

Bills Committee on United Nations (Anti-Terrorism Measures) Bill

Meeting on 3 June 2002

I. Issues raised by the Law Society in its note dated 30.4.2002

“Terrorist act”. Concern was expressed over the wide scope of the activities listed in the interpretation clause. The drafting should reflect the principle of minimum interference of existing rights. The clause, as drafted, is too broad as “normal political activism” can be easily targeted, e.g. the activities described in (A) and (B) could target the Falun Gong; whilst those in (F) could have a “chilling” effect on the existing rights of such activities as Greenpeace and animal rights activists.

Reply

The definition of “terrorist act” in the Bill is modelled on the definition of “terrorism” under the United Kingdom Terrorism (United Nations Measures) Order 2001, which in turn is modelled on the UK Terrorist Act 2000. The definition in the Bill is in line with the definition in anti-terrorist laws of almost all common law jurisdictions. The definition follows the international trend by requiring that a ‘terrorist act’ must involve the use or threat of action to influence a government or intimidate the public, and that the use or threat of action is for the purpose of advancing a political, religious or ideological cause.

In addition to these two criteria, it is important to note that the action must also satisfy a third criterion, that it involves serious violence, serious damage to property or serious risk to public health or safety.

Behind this internationally accepted definition is the consensus that there is a qualitative difference between terrorist acts capable of inflicting massive and indiscriminate injury and damage, and those public and ordinary criminal activities, such as criminal damage, assault or even murder. In accordance with the definition, unlawful acts will not be caught by the Bill unless all three criteria are met.

Paragraph (b) of the definition of “terrorist act” provides an exclusion for the action referred to in paragraph (a)(i)(F) of the definition where that action is taken in the course of “industrial” or “political” action. It is not considered that the exclusion should extend to the action referred to in paragraph (a)(i)(A) or (B) of the definition on the basis that action involving serious violence against a person, or serious damage to property, should not be legitimate because it is taken in the course of “industrial” or “political” action.

Clause 10. Prohibition against false threat of terrorist act. This equates to “false news” which was rejected when attempts were made to introduce similar provisions a decade ago.

Reply

Clause 10 is proposed to deal with deliberate and wilful acts to disseminate false information which are calculated to cause confusion. In order to substantiate an offence under Clause 10(1), the prosecution will have to prove to the court that -

- (i) the person who communicated or made available the false information actually knew or believed that the information was indeed false; and
- (ii) this person had the intention of inducing in another person a false belief that a terrorist act has been, is being or will be carried out.

Both elements have to be proved beyond reasonable doubt by the prosecution. This provision is not directed against inaccurate reporting by journalists. It is directed against malicious “hoax” actions. We believe that press freedom will not be infringed.

Many common law jurisdictions also have similar laws to prohibit false threats of terrorist acts.

Section 16. Applications to Court of First Instance (“CFI”). Section 16(3)(b)(i) of the Bill places the onus on the person seeking leave “to prove his innocence”. This is unacceptable. The onus should be on the Government to prove at the CFI that the person whose name is placed on the list “is a terrorist”. Placing a person’s name on the List of Terrorists can be regarded as an administrative punishment and a stigma until proven.

Reply

Section 16(3)(b)(i) does not place the onus on the person seeking leave “to prove innocent. In order to provide effective protection for the rights of those involved, Clause 16(3)(b) of the Bill requires that an application to the court to revoke a specification by the Chief Executive under Clause 4 or a notice by the Secretary for Security under Clause 5 shall be granted, unless the court is satisfied that there were, and continue to be, reasonable grounds to believe that the person was a terrorist or terrorist associate, or that the property or funds were terrorist property, as the case may be.

The government is required, in all of these applications, to bear the burden of proof that its decision made under Clause 4 or 5 was, and continue to be, a correct one.

