

Civil Forfeiture for Hong Kong?

A Discussion Paper of the Hong Kong Civil Forfeiture Project

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ABOUT THE PROJECT

The Hong Kong Civil Forfeiture Project aims at identifying the most effective laws and policies to eliminate and deter profit-making crime in Hong Kong by means of interdicting crime-tainted property (i.e. the proceeds and instruments of serious crime). The topic of civil and criminal forfeiture is quite a technical and complex one. To appreciate the subject fully, it requires extensive research and consideration of the experiences from many different countries. And it requires placing those international experiences in the Hong Kong context. We will identify these laws and policies by joining the experiences of International Experts with a local expert Civil Forfeiture Focus Group.

Throughout the fall of 2006, experts from the following jurisdictions will visit Hong Kong to share their countries' experiences in a public forum, and with the local Focus Group: Ireland, Canada, Australia, New Zealand, and the United Kingdom. Experts from regional jurisdictions such as Macau and Mainland China will also be invited. International experts will contribute a scholarly publication about their jurisdictions' experiences with civil forfeiture, from legal, policy, and operational perspectives. A final report is expected at the end of 2007.

More information about the Project can be found on the Centre for Comparative and Public website (www.hku.hk/ccpl). We welcome your views and comments on this Discussion Paper or on the topic of the Project generally. Please email your comments to Simon Young at snmyoung@hku.hk. Thank you.

TABLE OF CONTENTS

1.	INTRODUCTION	1
2.	IMPETUS FOR FORFEITURE LAWS	3
3.	EXISTING LEGAL REGIME IN HONG KONG	5
3.1.	Proceeds of Drug Trafficking and Serious Crimes	5
	3.1.1. <i>Scope and Application of the DTROPO and OSCO</i>	5
	3.1.2. <i>Financial Investigation Powers</i>	6
	3.1.3. <i>Confiscation where the Suspect/Accused has Died or Absconded</i>	7
	3.1.4. <i>Restraint and Charging Orders</i>	8
	3.1.5. <i>Accessing Restrained or Charged Property Pending Confiscation</i>	9
	3.1.6. <i>Confiscation Process</i>	10
	3.1.7. <i>Third Parties</i>	11
	3.1.8. <i>Determining the Confiscation Order</i>	11
	3.1.9. <i>Enforcing the Confiscation Order</i>	12
	3.1.10. <i>Data on Amounts Frozen and Confiscated</i>	12
3.2.	Proceeds of Bribery and Corruption	14
3.3.	Restitution Orders	14
3.4.	Civil Forfeiture of Drug Money Entering or Leaving Hong Kong.....	15
3.5.	Terrorist Property and United Nations Sanctions	16
3.6.	Property Connected with Offences in the Possession of the Police.....	16
3.7.	Vehicles and Property Taken into Custody by Police	18
3.8.	Offence or Context Specific Forfeiture Provisions.....	18
3.9.	Closure Orders for Vice Establishments.....	19
3.10.	Operational Obstacles to Hong Kong’s Current Confiscation Regime	20
3.11.	Existing Civil Remedies	20
4.	IS THERE A NEED FOR MORE FORFEITURE LAWS IN HONG KONG? ..	23

5.	ISSUES INVOLVED IN THE ADOPTION OF A CIVIL FORFEITURE REGIME IN HONG KONG	25
5.1.	Scope of Property Subject to Forfeiture.....	25
5.1.1.	<i>Applicable Offences</i>	25
5.1.2.	<i>Forms of Property</i>	26
5.1.3.	<i>Categories of Crime-Tainted Property</i>	27
5.1.3.1.	CONTRABAND	27
5.1.3.2.	PROFITS OR PROCEEDS FROM ILLEGAL ACTIVITY	27
5.1.3.3.	TOOLS OR INSTRUMENTS USED IN THE COMMISSION OF A CRIME.....	29
5.1.3.4.	OTHER FORMS OF CRIME-TAINTED PROPERTY	30
5.2.	Preservation of Property for Forfeiture.....	31
5.3.	Administrative or Judicial Forfeiture.....	33
5.4.	Test for Forfeiture	33
5.5.	Burden and Standard of Proof for Forfeiture.....	33
5.6.	Protection of Third Party Interests.....	35
5.7.	Procedural Issues	36
5.7.1.	<i>Notice and Discovery</i>	36
5.7.2.	<i>Forfeiture Hearing, Admissibility Rules, and Appeals</i>	37
5.7.3.	<i>Legal Representation</i>	38
5.8.	Creation of a New Government Agency?.....	38
5.9.	New Investigative Powers.....	39
5.10.	Relationship with Existing Agencies and Criminal Confiscation.....	40
5.11.	Where Does Forfeited Property Go?.....	41
5.12.	International and Domestic Co-operation.....	42
5.12.1.	<i>International Co-operation: Hong Kong vis-à-vis foreign jurisdictions</i>	42
5.12.2.	<i>Domestic Co-operation: Hong Kong vis-à-vis Macau, the PRC Mainland, and Taiwan</i>	44
5.13.	Human Rights Implications	45
6.	QUESTIONS FOR DISCUSSION	48

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APPENDIX I: Drug Trafficking Offences under DTROPO and Specified Offences under OSCO.....56

APPENDIX II: Table of Restraint and Confiscation Amounts in Hong Kong from 1989 to 2006..... 61

APPENDIX III: Table of Seizure, Restraint, Confiscation and Forfeiture Provisions in Hong Kong (up to June 2006)..... 62

1. INTRODUCTION

In theory, civil forfeiture laws hold great promise for greater efficiency and effectiveness in disgorging offenders of their crime-tainted property, ie the profits and instruments of crime. Civil forfeiture laws provide for governmental forfeiture of such property by way of *in rem* civil proceedings - proceedings taken against property (and not a person), using more relaxed rules of civil evidence and procedure.

Civil forfeiture is supposed to facilitate and maximize interdiction for three reasons: (1) the standard of proof is less onerous than in criminal cases; (2) evidence is more freely admissible in civil cases (eg hearsay evidence), and (3) proceedings can proceed even if the criminals have disappeared or fled the jurisdiction.

Since the mid-1990s, many countries have introduced civil forfeiture laws as a new means to eliminate and prevent organized and serious crime. For example, the United Kingdom enacted its Proceeds of Crime Act 2002 on 24 July 2002.¹ Australia passed a statute of the same name on 11 October 2002.² In April 2002, Ontario (Canada) proclaimed into force the Remedies for Organized Crime and Other Unlawful Activities Act,³ and since then four other Canadian provinces (Manitoba, Alberta, Saskatchewan, British Columbia)⁴ have enacted similar legislation and one (Québec) is in the process of doing so.⁵ These pieces of legislation were largely inspired by similar legislative reforms introduced by South Africa in 1998,⁶ Ireland in 1996,⁷ and the United States since the 1970s.⁸ While the details of the legislation may differ, all of these initiatives shared three common objectives:

- to introduce a scheme of civil forfeiture of criminal proceeds (and instruments);
- to create a new law enforcement agency to oversee the operation of the new scheme;
- to ensure that all the forfeited property is put into a central pool to be used for special purposes, oftentimes to further other law enforcement initiatives.

¹ 2002 Chapt 29.

² No 85, 2002.

³ SO 2001, Chapt 28 (“Ontario’s Civil Remedies Act”).

⁴ Manitoba passed similar legislation, The Criminal Property Forfeiture Act, CCSM c C306, in 2004 (“Manitoba’s Criminal Property Forfeiture Act”). Alberta’s legislation is called the Victims Restitution and Compensation Payment Act, SA 2001, c. V-3.5 (Section 1 and Parts 2, 3 and 4 were proclaimed into force 1 September 2004). Saskatchewan’s The Seizure of Criminal Property Act, Chapt S-46.001, 2005 became effective 3 November 2005. British Columbia’s Civil Forfeiture Act, SBC 2005, c 29 came into force in April 2006.

⁵ In Québec, Bill 36, An Act Respecting the Forfeiture, Administration and Appropriation of Proceeds and Instruments of Unlawful Activities was introduced to the National Assembly on 14 June 2006.

⁶ Prevention of Organized Crime Act, Act No 121, 1998.

⁷ Proceeds of Crime Act, 1996, No 30 of 1996. This was amended in 2005 by The Proceeds of Crime (Amendment) Act 2005 (Number 1 of 2005, 12 February 2005).

⁸ The US civil forfeiture model started with The Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. 1963, and includes, *inter alia*, the Continuing Criminal Enterprise Statute, 18 U.S.C. 848 and the Bank Secrecy Act., 31 U.S.C. 1051. The Civil Asset Forfeiture Reform Act of 2000 (“CAFRA”), 18 USC 983 (“CAFRA”) was enacted to right some of the inequities extant in this mixed regime. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. 107-56, Sec. 1, 26 October 2001, 115 Stat. 272 (“PATRIOT Act”) is the latest addition to these laws.

Hong Kong Civil Forfeiture Project

Many of these countries had pre-existing criminal forfeiture or confiscation systems when civil forfeiture was introduced. Criminal forfeiture usually occurs only after an individual has been convicted of an offence in the context of sentencing proceedings. When forfeiture is the goal, this is hampered by dependency on the criminal justice system, which can present delays and other obstacles.

Forfeiture laws can have a significant impact on the property and civil rights of residents who may be completely innocent of any criminal wrongdoing. These issues are of particular importance in Hong Kong where a wide array of civil, political, legal, social, economic and cultural rights and freedoms are protected under Hong Kong's constitution, the Basic Law, and the Hong Kong Bill of Rights.

Forfeiture laws also have important implications for existing confiscation laws and policies and for the criminal and civil justice system as a whole. Perhaps most importantly, these laws have significant administrative implications in terms of both the investigation and lodging of proceedings and also in terms of the interim and final management of restrained, seized, or forfeited property. Thus, the implementation and administration of civil forfeiture laws is of equal if not greater importance than the actual substance of those laws.

The Proceeds of Crime Act 2002 of both the United Kingdom and Australia were each preceded by a lengthy law reform study and final report. The Australian Law Reform Commission produced a 400+ page report,⁹ reviewing its then existing Proceeds of Crime Act 1987, after an extensive study of the matter over the course of 15 months. In the United Kingdom, a 128 page report by the Performance and Innovation Unit of the Cabinet Office ("PIU Report") sparked the reforms in the 2002 Act.¹⁰ Both these reports drew heavily upon the legal experiences of other countries that had already enacted civil forfeiture laws. These reports also illustrated the importance of trying to develop laws that fit the jurisdiction in question rather than blindly importing laws from abroad.

This Discussion Paper will first consider the impetus and rationale for forfeiture laws and then consider the scope and effectiveness of the current forfeiture and confiscation legal regime in Hong Kong. The aim of the first half of the paper is to facilitate discussion on the fundamental question of whether there is a need for more forfeiture laws in Hong Kong. The second half of the paper will outline and discuss the key issues that should be addressed when designing and implementing a comprehensive civil forfeiture regime. Although our Project will closely examine the laws and experiences of eight jurisdictions,¹¹ examples used in this paper will be drawn primarily from the United Kingdom (UK), the United States (US), and Canada (specifically, Ontario and Manitoba). The paper concludes by identifying the range of human rights issues in Hong Kong raised by a civil forfeiture system.

⁹ Australian Law Reform Commission, *Confiscation that Counts: A review of the Proceeds of Crime Act 1987*, Report No. 87. (Canberra: Australian Government Publishing Service, 1999).

¹⁰ See UK Cabinet Office, Performance and Innovation Unit, *Recovering the Proceeds of Crime* (UK: Cabinet Office, June 2000) ("PIU Report"). After this major law reform study, England repealed its old laws with the introduction of the *Proceeds of Crime Act 2002*. One of the reasons for the reform was the inefficiency and limited effectiveness of the criminal confiscation model.

¹¹ Mainland China, Macau, Taiwan, Ireland, Canada (Ontario, Manitoba, British Columbia, Alberta, Saskatchewan, and Quebec), UK, Australia, and New Zealand.

2. IMPETUS FOR FORFEITURE LAWS

Forfeiture laws are a response to profit-making and organized crime. There is a perception that the traditional tools in the fight against crime have failed.¹² Governments and law enforcement agencies realised that traditional approaches, such as deprivation of liberty and membership crimes, did not work for sophisticated and often transnational criminal networks yielding enormous profits. This was the backdrop that justified the creation of a confiscation/forfeiture approach. Professor Guy Stessens highlights the aim of forfeiture laws to rupture the structures of criminal enterprises:

These instruments were part of a new strategy against organized crime which is aimed at the structures of organized crime, rather than at deterring individuals from taking part in organized crime. This strategy is directed at the crucial function of organized crime: making money. By taking away the proceeds from crime and by making it more difficult to launder its proceeds, law enforcement authorities not only take away the incentive for organized crime, but, more importantly, seek to disrupt the functioning of organized crime itself. Organized crime groups depend on cash and assets to function just as much as their legitimate counterparts do.¹³

The UK's PIU Report identified six purposes of financial investigations and asset recovery laws:

- show that crime will not pay and underpin confidence in a fair¹⁴ and effective criminal justice system;
- remove negative role models from communities;
- disrupt criminal networks and markets with an impact on volume crime;
- deter people from crime by reducing the returns that can be anticipated;
- improve crime detection rates generally by providing a deeper understanding of criminal markets; and
- assist in the fight against money laundering and the harm that it causes.¹⁵

There is also an international law basis for forfeiture laws. Multilateral treaties and United Nations (UN) resolutions have called for measures to interdict crime-tainted property. This includes the 1988 UN Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances,¹⁶ which, at Article 5 requires States Parties to adopt measures that enable the restraint, seizure, and confiscation of proceeds and instruments of drug trafficking. Similar provisions were also adopted in the 2000 UN Convention on Transnational Organized Crime,¹⁷ the International Convention for the Suppression of the Financing of Terrorism,¹⁸ the 2001 UN Security Council Resolution 1373 concerning terrorist financing, and the 2003

¹² Guy Stessens, *Money Laundering – A New International Law Enforcement Model* (Cambridge: Cambridge University Press, 2000), p 9.

¹³ Guy Stessens, *ibid.*, pp 9-10.

¹⁴ Article 5(7) provides for Parties to consider whether to adopt reverse onus provisions regarding the lawful origin of the alleged proceeds “to the extent that such action is consistent with the principles of [their] domestic law and with the nature of the judicial and other proceedings”.

¹⁵ PIU Report, above n 10, para 3.2.

¹⁶ Vienna, 20 December 1988, 28 ILM 493 (1989).

¹⁷ Resolution 55/25, 15 November 2000.

¹⁸ 39 ILM 270 (2000) (entered into force 10 April 2002).

Hong Kong Civil Forfeiture Project

UN Convention Against Corruption.¹⁹ In addition, the Financial Action Task Force (FATF)'s 40 Recommendations echoes these obligations. In particular, Recommendation 3 encourages countries to enact laws for the interdiction of criminal property, either on the criminal *or civil* standard of proof.²⁰ Hong Kong is a FATF member and a party to the 1988 drug trafficking convention and the 2003 corruption convention.

While the received wisdom is that forfeiture laws are of great utility in the fight against organized crime, there is very little research, from the countries which have adopted such laws, on how forfeiture laws have impacted crime levels and criminal behaviour.²¹ Statistics on the quantum of property forfeited do not indicate the impact on criminal activities. Further, there is concern about significant amounts of criminal funds that do not go through the normal banking system. A broader range of data needs to be collected and analyzed to determine how forfeiture laws can make a difference in the prevention and disruption of organized crime and the flow of crime-tainted property.

- 1. Do any of the international treaties, particularly those binding on Hong Kong, require implementation by means of civil forfeiture?*
- 2. What data needs to be collected to assess the impact of forfeiture laws on the prevalence of organized crime groups and profit-making crime?*
- 3. How does widening the definition of “criminal proceeds” for forfeiture systems affect international financial systems and the costs of doing business generally? Will increased monitoring and enforcement increase the costs for governments and businesses to the extent that the measures become prohibitively expensive?*

¹⁹ Resolution 58/4, 31 October 2003.

²⁰ Recommendation 3 of the FATF's 40 Recommendations, which can be found at www.fatf-gafi.org, states that “Countries may consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction, or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law.”

²¹ This observation was also made in the PIU Report, above n 10, para 2.11.

3. EXISTING LEGAL REGIME IN HONG KONG

Since 1989, Hong Kong has had a criminal confiscation system for drug trafficking proceeds, and, in 1994, a similar system was adopted for the proceeds of organized and serious crimes. A separate provision exists for confiscating the unexplained wealth of government officials. There are also a host of provisions for forfeiting contraband and other crime specific property. With the exception of drug trafficking related cash found at the border and terrorist property, there is no general provision for the civil forfeiture of crime-tainted property. In regards to instruments of crime, there is a limited general power to forfeit property connected with offences and in the possession of the police. The following is a brief discussion of these and other provisions making up the existing regime governing the forfeiture of crime-tainted property.

3.1. Proceeds of Drug Trafficking and Serious Crimes

Hong Kong currently has laws for the criminal confiscation of drug trafficking proceeds and proceeds of serious crimes. The **Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405)** (“DTROPO”) and the **Organized and Serious Crimes Ordinance (Cap 455)** (“OSCO”) were enacted in 1989 and 1994 respectively. Although both were amended significantly in 1995 (and to a lesser degree in 1999 and 2002), they are still based very much on the previous English criminal confiscation laws that were enacted in the late 1980s and early 1990s. Both are notorious for being extremely technical and complex even for lawyers and judges.

4. *Can the DTROPO and OSCO schemes be simplified and made easier to understand?*
5. *Is there merit in having a single ordinance to govern the criminal confiscation of proceeds of crime?*

3.1.1. Scope and Application of the DTROPO and OSCO

The DTROPO applies when a person is convicted of a “drug trafficking offence” specifically enumerated in Schedule 1 of DTROPO. Schedule 1 is reproduced in Appendix I below. The list of offences in Schedule 1 includes various drug offences in the Dangerous Drugs Ordinance (Cap 134) and the money laundering offence (s 25) in the DTROPO. The OSCO applies when a person is convicted of a “specified offence” listed in Schedules 1 or 2 of the OSCO, which are reprinted in Appendix I below. While Schedules 1 and 2 capture many serious common law and statutory offences, they do not include all indictable offences. For example, tax evasion is not a specified offence in the OSCO.

Although many offences are not listed in Schedules 1 and 2 of OSCO, it is still possible to capture the proceeds of such offences through the vehicle of the money laundering offences in the DTROPO and OSCO, which are both listed in the schedules to the two ordinances.²² If one “deals” with the proceeds of any indictable offence, such as tax evasion,

²² The money laundering offence is found in s 25 of both the DTROPO and OSCO.

Hong Kong Civil Forfeiture Project

with the requisite *mens rea*, one commits the offence of money laundering, and thus one's proceeds of that indictable offence can come within the scope of the confiscation provisions in the OSCO.²³ The money laundering offence is an indirect way of extending the scope of the DTROPO and OSCO.

The DTROPO and OSCO also have a far reach in terms of place and time. Both ordinances apply to property situated outside of Hong Kong²⁴ and to offences committed prior to the coming into force of both ordinances.²⁵ Enforcement against property abroad must of course take place through established channels of international cooperation and mutual legal assistance.

