

**Extract from the Report of the Bills Committee on  
United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003**

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**Deliberations of the Bills Committee**

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Clause 5 (Section 6) on freezing of property

19. Clause 5 extends S for S's power to freeze terrorist funds under section 6 of the Ordinance to non-fund terrorist property, and empowers S for S to authorise seizure of the frozen property to prevent it from being moved from Hong Kong.

20. Hon Margaret NG, Hon Cyd HO and Hon Audrey EU consider the use of "having reasonable ground to suspect" as a test to freeze property objectionable, as S for S could freeze any property which is merely suspected to be terrorist property for as long as two years and without having to make an application to the Court.

21. Mr Simon YOUNG of the Faculty of Law of the University of Hong Kong and the Law Society of the Hong Kong, two of the deputations which have made written submissions to the Bills Committee, have raised similar concern. They are of the view that the proposed freezing mechanism under new section 6 should be replaced in entirety with the more familiar scheme to restrain crime-tainted property adopted in the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) (DTRPO) and the Organized and Serious Crimes Ordinance (Cap. 455) (OSCO). Moreover, under DTRPO and OSCO, a restraint order may be made on an ex parte application to a judge in chambers. This can prevent third parties from being aware of the judicial procedures.

22. The Administration has pointed out that "reasonable suspicion" cannot be supported solely on the basis of personal factors. The test as to whether reasonable grounds for suspicion to justify a freezing action exist is partly subjective, in that S for S must have formed a genuine suspicion that the

property concerned is terrorist property, and partly objective, in that there have to be reasonable grounds for forming such a suspicion; such grounds could arise from information received from another, provided that a reasonable person, having regard to all circumstances, would regard them as reasonable grounds for suspicion.

23. The Administration has also explained that speed is of paramount importance for freezing of terrorist property. This differs from DTRPO and OSCO, which are essentially directed towards confiscation of proceeds of crimes already committed. It will therefore be prudent not to underestimate the availability of modern technology and arrangements that allow funds to be transferred from one jurisdiction to another almost instantly, and non-fund property to be quickly liquidated or physically transferred out of Hong Kong. Upon careful deliberation that an appeal mechanism is available under section 17 of the Ordinance, the Administration has therefore proposed to apply the freezing mechanism for terrorist funds under the existing section 6 to non-fund terrorist property. Moreover, in the event of incorrect freezing, compensation is payable to the aggrieved under section 18 of the Ordinance.

24. The Administration also confirms that the legal effect of a freezing order and that of a restraint order is essentially the same. A restraint order under OSCO prohibits any person from dealing with any realisable property held or controlled by the defendant, whilst a freezing notice under new section 6 directs a person not to make available suspected terrorist property specified in the notice. Under section 15(11) of OSCO, where any property specified in a restraint order is immovable property the order shall, for the purposes of the Land Registration Ordinance (Cap. 128) be deemed to be an instrument affecting land and registrable as such in the Land Registry. New section 6(9) in the Bill contains similar provisions.

25. Members have asked how "making available" in new section 6 should be construed as far as non-fund terrorist property is concerned. They are of the view that a person living in a residential flat "frozen" under that section should not be considered as "making available" the flat to himself.

26. The Administration confirms that a person holding a residential flat "frozen" under new section 6 would not be considered as "making available" the property concerned to himself. This is in line with the intention underlying paragraph 1(c) of UNSCR 1373 and Special Recommendation III of FATF which aims to prevent funds and other assets from being provided to terrorists/terrorist associates and to prohibit terrorists/terrorist associates from mobilising funds and other assets. To reflect the aforesaid intention more clearly, the Administration has agreed to members' suggestion of replacing "make available" with "deal with" in new section 6. "Deal with" will also be defined in new section 6, based on the definition of "dealing" in OSCO.

27. The Administration has also accepted members' suggestion to add provisions under new 6(10) to the effect that S for S may give a direction to seize terrorist property only if he has reasonable grounds to suspect that the property will be removed from Hong Kong.

Section 7 on prohibition on supply of funds to terrorists and terrorist associates

28. Members have pointed out that the scope of section 7 goes beyond the requirement of paragraph 1(b) of UNSCR 1373 which requires all States to criminalise the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.

29. Having taking into account the views of members, the Administration has agreed to amend section 7 to follow closely the formulation of paragraph 1(b) of UNSCR 1373. In so doing, the Administration will also further improve the drafting of new section 7 to the effect that funds to be used "in whole or in part, to commit one or more terrorist acts" will be criminalised, taking reference from the Terrorism Suppression Act 2002 of New Zealand.

Section 8 on prohibition on making funds, etc. available to terrorists and terrorist associates

Section 9 on prohibition on supply of weapons to terrorists and terrorist associates

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30. Hon Margaret NG and Hon James TO consider that the coverage of section 8 is too wide, having regard to the fact that paragraph 1(d) of UNSCR 1373 does not seem to require criminalising every ordinary citizen for making funds available to terrorists and terrorist associates.

31. The Administration has advised that a criminal approach in the implementation of UNSCR 1373 is adopted by major common law and European jurisdictions. The Administration has also pointed out that UNSCR 1373 takes a very broad approach to the suppression of terrorist financing. To facilitate the setting of priorities by States to implement the wide range of measures required by UNSCR 1373, the United Nations Counter Terrorism Committee (CTC) has stated that it first looks at whether a Member State has put in place effective counter-terrorism legislation in all areas of activity related to UNSCR 1373 (including its paragraphs 1(b) and 1(d)), with specific focus on combating terrorist financing. The CTC has also elaborated that it focuses on legislation as the key issue because without an effective legislative framework States cannot develop the executive machinery to prevent and suppress terrorism, or bring terrorists and their supporters to justice.

32. Hon Margaret NG considers that the use of the mental element of "having reasonable grounds to believe" in sections 8 and 9 is too low a threshold, as terrorists and terrorist organisations do not carry a label proclaiming themselves to be terrorists. It is therefore wrong to criminalise every ordinary citizen unless he knows that. The gazettal of an organization as a terrorist organisation is an insufficient and unsafe basis. Miss NG has therefore suggested replacing the mental element of "having reasonable grounds to believe" in sections 8 and 9 with "recklessness". It is an objective test, with the proof being whether the risk involved would have been obvious to an ordinary prudent man. Applying "recklessness" to sections 8 and 9, the prosecution would have to prove that the offender either -

- (a) had not given thought to whether the person concerned was a terrorist or terrorist associate in circumstances where there was an obvious risk that this was the case; or
- (b) having recognised that there was a risk the person concerned was a terrorist or terrorist associate, proceeded anyway.

The Administration will move CSAs to replace the mental element of "having reasonable grounds to believe" with "recklessness" in sections 8 and 9.

33. In response to members' enquiry, the Administration has clarified that the Ordinance does not provide that a person is presumed to know of the existence or contents of a notice or an order published in the Gazette. The purpose of the presumption as provided for under sections 4(5) and 5(4) of the Ordinance is to relieve the prosecution of the requirement to prove that the specified persons or property are terrorists, terrorist associates or terrorist property as appropriate, in the absence of evidence to the contrary. However, if a person is charged with an offence relating to a terrorist or terrorist associate, (for instance, under sections 7, 8 or 9) the prosecution will still need to prove that the person knew, or was reckless as to whether he was dealing with such a person. The fact that the specification has been published in the Gazette does not create a presumption or proof that the accused person had the requisite mens rea.

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