

For discussion on  
10 February 2004

**Bills Committee on  
Deposit Protection Scheme Bill**

**Confidentiality**

**Purpose**

This paper sets out the Administration's proposal to address Members' concern in relation to clause 44(1)(a) of the Bill. For ease of reference by Members, clause 44(1) is reproduced below –

**44. Confidential**

(1) Except so far as it is necessary for the performance of any function under this Ordinance or for carrying into effect the provisions of this Ordinance, every person to whom this subsection applies –

(a) shall preserve and aid in preserving secrecy with regard to all matters relating to the affairs of any person that come to his knowledge in the performance of any function under this Ordinance;

(b) shall not communicate any such matter to any person other than the person to whom such matter relates; and

(c) shall not suffer or permit any person to have access to any records in his possession, custody or control.

## **Including a reasonableness qualifier in clause 44(1)(a)**

2. Clause 44(1)(a) requires a person subject to this provision (a “relevant person”)<sup>1</sup> to “preserve and aid in preserving secrecy” with regard to information received by him in the performance of functions under the DPS legislation. Some Members have commented that, under the existing formulation of this clause, the extent to which a relevant person should “aid in preserving secrecy” was unclear. They suggested that consideration be given to amending 44(1)(a) to clarify that a relevant person is only expected to take reasonable care to aid in preserving secrecy.

3. The Administration has explored the feasibility of including the words “take reasonable care” before “aid in preserving secrecy” in clause 44(1)(a) as suggested by some Members. However, we were advised by the Prosecution Division of the Department of Justice that such an amendment might have the unintended effect of lowering the threshold of proof by the Prosecution with respect to the mens rea of the defendant. This is explained in more detail below.

4. A contravention of clause 44(1)(a) is an offence under clause 44(5). As currently drafted, the offence under clause 44(5) requires proof of mens rea (i.e. not a strict liability offence). The Prosecution has to prove beyond reasonable doubt both the actus reus (i.e. a breach of the duty to preserve and aid

---

<sup>1</sup> The scope of application of clause 44(1) is defined in clause 44(2). In essence, the secrecy obligation in clause 44(1) applies to all staff of the DPS Board as well as any persons performing functions under the DPS legislation.

in preserving secrecy) and the mens rea of the defendant. For the latter, the Prosecution has to prove either (a) the officer intends his breach will bring about the consequence of leakage, or (b) the officer is reckless as to whether his breach will bring about that consequence.

5. If the words “take reasonable care” is added before the duty to “aid in preserving secrecy”, the provision will indeed be clear that a relevant person’s duty is to take reasonable care to aid in preserving secrecy.

6. However, with this amendment to clarify the duty, the Prosecution would probably only need to prove the failure of a relevant person in taking reasonable care in prosecuting such a case. In other words, the Prosecution might no longer need to prove the mens rea of “intention” or “recklessness”. In law, the standard of proof for failure to take reasonable care is similar to that for proving “negligence”. This is lower than the standard of proof for “intention” or “recklessness” which would otherwise need to be established by the Prosecution had the clause not been amended. This is obviously not meeting Members’ objective or the Administration’s intention.

7. For the above reason, the proposal of adding a reasonableness qualifier in clause 44(1)(a) does not appear to be desirable. The Administration has therefore considered other ways of addressing Members’ concern.

### **Redrafting clause 44(1)**

8. One possible solution is to remove clause 44(1)(a) and to enlarge

the scope of application of clause 44(1)(c) by deleting the words “in his possession, custody or control”. A similar provision can be found in section 41(1) of the MPF Ordinance (Cap, 485) and Section 46(1) of the Electronic Transaction Ordinance (Cap. 553). If this approach is adopted, this will require a relevant person not to suffer or permit any person to have access to any confidential information that he obtains in performing functions under the DPS legislation, **whether such information is contained in records in his possession or not.**

9. For ease of reference, clause 44(1) can be revised along the following lines (please note that the wording may be subject to further refinements) -

*"Except so far as it is necessary for the performance of any function under this Ordinance or for carrying into effect the provisions of this Ordinance, a specified person<sup>2</sup> -*

- (a) shall not suffer or permit any person to have access to any matter relating to the affairs of any person that comes to the specified person's knowledge in the performance of any function under this Ordinance; and*
- (b) shall not communicate any such matter to any person other than the person to whom such matter relates."*

10. We believe that the revised clause 44(1) is as effective as the

existing version in protecting the confidentiality of the information received by the Board. The following example, which has been used in the previous discussions, will illustrate this point.

11. Suppose that the Board appointed an accounting firm as an agent to assist in the payout of compensation to depositors and thus passed certain records containing confidential information to the firm. The firm later reported that the records had, for some reasons, fallen into the hands of a third party who is proposing to disclose the information in the records. Although the records are no longer in the Board's possession, custody or control, the clear requirement in the current clause 44(1)(a) for a member of the Board to aid in preserving secrecy imposes a duty on him to seek to recover the information and to prevent further disclosure of the information, for example, by reporting the incident to the Police or applying to the court for an injunction to prohibit disclosure by that third party.

12. We believe that the effectiveness would not be weakened under the revised clause 44(1). Although clause 44(1)(a) is now removed, the new clause 44(1)(a) has a wider scope of application (as compared with the existing clause 44(1)(c)) covering situations where the confidential information is not in the possession, custody or control of a relevant person. The relevant person has a duty not to suffer or permit any third party to have access to the confidential information that comes to his knowledge in the performance of any function under the Ordinance regardless of whether the information is in his possession, custody or control. Therefore in the example set out in para. 11 above, he still

---

<sup>2</sup> Clause 44(2) will be revised into a definition clause for "specified person".

has a duty to seek to recover the information from the unauthorized third party and to prevent further onward disclosure of the information.

### **Advice Sought**

13. The Administration believes that the revised clause 44(1), as set out in para. 9, would address Members' concern without compromising the effectiveness of the secrecy provisions in the DPS legislation. Subject to Members' views, appropriate Committee Stage Amendments will be introduced to effect this proposal.

Hong Kong Monetary Authority  
Financial Services and the Treasury Bureau  
February 2004