6. *Does the OSCO capture the proceeds from a sufficient scope of offences?*
7. *Should all indictable offences be capable of triggering the confiscation scheme in OSCO and thereby obviate reliance on the money laundering offence as the triggering offence for unspecified offences?*

3.1.2. Financial Investigation Powers

There are special investigative powers given to the police in the DTROPO, OSCO and Dangerous Drugs Ordinance (Cap 134) to assist in the gathering of financial intelligence, and other evidence. These powers generally require court authorization from the Court of First Instance ("CFI"). There are powers that require individuals to answer questions, produce relevant documents, and allow the police access to information. There are also powers to authorize entry and search of premises and seizure of relevant evidence. The purposes for which the information obtained by these powers may be used or disclosed are specifically limited.

Where a restraint or charging order has been made, there are powers that require the holders of such property to provide information to assist in determining the value of the property. Immunity from legal liability is conferred on those who are required to make such disclosures.

Another useful source of financial information can come from the Joint Financial Intelligence Unit ("JFIU"), which is jointly run by the Hong Kong Police Force and Hong Kong Customs and Excise Department. The JFIU was setup in 1989 to receive reports of suspicious financial activity made under the DTROPO and OSCO. All persons have a duty to make a report to the JFIU if they know or suspect that any property is the proceeds of drug trafficking or any indictable offence.²⁶

²³ The *actus reus* element of 'dealing' is defined broadly in s 2(1) of both the DTROPO and OSCO. The *mens rea* element is also broad as it includes both knowledge and "having reasonable grounds to believe", which has been interpreted as being an objective standard: see *HKSAR v Yam Ho Keung* [2002] HKLRD (Yrbk) 277 (CA); *HKSAR v Shing Siu Ming & Others* [1999] 2 HKC 818 (CA).

²⁴ See DTROPO, s 2(3) and OSCO, s 2(4).

²⁵ See DTROPO, s 2(4) and OSCO, s 2(5).

²⁶ See s 25A of both the DTROPO and OSCO.

3.1.3. Confiscation where the Suspect/Accused has Died or Absconded

Both the DTROPO and OSCO were amended in 1995 to enable confiscation where the suspect/accused died or absconded before conviction or sentencing. The scheme has been criticized for presenting interpretative difficulties:

It is clear that amendments made in 1995 were designed to adapt the provisions for the case where the defendant had died or absconded, but the end product does not achieve this objective very well, if at all. I hasten to say that this may not be the fault of the draftsman. I know how pressures from legislators and unwelcome contributions to the drafting process during the legislative process can sometimes destroy a carefully crafted legislative structure.²⁷

The following prerequisite conditions under OSCO must be satisfied before confiscation is possible:²⁸

- (a) proceedings for one or more specified offences have been instituted against a person;²⁹
- (b) the proceedings have not been concluded because the person has either died or absconded;
- (c) the person *could* have been convicted in respect of the offence(s);
- (d) where the person has absconded, 6 months have elapsed from the date on which the person absconded;
- (e) where the person has absconded, reasonable steps have been taken to ascertain the person's whereabouts or, if he is known to be outside Hong Kong, reasonable steps have been taken to obtain the return of the person to Hong Kong;³⁰
- (f) where the person has absconded, adequate notice of the proceedings has been given;
- (g) the person has benefited from the specified offence of which he could have been convicted.

A person will be treated as having absconded for any reason and whether or not, before absconding, the person had been in custody or released on bail.³¹ It is unclear whether the person's death or absconding must occur after proceedings have been instituted and before they have concluded. The language of the legislation is general and broad enough to encompass the following two scenarios:

- proceedings are instituted by issuing a warrant against a person who is believed to be alive but has in fact died; when his death is discovered, the confiscation

²⁷ See *In the Matter of the Drug Trafficking (Recovery of Proceeds) Ordinance, Chapter 405, The Attorney General (Applicant) and Lee Chau Ping (First Respondent) and Tam Wai Hung (Second Respondent)* [1997] HKEC 654 (SC), per Findlay J.

²⁸ See OSCO, s 8. See also s 3 of the DTROPO for a similar provision.

²⁹ Generally, proceedings are instituted when a warrant or summons has been issued for the person, when the person has been arrested and released on bail or refused bail, charged with an offence, or when an indictment has been preferred, see OSCO, s 2(15); DTROPO, s 2(11).

³⁰ A special rule applies if the person is known to be in custody abroad, see OSCO, s 8(3)(c)(i)(B)(bb); DTROPO, s 3(2)(c).

³¹ See OSCO, s 2(1); DTROPO, s 2(1).

Hong Kong Civil Forfeiture Project

application proceeds as proceedings have been instituted and have not been concluded because of the person's death;

- the person has absconded long before the authorities discover that an offence was committed; when the offence is discovered, proceedings are instituted by issuing a warrant; the confiscation application proceeds as proceedings have been instituted and have not been concluded because of the person has absconded.³²

The scheme was extensively considered and explained by Deputy Judge Lugar-Mawson (as he then was) in the case of *Secretary for Justice v Lee Chau Ping & Another*.³³ Briefly, the case held that the standard of proof to satisfy the court that the person could have been convicted was the balance of probabilities, that proof of this requirement did not require evidence and could be done by way of the statutory statement filed by the prosecution, that the hearsay rule did not apply in these proceedings, and that third parties did not have standing in the confiscation hearing, although they could be heard later when proceedings were taken to appoint a receiver to assist in the enforcement of the confiscation order.³⁴ The enforcement mechanism of imposing a default term of imprisonment does not apply to confiscation orders made under this scheme.

It is unknown how many confiscation orders have been made under the 'died or absconded' scheme. Judging from the number of reported cases, the total number is expected to be very low.³⁵ Despite the wide breadth of the scheme, the number of hurdles which must be surpassed before confiscation is possible prevents it from becoming an efficient and effective mechanism for attacking profit making crime.

8. *What data is available on the number of 'died/absconded' confiscation cases?*
9. *What are the practical difficulties in bringing such a case?*

3.1.4. Restraint and Charging Orders

Both the DTROPO and OSCO also provide for the restraint or charge of property in order to preserve it for purposes of satisfying a confiscation order, if and when it is made. A restraint order prohibits any person from dealing with the property under restraint. An item of property under restraint may also be seized by an authorized officer for the purpose of preventing realisable property from being removed from Hong Kong. A charging order imposes a charge on the property for securing the payment of money to the Government in an amount equivalent to the value of the property (and, after a confiscation order has been made, in an amount not exceeding the amount payable under the confiscation order). Charging orders are applied to the beneficial interest held by the accused in land in Hong Kong or securities.³⁶

³² This was the situation in *Secretary for Justice v Lee Cheung Wah* [2001] HKEC 682 (CFI).

³³ See *Secretary for Justice v Lee Chau Ping & Another* [2000] 1 HKLRD 49 (CFI).

³⁴ *Ibid.*

³⁵ Only three reported cases were found, see *Secretary for Justice v Lee Chau Ping*, *ibid.*; *Secretary for Justice v Leung Cheung Wah*, above n 32; *Secretary for Justice v Chow Sui Kwong* [1999] 2 HKC 118 (CFI). There has yet to be any appellate consideration of the scheme.

³⁶ See Schedule 3 of the OSCO and Schedule 2 of the DTROPO.

These orders against a person's property can be made by the Court of First Instance after proceedings for a 'drug trafficking offence' or 'specified offence' have been instituted and the judge is satisfied that there is reasonable cause to believe that the person has benefited from the relevant offence. The orders are broad as they apply to all the realisable property of the accused (ie property which may be used to realise a confiscation order) and not only property traceable to the relevant offence.

Once a restraint order is made, the court can appoint an interim receiver to take possession of realisable property and manage and deal with the property.³⁷ Private accounting firms have typically been appointed as interim and final receivers. Charging orders are enforceable in the same way as equitable charges.

3.1.5. Accessing Restrained or Charged Property Pending Confiscation

The **Rules of the High Court** provide for exceptions to be made to restraint and charging orders for purposes of paying reasonable living or legal expenses of the defendant.³⁸ Little guidance however is provided in these rules on how the discretion should be exercised. These provisions, in theory, recognize and attempt to mitigate the often harsh consequences of preservation orders on the presumed innocent defendant and his or her family members. They also serve to protect the defendant's constitutional right to legal representation.

It is necessary to examine the practice of courts in granting exceptions and to assess whether these theoretical goals are being achieved. If the practice has been too restrictive, it may mean that individuals have had to go to trial without counsel of choice or legal representation at all, which has direct constitutional human rights implications. Further, innocent family members may have had to suffer financially for long periods of time while the case makes its way through the courts. On the other hand, if the courts are too generous in granting exceptions, it could leave nothing or next to nothing left for confiscation. Such practices have been criticised as 'judicial laundering' of proceeds of crime with the legitimised property ending up usually in the hands of lawyers. The release of restrained property to pay legal fees means that the defendant continues to profit from his crime unless the scheme has a way to claw back this benefit upon conviction.

Applications for interim release of preserved property always present a dilemma for the accused awaiting trial. Putting forward one's best case for release typically requires full disclosure of relevant financial matters. However, such disclosures may in some cases (eg money laundering cases) effectively require the accused to disclose his defence or provide incriminating evidence which the prosecution can use at trial. Even if such disclosures are inadmissible at trial, it still provides a fruitful opportunity for the prosecution and police to obtain derivative evidence which they might never have discovered had the accused not made the application for release. Thus, unless there are adequate procedural safeguards to such disclosures, making an application to access restrained or charged property may in fact be a double-edged sword.³⁹

³⁷ Michael Blanchflower, "Restraint and Confiscation of Proceeds of Crime" paper presented at the Archbold Hong Kong Criminal Law Conference 2004, Hong Kong, November 2004, p 9.

³⁸ Cap 4A, Order 115, Rule 4. Also see *HKSAR v Cheng Wai Keung & Others* [2003] HKCFI 329.

³⁹ See s 462.34 of the Canadian Criminal Code for an interesting procedure which involves the exclusion of the prosecution for part of the proceeding. The procedure has been adopted in the Bahamas, see Money Laundering

Hong Kong Civil Forfeiture Project

10. *Should a full procedural and substantive scheme for accessing restrained or charged property be included in the main legislation and not only in the rules of court?*
11. *Should the Canadian scheme which excludes the prosecution from part of the hearing be adopted as a procedural safeguard against unfair defence disclosure?*

3.1.6. Confiscation Process

After conviction, the prosecution may apply as part of sentencing in the Court of First Instance or District Court for a confiscation order to be made *in personam* against the offender and not against any particular property. Confiscation orders may not be made by a magistrate. If the judge is satisfied that the offender had benefited from drug trafficking or a specified offence, he or she must order confiscation; the only remaining issue is the quantum to be confiscated. A person will have ‘benefited’ from a relevant offence by having received any payment or other reward in connection with the commission of the offence.⁴⁰ The judge must also impose a default term of imprisonment which must be served if the confiscation order is not satisfied. The length of the term of imprisonment will depend on the amount of the confiscation order.

Under OSCO, the prosecution may also request that the judge determine if the specified offence of which the person has been convicted is an “organized crime” which loosely defined means a Schedule 1 offence connected with the activities of a triad society or committed by two or more persons in a manner involving substantial planning and organization.⁴¹ If the judge finds that the accused has been convicted of an ‘organized crime’, the scope of offences from which to value the accused’s proceeds of crime is widened, and statutory presumptions concerning the extent to which the accused has benefited from organized crime apply.

The prosecution need only prove the preconditions to confiscation on a balance of probabilities.⁴² The legislation contemplates that most confiscation orders can be made without hearing oral evidence. It provides that the prosecution will file a statement (not made under oath or affirmation) setting out the facts to support an application for confiscation.⁴³ The statement of facts is treated as conclusive except those facts which the accused expressly does not accept. The accused is also expected to submit a statement on the amount that might be realised at the time the confiscation order is made. Those facts which are accepted by the prosecution may be treated as conclusive. A hearing resolves any disputed facts.

12. *Should magistrates have the power to confiscate proceeds of crime?*

(Proceeds of Crime) Act, 1996, s 11. Singapore adopted almost the same provision in their Terrorism (Suppression of Financing) Act 2002, s 19, but without the clause excluding the prosecution from the hearing.

⁴⁰ See OSCO, s 2(8); DTROPO, s 3(4).

⁴¹ See OSCO, s 2(1). Under the DTROPO, all drug trafficking offences are treated in the same manner as organized crime offences.

⁴² See OSCO, s 8(8B); DTROPO, s 3(12).

⁴³ See OSCO, s 10; DTROPO, s 5.

13. *Is the ‘organized crime’ mechanism in OSCO satisfactory?*
14. *Should an oral hearing be the norm in confiscation proceedings?*

3.1.7. *Third Parties*

The sentencing court has no discretion to reduce the amount of a confiscation order to benefit third parties because once all the preconditions are satisfied the confiscation order is mandatory. Thus, third party interests are not normally considered at the confiscation stage. The Court of Appeal has noted the possible unfairness this inflexibility can have for both offenders and third parties.⁴⁴

After the confiscation order is imposed, if the convicted person does not pay, a second proceeding must be initiated to recover property from the offender for the purposes of satisfying the confiscation order. In this proceeding, third parties with an interest in the property to be realised will have an opportunity to be heard. This is the only opportunity for third parties to have their interests recognised.

Both Ordinances allow for applications to the Court of First Instance for compensation to property holders where a proceeding has been wrongfully initiated.⁴⁵ However, the threshold test for obtaining compensation is high as it requires proof of “some serious default” on the part of the police or prosecution.⁴⁶

15. *Should third parties be heard and their interests recognised in sentencing proceedings where confiscation is sought?*

3.1.8. *Determining the Confiscation Order*

The amount to be recovered in the confiscation order is the value of the accused’s proceeds of any specified offence.⁴⁷ But if the amount that might be realised at the time the confiscation order is made is less than this amount then the recoverable amount is only the amount that might be realised.⁴⁸ This rule mitigates the harshness of the confiscation order by reducing the accused’s liability to the sum which he is currently able to pay by virtue of his owned and controlled property and gifts.

In all cases under OSCO, the value of the accused’s proceeds of a specified offence must be at least \$100,000 before a confiscation order will be made.⁴⁹ The judge has the power to reduce the confiscation order amount to take into consideration any fines and other penalties which may be or have been imposed on the accused.⁵⁰

⁴⁴ See *HKSAR v Lung Wai Hung* [1999] 1 HKLRD 598 at 606 (CA).

⁴⁵ See OSCO, s 29(1); DTROPO, s 27(1).

⁴⁶ See OSCO, s 29(2); DTROPO, s 27(2).

⁴⁷ A person’s proceeds of an offence include (i) any payments or other rewards received by him at any time in connection with the commission of that offence; (ii) any property derived or realised, directly or indirectly, by him from any of the payments or other rewards; and (iii) any pecuniary advantage obtained in connection with the commission of that offence, see OSCO, s 2(6)(a); DTROPO, s 4(1)(a).

⁴⁸ See OSCO, s 11(3); DTROPO, s 6(3).

⁴⁹ See OSCO, s 8(4). No similar provision exists in the DTROPO.

⁵⁰ See OSCO, s 8(7)(b); DTROPO, s 3(6)(b).

Hong Kong Civil Forfeiture Project

A statutory presumption aids the prosecution in the quantification process by presuming that property transferred to the offender in the past six years is his or her proceeds of crime. The presumption applies in all cases under the DTROPO and, in respect of the OSCO, only in those cases where the accused has been convicted of an ‘organized crime’. The presumption has survived constitutional challenge both in Hong Kong and England.⁵¹

3.1.9. Enforcing the Confiscation Order

To facilitate enforcement, the judge in making the confiscation order must also impose a default term of imprisonment, ranging from 12 months to 10 years, which the offender will serve if he or she fails to pay the order within a specified time. The following table from the legislation shows the different ranges of default imprisonment terms according to the amount of the confiscation order.

An amount not exceeding \$200000.....	12 months
An amount exceeding \$200000 but not exceeding \$500000.....	18 months
An amount exceeding \$500000 but not exceeding \$1 million	2 years
An amount exceeding \$1 million but not exceeding \$2.5 million	3 years
An amount exceeding \$2.5 million but not exceeding \$10 million.....	5 years
An amount exceeding \$10 million.....	10 years

Within each range, the judge has discretion to fix the exact length of the imprisonment term. The term ordered must be served on top of any other term of imprisonment for which the offender has been sentenced in respect of the offence(s) for which he has been convicted. This applies also in the District Court even if the total term of imprisonment is more than 7 years. The confiscation order is treated as a fine for purposes of enforcement. The court should not ordinarily fix a period of more than 6 months to pay the confiscation order unless special circumstances justify it doing so.

Where it is known that realisable property exists and the accused has not paid his confiscation order, the prosecutor can apply to the Court of First Instance for the appointment of a receiver.⁵² The receiver may be empowered to enforce any charge imposed by a charging order, and to take possession of property and sell it. The legislation provides for a detailed scheme of how sums collected by the receiver should be applied. Here the court may return property to legitimate third parties. Ultimately, any sums remaining are paid into the Government’s general revenue.⁵³

3.1.10. Data on Amounts Frozen and Confiscated

Appendix II shows data on assets restrained, seized or charged, amounts ordered confiscated, and amounts actually paid to government since 1989 under the DTROPO and since 1994 under the OSCO.⁵⁴ As at 31 May 2006, a cumulative total of over \$431 million has been ordered confiscated and paid to the government.

⁵¹ See *R v Ko Chi-yuen* [1994] 2 HKCLR 66 (CA); *R v Benjafield*; *R v Rezvi* [2003] 1 AC 1099 (HL).

⁵² See OSCO, s 17; DTROPO, s 12.

⁵³ See OSCO, s 18(7); DTROPO, s 13(7).

⁵⁴ The data was provided by the Hong Kong Police Force.

There appear to be great disparities between the amounts restrained, the amounts ordered confiscated, and the amounts ultimately paid to government. The figures provided for “Assets frozen pending confiscation proceedings” are *as on* 31 May 2006. These are point-in-time, and not cumulative figures. Still, these are significantly larger than the assets ordered confiscated and/or paid to the government. These disparities call for an explanation as one might expect a greater proportion of restrained property to be ultimately confiscated and recovered. In practice, some of the assets restrained at any given time end up being paid to third party victims. In other cases, the confiscation proceedings are unsuccessful in court and the assets must be “unfrozen”. Another explanation is that the figures on restrained assets indicate their value on the date of restraint. The realisable value is calculated at the date of confiscation. A fairly large portion of restrained assets have been real property assets. Real property prices have widely fluctuated in Hong Kong since 1997.⁵⁵

The figures for “Assets ordered to be confiscated but *pending recovery*” and the “Assets actually confiscated *and paid* to the Hong Kong Gov’t” are, by contrast, cumulative figures. When an amount gets paid to government, the equal amount is subtracted from the “pending recovery” figure.

