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**Paper for the Bills Committee
on United Nations (Anti-Terrorism Measures) Bill**

**Deliberations of the Bills Committee on
Drug Trafficking and Organized Crimes (Amendment) Bill 2000 in respect of the
mental element of "having reasonable grounds to suspect"**

Purpose

This paper summarises the previous discussions at the meetings of the Bills Committee on Drug Trafficking and Organized Crimes (Amendment) Bill 2000 in respect of the mental element of "having reasonable grounds to suspect". The paper also gives a summary of the concerns of the Hong Kong Association of Banks (HKAB) and professional bodies as well as the Administration's responses to these concerns.

Background

2. Under existing section 25 of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) and the Organized and Serious Crimes Ordinance (Cap. 455), 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.
3. 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.
4. The Drug Trafficking and Organized Crimes (Amendment) Bill 2000 makes a number of proposals to increase the effectiveness of the Hong Kong's anti-money laundering legislation which include, among other things, -

- (a) 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;
- (b) increasing the maximum penalty for the money laundering offence in existing section 25(1) of the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance from 14 to 20 years;
- (c) changing 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
- (d) increasing the custodial sanction for a contravention of section 25A(1) of the two Ordinances from three to 12 months.

5. The Bills Committee has so far held six meetings to discuss the proposed amendments to section 25 and section 25A of the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance relating to money laundering offence and disclosure of suspicious transaction offence. The discussions have mainly focused on the mental element of "having reasonable grounds to suspect".

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

6. 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 therefore 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.

7. 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 brought out a report in June 2000 covering a full umbrella of issues on recovering the proceeds of crime. UK through its own experience has come to the conclusion that even with the mental element of "suspect", they are 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".

8. Some members consider 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. They point out that it is illogical to argue that a certain proportion of money laundering cases must be involved in a certain number of investigations and there must be a proportionate numbers of prosecutions and convictions. These members have expressed concern that based on such a faulty reasoning, the Administration has proposed to cast the net too wide and as a result innocent persons will be unnecessarily caught.

9. 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.

10. In light of members' concerns that an innocent person who genuinely does not suspect 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.

11. Some members still 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.

12. Members note that as the Administration proposes to reduce the mental element to "reasonable grounds to suspect" in proposed section 25(1A), there is a corresponding reduction in the penalty which is proposed to be a maximum imprisonment of five years. The Administration 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.

13. Members have expressed concern that the Bill is introducing a novel concept into the criminal law whereby the standard of proof has a bearing on the level of penalty. In other words, an offence that is difficult to prove carries a higher penalty

whereas one that is easier to prove carries a lighter penalty. They have questioned whether this concept is in use in any criminal law in any part of the common law jurisdictions. These members are also concerned that setting different penalty levels according to the standard of proof will lead to further disputes in legal proceedings.

14. The Administration has explained to the Bills Committee that section 25(1) is basically targeted at professional money launders while proposed section 25(1A) is to deal with close friends and relatives of drug traffickers. If the penalty in section 25(1) is imposed on proposed section 25(1A), it may be too draconian. The Administration considers it logical to have two distinct offences with the same *actus reus* but different *mens rea*. The Administration has informed members that there are examples in common law systems in which the mental elements rather than *actus reus* will determine the severity of penalty, e.g. The Australian Proceeds of Crime Act 1987 and the Offences Against the Person Ordinance (Cap. 212) in the laws of Hong Kong.

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

15. 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".

16. 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 point out that the proposal will mean that persons who will not have committed any offence under the current law may well 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 further point 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.

17. 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 proof of that 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 criminalising 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.

18. 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.

19. The Administration has explained that whether there are sufficient evidence to charge a person will depend upon a combination of pieces of evidence. Bearing in mind that it will be the person carrying out the transactions in relation to bank accounts, he should know whether he is transgressing the law. 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.

