Paper No. CB(2)820/00-01(01)

Drug Trafficking and Organized Crimes (Amendment) Bill 2000
Note on "reasonable grounds to suspect",
"reasonable grounds to believe" and reasons for introducing
two money laundering offences using different mental elements

At the Bills Committee meeting on the Drug Trafficking and Organized Crimes (Amendment) Bill 2000 (the Bill) held on 20 November 2000, Members discussed the proposed amendments to sections 25 and 25A of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) and Organized and Serious Crimes Ordinance (Cap. 455) on money laundering offence and failure to report suspicious transactions. Members requested the Administration to elaborate on the difference between "reasonable grounds to believe" and "reasonable grounds to suspect" and provide examples, both in Hong Kong and overseas, for illustration. Members also requested the Administration to provide a detailed account of the rationale behind introducing a new money laundering offence using a different mental element.

Operational experience with regard to "know", "reasonable grounds to believe" (section 25) and "suspect" (section 25A)

2. 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 extremely difficult to prove these two mental elements. Owing to the narrow coverage of the existing legislation, prosecutions (85 persons from 1996 to 2000) and convictions against money launderers (49 persons from 1996 to 2000) were few, despite a relatively large number of investigations in the past years (2778 from 1996 to 2000). The difficulties can be illustrated by the actual case examples as attached at ***Annex I***. In some of these examples, the cases were not proceeded with because there was no reasonable prospect of conviction vis-à-vis the money launderers due to insufficient evidence for meeting the mental element of "reasonable grounds to believe". In other examples, the suspects were charged but acquitted due to the prosecution's inability to prove the mental element of section 25.

Difference between "believe", "suspect", "reasonable grounds to believe" and "reasonable grounds to suspect"

3. "Belief" is an inclination of the mind towards assenting to, rather than rejecting, a proposition; the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture (George v. Rockett (1990) 179 CLR 104 at 116 (H.C. Aust.)). "Suspect" requires a degree of satisfaction, not necessarily amounting to belief, but at least extending beyond speculation as to whether an event has occurred or not (Commissioner of Corporate Affairs v. Guardian Investments Pty Ltd [1984] VR 1019 at 1023-1025).

4. As illustrated in HKSAR v. SHING Siu-ming and Others, [1999] 2 HKC 818 at 825 H ***(Annex II)***, "reasonable grounds to believe" contains both objective and subjective elements:

(a) 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 believe that the property in whole or in part represented any person's proceeds of drug trafficking or an indictable offence; and

(b) subjective element – requires proof that those grounds were known to the defendant.

5. There must be evidence that the person had grounds for believing, and there is the additional requirement that the grounds must be reasonable, i.e. that anyone looking at those grounds would so believe (SENG Yuet-fong v. HKSAR [1999] 2 HKC 833 at 836 E) ***(Annex III)***. "Reasonable grounds to suspect" is a lower mental element than "reasonable grounds to believe". A similar phrase, "reasonable suspicion" was considered by the House of Lords in R. v. Director of Public Prosecutions, Exparte Kebilene and Others [1999] 3 W.L.R. 972 ***(Annex IV)***. It appears in s. 16A(1) of the UK Prevention of Terrorism (Temporary Provisions) Act 1989 :

"A person is guilty of an offence if he has any article in his possession in circumstances giving rise to a reasonable suspicion that the article is in his possession for a purpose connected with the commission, preparation or instigation of acts of terrorism to which this section applies".

Lord Hope explained what this subsection required by proof, at p. 999 E-G :

"What subsection (1) requires is prima facie proof, not mere suspicion. The prosecution must lead evidence which is sufficient to prove beyond reasonable doubt (a) that the accused had the article in his possession and (b) that it was in his possession in circumstances giving rise to a reasonable suspicion that it was in his possession for a purpose connected with terrorism. Subsection (1) allows for a conviction on reasonable suspicion, but the onus is on the prosecution to lead sufficient evidence to establish beyond reasonable doubt that the circumstances are such that the inference of connection with terrorism is justified. It should not be thought that proof to this standard will be a formality".

6. There are two parts of the mental element of "reasonable grounds to suspect" – an objective part and a subjective part. Adopting the test in HKSAR v. SHING Siu-ming and Others, supra :

(a) objective part – 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; and

(b) subjective part – requires proof that those grounds were known to the defendant.

7 In Vol. 4 of Saunders, Words & Phrases Legally Defined (3rd Ed.) at p.269, "good cause to suspect" means "a reasonable ground of suspicion upon which a reasonable man may act." In the case cited R v. Spencer (1863) 3 F & F 857, the court confirmed that common sense

should be the yardstick for determining whether the facts were adequate to amount to "good cause to suspect".

Reasons for introducing a new money laundering offence using the mental element of "having reasonable grounds to suspect"

8. To ensure the effectiveness of Hong Kong's anti-money laundering regime, the operational difficulties from the existing legislation need to be addressed. It is also considered that there is a pressing need to introduce an offence using the mental element of "reasonable grounds to suspect", so that the scope of the offences can be expanded to cover those obvious cases where a person is assisting criminals to launder crime proceeds but cannot be pursued due to the limitations of existing legislation.

9. The problem of the law being ineffective in combating money laundering does not only appear in Hong Kong. In UK, the Cabinet Office Report, "Recovery of Proceeds of Crimes June 2000", reveals the unsatisfactory state of UK's legislation. Paragraphs 9.59 to 9.62 of the report are extracted below :-

> "9.59 Currently, it is an offence to assist someone else to retain the benefits of criminal conduct. But to prove this, it is necessary to show that the defendant knew or suspected that the other person had indeed benefited from crime. This is hard to prove without an admission of guilt. It relies on making inferences as to the state of an individual's mind and demonstrating to a jury that a transaction or series of transactions appeared suspicious. This difficulty dissuades prosecutors from bringing money laundering cases and contributes to a relatively low conviction rate.
>
> 9.60 The formulation of this part of the legislation permits a professional to ask no questions and then claim that he or she had no suspicion or knowledge in relation to laundering. This is known as "blind-eyeing", as a recent case illustrates:

Turning a blind eye to laundering

Law enforcement officers contacted a local law firm and passed on information that they were aware that the UK and offshore companies set up by the solicitors were being used by organized criminal groups and drug traffickers. The firm responded that it did not need to make any disclosure so long as it did not enquire into its clients' affairs. It would then neither know or suspect that they might be involved in money laundering.

9.61 The offence of concealing or transferring another's proceeds of drug trafficking [section 49 (2) Drug Trafficking Act 1994] differs from other money laundering crimes in that it requires proof merely that the person "knew or had reasonable grounds to suspect" that the property represented proceeds of drug trafficking. It is not necessary to show actual knowledge or suspicion.

9.62 In aligning the drugs and non-drugs legislation as described in Chapter 8 a single offence of money laundering should be created. Further, the test for all money laundering offences, including that of assisting another to retain the benefit of criminal conduct, should be simplified so as to remove obstacles weighting the test unacceptably in the defendant's favour. The Home Office should consider whether this can be achieved by extending all money laundering offences to cover circumstances in which the defendant had reasonable grounds to suspect. This extension would overcome the current difficulty of making inferences about the state of an individual's mind and be particularly relevant in cases involving professionals where there should be greater expectation of due diligence."

