

**Submission by JUSTICE, the Hong Kong Section of
the International Commission of Jurists**

The UN (Anti Terrorist Measures) Bill : Main Points and Suggested Draft Amendments

As proposed amendments are not yet finalised and the nature of the procedure and rules for applications under the proposed section 4A remain unclear, the views expressed are provisional only and do not represent the entirety of what JUSTICE would wish to submit if time had allowed for a more considered submission. We deplore the lack of proper time for full public consultation when there is no demonstrated necessity for the urgency. Hong Kong is not facing any terrorist threat as is acknowledged by the Secretary for Security.

1. The Bill must implement *only* the terrorist-financing requirements of UN Security Council Resolution 1373 and Financial Asset Task Force Special Recommendations I and II. At present the Bill is too widely drawn and is in parts ambiguous.
2. The Bill must provide a more precise definition of terrorist act, in order to prevent abuse and the criminalisation of innocent conduct in Hong Kong. Draft amendments are attached.
3. The offences in the Bill presently catch innocent conduct. For example, S.6 criminalises the collecting of funds for humanitarian purposes. It prevents a named person or organisation or a suspected terrorist or terrorist associate having any access to funds for legal representation or advice. S.6 should be amended to accord with UNSCR 1373 which requires that the giver intends that the funds are to be used for terrorism. Draft amendments are attached
4. Other offences in the Bill use the formulation "*having reasonable grounds to suspect*". This is open to abuse and does not allow for innocent mistake, naivete or credulousness or careless conduct. It should be replaced by the twofold requirement

that a person “*suspect on reasonable grounds*” that one of the offences prescribed in the Bill is, has been or will be committed or that a person or body is a terrorist as defined. Draft amendments to section 7 and 8 are attached

5. Cl.9 must be amended to protect innocent connection with specified persons. Since it can be assumed that terrorist organisations will be operating under the appearance of a legitimate organisation, knowledge that the organisation or person with whom one is dealing is in fact the specified organisation or person must be a necessary ingredient of the offence. Draft amendments are attached.
6. The Court should not be involved in specification as is proposed in clause 4A for constitutional reasons. However, if it is, then for this and any other ‘ex parte’ procedure, the normal rules for all ‘ex parte’ applications shall apply including the power of the Court to revoke on short notice, the rules of full and frank disclosure to the Court of all that is known both for and against the making of the application and the rules of service must be observed. Third parties who are affected must also be allowed to apply on short notice. All such specifications must have a limited life of no more than 6 months and applications will have to be made to renew the application. Also, if the Court is to be asked to take on the role of deciding on a specification, it should be satisfied to an established standard that a person is a terrorist, terrorist associate or that property is terrorist property. The present formulation is vague and inappropriate.
- 7.
8. The Bill must expressly provide for all persons affected by a specification or freezing order to be able to apply to the Court for its revocation. Applications for revocation should be made to the Court of First Instance.
9. The Bill must also provide a full appellate jurisdiction for applications to the Court against a S.4A Order specifying a person or “entity” as a terrorist, etc.
10. There must also be a general power in the Court to order compensation for the

exercise of such a power, if later found not to be justified for all persons affected by the exercise of such a power.

11. The Bill must require a search warrant to be obtained for any search and that an order of the Court be obtained for any seizure of property for more than a minimal time, and for adequate safeguards.
12. The proposed protection for “legal privilege” in Clause 2(5) [CSA] is inadequate. The Bill does not provide protection for persons giving legal advice and representation in connection with the duties, powers, obligations and offences created by the legislation. The provision needs to be broadened to cover *legal advice privilege*. The Bill should also specifically exempt legal advisers from the duties of disclosure, reporting and production of material and information. Draft amendments are attached.
12. Cl.10 should be deleted. It is not compatible with the minimalist approach nor with the avowed intention of implementing only the UN Resolution (which only requires criminalizing of a very limited number of activities) or the FATF Special Recommendations. Nor is there any demonstrated need for this legislation.
13. Any specification should automatically lapse within a fixed and short period unless application is made for renewal when it will have to be demonstrated that there is still an existing threat from the person or organisation. The power to apply for a fresh specification once revoked or lapsed should only be upon demonstrating a material change of circumstances justifying the application.

JUSTICE
22 June 2002

Draft clause 2

“terrorist act () : -

- (1) An act or omission which is intended to cause, in any 1 or more countries or territories, 1 or more of the outcomes specified in subsection (2), and is carried out for the purpose of advancing an ideological, political, or religious cause, and with the following intention :
 - a) to induce terror in a civilian population; or
 - b) to unduly compel or to force a government or an international organisation to do or abstain from doing any act.

