

Response to the issues raised by Mr. Simon Young, Assistant Professor, The University of Hong Kong in his letter of 17 June 2002

B. Scheme for freezing terrorist funds

Paragraph 5(a) – Without a means to seek relief (from a refusal by S for S to issue a licence pursuant to s. 5(1)) from an impartial arbiter, I believe the present scheme risks violating Article 10 (right to an independent and impartial tribunal) of the Hong Kong Bill of Rights and Article 35 (right of access to courts and judicial remedies) of the Basic Law.

Judicial Review is available in respect of a decision by S for S to not issue a licence.

Paragraph 5(b)(1) – There is good reason to offer some mitigation from the possible harsh consequences of these measures from the point of view of legal representation and the innocent family dependents of the affected persons.

The circumstances under which the Secretary for Security will grant a licence under Clause 5 have to be considered on a case-by-case basis. Some examples are the funds are required to support the affected person's family or subject to bankruptcy or winding-up proceedings.

Paragraph 5(b)(2) – It is recommended that the funds acquired by innocent suppliers be exempted from the freezing scheme.

If a terrorist buys a car from an innocent supplier, the car will be "terrorist property" but the funds used to purchase the car will have lost their character as "terrorist property". Please also refer to the Administration's response to issues raised by the Hong Kong Association of Banks.

Paragraph 5(b)(3) – The clause which qualifies the power to grant a licence (i.e. "for the purposes of this section") is unclear and should be deleted.

We agree.

Paragraph 5(c) – It is recommended that freeze notices should expire at six months or a year unless proceedings have been brought under s. 13 to have the funds forfeited.

The amended Clause 5 in the draft Committee Stage Amendments (CSAs) addresses this issue.

Paragraph 5(d) – It is recommended that subparagraph 5(2)(b)(ii) be deleted.

Clause 5(2)(b) sets out the circumstances when the Secretary for Security shall revoke her earlier notice. We do not consider that subparagraph (ii) should be deleted.

Paragraph 5(e) – It is recommended that the hurdle of finding a ‘material change in circumstances’ be added.

The amended Clause 5(3B) in the CSAs addresses this issue.

Paragraph 5(f) – Without taking such steps to preserve the value of the asset, it could very well be that if the direction to freeze turns out to be unjustified, the government will be liable to pay the innocent party the interest that could have been earned during the period of restraint.

We do not consider it necessary to do so. The new Clause 16A of the draft CSAs enables the affected person to apply for compensation.

C. Scheme for freezing property other than funds

Paragraph 7 – It is recommended that there be greater clarification in the main body of the legislation as to the availability of judicial review.

The Regulations to be made under Clause 19 are subsidiary legislation which shall be subject to the scrutiny of the Legislative Council. Sub-clause (2) provides that the Regulations may provide for applications to be made to the Court.

Paragraph 8 – In particular, safeguards providing for a reasonable expiry period, notice to affected persons, judicial review and supervision, release of property for legitimate purposes, re-freezing of property only after a material change in circumstances, should be included.

It is envisaged that any Regulations made pursuant to Clause 19 (which, as indicated are subsidiary legislation and subject to scrutiny by Legislative Council) will replicate Clause 5 and the relevant parts of Clauses 16 and 16A in the draft CSAs.

Paragraph 9 – I think the Administration should reconsider its approach of using regulations to freeze property other than funds.

The suggestion is noted. However we do not see the need to deal with the freezing of property, other than funds, at the present stage.

D. The Prohibitions

Paragraph 11 – It may be necessary to create a regulatory offence to ensure that persons in a position to lend or leverage funds take reasonable care (at minimum) to check for the client’s name on the CE’s notices.

We do not consider it necessary to impose additional legal requirements upon concerned parties as suggested. Clause 11 (as amended in the draft CSAs) will require a person to make a report if he knows or suspects that property is terrorist property.

E. The reporting duty and offence

Paragraph 12 – These obligations, if taken seriously, pose significant intrusions on the traditional solicitor-client relationship and will probably adversely affect the ability of specified persons to obtain confidential legal assistance. Such consequences may be Bill of Rights and Basic Law implications.

Paragraph 14 – It is recommended that there be an exemption from disclosure in situations where the legal advisor genuinely believes the disclosure will undermine the trust and confidentiality in the relationship that is essential to the effective representation of client.

The new Clause 2(5) in the draft CSAs already addresses the issue.

F. Powers to obtain evidence and information

Paragraph 15 – Subsection 12(2) should make clear that Schedule 3 enables property “reasonably” suspected of being terrorist property to be seized and detained.

The powers to seize and detain property suspected to be terrorist property are drawn from Schedule 3 of the Bill. Clause 12(2) only describes the purpose and scope of the Schedule.

Paragraph 16 – I believe race, gender, age, ethnic origin, and place of birth, either taken alone or in combination, can never form the basis of a reasonable suspicion for the purposes of exercising any of the power in Schedules 2 and 3.

It should be noted that the provisions of Schedules 2 and 3 are modelled on existing provisions of our laws. We do not consider it necessary to explicitly include an overriding provision as suggested. Similar to the enforcement of other Hong Kong laws, the powers in the Schedules will be exercised in accordance with the provisions of the Bill and the Hong Kong Bill of Rights Ordinance.

