

立法會
Legislative Council

LC Paper No. LS89/00-01

**Paper for the House Committee Meeting
of the Legislative Council
on 27 April 2001**

**Legal Service Division Further Report on
Banking (Amendment) Bill 2001**

Members may recall that at the House Committee meeting last Friday, the Legal Adviser reported that we were studying the Administration's response to our queries on certain legal and drafting aspects of the Bill and would make a further report to the House Committee.

2. We have studied the reply of the Administration to our queries. The following are the more significant issues to which we would draw Members' attention:-

(a) *Definition of "local branch"* (clause 2)

Since a constituting element of the definition of "local branch" is that "members of the public ordinarily have physical access for the purposes of [a bank's] business", we take the view that it may be possible to take a de facto local branch outside the definition by restricting physical access.

The Administration in its reply has explained that the quoted wording is used to exclude back offices of the Authorised Institutions (AIs) from the regulatory regime and "members of public" is used because it includes both existing and potential customers and is therefore more comprehensive.

(b) *Definition of "manager"* (clause 2)

We are of the view that the definition as drafted does not enable one to be sure who are within the definition of "manager". This is because the meaning of "principally responsible" is somewhat elusive and the affairs or business of AIs specified in the proposed Fourteenth Schedule may not fit every AI at any point of time. The definition as it is could include an independent contractor who is responsible for any of the supporting services listed in the proposed Fourteenth Schedule. This might not be much a problem if managers were not made strictly liable

for the criminal offences created under the proposed sections 45A(3) (clause 7) and 72B(2) (clause 17).

The Administration has replied that the definition must be flexible and the description of the banking business and supporting services in the proposed Fourteenth Schedule corresponds to the way in which most banks manage their affairs. The Monetary Authority would issue guidelines to assist AIs to ascertain who are the "managers".

- (c) *Strict Liability of Managers under the proposed sections 45A(3)(clause 7) and 72B(2) (clause 17)*

We do not see why in respect of the managers, an element of knowledge could not be included as a constitutive element of the offence.

The Administration has answered that those offences are intended to be strict liability offences. They are consistent with similar offences in the Banking Ordinance (e.g. section 59A(3) and 72A(6) etc.). Under section 126, a defence would be available if one has taken all reasonable precautions and exercised due diligence.

We do not believe that such a defence would be relevant if a manager does not have any knowledge of the matter either because it is not within his area of responsibility or because he has no access to the relevant information.

3. In view of the matters aforesaid, Members may wish to set up a Bills Committee to study the Bill in detail.

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23 April 2001