Overall DTROPO has yielded higher amounts paid to the government, with over \$386 million compared to OSCO’s \$45 million. This however is not necessarily a reflection of the relative number of cases brought under the two ordinances because there have been a few DTROPO cases involving very large confiscated sums which have been paid to government.⁵⁶

What these figures do not show is that the DTROPO figures have been steadily declining since 2000. After a few big cases in the early years, police believe that the drug traffickers have altered their behaviour such that property is no longer kept in Hong Kong where it can be confiscated. However, local organized crime groups are more likely to have assets in Hong Kong; thus, while DTROPO figures have been declining, OSCO figures have increased. Neither trend however is perfectly consistent; fluctuations reflect the nature of confiscation investigations, that cases are complicated, difficult, and time-consuming.

Although the reported figures are informative in a broad way, they are lacking in detail for purposes of assessing the real impact of restraint and confiscation powers in Hong Kong. For instance, only a few offences under DTROPO and OSCO are mentioned. There is also no mention of how much is being seized, confiscated, or forfeited under other laws. There are no readily available statistics on how often confiscation orders are being made, relative to the number of prosecutions and convictions for profit-making offences.

16. *Can more complete and accurate data be obtained on the performance of the DTROPO and OSCO to date? Similarly, is data available for forfeiture and confiscations done under other laws?*

⁵⁵ Department of Justice, “Fighting money laundering and terrorist financing activities within the rule of law: A prosecutorial perspective”, 5 June 2003, paper for the Hong Kong Legislative Counsel Panel on Security, LC Paper No CB(2)2366/02-03(01), para 9(4), which can found at www.legco.gov.hk.

⁵⁶ See for example Law Kin Man’s case (and related case of *The Queen v Lo Chak Man & Another* [1996] HKCA 489) which involved international drug trafficking and money laundering in the United States, Canada and Australia. Ultimately, a total of \$200 million was ordered confiscated.

Hong Kong Civil Forfeiture Project

17. *What data are available to illustrate and track the impact that the DTROPO and OSCO have had on crime levels?*

3.2. Proceeds of Bribery and Corruption

The **Prevention of Bribery Ordinance (Cap 201)** (“PBO”) allows the Independent Commission Against Corruption (ICAC) to obtain *ex parte* restraining orders from the Court of First Instance against all of the property of a suspected person.⁵⁷ The power is far-reaching as it freezes all property of the suspect whether tainted or not, and whether held by the suspect or a third-party. The person who is the subject of a restraint order can apply to the CFI to vary or revoke the restraint order.⁵⁸ As with DTROPO and OSCO restraint orders, the court has discretion to impose such conditions or exemptions as it thinks fit to allow individuals to access the restrained property pending forfeiture. Oddly, where the suspect is convicted, the PBO does not provide for the forfeiture or confiscation of the restrained property. For this purpose, the prosecution must rely upon the provisions in OSCO. While the PBO confers a confiscation power, it is only for the limited purpose of forfeiting the assets of a government servant who has been convicted of possessing unexplained property under s 10 of the PBO.⁵⁹

There are, however, mandatory restitution orders that apply where the accused is convicted of a corruption or bribery offence.⁶⁰ A person convicted of an offence “shall be ordered to pay to such person or public body and in such manner as the court directs, the amount or value of any advantage received by him, or such part thereof as the court may specify.”⁶¹ The restitution order may be enforced in the same manner as a civil judgment of the High Court.⁶² In private sector cases, the only role of law enforcement and/or prosecution is to inform the principal of the making of the order. It is then for the principal to decide whether to enforce it. In public sector corruption cases the principal will include the government, which will usually take action to enforce the civil order. But in private sector cases the principal may not necessarily follow through with enforcement action.

18. *What data exists on the amounts of restrained, confiscated and recovered proceeds for bribery and corruption offences?*
19. *Is the PBO restraint power more far reaching than those in the DTROPO and OSCO and can this be justified?*

3.3. Restitution Orders

Restitution of property ordered pursuant to **s 84 of the Criminal Procedure Ordinance (Cap 221)** or **s 30 of the Theft Ordinance (Cap 210)** (in respect of stolen goods)

⁵⁷ See PBO, s 14C.

⁵⁸ See PBO, s 14D.

⁵⁹ See PBO, s 12AA.

⁶⁰ See PBO, s 12.

⁶¹ See PBO, s 12(1).

⁶² See PBO, s 12(4).

is another way to ensure that offenders do not continue to enjoy their ill-gotten gains.⁶³ The orders allow the court to do justice to victims directly by ordering the return of property. In cases involving public corruption or bribery, the government is a recognized victim for purposes of ordering restitution. The restitution provision under the PBO has already been mentioned.

The discretionary power in the Criminal Procedure Ordinance, which is subject to the provisions of the Pawnbrokers Ordinance (Cap 166), applies only after a person has been convicted of an indictable offence and only to “property found in his possession, or in the possession of any other person for him”. The identifiable property is ordered to be delivered “to the person who appears to the court or magistrate to be entitled thereto” even if that person is the offender.⁶⁴ Neither provision, however, confers a forfeiture power on the court.

3.4. Civil Forfeiture of Drug Money Entering or Leaving Hong Kong

Part IVA of the DTROPO was added in 1995 to allow for seizure and forfeiture of money (not less than \$125,000) being imported into or exported from Hong Kong which is the proceeds of or is intended for use in drug trafficking. The power is an example of a civil forfeiture provision as it expressly provides that forfeiture is possible upon proving these elements on a balance of probabilities irrespective of whether criminal proceedings are brought against any person. Case law has confirmed that the more liberal hearsay rules governing civil proceedings apply to forfeiture proceedings brought under Part IVA.⁶⁵

No similar scheme however exists in the OSCO. Thus, for example, if cash from a human trafficking operation was intercepted at the border, the Hong Kong authorities would only be able to forfeit this property if either it successfully prosecuted someone for the substantive offence or received an external confiscation order from a foreign jurisdiction.

Appendix II provides data on the amounts seized and forfeited under Part IVA. The seizure and detention powers under Part IVA are available to the police, but in practice are exercised by customs officials. The civil forfeiture power under s 24D, likewise, is available to customs officials but in practice has only been exercised by the police. Given that only \$1.9M in total has been forfeited from 1995 to 2006, this is a power which is little used and very little if any has been forfeited in recent years.

20. *Is there any reason why the ‘drug cash at the border’ power should not be extended to other offences and to other forms of property?*
21. *What are the reasons for the relatively small total forfeiture amount and the low forfeiture activity in recent years?*

⁶³ Magistrates may also order restitution for indictable offences triable summarily, see Magistrates Ordinance (Cap 227), s 93(c).

⁶⁴ See Criminal Procedure Ordinance (Cap 221), s 84(2), but such return must be consistent “with the interests of justice and with the safe custody or otherwise of the person so charged”.

⁶⁵ See *Secretary for Justice v Lin Xin Nian* [2001] 2 HKLRD 851 (CA) and, similarly, civil hearsay rules apply to cases where the accused has absconded, see *Secretary for Justice v Lee Chau Ping et al* [2000] 1 HKLRD 49 (CFI).

Hong Kong Civil Forfeiture Project

3.5. Terrorist Property and United Nations Sanctions

Another civil forfeiture provision is found in the **United Nations (Anti-Terrorism Measures) Ordinance (Cap 575)** (“UNATMO”), which was passed in July 2002, and amended in July 2004.⁶⁶ This law provides for the freezing and forfeiture of “terrorist property” which is defined as the property of a terrorist or terrorist associate or any funds used or intended to be used to finance or assist the commission of a terrorist act. The UNATMO was enacted to bring Hong Kong in line with the UN Security Council resolutions concerning terrorism and terrorist financing after September 11th.

As with the DTROPO and OSCO, the UNATMO allows for applications for compensation where a person or property has been improperly specified under the specification scheme in the legislation. However, the threshold test for obtaining compensation in the UNATMO (ie showing “some default” by the police or prosecution) is lower than that in the other two ordinances.

There are a number of subsidiary pieces of legislation under the **United Nations Sanctions Ordinance (Cap 537)**, which implement UN Security Council resolutions into Hong Kong law. Many of these implement embargoes imposed in conflict zones. The United Nations Sanctions (Iraq) Regulation (Cap 537B), United Nations Sanctions (Arms Embargoes) Regulation (Cap 537E), United Nations Sanctions (Afghanistan) Regulation (Cap 537K), and the United Nations Sanctions (Sudan) Regulation (Cap 537W) all allow an authorized officer to detain a ship, aircraft or other vehicle in or registered in Hong Kong if it is believed to be in the process of carrying prohibited goods to any of these enumerated countries. These regulations also generally allow for the preservation of any property found under a court ordered search warrant. Broad powers to order the production of any documents or other evidence are also set out. All of these regulations provide for the defence that the person having charge of the impugned goods did not know they were prohibited.

3.6. Property Connected with Offences in the Possession of the Police

Section 102 of the Criminal Procedure Ordinance (Cap 221) provides a scheme for disposing of property which comes into the possession of the police in the course of its investigations. The section covers the following three classes of property:

- (a) any property has come into the possession of a court, the police or the Customs and Excise Service in connection with any offence;
- (b) it appears to a court that an offence has been committed in respect of any property in the possession of the court, the police or the Customs and Excise Service;
or
- (c) it appears to a court that any property in the possession of the court, the police or the Customs and Excise Service has been used in the commission of an offence.⁶⁷
[Emphasis added.]

⁶⁶ Not all provisions have come into force.

⁶⁷ Criminal Procedure Ordinance (Cap 221), s 102(1).

A conviction is not a prerequisite to the application of s 102 but it must be established that an offence has been committed or appears to have been committed, whether in Hong Kong or abroad.⁶⁸ Generally, the judge or magistrate may either order the property to be delivered to the person entitled to the property or order the forfeiture of the property.⁶⁹ As a discretionary power, the court has the ability to recognize and give effect to legitimate third party interests.⁷⁰

There are two significant limitations to the operation of s 102. First, it does not apply to “immovable property or any aircraft, motor vehicle or ship”.⁷¹ Thus a flat used solely for cultivating marijuana or a boat used solely for trafficking persons for prostitution would not be forfeitable under this section.

Secondly, if another Ordinance provides for the forfeiture of the particular property or class of property in question, the provisions of this other Ordinance “shall prevail” over s 102.⁷² One case has highlighted a possible lacuna arising from this limitation. In *Attorney General v Yeung Lui*, the prosecution sought the forfeiture of an unlawfully obtained Argentinian passport under s 46A of the Immigration Ordinance which allowed for such forfeiture, but only in respect of offences under s 38 of the Immigration Ordinance or s 90 of the Criminal Procedure Ordinance.⁷³ The accused had been convicted of an offence under s 42 of the Immigration Ordinance and thus the forfeiture power in s 46A was inapplicable. At the same time, there could be no forfeiture under s 102 of the Criminal Procedure Ordinance because s 46A was found in *obiter* to be a prevailing provision. This clearly could not have been the intended effect of the exclusionary clause in s 102(6).

There is another anomaly in respect of the ability of aggrieved third parties to appeal or otherwise challenge a forfeiture order made under s 102. The circumstances in *Multi-Solid Ltd v Secretary for Justice* vividly illustrate this problem.⁷⁴ The applicant company was the victim from whom the convicted robbers had stolen \$2M worth of diamonds. The police had recovered \$143,000 which was proceeds from the sale of the diamonds. After trial and on application from the prosecutor, the court summarily forfeited these proceeds without seeking to hear from the victim company. The Court of Appeal held that it was wrong for the prosecutor to have made the application and that the court should have on its own motion ordered the return of the proceeds to the victim company. Nevertheless, the court had to dismiss the appeal by the company because there was no right of appeal for third parties.⁷⁵

⁶⁸ See *Leung Yuen v The Queen* [1975] HKLR 516 (AJ)

⁶⁹ This roughly captures the general idea but the actual legislative language is more technical, see Criminal Procedure Ordinance (Cap 221), s 102(2).

⁷⁰ The discretionary decision to forfeit is reviewable but was not disturbed in the case of *HKSAR v Fung Lin Cheong* [2003] HKEC 572 (CFI). Contrast the case with *HKSAR v Poon To Kun* [2004] HKEC 1494 (CFI), where the judge exercised his discretion against forfeiture.

⁷¹ Criminal Procedure Ordinance (Cap 221), s 102(7). See also *HKSAR v Chan Kwok Choi* [2004] 1 HKLRD A9 (CA), a case in which the court incorrectly used s 102 to forfeit the offender’s car which was parked at the scene of the burglary.

⁷² Criminal Procedure Ordinance (Cap 221), s 102(6).

⁷³ *Attorney General v Yeung Lui* [1989] HKLY 248 (HC).

⁷⁴ *Multi-Solid Ltd v Secretary for Justice* [1997] HKLY 295 (CA).

⁷⁵ Persons convicted may however appeal a s 102 order pursuant to s 83G of the Criminal Procedure Ordinance (Cap 221), see *HKSAR v Chai Man-Fong* [1998] 2531 HKCU 1 (CA).

Hong Kong Civil Forfeiture Project

3.7. Vehicles and Property Taken into Custody by Police

Section 57 of the Police Force Ordinance (Cap 232) provides that where any person having charge of a “vehicle, boat, horse or any other animal or thing” comes into police custody under this Ordinance, it is lawful for the police to take charge of the property and to deposit it safely as security. This is in the event that the individual is convicted and the property (or proceeds from its sale) is needed to satisfy a penalty owing (eg fine) and/or for any costs incurred in the storage of the property. It is necessary under section 57(2) to seek a magistrate’s order to sell the property. This appears to be tantamount to conviction-based forfeiture.

3.8. Offence or Context Specific Forfeiture Provisions

Scattered amongst different ordinances, there are a number of forfeiture provisions for specific types of property found or used in certain contexts. Appendix III lists and summarizes the terms of these forfeiture powers. The powers target property ranging from those of very specific social concern to property used in serious organized crime. Many of the powers target contraband, ie property for which it is an offence to possess.

Appendix III also indicates whether the power is judicial or non-judicial and whether it is mandatory or discretionary. The case of *In the matter of Causeway Bay Police Station R.B. No. X6649 of 1986* illustrates the possible unfairness that mandatory forfeiture powers can sometimes have on third party interests.⁷⁶ In this case, the court denied an application to have a pleasure vessel returned to the registered owners. The police seized the vessel after finding that it was being used for illegal gambling. It was undisputed, however, that the owners were unaware of the illegal activities which were being orchestrated by the boat-keeper. Nevertheless, as the forfeiture power under s 26 of the Gambling Ordinance (Cap 148) was mandatory, the court had no alternative but to forfeit the vessel.

Some of the criminal law related forfeiture powers in Appendix III are described and highlighted briefly below.

The **Dangerous Drugs Ordinance (Cap 134)** allows the Commissioner for Customs and Excise to arrest and detain a ship for 48 hours if he has “reasonable cause to suspect” that an excessive quantity of dangerous drugs is on board (s 38B). After the 48 hour period, a magistrate must grant an order for its continued detention, at which time the proceedings must also be transferred to the CFI. The Dangerous Drugs Ordinance also allows for the forfeiture of dangerous drugs brought into Hong Kong for any unlawful purpose or without proper documentation (s 55).

Perhaps the most significant provision of this Ordinance is s 56, which allows a court to order any money or “thing” used in the commission of any offence in the Ordinance or a drug trafficking offence under DTROPO, whether or not any person has been convicted of that offence, to be forfeited to the government. Specifically excluded properties include premises, a ship exceeding 250 gross tons, an aircraft, or a train. Vehicles are not excluded.

⁷⁶ *In the matter of Causeway Bay Police Station R.B. No. X6649 of 1986* [1987] HKEC 8 (SC).

Centre for Comparative and Public Law

The **Crimes Ordinance (Cap 200)** has disparate provisions throughout providing for forfeiture. A magistrate may order the forfeiture of counterfeit items if he or she is satisfied that it is in the public interest (s 106(2) – (4)). Section 106(4) allows for an interested third party (such as the owner of the item) to make submissions as to why the thing should not be forfeited; in such a case, forfeiture cannot be ordered until those submissions are heard.

Forged items (“false instruments”) can also be ordered forfeited at s 78(2) – (4) if the magistrate has “reasonable cause to believe” such an item is in the custody or possession of an individual. Section 78(3) also allows for the broader forfeiture of “any object which [the magistrate] is satisfied relates to the commission of the offence” where a conviction is made for any offence under Part IX, Forgery and Related Offences, of the Ordinance. Again, forfeiture under this provision cannot be ordered unless an opportunity has been given to any interested claimant to show cause why the order should not be made.

Where a person is convicted of an offence in respect of seditious publications, the publication may be ordered forfeited from the convicted person or anyone else who is believed to possess it (s 10(3)). Unmarked plastic explosives possessed by a person unlawfully are administratively forfeited (ie without the necessity of a court order) at s 58E. Vessels used as vice establishments or for prostitution offences are liable to forfeiture at s 153D-H and 153N, whether or not the owner or another person (such as a tenant) is convicted of the related offences. Section 153(2) allows a court to order the forfeiture of any other property (not being immovable) that the court has reasonable grounds to believe was used in the commission of such offences as well.

The **Gambling Ordinance (Cap 148)** defines gambling broadly, to include “gaming, betting and bookmaking”. It provides at s 26 for a court to order the forfeiture of any money, gambling equipment or other property (but not immovable property) if it is satisfied that it was used in the commission of unlawful gambling. This is so whether or not anyone has been convicted of an offence under this Ordinance.

The **Customs and Excise Service Ordinance (Cap 342)** contains a number of provisions allowing for the search and inspection of suspected property. In addition, s 17 grants a power to Customs and Excise officers to enforce a large number of other ordinances referred to in Schedule 2 of the Ordinance. Schedule 2 includes DTROPO and OSCO as well as several other Ordinances dealing with controlled substances. The effect is that customs officers acquire powers to seize and detain property under these associated laws.

22. *Given the host of disparate forfeiture powers for instruments of crime, is it necessary to have a general civil forfeiture power for instruments of crime?*
23. *Do any of the disparate forfeiture powers apply to immovable property?*

3.9. Closure Orders for Vice Establishments

It is possible under the Crimes Ordinance (Cap 200) to obtain a closure order in respect of a premise used for prostitution. Where a person has been convicted of an offence related to running a vice establishment or using a premise for the purpose of prostitution, a magistrate may order those premises (other than a vessel) to be closed (s 153A). Closure orders are usually made for six months (s 153B). Bona fide purchasers and mortgagees may

Hong Kong Civil Forfeiture Project

apply to the court for the closure order to be rescinded (s 153C). Although the premises are not forfeited to government, closure orders are an alternative crime control tool for addressing a dwelling based enterprise crime.⁷⁷

24. *How effective is a closure order and is it a feasible strategy for other crimes?*

3.10. Operational Obstacles to Hong Kong's Current Confiscation Regime

The above canvassing of Hong Kong's confiscation and forfeiture laws reveals a highly technical and complex regime. It is commonly believed that these laws are under-used as a result. In particular, the complicated method of assessing the quantum of realisable assets is a daunting task for investigators untrained in accounting methods. Ensuring adequate and standard training in financial investigation and evidence-gathering in confiscation cases remains a major challenge facing the law enforcement agencies in Hong Kong. Adequate training of prosecutors is also required together with their strategic placement in advisory roles during investigations.

Turnover and internal transfer of personnel can present obstacles in major cases. Investigating confiscation cases is time-intensive and costly, with proceedings often lasting years. As with anything else, constrained resources mean that those resources are generally targeted towards more standard crime investigation.

