

立法會

***Legislative Council***

**Paper for the Bills Committee on  
National Security (Legislative Provisions) Bill**

**Matters following proscription of an organization  
under proposed new section 8A of the Societies Ordinance**

This paper provides an analysis of the new Schedule 2 of the Societies Ordinance (Cap. 151) proposed in the Committee Stage amendments of the Administration (2<sup>nd</sup> draft of 16 June 2003) relating to matters following proscription of an organization under proposed new section 8A of that Ordinance.

**Background**

*Societies Ordinance (Cap. 151)*

2. The National Security (Legislative Provisions) Bill proposes a new section 8A to the Societies Ordinance to the effect that the Secretary for Security ("the Secretary") may by order proscribe any local organization if he reasonably believes that the proscription is necessary in the interest of national security and is proportionate for such purpose. The Committee Stage amendments seek to add a new section 8G and Schedule 2 to the Societies Ordinance providing matters following proscription of an organization under section 8A.

3. The proposed new Schedule 2 is divided into three parts : companies registered under the Companies Ordinance (Cap. 32)("the Ordinance"), unregistered companies under the Ordinance and other types of organizations.

*Companies Ordinance (Cap. 32)*

4. Before analyzing the legal effect of the proposed new Schedule 2, it may be helpful to set out briefly the general law on winding up procedures and dissolution of a company under the Companies Ordinance.

5. Dissolution puts an end to the existence of a company. A "company" is defined in section 2 of the Ordinance to mean a company formed or registered under

the Ordinance or an existing company. "Existing company" is defined to mean a company formed and registered under the Companies Ordinance 1865 or the Companies Ordinance 1911.

6. Normally, a company is dissolved after completion of winding-up procedures. During the process of winding up, the company continues to exist and all acts are done in its name. The conduct of the winding up is in the hands of a liquidator : assets are sold off; debts are paid or if the company is insolvent, its debts are paid to the extent which funds allow; any surplus funds are distributed among the shareholders or otherwise in accordance with the memorandum and articles of association.

7. There are exceptions to this rule. The following provisions of the Ordinance provide for dissolution taking place before or without winding up proceedings being taken :

- (a) section 291 (the Registrar of Companies ("the Registrar") striking a company off the register of companies ("the Register") if he has taken prescribed steps to ascertain that it is not carrying on business or in operation);
- (b) section 291A (the Court of First Instance ("the Court") ordering a company to be struck off and dissolved if it appears to the Court that it would not be appropriate to wind up the company having regard to its assets, if any, or for other reasons); and
- (c) section 360C (the Chief Executive in Council ordering the Registrar to strike a company off the Register if he is satisfied that such company would be liable to have its registration or exemption from registration cancelled under section 5D of the Societies Ordinance, or its operation or continued operation prohibited by the Secretary under section 8 of that Ordinance).

8. With regard to a unregistered company, section 327(3)(a) provides that it may be wound up if the company is dissolved. Part X of the Ordinance deals with winding up of unregistered companies. "Unregistered company" is defined in section 326 and will be elaborated in paragraph 19 below.

## **Companies registered under the Companies Ordinance**

### ***Proposal***

9. It is proposed in section 1 of the new Schedule 2 that if a company registered under the Ordinance is proscribed under section 8A of the Societies

Ordinance, the Registrar shall strike the name of such company off the Register and publish a notice of the striking off in the Gazette, and upon publication of the notice such company shall be dissolved. The Registrar may defer taking the aforesaid action if he is satisfied that the right to take legal action against the proscription has not been exhausted.

10. On an application of the Registrar to the Court, a company struck off the Register shall be wound up and sections 360D, 360E, 360F, 360G, 360H, 360I, 360J, 360K, 360L and 360M of the Ordinance shall apply to such company as if it were a company struck off the Register and dissolved under section 360C.

11. As explained in paragraph 7 above, section 360C is one of the exceptions under which dissolution precedes winding up. This section comes into operation when the Chief Executive in Council orders the Registrar to strike a company off the Register if he is satisfied that such company would be liable to have its registration or exemption from registration cancelled under section 5D of the Societies Ordinance, or its operation or continued operation prohibited by the Secretary under section 8 of that Ordinance. The legal effect of this proposal is to apply specific provisions in Part XIII A of the Ordinance relating to the prevention of evasion of the Societies Ordinance to a registered company that has been proscribed.

