

**Extract from the Report of the Bills Committee on
United Nations (Anti-Terrorism Measures) Bill**

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Deliberations of the Bills Committee

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Deletion of the definition of "property"

23. In view of Hon Audrey EU's concern about the meaning of the terms "funds, financial assets, economic resources and funds derived from property" in the definition of "property" in clause 2 of the Bill, the Administration has proposed to delete the definition and to rely instead on the definition as set out in section 3 of the Interpretation and General Clauses Ordinance (Cap. 1). "Property" in that section includes (a) money, goods, choses in action and land; and (b) obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as defined in (a).

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Specification of persons and property as terrorist, terrorist associates or terrorist property (clause 4)

29. Clause 4 empowers the Chief Executive (CE) to specify, by notice published in the Gazette, persons and property that CE has reasonable grounds to believe are terrorists, terrorist associates or terrorist property. Such notice is not subsidiary legislation. It would be presumed, in the absence of evidence to the contrary, that the persons and property specified in such notice are terrorists, terrorist associates or terrorist property. Such notice would, unless revoked, expire on the third anniversary of the date of its publication in the Gazette.

30. Whilst appreciating the need for an expeditious means of achieving the objectives of UNSCR 1373, members are very concerned that the power given to CE is too wide, and there are insufficient safeguards to prevent undue impairment of rights. The proposed system does not require any prior judicial authorisation, and it is left for an affected individual to bring an application before a judge to have the specification by CE reviewed in the CFI. Members have pointed out that the person concerned could be totally unaware that he is involved in any terrorist activities or financing. Under the proposed system, the unwary person would have no knowledge of the grounds for the specification by CE, and it would be difficult for him to refute the specification or provide relevant information to support his application to have the notice revoked under clause 16.

31. Members have suggested that CE should first obtain a court order before publishing by notice in the Gazette that a certain person or property is a terrorist, terrorist associate or terrorist property. The application for a court order should contain the reasons for the specification so that the person being specified knows the reasons for the specification when making the objection.

32. The Administration explains that the reasons for empowering CE under clause 4 of the Bill are as follows -

- (a) consistent with the designations made to date by the UN Security Council Committee, it is likely that terrorist or terrorist associates who need to be specified will be outside Hong Kong and in circumstances where it would not be feasible to serve notice of a proposed specification; and
- (b) even when a suspected terrorist is in Hong Kong, urgent action is needed to protect public safety and given the swiftness with which terrorist funds can be moved, to ensure that terrorist funds are not moved or transferred.

33. To address members' concern, the Administration has proposed to replace clause 4 by new clauses 4 and 4A. The new clauses differentiate between terrorists, terrorist associates and terrorist property designated by a UN Security Council Committee, and persons whom CE has reasonable grounds to believe are terrorists or terrorist associates and property which CE has reasonable grounds to believe is terrorist property.

34. The new clause 4 will enable CE to publish a notice in the Gazette specifying the name of the person or property if such person or property is designated by a UN Security Council Committee as a terrorist, terrorist associate or terrorist property. To address the concern of members, clause 4(6) provides that, where a specified person or property ceases to be designated by the UN Security Council Committee, the notice is deemed to be revoked to the

extent that it relates to the person or property immediately upon the cessation of the designation. CE shall for information purposes, publish as soon as practicable a notice in the Gazette stating the fact of such revocation.

35. The original proposed clause 4A provides for the Secretary for Justice to make an application, on behalf of CE, to the CFI for an order to specify a person or property as a terrorist, terrorist associate or terrorist property. The CFI shall only make the order if it is satisfied, on the balance of probabilities, that the person or property is a terrorist, terrorist associate or terrorist property, as the case may be. CE shall then arrange the court order to be published in the Gazette. If CE receives information which causes him to have reasonable grounds to believe that the person or property is not, or is no longer, a terrorist, terrorist associate or terrorist property, then the Secretary for Justice may, on behalf of CE, make an application to the CFI for the order to be revoked to the extent that it relates to that person or property.

36. Taking into consideration the views of members on the role of the Secretary for Justice in making such applications, the Administration has agreed to delete the references to the Secretary for Justice in the proposed new clause 4A. CE may make an application to the CFI and if CE receives information which causes him to have reasonable grounds to believe that the person or property is not, or is no longer, a terrorist, terrorist associate or terrorist property, then CE shall make an application to the CFI for the order to be revoked.

37. The new clause 4A(9) makes it clear that all applications under clause 4A(1) shall be made inter partes, except in circumstances to be prescribed by rules of court made under clause 18(1)(b). The Administration explains that the Rules Committee will decide whether specific rules or procedures for such application should be made, for example, to cater for applications made ex parte.

