

**Extract from the Official Record of Proceedings
of the Council meeting of 30 June 2004**

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**UNITED NATIONS (ANTI-TERRORISM MEASURES) (AMENDMENT)
BILL 2003**

Resumption of debate on Second Reading which was moved on 21 May 2003

PRESIDENT (in Cantonese): Mr James TO, Chairman of the Bills Committee on the above Bill, will now address the Council on the Committee's Report.

MR JAMES TO (in Cantonese): Madam President, in my capacity as Chairman of the Bills Committee on United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003 (the Bills Committee), I would like to first report on the deliberations of the Bills Committee.

The United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003 (the Bill), introduced into the Legislative Council on 21 May 2003, seeks to amend the United Nations (Anti-Terrorism Measures) Ordinance (the Ordinance) to:

- (i) give effect to the outstanding obligations of freezing terrorist property other than funds under United Nations Security Council Resolution (UNSCR) 1373 and the Financial Action Task Force on Money Laundering (FATF);
- (ii) implement the United Nations International Convention for the Suppression of Terrorist Bombings, the United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the United Nations Protocol for the

Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf; and

- (iii) provide for the power of investigation in relation to offences under the Ordinance, and powers of seizure and detention of property suspected to be terrorist property, and so on.

The Bills Committee held a total of 16 meetings with the Administration. In addition, the Bills Committee has met with four organizations/individuals, and has received written submissions from another 16 organizations/individuals.

Members noted that according to the definition of "public body" under clause 2(1), a private body may be required to furnish information or produce materials in accordance with a court order issued under new section 12A(2) or 12B(2).

The Administration stated that new section 2(8) had no intention to specify organizations that are purely private. To address members' concern, the Administration will introduce an amendment to delete the definition of "public body" and sections 2(8), 12A(10), 12B(7) and 12B(12). The Administration also agreed to explain the above at the Committee stage. According to new sections 12A and 12B, any "person" may be required to furnish information or produce materials. "Person" is defined according to the Interpretation and General Clauses Ordinance (Cap. 1) as including "any public body and any body of persons, corporate or unincorporated", so as to avoid the misunderstanding that public bodies are excluded from the definition of "person".

To address the concerns raised, the Administration will tighten the definition of "terrorist act" by strengthening the element of "intention".

Another provision that aroused great concern from members is clause 5, which extends the power of the Secretary for Security to freeze terrorist property to non-fund terrorist property, and empowers the Secretary for Security to authorize seizure of the frozen property to prevent it from being removed from Hong Kong.

In response to members' request, the Administration has agreed to add provisions under clause 5 to the effect that the Secretary for Security 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.

Members considered that the scope of the existing section 7 on the prohibition to supply funds to terrorists and terrorist associates has exceeded the requirement of paragraph 1(b) of UNSCR 1373. The Administration agreed to amend the existing section 7 to follow closely the formulation of paragraph 1(b) of UNSCR 1373.

Miss Margaret NG considered that the threshold in using the mental element of "having reasonable grounds to believe" in section 8 on the prohibition to make funds, and so on, available to terrorists and terrorist associates and section 9 on the prohibition to supply weapons to terrorists and terrorist associates is too low. Miss NG has therefore suggested replacing it with the element of "recklessness". It is an objective test, with the proof being whether the risk involved would have been obvious to an ordinary prudent man.

The Administration agreed to replace the mental element of "having reasonable grounds to believe" with "recklessness" in sections 8 and 9. The Administration also agreed to replace the mental element of having "reasonable grounds to believe" concerning the prohibition on recruitment to specified terrorist groups in new section 10 with "recklessness".

Concerning clause 8 on the disclosure of knowledge or suspicion that a property is terrorist property, Miss Margaret NG pointed out that neither UNSCR 1373 nor FAFT requires Hong Kong to make a potential criminal of every ordinary citizen to disclose information on suspicious terrorist transaction. Miss NG has therefore suggested that section 12 be revised by making reference to the United Kingdom Terrorism Act 2000 (the Act) to the effect that the obligation to report terrorist property would only cover information or other matters which come to a person arising from his work.

The Administration has agreed to consider the possibility of introducing in Hong Kong a two-tier reporting system provided for under sections 19 and 21A of the Act. In view of the possible implications such a reporting system may have on the sectors concerned, as well as the need to ensure consistency between the reporting requirements under section 25A of the Drug Trafficking (Recovery of Proceeds) Ordinance and Organized and Serious Crimes Ordinance, and under section 12 of the Ordinance, the Administration considered that a thorough

consultation should be carried out before amendments should be contemplated. The Administration has agreed to undertake a review of the present reporting requirements under the three Ordinances in the context of the exercise scheduled to start in 2004-05.

In order to remove the liability imposed on "any person" by the existing section 12(1), Miss Margaret NG has given notice to move a Committee stage amendment to the provision to the effect that the obligation to report terrorist property would only cover information or other matters which come to a person arising from his work. As the mental element has remained unchanged, she believes that this will not affect the relevant sectors in any way.

Apart from the above provisions, the Bills Committee was also very concerned about the issue of compensation.

Members have pointed out that the compensation provision under the existing section 18 is not of practical benefit to someone who is wrongly specified as a "terrorist" or "terrorist associate" and whose property is wrongly specified as "terrorist property", the main reason being that it would be difficult for the affected persons to satisfy the Court there has been "serious default" on the part of the Government.

To address members' concern, the Administration has agreed to lower the threshold from "serious default" to "default" under the existing section 18(2)(c) and new section 18(2B)(a), and to add a new section 18A to clearly preserve remedy available in common law.

Ms Cyd HO, Mr Albert HO, Miss Margaret NG and I are of the opinion that a compensation arrangement better than the common law position should be provided, in view of the Administration's wide freezing power under section 6.

Ms Miriam LAU did not agree with these members' suggestion concerning the existing compensation policy, given the impact of the suggestion on the existing compensation policy, public expenditure as well as the compensation arrangement available under existing law.

Madam President, the above report has been presented on behalf of the Bills Committee.

Next, I will express some of my personal opinions briefly. I wish to comment only on the arrangements for compensation mentioned just now.

The Government in fact has extensive powers in freezing properties according to the law. If we compare this piece of anti-terrorism legislation with other legislation on criminal offences in general, this power designed to combat crime in general is obviously greater than that provided for in other legislation. In the context of anti-terrorism, we feel that the basic principle of conferring greater powers is to a certain extent justified because the Secretary or the Government has to exercise these powers to take certain actions, for example, to freeze a person's property, which is the object of suspicion or to continue to detain the property after freeze for investigation and international co-operation purposes. However, in the event that something goes wrong in one area, for example, if a country with a global intelligence network or investigation agency finds that a sum of money or certain people have suddenly reached Hong Kong, Hong Kong as a responsible member of the international community will often find it rather difficult to refuse the requests for co-operation. Of course, before exercising his powers, the Secretary has to consider some fundamental legal principles and criteria. However, in the event that he issues an order and freezes some properties but finds afterwards that some overseas organizations may have made a mistake, or although the degree of his suspicion was founded on reasonable or reliable intelligence, the intelligence may not necessarily be accurate, so it is proven ultimately that a mistake has been made (but at that time, the degree of suspicion was very high), then the person involved will turn out to be totally innocent. If we say to that person that it is unfortunate he has been singled out, however, because the world and mankind as a whole are fighting terrorism, so we have to act fast and he was sacrificed, I think putting things this way will not deliver the message that the public as a whole has to be involved in the cause of fighting terrorism.

