

**Bills Committee on United Nations (Anti-Terrorism Measures) Bill -
Summary of Written Submissions and the Administration's Response**

Clause No.	Major views/concerns of deputations	Administration's response
General	<p><u>Concerned People's Organizations and Citizen's Groups</u></p> <ul style="list-style-type: none"> - The questions of whether the Bill is necessary and its potential impact on civil rights and liberties, have not been answered. - The Administration is demanded to withdraw the Bill and to acknowledge the need for public consultation on legislative proposals concerning livelihood protection and social justice. <p><u>YUA Current Affairs Society</u></p> <ul style="list-style-type: none"> - Hong Kong should fulfill its international obligations having regard to the interest of the Mainland and Hong Kong. The pre-requisite is that any legislation should be consistent with the foreign affairs policy of the Mainland. 	<ul style="list-style-type: none"> - Hong Kong's existing laws and administrative arrangements can already deal with most activities typically associated with terrorists. The United Nations Security Council Resolution (UNSCR) 1373 and the Special Recommendations of the Financial Action Task Force on Money Laundering (FATF) however deal principally with the financing of terrorism. New legislative measures will be required in this regard in order to implement Hong Kong's international obligations. - The Administration believes that the Bill is in full compliance with the relevant provisions of the Hong Kong Bill of Rights Ordinance and the International Covenant on Civil and Political Rights. - The Administration has considered all the views received from the public and will move Committee Stage amendments (CSAs) as appropriate. - The Central People's Government has already notified the HKSAR to implement UNSCR 1373.

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<p>2 Interpretation</p>	<p>- The Society regrets that public consultation was not conducted on the Bill.</p> <p><u>Mr Simon YOUNG of the University of Hong Kong</u></p> <p>- The HKSAR has an obligation to carry out all the decisions contained in UNSCR 1373, and particularly the decisions contained in paragraphs 1 and 2.</p> <p>- There are still some areas of UNSCR 1373 which need to be addressed. Particularly, the decisions relating to the movement of certain individuals, their presence in the Region and international cooperation.</p> <p><u>JUSTICE</u></p> <p>- The Bill must implement only the terrorist-financing requirements of UNSCR 1373 and FATF Special Recommendations I and II. At present the Bill is too widely drawn and is in parts ambiguous.</p> <p><u>Concerned People's Organizations and Citizen's Groups</u></p> <p>- The definition of an "act of terrorism" is so broad that everything from anti-globalization protests to civilian disobedience tactics of environmental activists and disruptive internet activism can be labelled as "terrorism".</p> <p><u>The Law Society of Hong Kong</u> <u>Amnesty International</u></p> <p>- Concerned over the potential abuse of the Bill in</p>	<p>- The Administration has considered all the views received from the public and will move Committee Stage amendments (CSAs) as appropriate.</p> <p>- The Bill seeks to implement the mandatory elements of UNSCR 1373 as set out in its paragraphs 1(a), (b), (c), (d) and 2(a) and Recommendations II, III and IV of the FATF. The Administration's intention is to adopt a minimalist approach in drawing up the Bill.</p> <p>- The Administration will move CSAs to amend the definition of "terrorist act" as follows -</p> <p>(i) "involves" in paragraphs (a)(i)(A) and (B) is amended to read "causes";</p> <p>(ii) "designed" in paragraphs (a)(i)(E), (F) and (a)(ii)(A) is amended to read "intended";</p> <p>(iii) "influence" in paragraph (a)(ii)(A) is amended to read "compel";</p> <p>(iv) "stoppage of work" in paragraph (b) is amended</p>

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	<p>limiting peaceful exercise of the right to freedom of expression, in view of the broad definition of "terrorist act"</p> <p><u>JUSTICE</u></p> <ul style="list-style-type: none"> - The Bill must provide a more precise definition of terrorist act, in order to prevent abuse and the criminalization of innocent conduct in Hong Kong. An "act" or "omission" intended to cause serious bodily injury against a person, serious damage to property etc should be regarded as a terrorist act. <p><u>Hong Kong Association of Banks</u></p> <ul style="list-style-type: none"> - Given the broad definition of "property" under the Interpretation and General Clauses Ordinance, ideally "financial assets" and "economic resources" should be defined. - The definition of "terrorist property" is too broad particularly in the context of Clause 11 in that it will include property bona fide in the hands or owned by 	<p>to read "industrial action"; and</p> <p>(v) the exceptions in respect of advocacy, protest, dissent or industrial action provided for in paragraph (b) is extended to cover paragraph (a)(i)(D), (E) and (F).</p> <ul style="list-style-type: none"> - The definition of "terrorist act" follows the international consensus that a "terrorist act" must satisfy three criteria – <ul style="list-style-type: none"> (i) it involves the use of action or threat of action to compel a government or intimidate the public; (ii) the use of threat of action is for the purpose of advancing a political, religious or ideological cause; and (iii) the action or threat of action causes serious violence, serious damage to property or serious risk to public health or safety (as described in paragraphs (a)(i)(A) – (F)). - Omission of the element of "threat" will render the definition ineffective, and we will not be able to curb terrorist financing effectively as a consequence. - The Administration will move CSAs to delete the definition of "property". - Terrorist property includes 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