25. *How can the current operational impediments to using the confiscation powers be overcome?*

26. *What role could regulators in the banking sector play to improve the use of confiscation laws?*

27. *What is the cost/benefit of using confiscation laws to target lesser amounts of proceeds of crime, taking into account investigators' expertise, public money spent, etc.?*

3.11. Existing Civil Remedies

In the absence of general civil forfeiture laws, the government (and more oftentimes the victims) can bring a traditional civil suit to recover the proceeds of crime. While such proceedings by government are rare, they nevertheless have been brought when the criminal justice system has been ineffective or otherwise inapplicable, eg where the defendant has fled the jurisdiction before charges are brought and extradition is no longer possible. Civil courts have been creative in recognizing equitable remedies to ensure that criminals are disgorged of their crime proceeds. Nevertheless, while legal doctrine may be favourable, a case that follows existing civil procedures can be met by considerable delays and complexities given that such proceedings must be *in personam* (rather than *in rem*) in nature and do not cater well to the transnational nature of money laundering and organized crime. As well, the

⁷⁷ See, for example, Joshua But, "Yuen Long love hotels closed by police" *South China Morning Post*, 10 June 2006.

existing civil process offers few if any remedies against the instruments of crime unless they are traceable to the profits of crime.

Consider the well-known case of *Attorney General for Hong Kong v Reid*.⁷⁸ Warwick Reid, a New Zealand national working in Hong Kong as an acting Deputy Director of Public Prosecutions, was convicted of taking bribes to cover up cases. Reid was ordered to pay restitution (presumably under s 12(1) of the PBO as discussed above) following conviction, but he never did. The Attorney General brought a subsequent civil case in New Zealand, seeking to recover Reid's properties in that country, which had been purchased with the bribe money and had increased substantially in value. Denied at the NZ Court of Appeal, the Attorney General appealed to the Privy Council, which held that any benefit a fiduciary receives during the course of his duties is held in trust for his principal. Through this principle of equity, the property was ultimately recovered after five years of litigation in three different jurisdictions.⁷⁹

It is interesting to consider what would happen in such a case now. Since 1999, Hong Kong has had a mutual legal assistance agreement with New Zealand in criminal matters, which now permits enforcement of external confiscation orders. Once confiscated in New Zealand, the property could be repatriated to Hong Kong subject to any agreement on the sharing of the proceeds with New Zealand. But it is still unclear whether it permits enforcement of a s 12(1) restitution order.⁸⁰ The Agreement with New Zealand refers to orders "forfeiting" or "confiscating" property. The definition of a Hong Kong confiscation order in s 2 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) refers to a "confiscation" and "forfeiture" order, although it may be broad enough to capture the purpose for which the restitution order is also made.

The existing confiscation regime may, therefore, be able to accommodate cases like *Reid* in large part because the offender was successfully prosecuted in Hong Kong. But what if the offender absconded from the jurisdiction and could not be extradited back to Hong Kong. Having absconded, it may be possible to bring a 'dead or absconded' confiscation proceeding under the OSCO, but as discussed above there are numerous hurdles to obtaining confiscation under this method. The alternative option is to bring a traditional civil action. This was the situation in the Hon Sum case which only recently came to a conclusion with a \$140 million settlement with the family of the late Hon Sum.⁸¹ This case involved a three decade odyssey to try to bring Hon Sum to justice and to recover his ill-gotten bribery proceeds. Hon Sum was a police sergeant who in the 1960s was known to have amassed a sizeable wealth from the systematic taking of bribes. He retired from the police force in 1971 and went to live in Canada. It is reported that he evaded extradition from Canada by fleeing to Taiwan where he eventually died in 1999. The Department of Justice filed a writ in 2000 against the estate of Hon Sum to try to recover property in Hong Kong and abroad on the equitable principles set down in the *Reid* case. After six years, the government announced in

⁷⁸ [1994] 1 AC 324 (PC).

⁷⁹ Following his release from prison, Reid was subsequently charged in relation to payments received for false affidavit testimony in an unrelated criminal appeal of Mr. Ch'ng Poh in Hong Kong. An extradition request was made to New Zealand in 1996. Reid plead guilty to offences in New Zealand relating to the same offence (the affidavit was signed and the payments were received in New Zealand), and he was convicted. As a result, the New Zealand authorities were able to claw back the payments made to him under their own domestic proceeds of crime legislation.

⁸⁰ Mutual Legal Assistance in Criminal Matters (New Zealand) Order (Cap 525).

⁸¹ Patsy Moy & Benjamin Wong, "Family Settles in ICAC's Bid for Officer's Millions", *South China Morning Post*, 30 May 2006; "When Bad Cops and Bribes Ruled Streets", *The Standard*, 1 June 2006.

Hong Kong Civil Forfeiture Project

May 2006 that an out-of-court settlement had been reached with the family of Hon. This case is a good example of how inefficient and potentially ineffective the use of the traditional civil process can be for recovering the proceeds of serious crime.

The Mareva injunction is a recognized *in personam* order to freeze assets pending the outcome of a civil action. While it is possible to obtain Mareva injunctions for worldwide assets, it has been observed by a leading English author on the subject that:

The granting of Mareva relief over assets abroad is likely to involve substantial costs for the parties and may lead to protracted interlocutory proceedings in England or abroad, possibly involving third parties, who are not within the jurisdiction of the court. It is also liable to deflect the efforts of the parties from the resolution of the substantial merits of the litigation. Furthermore, it is undesirable that litigation should be made more complex and onerous than is necessary for doing justice between the parties, and the defendant to a dispute claim is not to be treated as if he were a judgment debtor. These considerations are particularly important when the court is considering the granting of Mareva relief over assets abroad, and underlie why such relief is regarded as “exceptional” and why it should only be granted on cogent evidence.⁸²

These impediments to obtaining worldwide Mareva injunctions are a further limitation of the traditional civil process. At present, rather than resorting to a Mareva injunction, the government is more likely to use mutual legal assistance arrangements to freeze overseas property which it hopes to have confiscated.

⁸² Stephen Gee, *Commercial Injunctions*, 5th ed (London: Sweet & Maxwell, 2004)), pp 362-3.

4. IS THERE A NEED FOR MORE FORFEITURE LAWS IN HONG KONG?

The review of the existing legal regime has shown that government initiatives against crime-tainted property have generally been ad hoc, reactive, and highly context specific. There has yet to be a comprehensive review and legislative exercise to try to rationalize and devise a single coherent scheme. It is apparent that the current legal regime suffers from a number of shortcomings including the following:

- the scattered state of the law makes understanding and accessibility of the law difficult not only for the ordinary person and law enforcement but also for lawyers and judges;
- in particular, broadly worded forfeiture powers, such as in the Dangerous Drugs Ordinance or the Criminal Procedure Ordinance, belie the narrow interpretation long given by leading case law;⁸³
- having four separate ordinances (DTROPO, OSCO, UNATMO, and PBO) for confiscating proceeds of crime is repetitive and contributes to possible confusion;
- the confiscation schemes in the DTROPO and OSCO are extremely technical and complicated;
- magistrates generally have no powers to order the confiscation or forfeiture of proceeds of crime;
- the DTROPO and OSCO do not adequately address the issue of third party interests and claims to property. In particular, the laws do not provide for an innocent owner defence;⁸⁴ they also do not provide for victims of crime to be paid out of confiscated funds;
- the test for compensation is different in the DTROPO, OSCO and UNATMO; the requirement of showing a “serious default” in the former two ordinances is a very high threshold test;
- the DTROPO and OSCO confiscation of proceeds of crime schemes only apply if criminal proceedings can be instituted against an accused person; the schemes do not apply if the offender cannot be identified or is known to have died and a warrant may no longer be issued for his arrest;
- the DTROPO and OSCO only apply to a select number of criminal offences deemed ‘serious’; the confiscation provisions do not apply to all indictable offences;

⁸³ The leading case is *R v Cuthbertson* (1980) 2 Cr App R (S) 214 (HL). The House of Lords held that s 27 of the Misuse of Drugs Act, 1971, which allowed a court to order the forfeiture of “anything shown to be related to an offence” under the Act, was to be construed very narrowly. This meant that only tangible property and not proceeds of the offence could be forfeited in this and similarly-worded provisions.

⁸⁴ It should be noted that although these laws do not set out third party protections, in practice, where there is a victim who can prove title to the restrained property, the Department of Justice is in principle prepared to discharge the restraint order to permit the victim to re-possess the property.

Hong Kong Civil Forfeiture Project

- on the other hand, provisions found in disparate criminal ordinances such as the OSCO, DTROPO, Gambling Ordinance, and Crimes Ordinance allow for forfeiture or confiscation on a civil standard of proof for those dealing in property without the need for a separate charge or conviction; the isolated and ad hoc nature of these provisions makes the imposition of uniform standards difficult and presents challenges to transparency;
- the disparate forfeiture provisions often do not provide adequately for third-party interests as many of them require mandatory forfeiture;
- the traditional civil process is not well suited for pursuing the aim of confiscating or forfeiting crime-tainted property in and outside of Hong Kong.

Notwithstanding this list of anomalies and shortcomings, it is still necessary to consider the question of what impact the existing regime has had on the levels of organized and enterprise crime activities in Hong Kong. This information will help to shed light on the types and extent of current criminal activities and may reveal patterns or trends that will help in predicting future criminal activity. A crime impact study will require accessing and gathering various kinds of criminological data and performance statistics concerning law enforcement and prosecutions. It is our aim to undertake such a study to some extent during the course of the project.

For now, it is hypothesized that the prevalence of organized and enterprise crimes within and passing through Hong Kong is still sufficiently high to warrant the exploration of new opportunities and initiatives to prevent and deter such crimes. The delays and obstacles seen with the existing civil process indicate that it is not a viable means for recovering proceeds of crime. With the limitations of the criminal law model, it appears that new opportunities for interdicting crime-tainted property can be realised with a civil forfeiture regime.

28. *What problems or limitations are associated with the scattered provisions for confiscation and forfeiture in Hong Kong's laws?*
29. *Are opportunities being missed for interdicting crime-tainted property?*
30. *What other shortcomings can be seen with the existing regime?*
31. *If a civil forfeiture regime were adopted in Hong Kong, what reforms if any would need to be made to the existing criminal confiscation laws?*
32. *What kinds of evidence should be permissible in civil forfeiture cases?*

5. ISSUES INVOLVED IN THE ADOPTION OF A CIVIL FORFEITURE REGIME IN HONG KONG

Civil forfeiture has its early roots in admiralty law. This was a tool used by American and English courts when foreign ships collided with domestic ones in international waters. Since those responsible did not always reside or have assets in the jurisdiction, it was easier to hold the ship or cargo accountable *in rem*. Jurisdiction was taken over property, not persons. In early admiralty caselaw the innocence of the ship owner was found to be irrelevant.⁸⁵ This early history continues today in Hong Kong with *in rem* admiralty proceedings taken against ships.

In addition to *in rem* admiralty proceedings, the design of a civil forfeiture regime in Hong Kong will also need to have regard to the experiences of overseas countries which have adopted such regimes. The following sections identify and discuss some of the key issues in international civil forfeiture regimes.

33. *What is the historical context of recent laws on civil forfeiture? Can broad in rem civil forfeiture laws be legitimate today given the historical illegitimacy of such laws?*
34. *Why has modern civil forfeiture laws appeared in only some countries (mostly if not all common law countries) and not others? How did the legislative proposals in these countries acquire their legitimacy?*

5.1. Scope of Property Subject to Forfeiture

There are three main issues in deciding the scope of the property subject to forfeiture: (a) to what offences will the scheme apply; (b) what forms of property and interest in property will be subject to forfeiture; (c) what property-offence relationships are to be targeted. These three issues are discussed separately below.

5.1.1. Applicable Offences

As described above, the current Hong Kong regime provides for confiscation of proceeds of drug trafficking and proceeds of a list of serious offences.

Most civil forfeiture regimes are applied to all criminal offences whether committed within or outside the country's territory. The UK's Proceeds of Crime Act 2002, defines "unlawful conduct" as conduct which is "unlawful under the criminal law" of the country in which it occurs.⁸⁶ If the offence occurred outside the UK, the conduct in question, if it had occurred in the UK, must also be unlawful under UK law to come within the meaning of "unlawful conduct". This is known as a double criminality requirement.

⁸⁵ M. Michelle Gallant, *Money Laundering and the Proceeds of Crime: Civil Remedies and Economic Crime* (London: Edward Elgar Publications, 2005), p 61.

⁸⁶ Proceeds of Crime Act 2002 (UK), s 241.

Hong Kong Civil Forfeiture Project

The Ontario and Manitoba Acts also apply broadly to all offences (whether criminal or quasi-criminal) under federal or provincial law.⁸⁷ For offences occurring outside of Canada, a double criminality requirement is also imposed. Both Acts apply to offences which occurred prior to their coming into force.

35. *Should the new regime apply to all criminal and quasi-criminal offences? Should it apply to only the most serious offences? If not, to what offences should it apply? For example, should the regime apply to offences such as tax evasion and insider dealing?*
36. *Should the new regime apply to crimes committed abroad, and if so should a double criminality requirement apply?*
37. *Should the new regime apply retrospectively in the sense that it would cover offences occurring prior to the coming into force of the new law?*

5.1.2. Forms of Property

Under the DTROPO and OSCO, the definition of ‘proceeds’ is very broad as it includes not only moveable and immovable property but also “pecuniary advantages”.⁸⁸ The House of Lords has held that a pecuniary advantage includes the duty which ought to have been paid on goods entering the country even if the shipped goods were destroyed before reaching land.⁸⁹ Under these confiscation schemes, it is feasible to have a broad definition of proceeds because the order ultimately made is an *in personam* order (similar to a fine) for the value of the proceeds.

With an *in rem* scheme, however, there must be an identifiable property right or interest which can be subject to forfeiture. A pecuniary advantage, such as duty owing, generally does not assume the form of a property right or interest. In this respect, it may be necessary to confine the meaning of ‘proceeds’ and ‘property’ to recognized private law property rights and interests. The definition of ‘property’ in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) may be adequate. This definition is as follows:

“property” includes –

- (a) money, goods, choses in action and land; and
- (b) obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as defined in paragraph (a) of this definition;

38. *Is it necessary for the new regime to have a definition of forfeitable property that is broader than the definition in s 3 of the Interpretation and General Clauses Ordinance (Cap 1)?*
39. *Query whether the reference to ‘obligations’ in paragraph (b) of the s 3 definition is applicable?*

⁸⁷ See Ontario’s Civil Remedies Act, s 2 and Manitoba’s Criminal Property Forfeiture Act, s 1.

⁸⁸ See DTROPO, s 4(1); OSCO, s 2(6) – (7).

⁸⁹ See *R v Smith (David)* [2002] 1 Cr App R 35 (HL).

5.1.3. *Categories of Crime-Tainted Property*

Contraband, proceeds, and instruments are the three most common forms of forfeitable property. Other forms of crime-tainted property have also been proscribed, particularly in the US

5.1.3.1. CONTRABAND

Contraband is property for which possession itself constitutes a crime, such as smuggled goods, dangerous drugs, and unlicensed firearms. The protection of the public justifies the government's seizure and forfeiture. This type of forfeiture is usually carried out administratively by executive authorities or by civil forfeiture in the courts.

As seen from Appendix III, Hong Kong already has many forfeiture powers for contraband in specific legislation. These powers are generally uncontroversial since claims by third parties to the property are unwarranted. Given the adequacy of provisions by existing laws, it is probably unnecessary for a new civil forfeiture regime to cater specifically to this kind of property. Alternatively, the definition of 'instruments of crime' may often be broad enough to cover this form of crime-tainted property.

40. *Should the new regime cater specifically to contraband property?*

5.1.3.2. PROFITS OR PROCEEDS FROM ILLEGAL ACTIVITY

The rationale for forfeiting proceeds of crime is not to punish a person but rather to give effect to the equitable doctrine that a person should not be allowed to benefit from his or her own wrongdoing. In theory, forfeiture is a means for the state to correct the unjust enrichment of a person who was enriched by having breached the criminal laws of that country. The question of whether principles of proportional punishment are relevant to the amount forfeited frequently arose in the US prior to the reforms in CAFRA. Many civil forfeiture cases were litigated on the grounds of being unconstitutionally excessive (the Eighth Amendment includes an Excessive Fines Clause). CAFRA now allows claimants to make submissions regarding the proportionality of forfeiture.⁹⁰

Countries define proceeds of crime in different ways. Some examples include:

Hong Kong's OSCO (s 2)

(6) For the purposes of this Ordinance-

(a) a person's proceeds of an offence are-

(i) any payments or other rewards received by him at any time (whether before or after 2 December 1994) in connection with the commission of that offence;

(ii) any property derived or realised, directly or indirectly, by him from any of the payments or other rewards; and

⁹⁰ CAFRA, s 2(g)(1).

Hong Kong Civil Forfeiture Project

- (iii) any pecuniary advantage obtained in connection with the commission of that offence;
- (b) the value of the person's proceeds of that offence is the aggregate of the values of-
 - (i) the payments or other rewards;
 - (ii) that property; and
 - (iii) that pecuniary advantage.

UK's Proceeds of Crime Act 2002 (s 242)

"Property obtained through unlawful conduct"

- (1) A person obtains property through unlawful conduct (whether his own conduct or another's) if he obtains property by or in return for the conduct.
- (2) In deciding whether any property was obtained through unlawful conduct-
 - (a) it is immaterial whether or not any money, goods or services were provided in order to put the person in question in a position to carry out the conduct,
 - (b) it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct.

Ontario's Remedies for Organized Crime and Other Unlawful Activities Act, 2001 (s 2):

"Proceeds of unlawful activity" means property acquired, directly or indirectly, in whole or in part, as a result of unlawful activity, whether the property was acquired before or after this Act came into force, but does not include proceeds of a contract for recounting crime within the meaning of the *Prohibited Profiting from Recounting Crimes Act, 2002*.⁹¹

These definitions are broad enough to allow government to trace the proceeds of crime from one item of property to another. It follows that forfeiture will capture both increases and decreases in value. Is it possible for civil forfeiture regimes to capture the shortfall where there has been a decrease in value of the traced asset? Take the example of the thief who steals \$100,000 and uses the money to purchase shares. At the time of forfeiture, the shares are worth only \$30,000. Is there any legitimate way to try to capture back the shortfall of \$70,000, for example, from the personal assets of the perpetrator?

A related problem is that of commingling, ie where a traced asset has been acquired with legitimate and illegitimate funds or, in the case of a bank account, consists of a mixture of both types of funds. The definitions do not provide a ready answer to this issue and most civil forfeiture regimes will separately provide for tracing rules which enable the forfeiture of the entire amount of illegitimate property. Such rules ensure that forfeiture is not frustrated by the wrongdoers' attempts to obfuscate the criminal origins of the property. The US has used the doctrine of 'substitute property' to address these types of problems.