- (2) The outcomes referred to in subsection (2) are :
 - a) the death of, or other serious bodily injury to, 1 or more persons (other than a person carrying out the act);
 - b) a serious risk to the health or safety of a population;
 - c) destruction of, or serious damage to, property of great value or importance, or major economic loss, or major environmental damage, if likely to result in 1 or more outcomes specified in paragraphs (1)(a), (b) and (d);
 - d) serious interference with, or serious disruption to, an infrastructure facility, if likely to endanger human life;
 - e) introduction or release of a disease-bearing organism, if likely to devastate the economy of a country or territory.

- (3) An act or omission does not fall with subsection (2) if it occurs in a situation of armed conflict and is, at the time and in the place that it occurs, in accordance with rules of international law applicable to the conflict.
- (4) To avoid doubt, the fact that a person engages in any protest, advocacy, or dissent, or engages in any strike, lockout, or other industrial action, is not, by itself, a sufficient basis for inferring that the person :
 - a) is carrying out an act for a purpose, or with an intention, specified in subsection (1); or
 - b) intends to cause an outcome specified in subsection (2).

Compare: New Zealand 1969 No 24 s.2(1); New Zealand 1987 No 74 s.2(1); New Zealand 1987

No.179 s.2(1); Terrorism Act 2000 s.1 (UK:); Criminal Code s.83.01(1) (Canada)

Alternative Draft Clause 2

“terrorist act” ()-

- (a) subject to paragraph (b), ~~means the use or threat of action~~-an act or omission where -
 - (i) the ~~action~~-act or omission is intended to -
 - (A) ~~involves~~- cause death or serious bodily injury by serious violence against a person;
 - (B) ~~involves~~- cause serious damage to property;

(C) ~~endangers~~ ~~endanger~~ a person's life, other than that of the person committing the action;

(D) ~~creates~~ ~~cause~~ a serious risk to the health or safety of the public or a section of the public;

(E) ~~is designed~~ seriously to interfere with or seriously to disrupt an electronic system; or

(F) ~~is designed~~ seriously to interfere with or seriously to disrupt an essential service, facility or system, whether public or private; and

(ii) the use or threat is -

(A) ~~designed to influence~~ ~~intended unduly to compel~~ the Government or to intimidate the public or a section of the public ~~with regard to its security~~; and

(B) made for the purpose of advancing a political, religious or ideological cause;

(b) in the case of paragraphs (a)(i), (B), (E) and (F), does not include the use or threat of action in the course of any advocacy, protest, dissent or ~~stoppage of work~~ industrial action;

HK/NZ Bill; Canada Act

Definition of privilege communication to be inserted into section 2

- (5) For the purposes of this Ordinance, a communication is a privileged communication if-
- (a) it is a confidential communication, whether oral or written, passing between -
 - (i) a legal practitioner in his or her professional capacity and another in that capacity; or
 - (ii) in his or her professional capacity and his or her client, -whether made directly or indirectly through an agent of either; and
 - (b) it is made or brought into existence for the purpose of obtaining or giving legal advice or assistance; and
 - (c) it is not made or brought into existence for the purpose of committing or furthering the commission of some illegal or wrongful act.

Adapted from NZ

6. **Prohibition on supply of funds to terrorists and terrorist associates**

~~(1)~~ A person shall not provide or collect, by any means, directly or indirectly, funds -

~~(a) with the intention that the funds be directly or indirectly supplied to or otherwise used by; or~~

~~(b) knowing or having reasonable grounds to believe that the funds will be directly or indirectly supplied to or otherwise used by;~~

~~a person who the first mentioned person knows or has reasonable grounds to believe is a terrorist or terrorist associate.~~ with the intention that the funds should be used, in whole or in part, in order to carry out a terrorist act.

7. Financing of terrorism

- (1) A person shall not directly or indirectly, wilfully and without lawful justification or reasonable excuse, provide or collect funds knowing or intending that they be used in full or in part, in order to carry out acts of a kind that, if they were carried out, would be terrorist acts.

- (2) To avoid doubt, subsection (1) does not prohibit a person providing or collecting funds intending that they be used, or knowing that they are to be used, for the purpose of advocating democratic government or the protection of human rights.

NZ Bill

7. **Prohibition of making funds, etc. available for terrorism**

No person shall directly or indirectly, collect property, provide or invite a person to provide, or make available funds **or services related to finance**

- (a) **knowing or** intending that they be used in whole or in part, for the purpose of facilitating or carrying out any terrorist activity, or for the purpose of benefiting any person who is facilitating or carrying out such an activity, or
- (b) **knowing or intending** that, in whole or part, they will be used by or will benefit **[enhance the ability of]** a terrorist **associate [to carry out a terrorist act]** .