20. Some members do not agree with the Administration's analysis that the mental element of "having reasonable grounds to suspect" constitutes objective and subjective components. They consider that even if the objective and subjective components co-exist, the person may not link the two together and therefore harbours no suspicion. They stress that there is no statutory defence that the person can prove on balance of probability that he really did not suspect.

21. 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. 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.

22. Some members are still concerned that the proposed statutory defence is inadequate in protecting the banks and the staff. 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 the clients. They suggest that amendments to section 25A(3) should be made in order to adequately protect the banking staff and other relevant professionals from possible liabilities arising from the disclosure.

23. In light of member's concerns about the proposals concerning the disclosure of suspicious transaction offence, 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.

24. Members in general welcome the Administration's proposed statutory defence for the disclosure of suspicious transaction offence because it will at least serve as an additional protection to the professionals and those employees working according to the code of practice. However, some members point out that those employees who are not professionals or their trades do not have any code of practice will not be protected. They maintain the view that the proposals concerning the disclosure of suspicious transaction offence still have deficiencies.

25. Some members have expressed concern that although the legislation centres on serious crime, it actually encompasses all indictable offences, including those committed abroad which will also be indictable offences have they been committed in Hong Kong. They point out that there will be hundreds of such offences including such things as tax-related offences and offences under the Companies Ordinances (Cap. 32) and its overseas equivalents. It is beyond an average person's capability to understand the implications of proposed section 25A. These members are 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.

26. These members further point 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 another's proceeds of drug trafficking. They also refer 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 proposed section 25A, they question whether the Administration has taken into consideration the principle of proportionality when drafting the law.

27. HKAB, the Hong Kong Bar Association, the Law Society of Hong Kong, the Hong Kong Society of Accountants (HKSA), the Hong Kong Trustees Association and the Hong Kong Federation of Insurers have made submissions to the Bills Committee expressing their concerns about the proposed amendments to section 25 and section 25A of the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance. These bodies are mainly concerned that using the mental element of "having reasonable to suspect" in relevant provisions may have cast the net too wide and innocent people may be caught. In addition, the disclosure of suspicious transaction offence will impose an unreasonable burden on financial institutions, especially their frontline staff. The concerns of HKAB and professional bodies as well as the Administration's responses are summarised in **Appendix I**.

Draft Committee Stage amendments (CSAs) proposed by the Administration

28. In view of the concerns expressed by the Bills Committee, HKAB and professional bodies, the Administration has put forward a number of draft CSAs in respect of section 25 and section 25A for the Bills Committee's consideration. The latest proposed CSAs are shown in correction mode together with the existing section 25 and section 25A in **Appendix II**.

29. According to the Administration, the proposed section 25(1A) (the new money laundering offence) places the onus of proof on the prosecution and requires the prosecution to prove beyond reasonable doubt. The CSAs proposed comprise a defence provision under section 25(1A) for those who genuinely did not suspect, and a provision under section 25A to the effect that adherence to anti-money laundering guidelines issued by an employer, a professional body or a regulatory body may be taken into account by the Court in scrutinising such cases. Apart from these, the CSAs also include a defence provision which aims to offer protection to disclosure of suspicious transactions made in good faith under section 25A.

30. The Administration has informed the Bills Committee that it has consulted HKAB and relevant professional bodies on the proposed amendments to section 25 and section 25A and the proposed CSAs to address their concerns. However, HKAB, HKSA and the Law Society remain adamant in their disagreement to the proposed amendments to section 25 and section 25A. The Bar Association has changed its stance from no comments to opposed, and tendered a revised defence provision in place of the proposed section 25(3A) and (3AA), which is reproduced as follows -

"It is a defence to prove that, in all the circumstances of his case, he did not suspect that the property he dealt with in whole or in part directly or indirectly represented any person's proceeds of drug trafficking."

