

**The Administration's Response to Comments on the  
United Nations (Anti-Terrorism Measures) Bill raised by the  
Hong Kong Association of Banks**

**Introduction**

This note sets out the Administration's response to the comments on the United Nations (Anti-Terrorism Measures) Bill raised by the Hong Kong Association of Banks (HKAB). The HKAB's comments are reproduced in italics and the Administration's response set out in the ensuing paragraphs.

**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. We will move a Committee Stage Amendment to delete the definition of "property" under Clause 2 of the Bill. The meaning of the term "property" would be construed in accordance with the meaning as set out under Section 3 of the Interpretation and General Clauses Ordinance (Cap. 1).

**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 fide 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. Terrorist property includes, under paragraph (b) of the definition, property intended to be used to finance a terrorist act or which has been used to finance a terrorist act. This definition is in line with paragraph 1(b) of United Nations Security Council Resolution (UNSCR) 1373, which prohibits the wilful collection of funds to be used to carry out terrorist acts. It is also in line with Special Recommendation III of the Financial Action Task Force on Money Laundering regarding Terrorist Financing, which requires countries to adopt measures to seize and confiscate property that is the proceeds of, or used in, or intended for use in the financing of terrorism, terrorist acts or terrorist organisations.

4. We do not consider that this is too broad in the context of Clause 11. The existing reporting regime under the Drug Trafficking Recovery of Proceeds Ordinance (“DTROP”) and the Organised and Serious Crimes Ordinance (“OSCO”) already requires reporting where any property is known or suspected to be -

- (a) in whole or in part directly or indirectly represents any person proceeds of;
- (b) was used in connection with; or
- (c) is intended to be used in connection with

an indictable offence.

5. We will move a Committee Stage Amendment to Clause 11 of the Bill to change the mental element for the reporting requirement to “knows or suspects”, which is exactly the same as that found in Section 25A of the existing OSCO and DTROP.

6. In the example provided by the HKAB, read with the proposed Committee Stage Amendment to Clause 11 of the Bill, Party A would only be obliged to report the funds were terrorist property if he had knew or suspected this was the case. In the circumstances described, if Party A did not know or had not suspected, he would not be obliged to make a report. In any event we

disagree that in the example provided the proceeds from the sale of the car would constitute terrorist property. They do not fall within sub-clause (a) of the definition as they do not belong to a terrorist. Neither would they fall within sub-clause (b) as once they become the property of a *bona fide* seller they are no longer funds intended to be used in a terrorist act.

7. In addition, in the event that funds of an innocent third party are frozen, Clause 16(1)(c) provides that any person by or on behalf of whom any funds are held, or who otherwise has an interest in the funds (such interests are to be prescribed by rules of the court under clause 17) can apply to the court for an order revoking the notice to freeze.

### **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.*

8. A Committee Stage Amendment to Clause 11(1) will be moved to change the mental element for the reporting requirement to “knows or suspects”.

### **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 Crimes Ordinance and make it clear that a person is not liable for damages resulting from disclosure of information to an authorized 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.*

9. In general, we consider that the “tipping off” restriction is essential, as it minimises the possibility of jeopardizing investigation by law enforcement agencies into terrorist financing and any subsequent judicial proceedings. The power to freeze terrorist funds would also be jeopardized without such restrictions. However, we understand that the example quoted was an isolated case. In practice, consent to operate will only be refused by the Joint Financial Investigation Unit (JFIU) when there is current investigation and when the authorities are seeking or are about to seek a restraint order in respect of the property. In most of the cases where such consent had been refused, the JFIU had advised the banks concerned to refer their customers to the enforcement authorities. In addition, it should be noted that Clause 11(3)(b) of the Bill makes it clear that a financial institution is not liable for damages in these circumstances.

#### **Clause 11(4)**

*The triggering for the offence of disclosing information likely to prejudice an investigation is based on knowledge or “reasonable grounds 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.*

10. Please refer to paragraph 8 above.

#### **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 authorized 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.*

11. We will move a Committee Stage Amendment to Clause 11 of the Bill to insert an equivalent of Section 25A(4) of the OSCO and the DTROP.

### **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 any 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, that mental element required for crime is intent or recklessness but not mere negligence.*

12. We will move a Committee Stage Amendment to delete Clause 14(10) of the Bill. The issue of criminality of directors and officers etc. of corporate bodies shall be construed in accordance with Section 101E of the Criminal Procedure Ordinance (Cap. 221).

### **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.*

13. We do not see a pressing need for these Regulations in the present circumstances. Notwithstanding, any future Regulations, if the need arises,

would be based on the relevant provisions under the OSCO and DTROP. In addition, the Regulations are subsidiary legislation and as such subject to the scrutiny of the Legislative Council. There will also be opportunities for consultation with concerned parties.

### **Schedule 2, paragraph 1(1)**

*This allows an authorized 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 authorized officers to obtain search warrants for the obtaining of information.*

14. We will move a Committee Stage Amendment to Section 1 of Schedule 2 which will provide that, in the event that materials requested are not produced, an authorized officer could apply to a magistrate or court for an order compelling a person to furnish information for the purpose of securing compliance with or detecting evasion of the Bill.

### **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.*

15. This provision is modelled on section 52 of the Dangerous Drugs Ordinance which permits such powers where there is likely to be an article liable to seizure. It is considered that it is appropriate to have similar powers where there is believed to be terrorist property.

Security Bureau  
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