⁹¹ "proceeds of a contract for recounting crime" means,

- (a) money or other consideration paid under a contract for recounting crime to a person convicted of or charged with a designated crime or the agent of a person convicted of or charged with a designated crime, whether the money or other consideration is paid before or after this Act came into force, or
- (b) property acquired, directly or indirectly, in whole or in part, from money or other consideration referred to in clause (a), whether the property was acquired before or after this Act came into force

Another related problem is whether forfeiture should be applied to the net gains from crime (ie the profits) or to the gross gains which would include any expenditure made to gain the proceeds. For example, the US regime does not distinguish between proceeds and profits of crime for unlawful activities.⁹² This means that the gross profits (net profits + expenses) are subject to forfeiture. The UK definition is to the same effect. Some argue this turns recovery into a punitive measure, thereby rendering the civil standard problematic.⁹³ One response to this argument is that forfeiture is different from a tax. Tax regimes allow deductions for business expenses to encourage legitimate business operations; the same however cannot be said about criminal enterprises. Nonetheless, this can become controversial when the value of the proceeds sought for forfeiture is significantly greater than the value of property taken through crime.

The UK's Proceeds of Crime Act 2002 establishes a minimum financial threshold that restricts forfeiture to property whose value exceeds a prescribed amount (currently set at £10,000).⁹⁴ This ensures that resources are diverted to the most significant cases as indicated by the amount or value of the property to be forfeited.

41. *How can the offence-property relationship be defined to ensure the maximum degree of tracing of proceeds of crime?*
42. *Are there any viable ideas for capturing back diminutions in value? Could such ideas be legitimately applied to dissipated property in general?*
43. *What specific tracing rules, particularly for mixed funds, will need to be provided for?*
44. *Should forfeiture apply to the gross or net gains from crime?*
45. *Should there be a minimum financial threshold before a case for forfeiture can be brought?*

5.1.3.3. TOOLS OR INSTRUMENTS USED IN THE COMMISSION OF A CRIME

Forfeiture of property which has been used or is likely to be used in the commission of a crime is done for punitive, deterrent and preventative purposes. Unlike proceeds of crime, it is not done to further any equitable principle. Given the punitive nature of this kind of forfeiture, it is necessary to keep in mind principles of proportionate punishment, particularly if the individual offender has been or will be separately punished.

The Ontario and Manitoba Acts define “instrument of unlawful activity” as follows: “property that is likely to be used to engage in unlawful activity that, in turn, would be likely to or is intended to result in the acquisition of other property or in serious bodily harm to any person”.⁹⁵ One sees from this definition that it does not apply to all property likely to be used for any offence, but only if the circumstances are such that the commission of the offence is likely to or intended to result in the acquisition of property or in serious bodily harm to

⁹² Gallant, above n 85, p 86.

⁹³ Gallant, *ibid.* p 104.

⁹⁴ Proceeds of Crime Act 2002 (UK), s 287.

⁹⁵ Ontario's Civil Remedies Act, s 7; Manitoba's Criminal Property Forfeiture Act, s 1.

Hong Kong Civil Forfeiture Project

another. The UK Proceeds of Crime Act 2002 does not provide for the forfeiture of instruments of crime.

The forfeiture of instruments is controversial. The property involved is not inherently illegal nor will it often be predisposed for crime. There will often be legitimate third-party claims to the use or ownership of the property such as from the family members of the offender or from an innocent purchaser. Even the offender himself may have a legitimate claim to the use of the property, eg the use of a vehicle for getting to work. These reasons explain why existing laws, such as s 102 of the Criminal Procedure Ordinance (Cap 221), categorically excludes certain types of property from forfeiture. In the Canadian Criminal Code, criminal forfeiture of offence-related property can be applied to dwelling houses but before the court orders such forfeiture it is obligated to consider the impact of forfeiture on immediate family members who reside in the house.⁹⁶

46. *Should the new law provide for the forfeiture of instruments of crime? Is the existing regime already adequate?*
47. *If it should so provide, how should instruments of crime be defined? In particular, should it be based on past or future criminal activity?*
48. *If the definition is based on future criminal activity, is the test of ‘likelihood’ such as in the Ontario and Manitoba Acts a sufficient threshold?*
49. *Should there be any categorical exclusion of certain types of property from the definition of ‘instruments’?*
50. *What safeguards will need to be in place to protect adequately third parties who claim an interest in the property?*

5.1.3.4. OTHER FORMS OF CRIME-TAINTED PROPERTY

The US introduced a very broad scope of property subject to forfeiture for persons identified as “terrorists” under the PATRIOT Act. “All assets” of a person identified as a terrorist on a balance of probabilities are subject to forfeiture. There is no requirement of a substantial connection between the property and an offence, or that the property is in any way involved in an offence. This also anticipates forfeiture of assets that are destined for terrorist purposes, giving jurisdiction over prospective offences. When coupled with the UN mechanism of listing the names of suspected terrorists and terrorist entities, the forfeiture power can be quite draconian. Hong Kong has already adopted a similar scheme in its UNATMO.

Unlike the other categories of crime-tainted property, this method looks for a person-property relationship rather than an offence-property relationship. This means that on the civil standard of proof, and in the absence of a charge or conviction, one is liable to have all of one’s assets taken. When confined to the terrorist context, the scheme appears justifiable, although not without controversy. But should its application be limited to only proscribed terrorists? Individuals who lead a criminal lifestyle or have leadership roles in criminal

⁹⁶ Criminal Code, s 490.41(4).

enterprises might conceivably be treated in the same manner. Overseas civil forfeiture regimes have yet to go this far due to concerns, for instance, about the possibility of incorrect identification.

Another unique form of crime-tainted property is the already mentioned ‘substitute property’ category found in US law.

51. *Is it justifiable to forfeit all of the property of a certain class of persons other than proscribed terrorists or terrorist entities?*
52. *Is the US doctrine of ‘substitute property’ a feasible idea to adopt or at least explore further?*

5.2. Preservation of Property for Forfeiture

A preservation stage is contemplated in most civil regimes. In the UK under the 2002 reforms, upon the making of a recovery order, title to the property vests immediately in an appointed trustee.⁹⁷ The Act also allows for the pre-trial restraint of property pending the determination of its criminal origin.

Apart from a government agency to enforce the civil powers, it is useful to consider whether another government agency is required to manage the property. This was an issue initially underestimated by legislators. This is unlike the usual criminal law regime; there, confiscation of discrete objects can be managed by the police themselves.

Canada, at the federal level, has the Seized Property Management Body for criminal forfeiture. The need for such a body came about after the RCMP seized a ski resort in Québec, which was suspected of being owned by drug traffickers. The resort had to be operated on an interim basis while the Crown sought forfeiture. When forfeiture was not granted, the government had to pay massive damages because the resort had lost money during the intervening period. At the time of seizure, the market value of the resort was approximately \$4.5 million. However, the government faced creditors whose claims totaled \$2.5 million. It also had difficulty selling the property as land values in the area declined following the seizure.⁹⁸

Lessons can therefore be learned from overseas experiences. Consider whether it is practical and beneficial to manage property during an interim period, particularly if the property to be forfeited is a business. A “receiver” may encounter hostile employees or find that the business operates at a loss when the laundered proceeds no longer move through it. Further, the receiver’s expenses would be paid out of the property itself. While these issues may raise questions more at the enforcement and operational level, they are nevertheless of importance at the law reform stage as well.

There are the further issues of whether individuals will be allowed to access the preserved property pending forfeiture, and whether there should be compensation for losses incurred when ultimately forfeiture is refused. Concerning the first issue, existing criminal

⁹⁷ Proceeds of Crime Act 2002 (UK), s 266(2).

⁹⁸ Thomas Gabor, *Assessing the Effectiveness of Organized Crime Control Strategies: A Review of the Literature* (Ottawa: Department of Justice Canada, 2003), section 4.5.

Hong Kong Civil Forfeiture Project

confiscation laws allow for applications to be made to access restrained or charged property for purposes of paying for reasonable living and legal expenses. Should the same access be allowed in a civil forfeiture regime, as in CAFRA at s 2(f), where a claimant may secure the release of seized property if substantial hardship would otherwise ensue? The presumption of innocence is not directly applicable in civil regimes, although the property rights at stake can be profound. Further, the lower standard of proof invites protections for persons whose property is at issue. That said, once property is released for living and legal expenses, it is no longer possible to make the offender accountable for this benefit. This is because the *in rem* system cannot capture back dissipated property. This is unlike the existing confiscation schemes which use an *in personam* order to capture back the full amount of the benefit. In the US under the pre-2000 regime, lawyers could not get paid out of seized funds.⁹⁹ CAFRA now provides a small space for attorney compensation.¹⁰⁰

As part of CAFRA, compensation for damage to seized property is now provided for.¹⁰¹ This is new, since previously the government could not be held liable for damages to the property while in government custody. CAFRA also provides for the release of seized property.¹⁰² In Hong Kong, as mentioned above, ss 27 of the DTROPO and 29 of OSCO allow for compensation for improper cases of restraint, but only where there has been a “serious default” in the investigation or seizure, and the defendant has suffered a loss.

Finally, there is an issue of whether the police (or a new enforcement agency) should be given a search and seizure power for tangible property together with a restraint and charging power. Currently, the DTROPO and OSCO provide law enforcement with only the restraint and charging powers. “Authorized officers” and the Secretary for Justice are also given special investigative powers under ss 3, 4, 5 of the OSCO, and under ss 20 to 23 of the DTROPO. A related question is what levels of court should be entitled to authorize such preservation orders.

53. *What would be an appropriate body for the management of preserved property in Hong Kong? What has been the experience of receivers to date?*
54. *Should there be access to preserved property for paying reasonable living and legal expenses? If so, who should be entitled and what should be the test?*
55. *Should compensation be given for losses incurred in cases which ultimately fail to succeed? If so, what should be the test for compensation?*
56. *Should Hong Kong provide for a specific search and seizure power alongside restraint and charging powers?*
57. *Should the District Court be involved in ordering the preservation of property?*

⁹⁹ *United States v Monsanto*, (1989) 491 US 600 (1989).

¹⁰⁰ CAFRA, s 4.

¹⁰¹ CAFRA, s 3.

¹⁰² CAFRA, s 2(5)(f)(1).

5.3. Administrative or Judicial Forfeiture

Most confiscation and forfeiture in the existing regime is done by court order. This is equally true of most international civil forfeiture regimes. However, the US model has a system of administrative forfeiture for personal property valued at USD500,000 or less and monetary instruments including currency of any amount. The process begins as an administrative one but can become a judicial one where the claimant files a claim. Administrative forfeitures are often used by the customs authorities in the US. The process is described in greater detail below in section 5, Burden and Standard of Proof for Forfeiture.

58. *Should any form of administrative forfeiture be adopted in the new regime?*

5.4. Test for Forfeiture

The primary issue in considering the test for forfeiture is whether it should be mandatory or discretionary. While the UK Proceeds of Crime Act 2002 provides that the court “must make a recovery order” if “satisfied that any property is recoverable”, it also provides at s 266(3) what appears to be a discretionary qualifier:

- (3) But the court may not make in a recovery order –
- (a) any provision in respect of any recoverable property if each of the conditions in subsection (4)...is met and it would not be just and equitable to do so, or
 - (b) any provision which is incompatible with any of the Convention rights (within the meaning of the Human Rights Act 1998).

Subsection (4) provides a set of condition which allow for relief for innocent third parties who obtain the recoverable property in good faith.

Similarly, the Ontario Act provides that the court “shall, subject to subsection (3) and except where it would clearly not be in the interests of justice, make an order forfeiting property” in respect of both instruments and proceeds of crime.¹⁰³ Subsection (3) provides for exceptions for ‘legitimate’ or ‘responsible’ owners.

59. *In framing the test for forfeiture, should it follow the formulation seen in Ontario and the UK of having a mandatory power but with limited exceptions to give effect to legitimate third party interests?*

60. *Should there be a human rights clause similar to s 266(3)(b) of the UK Act?*

5.5. Burden and Standard of Proof for Forfeiture

Normally two standards of proof exist: proof “beyond a reasonable doubt” for criminal proceedings, and proof “on a balance of probabilities” for civil proceedings. Some jurisdictions have introduced lesser or stronger standards than balance of probabilities for civil forfeiture, but they all fall short of the criminal standard. This has been criticized as blurring the distinction between the civil and criminal regimes:

¹⁰³ Ontario’s Civil Remedies Act, ss 3 & 8.

Hong Kong Civil Forfeiture Project

[C]riminal allegations converge with the civil standard of proof. Criminal allegations clearly form the basis of the civil actions. This fusion is troublesome because it is tantamount to the determination of criminal liability on the basis of the legal standard that it is more likely than not that an individual committed the alleged crime. The criminal standard of proof ordinarily governs any determination of criminal responsibility. And unlike confiscation law, with the civil approach there has been no prior assessment of criminal liability through a criminal prosecution.¹⁰⁴

New York and Florida have placed the burden on the government to prove that property seized was subject to forfeiture by “clear and convincing evidence,”¹⁰⁵ the highest standard in US civil law.

In the UK’s Proceeds of Crime Act 2002, the civil standard of proof, a balance of probabilities, governs proceedings.¹⁰⁶ The state does not have to prove that the property in question is connected to a specific offence; it suffices to show that it derives from some kind of unlawful conduct.

Manitoba and Ontario also use the balance of probabilities standard to justify forfeiture. Controversially, however, they both provide that “proof that a person was...found not criminally responsible on account of a mental disorder in respect of an offence is proof that the person committed the offence.”¹⁰⁷

In the US, prior to CAFRA, civil forfeiture began with seizure of the *res* based on “probable cause” that the property was linked to an offence. Probable cause was more than mere suspicion but less than *prima facie* proof.¹⁰⁸ The forfeiture process began with the seizure of property at which time interested parties were given notice. If no objection was filed, the property was forfeited (either administratively or summarily). If an objection was filed, a judicial forfeiture proceeding would commence. The action was then “perfected” through civil proceedings in which the state had to establish that the property was linked to an offence on a “preponderance of the evidence” (a higher standard). Equally therefore, the burden of proof was on the defendant to show, on a preponderance of the evidence, that the property was *not* liable to forfeiture.

With CAFRA, although property can still be seized prior to notice being given, and the process is still “perfected” through a judicial process, the burden of proof has been raised from “probable grounds” for the government to prove (switching to balance of probabilities for claimant) to: “the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture”.¹⁰⁹

¹⁰⁴ Gallant, above n 85, p 115.

¹⁰⁵ NY Civ Prac L & R Section 1311(3)(McKinney Supp 1994); *Department of Law Enforcement v Real Property*, 588 So2d 957, 967 (Fl 1991).

¹⁰⁶ Proceeds of Crime Act 2002 (UK), s 241.

¹⁰⁷ Ontario’s Civil Remedies Act, s 17; Manitoba’s Criminal Property Forfeiture Act, s 13(b).

¹⁰⁸ Gallant, above n 85, p 84.

¹⁰⁹ CAFRA, s 2(c)(1).

If the proceeding involves something that facilitated an offence, the state must now also demonstrate a substantial connection between the property and the offence. This substantial connection test is also part of the 2000 reforms.¹¹⁰

The Supreme Court of Canada in *Martineau*¹¹¹ held that forfeiture proceedings (here, considered as part of sentencing after a criminal conviction) are not equivalent to penal proceedings, on the following reasoning:

[45] This process [of forfeiture] thus has little in common with penal proceedings. No one is charged in the context of an ascertained forfeiture. No information is laid against anyone. No one is arrested. No one is summoned to appear before a court of criminal jurisdiction. No criminal record will result from the proceedings. At worst, once the administrative proceeding is complete and all appeals exhausted, the notice of ascertained forfeiture is upheld and the person liable to pay still refuses to do so, he or she risks being forced to pay by way of a civil action.

...

[63] In addition, forfeiture is an *in rem* proceeding in which the subject is the thing itself. In such a proceeding, the guilt or innocence of the owner of the forfeited property is irrelevant...

This distinction between the criminal and subsequent (quasi-civil) sentencing provides a useful contrast to a purely civil regime. In recognition of the general controversy over whether civil forfeiture can be punitive in nature, s 16 of CAFRA explicitly provides for encouraging the use of criminal forfeiture as an alternative to civil forfeiture.¹¹²

61. *What standard and burden of proof would be appropriate for Hong Kong?*
62. *Should there be different standards for seizure or restraint and subsequent forfeiture?*
63. *What burdens should be placed on claimants seeking to claim an interest in property?*

5.6. Protection of Third Party Interests

Innocent third parties can include joint tenants, business partners, lien holders, and purchasers who have not been informed that a property is subject to forfeiture proceedings. The 2002 UK Act protects the reliance interest of innocent third parties and the proprietary interests of victims.¹¹³ US law now allows for an “Innocent Owner Defense”, whereby a claimant has the burden of proving that he is an innocent owner “on the preponderance of the evidence”. This includes having made good faith attempts at revoking permission for use of

¹¹⁰ CAFRA, s 2(c)(3).

¹¹¹ *Martineau v MNR* [2004] SCC 81.

¹¹² In August 2001, Washington state considered a bill (Senate Bill 5935) that would bar government forfeiture and sale of a person’s property unless that person had been convicted of a crime. The Bill also directed that proceeds from seized property be used exclusively for drug treatment. Oregon and Utah approved similar measures in 2000. From ACLU Press Release, “WA Bill Would Bar Police Seizure of Property Without a Conviction”, 2/8/2001. Accessed at: <http://www.aclu.org/police/forfeit/14571prs20010208.html>.

¹¹³ Proceeds of Crime Act 2002 (UK), s 281.

Hong Kong Civil Forfeiture Project

the property or taking “reasonable actions in consultation with a law enforcement agency” to discourage illegal use of the property.¹¹⁴ These steps do not have to put the claimant in danger.¹¹⁵

It has already been seen that most civil forfeiture regimes provide discretionary relief to third parties at both the preservation and forfeiture stages. By recognizing third party interests, these schemes also confer procedural rights of notice, defence and appeal on third parties. Most schemes impose a burden on the claimant to prove their innocence or to make out a case for compensation. Both the imposition of the burden and the test for innocence may be subjects of some debate.

In Hong Kong, these issues have a constitutional dimension because Article 105 of the Basic Law protects private property rights in these terms:

The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.

Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay.

The ownership of enterprises and the investments from outside the Region shall be protected by law.

The increasing body of jurisprudence on Article 105 will need to be studied carefully to assess what entitlements third parties should have under a civil forfeiture scheme and the extent to which burdens may be imposed on property interest holders to demonstrate their innocence.

64. *When should third parties be entitled to retain an interest in, or access, the property? What test of ‘innocence’ should be adopted?*
65. *When if ever should non-innocent third party interests be recognized?*
66. *Is imposing a civil burden on third parties to prove their claim inconsistent with Article 105 of the Basic Law?*

5.7. Procedural Issues

5.7.1. Notice and Discovery

Under US law, written notice is required no later than 60 days after administrative forfeiture, but no notice is required if within this 60-day period the Government files a civil judicial forfeiture action.¹¹⁶ This is a longer notice period than existed prior to the 2000

¹¹⁴ Compare this with some earlier US cases where innocence of the owner had no place. In *Bennis v Michigan* [1993] 516 US 442, the US Supreme Court upheld the forfeiture of a car owned by a woman who had no knowledge that her husband used the car to solicit a prostitute.

¹¹⁵ CAFRA, s 2(d)(2)(B)(i) and (ii).

