

For discussion by
Legislative Council Panel on Security
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LEGISLATIVE COUNCIL PANEL ON SECURITY

Amendments to Drug Trafficking (Recovery of Proceeds) Ordinance and Organized and Serious Crimes Ordinance

PURPOSE

This paper seeks Members' advice on the proposed amendments to the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) and the Organized and Serious Crimes Ordinance (Cap. 455) to further enhance the effectiveness of the confiscation and anti-money laundering provisions therein.

BACKGROUND

2. Cap. 405 and Cap. 455 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. After the two Ordinances were amended in 1995, the anti-money laundering provisions therein have been improved significantly. 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 commended highly on the co-ordinated and continuous efforts to improve our regime, 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), set up 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 to report those transactions. In fact, according to records of Police and Customs, 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.

PROPOSED AMENDMENTS

5. In view of the above, the Administration has conducted a review on Cap. 405 and Cap. 455, and proposed a number of amendments to improve the two Ordinances. The key proposed amendments and their considerations are set out below.

Confiscation orders

- (a) 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 and 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. To provide clarity in the legislation, **we propose that the requirement of notifying an absconded defendant in section 3(2)(c)(ii)(B) of Cap. 405 and section 8(3)(c)(i)(B)(II) of Cap. 455 be revised along the line that “reasonable steps should be taken to ascertain that person’s whereabouts”**. This amendment will allow the prosecution to satisfy the court by making attempts to locate an absconding person’s whereabouts, e.g.

through any known associates or relatives of his or through registered postage to his last known residential address or place of work, etc. The legal right of a person affected by an application to the court will not be affected by this proposed amendment.

Assessing the proceeds of drug trafficking

- (b) Cap. 405 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 assumptions should also apply to persons convicted of a drug money laundering offence since it is precisely such persons who are likely to hold a large amount of proceeds of drug trafficking. Section 4(4) of Cap. 405 currently prohibits the court from applying the assumptions in cases of persons convicted of drug money laundering. **We propose that this be changed and section 4(4) of Cap. 405 be repealed.**

Application of procedure for enforcing confiscation orders

- (c) 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. It is important and in the public interest that confiscation orders are satisfied in order to deprive defendants of their proceeds of crime.

To achieve the above objective, **we propose that the application of procedure for enforcing confiscation order under section 8(1)(a) of Cap. 405 and section 13(1)(a) of Cap. 455 be amended to require the court to specify a period, say, 6 months from the issue of the order, for the defendant to pay under that order.** If he has not done so

by the stipulated date, the Secretary for Justice can take steps to apply to the court to appoint a receiver to realize the defendant's property to satisfy that order. With this proposal, the court still has discretion to fix a period longer than 6 months if there are special circumstances justifying it doing so. Under the existing section 15 of Cap. 405 and section 20 of Cap. 455, a person affected by a confiscation order can go back to the court for a variation of that order.

Cases in which restraint orders may be made

- (d) Under existing legislation, a restraint 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.

In view of the above, **we propose to amend the definition in section 2(11) of Cap. 405 and section 2(15) of Cap. 455 to include a person who has been arrested for a drug trafficking offence or an organized crime /specified offence, where appropriate, and released on bail, so that a restraint order may be applied against him.** To balance this power, **we also propose to introduce a requirement along the line that the court must be satisfied that in the circumstances of the case, there is reasonable cause to believe that charges will be brought against that person after further investigation before the making of such a restraint order.** In section 10(6) of Cap. 405 (section 15(6) of Cap. 455), there is already safeguard for persons affected by a restraint order to apply to the court for the discharge or variation of that order.

Restraint orders and charging orders

- (e) At present, there is no penal provision in Cap. 405 or Cap. 455 for breaching a restraint or charging order. It is not a satisfactory situation that there is no sanction against a person who breaches a restraint or charging order. **We therefore propose that penal provisions be introduced to Cap. 405 and Cap. 455 to deter people from knowingly deal in any realizable property in contravention of a restraint or charging order. It is proposed that a person who commits such an offence should be liable on conviction upon indictment to a fine of \$500,000 and to imprisonment for 5 years, and on summary conviction to a fine of \$250,000 and to imprisonment for two years.**
- (f) 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. **We therefore propose that section 10 of Cap. 405 and section 15 of Cap. 455 be amended to require a holder of any realizable property that is the subject of a restraint or charging order to provide a statement in writing as to the value of the property. The penalty for breaching the requirement will be a fine at level 5 and to imprisonment for 1 year.**

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

- (g) 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 cost if the property realized is directly paid to the Registrar of the High Court. **We therefore propose that a streamlined**

procedure should be introduced for the realization of property where the amount to be recovered under a confiscation order is not more than \$500,000, thereby saving costs by dispensing with the need to appoint a receiver.