10. The relevant UK Bill is yet to be released publicly.

11. The current Hong Kong Bill introduces a new money laundering offence using the mental element of "having reasonable grounds to suspect", while keeping the original money laundering offence using the element of "knowing" or "having reasonable grounds to believe". To

distinguish these different elements, the new money laundering offence using "having reasonable grounds to suspect" will attract a lower penalty (a maximum fine of $1,000,000 and 5 years imprisonment), compared to the existing offence which uses "knowing or having reasonable grounds to believe" (the penalty is a maximum fine of $5,000,000 and a proposed 20 years imprisonment).

12. We consider it logical to have two distinct offences with the same actus reus but different mens rea. There are examples in common law systems in which the mental elements rather than actus reus will determine the severity of penalty. In Australia, the Proceeds of Crime Act 1987 also contains two money laundering offences with differing mental elements and punishment :

> Section 81 – Money Laundering
>
> (1) …
>
> (2) A person who, after the commencement of this Act, engages in money laundering is guilty of an offence against this section is punishable, upon conviction, by:
>
> > (a) if the offender is a natural person – a fine not exceeding $200,000 or imprisonment for a period not exceeding 20 years, or both; or
> >
> > (b) if the offender is a body corporate – a fine not exceeding $600,000
>
> (3) A person shall be taken to engage in money laundering if, and only if :
>
> > (a) the person engages, directly or indirectly, in a transaction that involves money; or other property, that is proceeds of crime; or
> >
> > (b) the person receives, possesses, conceals, disposes of or brings into Australia any money, or other property, that is

proceeds of crime;

and the person knows, or ought reasonably to know, that the money or other property is derived or realised, directly or indirectly, from some form of unlawful activity. (emphasis added)

Section 82 – Possession etc. of property suspected of being proceeds of crime

(1) A person who….receives, possesses, conceals, disposes of or brings into Australia any money, or other property, that may reasonably be suspected of being proceeds of crime is guilty of an offence against this section punishable, upon conviction, by :

(a) if the offender is a natural person – a fine not exceeding $5,000 or imprisonment for a period not exceeding 2 years, or both; or

(b) if the offender is a body corporate – a fine not exceeding $15,000. (emphasis added)

13. Under the laws of Hong Kong, there are a number of like offences (that is, the same actus reus but different mens rea) where the severity of the penalty that may be imposed hinges on the different mental elements comprised in the offences. Two examples of these like offences are -

(a) "murder" and "manslaughter" (see sections 2 and 7 of the Offences Against the Person Ordinance (Cap. 212); and
(b) "shooting or attempting to shoot, or wounding or striking with intent to do grievous bodily harm" and "wounding or inflicting grievous bodily harm" (see sections 17 and 19 of the Offences Against the Person Ordinance (Cap. 212).

Security Bureau
January 2001

Annex I

Case I

Facts of the Case

Mr. A and Ms. B are boyfriend and girlfriend. They are both Hong Kong citizens and residents. Mr. A has a brother, Mr. C, and sister-in-law, Ms. D who are Australian citizens and residents.

2. On 16-11-96 Mr C. and Ms. D were arrested in Australia for trafficking in 1.6 kgs of heroin. The heroin had been sent to Australia in envelopes through the postal system. An investigation was undertaken in Hong Kong to establish if Mr. A and Ms. B had laundered the proceeds of Mr. C and Ms. D's drug trafficking.

3. The following direct and circumstantial evidence was collected against Mr.A and Ms. B.

(a). From 3-6-96 to 5-11-96 three bank accounts held by Mr. A and Ms. B in Hong Kong received 27 remittances sent in the names of Mr. C, Ms D, their associates and aliases, totaling $1,230,424HK from Australia. All but one of the remittances were of just beneath $10,000AUS in value.

(ii). "Structuring" is a common method of money laundering in which large sums of money are divided into smaller sums and remitted overseas. "Structuring" is done in the hope that the small sums will not attract the suspicion which large sums may. In Australia it is very common for money launderers to "structure" by dividing large sums of money into sums of just beneath $10,000AUS or equivalent. This is done as anyone who uses cash for a remittance of $10,000AUS or more must produce proof of identity and a report is then made to the authorities. By remitting sums of just less than

$10,000AUS money launderers can avoid being identified and thus make it more difficult for law enforcement officers to trace their proceeds of crime.

(iii). Although it cannot be proved that either Mr. A or Ms. B knew of the $10,000AUS customer identification requirement it can be proved that they participated in a scheme designed to avoid the requirement by receiving a series of remittances of just under $10,000AUS in a short period. The making of numerous remittances is more expensive and time consuming than making one or a few. Mr. A and Ms. B knew their accounts were receiving such remittances. Mr. A and Ms. B's involvement in the "structuring" activity is indicative of their knowledge of its purpose.

(b). Mr. A and Ms. B withdrew the money shortly after it arrived in their accounts.

(ii). The use of bank accounts as temporary repositories for funds is a suspicious activity indicator.

(c). All Mr. A and Ms. B's withdrawals were made in cash.

(ii). Frequent cash withdrawals are a suspicious activity indicator.

(d). No remittances were received following the arrest of Mr. C and Ms. D.

(ii). This suggests a causal relationship between the arrests and the ceasing of the remittances, i.e. whatever activity was generating the funds sent to Hong Kong ceased with Mr. C and Ms. D's arrest. If the activity generating the funds had been legitimate it would be reasonable to expect that it would have continued, at least for a short time or at a reduced level after the arrests.

(e). On 25-10-96 Mr. A and Ms. B were arrested while attempting to depart from Australia in possession of $260,100AUS undeclared cash (approx. $1.6 HK million) in contravention of Australian currency reporting requirements. They were placed on bail but absconded. The cash was then confiscated. If they had been convicted of only the offence of "Failing To Report Currency" they could have expected a sentence of a small fine and to have had the bulk of the $260,100AUS returned to them.

(ii). The fact that Mr. A and Ms. B did not contest the "Failing To Report Currency" hearing can be seen as indicative of a realization on their part that the confiscation of the money was inevitable as the Australian authorities would have attempted to confiscate it as being the proceeds of crime had the hearing been contested. Had the money been legitimately earned it would be reasonable to assume that proving this fact would have been a simple matter thus allowing the seized money to be reclaimed.

(f). Mr. A's fingerprints were found on the outside of an envelope containing heroin seized from one of the post office boxes in Australia to which Mr. C held the key.

(ii). While this is not direct evidence that Mr. A sent the heroin to Australia, or that the envelope contained heroin at the time it was touched by Mr. A, it provides direct evidence of a link between Mr. A and the person who sent the heroin from Hong Kong, i.e. both must have touched the envelope. This is further circumstantial evidence that Mr. A is an associate of whoever sent the heroin to Australia.

(g). Telephones used by Mr. A and Ms. B called telephones used by Mr. C and Ms. D frequently in the months leading up to their arrest on 16-11-96.

(ii). This is indicative that there was a close relationship between either, or both, Mr. A and Ms. B with either, or both, Mr. C or Ms. D.

(h). Mr. C and Ms. D were arrested on 16-11-96. Also on 16-11-96 Mr. A's mobile telephone service in Hong Kong was canceled, followed on 18-11-96 by the cancellation of the telephone installed in Mr. A and Ms. B's home.

(ii). The closeness of the dates of arrest and cancellation of telephone services suggest a causal relationship, i.e. the former resulted in the latter. It can be inferred that Mr. A and Ms. B canceled their telephone services in the hope of destroying any evidence of telephone links between them and Mr. C and Ms. D.

(i). Mr. A and Ms. B visited Australia in 10-96. In their Immigration Arrival Cards they claimed they would stay at the home of Mr. C and Ms. D. It was on their departure from Australia on this trip that the $260,100AUS undeclared cash was seized from them, sub-paragraph (e) above refers.