¹¹⁶ CAFRA, s 2(a)(1)(A)(i-ii).

reforms. But should the norm be that notice be given prior to forfeiture, particularly, where it involves a court, and, if so, how much notice should be given?

With CAFRA, the US has introduced the concept of fugitive disentitlement to civil forfeiture.¹¹⁷ This means that one must return to the jurisdiction in order to defend property interests.

Once an intention to defend is indicated by the claimant, the next issue is whether the usual discovery process in civil proceedings should apply. Here, it will be beneficial to learn from the experiences and laws of other countries. Another issue is what limitation period if any should apply to the bringing of civil forfeiture cases.

67. *Should notice be given before or after forfeiture? What entitlements to challenge the forfeiture decision should be provided for in both situations?*
68. *What is an appropriate notice period?*
69. *Who should be given notice? To what extent should the court become involved in determining adequate and sufficient notice has been given to all interested persons? Should it be made a prerequisite to forfeiture?*
70. *Should the normal discovery processes apply in a civil forfeiture case?*
71. *Should there be a statute of limitations for civil asset forfeiture?*

5.7.2. Forfeiture Hearing, Admissibility Rules, and Appeals

The giving of notice to interested parties contemplates that there will be contested forfeiture hearings before a court. The right to institute legal proceedings in the courts against the acts of the executive authorities is guaranteed in Article 35 of the Basic Law. The immediate issue is which level of court can and should hear such proceedings. Should the value of the property to be forfeited determine the forum? Should there be jury trials for forfeiture proceedings?

A related issue is the rules of evidence and admissibility which should apply to such proceedings, including the restrictions on hearsay evidence. While Canada still adopts a rigid hearsay rule in civil proceedings, there has been substantial reform of hearsay in both English and Hong Kong civil proceedings. Courts in Hong Kong have already applied the civil hearsay rules to existing civil forfeiture proceedings.¹¹⁸ Presumably this practice will continue.

Finally, there is the issue of appeals. Depending on which level of court the proceedings are brought, the avenues of appeal should probably be the same as those available in existing civil proceedings.

72. *Which level(s) of court should be engaged for contested forfeiture hearings?*

¹¹⁷ 28 USC Sec 2466.

¹¹⁸ See cases discussed at n 65 above.

Hong Kong Civil Forfeiture Project

73. *How will hearings be conducted and what rules of evidence will apply?*
74. *What avenues of appeal should be available to the parties? When will leave to appeal be required?*

5.7.3. Legal Representation

In CAFRA, the right to counsel for indigent claimants was added.¹¹⁹ This was partly in response to criticisms by organizations such as the American Civil Liberties Union (ACLU), which has stated:

Since the civil forfeiture system can be just as punitive as the criminal system, it is essential that those citizens exposed to either system receive legal counsel to protect their rights and liberties... this provision is absolutely essential in order to insure that individuals can avail themselves of the other reforms contained in the Act that are designed to protect their property rights and liberties.¹²⁰

The Basic Law also guarantees rights to confidential legal advice and legal representation in the courts in Article 35(1).¹²¹ However the right to government funded legal representation in Article 11(2)(d) of the Hong Kong Bill of Rights does not apply as this right is conferred on only those defending a criminal charge. In a civil regime, while an interested person may be able to access seized or restrained property for purposes of paying for reasonable legal expenses, this may impose limits on one's choice of legal advisor. In addition, if the property has not been seized or restrained, the claimant may be put in a difficult position of having to liquidate immovable property or to go without legal representation. An important question to consider is whether property owners in such situations will be entitled to legal aid for forfeiture hearings.

75. *What measures should be taken to ensure that a claimant who wishes to have competent legal representation at the hearing is able to obtain such representation?*

5.8. Creation of a New Government Agency?

Other jurisdictions that have enacted civil forfeiture regimes have also created a government agency to enforce the new laws. These offices are often comprised of personnel with a diversity of skills including legal knowledge and advocacy skills, financial investigation skills, forensic accounting experience, and normal police investigatory skills.

¹¹⁹ CAFRA, s 4(b)(1)(A).

¹²⁰ See Statement of Nadine Strossen, President, "American Civil Liberties Union on The Civil Asset Forfeiture Reform Act Before the Committee on the Judiciary of the United States House of Representatives", 11 June 1997, which can be found at www.aclu.org/drugpolicy/forfeit/10837leg19970611.html.

¹²¹ Article 35 provides, *inter alia*, that "Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interest or for representation in the courts, and to judicial remedies."

Centre for Comparative and Public Law

In Ontario, the Civil Remedies for Illicit Activities Office (CRIA) of the Ministry of the Attorney General is responsible for enforcing its civil forfeiture legislation. The CRIA has successfully argued all of its forfeiture cases to date.¹²² CRIA was a newly created office separate from the Ministry of the Attorney General's Crown Law Office-Criminal and other local Crown Attorney's Offices.

The US Department of Justice's Asset Forfeiture Program enforces CAFRA.

In the UK, a centralized agency called the Assets Recovery Agency manages and coordinates the civil powers under the Proceeds of Crime Act 2002.¹²³

It is worth investigating whether a separate agency will be needed in Hong Kong which, unlike the jurisdictions mentioned above, has a single police force in a smaller geographical area.

76. *What needs to be done or created to administer a new civil forfeiture regime?*
77. *Should a new agency be created? Who will staff it?*
78. *What would be the relationship between this new agency and the existing agencies?*
79. *To what extent is it necessary to develop 'Chinese walls' between the new civil forfeiture office and existing offices which handle criminal investigation and prosecution?*

5.9. New Investigative Powers

Part VIII of the UK Proceeds of Crime Act 2002 provides a number of investigative orders to assist in investigations into the proceeds of crime: production orders; search and seizure warrants; customer information orders; account monitoring orders; disclosure orders. If the order is sought for a civil recovery investigation, it must be obtained from a High Court judge; otherwise, a Crown Court judge can grant orders pertaining to confiscation investigations or money laundering investigations. These orders can be simply defined as follows:

- Production orders:
 - An order to produce any thing to an officer; can include access to premises and can impinge on client confidentiality agreements (except for legal privilege, generally).
- Search and seizure warrants:
 - Permission to enter any property and search and seize anything which may be material to the investigation.

¹²² Ministry of the Attorney General Press Release, "Hamilton crack house gone for good", 28 March 2006, accessed at <http://ogov.newswire.ca/Ontario>.

¹²³ The Agency's scope of powers are set out in ss 1-5 of the Proceeds of Crime Act 2002 (UK).

Hong Kong Civil Forfeiture Project

- Customer information orders:
 - An order to a financial institution to provide general information requested about a customer.
- Account monitoring orders:
 - An order to a financial institution that it provide account information about a customer.
- Disclosure orders:
 - An order made by the Director of the Assets Recovery Agency to give to any person, whom the Director believes has relevant information, notice to answer questions or provide information. This can also more generally be an order requiring respondents, including third parties, to disclose their worldwide assets.

Some orders are more intrusive than others and require a higher threshold to satisfy the judge.

The UK Secretary of State issued a Code of Practice to provide guidance on how these investigative powers should be used. Note that these orders may be exercised in cooperation with foreign jurisdictions' investigations.

80. *What new investigatory powers should be given to the State to facilitate the enforcement of civil forfeiture laws, e.g. powers to seize and restrain property? Powers to access bank accounts?*
81. *Can any new powers legitimately be based on only executive authorization?*
82. *Are existing powers adequate?*
83. *Should a Code of Practice be included as part of any legal reform?*

5.10. Relationship with Existing Agencies and Criminal Confiscation

The creation of a new enforcement agency or office will likely give rise to many issues concerning its proper relationship with existing law enforcement agencies. To a certain extent the nature of the relationship will depend on whether the new agency will also assume responsibility for criminal confiscation investigations. However, it is more likely that existing agencies will continue with criminal confiscation while the new agency will carry out civil forfeiture investigations. Naturally there is a high probability that the cases investigated by the various agencies will often be the same and this may lead to duplicated efforts and even perhaps conflicts. Again, international experiences will be informative. Protocols and understandings will need to be adopted between the various agencies to improve co-operation, co-ordination and communication.

There will also be a strong desire to share information and intelligence between agencies. However, the agencies will need to proceed with caution here. Investigatory powers often limit the extent to which obtained information may be used and shared; if used for an improper purpose, the information gathered will likely be inadmissible in (at least)

criminal proceedings. Another concern, particularly for prosecutors, is that if there is an established practice of sharing information with the new agency, the new agency could be treated as being part of the police and prosecution for disclosure purposes. This might possibly increase the workload of prosecutors in answering disclosure requests and could jeopardize criminal convictions where on appeal it is discovered that a material document had not been disclosed.

Co-ordination between agencies will also be needed in deciding whether the civil forfeiture proceeding should follow criminal proceedings or whether they should occur in parallel. Policies on whether the civil forfeiture application should still be brought following an acquittal or refused criminal confiscation order will need to be considered. Similarly, consideration will need to be given to how an acquittal might affect a civil forfeiture order which has already been made.

84. *What has been the practical experience of other countries in respect of the relationship of the new agency with existing agencies?*
85. *What protocols and effective practices have been developed to improve co-ordination, co-operation and communication between agencies?*

5.11. Where Does Forfeited Property Go?

Consider what should be done with forfeited property: should the funds go into the general revenue pool, to a fund set up for specific purposes, or directly to the budget of law enforcement agencies? Currently, all confiscated and forfeited property in Hong Kong is ultimately paid into the general revenue.¹²⁴ The Chief Executive has a discretion to direct the payment of a fine or penalty (or part thereof) to “any aggrieved person, or to any person whose information or evidence has led to the conviction of the offender or to the recovery of the fine or penalty”.¹²⁵ This discretion applies to payments made pursuant to a DTROPO or OSCO confiscation order. However, there is no similar discretion in respect of forfeited property, such as forfeited instruments.¹²⁶

The Ontario Act provides for forfeited property to be deposited into a special purposes interest-bearing account to be used for limited purposes. Payments may be made out of the account for compensating victims of unlawful activity, paying the costs for administering the civil forfeiture scheme, assisting victims, compensating governmental authorities, and other purposes specified by regulation.¹²⁷ Except for purposes of recovering costs or losses, the scheme does not allow law enforcement agencies to receive direct payments from the fund.

In Manitoba, proceeds are first distributed to pay any government costs in disposing of the forfeited property; second, to reimburse the police chief for the cost of bringing about the order; and third, to be paid into the Victims’ Assistance Fund under *The Victims’ Bill of*

¹²⁴ Public Finance Ordinance (Cap 2), ss 17A & 17B.

¹²⁵ *Ibid.*, s 17A.

¹²⁶ *Ibid.*, s 17B.

¹²⁷ Ontario’s Civil Remedies Act, s 6.

Hong Kong Civil Forfeiture Project

Rights and the Legal Aid Services Society of Manitoba.¹²⁸ As part of the CAFRA in the US, provision is made for the use of forfeited funds to pay restitution to crime victims.¹²⁹

The problem with allowing law enforcement to have any financial benefit (whether actual or perceived) is the conflict of interest it may present to law enforcement agencies. A direct financial benefit from forfeiture laws may skew incentives and priorities and lead to the bringing of many unwarranted cases. Early experience with civil forfeiture laws in the US tells of many such cases. On the other hand, paying forfeited property into the general revenue together with all other forms of government revenue does not allow this unique class of revenue to have a special status or to be used for any special purposes, such as reinvestment in the justice system.

86. *Is it possible to devise a rational scheme for the distribution of forfeited property that can meet public concerns about governmental conflicts of interest and excessive enforcement of the law?*
87. *Should Hong Kong continue its current policy of paying confiscated and forfeited property into the general revenue?*
88. *If such property continues to be paid into the general revenue, should the Chief Executive's discretion be extended to all forfeited property?*

5.12. International and Domestic Co-operation

International jurisdictional issues arise in civil forfeiture, particularly because the laundering of criminal assets is a transnational business. To be an effective partner in the international fight against money laundering and organized crime, each jurisdiction must have three elements in its legal regime:

- the domestic jurisdiction of its courts to order restraint and forfeiture of extraterritorial property;
- a mutual legal assistance agreement that contains the relevant mutual obligations to co-operate in the restraint and forfeiture of proceeds of crime;
- the domestic laws to recognize and enforce foreign restraint and forfeiture/confiscation orders.

While these are the elements needed for international co-operation, ie between Hong Kong and other foreign jurisdictions, it is less clear what the procedures and standards should be for domestic co-operation, ie between Hong Kong and other parts of China including Macau.

5.12.1. International Co-operation: Hong Kong vis-à-vis foreign jurisdictions

¹²⁸ Manitoba's Criminal Property Forfeiture Act, ss 19(a) – (c).

¹²⁹ CAFRA, s 6.

Centre for Comparative and Public Law

Under the Basic Law, Hong Kong has capacity to become a party to certain treaties on its own if it is so authorized by the central authorities. Relevant international treaties to which Hong Kong is a party include the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,¹³⁰ the UN Convention Against Corruption,¹³¹ and the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.¹³² These treaties provide for international cooperation mechanisms which are binding on all parties, unless the party has entered an applicable reservation.

Bilateral mutual legal assistance treaties are another important means by which international cooperation occurs. As at 25 November 2005, Hong Kong had entered into bilateral Mutual Legal Assistance (“MLA”) Agreements in criminal matters with 19 countries.¹³³ On 26 May 2006 an Agreement was signed with Germany, bringing the total number to 20. These agreements allow for, among other things, the taking of evidence; search and seizure; the production of materials; and co-operation in the restraint and confiscation of proceeds of crime.

The Mutual Legal Assistance in Criminal Matters Ordinance (Cap 525) (“MLA Ordinance”) permits sharing of assets at the international level with “prescribed places”. These are places with which Hong Kong has bilateral or multilateral agreements in existence and which have been made the subject of a s 4 order applying those arrangements to Hong Kong. Section 10 of Schedule 2 of this ordinance provides for the proceeds of realisation to be paid to the Registrar and held for 5 years pending any application by the government of a prescribed place for sharing. In order to better facilitate mandatory requirements for sharing at the international level now found in some multilateral conventions (eg the UN Convention Against Corruption, Art. 57(3)(a)), s 4 orders implement such obligations domestically.

While the Department of Justice’s Commercial Crime Sub-division specializes in handling the restraint and confiscation of crime proceeds under DTROPO and OSCO in the domestic context, international asset recovery is handled by the Mutual Legal Assistance Unit in the International Law Division.¹³⁴

Sections 28 and 29 of the DTROPO provide for external confiscation orders to be registered and enforced. Therefore this Ordinance has a built-in international cooperation mechanism. Chapter 405A (“the Order”) is subsidiary legislation, setting out the appropriate authorities in “Designated Countries” for the purposes of enforcing external confiscation order in Hong Kong.¹³⁵ Schedule 1A lists those countries who were party to the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances at the time the Order was made. The Order enables for cooperation with any country which is or becomes a party to the Convention (at s 3(1)).

¹³⁰ Above n 16.

¹³¹ Above n 19.

¹³² Hague Conference on Private International Law, entered into force 10 February 1969. Accessible at: http://www.hcch.net/index_en.php?act=conventions.text&cid=17.

¹³³ 14 in force; the remaining 5 with Italy, Ireland, Belgium, Israel, Poland and Ukraine not yet in force, ie no order operative under s 4, Cap 525.

¹³⁴ *Hong Kong Department of Justice 2004 Report* (Hong Kong: Department of Justice, 2005) p 57.

¹³⁵ Note that there is an overlap between ss 28 and 29 of the DTROPO and ss 27 and 28 of the MLA Ordinance. The provisions of the latter are broad enough to include drug cases, and s 36 of the MLA Ordinance provides for consequential amendment of the DTROPO by repealing ss 28 and 29, the relevant rules under Order 115, and the subsidiary legislation in Cap. 405A. The repeal provisions have yet to come into operation.

Hong Kong Civil Forfeiture Project

By contrast, OSCO does not contemplate an international cooperation mechanism. Instead, the MLA Ordinance (Cap 525) and Rules of the High Court (Order 115A) provide for the enforcement of external confiscation orders in other serious crime cases.

89. *Will there be any difficulties in providing that the civil forfeiture regime will apply extraterritorially to overseas property?*
90. *Should the existing system of external confiscation orders continue to apply for purposes of recognizing overseas civil and criminal confiscation/forfeiture orders?*
91. *Do existing Mutual Legal Assistance agreements adequately cater for the introduction of a new civil forfeiture regime?*
92. *Are the existing bilateral and multilateral treaties adequate for purposes of cooperation? How can institutional delays be minimized?*
93. *Should international cooperation provisions be consolidated into a single coherent piece of legislation?*

5.12.2. Domestic Co-operation: Hong Kong vis-à-vis Macau, the PRC Mainland, and Taiwan

Hong Kong, as a special administrative region of the People's Republic of China, has become more integrated with Macau and the Mainland since 1997. Its border with the two jurisdictions has become increasingly porous in terms of both the movement of people and property. However, the legal systems of the four jurisdictions, including Taiwan, are fundamentally different and the principle of 'one country two systems' ensures that the differences continue.

There are currently no agreements between the four jurisdictions for co-operation in criminal matters, but limited *ad hoc* police force co-operation can and does occur. The MLA Ordinance specifically excludes the "provision or obtaining of assistance in criminal matters between Hong Kong and any other part of the People's Republic of China."¹³⁶ There is also no agreement on rendition of accused persons between Hong Kong and the Mainland. Shortly after the 1997 handover, there were some high-profile cases of Hong Kong citizens being tried and executed in China. Hong Kong does not have the death penalty. Progress has been slow in negotiating an agreement for this purpose. Due to political tensions between the Mainland and Taiwan, cooperation in criminal matters with Taiwan has been difficult and non-existent at times.

There are, however, a few agreements for co-operation in civil matters. Since 1997, there has been an arrangement in place for "Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and Hong Kong Courts". More importantly, on 14 April 2006 the Secretary for Justice announced that after five years of negotiations, an agreement between Hong Kong and the Mainland was to be signed that will allow judgments on commercial matters to be mutually enforceable. Although the scope of

¹³⁶ MLA Ordinance, s 3(1).

the Agreement appears to be very narrow (allowing contracting parties to include an option that, in the event of a dispute, judgments made in either jurisdiction can be enforced across the border), “the government said the scope of the pact could be widened to bring greater parity between the two legal systems.”¹³⁷ On 14 July 2006, An Arrangement on Reciprocal Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region pursuant to Choice of Court Agreements between Parties Concerned was concluded between Hong Kong and the Mainland. As indicated in the title of the document, its application is limited to cases where parties had included a choice of court clause in their agreement. For now, it seems this agreement will not further cooperation for restraint and forfeiture purposes.

Do there need to be more formal arrangements between the four jurisdictions in respect of co-operation in interdicting crime-tainted property? Ad hoc arrangements only go as far as sharing of intelligence but cannot be used to restrain and forfeit property on a regular basis. The status quo position probably sees co-operation to the extent of each jurisdiction alerting each other to possible investigations within their jurisdiction. However, formal arrangements that allow for the mutual recognition of forfeiture orders could certainly expedite the process of enforcement.

