

Drug Trafficking and Organized Crimes (Amendment) Bill 2000
Submission by the Law Society of Hong Kong

The Law Society of Hong Kong (the Society) wrote to the Clerk to the Bills Committee on 15 March 2001 on the Drug Trafficking and Organized Crimes (Amendment) Bill 2000 commenting on various provisions of the Bill.

The Effect of the Proposed Amendments on Cap. 455 in General

2. It is mentioned in the Society's submission that "members note with concern the extremely wide ambit of the Organized and Serious Crimes Ordinance in that a relatively minor offence can be interpreted as an "organized crime" thus empowering the authorised person to trigger all the additional ancillary power given to it under the proposed amendment in the Bill." "Organized crime" is defined in section 2 of the Organized and Serious Crimes Ordinance (Cap. 455) as follows:

"Organized crime" means a Schedule 1 offence that –

- (a) is connected with the activities of a particular triad society;
- (b) is related to the activities of 2 or more persons associated together solely or partly for the purpose of committing 2 or more acts, each of which is a Schedule 1 offence and involves substantial planning and organization; or
- (c) is committed by 2 or more persons, involves substantial planning and organization and involves-
 - (i) loss of the life of any person, or a substantial risk of such a loss;
 - (ii) serious bodily or psychological harm to any person, or a substantial risk of such harm; or
 - (iii) serious loss of liberty of any person.

3. Under such definition, it is not true that "relatively minor offence" can be interpreted as "organized crime". In addition, it is worth noting that when Cap. 455 was deliberated in the Legislative Council in 1994, the definition of "organized crime" was thoroughly considered and accepted by the Legislative Council. The

Administration sees no justification in the remark that “the failure of Cap. 455 and the Bill to distinguish the more from the less serious offences would also result in the final product being a trap for the innocent”.

Section 2(11) of Cap. 405 and Section 2(15) of Cap. 455

4. As explained earlier, the proposal for restraint or charging order under the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) and Cap. 455 to be made during an investigation 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 or charging 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.

5. Under the proposal, the protection offered to the person whose property becomes the subject of a restraint or charging order is as follows:

- (a) 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;
- (b) 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
- (c) 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).

Section 5(9) of Cap. 405 and section 10(9) of Cap. 455

6. The two amendments are meant to put the law beyond doubt. If the Law Society's suggestion to delete the words "and may always have been so accepted" were put into effect, the operation of the two sections concerned prior to the enactment of the Bill would remain in doubt. This is clearly undesirable. Hence the present wording of section 5 of Schedule 1 and section 4 of Schedule 2 should be retained.

Sections 25 and 25A of Cap. 405 and Cap. 455

7. Under the existing section 25A, all persons, including lawyers, are required to disclose to an authorized officer when he knows or suspects that any property : (a) in whole or in part directly or indirectly represents any person's proceeds of; (b) was used in connection with; or (c) is intended to be used in connection with drug trafficking or indictable offence. A person who fails to comply with this requirement will be subject to a maximum penalty of a fine at \$50,000 and to imprisonment for three months. No profession is exempted from this reporting requirement in the interest of justice and the community at large. If professional confidentiality by lawyers is considered to be a fundamental right of citizens, the duty to protect justice by reporting offence should also be considered as a basic duty of responsible citizens. There is a need to strike a balance between protecting the privilege of certain groups of citizens and the interest of the community.

8. As regards the increase of penalty level proposed by the Administration under section 25, it is worth noting that the court in the United Kingdom 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." In fact, money laundering plays a crucial role in drug trafficking or other serious crime activities as without it, drug or serious crime syndicates cannot be benefited from their crimes and will therefore lose the incentive for committing the offence.

9. As for section 25A(1) offence, the penalty should also be increased to enhance the deterrent effect for non-disclosure offence. So

far, because of the difficulty in proving the mental element of “knows or suspects”, there has been only one prosecution and conviction for section 25A offence under Cap. 405 and Cap. 455 since the provision came into operation in 1995.

Security Bureau
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