(ii). This is further evidence of the close relationship between the two couples.

(j). Neither Mr. A, Ms. B, Mr. C nor Ms. D had any legitimate employment which could reasonably be expected to have generated the funds dealt with by Mr. A and Ms. B as mentioned in sub-paragraphs (a) and (e) above.

4. So where did the money come from? It can be proved that in mid-11-98 Mr. C and Ms. D were engaged in the ongoing importation and distribution of heroin - an activity renowned for generating large cash profits. In the circumstances of this case Mr. C and Ms. D's drug trafficking can be inferred to have been the most likely, indeed the only reasonable, source of the funds handled by Mr. A and Ms. B.

5. Mr. A and Ms. B were arrested and questioned but refused to answer questions, i.e. refused to give any explanation for the source of the money mentioned in sub-paragraphs (a) and (e) above or the reason they dealt in the money.

Application of the Present and Proposed Laws

6. Department of Justice advised that neither Mr. A nor Ms. B should be prosecuted under S. 25 of the Drug Trafficking (Recovery of Proceeds) Ordinance (DTROP) or the Organized and Serious Crimes Ordinance (OSCO) due to insufficient evidence to prove knowledge or reasonable grounds to believe that the money with which they dealt was the proceeds of drug trafficking or indictable crime.

7. Department of Justice have not been asked to advise whether Mr. A or Ms. B would have been prosecuted had the proposed S.25(1A) amendment to DTROP and OSCO been in operation. In view of the reduced mental element under S.25(1A) of DTROP and OSCO investigators believe that prosecution would have been justified.

8. The banks did not make a suspicious transaction report although the below listed suspicious activity indicators were present on Mr. A and Ms. B's accounts.

(a). Frequent cash withdrawals.
(b). Account used as a temporary repository.
(c). Involvement of a country commonly associated with drug trafficking, i.e. Australia.
(d). "Structuring".

9. Bank staff were not prosecuted under S.25 or S.25A of DTROP or OSCO as there was no evidence to prove that they had knowledge, or reasonable grounds to believe (S.25), or suspect (S.25A) that the money was

the proceeds of drug trafficking or an indictable offence. This would also be the case if the proposed amendments to S.25(1A) and 25A were enacted.

Case II

Facts of the Case

Ms. E is a Hong Kong citizen and resident and is the sister of Mr. C, and sister-in-law of Ms. D, mentioned in Case I. Her case is examined separately here for the sake of simplicity.

2. On 16-11-96 Mr. C. and Ms. D were arrested in Australia for trafficking in 1.6 kgs of heroin. An investigation was undertaken in Hong Kong to establish if Ms. E had laundered the proceeds of Mr. C and Ms. D's drug trafficking.

3. The following direct and circumstantial evidence was collected.

(a). On 30-10-96 Ms. E's account received $1.2 HK million by telegraphic transfer from Australia. Ms. E subsequently placed the money in a time deposit. On 16-11-96, i.e. the date of Mr. C and Ms. D's arrest, Ms. E withdrew the money from the time deposit in cash and closed the bank account. 16-11-96 was not the maturity date of the time deposit, i.e. accrued interest was not paid due to the early redemption.

(ii). As the arrests, early withdrawal of the time deposit in cash, and the closure of the account all occurred on the same day there can be inferred to be a causal relationship between them, i.e. the arrests led to the early withdrawal of the time deposit in cash and the closure of the account. The following inferences can be drawn as to why the arrests led to Ms. E's early withdrawal of the time deposit and closure of the account. Firstly, Ms E withdrew the money from the time deposit as she was concerned that it would be restrained and confiscated by the police. Secondly, Ms. E withdrew the money in cash in order to frustrate investigators attempts to trace the money. Thirdly, Ms. E closed the account in the hope that police

would not find out about the $1.2 HK million. All three of these inferences are indicative of Ms. E knowing, believing or suspecting that the money was the proceeds of crime for which Mr. C and Ms. D had been arrested in Australia.

(b). A piece of paper bearing Ms. E's name and her Hong Kong bank account number were found when Mr. C and Ms. D were arrested in Australia on 16-11-96.

(ii). From this evidence it can be inferred that Mr. C and Ms. D knew Ms. E's account number. Additionally it can be inferred that Mr. C and Ms. D had Ms. E's bank account number in their possession for a reason. One possible reason is to facilitate the making of remittances to Ms. E's account.

(c). Ms. E withdrew the money from her account in cash.

(ii). The use of cash is a popular method of money laundering as it serves to frustrate attempts to trace the audit trail thus making evidence gathering, prosecution and confiscation more difficult.

(d). Telephones used by Ms. E were in frequent contact with telephones used by Mr. C and Ms. D in the months leading up to their arrest on 16-11-96.

(ii). This is indicative of a close relationship between Ms. E with Mr. C and, or, Ms. D.

(e). Also found during the search of Mr. C and Ms. D's premises on 16-11-96 was a piece of paper bearing the name of Ms. F and her Hong Kong bank account number. Enquiries revealed that Ms. F is a friend of Ms. E. Ms. F was interviewed and stated that she had opened the bank account at the request of Ms. E. Between 4 and 14-11-96 the account had received

three remittances of $0.6 HK million, $0.7 HK million, and $0.4 HK million, from Australia. Shortly after receipt the funds were all transferred to bank accounts of Ms. E from where the vast majority was quickly withdrawn in cash.

(ii). The fact that the remittances were transferred to Ms. E's account and then withdrawn proves that Ms. E was in control of, and dealt in, the funds.

(iii). Inferences can be drawn from Ms. E's use of the bank account of Ms. F. Firstly, Ms. E's preference for using the bank account of another person is indicative of her unwillingness for her own accounts to receive the funds directly from Australia. From this it can be inferred that Ms. E knew it would not be in her best interests to be clearly associated with such remittances, which in turn implies that she knew, believed or suspected their illegality.

(f). During the investigation a covert camera with audio recording facility was concealed within the home of Mr. C and Ms. D in Australia under the authority of a court order. On one occasion Mr. C was recorded receiving a call on his mobile telephone. Toll records show that the telephone making the call was installed in the home of Ms. E in Hong Kong. During the conversation Mr. C confirmed the receipt of one of the three remittances sent to Ms. F's Hong Kong bank account mentioned in sub-paragraph (e) above.

(ii). From this evidence, when considered together with the evidence at sub-paragraph (e) above, it can be inferred that Ms. E was the Hong Kong party who called Mr. C to tell him about the remittance. Additionally the covert recording provides direct proof that Mr. C had a keen interest in at least one of the remittances received by Ms. E's bank account. It can be inferred that Mr. C was interested because the funds being remitted were his own and that Ms. E was assisting him.

(g). No remittances were received by Ms. E or Ms. F following the arrest of Mr. C and Ms. D.

(ii). This suggests a causal relationship between the arrests and the ceasing of the remittances, i.e. whatever activity was generating the funds sent to Hong Kong ceased with Mr. C and Ms. D's arrest. If the activity generating the funds had been legitimate it would be reasonable to expect that it would have continued, at least for a short time or at a reduced level, after the arrests.

(h). Neither Ms. E, her husband, nor Mr. C nor Ms. D had any legitimate employment which could reasonably be expected to have generated the funds dealt with by Ms. E detailed in sub-paragraphs (a) and (e) above. In the absence of any such evidence the only reasonable explanation for the source of these funds is that they represented Mr. C and Ms. D's proceeds of drug trafficking.