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<p>4 specification of persons as terrorists or terrorist associates (persons designated by a UN Committee)</p>	<p>someone who is not a terrorist and is not necessarily involved in the terrorist act. The Association believes that the definition should be restricted to the property of terrorist or terrorist associate or some other formulation which would not encompass funds held or owned by an innocent third party.</p> <p><u>Concerned People's Organizations and Citizen's Groups</u></p> <ul style="list-style-type: none"> - The Bill will give the Chief Executive (CE) the power to list individuals or organizations as terrorists. This adds to the potential abuse of power by the CE to suppress political dissidents. <p><u>Amnesty International</u></p> <ul style="list-style-type: none"> - Concerned that CE does not have to obtain a court order before publishing in the Gazette that a person or property is a terrorist, terrorist associate or terrorist property. - The Bill does not seem to allow any means for the person being classified as terrorist, terrorist associate or whose property is being classified as terrorist property to appeal or halt the publication of the notice before it is actually published. 	<p>paragraph 1(b) of UNSCR 1373 and Recommendation III of the FATF. Meanwhile, the Administration will move CSAs to Clause 11 to provide for a test of "knows or suspects". The same formulation has been adopted for similar reporting requirements under the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance.</p> <ul style="list-style-type: none"> - The Administration will move CSAs (new Clauses 4 and 4A) to provide for a specification of persons as terrorists/terrorist associates under the following two mechanisms – <ul style="list-style-type: none"> (i) <i>new Clause 4</i> – Where a person or property is designated by a UN Committee as a terrorist/terrorist or terrorist property as appropriate, the CE may publish a notice in the Gazette specifying the name of that person or property. Where that person or property ceases to be designated by a UN Committee, the Gazette notice shall be deemed to be revoked immediately and the CE shall publish a notice in the Gazette on the revocation for public information; and (ii) <i>new Clause 4A</i> – The CE may apply to the Court of First Instance for an order to specify a person or property as a terrorist/terrorist associate or terrorist property as appropriate. Such application shall be made inter partes unless otherwise specified in the rules of court to be made under Clause 17. The Court of First Instance shall make the order if satisfied that the person or property is a terrorist/terrorist

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	<p><u>Mr Simon YOUNG of the University of Hong Kong</u></p> <ul style="list-style-type: none"> - under the new Clause 4, while the CE's power to specify is discretionary, there is no express obligation for the CE to verify or confirm the factual basis of each UN designation. In practice, the CE will need to have regard to the reliability of both the specific designation and the system of designation in properly exercising his or her discretion. - under the new Clause 4, since the CE's specification is almost wholly dependent on whether there exists an applicable UN designation, it would seem that the cessation of the UN designation should automatically trigger a revocation under our domestic law. It is therefore recommended that Clause 4(6) be amended to provide for the automatic revocation of the CE's notice upon cessation of designation of the relevant UN Committee. It is further recommended that the duty and power of the CE to revoke be replaced with the lesser authority of "specifying that the original notice has been revoked". 	<p>associate or terrorist property as appropriate. The CE shall publish the order in the Gazette.</p> <p>The CE must apply to the Court of First Instance to revoke the order if new information is received which causes him to have reasonable grounds to believe that the person or property is no longer a terrorist/terrorist associate or terrorist property as appropriate. The Court of First Instance shall, in that event, revoke the order.</p> <ul style="list-style-type: none"> - Under normal circumstances, the CE will specify the persons designated by a UN Committee as a matter of implementing international obligations in combating financing of terrorism. - The Administration will move CSAs (new Clause 4(6)) to provide that where that person or property ceases to be designated by a UN Committee, the Gazette notice shall be deemed to be revoked immediately upon the cesser and the CE shall publish a notice in the Gazette on the revocation for public information.