38. Members consider that the three-year expiry period for the specification by CE originally proposed under new clause 4A is too long and have asked the Administration to shorten it. Clause 4A(8) now provides that such specifications, if not otherwise revoked, will expire after two years. Some members have suggested adding a provision to the effect that there should be a material change in circumstances before CE could re-specify a person as a terrorist, terrorist associate or terrorist property. The Administration has pointed out such a provision is unnecessary as any application to re-specify a person or property using the same grounds which have been revoked or expired would invariably be thrown out by the court, or would run the risk of contempt.

Freezing of funds (clause 5)

39. Clause 5 empowers the Secretary for Security to serve a notice to direct the holders of funds not to make those funds available to any person when she has reasonable grounds to suspect that the funds are terrorist property. The reasons for this provision are the same as those mentioned in paragraph 32 above.

40. Hon Audrey EU has asked whether any provision will be made for releasing funds for legitimate uses, such as paying staff wages. The Administration has pointed out that under clause 5(1), the Secretary for Security can grant a licence for such purpose. Members are concerned that it is unclear as to the types of expenses which will be covered by such a licence, and have asked the Administration to set out clearly the circumstances to be covered by the licence. In this connection, JUSTICE, one of the deputations which have made submissions to the Bills Committee, has pointed out that innocent third parties may be affected and there should be provision for paying for expenses such as rent of premises and ordinary human needs of family members.

41. To address members' concern, the Administration has proposed adding a new clause 14A to set out supplementary provisions applicable to licences mentioned in clauses 5(1) and 7. Clause 14A provides that the Secretary for Security can grant a licence for the affected person to use part of the funds for such purposes as reasonable living expenses and reasonable legal expenses. Hon Albert HO considers that the two circumstances quoted may not be enough to guide those who need to implement the provision. He is particularly concerned that staff wages and funds held on behalf of third parties are not mentioned. The Administration has pointed out that the provision has to be read in conjunction with new clause 16(4) which provides that any person affected by the operation of the two provisions may apply to the CFI for the grant or variation of a licence. It is therefore of the view that the provisions offer sufficient protection.

42. As members consider that a three-year period before expiry is too long, the Administration will amend clause 5(3) to provide that the notices issued by the Secretary for Security will expire after two years. As regards members' comments that the two-year period is still too long, the Administration has explained 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. The Administration has also pointed out that the affected person can apply to the CFI to revoke the freezing notice.

43. In response to members' suggestion, the Administration will revise the proposed new clause 5(3A) to clarify that forfeiture applications made under clause 13 may refer only to part of the funds being the subject of a freezing notice.

44. To address concerns about the possibility of abuse of the process, a new clause 5(3B) has been added to provide that, where a notice has otherwise expired, the Secretary for Security shall not again exercise the power under clause 5(1) unless there has been a material change in the grounds for freezing such funds.

45. As the Administration does not agree to further reduce the length of the expiry period of the freezing notice, Hon Margaret Ng has proposed a CSA to provide that such notice which has not been revoked under subclause (2) shall expire on the 1st anniversary of the date on which it was signed by the Secretary for Security.

Prohibition on supply of funds to terrorists and terrorist associates (clause 6)

46. JUSTICE considers that clause 6 should be amended to accord with the United Nations Security Council Resolution (UNSCR) 1373 which requires that the person providing or collecting funds intends that the funds are to be used to carry out a terrorist act. Having regard to the views expressed, Hon Margaret NG has proposed to delete the clause and substitute it by -

"A person shall not provide or collect, by any means, directly or indirectly, funds with the intention that the funds should be used in whole or in part in order to carry out a terrorist act."

Prohibition on making funds etc. available to terrorists and terrorist associates (clause 7)

47. Hon Margaret NG has proposed to amend clause 7 by adding a new subclause (2) to ensure that funds will be made available for obtaining legal advice or representation.

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Disclosure of knowledge or suspicion that property is terrorist property (clause 11)

60. FATF Special Recommendation IV requires financial institutions and other entities subject to anti-money laundering obligations to make reports when they suspect or have reasonable grounds to suspect that funds are linked

to or used for terrorist acts. Clause 11 gives effect to this recommendation by requiring a person to make a report if he knows or has reasonable grounds to suspect that property is terrorist property.

61. As similar proposals on disclosure of knowledge or suspicion are being studied by the Bills Committee on the Drug Trafficking and Organised Crimes (Amendment) Bill 2000 (the other Bills Committee), members have made reference to the deliberations of the other Bills Committee in respect of the mental element of "having reasonable grounds to suspect".

62. The Drug Trafficking and Organised Crimes (Amendment) Bill 2000 makes a number of proposals to increase the effectiveness of Hong Kong's money laundering legislation. It includes, among other things, changing the test for requiring a disclosure under section 25A(1) of the Drug Trafficking (Recovery of Proceeds) Ordinance and of the Organised and Serious Crimes Ordinance from "knows or suspects" to "knows or has reasonable grounds to suspect".