(i). Ms. E made a statement under caution to police in which she stated that the $1.2 HK million received by her own bank account (sub-paragraph (a) above refers) belonged to Mr. C.

Application of the Present and Proposed Laws

4. In accordance with advice from Department Of Justice Ms. E was charged with four counts of money laundering under S.25 of OSCO. One count was in respect of the receipt of the $1.2 HK million remittance to Ms. E's own bank account, sub-paragraph (a) refers. The remaining three counts were in respect of the three remittances received by Ms. F's bank account, sub-paragraph (e) refers.

5. Evidence of drug trafficking by Mr. C and Ms. D and the evidence summarized in paragraph 3 above (with the exception of that in sub-paragraph 3(i) which was ruled inadmissible after a voire dire) was

adduced at Mr. E.'s trail. Although the evidence in sub-paragraph 3(i) played a part in the decision to lay charges it was not considered in the decision to find Ms. E guilty or innocent of the charges.

6. Ms. E was found not guilty of all four charges. The Learned Judge accepted that the funds which were remitted from Australia represented the proceeds of Mr. C and Ms. D's drug trafficking. The Judge found that there were grounds for Ms. E to suspect that she had dealt in the proceeds of drug trafficking, but insufficient evidence to prove that she knew or had reasonable grounds to believe this beyond a reasonable doubt.

7. From the Learned Judges comments it seems that Ms. E would have been convicted of all four counts if the proposed S.25(1A) of OSCO had been in operation at the time of the trial.

8. Although the suspicious activity indicators listed below were associated with Ms. E and, or, Ms F's accounts the banks did not make any suspicious transaction reports.

(a). Frequent, large cash withdrawals.
(b). Accounts used as temporary repositories.
(c). Involvement of a country commonly associated with drug trafficking, i.e. Australia.

9. The banks were not prosecuted under S.25 or S.25A of DTROP or OSCO as there was no evidence to prove that bank staff had knowledge, or reasonable grounds to believe (S.25), or suspect (S.25A), that the money was the proceeds of drug trafficking or an indictable offence. This would also be the case if the proposed amendments to S.25(1A) and 25A were enacted.

Case III

Facts of the Case

In 1997 Mr. P and Ms. Q were arrested for trafficking in heroin. Mr. P was arrested while holding a bag containing 4 kgs of heroin. Ms. Q was arrested nearby after 0.25 kgs of heroin was found in her handbag. Mr. P subsequently pleaded guilty to trafficking in the heroin found in his own and Ms. Q's possession and was imprisoned. As Ms. Q claimed not to know that her handbag contained heroin, and as Mr. P admitted trafficking in that heroin, Ms. Q was not charged with any drug trafficking offence.

2. The financial activity of Ms. Q was investigated to ascertain if she had laundered money for Mr. P. The following evidence was collected.

(a). Ms. Q was the holder of a bank account into which $1.1HK million had been deposited in the nine months preceding the arrests. Most of the deposits were by way of frequent cash deposit. Cash is the form of money most commonly generated by drug trafficking activity of the sort Mr. P was involved in.

(b). Ms. Q was the sole signatory of the account and withdrew $0.6HK million from the account during the nine-month period. This is evidence that Ms. Q operated the account herself and had knowledge of its contents.

(c). From time to time Ms. Q used the funds in the account to open time deposits held jointly in the names of Ms. Q and Mr. P. This is evidence that Mr. P had a beneficial interest in the money in Ms. Q's account.

(d). Mr. P and Ms. Q had been defacto husband and wife for many years. At the time of their arrests they were living together. This is evidence of a very close relationship between Ms. Q and Mr. P.

(e). Both Mr. P and Ms. Q were unemployed and had histories of employment in low income jobs. This is evidence that they could not reasonably be expected to have earned the $1.1 HK million legitimately. Ms. Q knew that she herself had not legitimately earned the money which entered her account. Due to her close relationship with Mr. P she could reasonably be expected to know that he either had no legitimate employment or would have been employed in a low paying job, i.e. that he had no legitimate employment which she could reasonably expect would generate $1.1 HK million in nine months.

(f). Ms. Q had visited Mr. P in prison on 298 occasions while he was imprisoned in respect of an earlier robbery conviction. Ms. Q therefore knew of Mr. P's previous background as a criminal. Having such knowledge, and in the absence of any indication of a legitimate source for any large sums of money acquired by Mr. P, Ms. Q would have had reasonable grounds to believe, and if not, then to suspect, that any large sums of money acquired by Mr. P would be the proceeds of crime.

(g). The fact that Ms. Q was present with Mr. P when he was in possession of 4 kgs of heroin, and that she had 0.25 kgs of heroin in her handbag, is an indication that Mr. P was not in the habit of concealing his heroin trafficking activities from Ms. Q. Indeed the opposite inference can be drawn, i.e. that, on this occasion at least, Mr. P involved Ms. Q in his drug trafficking activities.

(h). Ms. Q was questioned about the ownership and source of the $1.1HK million. She claimed that she had legitimately earned the money or been given it as gifts but was unable to give credible details.

Application of the Present and Proposed Laws

3. Department of Justice advised that there was insufficient evidence to charge Ms. Q under S.25 of DTROP or OSCO as there was

insufficient evidence to prove that she had knowledge or reasonable grounds to believe that the funds with which she was dealing were the proceeds of drug trafficking (DTROP) or indictable crime (OSCO).

4 Department of Justice have not been asked to advise if Ms. Q would have been charged had the proposed S.25(1A) amendment been in operation. In view of the reduced mental element in the S.25(1A) amendment investigators believe that prosecution would have been justified.

5 The bank with which Ms. Q held her account did not make a suspicious transaction report despite the frequent large cash transactions, i.e. the bank did not recognize this suspicious activity indicator. The bank was not prosecuted under S.25 or S.25A of DTROP or OSCO as there was no evidence to prove that bank staff had knowledge, or reasonable grounds to believe (S.25), or suspect (S.25A), that the money was the proceeds of drug trafficking or an indictable offence. This would also be the case if the proposed amendments to S.25(1A) and 25A were enacted.

Case IV

Facts of the Case

On 9-4-98 Mr. G was arrested in possession of 58 gms of cocaine. He was found guilty of trafficking in this cocaine and imprisoned for five years. An investigation was conducted to establish whether Mr. G's wife, Ms. H, had laundered the proceeds of Mr. G's drug trafficking.

2. The evidence collected against Ms. H is summarized below.

(a). Ms. H was the holder of five active bank accounts. From 4-96 until 4-98 these accounts received a total of $5.3 HK million in deposits. Drug trafficking activity of the sort undertaken by Mr. G is renowned as being a highly profitable enterprise.

(b). 69% of the deposits to Ms. H's bank accounts were in cash. Cash is the normal form of money generated by retail drug trafficking of the sort engaged in by Mr. G.

(c). Deposits made to Ms. H's account by cheque were mainly in amounts of $1,100 HK, or $1,200 HK, or small multiples thereof. When Mr. G was arrested he was found to be in possession of $89,000 HK cash contained in a total of 27 envelopes, the vast majority containing sums of $1,100 HK, or $1,200 HK, or small multiples thereof. During the period from 4-96 to 4-98 the average price of cocaine was approximately $1,200 HK per gram. From this it can be inferred that the sums of money being deposited by cheque into Ms. H's account represented payment for small amounts of cocaine trafficked by Mr. G.

(d). Evidence was collected which showed that Mr. G and Ms. H had a history of low paying employment. From this evidence it can be inferred that neither Mr. G nor Ms. H could reasonably be expected to have legitimately earned the large sums of money with which Ms. H was dealing as summarized in sub-paragraphs (a)-(c) above and (f) and (g) below.