Paragraph 17(a) – It is unclear to what extent the powers s. 1 of Schedule 2, to compel the production of information and materials, abrogates the common law privilege against self-incrimination.

The new Clause 2(5) in the draft CSAs applies to Schedule 2.

Paragraph 17(b) – In today’s climate of constitutional and human rights, it is difficult to conceive of a search power more raw and unrestrained in nature. I have little doubt that if challenged in an appropriate case, these powers will be found to be inconsistent with the Bill of Rights and Basic Law, and any incriminating evidence obtained as a result of the rights infringement will likely be ruled inadmissible either under those instruments or the common law residual discretion.

Clause 2(1) of Schedule 3 is modelled on section 52(1) of the Dangerous Drugs Ordinance. The powers provided under subparagraphs (b) and (c) are absolutely necessary to ensure effective border control given the large volume of passengers and goods passing through the HKSAR.

Paragraph 17(c) – It is my opinion that any search, even if authorized by law, will infringe the privacy rights in the Bill of Rights and Basic Law if executed in an unreasonable manner. Qualified language should be added to prevent unreasonable uses of the powers.

It should be noted that Clause 2(5) of Schedule 3 is modelled on section 52(8) of the Dangerous Drugs Ordinance.

Paragraph 17(d) – I recommend that provisions be added in Schedule 3 to provide for the prior judicial authorization of intrusive bodily searches.

Section 2(b) of Schedule 3 is a standard provision appearing in many Hong Kong Ordinances.

Paragraph 17(e) – It is recommended that this jurisdiction to release all or part of the detained property be included in S. 3(4) of Schedule 3.

We will consider.

G. Forfeiture of terrorist property

Paragraph 18(a) – I believe the rules must be framed to ensure that the government takes all reasonable steps to notify interested persons about the potential forfeiture of alleged terrorist property.

The suggestion is noted. The Rules Committee of the Judiciary will make the rules of court regarding procedures for the forfeiture of terrorist property under Clause 13. These rules will be subsidiary legislation and subject to the scrutiny of the Legislative Council.

Paragraph 18(b) – It is recommended that there be included provisions for discretionary relief to innocent third parties holding terrorist property.

Please see answer to paragraph 5(b)(2) above. The new Clause 16A(3) in the draft CSAs also provides for compensation to be paid by the Government under certain circumstances where suspected terrorist property is seized under the provisions of Schedule 3 and is not forfeited under Clause 13.

Paragraph 18(c) – Subsection 13(5) can be worded more clearly by deleting the last clause, “as it applies to and in relation to section 24D(1) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405)”.

This is a drafting matter. We consider it desirable to retain the existing wording.

Paragraph 18(d) – It is recommended that a clear right of appeal be provided in the Bill for aggrieved persons.

We can include in the provision dealing with compensation a sub-clause declaring that Section 14 of the High Court Ordinance shall apply to any judgment or Order of the Court arising from proceedings under the provision.

H. Other issues

Retrospectivity

The clear intention of the Bill is that a person who has committed the “terrorist acts” before the Bill comes into force will be a “terrorist” within the meaning of the Bill (see definition of “terrorist” and the power of the Chief Executive to specify persons designated by the UN Committee).

Paragraph 21(a) – The existing scheme requires showing “some serious default on the part of any person concerned in the investigation or prosecution” as a pre-requisite to obtaining compensation. This requirement should not be included under this legislation.

We consider that the Government should only be held responsible when there has been “serious default” on the part of any person concerned in obtaining the specification under Clause 4A(2) or 5(1). This is a reasonable standard and is necessary to protect the interest of the Government and public revenue; it replicates existing law (Section 27 of Cap. 405; section 29 of Cap. 455).

Paragraph 21(b) – If the ‘serious default’ requirement is removed then there is no reason to keep the proviso used in s. 29(3) of the Organized and Serious Crimes Ordinance.

See answer to paragraph 21(a) above.

Paragraph 21(c) – In the context of anti-terrorism and the specification system used in the Bill, it is necessary to consider whether compensation should be extended to reputational loss.

New Clause 16A in the draft CSAs provides that the amount of compensation to be paid under this section shall be such as the Court of First Instance thinks just in all the circumstances of the case.

I. Complying with UNSC Resolution 1373

Paragraph 22 – It is my opinion that the HKSAR has an obligation to carry out all the decisions contained in Resolution 1373, and particularly the decisions contained in paragraphs 1 and 2.

Paragraph 23 – Particularly, the decisions relating to the movement of certain individuals (para. 2(g)), their presence in the Region (paras. 2(c) and (d)) and international cooperation (para. 2(f)) must be implemented.

The purpose of the Bill is to implement paragraphs 1(a), (b), (c), (d) and 2(a) of Resolution 1373 which are the mandatory requirements of the resolution. We already have existing legislative and administrative measures to give effect to other decisions in UNSCR 1373 e.g. paragraphs 2(c), (d), (f) and (g). We are conducting further research into legislative amendments or proposals to implement the other non-mandatory elements of the resolution, to apply in HKSAR other international conventions against terrorism, and to give full effect the Special Recommendations of the Financial Action Task Force on Money Laundering.

Security Bureau
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