#### Discretion of the Registrar

12. Under the Societies Ordinance (sections 5E and 8(7)), an appeal may be made to the Chief Executive in Council against the decision of the Societies Officer to cancel the registration or exemption from registration under section 5D or against the making of a prohibition order by the Secretary under section 8. **We cannot find any material in the Hansard that explains why the then Governor in Council was given the power in section 360C to order the striking off of a company engaging in undesirable activities from the Register. However, such conferment of power appears to be consistent with the requirement that the Governor in Council (now Chief Executive in Council) is the body where appeals against a cancellation of registration or prohibition order lie under the Societies Ordinance.**

13. **The Administration's current proposal is different in that dissolution of a registered company takes place after proscription by the Secretary and not after the appeal is determined. Under section 1(2) of the proposed new Schedule 2, the Registrar is given a discretion to defer taking action to strike off the company if he is satisfied that the right to take legal action against the proscription has not been exhausted. The Administration had explained that the policy justification for adopting the approach of giving a discretion to the Registrar was because of the nature of the organization being proscribed. Members may consider whether the justification is acceptable and**

whether it would be a more desirable policy to impose an obligation to defer action on the Registrar rather than providing him with a discretion in order to reduce damage done to a proscribed organization which is subsequently vindicated through a successful appeal.

Liability of director, officer and member

14. There is a proviso in section 360C(2) : the liability, if any, of every director, officer and member of the company shall continue and may be enforced as if the company had not been dissolved. It is unclear whether this provision is applicable to a registered company that has been proscribed and dissolved. If it does, **whilst the provision is necessary in order to make sure that the striking off of a registered company from the Register does not absolve directors, officers and members of the company in question from liability, its operation may conflict with proposed new section 8C(1) and 8D(2) of the Societies Ordinance.** Under proposed new section 8C(1), any person who, among other things, acts as an office-bearer or member of a proscribed organization is guilty of an offence. That person is only relieved of that liability by virtue of proposed new section 8D(2) if he is lodging an appeal against a proscription order or doing any incidental act. **This may require further policy considerations in order to reconcile these apparent conflicting provisions.**

Disapplication of sections 290, 291(7) and 292

15. By virtue of section 360D, sections 290, 291(7) and 292 shall not apply in the case of a company struck off the Register under section 360C. Under both sections 290 and 291(7), the Court may make an order declaring the dissolution to have been void in the case of dissolution following winding up proceedings or in the case where the Registrar exercises its power to strike off a defunct company. Under section 292, all property and assets of a dissolved company shall be deemed to be bona vacantia and shall belong to the Government. **Whether or not these sections should, contrary to the disapplication by virtue of section 360D, apply to a registered company that has been proscribed and dissolved may involve policy issues for members as the circumstances leading to the dissolution would be different from that provided under section 360C from the technical point of view.**

Creditors

16. Section 360E provides for the vesting and disposal of property of a company struck off and dissolved under section 360C. Subsection (2) sets out the priority of payment after the Official Receiver realizes the property and rights of the company vested in him, and creditors who have proved their debts within a prescribed limited time fall within the fourth category.

17. Under section 360G, specified sections shall apply *mutatis mutandis* as if on the day of dissolution an order had been made for the winding up of the company by the Court and as if the Official Receiver were the liquidator thereof. Sections 263, 264 and 265 relating to the proof and ranking of claims in winding up are among other sections included. In particular, section 265(1) provides that debts owing to employees, clerks, servants, labourers or workmen are to be treated preferentially and paid in priority to all others. **It should be noted that sections 266 and 266B respectively relating to fraudulent preference and unfair preference would also apply.**

### **Unregistered companies under the Companies Ordinance**

#### *Proposal*

18. It is proposed in section 2 of the new Schedule 2 that an unregistered company within the meaning of section 326 of the Companies Ordinance which is proscribed under section 8A of the Societies Ordinance shall for the purpose of section 327(3) of the Ordinance be regarded as having been dissolved. On an application of the Registrar to the Court, such company shall be wound up and Part X of the Companies Ordinance shall apply.

#### *Unregistered company*

19. Section 326 of the Ordinance defines "unregistered company" to include any partnership, whether limited or not, any association and any company (as defined in section 2 of the Ordinance) with the following exceptions-

- (a) a company registered under the Companies Ordinance 1865 or under the Companies Ordinance 1911, or under the existing Companies Ordinance;
- (b) a partnership, association or company which consists of less than 8 members and is not formed or established outside Hong Kong;
- (c) a partnership registered in Hong Kong under the Limited Partnerships Ordinance (Cap. 37).