(e). Mr. G and Ms. H were married in 8-96, have one child, and were living together until the arrests in 4-98. This is evidence of the very close personal relationship between Mr. G and Ms. H. Due to their close personal relationship Ms. H could reasonably be expected to know something of Mr. G's previous and present employment, and know that he was unlikely to hold a high paying legitimate job.

(f). In the period from 10-97 to 2-98 Ms. H made early mortgage repayments worth totally $1.0 HK million in respect of two flats in her name. During this period Mr. G and Ms. H claimed to have been either employed in low paying jobs or unemployed i.e. they could not reasonably be expected to have earned the $1.0 HK million legitimately.

(g). Ms. H made monthly mortgage repayments of $23,000 HK, and paid insurance premiums of $9,000 HK per month from her accounts. Ms. H therefore had a recurrent monthly expenditure of at least $32,000HK. This would be a very high level of expenditure for a couple who claim to have been low wage earners and infers that Mr. G and Ms. H had an alternative source of income.

Application of the Present and Proposed Laws

3. Department Of Justice advised that Ms. H should not be charged with any S.25 OSCO or DTROP offence related to her dealing in the $5.3 HK million which entered her accounts prior to Mr. G's arrest for two reasons. Firstly, as the strength of the evidence that Ms. H knew or had reasonable grounds to believe that the money represented the proceeds of drug trafficking (DTROP) or indictable crime (OSCO) was doubtful.

Secondly to prevent any claim of double jeopardy by Ms. H at a confiscation hearing in respect of Mr. G's assets if Ms. H was acquitted of a S.25 offence in respect of dealing in the $5.3HK million prior to Mr. G's arrest.

4. In accordance with Department Of Justice advice Ms. H was charged only with S.25 DTROP charges in respect of her disposal of $1.1 HK million from her bank accounts after being informed by police following Mr. G's arrest that these funds were suspected to be the proceeds of Mr. G's drug trafficking. Ms. H was convicted and sentenced to one year imprisonment.

5. Department of Justice have not been asked to advise if Ms. H would have been charged had the proposed S.25(1A) amendment been in operation. In view of the reduced mental element in the S.25(1A) amendment investigators believe that prosecution would have been justified.

6. The banks with which Ms. H held her account did not make a suspicious transaction report despite the frequent large cash transactions, i.e. the bank did not recognize this suspicious activity indicator. The bank was not prosecuted under S.25 or S.25A of DTROP or OSCO as there was no evidence to prove that bank staff had knowledge, or reasonable grounds to believe (S.25), or suspect (S.25A), that the money was the proceeds of drug trafficking or an indictable offence. This would also be the case if the proposed S.25(1A) and 25A amendments were enacted.

Case V

Facts of the Case

In late 1997 police investigated the activities of Mr. J and his associates who were openly selling heroin to large numbers of drug users in the public areas of a public housing estate in Kowloon. Evidence was collected by plainclothes police officers posing as drug buyers and purchasing drugs from the group using "marked" money, i.e. banknotes for which the serial numbers had been recorded prior to the drugs being purchased. The investigation revealed that between 11-11-97 and 25-11-97 Mr. L assisted Mr. J to deal in the proceeds of drug trafficking. The following evidence was collected against Mr. L.

2. In late 1997 Mr. L was 20 years old and unemployed. He lived in the public housing estate in which Mr. J and his associates monopolized retail drug trafficking and openly carried out their activities. Mr. L had a history of low paid employment.

3. In the two week period between 11-11-97 and 25-11-97 Mr. L made the following deposits to a bank account belonging to Mr. J.

Date	$'s
11-11-97	$66,580HK
13-11-97	$19,920HK
14-11-97	$25,600HK
21-11-97	$79,000HK
25-11-97	$29,000HK
Total :	$220,100HK

4. The five deposits listed above were all in cash and consisted of low denomination banknotes. Amongst the banknotes deposited on 11-11-97 were six $100HK banknotes of marked money which had been used by undercover police officers to purchase heroin from associates of Mr. J on 9-11-97 and 10-11-97. Amongst the banknotes deposited on 25-11-97 were three banknotes of marked money which had been used by undercover officers to purchase drugs from Mr. J and his associates earlier on 25-11-97.

5. At the time of making the deposit in the bank on 14-11-97 Mr. L was approached by, and conversed with, two associates of Mr. J who were subsequently charged with selling drugs to the undercover officers.

6. The following inferences can be drawn from Mr. L's activities.

(a). Mr. L's deposits to Mr. J's bank account provide a direct evidential link of association between Mr. L and Mr. J.

(b). Mr. L's conversation with the two drug trafficking associates of Mr. J on 14-11-97 provides a direct evidential link of association between Mr. L and two drug traffickers working for Mr. J.

(c). As a resident of the public housing estate in which Mr. J and his associates openly carried out their drug trafficking activities, and being an associate of Mr. J and two of his drug traffickers, it can be inferred that Mr. L would know of Mr. J and his associates involvement in drug trafficking.

(d). The marked money which Mr. L deposited to Mr. J's bank account on 11-11-97, and 25-11-97, had been earned by drug trafficking on 9 and 10-11-97, and 25-11-97, respectively. In the absence of any legitimate explanation of the source of the five deposits, and in view of their similar nature and the fact that they took place within a short period of time, it can be inferred that the money which was not "marked" money deposited by Mr.

L to Mr. J's account between 11 and 25-11-97 was also the proceeds of drug trafficking.

(e). While depositing the money to Mr. J's account between 11 and 25-11-97 Mr. L was, in effect, assisting to channel the proceeds of drug trafficking from the individual group members who had earned the money to their leaders, Mr. J's, bank account. Common sense dictates that it is unlikely that an outsider would be tasked to perform this important role. Far more likely is that a trusted insider would perform the function undertaken by Mr. L.

(f). The $220,100HK deposited by Mr. L to Mr. J's account, was all in cash. Cash is the normal form of money generated by retail level drug trafficking and the drug trafficking activities engaged in by Mr. J's group.

(g). The $220,100HK deposited by Mr. L to Mr. J's account, was all in low denomination banknotes. Low denomination notes are the form of money most often acquired by retail level drug traffickers such as Mr. J and his associates.

7. Mr. J, and a number of his accomplices, including Mr. L, were arrested. Under caution Mr. L made no admissions and refused to answer questions.

Application of the Present and Proposed Law

8. Mr. J was prosecuted on drug trafficking and money laundering charges but was acquitted of all charges due to difficulties unconnected to those normally encountered which have brought about the proposed amendments to S. 25 and S.25A of DTROP and OSCO.

9. Mr. L was prosecuted on one count of conspiracy to commit the S.25 DTROP offence together with Mr. J and others in respect of the five deposits made by Mr. L to Mr. J's bank account. Mr. L was found to have no case to answer and acquitted. The Learned Judge ruled that there was insufficient evidence to prove that Mr. L had known, or had reasonable grounds to believe, that the money he dealt in was the proceeds of drug trafficking.

10. It is not possible to know the result of Mr. L's prosecution if the proposed amendment under S.25(1A) of DTROP had been in effect. However, it is possible to say that there would have been a higher likelihood of a conviction given the lower mental element of "reasonable grounds to suspect" contained in the S.25(1A) amendment.

11. The bank at which Mr. L made the five deposits did make a suspicious transaction report. Due to the defence provisions in S.25A(2) of DTROP there was no question of the bank being prosecuted for money laundering. This would remain so if the presently proposed amendments came into effect.