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<p>4A specification of persons as terrorists or terrorist associates (persons not designated by a UN Committee)</p>	<p><u>The Law Society of Hong Kong</u></p> <ul style="list-style-type: none"> - The “minimalist approach” should be adopted. The Administration has failed to justify the need for Clause 4A and related procedures. The procedures in Clause 4 covering terrorist and terrorist property specified by the UN Committee are sufficient for the purpose to meet Hong Kong’s obligations. - The test of “reasonable grounds to believe” proposed by the Administration should be changed to one of “beyond reasonable doubt” or at the very least a “balance of probabilities” or “prima facie” case. - In the case of interim orders made ex parte, it may be acceptable to adopt a lower threshold of “reasonable grounds to believe”. However, an inter-partes hearing before a Court of First Instance judge should follow to determine the continuation of the order and at that hearing, a higher threshold as suggested above should be adopted. <p><u>Mr Simon YOUNG of the University of Hong Kong</u></p> <ul style="list-style-type: none"> - Unclear why there is not simply a single avenue of review in the Court of First Instance available to both the Government and affected persons for the purposes of reviewing and possibly revoking the original order. 	<ul style="list-style-type: none"> - It should be noted that UNSCR 1373 requires Member States to prevent and suppress the financing of terrorist acts on different fronts. It does not restrict the scope of actions to the terrorists/terrorist associates or terrorist property designated by a UN Committee. The Administration believes that Clause 4A is necessary for the implementation of UNSCR 1373. And of course it addresses the Bills Committee’s suggestion that the power for the CE to designate terrorists/terrorist associates or terrorist property should be subject to judicial scrutiny. - The new Clause 4A requires that the Court of First Instance shall only make the order sought by the CE’s application to specify terrorists/terrorist associates or terrorist property if it is satisfied that the persons or property concerned are terrorists/terrorist associates or terrorist property as appropriate. - The Administration will move CSAs (new Clause 4A and 16) to provide for the following – <ul style="list-style-type: none"> (i) where the CE’s application to the Court of First Instance for an order to specify a person or property as a terrorist/terrorist associate or terrorist property as appropriate is made <i>inter partes</i> (and

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	<p><u>JUSTICE</u></p> <ul style="list-style-type: none"> - 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 an 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 applications must have a limited life of no more than six months and applications will have to be made to renew the application. The Court 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. - The Bill must expressly provide for all persons affected by a specification and 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. - The Bill must also provide a full appellate jurisdiction for applications to the Court against Clause 4A order specifying a person or entity as a terrorist etc. - 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 	<p>the Court of First Instance makes the order), the avenue for the affected person to appeal against the order is the Court of Appeal;</p> <ul style="list-style-type: none"> (ii) where the CE's application to the Court of First Instance for an order to specify a person or property as a terrorist/terrorist associate or terrorist property as appropriate is made <i>ex parte</i> (and the Court of First Instance makes the order), the avenue for the affected person to appeal against the order will also be the Court of First Instance; and (iii) the Court of First Instance shall only make the order sought by the CE's application to specify terrorists/terrorist associates or terrorist property if it is <i>satisfied</i> that the persons or property concerned are terrorists/terrorist associates or terrorist property as appropriate. <ul style="list-style-type: none"> - The rules of court to be made under Clause 17, which are subsidiary legislation subject to LegCo's scrutiny, will deal with the circumstances and procedures under which ex parte applications will be allowed. - Under the new Clause 4A, an order made shall automatically expire after two years (previously three years).

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<p>5 Freezing of Funds</p>	<p>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.</p> <p><u>Concerned People's Organizations and Citizen's Groups</u></p> <ul style="list-style-type: none"> - The Bill provides the Government with arbitrary powers to freeze the assets and take control of the bank accounts of non-profit organizations under mere suspicion (without evidence) of links to terrorist financing. The Government will use these new powers to harass and intimidate non-profit organizations, targeting them for their involvement in advocating human rights, freedom of expression, freedom of religion and the right to self-determination. <p><u>Mr Simon YOUNG of the University of Hong Kong</u></p> <ul style="list-style-type: none"> - There are inherent difficulties with using a freezing scheme which does not require any prior judicial authorization. - Without a means to seek relief (from a refusal by S for S to issue a licence pursuant to Clause 5(1)) from an impartial arbiter, the proposed scheme for freezing terrorist funds risks violating Article 10 (right to an independent and impartial tribunal) of 	<ul style="list-style-type: none"> - Clause 5(1) requires the Secretary for Security (S for S) to have reasonable grounds to suspect that any funds are terrorist property before she can freeze the funds. Under the new Clause 16, an affected person can apply to the Court of First Instance to revoke the freezing notice. - The Administration considers it vital that freezing action can be taken immediately to combat financing of terrorism, taking into account the reality of modern technology that allows funds to be transferred from one jurisdiction to another almost instantly. In order to provide effective safeguards against abuse and wrongful exercise of such powers, the Bill provides for full judicial oversight of the freezing actions. The Administration bears the burden of proof in all these judicial proceedings. - The Administration will move CSAs (new Clause 16(4)) providing for applications to the Court of First Instance to have a licence issued or to vary the conditions of a licence which has been issued previously.