Since it is necessary to engage all members of the public in the anti-terrorism effort, it is a commensurate measure to assume the responsibility for offering compensation. We cannot say that because fighting terrorism is a joint effort, therefore, should anyone happen to suffer any loss and should this befall any person, for the sake of the campaign waged by mankind against terrorism, that person has to be sacrificed. I think this is fundamentally unjustifiable. Of course, some people may put forward the argument that in the global effort against terrorism, sometimes the intelligence we gathered or the requests we received may come from other countries, in that case, can we

request other people to offer us compensation? If Hong Kong, as an international financial centre, receives this kind of requests frequently and has to comply because of reasonable grounds, but in the end, it turns out that several million people in Hong Kong have to bear the burden of offering compensation to perhaps one individual, in that case, is it fair? It is not possible to solve this problem because in fact, no matter in which country, region or jurisdiction, it is impossible to request other people to agree to sign an undertaking in compliance with your demands on account of the inherent value of anti-terrorism and the need for global co-operation in fighting terrorism.

Therefore, I can only say that if our community can achieve this, then at least everyone will find things more palatable and for the benefits of others and oneself, they will bear the burden and co-operate with the whole world. However, the bottomline held by the Secretary is only to amend "serious default" to "default". In fact, we can imagine that an innocent person only knows that his properties have been frozen, but there can be many possibilities for this. It is possible that the names happen to be the same, or a third party has monetary or commercial connections with an innocent person under circumstances unbeknown to him. For example, it is possible that your company has many clients and they may pay you money for goods. In other words, any situation is possible. Therefore, in the meetings of the Bills Committee, members discussed whether the Secretary should consider some possibilities. One line of thought is that if a person whose properties are frozen or is the object of suspicion is found to have done nothing wrong, that is, he is innocent rather than having done something to arouse suspicion, in that case, should the Government undertake to offer compensation to show that all people have to assume responsibility in fighting terrorism? We cannot just say that though somebody is innocent, since neither the Government nor the whole world has done anything wrong, only that something has perhaps been mistaken, that person should bear the consequences himself. Of course, another argument is that if it is proven that someone has not done anything wrong, nor has the Government or any party for that matter, that means no compensation will ever be offered in the whole world. This is another kind of standard.

However, as things now stand, we are putting the onus of proof on the suspected person and the one whose properties have been frozen. In that case, it is useless even if he can prove that he has done nothing wrong. It will suffice only if he can go further and prove that the Government is at fault. However, in an anti-terrorism situation, he has no idea at all who provided the information

to the Government, from which intelligence agency the information came or about the provenance of the information. What he knows is that within his scope, he is in possession of little information. He only knows that one day, his account or some of his properties were frozen for no apparent reason. How can he provide any proof? In fact, it is not only difficult for the suspect to provide any proof, I think that in most situations, according to my understanding of the system's operation, this is next to impossible.

In addition, since the Government has the defence of public interest immunity, in many legal proceedings, often it is not even possible to disclose certain information. Moreover, it is also possible that the Government has promised other international organizations or intelligence agencies in their conditions of co-operation that under no circumstances will any disclosure be made because some matters may involve other operations being carried out globally. Therefore, even though the Government may want to make some disclosures so that the legal process can be fairer, it is not possible to do so. In the end, the victim or the aggrieved person will have no recourse available to him.

If the present term of "serious default" is revised to "default", in the final analysis, I can only say to the public that if you have any religious faith, I hope your religious faith will lead you not into becoming an innocent victim, other than that, there is no other way. Of course, I also hope that if members of the public really know or have reasons to suspect that certain people are terrorists, or know what properties or funds belong to terrorists or are associated with them, then of course they have to make reports and should also avoid consorting with these people. However, sometimes it may be impossible to do so even though one wants to because there is no way of knowing. Terrorists do not etch any mark on their foreheads. They adopt very covert, sophisticated and shrewd tactics and can even elude government intelligence agencies and enforcement officers. Can the general public identify them easily? This is an inadequacy of the Bill.

On behalf of the Democratic Party, I want to say that owing to reasons such as our international responsibilities, even though we feel that there are inadequacies and undesirable areas in this regard, if we look at the existing piece of legislation as a whole, it can be seen that the Bill has not just made improvements to the first phase of the anti-terrorism legislation, but even at the final stage, the Government has also made huge improvements to many of the

provisions. On this basis, the Democratic Party is of the view that it can vote in favour of the Bill, so as to show support for our duties in the international anti-terrorism effort and our resolve to co-operate.

However, I hope that the Government can consider if further review is called for after implementing this piece of legislation for a period of time. In case it considers committing to an unlimited amount of compensation impractical, it can set a lower limit of, say, \$100 million or \$50 million to show that the Government will at least protect innocent victims within its means, rather than make the public to pay premiums as though they were taking out insurance policies, so that innocent victims will not have to bear the full and unwarranted costs of the general anti-terrorism effort on their own.

Concerning Miss Margaret NG's amendment, the Democratic Party will support it.

MISS MARGARET NG: Madam President, anti-terrorism is a global issue. This summer, the International Commission of Jurists (ICJ) is holding its biennial conference in Berlin on "Counter-Terrorism and Human Rights". In its invitation letter, the ICJ says and I quote:

"In the global 'war against terrorism', states in all parts of the world have adopted new or strengthened laws and policies to suppress and punish terrorism. Governments must protect their people from terrorist attacks. Many counter-terrorism measures, however, have themselves become a critical threat to human rights, undermining international human rights and humanitarian law and fundamental principles of the rule of law."

It is in this context that this Council should regard the United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003 (the Bill).

Almost exactly a year ago, on 11 July 2003, I spoke strongly against the Bill. It was rushed through this Council in a few weeks' time. Although the Government accepted part of the views and suggestions of the Bills Committee and made some amendments, a great many provisions which infringed upon basic rights were left unamended, and I referred to this in my speech in the Second Reading debate.

In my last ditch efforts, I moved a great many amendments at the Committee stage. The Government rejected every one of them, and under its opposition, every one of them was defeated, and these glaring defects remained on our statute book. In fact, the then Secretary for Security was so headstrong about getting all the provisions passed that she refused to withdraw what was clause 9 of the Bill prohibiting the recruitment to an organization specified in the Gazette as terrorist, although she fully realized that that clause had become a nonsense. Clause 9 is now section 10 of the Ordinance. In fact, one of the aims of the Bill now before this Council is to remove this blot. But, in the meantime, this nonsense has the effect of law in the Hong Kong Special Administrative Region (SAR).

This year's experience has been fortunately somewhat better. It did not begin well. The main purpose of the Bill was to restore the excessive investigation powers of "authorized officers" rejected by the last Bills Committee. To prevent members from taking the opportunity to amend other parts of the Ordinance, the Bill is given a long title of unprecedented length and specificity. The scrutiny of the Bill was extremely tough-going for many months because the Government resisted every demand of members and non-governmental organizations which made representations, including Justice — the Hong Kong section of the ICJ.

Thankfully, the Government changed its attitude in the end, and worked together with the Bills Committee with a more open mind. The many amendments to be introduced by the Government is a result of that process. Although it has caused us much effort, I am pleased that it has happened, and I do sincerely thank the Government for its co-operation.

I took some time to revisit the Committee stage amendments I proposed last year. I am pleased to say that many of them are now being effected through the Government's amendments. I would like to mention the most significant improvements from the point of view of better legislation and better regard for human rights.

