

**Bills Committee on
Anti-money Laundering and Counter-Terrorist Financing
(Financial Institutions) Bill**

**Further Information on the Anti-Money Laundering and
Counter-Terrorist Financing (Financial Institutions) Review Tribunal**

This note provides further information on the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Review Tribunal (“the Tribunal”) to be established under the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Bill (“the Bill”).

Clarification on provisions under clause 60

2. At the meeting on 31 March 2011, a Member enquired whether the oral evidence or written statements received and considered by the Tribunal under clause 60(1)(a) would enjoy absolute privilege or qualified privilege. It is trite law that everything said in court is protected by absolute privilege, whether by the judges, parties, witness or legal representatives. Section 10(b) of Schedule 4 of the Bill provides that the parties to the review and any witness, solicitor, counsel or other person involved in a review would have the same privileges and immunities in respect of the review as they would have if the review were civil proceedings before the Court of First Instance. As such, the oral evidence or written statements given to the Tribunal are covered by the absolute privilege.

3. At the same meeting, a Member enquired whether an employer deducting wages of an employee due to his/her absence from work to appear before the Tribunal would be committing an offence provided under clause 60(2)(e). Under clause 60(2)(e), a person commits an offence if the person, without reasonable excuse, “threatens, insults, or causes any loss to be suffered by any person who has attended before the Tribunal, on account of that attendance”. Whether an employer commits the relevant offence when he deducts the employees’ wages on account of his absence from work to appear before the Tribunal depends on the terms in the employment contract. Usually witnesses take leave to attend the court.

In most cases it may be argued that the situation covered by clause 60(2)(e) does not arise if the employer is entitled to deduct the salary or forfeit annual leave pursuant to the employment contract.

Whether clause 63 would create an inequitable situation

4. A Member is concerned that clause 63 may create an inequitable situation between the party seeking a review and the relevant authority, as it appears that the latter is not subject to the same restriction in its exercise of powers leading to the decision which is the subject of the review.

5. Clause 63 of the Bill, which was modeled on section 222 of the Securities and Futures Ordinance (Cap 571) (“SFO”), seeks to preserve a bank’s duty of confidentiality towards its customers, as in the case of clause 9(8) of the Bill which was modeled on section 180(9) of SFO. It does not affect any requirement on the authorized institution to disclose information in relation to the affairs of the person making the application for review.

6. While there is no identical restriction as the one provided under clause 63 on a relevant authority in exercising the power of inspection and investigation, there are other safeguards provided under clauses 9 and 12. The information that may be obtained by a relevant authority during an inspection must relate to the business carried on or any transaction carried out by the financial institution and the information that may be obtained during an investigation must relate to the investigation. It is unlikely that the relevant authority could fulfill the above-mentioned requirements and obtain information from an authorized institution in relation to the affairs of a person that is not related to the one under inspection or investigation. We therefore do not consider that clause 63 would create an inequitable situation in its operation.

Channel to lodge a complaint against the Tribunal

7. If the party to the review is dissatisfied with the determination of the review, he may appeal to the Court of Appeal if leave is granted by the Court of Appeal following the procedures set out in Clause 70. A party to the review may lodge an appeal if he considers the determination of the review made by the Tribunal has been affected by the conduct of the

chairperson and members of the Tribunal, although the conduct of the chairperson or the member(s) per se is itself not a subject for appeal or judicial review.

8. A party dissatisfied with the conduct of the chairperson or the members may make a complaint to the Secretary for Financial Services and the Treasury (“the Secretary”) who is the authority to appoint the chairperson and members of the Tribunal. Under sections 2 and 3 of Schedule 4, the Secretary is empowered to remove the chairperson or the panel members from office on grounds of, inter alia, neglect of duty, conflict of interest or misconduct.

Rationale for clause 66(2)

9. The Administration is requested to explain the rationale behind clause 66(2) and provide examples of similar provisions in other legislation. Clause 66(2) provides that a document purporting to be an order of the Tribunal signed by the chairperson of the Tribunal is presumed to be an order duly made and signed without further proof. Similar provisions can be found under a number of other legislations, including sections 225 and 263 of SFO, section 41 of the Deposit Protection Scheme Ordinance (Cap 581) and section 101D of the Banking Ordinance (Cap 155).

10. The purpose of the provision is to facilitate efficient enforcement of the orders made by the Tribunal by dispensing with the requirement for the Tribunal to prove that the orders it made have been duly made and signed. For example, to register an order of the Tribunal in the Court of First Instance, it is necessary for the Tribunal to produce the original of the order to the Registrar to the High Court without having to take other additional steps or measures to prove to the Registrar that the order has been duly made and signed.

Clarification regarding section 4(1) of Schedule 4

11. Section 4(1) of Schedule 4 was modeled on section 12 of Schedule 8 of SFO. Making reference to the operation of the Securities and Futures Appeals Tribunal to which section 12 of Schedule 8 of SFO applies, the chairperson always, as part of his duty, makes recommendation

on the panel members to be appointed as ordinary members. In the extremely unlikely event that a chairperson refuses to make any recommendation on the panel members to be appointed as ordinary members for a review, the Secretary may consider removing the chairperson from office for neglect of duty under section 3(5) of Schedule 4.

Chairman sitting as sole member of the Tribunal

12. Section 9 of Schedule 4 allows parties to a review, upon mutual agreement, to choose whether a hearing by the full Tribunal or a Tribunal with the chairperson as the sole member. For instance, if the review involves mainly legal issues, the parties may consider that it will be more efficient for their case to be reviewed by the chairperson alone given his credential as a person who is eligible for appointment as a judge of the High Court. If the review involves examinations of factual or technical matters which require more than legal expertise, the parties may wish to have ordinary members assisting the chairperson and participating in making the determination. We do not see the benefit of restricting the application of section 9(1) and circumscribing the rights of the parties to make use of section 9(1). Since the application of section 9(1) requires the consent from all parties to the review, if either one party of the review is of the view that a determination by the chairperson alone is not appropriate or is not in his interest, the person may disagree with such an arrangement. Under such a circumstance, section 9(1) will not be applicable.

13. We agree with a Member's observation that the requirement for the chairperson to report to the Tribunal the making of the determination etc. under section 9(4) in circumstances covered by section 9(1) is not necessary. As such, we propose removing the reference to subsection (1) under section 9(4). However, as there is a need for the chairperson to keep the other members informed of his/her decision on the application for a stay of execution of a specified decision under section 9(2)(b), we consider that section 9(4) (after removal of the reference to subsection (1)) should be retained.

Financial Services and the Treasury Bureau
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