Drug Trafficking and Organized Crimes (Amendment) Bill 2000
Hong Kong Bar Association's Submission

The Hong Kong Bar Association wrote to the Bills Committee on Drug Trafficking and Organized Crimes (Amendment) Bill (the Bill) on 15 February 2001 commenting on various provisions of the Bill.

Consultation with the Bar Association

2. In drafting the Bill, the Administration had consulted the Hong Kong Bar Association (the Association) three times (on 30 December 1998, 12 February 1999 and 8 September 1999). On 20 January 1999 and 12 March 1999, the Association provided the Administration with written comments on the Bill. The Administration had considered and responded to those comments, and sent the fifth draft of the revised Bill to the Association on 8 September 1999. The Chairman of the Association subsequently wrote back on 13 October 1999, informing the Administration that the Association had no further comments on the draft Bill. The letter dated 13 October 1999 from the Association is attached at annex.

3. As the Bills Committee is now deliberating on the proposed amendments in relation to dealing with proceeds of crime under section 25 and disclosure of suspicious transaction under section 25A of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) and Organized and Serious Crimes Ordinance (Cap. 455), the Administration would set out its response to the Association's comments in respect of these two sections first.

Dealing with property known or believed to represent the proceeds of drug trafficking or indictable offence

4. The Administration has explained on various occasions the reasons for introducing the proposed new money laundering offence using the mens rea of "having reasonable grounds to suspect". The Administration is aware that the mental element of "having reasonable grounds to suspect" was discussed when the Drug Trafficking (Recovery of Proceeds) Bill was introduced into the Legislative Council in 1989 and

was amended to "having reasonable grounds to believe" when the Bill became law in the same year. The 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.

5. Paragraph 30 of the Bar Association's paper states, "The underlying objective behind the law at present is to ensure that the courts do not send careless or gullible people to prisons who do not belong there". This is answered by HKSAR v WONG Ping-shui, Adam, and Another, CACC 251/2000, 15 December 2000, where Mr Justice Seagrott, giving the judgement of the Court of Appeal, said at page 9 H-K:

> "The scheme or system by which money is laundered is intrinsically a criminal scheme. It is not necessary to launder money which is legitimately and honestly acquired. Criminality is implicit in such an enterprise."

6. As explained previously at Bills Committee meetings, 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.

7. The above interpretation is adopted by the Court of Appeal in the HKSAR v SHING Siu-ming and Others case when considering the meaning of the term "reasonable grounds to believe". 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 a 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.

Disclosure of knowledge or suspicion that property represents proceeds of drug trafficking or indictable offences

8. As regards the proposal to amend the mental element in section 25A of the two Ordinances, the existing section 25A requires that when a person "knows or suspects" that any property represents any person's proceeds of drug trafficking or indictable offence, he shall as soon as it is reasonable for him to do so disclose that knowledge or suspicion. The duty to report arises when the person acquires the knowledge or suspicion. The test is subjective, not objective. This implies that it is the person's knowledge or suspicion, i.e. what he knew or suspected and not what a reasonable person with the information available to the person would have known or suspected. In other words, the evidence must prove what was in the person's mind, not what should have been in their mind. This pure subjective test of the existing legislation has made it extremely difficult to prosecute a person who turns a blind eye to obviously suspicious transaction. Owing to the difficulties in proving the subjective element, the prosecution is able to prosecute and convict only one person under section 25A offence since the section has been in operation in 1995.

9. Paragraph 34 of the Bar Association's submission states that in relation to the proposed amendment to section 25A, it would mean that "a person who firmly believes that property is "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". The Administration does not agree with this comment. If a person honestly believed the property

was clean, a court would have a doubt that he had a reasonable suspicion about the connection of the property to crime.

10. As regards the assistance provided to relevant sectors which may be particularly concerned about the new proposals, 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 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.

Confiscation Orders

11. 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. Given the person's whereabouts is already unknown, it is illogical to further require the prosecution to give notice of those proceedings to that person. Rather, emphasis should be put on ascertaining the person's whereabouts. Whether the steps taken by the prosecution to ascertain a person's whereabouts is sufficient should be decided by the court.

12. Apart from the above, it needs to be stressed that the proposed amendment is merely intended to clarify what is required of the prosecution, rather than change what the prosecution is required to do in practice. Implementation of the amendment is not anticipated to bring about any change to the way the enforcement agencies would deal with the issue. At present, and if the amendment was implemented, the enforcement agencies attempt to locate abscondees by the most appropriate practical means bearing in mind the individual circumstances of the case. The burden of showing to the court that reasonable steps had been taken would not be discharged any easier under the proposed amendment.

Assessing the Proceeds of Drug Trafficking

13. Section 4(4) of Cap. 405 was modelled upon section 2(4) of the UK Drug Trafficking Offences Act 1986, which itself was replaced by section 4(5) of the Drug Trafficking Act 1994. In R.v. Simpson and Others [1998] 2 Cr. App.R. (S) 111, the Court of Appeal considered section 4(5) of the 1994 Act and said at page 118:

> "It is true that the statutory assumptions do not apply in the case of those who commit offences of drug money laundering. It is not clear why Parliament should have made this distinction and it is unnecessary for us to speculate."