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	<p>the Hong Kong Bills of Rights and Article 35 (right of access to courts and judicial remedies) of the Basic Law.</p> <ul style="list-style-type: none"> - Persons affected by the freezing of funds need to know if they can obtain a licence to access the funds specified in a notice by S for S for legitimate purposes, such as paying reasonable living and legal expenses. Thus 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. - It is conceivable that the money paid by a terrorist to a third party supplier of goods (e.g. car) which are ultimately used in a terrorist act will be considered “terrorist property” regardless of whether the supplier knew the malevolent intentions of the purchaser. It is therefore recommended that funds acquired by innocent people should be exempted from the freezing scheme - The clause which qualifies the power to grant a licence (i.e. “for the purposes of this section”) is unclear and should be deleted. There is a risk that this clause will be used in an arbitrary fashion to prevent the access to frozen for legitimate purposes. - The two year expiry period is still too long. It is recommended that notices on freezing of funds should expire at six months or a year unless proceedings have been brought against under clause 13 to have the funds forfeited. 	<ul style="list-style-type: none"> - The Administration will move CSAs (new Clause 14A) to provide that S for S can grant a licence for the affected person to use part of the funds for such purposes including the meeting of reasonable living expenses and legal costs, and (new Clause 16(4)) to provide that any person affected by the licence may apply to the Court of First Instance to vary the licence. - If a terrorist buys a car from an innocent supplier, the car will be “terrorist property” but the funds used to buy the car will have lost their character as “terrorist property”. - The Administration will move CSAs to delete “for the purposes of this section” in Clause 5(1). - The Administration considers that the two year expiry period is needed for the purpose of collecting evidence relating to the funds concerned, and applying to the court for forfeiting the funds, including the obtaining of relevant materials from overseas jurisdictions, where applicable, through Mutual Legal Assistance arrangements. In addition, under the new Clause 16,

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<p>6-8 Prohibitions relating to terrorists, terrorist associates and terrorist property</p>	<p><u>Mr Simon YOUNG of the University of Hong Kong</u></p> <ul style="list-style-type: none"> - To prevent carelessness on the part of lending agents or institutions in identifying a terrorist or terrorist associate specified by CE in the Gazette, it may be necessary to create a regulatory offence to ensure that persons in a position to lend or leverage funds take reasonable steps (at minimum) to check for the client's name on the CE's notices. <p><u>JUSTICE</u></p> <ul style="list-style-type: none"> - Clause 6 criminalizes the collecting of funds for humanitarian purposes. It prevents a named person 	<ul style="list-style-type: none"> - the affected person can apply to the Court of First Instance to revoke the freezing notice. - The Administration will move CSAs (new Clause 5(3B)) to provide that S for S shall not re-freeze the same funds unless there has been a material change in the grounds for S for S to exercise the freezing power. - The new Clause 16A enables the affected person to apply for compensation. - The Administration will move CSAs (new Clause 16) to provide that an affected person may apply to the Court of First Instance to revoke the freezing order. <ul style="list-style-type: none"> - The Administration does not consider it necessary to impose additional legal requirements upon concerned parties as suggested. The new Clause 11 will require a person to report if he knows or suspect that a property is a terrorist property. The same formulation has been adopted for similar reporting requirements in the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance. - The Administration considers that Clause 6 as presently drafted is required to implement paragraph 1(a) and (b)

