

**Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2005
Review of Dangerous Drugs Ordinance, Cap. 134**

Issue

This paper proposes the way forward in tackling the lack of provisions to effectively prevent a person who is the subject of a section 53A(1) notice under the Dangerous Drugs Ordinance, Cap. 134 (“DDO”) from leaving Hong Kong.

Background

2. Clauses 35 and 36 of the Statute Law (Miscellaneous Provisions) Bill 2005 (the Bill) propose to amend sections 17A and 17B of the Prevention of Bribery Ordinance, Cap. 201 (“POBO”) to prohibit a person who is the subject of investigation in respect of an offence reasonably suspected to have been committed by him under the POBO and who is required to surrender his travel document from leaving Hong Kong.
3. Under the “Easy Travel Scheme”, it is possible for a Hong Kong resident to leave Hong Kong for Macau on production of a Hong Kong identity card at immigration control points. Since a notice issued under section 17A(1) requiring a person to surrender his travel document does not in fact prevent the person from leaving Hong Kong, Immigration Officers have no power to prevent persons holding Hong Kong identity cards from leaving Hong Kong even though they have been required to surrender their travel documents. Amendments to section 17A of POBO are considered necessary to provide that the subject of a section 17A(1) notice shall not leave Hong Kong during the currency of the notice.
4. Members of Bills Committee also suggested further amendments to enable a person to whom a written notice to surrender travel document is served under s.17A(1) to seek permission to leave Hong Kong.
5. Preliminary examination of sections 53A and 53B of DDO

reveals that similar technical loophole exists in that whilst a person may have surrendered his travel documents, he is not prohibited by s.53A from leaving Hong Kong and may actually do so using his Hong Kong identity card.

6. We have also examined the existing operation of s.53A of DDO in consultation with law enforcement agencies. To our knowledge, section 53A of DDO has rarely, if ever, been invoked. Most drug investigations are of a covert nature to reduce opportunities for destruction of evidence by the subjects under investigation. The application of section 53A would inevitably alert the subject. Usually, persons reasonably suspected to have committed a crime under DDO are charged and are brought into judicial proceedings and subject to court orders in respect of right to leave Hong Kong. In practice, the court will order such person to surrender his travel document and restrict him from leaving Hong Kong, and impose certain conditions it thinks necessary. This has proven effective in preventing persons wanted for drug investigations from leaving Hong Kong.

7. Despite the above, in view of the legal anomaly, our preliminary view is that amendments to DDO are necessary to achieve the same purpose as the proposed amendments to POBO to effectively prevent a subject of a section 53A notice from leaving Hong Kong. Also, to enable a subject of a section 53A(1) notice to apply for permission to leave Hong Kong, it is necessary to add a new provision for the purpose. For consistency, it appears logical that such application be made and handled in the same manner as application for return of travel document under existing section 53B. A preliminary draft of amendments to DDO along these lines has been drawn up as enclosed in **Annex**.

8. However, we are advised that existing section 53B(4) may have a problem as described in paragraph 9 below.

Issue requiring more in-depth review

9. Section 53B(1) provides that a person who has surrendered his travel document under section 53A may apply to the Commissioner of Police or Commissioner of Customs and Excise for its return. Section

53B(3) provides that any person aggrieved by the refusal of an application may appeal to a magistrate against the refusal. Under section 53B(4), the decision of a magistrate in relation to an appeal shall be final. Initial legal advice is that the existing section 53B(4) might have implications under Article 82 of the Basic Law in the light of the judgment of the Court of Final Appeal (CFA) in A Solicitor v The Law Society of Hong Kong & Secretary for Justice (Intervener) [2004] 1 HKLRD 214. According to the CFA in the said case, a provision that imposes an absolute bar (directly or indirectly) on appeals to the CFA would be inconsistent with BL82 (which vests the power of final adjudication in the CFA) unless it satisfies the proportionality test implicit in BL 82.

10. As mentioned to Members by Department of Justice representatives before, the Department is conducting an on-going review of those statutory provisions relating to judicial finality that might be affected by the CFA judgment.

Proposed Way Forward

11. We propose that the draft amendments to DDO as per **Annex** could form the basis of discussion of the Bills Committee. The draft amendments seek to:

- (a) Similar to amendments to POBO, it is proposed to add a new provision to section 53A providing that the subject of a section 53A(1) notice shall not leave Hong Kong before the expiry of a period of three months from the date of the notice, which is in line with the period of which surrendered travel document can be detained. This period of three months may be further extended in line with the detention period of the travel document;
- (b) To enable a subject of a section 53A(1) notice to apply for permission to leave Hong Kong, it is necessary to add a new provision for the purpose. It is proposed that such application be made in the same manner as application for return of travel document under existing section 53B except

section 53B(4).

12. As regards section 53B(4) of DDO, this will be looked into in the review of statutory provisions relating to judicial finality conducted by Department of Justice.

Advice Sought

13. Members of the Bills Committee are requested to consider the proposed way forward as described in paragraphs 11 and 12.