The definition of "terrorist's act" is to be tightened up more or less along the lines I proposed last year, namely, there has to be a specific intent not only to do an act which resulted in various harm, but also the harm has to be intended. The person who commits the act must intend the act to cause the serious harm set

out in the provision. Moreover, when action is threatened, the threat has to be made with the intention of using action which would have the result of causing those harm. In this way, the law protects the innocent while punishing the true terrorist, and the legitimate exercise of the freedom of expression and industrial action will be safe from being gagged as "terrorist acts".

Amendment is being proposed to criminal provisions under section 10, as well as sections 7, 8 and 9. The Government's proposed amendments do not go as far as the amendments I proposed last year, but they are more thoroughly considered.

Two general principles apply in all these sections. One is the criminal intent which, under the Ordinance, is "knowing or having reasonable grounds to believe". There is great objection against "having reasonable grounds to believe". Recent judicial decisions have made clear that this is an objective test. If the reasonable grounds are objectively there, and known to the defendant, then it matters not even if he can prove that he did not in fact, believe. This punishes the innocent who happens to be stupid or lacking in common sense. This is not the aim of the law. We checked against the United Nation's resolution which China, and therefore the Hong Kong SAR, is under obligation to implement. It is plain to see that the resolution concerned does not require us to go that far.

The other principle is that a person does not commit an offence for making funds available to someone who is not a terrorist, or for a purpose which is not to further terrorism. For example, a person donates money to the XYZ Recreation Club knowing that it is the XYZ Recreation Club, does not commit an offence if, unknown to him, this XYZ Recreation Club is a terrorist organization. This is largely a drafting point, but the drafting is all important.

The Government's Committee stage amendments accept that "having reasonable grounds to believe" is too low a threshold. These are serious offences with a maximum sentence of 14 years imprisonment. However, the Government still considers something short of actual knowledge is necessary. In the end, "recklessness" is accepted as the middle ground.

There is some problem applying this compromise to section 10(2). This subsection makes it an offence for a person not to take all practical steps to cease

to be a member of an organization gazetted to be a terrorist organization as soon as practicable after he has come to know, or have reasonable grounds to believe, that the organization has been so gazetted. How does recklessness apply to such an offence? There may be a way, but I am glad to hear that the Government is prepared to do away with the offence under this subsection altogether. This offence is of no practical value. A true member of a terrorist organization is hardly likely to be deterred, and moreover, can be caught under other offences of supporting terrorism.

A person who has joined an organization not knowing that it is an under-cover terrorist group should be allowed to stop having anything more to do with it as soon as he finds out that it has been gazetted as a terrorist group. He should not be required to seek it out in order to tender his resignation.

Madam President, there remains three important defects. The present offence under section 11 on "false threats" and communicating these "false threats" should be removed. This is not required by any United Nations resolution, and is already covered by other legislation where justified. The section is also badly drafted, making a mentally unbalanced person who is no terrorist liable to be convicted. In fact, the section had been used to prosecute just such a person. Unfortunately, it is outside the scope of the Bill to amend the Ordinance by repealing this. I hope the Government will revisit this point as soon as possible.

The second serious defect, and one I feel very strongly about and spoke at some length on it last year, is the duty imposed on every person who "knows or suspects that any property is terrorist property" to report this to the authorities. If he fails to do so, he commits an offence under the existing section 12(1) of the Ordinance.

On the last occasion, I was at a loss how to amend such a provision. This time, the Bills Committee had the benefit of seeing the United Kingdom legislation, namely the Terrorism Act of 2000, amended later under an Act of 2003. In the earlier Act, the reporting duty was confined, in effect, to professions and services sectors which money laundering attempts may pass through. In the later Act, the duty is imposed on a defined "regulated sector". Hong Kong can safely adopt either without fear of failing to meet its international obligation. The unjustified threat of criminal prosecution should and must be removed from the ordinary citizen.

The Government basically agrees with these principles, but does not agree with me on the need to put things right immediately. Instead, it proposes to carry out a consultation and introduce amendments if the consultation warrants it. I agree if we follow the later Act and establish a "regulated sector", we must first consult. But it is unnecessary to wait if the amendment is confined to just narrowing down section 12(1) so that ordinary people will no longer be caught. Those who will be within the scope of section 12(1) are already within it now, without any change.

An unjustifiably broad offence should be corrected as soon as possible. It is possible to do so now. I will, therefore, move a simple amendment to section 12(1) at the Committee stage of the Bill. I hope Members will support my proposal.

Lastly, the lack of a fair provision for compensation is still outstanding. I know that the Honourable Albert HO has tried to introduce an amendment, but that has not been approved by the President for the reasons she has issued to Members. The Chairman of the Bills Committee, James TO, has spoken at length on this point, and I shall not repeat what he said. I just want to record my agreement with him.

The Bill is not about old defects only but also about new additions. My major concern is the wide powers of investigation, although the requirement of a warrant provides some safeguard. The Government is proposing certain amendments which I consider an improvement, but I remain uneasy about the overall effect. The exercise of these powers should be kept under review.

Madam President, subject to the Committee stage amendments, I support the Second Reading of the Bill.

PRESIDENT (in Cantonese): Does any other Member wish to speak?

MS MIRIAM LAU (in Cantonese): Madam President, as a member of the international community, Hong Kong is duty-bound to introduce local legislation to comply with the United Nations' Resolution on combating terrorism. Therefore, the Liberal Party has also made an effort to contribute to the scrutiny of this Bill. In the scrutiny of the Bill, the stance of the Liberal Party has all

along been that of striving to strike a balance between anti-terrorism measures and protecting the rights of the public. The Government will move a number of Committee stage amendments later, mainly to address the concerns expressed by the Bills Committee on the provisions of the Bill, with a view to making the provisions clearer and more focused, as well as complying more closely with the requirements the United Nations Security Council Resolution 1373. The Liberal Party believes that these amendments can achieve the aim of striking a balance between the two aspects mentioned above, therefore, it welcomes and supports them.

However, not all suggestions proposed by members of the Bills Committee during its meetings were taken on board by the Government. For example, in clause 5, the Government has adopted the test of "having reasonable grounds to suspect" when freezing property. Some members considered that this test might be too subjective because the Secretary for Security can freeze suspected terrorist properties without having to make any application to the Court. The Government explained that in conforming to the test of "having reasonable ground to suspect", apart from subjective opinions, it is also necessary to have objective collaborative evidence to support the subjective opinions, that is, the Secretary for Security must have genuine suspicion that the property concerned is terrorist property and there must be reasonable grounds for forming such a suspicion. If the standard of this test is raised and the weight of the objective element is increased, the difficulty in law enforcement will actually increase and those targets that should actually be hit may be able to slip through the net of justice, such that the goal of striking a balance between anti-terrorism measures and protecting the human rights of the public will be missed. The Liberal Party accepts the explanations given by the Government, however, since freezing other people's property is a very serious matter, it is imperative for the Government to exercise the relevant power in an extremely prudent manner.

As regards the amendments proposed by the Government, the first one is to section 2(1) of the Ordinance on the definition of terrorist act. In the original provision, only the criminal element is included without highlighting the element of criminal intent. However, since this definition is the focus of the entire provision, it must not be ambiguous in any way or catch innocent members of the public. To incorporate the element of criminal intent will also be in keeping with the standard of proof in common law.