Case VI

This case is connected to Case V as it concerns another person who assisted Mr. J to deal in the proceeds of his groups drug trafficking activities. It is dealt with separately here for the sake of simplicity.

Facts of the Case

2. In late 1997 police investigated the activities of Mr. J and his associates who were openly selling heroin to large numbers of drug users in the public areas of a public housing estate in Kowloon. Evidence was collected by plainclothes police officers posing as drug buyers and purchasing drugs from the group using "marked" money, i.e. banknotes for which the serial numbers had been recorded prior to the drugs being purchased. The investigation revealed that on 17-11-97 Mr. K assisted Mr. J to deal in the proceeds of drug trafficking. The following evidence was collected against Mr. K.

3. In late 1997 Mr. K was 18 years old and unemployed. He lived in the public housing estate in which Mr. J and his associates monopolized retail drug trafficking and openly carried out their activities. Mr. K had a history of low paid employment.

4. On 17-11-97 Mr. K went to a bank and informed a teller that he wished to deposit a sum of cash into the bank account of Mr. J. While the transaction was being processed Mr. J himself entered the bank. Mr. J approached Mr. K at the counter and gave Mr. K a bag containing cash. Mr. K instructed the bank teller to also deposit this cash into Mr. J's bank account. Mr. J then left the bank. The total amount deposited by Mr. K was $128,260HK and consisted mainly of small denomination notes. The $128,260HK included two $100HK banknotes of "marked" money used to purchase drugs by undercover police officers from two associates of Mr. J earlier on 17-11-97.

5. The following inferences can be drawn from Mr. K's actions on 17-11-97.

(a). Mr. K's deposit to Mr. J's bank account, and the evidence of Mr. J's approach to Mr. K in the bank, provide direct evidence of association between Mr. K and Mr. J.

(b). As a resident of the public housing estate in which Mr. J and his associates openly carried out their drug trafficking activities, and being an associate of Mr. J, it can be inferred that Mr. K would know of Mr. J's involvement in drug trafficking.

(c). In the absence of any legitimate explanation of the source of the $128,260HK deposit, the fact that it contained "marked" money used to purchase drugs, the fact that some of it had been handed to Mr. K by Mr. J a drug trafficker, and the fact that the money was deposited into the bank account of Mr. J a drug trafficker with no known legitimate source of large income, it can be inferred that the money which was not "marked" money was also the proceeds of drug trafficking.

(d). When depositing the money to Mr. J's account on 17-11-97 Mr. K was, in effect, assisting Mr. J to deal in the proceeds of drug trafficking. Common sense dictates that it is unlikely that an outsider would be tasked to perform this important role. Far more likely is that a trusted insider would perform the function undertaken by Mr. K.

(e). The $128,260HK deposited by Mr. K to Mr. J's account, was all in cash. Cash is the normal form of money generated by retail level drug trafficking and the drug trafficking activities engaged in by Mr. J's group.

(f). The $128,260HK deposited by Mr. K to Mr. J's account, was all in low denomination banknotes. Low denomination notes are the form of money most often acquired by retail level drug traffickers such as Mr. J and his associates.

6. Mr. J, and a number of his accomplices, including Mr. K, were arrested. Under caution Mr. K made no admissions and refused to answer questions.

Application of the Present and Proposed Law

7. Mr. J was prosecuted on drug trafficking and money laundering charges but was acquitted of all charges due to difficulties unconnected to those normally encountered which have brought about the proposed amendments to Sections 25 and 25A of DTROP and OSCO.

8. Mr. K was prosecuted on one count of conspiracy to commit the S.25 DTROP offence together with Mr. J and others in respect of the deposit he made to Mr. J's bank account. Mr. K was found to have no case to answer and acquitted. The Learned Judge ruled that there was insufficient evidence to prove that Mr. K had known, or had reasonable grounds to believe, that the money he dealt in was the proceeds of drug trafficking.

9. It is not possible to know the result of Mr. K's prosecution if the proposed amendment under S.25(1A) of DTROP had been in effect. However, it is possible to say that there would have been a higher likelihood of a conviction given the lower mental element of "reasonable grounds to suspect" contained in the S.25(1A) amendment.

10. The bank at which Mr. K made the deposit did make a suspicious transaction report. Due to the defence provisions in S25A(2) of DTROP there was no question of the bank being prosecuted for money laundering. This would remain so if the presently proposed amendments came into effect.

Case VII

Facts of the Case

In 1996, a Canadian stockbroker, Mr. X, embezzled US$1.74 million from a client account. The proceeds of the crime were remitted in three separate transactions to a bank account in Hong Kong which had been opened by a Swiss male Mr. Y. The funds were then remitted to a Swiss bank account by way of 5 separate transactions. There was no apparent reason for the money to be routed through Hong Kong rather than remitted directly from Canada to Switzerland. The Royal Canadian Mounted Police requested the assistance of the Hong Kong Police to investigate the money laundering aspect and to trace the ultimate beneficiary of the stolen funds.

2. Mr. Y was arrested by officers of Commercial Crimes Bureau. He turned out to be a merchant who was actually based in Southern China but travelled regularly to Hong Kong. He admitted opening the suspect account in Hong Kong but claimed he had been paid US$10,000 to do so by another Swiss male Mr. Z. As for the money in the account and outward remittances, all instructions had come from Mr. Z. Enquiries revealed that Mr. Z had been resident in Hong Kong for 12 years prior to the case in question, but had departed for Switzerland shortly after the last outward remittance of the stolen funds to Switzerland, in about June 1996.

3. Mr. X and Mr. Z had been long time friends. Mr. Z, at the time of the offence, was working as a merchant/trader, but he had previously worked for a Swiss bank in Switzerland and Hong Kong in their commercial sector for some 20 years, before branching out on his own. Mr. Z and Mr. Y had met through the HK Swiss Society of which they were both members and they were planning a joint venture in Southern China involving the manufacture of air purifiers. By the time the offence was investigated by the HK Police, Mr. Z had settled back in Switzerland but was still involved in the trading business.

4. Upon hearing of the Hong Kong Police investigation from Mr. Y, Mr. Z contacted the Hong Kong Police through his legal representative. He

was asked to return to Hong Kong to assist police but declined to do so. However, in July 1997, Mr. Z did return to Hong Kong and was arrested upon arrival. Upon caution he admitted employing Mr. Y to open the Hong Kong account and paying Mr. Y US$10,000 to do so. He claimed that he in turn had been paid US$100,000- by Mr X to open the account and arrange the remittance of the money to Switzerland. He admitted that he personally had 20 years experience in the banking sector but declined to explain the logistics of the suspect transactions from a banker's point of view. He was also unable to explain why he had been paid US$100,000 to conduct the transactions but then paid US$10,000 to Mr. Y for him to do it instead. However, Mr. Z did deny any knowledge of the true source of the funds.

Application of the Present and Proposed Laws

5. Although there was no direct evidence of Mr. Z's knowledge of the source of the money, the Department of Justice agreed that there was sufficient circumstantial evidence to charge Mr. Z with 5 counts of money laundering whereas Mr. Y was to be used as a prosecution witness. Mr. Z was acquitted after trial. The Judge commented that he was satisfied that the funds were proceeds of an indictable offence and that Mr. Z had dealt with the funds. However, he stated that although the conduct of Mr. Z was "gravely suspicious", that alone was not enough to draw the irresistible inference that he knew or had reasonable grounds to believe that the funds were the proceeds of an indictable offence. If the proposed amendment to the mental element of Section 25(1) of OSCO was in operation (i.e. "reasonable grounds to suspect"), then in all likelihood Mr. Z would have been convicted as charged.

