

LEGISLATIVE COUNCIL BRIEF

Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) and
Organized and Serious Crimes Ordinance (Cap. 455)

DRUG TRAFFICKING AND ORGANIZED CRIMES (AMENDMENT) BILL 1999

INTRODUCTION

At the meeting of the Executive Council on 23 November 1999, the Council ADVISED and the Chief Executive ORDERED that the Drug Trafficking and Organized Crimes (Amendment) Bill 1999, at Annex A, should be introduced into the Legislative Council to enhance the effectiveness of our anti-money laundering legislation.

BACKGROUND AND ARGUMENT

2. The Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance 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 and other indictable offences. The two Ordinances mirror each other in their confiscation and anti-money laundering provisions.

3. Notwithstanding the fact that the international Financial Action Task Force on Money Laundering (FATF)'s second comprehensive evaluation report on Hong Kong's anti-money laundering regime (in 1998) commended highly on our coordinated and continuous efforts to improve our systems, certain provisions of the two Ordinances still fall short of FATF's requirements in the light of changing circumstances.

4. In a working group comprising law enforcement agencies, financial regulators and professional bodies (such as the Law Society of Hong Kong) to improve the quantity and quality of suspicious transaction reporting, it was agreed that one of the major obstacles for such reporting was the small number of convicted money laundering cases, which in turn discouraged people from reporting those transactions. In fact, according to the Police and Customs' records, there were only 34 persons convicted of money laundering offences and one convicted of failure to disclose suspicious transaction during the years from 1996 to 1999.

5. Specifically, operational experience has revealed the following areas where tightening up of legislation is required to increase the effectiveness of anti-money laundering legislation:

(a) Confiscation orders

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 fail that the person's whereabouts will be accepted as unknown but the prosecution is still required by legislation to take reasonable steps to give notice of those proceedings to that person. At the operational level, it may be impracticable to notify a person whose whereabouts are not known and it is considered that this requirement is repetitive and requires clarification.

(b) Assessing the proceeds of drug trafficking

The Drug Trafficking (Recovery of Proceeds) Ordinance currently gives the court the power to assume that all property held by the defendant since conviction, 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. 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. Section 4(4) of this Ordinance currently prohibits the court from applying the assumption for persons convicted of drug money laundering.

(c) Application of procedure for enforcing confiscation orders

Sometimes a court will specify in the Certificate of Sentence the period in which the defendant has to pay 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.

(d) Cases in which restraint orders and charging orders may be made

Under existing legislation, a restraint or charging order cannot be issued in respect of a person who has been arrested and released on bail. During the lengthy period when evidence is being gathered and the person is released on bail, that person, knowing that he is under investigation and that his property may be restrained in the future, will naturally seek to dispose of, transfer or conceal his property.

(e) Restraint orders and charging orders

(i) 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. It is not satisfactory that there is no criminal sanction against a person who breaches a restraint or charging order.

(ii) At present, there is no requirement on 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. However, the court must have such

information for monitoring the enforcement of the relevant orders, and for hearing the applications for such orders.

(f) Realization of property where amount to be recovered under confiscation order is not more than a prescribed amount

Under existing legislation, the court will appoint a receiver to realize any realizable property and order a person in possession of such property to hand over the property to a receiver. In cases where the amount of the property is small, it is not cost-effective to appoint a receiver to realize the property. It will save time and administration costs if the property realized is directly paid to the Registrar of the High Court.

(g) Dealing with property known or believed to represent proceeds of drug trafficking or indictable offence

(i) Existing section 25 of the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance makes it 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 drug trafficking or indictable offences. However, past operational experience revealed that in most cases, it was difficult to prove these two mental elements. 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.

(ii) To deter people from dealing with property known or believed to represent proceeds of drug trafficking, or indictable offences, and to reflect the gravity of the offence in a more appropriate manner, the term of imprisonment for money laundering should be increased.

(h) Disclosure of knowledge or suspicion that property

represents proceeds of drug trafficking or indictable offence

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 authorized officer. The level of mens rea is not consistent with that in section 25(1) of the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance. Furthermore, the existing penalty level of the offence does not reflect the gravity of the offence for failing to disclose suspicious transactions.

