

《2003年聯合國(反恐怖主義措施)(修訂)條例草案》委員會

目的

本文件旨在回應“罔顧”的舉證準則是否適用於新訂第10(2)條下的罪行，以及在二零零四年五月六日的委員會會議上提出的事項。

新訂第10(2)條 有關未有使自己不再是被刊憲指明的恐怖分子集團成員的罪行

2. 我們較早前已確定接受以“罔顧”取代第8、9和新訂第10(1)條中“有合理理由相信”的思想元素。我們現已進一步研究“罔顧”是否適用於新訂第10(2)條下的罪行。

3. 修訂原來第10(2)條的原因，是規定任何人須在明知或有合理理由相信其所屬集團已按照第4或5條被刊憲指明後，採取步驟使自己不再是該被刊憲指明的恐怖分子集團的成員。因此，該罪行是在任何人明知或有合理理由相信有關集團已按照第4或5條被刊憲指明後，未能盡快採取步驟終止會籍。就“罔顧”而言，對等的罪行則是在該人不再罔顧有關集團是否已按照第4或5條被刊憲指明後，未能盡快採取步驟終止會籍。這種罪行並不合理。因此我們不建議將“罔顧”應用於新訂第10(2)條下的罪行。

新訂第11D條 第3B部不適用於某些船舶

4. 委員會要求我們提供進一步資料，闡釋新訂第11D(c)條中“已退出航海或已閒置的船舶”的涵義。一艘船舶如被永久繫泊而無船隊成員；或正在船塢或船廠進行全面的檢查維修或大規模的修補，而期間不能航行，一般來說即屬已退出航海。已閒置的船舶則指因沒有被使用或因等候任何法庭席前進行的法律程序結果，而停留於或將停留於某司法管轄區的水域的船舶。

新訂第 11E 條 關乎船舶的禁制

5. 有議員要求我們提供進一步有關闡釋新訂第 11E(1)(a)條中“威嚇”一語的資料。在香港本地法律中，有關的條文為《刑事罪行條例》(第 200 章)第 24 條，該條訂明

“任何人威脅其他人

- (a) 會使該其他人的人身、名譽或財產遭受損害；或
- (b) 會使第三者的人身、名譽或財產遭受損害，或使任何死者的名譽或遺產遭受損害；或
- (c) 會作出任何違法作為，

而在任何上述情況下意圖

- (i) 使受威脅者或其他人受驚；或
- (ii) 導致受威脅者或其他人作出在法律上並非必須作出的行為；或
- (iii) 導致受威脅者或其他人不作出他在法律上有權作出的作為，即屬犯罪。

6. 在 R v Lo Tong-kai [1997] HKLR 193 一案，法官 McMullin 在判詞第 196 段提到

“控方在提起《刑事罪行條例》第 24 條下的控罪時，必須證明作出威脅的人或該種威脅本身，會影響擁有一般堅定程度的人。在判決這些事宜時，我似乎覺得，該威脅出現的環境情況，是需予考慮的極為重要的因素。”

我們認為香港的法庭在處理新訂第 11E 條時，會考慮類似的方式。

新訂第 12A 和 12B 條 提供資料或提交材料的要求，以及提交材料的命令

7. 立法會的助理法律顧問向委員會提到，《釋義及通則條例》(第 1 章)第 XII 部關乎“新聞材料”的搜查和檢取，並不適用於新訂第 12A 和 12B 條。

8. 記者或會按照新訂第 12A 和 12B 條下的法庭命令，被要求提供資料或提交材料。就此而言，新訂第 12A 和 12B 條訂明，原訟法庭須信納新訂第 12A(4)和 12B(5)條所訂的客觀準則已予符合，才會作出有關命令

- (a) 有合理理由懷疑有人已犯正在調查中的有關罪行；
- (b) 有合理理由懷疑某特定的人/屬特定種類的人，有或管有相當可能對調查是相干的資料；
- (c) 有合理理由相信有關材料相當可能對調查是相干的；
- (d) 經考慮正在調查中的有關罪行的嚴重性；如不作出命令，能否有效地調查有關罪行；披露有關資料或取得有關材料相當可能會對調查帶來的利益；及該名/該等人士在何種情況下可能已獲取或持有有關資料或材料，有合理理由相信作出命令是符合公眾利益的。