Case VIII

Facts of Case

TSE met a loanshark TAM, also known as Ah B in prison and TSE became aware that Ah B was a loanshark. Upon release they met and TSE asked for a loan. Ah B agreed to lend him $3,000 on the condition that TSE opened a bank account and gave the book and ATM Card to Ah B. As TSE opened the account he was not required to pay any interest and could repay the principal bit by bit.

2. In fact TSE did not make any repayment and Ah B told him that he would let him off and give him $500 more if he opened another account, which TSE did.

3. TSE and Ah B were arrested by Police along with various other people involved. At the subsequent District Court trial Ah B received 9 months imprisonment for money lending and assault charges and TSE received 2 months imprisonment for money laundering.

4. TSE then appealed against his conviction and sentence. The actual charge TSE appealed against was under S.25(1) of OSCO and it read :-

"TSE did between the 24th January 1995 and the 29th June 1995 open and operate a bank account at XX Bank account No. XXX-X-XXXXXX which was used to receive for and on behalf of Tam (also known as 'Ah B') proceeds of an indictable offence namely lending money at an excessive rate of interest contrary to S.24(1) of the Money Lenders Ordinance Cap. 163 knowing or having reasonable grounds to believe that it would be used for such purpose."

5. The trial judge found :-

"In my view a compelling or irresistible inference arises from these facts to the effect firstly that the defendant knew what Ah B's business was, namely lending money at excessive rates of interest, and secondly that the defendant had entered into an arrangement with Ah B thereunder the defendant consented to Ah B using his account for the purpose of his

borrowers making interest payments into it and that the defendant gave Ah B the necessary particulars of the account and control of it, including the ATM card, to enable Ah B to achieve this purpose.

There is no reasonable possibility in my view, that the defendant entered into this arrangement with Ah B ignorant of what Ah B was up to, namely, that he was loan sharking. Nobody opens a bank account, as the defendant did, and then immediately puts it at the disposal of another person without a very particular reason for doing so. It is an irresistible inference that the defendant knew that Ah B required to use this account of the defendant's for the purpose of having his victims made their interest payments into it, rather than using his own account, precisely because he was up to no good, namely, he was loan-sharking and using somebody else's account, such as the defendant's, was a means of trying to conceal or distance his involvement in such an activity from the public eye.

I am satisfied beyond a reasonable doubt that the defendant knew, or had reasonable grounds to believe that the monies in question which were paid into his bank account - I refer to the interest payments by Ah B's victims - were the proceeds of loan-sharking on the part of Ah B."

6. On appeal the defence submitted that the conclusion drawn was neither irresistible nor the only one which a reasonable man might draw. It was submitted that it could not be established that TSE knew or had reasonable grounds to believe that the transactions effected represented the proceeds of loansharking. It was further submitted that the facts were collectively suspicious but do not admit only the inference drawn by the trial judge.

7. The Appeal Court said it was for the prosecution to show that TSE was aware of the alleged purpose to which the account was to be put and this was not shown. The Court concluded by saying, "We are satisfied that there was no sufficient evidence, safely, to support the irresistible inferences drawn by the judge. The application is allowed and the appeal must succeed."

Application of the Present and Proposed Laws

8. By opening a bank account for another knowing or reasonably believing it will be used to collect the proceeds of loansharking is clearly meant to conceal or disguise the ownership of the property and is thus dealing. In this case TSE knew Ah B was a loanshark and by giving him his account TSE should have suspected what it was to be used for. Under the proposed law he might have been convicted.

Case IX

Bookmaking Accounts

Generally speaking bookmaking accounts follow a set pattern -

(a) A lot of Monday and Thursday transactions (i.e. the day after racing)

(b) No transactions in July and August

(c) No book cash or transfer deposits

(d) Cash withdrawals, often followed by cash deposits to numerous other accounts. These are done in cash rather than by transfer to break the trail.

2. These indicators have been pointed out to the banks and the Police receive regular and numerous disclosures on this. Checks on Police records show that the account operator is either a bookmaker or as is more regularly seen now a relative or associate of a bookmaker. Also regarding point (d) the disclosures mention which accounts cash is paid into and these account holders usually have long gambling or bookmaking criminal records. Travel Index checks also often show that the main account holder (if he is the bookmaker) or the bookmaker using the account, travels to China or Macau just before each race meeting returning after the last race and it is well known that illegal bookmakers operate in other jurisdiction to avoid detection.

3. Despite all these suspicions, it is currently not possible to charge the account holders unless they admit under caution that the money going through the account is the proceeds of bookmaking or at least that they believed the money to be the proceeds. Of course few will actually make such an admission.

4. The two cases below give good examples of the above.

Case 1

Facts of Case

5. Mr. A had two accounts at a bank in Hong Kong, he gave his profession as a cook, and had a minor conviction for gambling in 1996. Mr. A's savings account showed a typical Monday/Thursday pattern of transfers and withdrawals, however it was maintained at a very low balance. The sums going in and out of the account were large, on average nearly HKD$2 million went through the account each month in the horse racing season.

6. The vast majority of the account deposits were small with no book cash deposits or transfers, the funds were then either withdrawn in cash or in large transfers to Mr. A's second account. Mr. A tended to use this account to pay the bills on six mobile telephones and to make numerous telephone banking transfers on Mondays and Thursdays. The disclosures also mentioned that the cash withdrawals from both accounts were followed by deposits to other accounts. Mr. A specifically requesting this be shown as cash rather than as a transfer, which is not the action of a normal person.

7. Mr. A's travel index showed that he traveled to and from China every race day. Additionally the call frequency on his mobile telephones increased every race day. From this telephone analysis several person who were suspected of placing bets with Mr. A were identified.

8. Mr. A was arrested when he returned from China after a race meeting. Several pieces of paper that appeared to be betting slips were found in his possession, although this could not be confirmed by a gambling expert. Under caution Mr. A claimed his two accounts were used in connection with a car rental business in China. Attempts to obtain statements from those persons suspected of betting with Mr. A failed, no person was willing to claim that they had placed bets with Mr.A. Mr. A was subsequently released without charge.

Application of the Present and Proposed Laws

9. At present despite the large amount of circumstantial evidence in this case, it has proved impossible to show to a court that a reasonable person would know or believe the funds in Mr. A's accounts were the

proceeds of illegal bookmaking in China in the absence of an admission. Mr. A is clearly operating bookmaking on HK racing in China and settling through his accounts in Hong Kong, i.e. he is laundering the proceeds of his bookmaking through his Hong Kong accounts.

10. If the level of knowledge was reduced to that of reasonable grounds to suspect, the large amount of circumstantial evidence in this case would make it more likely that a reasonable person viewing Mr A's accounts would believe they had been used to launder the proceeds of his bookmaking in China, rather than a car rental business and Mr. A could be prosecuted.

Case 2

Facts of Case

11. Between 1997 and 1998, a bank in Hong Kong made numerous suspicious transaction reports in relation to accounts held by a Mr. B and these accounts showed a typical Monday/Thursday pattern of deposits and withdrawals. The withdrawals were in cash and then deposited straight into numerous other accounts. Mr. B had a criminal conviction for 'Engaging in Bookmaking'. In his application to open the bank account he was shown as a 'restaurant worker'. His travel index check showed that he left Hong Kong for Macau on days there was horse racing in Hong Kong, and returned shortly after the racing had finished.