THE PROPOSAL

6. In order to address the inadequacies presented in paragraph 5 above and to enhance the effectiveness of our anti-money laundering regime, it is proposed that the two Ordinances be amended.

THE BILL

7. **Section 3 of Schedules 1 and 2** to the Bill amends the requirement of notifying an absconded defendant along the line that "reasonable steps should be taken to ascertain that person's whereabouts".

8. **Section 4 of Schedule 1** repeals section 4(4) of the Drug Trafficking (Recovery of Proceeds) Ordinance to allow an assumption provision to be applied to defendants who have been convicted of a money laundering offence. **Section 6 of Schedule 1** and **section 5 of Schedule 2** require the court to fix a period within which a defendant is to pay the amount under a confiscation order.

9. **Section 7 of Schedule 1** and **section 6 of Schedule 2** amend

the two Ordinances to allow for issue of a restraint or charging order in relation to the assets of a person who has been arrested for a drug trafficking offence or a specified offence and released on bail. To balance this power, there will be a requirement along the line that the court must be satisfied before the making of 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.

10. **Sections 8 and 9 of Schedule 1 and sections 7 and 8 of Schedule 2** 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. They also introduce penal provisions for breaching a restraint or charging order.

11. **Sections 10 and 11 of Schedule 1 and sections 9 and 10 of Schedule 2** introduce a streamlined procedure for the realisation of property where the amount to be recovered under a confiscation order is not more than \$500,000.

12. **Section 12 of Schedule 1 and section 11 of Schedule 2** create a new offence of dealing in realisable property 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. It also increases the maximum penalty for a money laundering offence from 14 years to 20 years. The proposed increase is in line with similar legislation in other jurisdictions e.g. Australia.

13. **Section 13 of Schedule 1 and section 12 of Schedule 2** change the test for requiring a disclosure under section 25A(1) of both Ordinances from "know or suspect" to "know or has reasonable grounds to suspect". It is also proposed to increase the custodial sanction for a contravention of section 25A(1) of the two Ordinances from 3 months to 12 months, in line with the international trend.

14. **Schedule 3** of the Bill introduces consequential amendments that are required to the Drug Trafficking (Recovery of Proceeds) (Designated Countries and Territories) Order.

15. The existing provisions which are being amended are at Annex B.

LEGISLATIVE TIMETABLE

16. The legislative timetable approved by the Chief Executive in Council is: -

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| Publication in the Gazette | 3 December 1999 |
| First Reading and commencement of Second Reading debate | 15 December 1999 |
| Resumption of Second Reading debate, committee stage and Third Reading | to be notified |

COMMENCEMENT

17. The proposed amendments will take effect on a date to be appointed by the Secretary for Security.

BASIC LAW IMPLICATIONS

18. The Department of Justice advises that the Bill does not conflict with those provisions of the Basic Law carrying no human rights implications.

HUMAN RIGHTS IMPLICATIONS

19. The Department of Justice advises that the Bill is consistent with the human rights provisions of the Basic Law.

BINDING EFFECT OF THE LEGISLATION

20. The amendments will not affect the current binding effect of the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance.

FINANCIAL AND STAFFING IMPLICATIONS

21. There are no financial and staffing implications relating to the proposed amendments. The proposal to dispense with receivers to realize confiscated property not more than \$500,000 should result in increase in revenue arising from the confiscated property.

ECONOMIC IMPLICATIONS

22. The measures are unlikely to affect normal business activities.

PUBLIC CONSULTATION

23. We have consulted the professional bodies (the Hong Kong Bar Association, the Law Society of Hong Kong and the Hong Kong Society of Accountants), financial regulators, the Action Committee Against Narcotics and the LegCo Panel on Security. They are, in general, supportive of our proposals.

PUBLICITY

24. A press release will be issued on 1 December 1999. A spokesman will be available for answering media enquiries.

ENQUIRIES

25. For any enquiries on the Amendment Bill, please contact Ms Mimi Lee, Principal Assistant Secretary for Security (Narcotics), at 2867 2748.

Security Bureau
1 December 1999
[NCR 3/1/8(G) Pt. 22]