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<p>9 Prohibition on recruitment etc to specified persons</p>	<p>or organization or suspected terrorist or terrorist associate having any access to funds for legal representation. Clause 6 should be amended to accord with UNSCR 1373 which requires that the giver intends that the funds are to be used for terrorism.</p> <p><u>Mr Simon YOUNG of the University of Hong Kong</u></p> <ul style="list-style-type: none"> - How does one "become a member of a person"? If "person" is simply referring to a corporate person then this makes sense. He recommends more consideration be given to the use of more precise language in carving out an offence that is tailored to the mischief that is targeted. <p><u>JUSTICE</u></p> <ul style="list-style-type: none"> - Clause 9 must be amended to protect innocent connection with specified persons. Knowledge that the organization or person with whom one is dealing is in fact the specified organization or person must be a necessary ingredient of the offence. 	<p>of UNSCR 1373.</p> <ul style="list-style-type: none"> - In order to prosecute an offence, the Administration has to prove beyond reasonable doubt that the person concerned knew or had reasonable grounds to believe that the other person to whom he was supplying funds, financial services or weapons is a terrorist or terrorist associate. It should be noted that the fact that the other person has been specified by the CE in the Gazette does not constitute sufficient proof. - The Administration will move CSAs (new Clause 14A) to provide that S for S can grant a licence for the affected person to use part of the funds for meeting reasonable living expenses and legal costs, and (new Clause 16(4)) providing for applications to the Court of First Instance to have a licence issued or a licence which has been issued, varied. <p>The Administration will move CSAs (new Clause 9) limiting the ambit of Clause 9 to recruitment of persons to become members of bodies which the recruiter knows or has reasonable grounds to believe have been specified.</p>

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<p>10 Prohibition against false threats of terrorist acts</p>	<p><u>The Law Society of Hong Kong</u></p> <ul style="list-style-type: none"> - Prohibition against false threat of terrorist act under Clause 10(1) equates to prohibition against publication of false news likely to alarm public order which was repealed by the Administration in 1989. This Clause should be deleted. <p><u>Hong Kong News Executive' Association</u></p> <ul style="list-style-type: none"> - Clause 10(1) will put an onerous burden on the media and seeks to criminalize attempts by media organizations to clarify information relating to an alleged terrorist threat. If the media are required to confirm if any information is genuine before any reports can be made, it will impose part of the investigation responsibility on the media and will impact normal news reporting. During the checking process, the reporters will have to talk to many persons and may be regarded as communicating information which one believes to be false to another person. Clause 10(1) will impact the free flow of information and the media will have practical difficulties abiding by it. <p><u>Hong Kong Journalists Association</u></p> <ul style="list-style-type: none"> - The Association is concerned with the loose wording of Clause 10(1) and therefore calls for the deletion of the Clause. <p><u>JUSTICE</u></p> <ul style="list-style-type: none"> - Clause 10 should be deleted. It is not compatible with the minimalist approach. 	<ul style="list-style-type: none"> - Clause 10(1) deals with deliberate and wilful acts to disseminate false information, which are calculated to cause confusion. Clause 10 will not suppress freedom of the press. In order to substantiate an offence under clause 10(1), the prosecution will have to prove beyond reasonable doubt that – <ul style="list-style-type: none"> (i) the person who communicated or made available the false information actually knew or believed that the information was indeed false; and (ii) this person had the intention of inducing in another person a false belief that a terrorist act has been, is being or will be carried out. <p>This provision is not directed against inaccurate reporting by journalists. It is directed against malicious "hoax" actions. Many common law jurisdictions such as the UK, Australia and Singapore also have similar statutory provisions to prohibit false threats of terrorist acts.</p> <ul style="list-style-type: none"> - The Administration will move CSAs (new Clause 10(4)) to provide, for the avoidance of doubt, that Clause 10 does not restrict the operation of Part XII of the Interpretation and General Clauses Ordinance.

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<p>11 Disclosure of knowledge or suspicion that property is terrorist property</p>	<p><u>Mr Simon YOUNG of the University of Hong Kong</u></p> <ul style="list-style-type: none"> - 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 have Bill of Rights and Basic Law implications. - Having lawyers make secret disclosure of suspected terrorist property is not simply a concern about disclosing privileged information, because confidential information about the client may not necessarily be covered by legal professional privilege but would have to be secretly disclosed to the Government if it formed the basis of suspicion. This secret disclosure will hamper the essential trust in the relationship necessary for the full and effective representation of the client. The only adequate solution to the problem is an express exemption from disclosure. - There should be an exemption from disclosure in situations where the legal adviser genuinely believes the disclosure will undermine the trust and confidentiality in the relationship that is essential to the effective representation of the client. <p><u>JUSTICE</u></p> <ul style="list-style-type: none"> - There should be provisions to cater for privileged communication between legal practitioners and between legal practitioners and their clients for the purpose of obtaining or giving legal advice or assistance. 	<ul style="list-style-type: none"> - The Administration will move CSAs (new Clause 2(5)) to provide that nothing in the Bill shall require a legal practitioner to disclose any privileged communication which is a confidential communication passing between legal practitioners or between the legal practitioner and his client for the purpose of obtaining or giving legal advice. The new provision is adapted from similar proposals under the New Zealand Terrorism (Bombings and Financing)(Suppression) Bill. - The new Clause 2(5) also will also provide that nothing in the Bill shall restrict the privilege against self-incrimination.