After considering the suggestions of members, the Administration has made amendments to the provision by revising the drafting on criminal acts in the

original provision and introduced a provision that includes both criminal intent and criminal element, so that the definition of terrorist act can be complete and clearer. The Liberal Party considers that the amendment can reflect the spirit of common law and avoid putting the human rights of the public in a vulnerable position because of the provision. It therefore supports the Government's amendment.

On sections 8 and 9 of the existing Ordinance relating to the prohibition on supplying funds and weapons to terrorists and terrorist associates, the Liberal Party believes that in such situations, it seems that adopting the test of "having reasonable grounds to believe" is too low a standard of proof. If a member of the public inadvertently and unknowingly supplies funds to terrorists or terrorist associates published in the Gazette in the course of doing business, he is liable to prosecution and conviction. After consideration, the authorities have raised the standard of proof from "having reasonable grounds to believe" to that of "recklessness", which is more objective and stringent. The Liberal Party supports the amendment.

Concerning the amendments to be moved by Miss Margaret NG at the Committee stage, I wish to make some comments here. Section 12(1) of the anti-terrorism Ordinance provides that where a person knows or suspects that any property is terrorist property, the person has the duty to disclose the information to an authorized officer. Certainly, it is the desire of the Administration to have sufficient legal backing to combat terrorist activities more effectively and attain the end of engaging the public in anti-terrorism efforts. This requirement on making reports is consistent with those in the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance. On the amendments to be moved by Miss Margaret NG at the Committee stage, in fact we learned that Miss Margaret NG would move amendments in this regard only towards the end of the scrutiny process because she submitted her amendments at a rather late stage. Making reference to the United Kingdom Terrorism Act 2000, Miss Margaret NG suggests that the persons covered by the provision be tightened to only cover those who deal with terrorist properties as a result of their work.

The Liberal Party considers that if it is necessary to tighten the coverage, as did the anti-terrorism act in the United Kingdom, and to draw up separate provisions to step up supervision of specific sectors, such as the legal and accounting sectors, then these professions should be consulted first and

corresponding amendments should then be made to the three ordinances containing the same reporting requirements, so as to avoid confusion. The authorities have also made an undertaking in this regard and will conduct a consultation and review later. The amendments proposed by Miss Margaret NG have in fact only adopted part of the relevant provisions in the United Kingdom which are in fact more detailed. It is probably because of Miss Margaret NG's desire to introduce concise amendments that she adopted them partially. However, should the amendments proposed by Miss Margaret NG be passed, inconsistency with the reporting requirements in the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance would arise. I have mentioned earlier on that doing so may lead to problems. Therefore, the Liberal Party cannot support Miss NG's amendments at this stage. However, we urge the Government to conduct a review and consultation on such requirement as soon as possible.

Madam President, I so submit.

MR LAU KONG-WAH (in Cantonese): Madam President, to combat international terrorism, we must clamp curb their channels of recruiting members and financing. These terrorist groups will look for opportunities all over the world to recruit new members and obtain funds through various economic and financing channels to acquire ammunitions and launch biochemical attacks. To them, an internationalized society will enable them to come into contact with and recruit people of different ethnic origins and creed as members of their groups, and they can also raise funds and conduct money laundering through various channels and means. To prevent Hong Kong from becoming the breeding ground for international terrorism, and in order to implement the resolution of the United Nations, the SAR Government should on the one hand actively participate in international organizations and the collection of intelligence to help tracking and combating these terrorist groups. On the other hand, it should strengthen local anti-terrorism legislation, and endeavour to curb their organizational ability and cut off their source of income. Therefore, the Democratic Alliance for Betterment of Hong Kong (DAB) supports the SAR Government to pass a bill to combat terrorist activities.

Insofar as this anti-terrorism Bill is concerned, the Government has accepted many suggestions of the Bills Committee. The proposed amendments all aim to balance the rights of all sectors in the community, raise the standards

for monitoring the Government and introduce more provisions on the protection of human rights. As proposed by the Government, insofar as the definition of terrorist act is concerned, the element of intention will be strengthened in order to narrow the scope of terrorist act, so that general criminal acts will not be easily defined as terrorist acts. Moreover, the Government has explicitly stipulated that the Secretary for Security, before making a decision on seizure of property suspected to be terrorist property, must have reasonable grounds to suspect that the property will be removed from Hong Kong, and only under this circumstance that such decision can be made. This can narrow the power of the law enforcement agencies in seizure of property. Regarding provisions on offences involving the mental element, such as prohibition on supplying funds and weapons to terrorists and terrorist associates and prohibition on the recruitment of terrorists, the Government has proposed an amendment to the effect that a higher mental element, that is, "recklessness", will replace "having reasonable grounds to believe", so that prosecution will require the collection of more information and submission of more evidence. With respect to empowering law enforcement agencies to require the relevant persons to furnish information for the purposes of investigation into terrorist acts, the Government has also proposed an amendment to require that such order which confers this power on law enforcement agencies should be issued by the Court of First Instance and to adopt the model of the exercise of law enforcement powers in the Organized and Serious Crimes Ordinance, in order to prevent the powers of the law enforcement agencies from becoming too wide. Besides, in the provisions on compensation, the Government has lowered the threshold for proving default on the part of the Government by deleting the word "serious", so that the affected persons only have to satisfy the Court on default on the part of the Government. This will reduce the burden of proof on the affected persons and facilitate claims for compensation by the claimants. For these reasons, the DAB supports the Committee stage amendments to be proposed by the Government.

Anti-terrorism legislation involves public security, but it may, to some extent, affect the freedoms of individuals. To strike a balance, it requires appropriate consultations and due consideration to options. On Miss Margaret NG's amendment, however, the DAB considers that both public interest and public security must be protected and both should be considered on an equal footing. When Members continue to stress the rights of individuals and narrow the obligations of individuals, the public cannot but ask: Who will be there to protect public security, public interest, social order and world peace? An

imbalanced anti-terrorism legislation riddled with loopholes will only create more opportunities for terrorists. Miss NG pointed out that neither the United Nations Security Council Resolution 1373 nor the Financial Action Task Force on Money Laundering makes it a duty for every ordinary citizen to disclose information on suspicious terrorist transactions. She, therefore, suggested that section 12 be revised by making reference to the United Kingdom Terrorism Act 2000 to the effect that the obligation to report terrorist property would only cover information or other matters which come to a person arising from his work. From another viewpoint, Resolution 1373 does not provide for a compensation mechanism, but there are indeed provisions on compensation in this Bill. Insofar as international covenants and provisions are concerned, the member states will comply with and observe the original intent and wording of the relevant provisions as far as possible in formulating their own legislation. But it does not mean that when formulating their own legislation, no country or territory can take into account the needs of the time, the place and the individual situation and enact laws in accordance with the local actual circumstances. Furthermore, even though we should make reference to the United Kingdom Terrorism Act 2000, the Act itself has provided that every person has the duty to disclose their knowledge and suspicion of terrorist transactions. In this connection, the disclosure requirement in the United Kingdom Terrorism Act 2000 consists of two tiers, providing for different standards on the mental element for ordinary citizens and members of regulated sectors. Therefore, there are different standards for this duty of disclosure. Miss Margaret NG's amendment has nevertheless changed the two-tier system in the United Kingdom Act into a single-tier system and narrowed the scope of information to be disclosed to information which comes to a person arising from his work. This will greatly reduce the duty of individuals to protect public security and public interest and hence undermine the investigation into terrorists, and this amendment has never been published for consultation with the relevant sectors. Therefore, the DAB cannot support Miss Margaret NG's amendment.