Narcotics Division, Security Bureau
2 June 2005

DRAFT PROPOSED AMENDMENTS TO DIVISION 7 OF PART 3 OF THE
STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL 2005

Dangerous Drugs Ordinance

53A. Surrender of travel document

(1) A magistrate may, on the application of the Commissioner of Police or the Commissioner of Customs and Excise, by written notice require a person who is the subject of an investigation in respect of a specified offence alleged or suspected to have been committed by him to surrender to the Commissioner of Police or Commissioner of Customs and Excise any travel document in his possession.

(2) The matter of an application under subsection (1) shall be substantiated by the oath of the applicant.

(3) A notice under subsection (1) shall be served personally on the person to whom it is addressed.

(4) A person on whom a notice under subsection (1) is served shall comply with such notice forthwith.

(4A) Subject to subsection (8), a person to whom a notice under subsection (1) is addressed shall not leave Hong Kong, whether or not the notice has been served on him under subsection (3), before the expiry of a period of 3 months from the date of the notice unless -

- (a) an application made under section 53B(1) for the return of a travel document is granted; or
- (b) an application made under section 53C(1) for permission to leave Hong Kong is granted.

(5) If a person on whom a notice under subsection (1) has been served fails to comply with the notice forthwith, he may ~~thereupon~~ be arrested and taken before a magistrate.

(6) Where a person is taken before a magistrate under subsection (5), the magistrate shall, unless such person thereupon complies with the notice under subsection (1) or satisfies the magistrate that he does not possess a travel document, by warrant commit him to prison there to be safely kept -

- (a) until the expiry of the period of 28 days from the date of his committal to prison as aforesaid; or
- (b) until such person complies with the notice under subsection (1) and a magistrate, by order in that behalf, orders and directs the Commissioner of Correctional Services to discharge such person from prison (which order shall be sufficient warrant for the Commissioner of Correctional Services so to do),

whichever occurs first.

(7) Upon the surrender of a travel document under this section, the Commissioner of Police or the Commissioner of Customs and Excise, as the case may be, shall issue a receipt identifying the travel document.

(7A) Subject to subsection (8), a travel document surrendered to the Commissioner of Police or the Commissioner of Customs and Excise in compliance with a notice under subsection (1) may be detained for a period of 3 months from the date of the notice unless an application made under section 53B(1) for the return of the travel document is granted.

~~(8) A travel document which is surrendered to the Commissioner of Police or the Commissioner of Customs and Excise under this section may be detained for 3 months from the date on which it was surrendered and may be detained.~~ The period of 3 months referred to in subsections (4A) and (7A) may be extended for not more than 2 further periods of 3 months if a magistrate, on application by the Commissioner of Police or the Commissioner of Customs and Excise, is satisfied that the investigation could not reasonably have been completed before the date of such application and authorizes such further detention extension.

(9) All proceedings before a magistrate under this section shall be conducted in chambers.

(10) In this section and sections 53B and 53C -
"Commissioner of Customs and Excise" (香港海關關長) includes a Deputy Commissioner of Customs and Excise and an Assistant Commissioner of Customs and Excise;
"Commissioner of Police" (警務處處長) includes a deputy or assistant commissioner of police;
"specified offence" (指明罪行) means any offence punishable under

any section of this Ordinance, on conviction on indictment, with imprisonment for a term of 15 years or any greater punishment, and aiding, abetting, counselling or procuring the commission by another of any such offence;

"travel document" (旅行證件) means a passport or other document issued for the purpose of travel which establishes the identity or nationality of the holder.

53B. Application for return of travel document

(1) A person who has surrendered his travel document in accordance with section 53A may at any time make written application to the Commissioner of Police or the Commissioner of Customs and Excise, as the case may be, for its return and every such application shall contain a statement of the grounds on which it is made.

(2) Before determining an application under subsection (1), the Commissioner of Police or the Commissioner of Customs and Excise may require that any matter of fact relied on in the application shall be substantiated by statutory declaration.

(3) Any person aggrieved by the refusal of an application under subsection (1) may, within 14 days of being informed of such refusal, appeal to a magistrate against that refusal and the magistrate may, upon considering the grounds of the application and any evidence which may be adduced in relation thereto by or on behalf of either party, order that the travel document be returned.

(4) The decision of a magistrate in relation to an appeal

under this section shall be final.

53C. Application for permission to leave Hong Kong

(1) Without prejudice to section 53B, a person on whom a notice under section 53A(1) is served may at any time make written application to the Commissioner of Police or the Commissioner of Customs and Excise, as the case may be, for permission to leave Hong Kong and every such application shall contain a statement of the grounds on which it is made.

(2) Before determining an application under subsection (1), the Commissioner of Police or the Commissioner of Customs and Excise may require that any matter of fact relied on in the application shall be substantiated by statutory declaration.

(3) Any person aggrieved by the refusal of an application under subsection (1) may, within 14 days of being informed of such refusal, appeal to a magistrate against that refusal and the magistrate may, upon considering the grounds of the application and any evidence which may be adduced in relation thereto by or on behalf of either party, order that the person be permitted to leave Hong Kong.