Paper No. CB(2)2548/01-02(01)

HONG KONG BAR ASSOCIATION

SUBMISSIONS ON

UNITED NATIONS (ANTI-TERRORISM MEASURES) BILL

Background

1. As a result of the 911 terrorist attack, the UN Security Council passed Resolution 1373 of 2001 (UNSCR 1373) calling on member states to criminalize wilful provision or collection of funds for use in order to carry out terrorists acts. The HKSAR Government was directed by the CPG in October 2001 to implement UNSCR 1373. Further, the HKSAR is also a member of the Financial Action Task Force on Money Laundering (FATF), an international body specialising in recommending standards and best practices in countering money laundering. Following the 911 attack, FATF also made 8 Special Recommendations to tackle the issue.

2. It is recognised by the Administration that the purpose of the Bill is to implement the mandatory elements of UNSCR 1373 as set out in its §§1(a), (b), (c), (d) and 2(a) and Recommendations II, III and IV of the FATF Special Recommendations.

3. Various countries (including, inter alia, the UK, Singapore, Canada, Australia & New Zealand) have already enacted legislation to implement UNSCR 1373.

4. As recognised by the Secretary for Security ("the Secretary"), Hong Kong has always been one of the safest cities in the world and has traditionally not been the subject to threats of terrorism. Further, most activities typically associated with terrorism are already dealt with by our existing laws. The Government should therefore adopt a minimalist approach in implementing the obligations under UNSCR 1373. The view was echoed by the Secretary herself and it is submitted that there is clearly no need to do more than what is necessary in Hong Kong.

5. The Bar also deplores the lack for proper time for full public consultation on the Bill when there is obviously no urgency to enact any anti-terrorist legislation in Hong Kong.

Comments on the Bill (as amended by Draft CSAs of 26th June 2002 and read together with the Secretary for Security's Proposed Amendments dated 28th June 2002 ("the Proposed Amendments"))

Definition of terrorist property

6. The present definition is too wide and should be amended to "any property including funds that is intended to be used to finance or otherwise assist the commission of a terrorist act".

7. In relation to s.4A (8) and 5(3), an order /notice made under these sections respectively should expire on the 1st anniversary. Two years is too long given the drastic consequences of an order/notice made under these sections.

Subjective knowledge

8. The amendments to s. 11(1) and 11(4) of the Bill by substituting "reasonable grounds to suspect" to "suspects" are insufficient. "Suspects" is insufficient protection because the police can act on the basis that someone merely suspects that any property is terrorist property without having satisfied at the same time that there are reasonable grounds of suspicion. It is submitted that "suspects on reasonable grounds" should be used instead. We also urge the Administration to amend s. 6 to 9 of the Bill by deleting "having reasonable grounds to believe" and substituting "believes on reasonable grounds." It is submitted that subjective knowledge of the suspect should be taken into account. Further, there should be a requirement that the provider or collector of funds must be aware that the funds involved are to be used for terrorist activities before being liable under s. 6. Provisions in relation to knowledge or intent are absolutely vital in drafting any legislation imposing criminal liability. The approach proposed is clearly more in line with §1(b) of UNSCR 1373.

Gazette

9. The Bar is also of the view that no person shall be presumed to know of the existence or contents of any notices published in the Gazette. Otherwise persons may commit criminal acts because they do not read the Gazette.

Standard of proof

10. Specification of persons and property as terrorist, terrorist associates or terrorists property can attract serious consequences, the result of which can

potentially be more damaging than a criminal conviction. It is therefore submitted that in specification and forfeiture proceedings, the criminal standard of proof should be adopted instead.

Freezing of Funds

11. §1(c) of UNSCR 1373 provides that members states should freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit terrorist acts or participate in or facilitate the commission of terrorist acts. A balance between the power to freeze terrorist properties and the right to private ownership of property under Article 6 and Article 105 of the Basic Law should be maintained.

12. The Canadian Act requires the recommendation of the Solicitor-General before the Governor in Council freezes any funds belonging to any entity to be listed knowingly attempted, carried out, participated in a terrorist activity or is acting on behalf of another such entity.

13. s. 5 of the Bill conferred power on the Secretary to give notice directing funds not be made available to any person except under the authority of a licence granted by the Secretary. s.16 provides a mechanism to set aside the notice by an application to the Court of First Instance.

14. It is submitted that the power to give notice under s.5 should not rest solely in the hands of the Secretary. The spirit of §1(c) of UNSCR 1373 can be implemented if power is given to the Secretary to make an application to the Court of First Instance to make such an order. The procedure should be similar to the application for an restraint order under the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405).

15. Further, it should also be expressly spelt out that any notice (or court order) in relation to freezing of funds shall not affect the making available of funds specified in such notice to a person solely for the purpose of feeding, clothing, housing or satisfying the medical needs of such person or dependant of such person or for the purposes of obtaining legal advice or representation.

Forfeiture proceedings

16. In relation to s.13 (1), with the proposed definition of "terrorist property", sub-paragraph (a) and (b) ought to be deleted.

Part 3

17. The ambiguity of the Bill is also illustrated in Part 3 of the Bill. Section 7 makes it an offence to "make any funds or financial (or related) services available, directly, or indirectly" to a person believed to be a terrorist with no definition of what constitutes "related service".

18. It is also submitted that s. 8 of the Bill ought be deleted as the acts are sufficiently covered by existing legislation such as the Weapons Ordinance (Cap. 217), the Biological Weapons Ordinance (Cap. 491) and s. 33 of the Public Order Ordinance (Cap. 245).

19. S. 9 should also be amended to protect innocent connection with specified organisations or persons. Many terrorist organisations operate under the appearance of a legitimate organisation. It is therefore submitted that knowledge that the organisation or person that one is dealing with is in fact a specified organisation or person must be a necessary element of the offence.

20. Similarly, s. 10 should also be deleted as the section clearly goes further than what is recommended under UNSCR 1373 and the FATF Recommendations.

Compensation

21. The Bar welcomes the addition of the section in relation to compensation (s. 16A) for loss occasioned by an order or notice obtained under s. 4A(2) or 5(1) where there has been an error.

22. However, it is submitted that s. 16A(2)(a) and (c) should be deleted. The draconian powers exercisable 'ex parte' must be balanced with entitlement to compensation where a mistake has been made. The fact that a person was wrongfully specified as a terrorist/terrorist associate or has his property seized should be sufficient to give rise to the Court's discretion to order compensation. It will be going to far to require the "victim" to satisfy that Court that there has been some "serious default".

Section 17

23. This section should be deleted. It puts too much power in the hands of the Secretary.

July 9, 2002.
Hong Kong Bar Association