The propriety of any anti-terrorism legislation depends on whether or not it can keep abreast of the ever changing international trends in combating terrorism and standards of human rights protection. Therefore, the DAB welcomes the proposal of the Government that a detailed and extensive consultation be conducted on the reporting system in section 12 of the Ordinance together with the reporting provisions in the Drug trafficking (Recovery of Proceeds) Ordinance and under section 25A of the Organized and Serious Crimes Ordinance. The two-tier standard for disclosure mentioned in the

United Kingdom Terrorism Act 2000 can also be included in the consultation. Moreover, the DAB hopes that the Government can regularly review the provision concerning the freezing of terrorist property by the Secretary for Security in section 6 of the Ordinance and look into whether the power to freeze such property can be exercised by the Judiciary.

Madam President, I so submit.

MR AMBROSE LAU (in Cantonese): Madam President, on behalf of the Hong Kong Progressive Alliance, I support the Bill and the amendments proposed by the Government. According to the direction given by the Central Government in 2001, Hong Kong must implement the United Nations Resolution on combating terrorism. This is also an international obligation of Hong Kong as a world metropolis.

We consider that the existing reporting requirement is not the most desirable arrangement. But Miss Margaret NG's amendment will make the reporting duty in the United Nations (Anti-terrorism Measures) Ordinance inconsistent with the references in the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance. Besides, Miss Margaret NG's amendment is far from comprehensive and so, we consider it necessary for the Government to comprehensively review and study in detail the reporting provisions in various Ordinances. We hope that the Government can expeditiously consult the relevant sectors on how the reporting provisions can be improved. But given a rather tight timeframe and as it is necessary for Hong Kong to expeditiously fulfil its international obligation, I hope the Government can conduct the relevant studies and consultation immediately. We cannot support Miss Margaret NG's amendment at this stage. We hope that after studies and consultation, the Government can put forward some proposals to further protect the rights and interest of the public.

Madam President, I so submit.

PRESIDENT (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

SECRETARY FOR SECURITY (in Cantonese): Madam President, first of all, I would like to thank Mr James TO, Chairman of the Bills Committee and all other members for having scrutinized carefully all the provisions in the United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003 (the Bill) as well as reviewing all the relevant provisions in the United Nations (Anti-Terrorism Measures) Ordinance (the Ordinance) passed in 2002 in more than 10 meetings. In the course of scrutiny, the Bills Committee had proposed a number of workable concrete proposals. Later, we will propose amendments at the Committee stage to incorporate these proposals. We believe the Bill as amended will be able to discharge Hong Kong's international obligation in combating terrorism and meet Hong Kong's actual needs.

Hong Kong has all along been a safe city with low risks of terrorist attack. However, as an international financial centre, the frequent flow of funds is not subject to any restriction. Neither is there any foreign exchange control. So, Hong Kong has to formulate effective legislation against financing terrorism to prevent Hong Kong from being used as a fund-raising or fund deployment centre.

In fact, according to the information in hand, the way the terrorists plan their actions now are very different from the past. In the past, terrorist attacks were made through organized and detailed planning. But now they tend to take smaller-scale, self-financed and regionalized actions. They may not necessarily belong to some known terrorist organizations, rather, they may act on their own. So it is more difficult to predict and prevent their acts. And their fund-raising methods are wide ranging. Their funds may, on the surface, come from proper trades or organizations, such as non-profit-making bodies, or from other illegal activities such as drug trafficking, blackmailing, and so on. Because of such situation, it is all the more necessary for us to have comprehensive and effective legislation for combating terrorist financing in order to prevent Hong Kong, as a city of active fund movement, from being used, rendering Hong Kong a weaker link in the international community.

A two-stage approach is adopted by us to implement the anti-terrorism legislation. In stage one, the Ordinance was enacted in July 2002 to give effect to most of the mandatory elements of the United Nations Security Council Resolution (UNSCR) 1373 and the most pressing Financial Action Task Force on Money Laundering (FATF) Special Recommendations in order to combat terrorist financing acts.

In stage two, we aim to fulfil through the Bill Hong Kong's outstanding international obligations in anti-terrorism, including the following items:

- (1) UNSCR 1373 and the FATF Special Recommendations to freeze non-fund terrorist property;
- (2) The United Nations International Convention for the Suppression of Terrorist Bombings, under which State Parties are required to criminalize terrorist type attacks by means of explosives or other lethal devices; and
- (3) The United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the United Nations Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf which respectively require State Parties to criminalize unlawful acts endangering safety of maritime navigation and fixed platforms attached to the sea-bed for exploiting offshore resources.

The existing section 10 of the Ordinance on prohibition of recruitment of members for terrorist groups will also be amended by the Bill so as to improve the wording of the provision and provide for the appropriate mental element. It will also provide the law enforcement agencies with the powers required.

As far as we know, all major common law countries like the United Kingdom, the United States, Canada, Australia, New Zealand and Singapore have formulated legislation and measures to implement UNSCR 1373 and the FATF Special Recommendations. As regards the European Union (EU), a framework resolution with legal effect to suppress the financing of terrorist acts was formulated long time ago. All EU states are required to fully implement the relevant provisions. So, the enactment of legislation against terrorism is not only meant to fulfil the international requirements and keep Hong Kong abreast of the legislative measures of its international partners, but also uphold the integrity of Hong Kong's financial system. It is an indispensable preventive measure to suppress the fund-raising activities of terrorists.

The Bills Committee fully agrees to the need and importance of the legislation. During the scrutiny of the Bill, it has raised many valuable and constructive proposals so as to make the provisions more accurate and sound.

Having accepted most of the proposals made by the members, we have amended various parts of the proposed provisions of the Bill as well as the existing provisions of the Ordinance. The following are the more significant ones:

- (1) to tighten the existing definition of "terrorist act" in the Ordinance so as to strength the "intention" element. This should dispel worries that the scope of the definition is too wide;
- (2) in order to reflect our policy intent more clearly, we have improved the terms used in some provisions. For instance, in clause 5 of the Bill on freezing of property, it is stipulated that the Secretary for Security can instruct any person not to "deal with" terrorist property instead of "make available" the relevant property as in the original provision. The interpretation of the provision will become more precise. Another example is the exchange of information between the law enforcement agencies and their local and overseas counterparts. A provision regarding the purpose of information disclosure is added so as to specify that the relevant information can only be referred to the relevant authorities when it is related to the specified offences and the relevant information will not be disclosed in an unrestricted manner;
- (3) in respect of drafting the offence provisions, we have accepted the proposal of the Bills Committee to replace the mental element of "having reasonable grounds to believe" with "recklessness" in sections 8, 9 and 10. Section 7 of the Ordinance and Parts 3A and 3B of the Bill have been amended so that the relevant provisions will more closely reflect the drafting of the UNSCR 1373 and the three international conventions and protocols;
- (4) in respect of enforcement power, we agree to the views of the Bills Committee that an authorized officer be clearly defined as a police officer, a member of the Customs and Excise Department, a member of the Immigration Department and an officer of the Independent Commission Against Corruption. And the operation mechanism for the enforcement of authorized power will completely follow the model currently established under the Organized and Serious Crimes Ordinance. We have also improved the drafting of provisions in addition to deleting individual provisions to put it

beyond doubt that nothing in the relevant provisions affects the protection of legal privilege and of the privilege against self-incrimination.

I will explain the details of the amendments at the Committee stage.

