

## **Legislative Council Bills Committee on the United Nations (Anti-Terrorism Measures) Bill**

### **Introduction**

Further to the meeting of the Bills Committee on 28 June 2002, this note sets out the Administration's response to issues raised at earlier meetings, and also explains the revisions made to the draft Committee Stage amendments (CSA) after taking into account Members' comments.

### **Articles 6 and 105 of the Basic Law**

2. In response to Members' concern, the Administration considers that the forfeiture provision in Clause 13 of the Bill is consistent with the property right protection requirement under BL 6 and BL 105, and in particular, that it does not constitute a "deprivation" ("*zhengyong*" (徵用)) of property within the meaning of BL 105 for which compensation is payable.

3. Under BL 105, the HKSAR shall, in accordance with law, protect the "right to compensation for lawful deprivation of ... property". The term "deprivation" in BL 105, when construed in the light of the corresponding Chinese text of "*zhengyong*" (徵用), arguably refers to the act where the state or the government resumes or acquires properties due to needs of defence or socio-economic development. In the present case, the forfeiture provision in Clause 13 does not fall within the narrow meaning of deprivation ("*zhengyong*" (徵用)) of property, since it is in the nature of preventive confiscation of terrorist properties.

4. Even if a broader meaning is given to the term "deprivation", it does not, under European human rights jurisprudence, include preventive confiscation that can be justified under the principle of proportionality with reference to overriding public interest(s). In this regard, Clause 13 seeks to combat the global problem of terrorism and, more specifically, terrorism financing, by way of preventive confiscation of terrorist property.

5. Apart from the protection of the above important public interest, the principle of proportionality requires that there be a reasonable relationship of proportionality between the means employed for the interference with private property rights and the aim sought to be realised. Under European human rights jurisprudence in relation to confiscation or forfeiture of properties, it is relevant to consider whether there are procedures which enable reasonable account to be taken of the link between the conduct of owner and breach of law and allow the owner to put his case to the responsible authorities. In this regard, a forfeiture order under Clause 13 will not be made unless the court, under relevant Rules of the High Court, is satisfied that the property concerned is terrorist property and falls within the criteria laid down in Clause 13. There will therefore be sufficient procedural safeguards in compliance with the principle of proportionality to protect the rights of the parties concerned.

### **“Precursors” and “Components” of Weapons**

6. As the Administration has explained to the Bills Committee earlier, the ordinary meaning of the term “precursor” will prevail. In the context of the Bill, precursors will include the key substances within the stages of production from which the chemical, biological, radiological or nuclear weapons are assembled or manufactured.

7. We note that “components” which may form part of a weapon could also have other legitimate uses. However, in order to substantiate an offence under Clause 8 of the Bill, the prosecution has to prove to the court beyond any reasonable doubt that the accused has the intention or knowledge to supply weapons to persons whom he knows or has reasonable grounds to believe are terrorists or terrorist associates. In addition, the prosecution has to prove that such component was indeed part of any arms, ammunition or military equipment. The enforcement agencies will in most cases act upon intelligence or information on possible breaches of the law. The fact that such components could be used for other legitimate purposes will in practice render the offence even more difficult to prosecute.

## **Safeguarding Legal Privilege**

8. Following discussion with the Bills Committee at the meeting on 28 June, the Administration will move a CSA to incorporate in the Bill the meaning of “items subject to legal privilege” as it is now defined under Section 2(1) of the Organised and Serious Crimes Ordinance (Cap. 455) and Section 22 of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405).

## **Protection of Press Freedom**

9. For the avoidance of doubt, the Administration will move a CSA to Section 2 of the Bill to declare that nothing in the new legislation will operate in contravention of Part XII of the Interpretation and General Clauses Ordinance (Cap. 1).

## **Court Proceedings**

10. Taking into account the comments of the Bills Committee, the Administration will move a CSA to add Clause 2(6) to the Bill to clarify that the Court of First Instance may, by its own motion or on application, order that any person affected by an application under Clauses 4A, 13, 16 or 16A be joined as a party to the proceedings.

11. The Administration will also move a CSA to specify, under Clauses 16(2)(b) and (5)(b), that the time limit for the submission of relevant documents, if any, could be made shorter than 7 days before the date of the hearing as may be permitted by the court as set out in respective rules of court.

12. A new Clause 19 will be added to provide that *inter partes* proceedings for applications made pursuant to Clauses 4A, 13, 16, 16A or 17 shall be held in open court unless the court otherwise orders. In deciding whether to allow for proceedings to be held in chambers or in camera, the court shall be satisfied that in so doing, it is in the interests of security, defence or international relations of Hong Kong, or in the interests of any witness giving evidence. Members may wish to note that the terms “international relations” and “security” are defined under Section 57 of the Personal Data (Privacy) Ordinance (Cap. 486).

## **Notices under Clause 5**

13. The Administration will move a CSA to Clause 5(3A) to clarify that forfeiture applications made under Clause 13 may refer only to a part of the funds being the subject of a freezing notice.

## **Defence for Disclosure Offence under Clause 11**

14. Members may wish to note that Clause 14(7) of the Bill sets out the defence available to a person accused of an offence relating to disclosure under Clause 11(4). Clause 14(7) of the Bill is based on Section 25A(6) of both the Organised and Serious Crimes Ordinance (Cap. 455) and Drug trafficking (Recovery of Proceeds) Ordinance (Cap. 405).

## **Forfeiture of Terrorist Property**

15. In response to comments by the Bills Committee, the Administration will move a CSA to Clause 13(4) of the Bill to provide that the civil standard of proof will be adopted in forfeiture proceedings.

## **Enforcement Powers**

16. Pursuant to discussion at the meeting of the Bills Committee on 28 June, the Administration will move CSAs to delete Clause 15(1) and Schedules 2 and 3 to the Bill, and rely on powers of investigation, seizure and detention as are available under existing laws. A new Clause 17 will be added to empower the Secretary for Security to make regulations to deal with the freezing of property other than funds, and to provide for matters such as any necessary investigative and seizure and detention powers that may be required in future. All of the regulations made under Clause 17 will be subject to the approval of the Legislative Council by way of resolution.

Security Bureau

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