extent that it is practicable to do so, documents, or copies of documents, or any other information (in whatever form), in his possession or control which may assist the authorized officer to determine the value of the property.

(12) A person who receives a notice under subsection (11) shall, as soon as is practicable after receipt of the notice, comply with the notice to the extent that it is practicable to do so taking into account the nature of the realisable property the subject of the restraint order concerned.

(13) A disclosure made in order to comply with a requirement under subsection (11) -

(a) shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract or by any

enactment, rule of
conduct or other
provision;

(b) shall not render the
person who made it
liable in damages for
any loss arising out
of -

(i) the
disclosure;

(ii) any act done
or omitted
to be done
in relation
to the
property
concerned in
consequence
of the
disclosure.

(14) Any person who contravenes
subsection (12) commits an offence
and is liable on conviction to a fine
at level 5 and to imprisonment for 1
year.

(15) A person who knowingly deals in any realisable property in contravention of a restraint order commits an offence.

(16) A person who commits an offence under subsection (15) is liable -

(a) on conviction upon indictment to a fine of \$500,000 or to the value of the realisable property the subject of the restraint order concerned which has been dealt with in contravention of that order, whichever is the greater, and to imprisonment for 5 years; or

(b) on summary conviction to a fine of \$250,000 and to imprisonment for 2 years.";

(b) in section 8, by adding -

“(9) An authorized officer may, by notice in writing served on a person who holds any realisable property the subject of a charging order, require the person to deliver to the authorized officer, to the extent that it is practicable to do so, documents, or copies of documents, or any other information (in whatever form), in his possession or control which may assist the authorized officer to determine the value of the property.

(10) A person who receives a notice under subsection (9) shall, as soon as is practicable after receipt of the notice, comply with the notice to the extent that it is practicable to do so taking into account the nature of the realisable property the subject of the charging order concerned.

(11) A disclosure made in order to comply with a requirement under subsection (9) -

(a) shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract or by any enactment, rule of conduct or other provision;

(b) shall not render the person who made it liable in damages for any loss arising out of -

(i) the disclosure;

(ii) any act done or omitted to be done in relation to the property concerned in consequence of the disclosure.

(12) Any person who contravenes subsection (10) commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 1 year.

(13) A person who knowingly deals in any realisable property in contravention of a charging order commits an offence.

(14) A person who commits an offence under subsection (13) is liable -

- (a) on conviction upon indictment to a fine of \$500,000 or to the value of the realisable property the subject of the charging order concerned which has been dealt with in contravention of that order, whichever is the greater, and to imprisonment for 5 years; or

(b) on summary conviction
to a fine of \$250,000
and to imprisonment
for 2 years."."