I understand that some members of the Bills Committee consider that the amendment relating to compensation provision is not satisfactory. According to their opinion, although we have lowered the threshold from "serious default" to "default" on the part of the Government, the claimant will still have difficulty in meeting the new standard of proof. Members are of the view that in most cases, the Government is based on overseas information and intelligence to specify or freeze the terrorist property. If there is a mistake, most likely it is due to inaccurate overseas intelligence — if there is a mistake, most likely it is due to inaccurate intelligence and there is no "default" on the part of the Government. So, if neither the Government nor the aggrieved has defaulted, it is very unfair to the latter if the latter has to prove that the Government has defaulted in order to get compensation.

We understand members' concern. In fact, before proposing the amendments, we have considered carefully the compensation arrangement in respect of anti-terrorism in other major common law countries. We notice that compensation is not provided for wrongful specification or freeze in these countries. Besides, under the common law principle, compensation is provided only if it can establish that serious negligence on the part of the Government has led to damage suffered by the parties concerned. So, after careful consideration, we propose to lower the threshold from the original "serious default" to "default" and add a provision which clearly preserves remedy available in common law. We consider that the amended compensation provision is proportionate and reasonable. It complies with the existing criteria for compensation available in law, and strikes a balance between our obligation to combat terrorist financing and the need to compensate the aggrieved.

We understand that Mr Albert HO wishes to amend the compensation criteria which require the claimant to prove that there has not been any default or misconduct on his own part instead of proving that there has been "serious default" on the part of the Government. We are also aware that since Mr HO's proposed amendment will increase the Government's compensation expenditure

and have charging effect on public moneys under Rule 57(6) of the Rules of Procedure of the Legislative Council, the President has ruled that the amendment cannot be raised. We understand that Mr Albert HO considers that the compensation should be borne by the whole community in order to protect the interests of the aggrieved. But on the basis of the justifications I have mentioned, we cannot accept Mr HO's proposal. We believe the compensation provision as amended by the Government will ensure a proportionate and reasonable compensation arrangement.

Besides, concerning section 12 on the disclosure of terrorist property, a member has suggested that the two-tier reporting system provided for under the United Kingdom Terrorism Act 2000 be adopted. We understand the possible implications the proposed reporting provision may have on the general public and the related sectors, such as accountants, lawyers, estate agents, company and trust service providers, and precious metals and precious stones dealers, as well as the need to ensure consistency with the reporting requirements under the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance, the Bills Committee agrees to undertake a review, including a consultation, of the present reporting requirements under the three Ordinances.

We agree to the Bills Committee's opinion and the review will be undertaken in the context of the exercise to implement FATF's Forty Recommendations which is scheduled to start in 2004-05. The review will cover both the scope of the obligation to report as well as the mental element to be adopted for making disclosures, having regard to similar legislation in the United Kingdom and other common law jurisdictions. Besides, it will also involve consultation with the abovementioned sectors to be brought into the fold of the Recommendations and thus are subject to the reporting requirements.

With these remarks, I urge Members to support the Bill and the amendments I will move in due course. Thank you.

PRESIDENT (in Cantonese): I now put the question to you and that is: That the United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003 be read the Second time. Will those in favour please raise their hands?

(Members raised their hands)

PRESIDENT (in Cantonese): Those against please raise their hands.

(No hands raised)

PRESIDENT (in Cantonese): I think the question is agreed by a majority of the Members present. I declare the motion passed.

CLERK (in Cantonese): United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003.

Council went into Committee.

Committee Stage

CHAIRMAN (in Cantonese): Committee stage. Council is now in Committee.

UNITED NATIONS (ANTI-TERRORISM MEASURES) (AMENDMENT) BILL 2003

CHAIRMAN (in Cantonese): I now propose the question to you and that is: That the following clauses stand part of the United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003.

CLERK (in Cantonese): Clauses 1, 3, 10, 12, 13, 15 to 18 and 20.

CHAIRMAN (in Cantonese): Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(No hands raised)

CHAIRMAN (in Cantonese): I think the question is agreed by a majority of the Members present. I declare the motion passed.

CLERK (in Cantonese): Clauses 2, 4 to 9, 11, 14 and 19.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I move the amendments to clauses 2, 5 to 9, 11, 14 and 19, and the deletion of clause 4, as set out in the paper circularized to Members.

Clause 2 — the existing definition of "terrorist act" in the United Nations (Anti-Terrorism Measures) Ordinance (the Ordinance) be amended; the definitions of "authorized officer" and "premises" in the United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003 (the Bill) be amended; the definition of "public body" in the Bill and relevant clauses be deleted

Clause 4 — deletion

The amendment to clause 2 seeks mainly to amend the existing definition of "terrorist act" in the Ordinance, rectify the definitions of "authorized officer" and "premises", and delete the definition of "public body" and relevant provisions in the Bill.

As mentioned by me earlier, we have adopted the proposal of the Bills Committee to tighten the existing definition of "terrorist act" and, with reference to the Terrorism Suppression Act 2002 of New Zealand, extend the existing "intention" element in paragraphs (a)(i)(E) and (F) of the definition to paragraphs (a)(i)(A) to (D). The definition of "terrorist act", after amendment, will become tightened to mean the use or threat of action where the action will lead to serious consequences listed in paragraphs (a)(i)(A) to (F) of the definition. They would have the effect of, for instance, causing serious violence against a person, causing serious damage to property, endangering other persons' lives, creating a serious interference or disturbance to an electronic system, and so on, or the threat of action has the intention of causing actions that would lead to those serious consequences.

As for the definition of "authorized officer", it originally referred to any public officer of the Hong Kong Police Force, Immigration Department,

Customs and Excise Department, Independent Commission Against Corruption or the Department of Justice, authorized by the Secretary for Security under new section 3A. The Bills Committee considers it inappropriate for officers of the Department of Justice to be authorized by the Secretary for Security. Furthermore, according to actual enforcement of law, it is not necessary for officers of the Department of Justice to exercise such power as demanding relevant persons to answer questions or produce materials.

We share the views of the Bills Committee. It is anticipated that only officers of the Hong Kong Police Force, Customs and Excise Department, Immigration Department and Independent Commission Against Corruption will take part in investigating offences specified in the Ordinance. As such, we propose to amend the definition of "authorized officer" by putting it beyond doubt that "authorized officer" is confined to officers of the abovementioned four law enforcement agencies, whereas officers of the Department of Justice will be excluded from the list of "authorized officer". Consequent to this amendment, the retention of clause 4 empowering the Secretary for Security to authorize public officers is no longer necessary, and should therefore be deleted.

According to its definition in the Bill, "public body" originally referred to any government department and any public body specified by the Chief Executive under new section 2(8). The Bills Committee is concerned that a private body may be specified under section 2(8) and mandated to furnish information or produce materials under new section 12A or 12B. In this connection, I wish to emphasize that the definition of "public body" is provided mainly for the purpose of putting it beyond doubt that any public body and government department may be required to comply with a court order issued under new section 12A or 12B. For the purpose of section 2(8), we have no intention to specify organizations that are purely private.

We have carefully deliberated the abovementioned provisions in response to the concern of the Bills Committee. Under new sections 12A and 12B, the Court may issue an order requiring any "person" to furnish information or produce materials, whereas "person" is defined in the Interpretation and General Clauses Ordinance to include "any public body and any body of persons, corporate or unincorporated". We can thus see that these provisions have made it clear that "person" includes "public body". In other words, by virtue of a court order issued under new sections 12A and 12B, "public body" is required to fulfil the legal liability specified in the two provisions. In this connection, it is

considered unnecessary to give a new definition to "public body". As such, it is proposed that the definition and section 2(8) be deleted.

