

7 June 2002

“By fax and mail”

Mr Raymond Li
Executive Director
(Banking Development)
Hong Kong Monetary Authority
30th Floor, 3 Garden Road
Hong Kong

Dear Raymond,

United Nations (Anti-terrorism Measures) Bill

Thank you for your letter dated 18th April 2002.

We set out below our comments on the Bill and should be grateful if you would forward them to the LegCo Bills Committee for its consideration.

1. Definition of “property”

This includes in paragraph (b) “funds” but in paragraphs (c) and (d) also includes “financial assets” and “economic resources”. Given the broad definition of funds in Schedule 1, ideally “financial assets” and “economic resources” should be defined.

2. Definition of “terrorist property”

This includes not only the property of a terrorist or a terrorist associate but also under paragraph (b) property which is intended to be used to finance a terrorist act or which was used to finance a terrorist act. This is too broad particularly in the context of Clause 11 in that it would include property bona

vide in the hands of or owned by someone who is not a terrorist and is not necessarily involved in the terrorist act. For example, if Party A has sold a car to Party B (a terrorist) and receives the proceeds under circumstances where the car is to be used in connection with the terrorist act, the proceeds of sale of the car in the hands of Party A would seem to be terrorist property within the definition even though Party A did not know that the car was to be used for a terrorist act. We believe that the definition should be restricted to the property of a terrorist or terrorist associate or some other formulation which would not encompass funds held or owned by an innocent third party.

3. Clause 11(1)

The provisions of Section 25A of the Drug trafficking (Recovery of Proceeds) Ordinance and the Organised and Serious Crimes Ordinance only trigger the obligation to report when the person “knows or suspects”. The same formulation should be adopted here; this section should only refer to the person knowing or suspecting that any property is terrorist property.

4. Clause 11(3)(b) and (4)

These provisions are parallel to Sections 25A(3)(b) and (5) of the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organised and Serious Crime Ordinance and make it clear that a person is not liable for damages resulting from disclosure of information to an authorised officer or for doing or omitting to do anything in relation to the property concerned in consequence of the disclosure. Under Clause 11(4), a person is not permitted to disclose to any other person information likely to prejudice an investigation. We understand from our members that there have been incidents where the banks had made reports and the Joint Financial Intelligence Unit refused consent to deal with the property and the banks were in the position where they could not deal with the property neither could they inform the customers as to why this was. In one case, the bank had incurred costs in defending proceedings following which eventually consent was given. If consent is not given to deal with the property, the bank ought at least to be in the position of being able to tell the customer as to why its instructions are not to be followed thereby hopefully avoiding any proceedings by the customer for failure to follow the customer’s instructions.

5. Clause 11 (4)

The triggering for the offence of disclosing information likely to prejudice an investigation is based on knowledge or “reasonable ground to suspect” that a disclosure has been made. In the parallel provision of the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organised and Serious Crimes Ordinance (Section 25A(5)), the offence is only committed if the person knows or suspects that a disclosure has been made. A similar mental element should apply under the Bill.

6. Clause 11

One provision in Section 25A of the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organised and Serious Crimes Ordinance which is not repeated in the Bill is that contained in Section 25A(4). This is a provision to the effect that if a person who is employed makes a disclosure to an internal compliance officer of any relevant knowledge or suspicion, that person should be treated as having made disclosure to the authorised officer. This was to protect junior bank staff who make disclosures to compliance officers from liability under the Ordinance. A parallel provision should be included in this Bill.

7. Clause 14(10)

This is a clause which fixes criminal liability for offences on the part of employees of companies. It states that where the offence is committed by the employer, it would also be committed by my director, manager, secretary or similar officer if it is committed with the consent or connivance of, or attributable to the neglect of, that person. Whilst it is correct that the officer of the employer should be responsible if he consents or connives in a criminal offence, no offence should be committed if a person is negligent thereby giving rise to the commission of an offence. Normally, the mental element required for crime is intent or recklessness but not mere negligence.

8. Clause 19

This contains broad authority for the Secretary for Security to make regulations enabling persons to be prohibited from dealing with property (other than funds). The regulations may prescribe offences including offences carrying custodial sentences. It would be preferable if regulations of this type were not in the form of delegated legislation but by way of principal legislation. However, if it is by way of delegated legislation, the Government should confirm that prior to making any regulations of this type, there should be a consultation exercise as the kinds of regulations concerned could well affect our members.

9. Schedule 2, paragraph 1(1)

This allows an authorised officer to obtain material from any person in Hong Kong for the purpose of securing compliance with or detecting evasion of the Ordinance. No search warrant is required. We query whether this is appropriate. The provisions of the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organised and Serious Crimes Ordinance both require authorised officers to obtain search warrants for the obtaining of information.

10. Schedule 3, paragraph 2(1)

Likewise, this enables a search of a ship, aircraft, vehicle or train or person without warrant. Again, we query whether this is appropriate.

Yours sincerely

Eva Wong
Secretary

cc. Dr. the Honourable D.K.P.Li
Deacons (Mr. J.W.C. Richardson)