Adapted from Canadian Act

7. **Prohibition on making funds or financial or related services available to terrorists and terrorist associates**

- (1) No person shall knowingly make available, or cause to be made available, directly or indirectly, without lawful justification or reasonable excuse, any funds either to, or for the benefit of, a person, knowing that the person is for the time being specified under this Ordinance as a terrorist or as a terrorist associate or that the funds are for the time being specified under this Ordinance as terrorist property.
- (2) To avoid doubt, nothing in subsection (1) prohibits a person making funds available, or causing property or financial or related services to be made available, either to, or for the benefit of, a movement or organisation advocating democratic government or the protection of human rights and that is not involved in any way in the carrying out of a terrorist act.
- (3) To avoid doubt, a reasonable excuse, for the purposes of subsection (1), is where the funds are made available in an act that does no more than satisfy essential human needs of (or of a dependant of) an individual specified under this Ordinance.
- (4) Subsection (1) does not apply if the Secretary has, under the authority of a license granted under this section, or **under** section 5, authorised the making available of the funds or services.

Adapted from Canadian Bill

Alternative Clause 7 based on current draft

7. **Prohibition on making funds, etc. available to terrorists and terrorist associates**
- (1) No person shall, except under the authority of a licence granted by the Secretary for the purposes of this section, knowingly make any funds available, directly or indirectly with the intention that the funds should be used, in whole or in part, in order to carry out a terrorist act.
- (2) To avoid doubt, subsection (1) does not make it an offence for a person to make funds available intending that they be used, or knowing that they are to be used, for the purpose of advocating democratic government or the protection of human rights.

HK; Canada/NZ

8. Prohibition on supply of weapons to terrorists and terrorist associates

A person shall not knowingly provide or collect, by any means, directly or indirectly, weapons –

- (a) with the intention that the weapons be directly or indirectly supplied to or otherwise used in connection with a terrorist act; or
- (b) knowing or suspecting on reasonable grounds that the weapons will be directly or indirectly supplied to or otherwise used by, a person who the first-mentioned person knows or suspects on reasonable grounds is a terrorist or terrorist associate.

NZ

9. Recruiting and membership of terrorist groups

- (1) No person shall recruit another person as a member of a group or organisation, knowing that the group or organisation is
- (a) for the time being specified under this Ordinance as a terrorist or terrorist associate; or
 - (b) a person that carries out, or participates in the carrying out of a terrorist act.
- (2) No person shall participate in a group or organisation for the purpose stated in subsection (2), knowing that the group or organisation is -
- (a) a person that is for the time being specified under this Ordinance Act as a terrorist or terrorist associate; or
 - (b) that carries out, or participates in the carrying out of a terrorist act.
- (3) The purpose referred to in subsection (1) is to enhance the ability of any person (being a person of the kind referred to in subsection (1)(a) or (b)) to carry out, or to participate in the carrying out of, terrorist acts.

NZ

Alternative Draft Clause 9

9. Prohibition on recruitment, etc. to person specified in notices under sections 4 and 4A

(1) A person shall not knowingly -

- (a) recruit another person to become a member of, or
- (b) become a member of

a person whom he knows to be the person specified in a notice under section 4(1) or (2) or section 4A of this Ordinance.

(2) Where a person is a member of a person specified in a notice under section 4 or 4A immediately before the date of publication in the Gazette of a notice of specification of that person the first-mentioned person shall, upon learning of the notice, take all practicable steps to cease to be such a member.

HK

11. Disclosure of knowledge or suspicion that property is terrorist property

- (1) Where a financial institution or other person in possession or control of property knows or ~~has reasonable grounds to suspect~~ suspects on reasonable ground that any property is terrorist property, then the financial institution or other person shall disclose to an authorised officer the information or other matter -
- (a) on which the knowledge or suspicion is based; and
 - (b) as soon as is practicable after that information or other matter comes to the ~~person's~~ attention of the financial institution or other person .
- (2) If a person who has made a disclosure referred to in subsection (1) does any act in contravention of section 6 or 7 (whether before or after the disclosure), and the disclosure relates to that fact, the person does not commit an offence under section 14(1) in respect of that contravention if -
- (a) that disclosure is made before the person does that act and the person does that act with the consent of an authorized officer; or
 - (b) that disclosure is made -
 - (i) after the person does that act;
 - (ii) on the person's initiative; and
 - (iii) as soon as it is practicable for the person to make it.

- (3) A disclosure referred to in subsection (1) -
- (a) shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract or by any enactment, rule of conduct or other provision;
 - (b) shall not render the person who made it liable in damages for any loss arising out of -
 - (i) the disclosure;
 - (ii) any act done or omitted to be done in relation to the property concerned in consequence of the disclosure.
- (4) Where a person knows or ~~has reasonable grounds to suspect~~ suspects on reasonable grounds that a disclosure has been made under subsection (1), the person shall not disclose to another person any information or other matter which is likely to prejudice any investigation which might be conducted following that first-mentioned disclosure.
- 11A. Nothing in this Ordinance or in regulations made hereunder shall apply to or create powers, obligations or liabilities in respect of privileged communications, or to restrict the privilege against self-incrimination.

S.11 : HK

S.11A : New, adapted from NZ