The UK court now considers money laundering nearly as serious as drug trafficking, e.g. the judge in R v Greenwood case (1995) 16 Cr App R(S) 614 (CA) commented that "those who launder money from drugs are nearly as bad as those who actually deal in them. It is merely one step along the line." Apart from the above, the UK Proceeds of Crime Act 1995 gave the courts the power to make the assumption where defendants are convicted of a very wide range of serious or lucrative non-drug crimes.

14. Since the enactment of the Drug Trafficking Offences Act 1986, courts have found that money launderers "receive" any payment in connection with drug trafficking, therefore, they benefited from drug trafficking (see section 3(4) of Cap. 405). It should be noted that section 25 of Cap. 405 is included as a "drug trafficking offence" under section 2(1) of Cap. 405. Since drug money launderers commit a "drug trafficking" offence they should be treated the same persons convicted of other offences of "drug trafficking".

15. Furthermore, experience has shown that money launders retain proceeds of drug trafficking. It will be in the public interest if the assets of a person who is convicted of money laundering can be confiscated, as these assets are highly likely to be proceeds of drug trafficking or other indictable offence. At present, Cap. 455 allows the court to apply such assumption to persons convicted of money laundering under that Ordinance, but Cap. 405 does not allow the court to do the same. Our proposal will bring Cap. 405 in step with Cap.

455.

Cases in which restraint orders and charging orders can be made

16. 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. The proposal for restraint or charging orders to be made during an investigation is not, as the Association suggests in paragraph 22 of its submission, to overcome "difficulties in conducting police investigations". It is to overcome problems with a suspect's property being hidden, removed or dissipated while an investigation is underway. As soon as a suspect is arrested he knows there is a high risk that his property will be the subject of a restraint order, consequently, he will try to put it beyond the reach of the court. Under the proposal a suspect will have the right to apply to vary the restraint order for reasonable living or legal expenses, and he will have the use of his home or vehicle which may be the subject of an order.

17. Similar power has been provided to the court under the Prevention of Bribery Ordinance (Cap. 201). Section 14C of Cap. 201 allows the property of a suspect to be "frozen" until any criminal proceedings against that person for a corruption offence have concluded. The present proposal is not as powerful as Cap. 201 as the process involved in the restraint order must have been arrested and released on bail.

18. Restraint or charging orders under Cap. 405 and Cap. 455 do not involve taking away the relevant owners' title to their properties. Whilst in the jurisprudence developed by the European Court of Human Rights (ECHR) on the protection of property rights, "deprivation" has been held to include cases of de facto deprivation where there is substantial interference with the enjoyment of possessions without formally divesting the owner of his title, real instances of de facto deprivation are very rare. Generally, where ownership of property remains or some form of expropriation, by way of sale or receipt for rents for example, the measure will not be regarded as a de facto deprivation of property, but as

an interference with property rights. Hence, restraint or charging orders are unlikely to constitute deprivation under Article 105 of the Basic Law. Instead, they should be regarded as measures to control the use of properties.

19. On the issue whether such control measures are consistent with the protection of property rights under Articles 6 and 105 of the Basic Law, the test is likely to be one of proportionality, i.e. whether the control or regulation of individuals' property rights is proportionate to the general interest of the public. In the present case, the Administration takes the view that this test is satisfied for the following reasons :

(a) there is apparent public interest in the proposed extension of the application of restraint or charging orders as discussed in paragraph 16 above;

(b) the proposed extension is predicated upon the requirement that the court must be satisfied before making a restraint or charging order that in the circumstances of the case, there is reasonable cause to believe that charges will be brought against the relevant person after further investigation;

(c) if it turns out that the person under investigation is acquitted or not charged, he may apply to the court for compensation under section 27 of Cap. 405 or section 29 of Cap. 455. The court may order compensation to be paid by the Government to the applicant if, having regard to all the circumstances, it considers it appropriate to make such an order; and

(d) any person affected by a restraint or charging order may apply to the court for its discharge or variation (see sections 10(6) and 11(7) of Cap. 405, and sections 15(6) and 16(7) of Cap 455).

Restraint Orders and Charging Orders

20. Contempt of court is a civil proceeding, which normally entails lighter punishment. It is more appropriate and more effective if the judge who made the order, who is familiar with the case, deals with the breach and that a penalty is provided for breach within the same provision

empowering the making of the order.

Security Bureau
March 2001

Annex

LETTERHEAD OF HONG KONG BAR ASSOCIATION

Your Ref: NCR 3/1/8 (G) Pt. 19

13th October, 1999.

Commissioner for Narcotics
Narcotics Division
Government Secretariat
Queensway Government Officers
High Block, 23rd Floor
66 Queensway
Hong Kong

Attn: Ms. Mimi Lee

Dear Ms. Lee,

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

Thank you for your letter of 8th September, 1999. The latest draft Bill has been considered by the Bar's Special Committee on Criminal Law & Procedure. I am pleased to inform your that we have no further comments on the Bill.

Yours sincerely,

Ronny Tong, S.C.
Chairman