The terms "partnership" and "association" referred to in the definition is not defined in the Ordinance or in the Interpretation and General Clauses Ordinance (Cap.1). An unregistered company also includes an oversea company which is registered under Part XI of the Ordinance.

20. An unregistered company may fall within the definition of local organization in the proposed new section 8A(5)(f) which the Bill proposes to add to

the Societies Ordinance. It means, inter alia, any society which is registered, registrable or exempted from registration under the Societies Ordinance. Section 5 requires a local society to apply for registration or exemption from registration. Under section 2, a "local society" is defined to mean any society organized and established in Hong Kong or having its headquarters or chief place of business in Hong Kong. A "society" means any club, company, partnership or association of persons, whatever the nature or objects to which the provisions of the Societies Ordinance apply.

Application to the Court

21. **Whilst the proposed section 2(2) of the new Schedule 2 provides the triggering mechanism of application to the Court of First Instance for Part X of the Companies Ordinance to apply to the unregistered companies concerned, it is not apparent from the proposed new Schedule 2 as to how the Registrar would come to know about the proscription of an organization which is not on the Register. Since there is no provision similar to section 1(2) of the proposed new Schedule 2 which provides the Registrar with a discretion to defer dissolution by not taking actions under section 1(1) of the proposed new Schedule 2 immediately, this may give rise to policy issues as to why unregistered companies should be treated differently under the proposal and possible implications on innocent persons who may have had legitimate association with the unregistered company before the coming into effect of a proscription order.**

Part X

22. Under section 327(1), any unregistered company may be wound up under the Ordinance subject to the provisions of Part X and all the provisions of the Ordinance with respect to winding up shall apply to an unregistered company with the exceptions and additions mentioned in that section. Section 331 provides clearly that the provisions in Part X shall be in addition to and not in restriction of any provisions in the Ordinance with respect to winding up companies by the Court. There appears to be two provisions in Part X which apply specifically to unregistered companies, namely sections 328 and 330 which merit detailed consideration

23. A "contributory" is defined in section 171 of the Ordinance to mean every person liable to contribute to the assets of a company in the event of its being wound up. In the case of an unregistered company, section 328 extends it to include every person who is liable to pay or contribute to the payment of any debt or liability of the company, or of any sum of the adjustment of the rights of the members among themselves, or the costs and expenses of the winding up of the company.

24. Section 330 provides that where an order has been made for winding up an unregistered company, no action or proceeding shall be proceeded with or

commenced against any contributory of the company in respect of any debt of the company, except by leave of the Court, and subject to such terms as the Court may impose. **The effect of sections 328 and 330 might effectively unfairly restrict persons including employees and other persons who may have had legitimate claims against the unregistered company from pursuing their claims. This may involve policy considerations as to whether lawful rights of innocent third parties should be restricted in such a manner under the particular circumstances of a proscription order coming into effect under proposed new section 8A of the Societies Ordinance.**

25. As a general point of policy, it should be noted that under section 327(3) the circumstances under which an unregistered company may be wound up are: (a) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs; (b) if the company is unable to pay its debts; (c) if the court is of opinion that it is just and equitable that the company should be wound up. **The drafting technique used to trigger off the application of winding up procedures provided in Part X of the Companies Ordinance to an unregistered company which is subject to a proscription order is by stipulating it as a fact that such unregistered company is "regarded as having been dissolved" for the purposes of section 327(3). As the detailed provisions of the rest of Part X of the Companies Ordinance may have been made to suit the circumstances specified under section 327(3), it may be necessary to examine the policy justifications for creating a dissolution by operation of section 2(1) of the proposed new Schedule 2 of the Societies Ordinance.**

### **Other types of organizations**

#### *Proposal*

26. Section 3 of the new Schedule 2 proposes to deal with matters following the proscription of an organization registered under an Ordinance other than the Companies Ordinance. If such an organization is proscribed under section 8A of the Societies Ordinance, either the person having the authority under the relevant Ordinance to cancel registration of the relevant organization or, in any other case, the Registrar of Companies, shall:

- (a) cancel the registration of that organization and, if applicable under that other Ordinance, remove or strike its name off the relevant register or any other similar record; and
- (b) publish a notice of the cancellation in the Gazette.