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	<ul style="list-style-type: none"> - The proposed protection for “legal privilege” in the new Clause 2(5) is inadequate. The provisions need 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. - The formulation “having reasonable grounds to suspect” 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 “suspects on reasonable grounds” that one of the offences has been or will be committed. <p><u>Hong Kong Federation of Insurers</u></p> <ul style="list-style-type: none"> - The amendment of the existing test of "knows or has reasonable grounds to suspect" to "knows or suspects" represents a shift of unnecessary burden to the financial institutions, in particular for the front line staff. The Federation recommends the test of "knows or has reasonable grounds to believe". <p><u>Hong Kong Association of Banks</u></p> <ul style="list-style-type: none"> - The provisions of Section 25A of the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance only trigger the obligation to report when the person “knows or suspect”. The same formulation should be adopted here. 	<ul style="list-style-type: none"> - The Administration will move CSAs to Clause 11 to provide for a test of "knows or suspects", which is consistent with the FATF’s Special Recommendation IV and is generally acceptable to the financial and accounting sectors. The same formulation has been adopted for similar reporting requirements under the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance. - The Administration considers that the test of "knows or suspects" is consistent with the FATF’s Special Recommendation IV and is generally acceptable to the financial and accounting sectors. The same formulation has been adopted for similar reporting requirements under the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance. - The Administration will move CSAs to Clause 11 to provide for a test of "knows or suspects", which is consistent with the formulation in the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance.

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	<ul style="list-style-type: none"> <li data-bbox="510 248 1236 759">- Under Clause 11(4), a person is not permitted to disclose to any other person information likely to prejudice an investigation. 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. 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 customers for failure to follow the customer's instructions. <li data-bbox="510 916 1236 1168">- There should be 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 is to protect junior bank staff who make disclosures to compliance officers from liability. <p data-bbox="510 1248 963 1279"><u>Hong Kong Society of Accountants</u></p> <li data-bbox="510 1321 1236 1426">- The Society supports the Administration's proposal to amend "know or has reasonable grounds to suspect" to "knows or suspects". 	<ul style="list-style-type: none"> <li data-bbox="1254 248 2020 868">- In general, the Administration considers that the "tipping off" restriction is essential, as it minimizes the possibility of jeopardizing investigation by law enforcement agencies into terrorist financing and any subsequent judicial proceedings. The power to freeze funds would also be jeopardized without such restrictions. In practice, consent to operate will only be refused by the Joint Financial Investigation Unit when there is current investigation and when the authorities are seeking or about to seek a restraint order in respect of the property. In most of the cases where such consent had been refused, the Unit had advised the banks concerned to refer their customers to the enforcement authorities. In addition, it should be noted that Clause 11(3)(b) makes it clear that a financial institution is not liable for damages in these circumstances. <li data-bbox="1254 916 2020 1056">- The Administration will move CSAs (new Clause 11(3A)) to give protection to those employees who have made disclosures to their employers in accordance with the guidelines set by the latter. <li data-bbox="1254 1321 2020 1391">- The relevant professional organization has expressed support for this approach.

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<p>12</p> <p>Powers to obtain evidence and information</p>	<p><u>Mr Simon YOUNG of the University of Hong Kong</u></p> <ul style="list-style-type: none"> - The word "reasonably" should be added before the word "suspected" in clause 12(2) to make clear that property reasonably suspected of being terrorist property will be seized and detained. 	<ul style="list-style-type: none"> - 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. Section 2(4) of Schedule 3 uses the formulation "reason to suspect".
<p>13</p> <p>Forfeiture of terrorist property</p>	<p><u>The Law Society of Hong Kong</u></p> <ul style="list-style-type: none"> - The Court of First Instance may make an order to forfeit property of the "terrorist". The Administration should review these provisions to enable such "named terrorists" to have access to sufficient funds should they challenge the order. The practice in Mareva proceedings should be adopted as a model. <p><u>Mr Simon YOUNG of the University of Hong Kong</u></p> <ul style="list-style-type: none"> - Hearings on forfeiture of terrorist property held in camera and ex parte should not be made unless under extremely exceptional circumstances. 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. - Provision should be made for discretionary relief to innocent third parties holding terrorist property. - The words "as it applies to and in relation to section 24D(1) of the Drug Trafficking (Recovery of 	<ul style="list-style-type: none"> - If property has been frozen prior to forfeiture proceedings, a licence can be granted in respect of legal expenses. - The Administration has noted the suggestion. 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 are subsidiary legislation subject to LegCo's scrutiny. - The Administration will move CSAs (new Clause 16A) to provide for compensation to be paid under certain circumstances where suspected terrorist property is seized under Schedule 3 but is not forfeited under Clause 13. - This is a drafting matter. The Administration considers it desirable to retain the existing wording.