Dealing with property known or believed, etc. to represent proceeds of a drug trafficking/indictable offence

- (h) Existing section 25 of Cap. 405 and Cap. 455 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 a drug trafficking or indictable offence. 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.

In view of the above, **we propose that a provision be added to section 25 of the two Ordinances to provide that a person commits an offence if, *having reasonable grounds to suspect* that any property represents any person's proceeds of drug trafficking or indictable offences, he still deals with that property.** This proposal is in line with a similar requirement in the UK Drug Trafficking Act 1994.

We also propose that a person who commits an offence under this new section should be liable on conviction upon indictment to a fine of \$1 million and to imprisonment for 5 years, or on summary conviction to a fine of \$250,000 and to imprisonment for 2 years.

- (i) To deter people from dealing with property known or believed to represent proceeds of a drug trafficking, or indictable offence, and to reflect the gravity of the offence, **we propose that the maximum term of imprisonment in**

section 25(3)(a) of Cap. 405 and Cap. 455 be increased from 14 years to 20 years, in line with similar provisions in overseas legislation, e.g. Australia's Proceeds of Crime Act 1987.

Disclosure of knowledge or suspicion that property represents proceeds, etc, of a drug trafficking or indictable offence

- (j) Under section 25A of Cap. 405 and Cap.455, 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 two Ordinances. Furthermore, the existing penalty level of the offence does not reflect the gravity of the offence for failing to disclose suspicious transactions.

In view of the above, **we propose that the test for requiring a disclosure under section 25A(1) of the two Ordinances should be altered from “knows or suspects” to “knows or has reasonable grounds to suspect”**. To reflect the gravity of the offence of failing to disclose suspicious transactions, **we also propose that the custodial sanction for a contravention of section 25A(1) of the two Ordinances should increase from 3 months to 12 months**. This proposal, if accepted, will still be more lenient than the penalty for similar offences in the UK, where a person is liable to imprisonment of 5 years under the Drug Trafficking Act 1994.

SUMMARY OF RECOMMENDATIONS

6. The proposals are summarized below:
- (a) To amend the requirement of notifying an absconded

defendant in the case of an application for a confiscation order along the line that “reasonable steps should be taken to ascertain that person’s whereabouts” (paragraph 5(a));

- (b) To repeal section 4(4) of Cap. 405 (paragraph 5(b));
- (c) To require the court to fix a period of, say, 6 months, within which a defendant has to pay the amount under a confiscation order (paragraph 5(c));
- (d) To allow for issue of a restraint order to the assets of a person who has been arrested for a drug trafficking offence or specified offence, and released on bail (paragraph 5(d));
- (e) To introduce penal provisions for breaching of a restraint or charging order (paragraph 5(e));
- (f) To require a holder of any realizable property that is the subject of a restraint or charging order to provide a statement in writing as to the value of the property (paragraph 5(f));
- (g) To 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 (paragraph 5(g));
- (h) To 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 certain offences (paragraph 5(h));
- (i) To increase the maximum penalty for money laundering offence from 14 years to 20 years (paragraph 5(i));
- (j) To alter the test for requiring disclosure under section 25A(1) of both Ordinances from “know or suspects” to “knows or has reasonable grounds to suspect”. To increase the custodial sanction for a contravention of section 25A(1) of the two Ordinances from 3 months to 12 months (paragraph 5(j)).

CONSULTATION

7. We have consulted the Bar Association, the Law Society and the Action Committee Against Narcotics on the proposed amendments and incorporated their comments in our proposals. We have also circulated the proposed amendments to the Judiciary and its comments are awaited.

TIMETABLE

8. Subject to Members' views on the proposals, we plan to introduce the Bill into Legislative Council for First Reading within this legislative year.

ADVICE SOUGHT

9. Members are requested to advise on the proposed amendments in paragraph 6.

Narcotics Division
Security Bureau

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