The proposed amendment to the definition of "premises" seeks mainly to make drafting improvement; whereas the deletion of the reference to clause 2 is consistent with the conventional practice of drafting.

Clause 5 — provisions on freezing and seizing terrorist property amended

Clause 5 amends section 6 of the Ordinance to provide that the Secretary for Security may specify to the effect that a property not be "made available" to any person should there be reasonable grounds to suspect the property to be terrorist property. The Bills Committee considers the meaning of "making available" far from clear and specific. A person living in a residential flat "frozen" may be considered as "making available" the flat to himself and has thus contravened section 6. The Bills Committee has thus proposed that, with reference to the Organized and Serious Crimes Ordinance (OSCO), "make available" be replaced with "deal with".

On the advice of the Bills Committee, we have further examined the requirements in paragraph 1(c) of the United Nations Security Council Resolution (UNSCR) 1373 and Special Recommendation III of the Financial Action Task Force on Money Laundering (FATF) in relation to freezing funds and other assets belonging to terrorists/terrorist bodies. We are of the view that these requirements are intended to prevent funds and other assets from being made available to terrorists/terrorist bodies and to prohibit terrorists/terrorist bodies from mobilizing funds and other assets. As such, a person living in a "frozen" residential flat should not be considered as having conducted acts prohibited by UNSCR 1373 and FATF.

To better reflect the intention of the abovementioned international requirements, we have accepted the proposal of the Bills Committee to replace the existing "make available" with "deal with". The clause, after amendment, makes it clear that the Secretary for Security may, should there be reasonable grounds to suspect any property to be terrorist property, give a direction that no one can "deal with" the property. Furthermore, we have proposed to replace "deal with" with a new provision based on the definition of "dealing" in the OSCO.

The new section 6(10) to be made under clause 5 provides that the Secretary for Security may, in order to prevent any frozen terrorist property from being removed from Hong Kong, direct authorized officers to seize the property. Both the Bills Committee and legal academics share the view that the power of freezing and seizing property is extremely broad. In order to enhance protection for affected persons, it should be specified that the Secretary for Security may exercise his power of seizure under section 6(10) only when he has reasonable grounds to suspect that the relevant property will be removed from Hong Kong. Sharing and accepting these views, we propose adding section 6(11).

Clause 6 — provisions on prohibition on recruitment of members and so on to terrorist bodies amended

Clause 6 amends section 10 of the Ordinance on prohibition on recruitment of members to terrorist groups or becoming members of terrorist groups. The amendment seeks to improve the language of the provision and provide for appropriate mental element. Considering that the mental element of "having reasonable grounds to believe" in the existing provision too low a threshold for proof and not applicable to offences specified in the Ordinance, the Bills Committee has proposed that "having reasonable grounds to believe" be replaced with "recklessness".

We have carefully considered the suggestions of the Bills Committee and examined the standard of proof laid down as a result of "recklessness" precedents — the prosecution would have to prove that the offender committed an act where there was an obvious risk and he had failed to consider any of those possible risks when he committed the act, or he insisted on committing the act even though he recognized the possibility of those risks.

"Recklessness" is an objective standard of proof, with the proof being whether the risk involved would have been obvious to an ordinary prudent man.

Taking into account that "recklessness", a well-proven mental element, has been in use in Hong Kong and other jurisdictions, and that it is frequently adopted in the existing criminal legislation, we have accepted the proposal of the Bills Committee to replace the mental element of "having reasonable grounds to believe" in the relevant provisions of the Ordinance with "recklessness".

Section 10(1) under clause 6, if amended, requires that a person shall not recruit another person to become a member or become a member of a body, knowing that, or being reckless as to whether it is a body specified in a notice published in the Gazette to be terrorist bodies. The drafting of the provision has been further improved by making "recklessness" applicable to it. In other words, the prosecution will have to prove that the offender either:

- (a) has not given thought to whether the body concerned is a terrorist body specified in the Gazette in circumstances where there is an obvious risk that this is the case; or
- (b) having recognized that there is a risk the body concerned is a terrorist body, still chooses to recruit another person to become a member or become a member of the body.

Clause 6 has originally required in section 10(2) that a person who is a member of a terrorist group specified in the Gazette shall, as soon as possible, take all practicable steps to cease to be such a member. The Bills Committee is concerned whether this requirement is practically feasible.

Have regard to the concern of the Bills Committee, we have re-examined the requirement of paragraph 2(a) of UNSCR 1373 in relation to recruitment of members to terrorist groups. We consider section 10(1) has already met this requirement. As such, we propose to delete the original section 10(2) in the amendment.

In addition, we propose to replace the definition of "body" with a new provision to make it clear that "body" means a body of persons, whether corporate or unincorporated.

Clause 7 — provisions relevant to the implementation of international conventions and the Protocol amended

Sections 11A to 11I made under clause 7 seek to put into effect the United Nations International Convention for the Suppression of Terrorist Bombings (the Bombings Convention), the United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (the Maritime Safety Convention) and the United Nations Protocol for the Suppression of Unlawful

Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (the Protocol).

The proposed amendments to sections 11B, 11E and 11F seek mainly to tighten the new offence provisions to make the language of those provisions follow more closely the drafting of the abovementioned conventions and the Protocol.

The amendment to section 11D seeks to reflect section 2 of the Maritime Safety Convention. It is provided that the Convention shall not apply to warships, ships owned or operated by a state when being used as a naval auxiliary or for customs or police purposes. Despite the fact that the Convention has referred merely to a "state", it is intended to cover other jurisdictions as well. As such, we propose to add section 11D(ba) to include ships owned or operated by the Hong Kong Special Administrative Region for customs or police purposes for the purpose of exemption under section 11D.

In the course of discussing the implementation of the abovementioned conventions and Protocol, the Bills Committee was concerned whether the interpretation of the expression "in connection with the commission or attempted commission of" will be generally applied to other Hong Kong legislation as a model for defining similar provisions. I hope to reiterate that section 11G is enacted in the light of the specific needs of implementing the Maritime Safety Convention and the Protocol. The drafting of sections 11G(a), (b) and (c) will not become a standard for drafting other legislation. Actually, the drafting of each legal provision has to be based on its own objective and actual implementation requirements, rather than following the existing provisions of other legislation.

Clause 8 — disclosure of information on transactions of suspected terrorist property

Clause 8 replaces section 12(6) of the Ordinance with a new provision to authorize law enforcement agencies to disclose information on transactions of suspected terrorist property which has been obtained pursuant to section 12 to their local and overseas counterparts for the purpose of preventing and suppressing terrorist co-operation. The Bills Committee suggested that the objective of the abovementioned disclosure be made clear in the provision.

On the recommendation of the Bills Committee, we propose to replace section 12(6)(a) with a new provision to specify that the objective of the disclosure of information is to prevent and suppress the financing of terrorist acts. The drafting of section 12(6)(b) is also amended.

Clause 9 — provisions concerning law enforcement powers amended

Sections 12A to 12K made under clause 9 seek mainly to provide for the necessary law enforcement powers to deal with the offences under the Ordinance. The provisions empower law enforcement agencies to require relevant persons to furnish information or produce materials, to search premises for relevant materials, and to seize and retain such materials. These powers are modelled on similar well-proven powers provided under the Drug Trafficking (Recovery of Proceeds) Ordinance (DTRPO) and the OSCO. Law enforcement agencies have to meet all stringent statutory requirements before exercising these powers, and all such powers can be exercised only after the Court has given authorization to do so. The legal threshold and judicial procedure stipulated in the provisions provide the relevant persons with effective protection and serve to prevent abuse or misuse of powers.