<p>Clause No.</p>	<p>Major views/concerns of deputations</p>	<p>Administration's response</p>
<p>14 Offences</p>	<p><u>Amnesty International</u></p> <ul style="list-style-type: none"> - A person liable to offences under Clause 14 should have access to the evidence against him and has the right to challenge that evidence. - Any proceedings related to summary trials should contain internationally recognized provisions relating to fair trials - particularly to have adequate time and facilities to prepare a defence case and to call and examine witnesses - as any standard criminal trial would contain. - Trials in camera should only be held when there are compelling reasons to do so, such as the safety of witnesses, protection of minors and national security interests. 	<ul style="list-style-type: none"> - The Administration will move CSAs (new Clause 2(7)) to provide, for the avoidance of doubt, that an appeal will be from a decision to order forfeiture by the Court of First Instance. - Such persons will have all the rights that any accused person has under Hong Kong's criminal justice system. - Obviously there will be degrees of culpability in the criminal conduct which can give rise to offences under the Bill. It will be fair for the Secretary for Justice to decide whether an alleged offender is dealt with summarily or on indictment. A person who is tried summarily i.e. before a Magistrate will not be disadvantaged as far as receiving a "fair trial" is concerned. Rather he will have the advantage of being exposed to a lesser penalty. - Clause 17 provides that the rules of court may be made to provide for the circumstances under which certain applications can be held in camera in the interest of security, defence, international relations or a witness giving evidence. "International relations" are relevant where another Government requests that intelligence or evidence it is supplying not be made public because it may, for instance, expose the source of that intelligence to danger or nullify an informant as a source of future intelligence. Rules of court are subsidiary legislation subject to LegCo's scrutiny.

<p>Clause No.</p>	<p>Major views/concerns of deputations</p>	<p>Administration's response</p>
	<p><u>Hong Kong Association of Banks</u></p> <ul style="list-style-type: none"> - Clause 14(10) 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. Whiles 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. 	<ul style="list-style-type: none"> - The Administration will move CSAs to delete Clause 14(10). 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.
<p>16 Applications to Court of First Instance</p>	<p><u>The Law Society of Hong Kong</u></p> <ul style="list-style-type: none"> - Clause 16 (3)(b) places the onus on the person seeking leave "to prove his innocence". This is unacceptable. The onus should be on the Government to prove that the person whose name is placed on the list "is a terrorist". 	<ul style="list-style-type: none"> - Clause 16(3)(b) does not place the onus on the person seeking leave "to prove his innocence". The Administration is required, in all these applications, to bear the burden of proof to satisfy the Court of First Instance that the person concerned is a terrorist/terrorist associate or that there are reasonable grounds to suspect that the property concerned is a terrorist property.
<p>16A Compensation</p>	<p><u>The Law Society of Hong Kong</u></p> <ul style="list-style-type: none"> - A "right to compensation" should be included in the Bill. This will enable the judge hearing the Clause 16 application to consider whether immediate relief can be awarded to an innocent party. 	<ul style="list-style-type: none"> - The Administration will move CSAs (new Clause 16A) to provide that where a person or a property has ceased to be specified as a terrorist/terrorist associate or terrorist property as appropriate, the Court of First Instance may, on application by the person concerned, order compensation to be paid subject to some conditions.

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	<ul style="list-style-type: none"> - It is inappropriate for the Court of Appeal to perform a fact-finding role which should be exercised by the Court of First Instance. <p><u>Mr Simon YOUNG of the University of Hong Kong</u></p> <ul style="list-style-type: none"> - The requirement of "serious default" on the part of any person concerned in the investigation or prosecution as a pre-requisite to obtaining compensation should not be included. - It is necessary to consider whether compensation should be extended to reputational loss. <p><u>JUSTICE</u></p> <ul style="list-style-type: none"> - There must be a general power in the court to order compensation for the exercise of such power, if later found not to be justified for all persons affected by the exercise of such power. 	<ul style="list-style-type: none"> - Under the new Clause 16A, it will be the Court of First Instance which may order compensation. - The Administration considers that that the requirement of "serious default" is a reasonable standard and is necessary to protect the interest of the Government and public revenue. It replicates existing laws (e.g. Section 27 of The Drug Trafficking (Recovery of Proceeds) Ordinance, Section 29 of the Organized and Serious Crimes Ordinance). In regard to wrongful decisions that do not stem from negligence or bad faith, ex-gratia payments are available, at the discretion of the Executive, after consideration of the overall circumstances. - The new Clause 16A provides that the amount of compensation to be paid shall be such as the Court of First Instance thinks just in all the circumstances of a case. - Under the new Clause 16A, the Court of First Instance may, on application by an affected person, order compensation to be paid having regard to all the circumstances.
<p>19 Regulations - freezing of property (other than funds)</p>	<p><u>Mr Simon YOUNG of the University of Hong Kong</u></p> <ul style="list-style-type: none"> - There should be greater clarification in the main body of the Bill as to the availability of judicial review of the freezing regulations. 	<ul style="list-style-type: none"> - The Regulations to be made under Clause 19 are subsidiary legislation which shall be subject to LegCo's scrutiny. Clause 19(2) provides that the Regulations may provide for applications to be made to the court.