63. Members note that the Hong Kong Association of Banks, the Hong Kong Bar Association, the Law Society of Hong Kong, the Hong Kong Society of Accountants, the Hong Kong Trustees Association and the Federation of Insurers have made submissions to the other Bills Committee expressing their concerns about the proposed amendments. They have pointed out that using the mental element of "having reasonable grounds to suspect" may cast the net too wide and innocent people may be caught. In addition, the requirement for disclosure of suspicious transaction will impose an extremely onerous burden on accountants, solicitors and financial institutions.

64. Some members of the other Bills Committee have pointed out that using the mental element of "having reasonable grounds to suspect" for the disclosure of suspicious transaction offence will mean that persons may well be convicted because they harbour no suspicion about a certain set of circumstances. They are concerned that the subjective mental state of the defendant will play little part in establishing that person's guilt. They consider that the proposed section 25A of the Organised and Serious Crimes Ordinance and Trafficking (Recovery of Proceeds) Ordinance will impose a statutory duty on a person to suspect if a certain set of circumstances comes to his knowledge, but the elements constituting "reasonable grounds to suspect" are not clear.

65. Members share the concerns of the other Bills Committee. Hon Eric LI has pointed out that the Administration has failed to convince the relevant sectors. In addition, he has highlighted the need for thorough consultation and discussion with the relevant sectors before any legislation affecting the financial sector is introduced. He has also pointed to the need for objective factors and other relevant indicators to be drawn up as guidelines for financial

institutions and other relevant sectors, especially those which do not have any code of practice.

66. Hon Audrey EU considers that since the provision is mainly targeted at accountants and lawyers, it is more appropriate to bind the professionals concerned by their codes of practice rather than to impose a criminal sanction for non-disclosure. She has pointed out that as professional negligence could have serious consequence, the same aim could be achieved through provisions in the code of practice of the relevant professions. In addition, Ms EU considers that the public, and in particular staff of the financial institutions concerned, should be educated on the need to report.

67. Hon Margaret NG and Hon Albert HO have both expressed concern about the disclosure expected of lawyers in respect of the affairs of their clients and the implications on the traditional lawyer-client relationship. Ms NG proposes a new clause 11A expressly providing that nothing in the Bill shall create powers, obligations or liability in respect of privileged communications or to restrict the privilege against self-incrimination.

68. Members note that clause 11 imposes an obligation on any person, which goes further than what FATF Special Recommendation IV requires. The Administration explains that clause 11 seeks to facilitate action on freezing of funds and forfeiture of certain terrorist property pursuant to clauses 5 and 13. It has pointed out that the UK Anti-Terrorism, Crime and Security Act 2001 amends the Terrorism Act 2000 by adding a new section which includes a similar reporting requirement upon any person.

69. To address members' concerns, the Administration has proposed to move an amendment to clause 11 to change the mental element for the reporting requirement to "knows or suspects". Members note that the relevant professional organisations have expressed support for this approach. In addition, a new clause 11(3A) will be added to protect staff who made disclosure to their compliance officers from liability under clause 11.

70. Hon Margaret NG has proposed CSAs to subclause (1) by deleting "has reasonable grounds to suspect" and substituting "suspects on reasonable grounds". She holds the views that subclause (4) may have implications on the implementation of subclause (1) unless the words "has reasonable grounds to suspect" are deleted.

71. The Administration has pointed out that there is a need for the provision to be consistent with that in the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) and the Organised and Serious Crimes Ordinance (Cap. 455).

72. In response to members' questions, the Administration has clarified 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). The Administration has further pointed out that clause 14(7) of the Bill is based on section 25A(6) of both the Organised and Serious Crimes Ordinance (Cap. 455) and the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405).

Forfeiture of terrorist property (clause 13)

73. Taking into consideration comments made by members, the Administration has accepted Hon Albert HO's suggestion to provide that the civil standard of proof will be adopted in forfeiture proceedings. Clause 13(4) will be amended by deleting "on the balance of probabilities" and substituting "the standard of proof applicable to civil proceedings in a court of law".

74. Hon Margaret NG has proposed CSAs to clause 13 to restrict the type of terrorist property that can be forfeited.

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Protection of property rights

92. Members have expressed concern whether the forfeiture provision in clause 13 of the Bill and the compensation provision in the new clause 16A proposed in the Administration's CSAs are consistent with the property right protection requirement under Articles 6 and 105 of the Basic Law (BL). The Administration has provided a written explanation to the Bills Committee stating that it considers that it is consistent and that, in particular, it does not constitute a "deprivation" ("zhenyong"(徵用)) of property within the meaning of BL 105 for which compensation is payable.

93. The Administration has pointed out that under BL 105, the Hong Kong Special Administrative Region (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 "zhenyong" (徵用), arguably refers to the act where the state or the Government resumes or acquires properties due to the 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" ("zhenyong"(徵用)) of property, since it is in the nature of preventive confiscation of terrorist properties.

94. The Administration is of the view that even if a broader meaning is given to the term "deprivation", it does not, under the 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.

95. The Administration has further pointed out that 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.

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