94. *Will tougher forfeiture laws simply push the crime proceeds outside the borders into neighbouring jurisdictions including Macau and the Mainland? And if so, what steps can be taken to prevent such movement or enable the transnational enforcement of forfeiture laws?*
95. *What special issues arise when the source of the criminal activity is from Macau, the Mainland or Taiwan? What if the crime-tainted property forfeited by the Hong Kong court is in these jurisdictions? What are the existing practices?*

5.13. Human Rights Implications

We have left the topic of human rights implications to the end not to diminish the importance of it but to highlight its gatekeeper role to any proposal to introduce civil forfeiture laws. In this research project, human rights standards, internationally and domestically, will necessarily shape the contours of policies and laws to be proposed. Many important lessons in the area of human rights can be learned from other jurisdictions. One of the repeated criticisms of civil forfeiture laws, as already mentioned, is that it blurs the distinction between criminal allegations and civil remedies, but it does so under the civil standards of proof and evidence.

The US reforms of 2000 were a response to constitutional challenges to the earlier civil forfeiture regime, and a large body of scholarly¹³⁸ and civic¹³⁹ writing that characterized

¹³⁷ Agence France-Presse, “Lawyers applaud plan on Hong Kong, China Courts”, 14 April 2006. *Also see* “Legal pacts must protect HK’s separate system”, South China Morning Post, 14 April 2006.

¹³⁸ See, for example, S. Noya, “Hoisted on their own petards: Adverse inferences in civil forfeiture” (1996) *Journal of Criminal Law and Criminology* 18; T. Piety, “Scorched earth: How the expansion of the civil forfeiture doctrine has laid waste to due process” (1991) *University of Miami Law Review* 45; M. Schechter, “Fear and loathing in forfeiture laws: A Note” (1990) *Cornell Law Review* 75; M. Stahl, “Asset forfeiture, burdens of proof and the war on drugs” (1992) *Journal of Criminal Law and Criminology* 83.

Hong Kong Civil Forfeiture Project

the earlier regime as draconian. Some of the human rights issues have already been discussed, including shifting the burden of proof, and guaranteeing access to counsel in certain circumstances. Another important CAFRA 2000 reform allows the court to review the proportionality of the forfeiture to the gravity of the act committed. It provides for a claim that the forfeiture is constitutionally excessive,¹⁴⁰ or that continued restraint of the property will cause substantial hardship to the claimant.

Until 2000 proportionality did not come into the law or its judicial interpretation. Therefore there is some softening of the regime with these 2000 reforms, but not completely:

The standard of review is ‘grossly’ disproportionate, not disproportionate. As a modifier, ‘grossly’ continues to impose a heavy burden on a respondent. To displace forfeiture, it is not sufficient to prove that it is disproportionate: the forfeiture must be grossly disproportionate to the underlying offences. This suggests that legislative excess continues to be the rule rather than the exception.¹⁴¹

Other hallmarks of CAFRA include:

- Under the earlier act, the ACLU described the “unjust procedural barriers such as unreasonable short time limits to contest a seizure...” Now, any person claiming property seized in a nonjudicial civil forfeiture proceeding under a civil forfeiture statute may now file a claim with the appropriate official... no later than 30 days after the date of final publication of notice of seizure. (Sec. 983(2)(A))
- The law also anticipates an innocent joint tenant or partial interest holder and provides for a variety of remedies that could be invoked in such a case.
- Under the previous regime, a property owner had to put up a 10% bond as precondition to the challenge; this is no longer required.

However, the expansion of civil forfeiture through the PATRIOT Act in 2001 has arguably continued some of the more pernicious aspects.

For Hong Kong, the human rights concerns must be framed in terms of the rights and freedoms in the Basic Law and Hong Kong Bill of Rights. Legislators and members of the public, particularly in the business sector, have been critical of attempts in the past to widen anti-money laundering laws and offences. In 2001-2, attempts by the Government to reform and introduce new money laundering offences were met by strong objection by legislators and business leaders. Ultimately the proposals were dropped to make way for the passage of the remaining parts of the bill.¹⁴² Thus a careful consideration of human rights implications must be conducted in any reform exercise.

Some possible challenges to a civil forfeiture regime from the two main human rights instruments are identified as follows:

¹³⁹ See, for example, above n 120.

¹⁴⁰ CAFRA, s (7)(g).

¹⁴¹ Gallant, above n 85, p 88.

¹⁴² See LegCo Secretariat, “Paper for the House Committee meeting on 28 June 2002: Report of the Bills Committee on Drug Trafficking and Organized Crimes (Amendment) Bill 2000”, 28 June 2002, LC Paper No CB(2)2417/01-02, which can found at www.legco.gov.hk.

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- Respect for the presumption of innocence in civil forfeiture regimes (BL, Art 87, BOR, Arts 10 & 11(1));
- Right to legal representation and lawyer of choice impaired by the restraint and seizure of property (BL, Art 35);
- Right of claimants to the acquisition, use, disposal and inheritance of restrained, seized or forfeited property (BL, Art 105);
- Right of claimants to compensation for lawful deprivation of their property (BL, Art 105);
- Right to a fair and public forfeiture hearing (BOR, Art 10; BL, Art 87(1));
- Rights to have access to the courts and to judicial remedies (BL, Art 35);
- Right to institute legal proceedings in the courts against the acts of the executive (BL, Art 35);
- Right to have freedom of choice of occupation (BL, Art 33);
- The homes and other premises of Hong Kong residents shall be inviolable (BL, Art 29).

Finally, as public policy research, it is incumbent upon this project to ensure that any proposed reforms are in line with common law principles of fundamental justice and due process.

96. *Can civil forfeiture be compatible with the fundamental rights and freedoms protected in the Basic Law and Hong Kong Bill of Rights?*
97. *What civil liberties are at risk by the blurring of criminal and civil remedies within a forfeiture regime?*

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6. QUESTIONS FOR DISCUSSION

We welcome your views and comments on any aspect of this Discussion Paper and particularly in respect of the following questions.

IMPETUS FOR FORFEITURE LAWS

1. *Do any of the international treaties, particularly those binding on Hong Kong, require implementation by means of civil forfeiture?*
2. *What data needs to be collected to assess the impact of forfeiture laws on the prevalence of organized crime groups and profit-making crime?*
3. *How does widening the definition of “criminal proceeds” for forfeiture systems affect international financial systems and the costs of doing business generally? Will increased monitoring and enforcement increase the costs for governments and businesses to the extent that the measures become prohibitively expensive?*

EXISTING LEGAL REGIME IN HONG KONG

Proceeds of Drug Trafficking and Serious Crimes

4. *Can the DTROPO and OSCO schemes be simplified and made easier to understand?*
5. *Is there merit in having a single ordinance to govern the criminal confiscation of proceeds of crime?*
6. *Does the OSCO capture the proceeds from a sufficient scope of offences?*
7. *Should all indictable offences be capable of triggering the confiscation scheme in OSCO and thereby obviate reliance on the money laundering offence as the triggering offence for unspecified offences?*
8. *What data is available on the number of ‘died/absconded’ confiscation cases?*
9. *What are the practical difficulties in bringing such a case?*
10. *Should a full procedural and substantive scheme for accessing restrained or charged property be included in the main legislation and not only in the rules of court?*
11. *Should the Canadian scheme which excludes the prosecution from part of the hearing be adopted as a procedural safeguard against unfair defence disclosure?*

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12. *Should magistrates have the power to confiscate proceeds of crime?*
13. *Is the 'organized crime' mechanism in OSCO satisfactory?*
14. *Should an oral hearing be the norm in confiscation proceedings?*
15. *Should third parties be heard and their interests recognised in sentencing proceedings where confiscation is sought?*
16. *Can more complete and accurate data be obtained on the performance of the DTROPO and OSCO to date? Similarly, is data available for forfeiture and confiscations done under other laws?*
17. *What data are available to illustrate and track the impact that the DTROPO and OSCO have had on crime levels?*

Proceeds of Bribery and Corruption

18. *What data exists on the amounts of restrained, confiscated and recovered proceeds for bribery and corruption offences?*
19. *Is the PBO restraint power more far reaching than those in the DTROPO and OSCO and can this be justified?*

Civil Forfeiture of Drug Money Entering or Leaving Hong Kong

20. *Is there any reason why the 'drug cash at the border' power should not be extended to other offences and to other forms of property?*
21. *What are the reasons for the relatively small total forfeiture amount and the low forfeiture activity in recent years?*

Offence or Context Specific Forfeiture Provisions

22. *Given the host of disparate forfeiture powers for instruments of crime, is it necessary to have a general civil forfeiture power for instruments of crime?*
23. *Do any of the disparate forfeiture powers apply to immovable property?*

Closure Orders for Vice Establishments

24. *How effective is a closure order and is it a feasible strategy for other crimes?*

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Operational Obstacles to Hong Kong's Current Confiscation Regime

25. *How can the current operational impediments to using the confiscation powers be overcome?*
26. *What role could regulators in the banking sector play to improve the use of confiscation laws?*
27. *What is the cost/benefit of using confiscation laws to target lesser amounts of proceeds of crime, taking into account investigators' expertise, public money spent, etc.?*

IS THERE A NEED FOR MORE FORFEITURE LAWS IN HONG KONG?

28. *What problems or limitations are associated with the scattered provisions for confiscation and forfeiture in Hong Kong's laws?*
29. *Are opportunities being missed for interdicting crime-tainted property?*
30. *What other shortcomings can be seen with the existing regime?*
31. *If a civil forfeiture regime were adopted in Hong Kong, what reforms if any would need to be made to the existing criminal confiscation laws?*
32. *What kinds of evidence should be permissible in civil forfeiture cases?*

ISSUES INVOLVED IN THE ADOPTION OF A CIVIL FORFEITURE REGIME IN HONG KONG

33. *What is the historical context of recent laws on civil forfeiture? Can broad in rem civil forfeiture laws be legitimate today given the historical illegitimacy of such laws?*
34. *Why has modern civil forfeiture laws appeared in only some countries (mostly if not all common law countries) and not others? How did the legislative proposals in these countries acquire their legitimacy?*

Scope of Property Subject to Forfeiture

35. *Should the new regime apply to all criminal and quasi-criminal offences? Should it apply to only the most serious offences? If not, to what offences should it apply? For example, should the regime apply to offences such as tax evasion and insider dealing?*

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36. *Should the new regime apply to crimes committed abroad, and if so should a double criminality requirement apply?*
37. *Should the new regime apply retrospectively in the sense that it would cover offences occurring prior to the coming into force of the new law?*
38. *Is it necessary for the new regime to have a definition of forfeitable property that is broader than the definition in s 3 of the Interpretation and General Clauses Ordinance (Cap 1)?*
39. *Query whether the reference to ‘obligations’ in paragraph (b) of the s 3 definition is applicable?*
40. *Should the new regime cater specifically to contraband property?*
41. *How can the offence-property relationship be defined to ensure the maximum degree of tracing of proceeds of crime?*
42. *Are there any viable ideas for capturing back diminutions in value? Could such ideas be legitimately applied to dissipated property in general?*
43. *What specific tracing rules, particularly for mixed funds, will need to be provided for?*
44. *Should forfeiture apply to the gross or net gains from crime?*
45. *Should there be a minimum financial threshold before a case for forfeiture can be brought?*
46. *Should the new law provide for the forfeiture of instruments of crime? Is the existing regime already adequate?*
47. *If it should so provide, how should instruments of crime be defined? In particular, should it be based on past or future criminal activity?*
48. *If the definition is based on future criminal activity, is the test of ‘likelihood’ such as in the Ontario and Manitoba Acts a sufficient threshold?*
49. *Should there be any categorical exclusion of certain types of property from the definition of ‘instruments’?*
50. *What safeguards will need to be in place to protect adequately third parties who claim an interest in the property?*
51. *Is it justifiable to forfeit all of the property of a certain class of persons other than proscribed terrorists or terrorist entities?*
52. *Is the US doctrine of ‘substitute property’ a feasible idea to adopt or at least explore further?*

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Preservation of Property for Forfeiture

53. *What would be an appropriate body for the management of preserved property in Hong Kong? What has been the experience of receivers to date?*
54. *Should there be access to preserved property for paying reasonable living and legal expenses? If so, who should be entitled and what should be the test?*
55. *Should compensation be given for losses incurred in cases which ultimately fail to succeed? If so, what should be the test for compensation?*
56. *Should Hong Kong provide for a specific search and seizure power alongside restraint and charging powers?*
57. *Should the District Court be involved in ordering the preservation of property?*

Administrative or Judicial Forfeiture

58. *Should any form of administrative forfeiture be adopted in the new regime?*

Test for Forfeiture

59. *In framing the test for forfeiture, should it follow the formulation seen in Ontario and the UK of having a mandatory power but with limited exceptions to give effect to legitimate third party interests?*
60. *Should there be a human rights clause similar to s 266(3)(b) of the UK Act?*

Burden and Standard of Proof for Forfeiture

61. *What standard and burden of proof would be appropriate for Hong Kong?*
62. *Should there be different standards for seizure or restraint and subsequent forfeiture?*
63. *What burdens should be placed on claimants seeking to claim an interest in property?*

Protection of Third Party Interests

64. *When should third parties be entitled to retain an interest in, or access, the property? What test of 'innocence' should be adopted?*
65. *When if ever should non-innocent third party interests be recognized?*

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66. *Is imposing a civil burden on third parties to prove their claim inconsistent with Article 105 of the Basic Law?*

Procedural Issues

67. *Should notice be given before or after forfeiture? What entitlements to challenge the forfeiture decision should be provided for in both situations?*
68. *What is an appropriate notice period?*
69. *Who should be given notice? To what extent should the court become involved in determining adequate and sufficient notice has been given to all interested persons? Should it be made a prerequisite to forfeiture?*
70. *Should the normal discovery processes apply in a civil forfeiture case?*
71. *Should there be a statute of limitations for civil asset forfeiture?*
72. *Which level(s) of court should be engaged for contested forfeiture hearings?*
73. *How will hearings be conducted and what rules of evidence will apply?*
74. *What avenues of appeal should be available to the parties? When will leave to appeal be required?*
75. *What measures should be taken to ensure that a claimant who wishes to have competent legal representation at the hearing is able to obtain such representation?*

Creation of a New Government Agency?

76. *What needs to be done or created to administer a new civil forfeiture regime?*
77. *Should a new agency be created? Who will staff it?*
78. *What would be the relationship between this new agency and the existing agencies?*
79. *To what extent is it necessary to develop 'Chinese walls' between the new civil forfeiture office and existing offices which handle criminal investigation and prosecution?*

New Investigative Powers

80. *What new investigatory powers should be given to the State to facilitate the enforcement of civil forfeiture laws, e.g. powers to seize and restrain property? Powers to access bank accounts?*

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81. *Can any new powers legitimately be based on only executive authorization?*
82. *Are existing powers adequate?*
83. *Should a Code of Practice be included as part of any legal reform?*

Relationship with Existing Agencies and Criminal Confiscation

84. *What has been the practical experience of other countries in respect of the relationship of the new agency with existing agencies?*
85. *What protocols and effective practices have been developed to improve co-ordination, co-operation and communication between agencies?*

Where Does Forfeited Property Go?

86. *Is it possible to devise a rational scheme for the distribution of forfeited property that can meet public concerns about governmental conflicts of interest and excessive enforcement of the law?*
87. *Should Hong Kong continue its current policy of paying confiscated and forfeited property into the general revenue?*
88. *If such property continues to be paid into the general revenue, should the Chief Executive's discretion be extended to all forfeited property?*

International and Domestic Co-operation

89. *Will there be any difficulties in providing that the civil forfeiture regime will apply extraterritorially to overseas property?*
90. *Should the existing system of external confiscation orders continue to apply for purposes of recognizing overseas civil and criminal confiscation/forfeiture orders?*
91. *Do existing Mutual Legal Assistance agreements adequately cater for the introduction of a new civil forfeiture regime?*
92. *Are the existing bilateral and multilateral treaties adequate for purposes of cooperation? How can institutional delays be minimized?*
93. *Should international cooperation provisions be consolidated into a single coherent piece of legislation?*
94. *Will tougher forfeiture laws simply push the crime proceeds outside the borders into neighbouring jurisdictions including Macau and the Mainland?*

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And if so, what steps can be taken to prevent such movement or enable the transnational enforcement of forfeiture laws?

95. *What special issues arise when the source of the criminal activity is from Macau, the Mainland or Taiwan? What if the crime-tainted property forfeited by the Hong Kong court is in these jurisdictions? What are the existing practices?*

Human Rights Implications

96. *Can civil forfeiture be compatible with the fundamental rights and freedoms protected in the Basic Law and Hong Kong Bill of Rights?*
97. *What civil liberties are at risk by the blurring of criminal and civil remedies within a forfeiture regime?*

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APPENDIX I: Drug Trafficking Offences under DTROPO and Specified Offences under OSCO

A. DTROPO

Schedule 1: Drug Trafficking Offences

Offence	Description
Dangerous Drugs Ordinance (Cap 134) section 4(1) section 4A section 5(1) section 6(1) section 9(1), (2) and (3) section 35 section 37 section 40(1)(c)	trafficking in a dangerous drug trafficking in purported dangerous drug supplying or procuring a dangerous drug to or for unauthorized persons manufacturing a dangerous drug cultivating, supplying, procuring, dealing in, importing, exporting, or possessing cannabis plant or opium poppy keeping or managing a divan for the taking of dangerous drugs permitting premises to be used for unlawful trafficking, manufacturing or storage of dangerous drugs aiding, etc. offence under a corresponding law
Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405) section 25	dealing with property known or believed to represent the proceeds of drug trafficking

B. OSCO

Schedule 1: Offences relevant to definitions of “Organized Crime” and “Specified Offence”

Common law offences:

1. murder
2. kidnapping
3. false imprisonment
4. conspiracy to pervert the course of justice

Statutory offences:

Offence	Description
5. Import and Export Ordinance (Cap 60) section 6A section 6C section 6D(1) and (2) section 6E section 18	import or export of strategic commodities import of certain prohibited articles export of certain prohibited articles carriage, etc. of prescribed articles in Hong Kong waters importing or exporting unmanifested cargo

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6.	Immigration Ordinance (Cap 115) section 37D(1) section 38(4) section 42(1) and (2)	arranging passage to Hong Kong of unauthorized entrants carrying an illegal immigrant false statements, forgery of documents and use and possession of forged documents
7.	Dangerous Drugs Ordinance (Cap 134) section 4(1) section 4A(1) section 6(1)	trafficking in dangerous drugs trafficking in purported dangerous drugs manufacturing a dangerous drug
8.	Gambling Ordinance (Cap 148) section 5 section 7(1)	operating, managing or controlling gambling establishment bookmaking
9.	Societies Ordinance (Cap 151) section 19 section 21 section 22	penalties on an office-bearer, etc. of an unlawful society allowing a meeting of an unlawful society to be held on premises inciting etc., a person to become a member of an unlawful society
10.	Money Lenders Ordinance (Cap 163) section 24(1)	lending money at an excessive interest rate
11.	Crimes Ordinance (Cap 200) section 24 section 25 section 53 section 54 section 55 section 60 section 61 section 71 section 75(1) section 98(1) section 100(1) section 105 section 118 section 119 section 120 section 129 section 130 section 131 section 134 section 137 section 139	threatening a person with intent assaulting with intent to cause certain acts to be done or omitted causing explosion likely to endanger life or property attempt to cause explosion, or making or keeping explosive with intent to endanger life or property making or possession of explosive destroying or damaging property threats to destroy or damage property forgery possessing a false instrument with intent counterfeiting notes and coins with intent custody or control of counterfeit notes and coins with intent importation and exportation of counterfeit notes and coins rape procurement of person by threats procurement of person by false pretences trafficking to or from Hong Kong in persons control over person for purpose of unlawful sexual act or prostitution causing prostitution of person detention of person for unlawful sexual act or in vice establishment living on earnings of prostitution keeping a vice establishment