II. Issues raised at the meeting of the Bills Committee on 17.5.2002

To specify in the Bill that a person would have the right to claim damages from the Government in the event that his application to apply to the court under clause 16 of the Bill to revoke the notice by the Chief Executive under Clause 4 or the notice made by the Secretary for Security under Clause 5 of the Bill had been successful.

Reply

The Bill does not affect a person's statutory rights to claim damages from the Government in the event that he feel that he has been aggrieved by a specification by the Chief Executive under Clause 4 or a notice made by the Secretary for Security under Clause 5. The right to claim damages from the Government is available under common law.

A person who has suffered loss as a result of a "wrong" specification in a notice under Clause 4 or 5 may have an action in common law for damages if, for example, the specification was not done in good faith or was done negligently. An example of a specification done negligently would be where the grounds for the notice clearly do not amount to reasonable grounds as mentioned in Clause 4 or 5.

As regards statutory compensation, Members may note that Section 29 of the Serious and Organised Crimes Ordinance (Cap. 455) provides for the payment of compensation to the holder of property which has been effectively "frozen" in the case where there has been a serious default on the part of the authorities in relation to the criminal proceedings which could have led to the making of a confiscation order in respect of that property. A similar provision on compensation is in Section 27 of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405).

Consideration could be given to incorporating a similar provision into the Bill to provide for compensation to a person who successfully applies to the Court of First Instance to revoke a specification by the CE under Clause 4 or a notice made by the Secretary for Security under Clause 5.

To consider that the CE should, before publishing by notice in the Gazette to specify a person or property was a terrorist, terrorist associate or terrorist property, first apply to the court for an injunction against a person or property whom/which CE had reasonable grounds to believe was a terrorist, terrorist associate or terrorist property and allow the person to apply to the court to set aside the injunction within a specified time. If the person concerned failed to apply to the court to set aside the injunction against him within the specified time, CE could then proceed to publish by notice in the Gazette that the person or property was a terrorist, terrorist associate or terrorist property. In the meantime, S for S could issue notice to freeze the funds and property of the person concerned.

Reply

Under Clauses 4 and 5 of the Bill, the Executive branch of the government is empowered to determine and make, respectively -

- (i) a specification of a person as a terrorist or terrorist associate, or a specification of property as terrorist property, when the Chief Executive has reasonable grounds to believe so; and
- (ii) a notice that funds are not to be made available to any person, when the Secretary for Security has reasonable grounds to suspect so.

The reasons why the Bill gives the Executive the initial power to determine the issues as set out above is that -

- (a) consistent with the designations made to date by the UN 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.
- (b) even where 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;

We are however aware that it is essential to ensure adequate and effective checks and balances over executive action that will entail grave consequences for the individuals or entities concerned. Indeed these consequences are such that recourse to an independent and impartial tribunal are likely to be required by Article 10 of the Hong Kong Bill of Rights Ordinance. We are satisfied that the right to apply to the Court of First Instance, in case of a person or entity aggrieved by a notice specifying terrorists, terrorist associates or terrorist property, or a direction to freeze terrorist funds, is in full compliance with the relevant provisions of the Hong Kong Bill of Rights Ordinance and the International Covenant on Civil and Political Rights.

To ascertain whether the definition of “terrorist act” referred to in Clause 2(1) of the Bill would undermine an individual’s civil and political rights.

Reply

The definition of “terrorist act” in the Bill follows the international consensus that a ‘terrorist act’ must satisfy three criteria -

- (i) it involves the use of action or threat of action to influence a government or intimidate the public;
- (ii) the use or threat of action is for the purpose of advancing a political, religious or ideological cause; and
- (iii) the action or threat involves serious violence, serious damage to property or serious risk to public health or safety.

In addition, the definition also provides for certain exceptions in respect of advocacy, protest, dissent or stoppage of work to avoid the inadvertent inclusion of normal activities. We are satisfied that the definition is consistent with the human rights provisions in the Basic Law and the Hong Kong Bill of Rights Ordinance.