27. Upon the publication of the notice, that organization shall be dissolved for the purposes of that other Ordinance and all other purposes. If that other

Ordinance contains provisions applicable to the dissolution and winding up of the organization, they shall apply. If not, upon application of the Registrar of Companies to the Court, the organization shall be wound up and Part X of the Companies Ordinance shall apply as if the organization were an unregistered company.

*An organization registered under an Ordinance other than the Companies Ordinance*

28. The Administration has provided Paper No. 95 enclosing copies of the winding up provisions in the Co-operative Societies Ordinance (Cap. 33), the Trade Unions Ordinance (Cap. 332), the Credit Unions Ordinance (Cap. 119) and the Building Management Ordinance (Cap. 344). Under the first three Ordinances, the relevant Registrar has the power to cancel the registration of an organization and appoint a liquidator to wind up that organization. Under the fourth Ordinance, the organization may be wound up under the provisions of Part X of the Companies Ordinance as if it were an unregistered company.

29. **We have asked the Administration to provide us with the relevant provisions of the Ordinances under which a body of persons listed in the Schedule to the Societies Ordinance is registered (proposed to be amended as Schedule 1 in the Committee Stage amendments) other than the aforesaid four Ordinances.**

30. **Section 3(3) provides that the person who has authority under the relevant Ordinance to cancel registration of an organization may defer taking action if he is satisfied that the right to take legal action against the proscription has not been exhausted. That person has to exercise that authority in accordance with the usual administrative law principles and his decision is subject to judicial review. However, there may be technical difficulties for a person aggrieved by that decision should he wish to seek judicial review of that decision. The reason being that if the aggrieved person acts in any of the capacities referred to the proposed new section 8C(1), he may be liable criminally for acting as an office-bearer or member of a proscribed organization. This problem would be resolved if the person given the authority was required to defer taking action. This point applies equally to proposed new section 1(2) of the new Schedule 2.**

*Remaining types of organizations*

31. Among the bodies of persons listed in the Schedule to the Societies Ordinance, there are organizations which are :

- (a) constituted pursuant to or under any Ordinance or other legislation applicable to Hong Kong (paragraph (5));

- (b) constituted under Royal Charter, Royal Letters Patent or any Imperial Act and was immediately before the commencement of the Adaptation of Laws (No.3) Ordinance 1999 (13 of 1999) a local society (paragraph (5A));
- (c) any association of owners or occupiers of premises which is approved for the purposes of the Societies Ordinance by the Secretary for Home Affairs (paragraph 11);
- (d) any association or group of persons which is formed for the sole purpose of recreation or training, conducts its activities wholly or largely in a community or youth centre and was formed with and continues to have the approval of the Director of Social Welfare (paragraph 12); and
- (e) any association of which one or more of the directors, trustees or other office holders, or the committee or board or other body having the management of the association is or are incorporated by any Ordinance (paragraph 13).

32. **Since the above organizations are not "registered" under the Companies Ordinance nor any other Ordinance, proposed section 3 of the new Schedule 2 would not apply to them but they would be regarded as unregistered companies under proposed section 2 of the new Schedule 2. There has been no explanation for the policy why provisions of the relevant Ordinance or legislation or other legal documents under which an organization is constituted are overridden or the approval of the relevant Government official displaced.**

33. **Moreover, our analysis on the application of Part X of the Companies Ordinance to unregistered companies set out in paragraphs 21 to 25 of this paper applies equally to an organization where there is no statutory system of registration.**

## **Conclusion**

34. We have highlighted some issues which we hope members of the Bills Committee may find useful. They are summarized below :

### **Companies registered under the Companies Ordinance**

- (a) We cannot find any material in the Hansard that explains why the then Governor in Council was given the power in section 360C to order the striking off of a company engaging in undesirable activities from the Register. However, such conferment of power appears to be consistent with the requirement that the Governor in Council (now Chief Executive

in Council) is the body where appeals against a cancellation of registration or prohibition order lie under the Societies Ordinance (paragraph 12).