31. The Bills Committee considered the latest draft CSAs put forward by the Administration at its meeting on 3 January 2002. Members in general are not convinced that the CSAs put forward by the Administration will provide sufficient safeguard to avoid catching a person who genuinely did not suspect. To facilitate future discussion of the Bills Committee, members requested the Administration -

- (a) to prepare an analysis on a representative size of the 498 money laundering cases investigated by the Police in the period between May and November 2001 to ascertain the number of the cases which would have brought to trial and the amount of suspected criminal proceeds involved, if the mental element in the present section 25 and section 25A has been lowered as proposed by the Administration;
- (b) to provide information on the scope of application of the relevant provisions of the overseas legislation which have adopted a lower mental element test than "knowledge" and to confirm whether the relevant provisions impose a criminal offence; and
- (c) to make reference to the suggestion of the Hong Kong Bar Association in re-drafting the proposed defence provision in section 25(3A) and section 25(3AA) [paragraph 30 above refers].

32. Members also agreed that the Bills Committee should make reference to the scrutiny of the legislative proposals to implement the United Nations Security Council Resolution 1373, which would adopt the mental element of "having reasonable grounds to suspect" in reporting requirement linked to terrorist financing, when it discussed proposals in respect of section 25 and section 25A.

Relevant papers

33. A list of the relevant papers and documents is in **Appendix III** for members' easy reference. These papers/documents (except the UK Cabinet Report) are available on the Council's website at <http://www.legco.gov.hk>.

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

**Summary of the concerns expressed by the Hong Kong Association of Banks and professional bodies
on proposals in respect of section 25 and section 25A of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) and
the Organized and Serious Crimes Ordinance (Cap. 455) and the Administration's responses to these concerns
(as at 17 June 2002)**

<u>Hong Kong Society of Accountants (HKSA)</u> [CB(2)305/00-01(01)]	<u>Administration's response</u> [CB(2)800/00-01(01) and CB(2)820/00-01(02)]
<p>(1) 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.</p> <p>(2) Because of the very broad scope of the Organized and Serious Crimes Ordinance and the failure of the Bill to distinguish the more serious from the less serious offences, 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 Court may have a lower threshold of tolerance for any ignorance on their part.</p>	<p>(a) Past operational experience revealed that in most cases, it was extremely difficult to prove the mental element of "knows" or "has reasonable grounds to believe". Owing to the narrow coverage of the existing legislation, prosecutions (85 persons from 1996 to 2000) and convictions against money launderers (49 persons from 1996 to 2000) were few, despite a relatively large number of investigations in the past years (2778 from 1996 to 2000).</p> <p>(b) To ensure the effectiveness of Hong Kong's anti-money laundering regime, the operational difficulties from the existing legislation need to be addressed. It is also considered that there is a pressing need to introduce an offence using the mental element of "reasonable grounds to suspect", so that the scope of the offences can be expanded to cover those obvious cases where a person is assisting criminals to launder crime proceeds but cannot be pursued due to the limitations of existing legislation.</p> <p>(c) "Indictable offences" referred to in section 25A of Cap. 455 are serious offences which may be dealt with "on indictment" i.e. in the Court of First Instance, although some indictable offences may be dealt with in the District Court or Magistrates' Court.</p>

<p><u>Hong Kong Trustees Association</u> [CB(2)801/00-01(01)]</p> <p>Supports the views in HKSA's submission.</p>	<p><u>Administration's response</u></p> <p>N/A</p>
<p><u>Hong Kong Bar Association</u> [CB(2)916/00-01(01)]</p> <p><i>Section 25</i></p> <p>(3) When the Drug Trafficking (Recovery of Proceeds) Ordinance was enacted in 1989, the option of creating a laundering offence with a lesser <i>mens rea</i> must have been considered and rejected as a legal policy option. 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 the Organized and Serious Crimes Ordinance was enacted a few years later.</p> <p>(4) It may well be difficult to prosecute money laundering cases successfully but that is not necessarily a bad thing. The underlying objective behind the law at present is to ensure that the Court does 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 <i>mens rea</i> for that offence should be changed so as to make it easier to prosecute.</p> <p>(5) 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-</p>	<p><u>Administration's response</u> [CB(2)1073/00-01(05)]</p> <p><i>Section 25</i></p> <p>(d) The Drug Trafficking (Recovery of Proceeds) Bill being deliberated at that time was entirely new and did not have the benefit of operational experience to back it up. Given the changes in circumstances and the 11 years of operational experience since the Drug Trafficking (Recovery of Proceeds) Ordinance came into being, and 5 years' experience since the Organized and Serious Crimes Ordinance came into operation, the Administration considers that problems arising from the current provisions of these Ordinances need to be addressed.</p> <p>(e) Given the presence of both subjective and objective elements and the requirements to prove the linkage between the action of dealing in 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 Administration does not consider that the Bill will catch those merely careless people who were unintentionally involved in transactions of the proceeds of drug trafficking or indictable offence. Furthermore, if a person genuinely believed that he was dealing with something other than the proceeds of crime, then the Court would not convict him because there would be a doubt that he had reasonable grounds to suspect that the property was the proceeds of crime.</p>