12. Further enquiries identified accounts held by Mr. B's wife and daughter and their given employment on account opening documents were that of 'housewife' and 'student' respectively. These accounts also showed the Monday/Thursday pattern of transactions during the horse racing season. Again the accounts showed the cash withdrawal and deposits to other accounts, many of whom had gambling and bookmaking records amongst others. There is no good reason to make such transactions instead of direct transfers other than to break the trail. A total of about HK$20 million went through Mr. B and his family's accounts in a period of three months. This is of course well in excess of what would be expected for a 'restaurant worker' and his family.

13. Mr. B, his wife and daughter were arrested. Under caution all remained silent. All were released without charge.

14. Experience shows that they would have had 'gambling' and 'bookmaking' records, amongst others. However, given that no one co-operated, tracing of identifiable transactions through the various bank accounts was not undertaken in this case.

Application of Present and Proposed Laws

15. At present despite the large amount of circumstantial evidence in this case it has proved in the absence of an admission impossible to show to a court that a reasonable person would know or have reasonable grounds to believe the funds in Mr.B, his wife and daughter's accounts were the proceeds of illegal bookmaking in Macau or any other indictable offence.

16. If the level of knowledge was reduced to that of reasonable grounds to suspect the large amount of circumstantial evidence in this case would make it more likely that a reasonable person viewing the accounts of Mr. B and his family would believe they had been used to launder the proceeds of his bookmaking in Macau, and Mr. B and his family could be prosecuted.

Case X

Facts of the case

This case concerns an international firm of accountants who also operate a company formation/business services company for its clients. A number of years ago they set up two companies (X & Y) and related bank accounts for a Japanese client Mr. K and operated the bank accounts on his behalf. In March 2000 company X received 10 billion yen ($762 million HK) by telegraphic transfer from Japan. On the same day 9.9 billion yen was moved to company Y and 9.7 billion yen was then transferred to another company in Japan also controlled by Mr. K. Mr. K explained the transactions as a short term loan with a Japanese Insurance Company. No one apparently asked why the money was not remitted direct from one Japanese Company to another, saving large bank charges. In June 2000 most of the money left in the HK accounts was also moved to Mr. K's Japanese Company on Mr. K's instruction.

2. In August the Insurance Company involved in the deal shut down and was declared bankrupt due to a massive fraud against it. On 14 September 2000 staff at the accounting firm learnt from a local press report that Mr. K had been arrested in connection with the fraud on the Insurance Co. and that the money (proceeds) had passed through the accounts of Co. X and Y which were the HK Companies they opened and accounts they operated.

3. The staff member dealing with this account brought this to her boss's notice and he informed the company's management committee who discussed it at a meeting on 15 September 2000. A partner of the accounting firm was then tasked to review all the files to assess any "risk exposure" i.e. whether they were liable for professional negligence. On 22 September this partner reported back that there was no problem. Basically was the end of the matter as far as the accounting firm were concerned.

4. On 25 September Police searched the accounting firm under a warrant as they were investigating the laundering of stolen money through HK. The two people dealing with the account and subsequently the management committee of the accounting firm were arrested for failing to

disclose a suspicious transaction under S.25A of OSCO. No one was prepared to be interviewed until they had consulted their lawyers. Their statements were subsequently written by their lawyers and submitted to the Police.

5. During the Police enquiries, it became apparent that the firm had little to no knowledge about the local money laundering laws and compliance with them. They knew about the requirement to disclose on drug offences and had issued a circular back in 1990 on it but nothing since. They had not updated any procedures following the introduction of OSCO in 1995. However the compliance officer said he was vaguely aware that some other crimes besides drug offences were now included. The partner who was appointed as a compliance officer did not know how to make a disclosure or really anything about his responsibilities. Basically the company had not bothered and had done nothing to ensure they complied with the law.

6. Legal advice was sought as the Police felt that the company had suspected the money they had dealt with was the proceeds of the fraud. It also seemed obvious to anyone reading the press report that the money going through the accounts they operated on behalf of Mr. K was the proceeds of his fraud. The companies X and Y were mentioned by name in the report as was the fact that their accounts were at a bank in Hong Kong, which is where the accounts they operated were held. The report had made them suspicious enough to assess their liability and therefore surely they must have suspected they had handled the proceeds of crime.

7. The Department of Justice advised that no charges should be laid in this case as the prosecution were not in a position to prove beyond reasonable doubt that anyone knew or suspected that Mr. K's transfers were connected with an indictable offence.

8. The two staff who dealt with the account had reported to their superiors and had thus fulfilled the requirements of S.25(4) of OSCO. Consequently one had to look at the criminality of the management committee. The advising counsel stressed the following points :-

(a) s.25A (1) speaks in terms of the property being connected with an indictable offence, not that it may be connected. Therefore, speculation about the source of the property is not sufficient;

(b) the duty arises when the person acquires the knowledge or suspicion. The test is subjective, not objective, i.e. it is the person's knowledge or suspicion, i.e. what did he know or suspect, not what would a reasonable person with the information available to the person 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.

9. From the available facts and from what the defendants claimed in their cautioned statements the advising counsel then considered each committee members level of knowledge and suspicion. He also added :-

> "Although ignorance or mistake of the law does not provide an excuse, in the circumstances of this case, because of an appalling lack of awareness about s. 25A of the Ordinance, the persons did not draw a connection between the information they received about (Mr. K) and an alleged source of the transfers from an indictable offence, and the duty to report any suspicions.
>
> In their statements and videotaped interviews, none of the persons said they knew or suspected that (Mr. K's) transfers were connected with an indictable offence. From my reading of their statements and transcripts of videotaped interview, although (an accountant) briefed the management committee for about 20 minutes, I did not find any suggestion that they were concerned about the transfers, or connected the transfers to an alleged indictable offence. They were preoccupied with (their company's) potential liability for negligence. The alleged nature of (Mr. K's) transfers did not give rise to knowledge (or) suspicion in their minds of a kind to make a report."

10. In conclusion the counsel advised:-

"The evidence shows the management committee considered that they did not have sufficient information to understand the transfers, hence they did not know or suspect the transfers were connected to an illegal source. They saw the problem as being only a risk of potential claims for professional liability. After (the partner) reported that he did not find any problem, the matter was taken no further. The "criminal" aspect of the transfers did not enter their minds.

The evidence does not disclose a reasonable prospect of the conviction. If one or more of the members of the management committee were charged with a s. 25A offence, and if all the evidence which I examined was admitted in the trial, I am sure they would be acquitted.

This case highlights the problem with the mental element in s. 25A(1) - "knows or suspects", and the difficulties proving the subjective test : what did the person know or suspect? This problem is addressed in the Drug Trafficking and Organized Crime (Amendment) Bill being currently studied by the Legislative Council."

Application of the Present and Proposed Law

11. This case highlights the problems in proving that someone suspects property is the proceeds of crime. If he says he did not suspect, no matter how ludicrous this may seem, the prosecution cannot prove otherwise. All the partners were worried about was their liability in case they had done something wrong. All the facts point to a strong suspicion that they must have known they had handled the proceeds but as they will not admit this they cannot be charged. It also appears that in this case and under S.25A as it currently stands, ignorance of the law could in fact be a viable defense.

12. If the proposed law was in place one could examine all the facts and judge whether there were "reasonable grounds to suspect" bearing in mind that the people dealing with the money were experienced accountants. The courts/prosecution could have considered all the circumstantial and

surrounding evidence and decided whether it was reasonable or not in all the circumstances for the accountants not to suspect.