Clause No.	Major views/concerns of deputations	Administration's response
	<ul style="list-style-type: none"> - 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 in either the main body of the legislation or in the regulations to be made by S for S. - The Administration should re-consider the approach of using regulations to freeze property other than funds. <p><u>Hong Kong Association of Banks</u></p> <ul style="list-style-type: none"> - Clause 19 contains broad authority for S for S 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 the Association's members. 	<ul style="list-style-type: none"> - It is envisaged that any Regulations made pursuant to Clause 19 will replicate Clause 5 and the relevant parts of Clauses 16 and 16A. - The Administration has noted the suggestion. However, the Administration does not see the need to deal with the freezing of property, other than funds, at the present stage. - The Administration does not see a pressing need for these Regulations in the present circumstances. Any such Regulations are subsidiary legislation subject to LegCo's scrutiny. There will be opportunities for consultation with parties concerned.
<p>Schedule 2 Evidence and information</p>	<p><u>Mr Simon YOUNG of the University of Hong Kong</u></p> <ul style="list-style-type: none"> - An overriding provision should be added to the main body of the Bill clearly stating the powers in Schedules 2 and 3 be exercised by authorized officers without any discrimination based on race, colour, 	<ul style="list-style-type: none"> - It should be noted that the provisions of Schedules 2 and 3 are modelled on existing provisions in our laws. The Administration does not consider it necessary to explicitly include an overriding provision as suggested.

Clause No.	Major views/concerns of deputations	Administration's response
	<p>sex, language, religion, national or social origin, and birth.</p> <p>- It is unclear as to what extent the powers in Section 1 of Schedule 2 to compel the production of information and materials would abrogate the common law privilege against self-incrimination.</p> <p><u>Hong Kong Journalists Association</u></p> <p>- The Association is concerned with the possibility that journalists might be forced to hand over journalistic material which has been obtained in confidence and which might contain the names of sources. The Association is uncertain whether the special provisions of search and seizure of journalist material, as set out in Part XII of the Interpretation and General Clauses Ordinance, apply to the Bill.</p> <p><u>Hong Kong Association of Banks</u></p> <p>- Section 1(1) of Schedule 2 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. The Association queries whether this is appropriate.</p>	<p>Similar to the enforcement of other Hong Kong laws, the powers in the Schedules will be exercised in accordance with the provisions of the Hong Kong Bill of Rights Ordinance.</p> <p>- The Administration will move CSAs (new Clause 2(4)) to provide that nothing in the Bill shall restrict the privilege against self-incrimination.</p> <p>- The Administration will move CSAs (new Clause 10(4)) to provide, for the avoidance of doubt, that Clause 10 does not restrict the operation of Part XII of the Interpretation and General Clauses Ordinance.</p> <p>- The Administration will move CSAs to Section 1 of Schedule 2 to 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.</p>
<p>Schedule 3 Seizure and detention of property suspected to be terrorist property</p>	<p><u>Mr Simon YOUNG of the University of Hong Kong</u></p> <p>- The search powers are raw and unrestrained in nature. If challenged, these powers will be found to be inconsistent with the Bill of Rights Ordinance and the</p>	<p>Schedule 3 is modelled on similar provisions in the Dangerous Drugs Ordinance. The powers provided are necessary to ensure effective border control given the</p>

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Other issues	<u>Mr Simon YOUNG of the University of Hong Kong</u> - The Bill fails to address the issue of retrospective application	terrorist property. - The clear intention of the Bill is that a person who has committed a "terrorist act" before the Bill comes into force will be a "terrorist" within the meaning of the Bill.

Security Bureau
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