laundering legislation and they devised internal procedures to spot suspect transactions. Legislative Council Members should be told what guidance banks and deposit-takers will be expected to give staff in the changed circumstances.

- (6) 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.

Section 25A

- (7) The proposal means that a person who firmly believed that property was "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.
- (8) The proposal suffers from the same flaws as that discussed above relating to the new money-laundering offence. 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.

Section 25A

- (f) If a person honestly believed the property was clean, the Court would have a doubt that he had a reasonable suspicion about the connection of the property to crime.
- (g) The Administration already proposed a provision whereby the court can take into consideration the compliance with guidance or guidelines issued by respective regulators when considering the disclosure of suspicious transaction offence. For some years, the Administration has been assisting the respective regulators in improving their anti-money laundering guidelines, and will continue to do so in future. Publicity and education on anti-money laundering measures will continue to be stepped up to raise the awareness of the relevant sectors and the public at large.

The Hong Kong Bar Association

[CB(2)1808/00-01(01) - further submission responding to the Administration's views]

Section 25

- (9) Careless and gullible people do get mixed up in criminal activities of one kind or another. Their carelessness or gullibility may be the reason why criminals use them to further their own ends. However, save for regulatory offences, legal policy does not require laws that impose criminal (as opposed to civil) sanctions on account of carelessness or gullibility.
- (10) If the accused is stupid or naïve it is very unlikely that he can prove that it was reasonable that he did not suspect that the property represented the proceeds of drug trafficking or indictable offences.

Section 25A

- (11) If the requisite state of mind is not subjective, then a person could be convicted even though he had a positive belief, not a reasonable belief, that property was "clean".
- (12) The proposal of taking into account regulatory and professional guidelines by the Court does not appear a good idea. This is because the dealing with money and property is not a regulated activity or a professional obligation in itself, although the actors in a particular case may well, depending on their status, be subject to regulation or to a code of conduct.

- (13) It is not wise to include any reference to an employer's set of guidelines. The source of a power to regulate or to make provision for standards of conduct is likely to be a public law power. The legality and rationality of guidelines or codes of conduct may be subject to judicial review. However the relation between employer and employee is governed by contract. An employer's guidelines may be unreasonable. It appears contrary to legal policy to make criminal liability depend, potentially, on the exercise of a private law power that arises from the employer-employee relationship.
- (14) In cases involving persons who are in a regulated activity or who are governed by a professional code of conduct, the Bar Association thinks that any relevant guidelines or code could be proved in evidence in the ordinary way. There may well be a case for the court being able to refer to guidelines where an activity is regulated subject and the accused is subject to the scheme of regulation.

The Hong Kong Association of Banks (HKAB)
[CB(2)1073/00-01(07)]

- (15) The proposed wording for the new offences is capable of turning into criminals junior bank staff who did not suspect anything, in circumstances in which a reasonable man would have formed a suspicion.
- (16) The new offences will create an objective test, which could catch the innocent who did not have a guilty mind.
- (17) To impose criminal sanction on a failure to rise to the standard of a reasonable man (in other words, for negligence), when front-line bank staff have to deal with a large volume of cash transactions on a daily basis is not reasonable and is undesirable.