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12.	Theft Ordinance (Cap 210) section 9 section 10 section 11(1) section 16A section 17 section 18 section 18D section 19 section 23(1) and (4) section 24(1)	theft robbery burglary fraud (Added 45 of 1999 s. 6) obtaining property by deception obtaining a pecuniary advantage by deception procuring false entry in certain records false accounting blackmail handling stolen goods
13.	Offences against the Person Ordinance (Cap 212) section 17	shooting or attempting to shoot, or wounding or striking with intent to do grievous bodily harm
14.	Firearms and Ammunition Ordinance (Cap 238) section 13 section 14	possession of arms or ammunition without licence dealing in arms or ammunition without a licence
14A.	Trade Descriptions Ordinance (Cap 362) section 9(1) and (2) section 12 (provided that for the purpose of this Ordinance, an offence under section 12 of the Trade Descriptions Ordinance does not include an offence relating only to false trade description) section 22 (provided that for the purpose of this Ordinance, "offence under this Ordinance" referred to in section 22 of the Trade Descriptions Ordinance only means an offence under- (a) section 9(1) or (2) of that Ordinance; or (b) section 12 of that Ordinance, excluding any offence relating only to false trade description)	offences in respect of infringement of trade mark rights import or export of goods bearing forged trade mark being accessory to certain offences committed outside Hong Kong
15.	Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405) section 25(1)	dealing with property known or believed to represent proceeds of drug trafficking
16.	Organized and Serious Crimes Ordinance (Cap 455) section 25(1)	dealing with property known or believed to represent proceeds of indictable offence
17.	Weapons of Mass Destruction (Control of Provision of Services) Ordinance (Cap 526) section 4	providing services that assist the development, production, acquisition or stockpiling of weapons of mass destruction

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18.	<p>Copyright Ordinance (Cap 528) section 118(1), (4) and (8) (provided that for the purpose of this Ordinance, "infringing copy" referred to in section 118(1) and (4) of the Copyright Ordinance does not include a copy of a work which is an infringing copy by virtue only of section 35(3) of that Ordinance) section 120(1), (2), (3) and (4) (provided that for the purpose of this Ordinance, "infringing copy" referred to in section 120(1) and (3) of the Copyright Ordinance does not include a copy of a work which is an infringing copy by virtue only of section 35(3) of that Ordinance)</p>	<p>offences relating to making or dealing with infringing copies offences relating to making infringing copies outside Hong Kong</p>
19.	<p>Chemical Weapons (Convention) Ordinance (Cap 578) section 5</p>	<p>prohibition against using, developing or producing, acquiring, stockpiling, retaining, participating in the transfer of, engaging in military preparations, or in preparations of a military nature, intending to use, chemical weapons, or assisting, encouraging or inducing anyone to engage in any activity prohibited by the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, signed at Paris on 13 January 1993</p>

Schedule 2: Other Specified Offences

Common law offences:

1. manslaughter
2. conspiracy to defraud

Statutory offences:

	Offence	Description
3.	<p>Import and Export Ordinance (Cap 60) section 14 section 14A section 18A section 35A</p>	<p>alteration of vessel, aircraft or vehicle for the purpose of smuggling construction, etc., of vessels for the purpose of smuggling assisting, etc., in export of unmanifested cargo assisting, etc., in carriage of prohibited, etc., articles</p>
4.	<p>Immigration Ordinance (Cap 115) section 37DA(1)</p>	<p>assisting unauthorized entrant to remain</p>

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5.	Dangerous Drugs Ordinance (Cap 134) section 5(1) section 9(1), (2) and (3) section 35(1) section 37(1)	supplying or procuring a dangerous drug to or for unauthorized persons offences relating to cannabis plant or opium poppy keeping or managing a divan for the taking of dangerous drugs permitting premises to be used for unlawful trafficking, manufacturing or storage of dangerous drugs
6.	Gambling Ordinance (Cap 148) section 14 section 15(1)	providing money for unlawful gambling or for an unlawful lottery permitting premises to be used as gambling establishment
7.	Registration of Persons Ordinance (Cap 177) section 7A	possession of forged identity cards
8.	Crimes Ordinance (Cap 200) section 72 section 73 section 74 section 76 section 99(1) section 101	copying a false instrument using a false instrument using a copy of a false instrument making or possessing equipment for making a false instrument passing, etc. counterfeit notes and coins making or custody or control of counterfeiting materials and implements
9.	Prevention of Bribery Ordinance (Cap 201) section 4(1) section 5(1) section 6(1) section 9(2)	bribery of public servant bribery for giving assistance, etc. in regard to contracts bribery for procuring withdrawal of tenders bribery of agent
10.	Theft Ordinance (Cap 210) section 12(1) section 18A	aggravated burglary obtaining services by deception
11.	Offences against the Person Ordinance (Cap 212) section 19	wounding or inflicting grievous bodily harm
12.	Criminal Procedure Ordinance (Cap 221) section 90(1)	doing an act with intent to impede apprehension or prosecution of offender

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APPENDIX II: Table of Restraint and Confiscation Amounts in Hong Kong from 1989 to 2006

DTROPO ACCUMULATED STATISTICS SINCE 1989-09-01 (as on 31 May 2006)			
	Police	Customs	Total
(A) Property seized under 24B & 24C	0	828,800	828,800
(B) Property forfeited under 24D (civil forfeiture)	1,900,000	0	1,900,000
(A) Assets ' <i>frozen</i> ' pending confiscation proceedings	18,739,260	1,590,845	20,330,105
(B) Assets ordered to be confiscated but <i>pending recovery</i>	51,111,827	1,424,214	52,536,041
(C) Assets actually confiscated and <i>paid</i> to Hong Kong Gov't	369,647,765	16,756,008	386,403,773
OSCO ACCUMULATED STATISTICS SINCE 1994-12-2 (as on 31 May 2006)			
	Police	Customs	Total
(A) Assets ' <i>frozen</i> ' pending confiscation proceedings	1,267,054,844	97,645,284	1,364,700,128
(B) Assets ordered to be confiscated but <i>pending recovery</i>	13,833,027	0	13,833,027
(C) Assets actually confiscated and <i>paid</i> to Hong Kong Gov't	43,200,070	1,857,858	45,057,928
DTROPO & OSCO ACCUMULATED STATISTICS (as on 31 May 2006)			
	Police (DTROPO + OSCO)	C&E (DTROPO + OSCO)	(Police + C & E) Total
(A) Assets ' <i>frozen</i> ' pending confiscation proceedings	1,285,794,104	99,236,129	1,385,030,233
(B) Assets ordered to be confiscated but <i>pending recovery</i>	64,944,854	1,424,214	66,369,067
(C) Assets actually confiscated and <i>paid</i> to Hong Kong Gov't	412,847,835	18,613,866	431,461,701

Amounts are in HKD

Period Year Adjustment

DTROP - Police

Pending Recovery : (-) HK\$35,914,271.93 was paid to HKSAR in May 2002 & June 2004

Paid to Government : (+) HK\$16,032,869.51 was paid to HKSAR in May 2002 & June 2004

Source: Hong Kong Police Force

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APPENDIX III: Table of Seizure, Restraint, Confiscation and Forfeiture Provisions in Hong Kong (up to June 2006)

LEGISLATION	SECTION NO.	BRIEF DESCRIPTION	COURT OR EXECUTIVE POWER?	MANDATORY OR DISCRETIONARY?
Drug Trafficking (Recovery of Proceeds) Ordinance (CAP 405)	3	Confiscation of proceeds of drug trafficking - Allows a court, on application by the prosecution, to make a confiscation order where sentencing for conviction of a drug trafficking offence is about to take place, or the person has died or absconded.	Court-ordered confiscation.	Mandatory, so long as the court determines the defendant has benefited from the offence.
	9	Restraint orders and charging orders – Where proceedings have been initiated in respect of a drug trafficking offence or a confiscation order has been made, a court may issue a restraint or charging order. Also, proceedings must have not been concluded and there is “reasonable cause” that the defendant will be charged upon further investigation.	Court-ordered restraint or charging order.	Discretionary.
	24B and 24C	Detention and seizure of property – Authorized Officers (includes customs officials) may detain any seized property. Seized property may be held for certain periods of time further to s 24C.	Continued detention must be court-ordered.	Discretionary

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	24D	Forfeiture of cash at the border - Cash suspected to be drug trafficking related entering or leaving Hong Kong can be forfeited but amount must be not less than \$125,000. The standard of proof is on a balance of probabilities.	Court-ordered forfeiture.	Discretionary.
Organized and Serious Crimes Ordinance (CAP 455)	8	Confiscation of proceeds of serious crimes - Allows a court, on application by the prosecution, to make a confiscation order where sentencing for conviction of one or more specified offences is about to take place, or the person has died or absconded.	Court-ordered confiscation.	Mandatory, so long as the court determines the defendant has benefited from the offence.
	14	Restraint orders and charging orders – Where proceedings have been initiated in respect of a drug trafficking offence or a confiscation order has been made, a court may issue a restraint or charging order. Also, proceedings have not been concluded and there is “reasonable cause” that the defendant will be charged upon further investigation.	Court-ordered restraint or charging order.	Discretionary.
Prevention of Bribery Ordinance (CAP 201)	12AA	Confiscation of assets - If a “prescribed officer” is in possession of unexplainable assets beyond his current or past offices, in addition to other penalties, order the confiscation of his property.	Court-ordered confiscation.	Mandatory; Also see CAP 201A, which allows for the appeal of a Confiscation Order.
	14C	Restraint orders – A court may issue a restraint order on property held by someone under suspicion under this Ordinance.	Court-ordered restraint.	Discretionary.
Criminal Procedure Ordinance (CAP 221)	102 - 103	Disposal of property connected with offences – A court may dispose of property that has come into the possession of the court, the police, or the Customs and Excise Service if it “appears: that it has been used in the commission of an offence. Under Sec.	Court-ordered disposal.	Discretionary

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		103 a court may order the seizure of things indented for use in an offence.		
Theft Ordinance (CAP 210)	30	Restitution order - A victim can receive restitution by a court order requiring the return of the property.	Court-ordered restitution	Discretionary
United Nations (Anti-Terrorism Measures) Ordinance (CAP 575)	6	Freezing of funds – The Secretary for Justice may order the freezing of any funds suspected of being held by a terrorist organization.	Executive-granted power to Secretary for Justice.	Discretionary.
	13	Forfeiture of certain terrorist property – A court may order any property that is proceeds of a terrorist offence; related to a terrorist offence; or intended for a terrorist offence, whether or not a charge has been made. Standard of proof is on a balance of probabilities.	Court-ordered forfeiture.	Discretionary.
Police Force Ordinance (CAP 232)	57	Detention and sale of vehicle, etc. of person apprehended – Any vehicle, boat, horse, or any other animal or thing taken into custody by the police under this Ordinance can be detained and eventually sold for the purpose of satisfying any penalty given under the Ordinance.	Executive Power granted to police for forfeiture; Court-ordered sale to satisfy a penalty.	Discretionary.
Dangerous Drugs Ordinance (CAP 134)	55	Dangerous drugs forfeited – Any dangerous drugs brought into Hong Kong are forfeited to the government upon seizure.	Executive granted power to authorized Customs officers	Mandatory
	56	Forfeiture of articles, etc., used in connection with offence – A court can order the forfeiture of any money or thing (other than an aircraft, train, or ship exceeding 250 gross tons) that was used in connection with or in the commission of an offence	Court-ordered forfeiture.	Discretionary.

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		to be forfeited to the government.		
	38A-C	Commissioner of Customs and Excise may seize and detain ship/Magistrate may order arrest and detention of ship – Commissioner may seize and detain a ship for 48 hours if he has reasonable cause to believe an excessive quantity of dangerous drugs are on board; A magistrate, on application, shall order the continued detention of that ship if it appears that there is reasonable cause to suspect an excessive amount of dangerous drugs is on board.	Executive power granted to Commissioner of Customs and Excise; Court-ordered forfeiture after 48 hours.	Discretionary; Mandatory.
Crimes Ordinance (CAP 200)	10	Forfeiture of seditious publications – Any person in possession of a seditious publication shall have it forfeited to the HKSAR.	Executive granted power.	Mandatory.
	55	Forfeiture of explosives – Any person who makes or possesses an explosive device shall have that explosive forfeited.	Executive granted power.	Mandatory.
	58E	Forfeiture, seizure and destruction of unmarked plastic explosive – Any person convicted of an offence under this Part of the Ordinance shall have the explosive forfeited.	Court-ordered power (upon conviction).	Mandatory.
	78 and 106	Forfeiture of false instruments and counterfeit goods – A magistrate may, if satisfied that anyone has committed an offence under this Ordinance relating to the making of false instruments, or counterfeit goods, order the forfeiture of the goods.	Court-ordered forfeiture.	Discretionary.
	153	Seizure and forfeiture in respect of vice establishment – A police officer may seize and detain any person or thing found in a search of a vice establishment; A court may order the forfeiture of anything (not immovable property) that has been	Executive grants power to police for seizure; Court-ordered	Discretionary.

Hong Kong Civil Forfeiture Project

		used in commission of an offence under S. 139 (keeping a vice establishment).	forfeiture.	
	153H	Effect of appeals and applications on closure orders, and forfeiture orders and declarations – Forfeiture orders remain in effect even while an appeal is pending; where an appeal is successful, the order is generally rescinded.	Court-ordered continuation of forfeiture.	Mandatory.
Gambling Ordinance (CAP 148)	26	Forfeiture of property used in unlawful gambling – A court shall, if satisfied that any money or property (not immovable property) was used in the commission of an offence under this Ordinance, order it to be forfeited to the government.	Court-ordered forfeiture.	Mandatory.
Prevention of Child Pornography Ordinance (CAP 579)	10	Forfeiture of child pornography – A public officer may make an application before a magistrate for the forfeiture of any thing related to a charge under this Ordinance, whether or not the person has been convicted of an offence.	Court-ordered forfeiture	Discretionary – Section 11 allows for interested third parties to make submissions as to why the thing should not be forfeited.
	40	Forfeiture of obscene materials or other child pornography – A magistrate <i>shall</i> order the forfeiture of an obscene article, and <i>may</i> order the forfeiture of a “Class III” article under this Ordinance. Forfeiture can be ordered whether or not anyone is convicted of any offence in connection with that article.	Court-ordered forfeiture	Depends on the type of article.
Immigration Ordinance (CAP 115)	46A	Forfeiture of property other than a ship or vehicle - If in the course of a prosecution for an offence related to entering Hong Kong without permission, or assisting such an offender, it appears to the court that any property (other than a ship or vehicle) has been used in commission of the offence	Court-ordered forfeiture.	Discretionary – interested third parties may be invited to make representations before the court. (The Court shall make the order “unless it

Centre for Comparative and Public Law

		or amounts to proceeds from the offence, the court shall, whether or not any person is convicted of any such offence, order the forfeiture of such property		is satisfied that it would not be just to do so or that there is other good reason why it should not do so.”)
Chemical Weapons (Convention) Ordinance (CAP 578)	21	Seized articles liable to forfeiture, etc. – Sets out the range of items seized under this and the Customs and Excise Service Ordinance that are liable to forfeiture.	Executive grants forfeiture power to the Commissioner.	Discretionary – interested third parties are given notice and the opportunity to respond.
Telecommunications Ordinance (CAP 106)	32J	Confiscation of apparatus – Where any apparatus interferes with a telecommunications device can be ordered to present it to the Authority; where this is not done, a Court may order the apparatus confiscated.	Court-ordered confiscation	Discretionary.
Marine Insurance Ordinance (CAP 329)	92	Forfeiture of profits made by gambling on loss by maritime perils – Anyone who effects a contract of marine insurance without having a bona fide interest in the ship’s safe arrival, in addition to other penalties, shall forfeit to the Government the money made under the contract.	Court-ordered forfeiture (upon conviction).	Mandatory.
Magistrates Ordinance (CAP 227)	47	Order for delivery of goods stolen or fraudulently obtained and in possession of dealer in second-hand property – A magistrate may order the full value of stolen goods in the possession of a second-hand dealer to be forfeited to the owner of those goods.	Court-ordered forfeiture.	Mandatory.
Dutiable Commodities Ordinance (CAP 109)	48	Forfeiture of goods – Wherever a provision of this Ordinance is contravened in respect of goods, those goods shall be liable to forfeiture whether or not anyone has been convicted of an offence.	The Commissioner has the power of seizure, but forfeiture powers are court-ordered	Discretionary.

Hong Kong Civil Forfeiture Project

			as set out below in s 48A.	
	48A	Proceedings for forfeiture - For a forfeiture proceeding under 48 above, the Commissioner shall apply to a Magistrate for forfeiture of goods. Section 48B allows for an application for the release of a ship, vehicle or aircraft, if it is forfeited.	Court-ordered forfeiture	Discretionary - Court may hear from third parties as to why goods should not be forfeited.
Waste Disposal Ordinance (CAP 354)	15C	Forfeiture of livestock - A court which convicts any person of an offence related to keeping livestock in a waste control area may, in addition to any other order that it makes, order the forfeiture of any livestock in respect of which the offence is committed.	Court-ordered forfeiture	Discretionary
Weights and Measures Ordinance (CAP 68)	28	Forfeiture and disposal of certain equipment and goods – The Commissioner may apply to a magistrate for the forfeiture of any weighing or measuring equipment or goods seized under this Ordinance.	Court-ordered forfeiture.	Discretionary
Agricultural Products (Marketing) Ordinance (CAP 227)	12	Sale and forfeiture of goods seized – The Director can apply to a magistrate for forfeiture of any goods seized under Section 11 of this Ordinance.	Court-ordered forfeiture	Discretionary
Amusement Game Centres Ordinance (CAP 435)	22	Forfeiture – A Court may order forfeiture of any item related to an amusement game centre, upon the conviction of certain offences under this Ordinance.	Court-ordered forfeiture.	Discretionary – but financial hardship or innocent owner not factors to consider.
Kadoorie Farm and Botanic Garden Bylaw (CAP 1156A)	19	Forfeiture of erected structures – The Executive Director of the Garden may forfeit any unauthorized structure built and not claimed within 7 days.	Executive Power granted to the Executive Director.	Discretionary.

Centre for Comparative and Public Law

Hong Kong and Yaumati Ferry Company By-Laws (CAP 104D); "Star" Ferry Company, Limited By-Laws (CAP 104E)	Bylaw 7	Forfeiture and cancellation of monthly and season tickets – Where a ticket holder contravenes one of these by-laws, the Company can forfeit the ticket or pass	Executive Power granted to the Company.	Discretionary.
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