- (b) The Administration's current proposal is different in that dissolution of a registered company takes place after proscription by the Secretary and not after the appeal is determined. Under section 1(2) of the proposed new Schedule 2, the Registrar is given a discretion to defer taking action to strike off the company if he is satisfied that the right to take legal action against the proscription has not been exhausted. The Administration had explained that the policy justification for adopting the approach of giving a discretion to the Registrar was because of the nature of the organization being proscribed. Members may consider whether the justification is acceptable and whether it would be a more desirable policy to impose an obligation to defer action on the Registrar rather than providing him with a discretion in order to reduce damage done to a proscribed organization which is subsequently vindicated through a successful appeal (paragraph 13).
- (c) Whilst the proviso in section 360C(2) is necessary in order to make sure that the striking off of a registered company from the Register does not absolve directors, officers and members of the company in question from liability, its operation may conflict with proposed new section 8C(1) and 8D(2) of the Societies Ordinance. This may require further policy considerations in order to reconcile these apparent conflicting provisions (paragraph 14).
- (d) Whether or not sections 290, 291(7) and 292 should, contrary to the disapplication by virtue of section 360D, apply to a registered company that has been proscribed and dissolved may involve policy issues for members as the circumstances leading to the dissolution would be different from that provided under section 360C from the technical point of view (paragraph 15).
- (e) Under section 360G, specified sections shall apply *mutatis mutandis* as if on the day of dissolution an order had been made for the winding up of the company by the Court and as if the Official Receiver were the liquidator thereof. Sections 263, 264 and 265 relating to the proof and ranking of claims in winding up are among other sections included. It should be noted that sections 266 and 266B respectively relating to fraudulent preference and unfair preference would also apply (paragraph 17).

Unregistered companies

- (f) Whilst the proposed section 2(2) of the new Schedule 2 provides the triggering mechanism of application to the Court of First Instance for Part X of the Companies Ordinance to apply to the unregistered companies concerned, it is not apparent from the proposed new Schedule 2 as to how the Registrar would come to know about the proscription of an organization which is not on the Register. Since there is no provision similar to section 1(2) of the proposed new Schedule 2 which provides the Registrar with a discretion to defer dissolution by not taking actions under section 1(1) of the proposed new Schedule 2 immediately, this may give rise to policy issues as to why unregistered companies should be treated differently under the proposal and possible implications on innocent persons who may have had legitimate association with the unregistered company before the coming into effect of a proscription order (paragraph 21).
- (g) The effect of sections 328 and 330 might effectively unfairly restrict persons including employees and other persons who may have had legitimate claims against the unregistered company from pursuing their claims. This may involve policy considerations as to whether lawful rights of innocent third parties should be restricted in such a manner under the particular circumstances of a proscription order coming into effect under proposed new section 8A of the Societies Ordinance (paragraph 24).
- (h) The drafting technique used to trigger off the application of winding up procedures provided in Part X of the Companies Ordinance to an unregistered company which is subject to a proscription order is by stipulating it as a fact that such unregistered company is "regarded as having been dissolved" for the purposes of section 327(3). As the detailed provisions of the rest of Part X of the Companies Ordinance may have been made to suit the circumstances specified under section 327(3), it may be necessary to examine the policy justifications for creating a dissolution by operation of section 2(1) of the proposed new Schedule 2 of the Societies Ordinance (paragraph 25).

Other types of organizations

- (i) We have asked the Administration to provide us with the relevant provisions of the Ordinances under which a body of persons listed in the Schedule to the Societies Ordinance is registered (proposed to be amended as Schedule 1 in the Committee Stage amendments) other than the aforesaid four Ordinances (paragraph 29).

- (j) Section 3(3) of new Schedule 2 provides that the person who has authority under the relevant Ordinance to cancel registration of an organization may defer taking action if he is satisfied that the right to take legal action against the proscription has not been exhausted. That person has to exercise that authority in accordance with the usual administrative law principles and his decision is subject to judicial review. However, there may be technical difficulties for a person aggrieved by that decision should he wish to seek judicial review of that decision. The reason being that if the aggrieved person acts in any of the capacities referred to the proposed new section 8C(1), he may be liable criminally for acting as an office-bearer or member of a proscribed organization. This problem would be resolved if the person given the authority was required to defer taking action. This point applies equally to proposed new section 1(2) of the new Schedule 2 (paragraph 30).
- (k) Since the organizations set out in paragraph 30 are not "registered" under the Companies Ordinance nor any other Ordinance, proposed section 3 of the new Schedule 2 would not apply to them but they would be regarded as unregistered companies under proposed section 2 of the new Schedule 2. There has been no explanation for the policy why provisions of the relevant Ordinance or legislation or other legal documents under which an organization is constituted are overridden or the approval of the relevant Government official displaced (paragraph 32).
- (l) Our analysis on the application of Part X of the Companies Ordinance to unregistered companies set out in paragraphs 21 to 25 of this paper applies equally to an organization where there is no statutory system of registration (paragraph 33).

Prepared by

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