Administration's response

HKAB has provided the Bills Committee with a copy of its submission to the Administration. The Administration has not provided a response to HKAB's views.

<p>(18) The proposed offences cannot be defended on the ground that the bank staff intended to make a report of a suspicious transaction, because a person who may become liable under the new offences may not have actually suspected anything, and was therefore in no position to make any report.</p> <p>(19) The Bill should make clear that no offence is committed and no duty to report arises until after the person has formed a suspicion.</p>	
<p><u>The Law Society of Hong Kong</u> [CB(2)1100/00-01(01)]</p> <p>(20) By adopting the test of "reasonable ground to suspect" as an additional mental element of the money laundering offence and as the test for disclosure of suspicious transaction offence, the proposed amendments have, in effect, imposed an extremely onerous duty upon a solicitor. A solicitor would have to decide, on a case-by-case basis, whether a "reasonable person" has "reasonable grounds to suspect" that certain property is related to drug trafficking and an indictable offence and if so, make a report to the appropriate authority. This duty to disclose is extremely onerous when one considers that the proposed legislation encompasses all indictable offences, including those committed abroad (which would also be indictable offences have they been committed in Hong Kong).</p> <p>(21) The proposals will also create difficulties for solicitors in practice in the light of the solicitor's professional duty of confidentiality towards his clients.</p>	<p><u>Administration's response</u> [CB(2)1266/00-01(01)]</p> <p>(h) Under the existing section 25A, all persons, including lawyers, are required to disclose to an authorized officer when he knows or suspects that any property : (a) in whole or in part directly or indirectly represents any person's proceeds of; (b) was used in connection with; or (c) is intended to be used in connection with drug trafficking or indictable offence. A person who fails to comply with this requirement will be subject to a maximum penalty of a fine at \$50,000 and to imprisonment for three months. No profession is exempted from this reporting requirement in the interest of justice and the community at large. If professional confidentiality by lawyers is considered to be a fundamental right of citizens, the duty to protect justice by disclosure of suspicious transaction offence should also be considered as a basic duty of responsible citizens. There is a need to strike a balance between protecting the privilege of certain groups of citizens and the interest of the community.</p>

<p>(22) The effect of the amendment would mean that the very act of being suspicious would require a solicitor to make a report notwithstanding that he may be able to eliminate any suspicion by making reasonable inquiry. Given the emphasis of the Society's advice to encourage solicitors to suspect, it would mean that compliance with the Society's guidelines issued to its members would inevitably put them in the position that they would have to make a report, failing which they would have committed an offence. The Law Society believes that this is quite unworkable in practice.</p> <p>(23) Further information should be supplied by the Administration on the nature of cases that have been brought before the Hong Kong courts under section 25(3)(a) where the term of imprisonment would have exceeded 14 years and the number of actual prosecutions on section 25A(7) to support their petition for increased penalties.</p>	<p>(i) Money laundering plays a crucial role in drug trafficking or other serious crime activities as without it, drug or serious crime syndicates cannot be benefited from their crimes and will therefore lose the incentive for committing the offence.</p> <p>(j) As for section 25A(1) offence, the penalty should also be increased to enhance the deterrent effect for non-disclosure offence. So far, because of the difficulty in proving the mental element of "knows or suspects", there has been only one prosecution and conviction for section 25A offence under Cap. 405 and Cap. 455 since the provision came into operation in 1995.</p>
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Hong Kong Federation of Insurers

[CB(2)1110/00-01(01)]

- (24) It is unacceptable to alter the existing test from "reasonable ground to believe" to "reasonable ground to suspect" that requires a lower mental element. This represents a fundamental shift of responsibility from the law enforcement agencies to the financial institutions. All insurers in Hong Kong are now following the Anti-money laundering practice guidelines issued by the Office of the Insurance Commissioner.
- (25) To replace such a well-established government guidelines with the test of reasonableness which is vague and unclear would impose an unreasonable and excessive burden on the financial institutions, in particular, to require thousands of front line staff to ascertain what is reasonable outside the scope of the guidelines. The Federation believes the existing system works well and sees no reason to alter the status quo.