In the course of scrutiny, the Bills Committee considered that the coverage of individual law enforcement provisions might not be clear enough. Having regard to the concern of the Bills Committee, we propose to improve the drafting of sections 12A(3)(c)(ii) and 12A(6) to provide that applications to the Court for the furnishing of information or production of materials can be made only under circumstances "relevant to the investigation" rather than "relate to any matter relevant to the investigation" which is considered to be too broad under the existing provision.

The OSCO mechanism adopted

The Bills Committee also recommended that the mechanism established under the OSCO be adopted for the purpose of exercising law enforcement powers. Readily accepting good advice, we agree with the proposal of the Bills Committee. As a result, necessary amendments will be made to sections 12A, 12B and 12D by providing that only the Secretary for Justice may apply to the Court for the furnishing of information or production of materials pursuant to section 12A, whereas the Secretary for Justice or an authorized officer may apply to the Court for the production of materials, and so on, pursuant to section 12B.

Legal privilege and the privilege against self-incrimination protected

The existing section 2(5) has also put it beyond doubt that nothing in the Ordinance shall require the disclosure of or authorize the search or seizure of any items subject to legal privilege, or restrict the privilege against self-incrimination. The Bills Committee is concerned that individual provisions on law enforcement powers might override the protection provided under section 2(5). To remove such worries, we propose to delete sections 12A(9) and 12A(12)(b) and put it beyond doubt that sections 12A(11) and 12B(13) shall be subject to section 2(5).

Sections 12A(10), 12B(7) and 12B(12) will be deleted as consequential amendments subsequent to the deletion of the definition of "public body" under clause 2.

Existing provisions improved

Section 12G originally empowers a Magistrate to authorize law enforcement officers to enter premises and to seize and detain any terrorist property. The Bills Committee holds the view that, having regard to the severity of the offences specified in the Ordinance and given the fact that sections 12A to 12C empower the Court of First Instance to issue the relevant order, section 12G should similarly empower the Court of First Instance to issue the order to make the judicial mechanisms giving the authority consistent.

On the advice of the Bills Committee, we have improved the drafting of the provision. The amended section 12G provides that, where it appears to the Court of First Instance upon the oath of law enforcement agencies that there is reasonable cause to suspect that on any premises there is terrorist property or there is evidence of an offence specified in the Ordinance, the Court may issue a warrant authorizing law enforcement officers to enter the relevant premises to search for and seize, remove and detain any terrorist property.

In addition, section 12G originally provides that the Court may empower law enforcement officers to use such assistance or power as is necessary and reasonable to enter the relevant premises. In this regard, the Bills Committee considered it necessary to specify direct in the legislation that law enforcement officers may use assistance or power. On the recommendation of the Bills

Committee, we have added section 12G(1A) to provide that law enforcement officers responsible for enforcing the warrant may, according to circumstances, use such assistance or power as is necessary and reasonable. The drafting of section 12G(2) has also been improved to make it clear that only law enforcement officers entering the relevant premises by virtue of a warrant issued under section 12G(1) may seize, remove and detain suspected terrorist property.

Section 12D provides that law enforcement agencies may disclose information acquired under sections 12A to 12C to local counterparts or overseas authorities. This section seeks to strengthen local and international co-operation in combating terrorist activities and the financing of terrorist acts. Similar to the amendment to section 12(6) earlier, the Bills Committee proposed to put it beyond doubt in section 12D the objective of disclosure. We agree to this proposal. As such, we will in sections 12D(2)(a) and (b) provide that the disclosure of information is to prevent and suppress offences specified in the Ordinance or offences the nature of which is similar to those specified in the Ordinance.

Section 12H provides that any property seized under section 12G may be detained. Given that section 12G has already provided for the seizure and detention of the property, section 12H has actually become redundant. We therefore propose to delete the section.

The amendment to section 12B(3)(a) is an improvement to the Chinese wordings.

Clause 11 — the penalty provisions amended

Clause 11 is amended mainly to improve the penalty provisions, including:

- (a) to make it clear in the existing section 14(2) of the Ordinance that only a person who "knowingly" contravenes a notice on the freezing of terrorist property commits an offence; and
- (b) to make it clear in the new sections 14(7H) and 14(7J) that only a person who "intentionally and without reasonable excuse" obstructs any law enforcement officer in the enforcement of a search warrant commits an offence.

In addition, in the light of the deletion of the provision on the termination of the membership of terrorist groups under section 10(2), a consequential amendment shall be made to the existing section 14(4) of the Ordinance to delete the reference to section 10(2).

Clause 14 — the compensation provisions amended

The existing section 18 of the Ordinance provides that, had the Government wrongfully specified a certain person to be a terrorist or terrorist associate, or wrongfully specified certain property to be terrorist property, the affected person might apply to the Court of First Instance for compensation to be paid by the Government. The Court shall not order compensation to be paid by the Government unless it is satisfied that there has been some "serious default" on the part of the Government and after the Court has considered it fit to do so upon taking account of the whole situation.

In enacting stage-one anti-terrorism legislation in 2002, the Government understood it very well that some Members were dissatisfied with the compensation threshold laid down in the provision, for it was very difficult as well as unreasonable for the claimants to prove that there had been "serious default" on the part of the Government. However, as alteration to the compensation arrangement provided for in the provision will significantly affect the Government's compensation policy, the Government undertook at the time that the provision would be reviewed and the Legislative Council would be briefed in due course.

In the course of the review, we carefully examined the compensation threshold adopted by in common law and made reference to relevant legislation in other common law countries. Under common law, the prerequisite for compensation is that something more than negligence has to be established on the part of the Government. As for the anti-terrorist legislation in place in major common law countries, such as Britain, the United States, Australia, Canada, New Zealand, Singapore and India, no provision has been made to the effect that compensation is required on the part of the Government even if the Government has "wrongfully" specified a person to be a terrorist, or "wrongfully" specified a property to be terrorist property. At the same time, we have reviewed the existing compensation arrangements specified under other criminal legislation in Hong Kong. Insofar as Ordinances of similar nature are concerned, such as the DTRPO and OSCO, the compensation provisions therein have made it clear that

a claimant is required to prove that there has been "serious default" on the part of the Government.

Owing to the abovementioned findings, and subsequent to careful consideration of the suggestions and concern of Members, we propose to amend the compensation threshold in the existing section 18(2)(c) of the Ordinance and new section 18(2B)(a) in the Bill by lowering the requirement of proving that there has been "serious default" on the part of the Government to proving that there has been "default" on the part of the Government. We are of the view that this amendment has taken account of the compensation arrangement under the existing law, the need to compensate the aggrieved and the responsibility of combating terrorist financing, and the need to strike a reasonable and appropriate balance. I implore Members to, in appreciation of the existing compensation mechanism provided by law and the relevant practices of other countries, support our amendments.

Clause 19 — the notice requiring the relevant persons to answer questions or furnish information amended

Clause 19 specifies the notice form requiring the relevant persons to furnish information pursuant to a court order issued under section 12A. Consequential amendment to the notice form is required in the light of the amendment to law enforcement powers under section 12A earlier.

Madam Chairman, the abovementioned amendments have been discussed by the Bills Committee. I implore Members to support and endorse them. Thank you, Madam Chairman.

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