Administration's response

[CB(2)1266/00-01(02)]

- (k) The current proposals of introducing a new money laundering offence using the mental element of "has reasonable grounds to suspect" under the proposed section 25(1A) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) and the Organized and Serious Crimes Ordinance (Cap. 455), and altering the mental element from "knows or suspects" to "knows or has reasonable grounds to suspect" under section 25A of the two Ordinances will not change the onus of proof and standard of proof of the offences. The onus of proof for conviction of the offences will still lie totally with the prosecution. Under the current proposals, the prosecution still has to prove beyond reasonable doubt the relevant mental elements and it is still not easy to convict a person of the new money laundering offence or failure to disclose suspicious transaction.
- (l) The proposals are not intended to replace any guideline issued by financial regulators. Indeed, at the Bills Committee meeting on 16 March 2001, the Administration also proposed to the Bills Committee a provision for those who have followed the requirements of anti-money laundering guidelines stipulated by their respective regulators.

**Proposed changes to
Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405)**

Section 25

(1) Subject to section 25A, a person commits an offence if, knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person's proceeds of drug trafficking, he deals with that property.

(1A) Subject to section 25A, a person commits an offence if, having reasonable grounds to suspect that any property in whole or in part directly or indirectly represents any person's proceeds of drug trafficking, he deals with that property.

(2) In proceedings against a person for an offence under subsection (1) or (1A), it is a defence to prove that-

- (a) he intended to disclose to an authorized officer such knowledge, suspicion or matter as is mentioned in section 25A(1) in relation to the act in contravention of subsection (1) or (1A), as the case may be, concerned; and
- (b) there is reasonable excuse for his failure to make disclosure in accordance with section 25A(2).

(3) A person who commits an offence under subsection (1) is liable-

- (a) on conviction upon indictment to a fine of \$5,000,000 and to imprisonment for 14 years; or
- (b) on summary conviction to a fine of \$500,000 and to imprisonment for 3 years.

(3A) In proceedings against a person for an offence under subsection (1A), it is a defence to prove that, in all the circumstances of his case, it was reasonable that he did not suspect that the property he dealt with in whole or in part directly or indirectly represented any person's proceeds of drug trafficking.

(4) A person who commits an offence under subsection (1A) is liable-

(a) on conviction upon indictment to a fine of \$1,000,000 and to imprisonment for 5 years; or

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

Section 25A

(1) Where a person knows or **suspects** has reasonable grounds to suspect that any property-

- (a) in whole or in part directly or indirectly represents any person's proceeds of;
- (b) was used in connection with; or
- (c) is intended to be used in connection with,

drug trafficking, he shall as soon as it is reasonable for him to do so disclose that knowledge or suspicion, together with any grounds and any other matter on which that knowledge or suspicion is based, to an authorized officer.

(2) If a person who has made a disclosure referred to in subsection (1) does any act in contravention of section 25(1) or (1A) (whether before or after such disclosure), and the disclosure relates to that act, he does not commit an offence under that section if-

- (a) that disclosure is made before he does that act and he does that act with the consent of an authorized officer; or
- (b) that disclosure is made-
 - (i) after he does that act;
 - (ii) on his initiative; and
 - (iii) as soon as it is reasonable for him to make it.

(3) A disclosure referred to in subsection (1) (including a disclosure made in good faith and purporting to be a disclosure referred to that subsection)-

- (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.

(4) In the case of a person who was in employment at the relevant time, this section shall have effect in relation to disclosures to the appropriate person in accordance with the procedure established by his employer for the making of such disclosures as it has effect in relation to disclosures to an authorized officer.

(5) A person commits an offence if, knowing or ~~suspecting~~ having reasonable grounds to suspect that a disclosure has been made under subsection (1) or (4), he discloses to any other person any matter which is likely to prejudice any investigation which might be conducted following that first-mentioned disclosure.

(6) In proceedings against a person for an offence under subsection (5), it is a defence to prove-

(a) that he did not know or have reasonable grounds to suspect that the disclosure concerned was likely to be prejudicial in the way referred to in that subsection; or

(b) that he had lawful authority or reasonable excuse for making that disclosure.

(7) A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 3 months.

(8) A person who commits an offence under subsection (5) is liable-

(a) on conviction upon indictment to a fine of \$500,000 and to imprisonment for 3 years; or

(b) on summary conviction to a fine at level 6 and to imprisonment for 1 year.

(9) In proceedings for an offence under this section-

(a) any provision of a guideline which-

(i) was issued or otherwise approved by-

(A) the defendant's employer at the material time;

(B) a body representing a profession to which the defendant belonged at the material time; or

(C) a regulatory body which pursuant to any enactment regulates the industry or other activity in which the defendant worked or was engaged at the material time;

(ii) applied to the defendant at the material time in his capacity as an employee of that employer, as a member

of that profession, or as a person working or engaged in that industry or activity, as the case may be; and
(iii) appears to a court to be relevant to a provision of this section alleged to have been contravened,
shall be admissible in evidence in the proceedings; and
(b) the court may give the defendant's observance or non-observance of the guideline such weight in the proceedings as the court thinks proper in the interests of justice.

(10) In subsection (9)-

“court”() includes a magistrate;

“guideline”() includes a code of practice.

**Proposed changes to
Organized and Serious Crimes Ordinance (Cap. 455)**

Section 25

(1) Subject to section 25A, a person commits an offence if, knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person's proceeds of an indictable offence, he deals with that property.

(1A) Subject to section 25A, a person commits an offence if, having reasonable grounds to suspect that any property in whole or in part directly or indirectly represents any person's proceeds of an indictable offence, he deals with that property.

(2) In proceedings against a person for an offence under subsection (1) or (1A), it is a defence to prove that-

- (a) he intended to disclose to an authorized officer such knowledge, suspicion or matter as is mentioned in section 25A(1) in relation to the act in contravention of subsection (1) or (1A), as the case may be, concerned; and
- (b) there is reasonable excuse for his failure to make disclosure in accordance with section 25A(2).

(3) A person who commits an offence under subsection (1) is liable-

- (a) on conviction upon indictment to a fine of \$5,000,000 and to imprisonment for 14 years; or
- (b) on summary conviction to a fine of \$500,000 and to imprisonment for 3 years.

(3AA) In proceedings against a person for an offence under subsection (1A), it is a defence to prove that, in all the circumstances of his case, it was reasonable that he did not suspect that the property he dealt with in whole or in part directly or indirectly represented any person's proceeds of an indictable offence.

(3A) A person who commits an offence under subsection (1A) is liable-

- (a) on conviction upon indictment to a fine of \$1,000,000 and to imprisonment for 5 years; or

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

(4) In this section and section 25A, references to an indictable offence include a reference to conduct which would constitute an indictable offence if it had occurred in Hong Kong.

Section 25A

(1) Where a person knows or ~~suspects~~ has reasonable grounds to suspect that any property-

- (a) in whole or in part directly or indirectly represents any person's proceeds of;
- (b) was used in connection with; or
- (c) is intended to be used in connection with,

an indictable offence, he shall as soon as it is reasonable for him to do so disclose that knowledge or suspicion, together with any grounds and any other matter on which that knowledge or suspicion is based, to an authorized officer.

(2) If a person who has made a disclosure referred to in subsection (1) does any act in contravention of section 25(1) or (1A) (whether before or after such disclosure), and the disclosure relates to that act, he does not commit an offence under that section if-

- (a) that disclosure is made before he does that act and he does that act with the consent of an authorized officer; or
- (b) that disclosure is made-
 - (i) after he does that act;
 - (ii) on his initiative; and
 - (iii) as soon as it is reasonable for him to make it.

(3) A disclosure referred to in subsection (1) (including a disclosure made in good faith and purporting to be a disclosure referred to in that subsection)-

- (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.
- (4) In the case of a person who was in employment at the relevant time, this section shall have effect in relation to disclosures to the appropriate person in accordance with the procedure established by his employer for the making of such disclosures as it has effect in relation to disclosures to an authorized officer.
- (5) A person commits an offence if, knowing or **suspecting** having reasonable grounds to suspect that a disclosure has been made under subsection (1) or (4), he discloses to any other person any matter which is likely to prejudice any investigation which might be conducted following that first-mentioned disclosure.
- (6) In proceedings against a person for an offence under subsection (5), it is a defence to prove-
- (a) that he did not know or have reasonable grounds to suspect that the disclosure concerned was likely to be prejudicial in the way referred to in that subsection; or
 - (b) that he had lawful authority or reasonable excuse for making that disclosure.
- (7) A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 3 months.
- (8) A person who commits an offence under subsection (5) is liable-
- (a) on conviction upon indictment to a fine of \$500,000 and to imprisonment for 3 years; or
 - (b) on summary conviction to a fine at level 6 and to imprisonment for 1 year.

(9) In proceedings for an offence under this section-

(a) any provision of a guideline which-

(i) was issued or otherwise approved by-

(A) the defendant's employer at the material time;

(B) a body representing a profession to which the defendant belonged at the material time; or

(C) a regulatory body which pursuant to any enactment regulates the industry or other activity in which the defendant worked or was engaged at the material time;

(ii) applied to the defendant at the material time in his

capacity as an employee of that employer, as a member of that profession, or as a person working or engaged in that industry or activity, as the case may be; and
(iii) appears to a court to be relevant to a provision of this section alleged to have been contravened,
shall be admissible in evidence in the proceedings; and
(b) the court may give the defendant's observance or non-observance of the guideline such weight in the proceedings as the court thinks proper in the interests of justice.

(10) In subsection (9)-

“court”() includes a magistrate;

“guideline”() includes a code of practice.

Relevant Papers/Documents

<u>Paper No.</u>	<u>Papers</u>
CB(2)305/00-01(01) (issued on 18 November 2000)	Submission of the Hong Kong Society of Accountants
CB(2)744/00-01(03) (issued on 19 January 2001)	UK Report on Recovery of Proceeds of Crimes
CB(2)800/00-01(01) (issued on 5 February 2001)	Administration's paper on "Drug trafficking offence" referred to under section 25A of the Drug Trafficking (Recovery of Proceeds) Ordinance and "indictable offence" under section 25A of the Organized and Serious Crimes Ordinance
CB(2)820/00-01(01) (issued on 7 February 2001)	Administration's paper on "Reasonable grounds to suspect", "reasonable grounds to believe" and reasons for introducing two money laundering offences using different mental elements
CB(2)916/00-01(01) (issued on 22 February 2001)	Submission of the Hong Kong Bar Association
CB(2)1073/00-01(05) (issued on 15 March 2001)	Administration's response to submission of the Hong Kong Bar Association
CB(2)1073/00-01(07) (issued on 15 March 2001)	Submission of the Hong Kong Association of Banks
CB(2)1100/00-01(01) (issued on 15 March 2001)	Submission of the Law Society of Hong Kong
CB(2)1110/00-01(01) (issued on 16 March 2001)	Submission of the Hong Kong Federation of Insurers
CB(2)1266/00-01(01) (issued on 11 April 2001)	Administration's response to submission of the Law Society of Hong Kong
CB(2)1266/00-01(02) (issued on 11 April 2001)	Administration's response to submission of the Hong Kong Federation of Insurers
CB(2)1808/00-02(01) (issued on 13 June 2001)	Further submission of the Hong Kong Bar Association