9. 新訂第 12A(15)和 12B(9)條訂明，根據有關命令被施加要求的人，可申請撤銷或更改命令。

10. 根據第 1 章第 XII 部，作出要求提交“新聞材料”的法院命令須符合的條件，與上述的準則實質上相同，即

- (a) 有合理理由相信有人已犯可逮捕的罪行；

- (b) 有關材料相當可能對調查該可逮捕的罪行有重大價值，或就該可逮捕的罪行進行的法律程序為有關證據；
- (c) 已嘗試用其他方法獲取有關材料，但已失敗；或因相當可能會不成功或相當可能會嚴重損害調查而未嘗試用其他方法獲取該材料；以及
- (d) 在顧及有關命令相當可能會為調查帶來的利益，及管有有關材料的人是在何種情況下持有材料，有合理理由相信作出命令是符合公眾利益的。

11. 基於上述情況，我們認為新訂第 12A 和 12B 條已受到足夠的司法程序上的監察。

新訂第 12H 條 被檢取的涉嫌恐怖分子財產可予扣留

12. 新訂第 11H 條訂明獲授權人員可扣留被檢取的涉嫌恐怖分子財產。由於新訂第 12G 條已訂明可檢取和扣留該等財產，因此我們認為可刪除新訂第 12H 條，並已擬備所需的委員會審議階段修正案(修正案)。

新訂第 12I 條 被檢取的涉嫌恐怖分子財產可予扣留的限期

13. 委員會要求我們提供進一步資料，說明在新訂第 12(I)(1)條訂定被檢取的涉嫌恐怖分子財產可予扣留不超過 30 日的原因。我們曾解釋，訂明不超過 30 日的限期是基於運作上的考慮，顧及證實被檢取財產的來源或如何得來、或就被檢取的財產在香港或其他地方對任何人採取法律程序、或根據第 6 條採取步驟以凍結被檢取財產所需的時間。

14. 按照新訂第 12G 和 12I 條檢取和扣留涉嫌的恐怖分子財產，很大可能是基於海外提供的情報。要進一步證實被檢取財產的來源或如何得來，執法機關需要透過例如刑事事宜相互法律協助的程序，向有關海外司法管轄區尋求更多的資料或證據，藉以在香港或其他地方進行法律程序，或根據第 6 條凍結該等財產。新訂第 12I(1)條訂明不超過 30 日的限

期，是合理的安排，以顧及進行上述有關程序所需的時間。

新訂第 14(7H)和 14(7J)條 罰則

15. 委員會建議修改新訂第 14(7H)和 14(7J)條，訂明任何人“故意”而“無合理辯解”妨礙獲授權人員執行根據新訂第 12C 或 12G 條發出的手令，即屬犯罪。我們同意此建議，並已擬備所需的修正案。

保安局

二零零四月五月

Draft

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

COMMITTEE STAGEAmendments to be moved by the Secretary for SecurityClauseAmendment Proposed

- 2(a) (a) By adding –
- “(ia) in the definition of “terrorist act” in paragraph (a)(i) –
 - (A) by repealing “(including, in the case of a threat, the action if carried out)” and substituting “is carried out with the intention of, or the threat is made with the intention of using action that would have the effect of”;
 - (B) in sub-subparagraphs (A) and (B), by repealing “causes” and substituting “causing”;
 - (C) in sub-subparagraph (C), by repealing “endangers” and substituting “endangering”;
 - (D) in sub-subparagraph (D), by repealing “creates” and substituting “creating”;
 - (E) in sub-subparagraphs (E) and (F), by repealing “is intended seriously to interfere with or seriously to disrupt” and

substituting “seriously interfering with or seriously disrupting”;

(b) In subparagraph (iii) –

(i) by deleting the proposed definition of “authorized officer” and substituting –

““authorized officer” () means –

- (a) any police officer;
- (b) any member of the Customs and Excise Service established by section 3 of the Customs and Excise Service Ordinance (Cap. 342); or
- (c) any other person authorized in writing by the Secretary for Justice for the purposes of this Ordinance;”;

(ii) in the proposed definition of “premises” in paragraph (b) by deleting “removable” and substituting “movable”;

(iii) by deleting the proposed definition of “public body”.

2 By deleting paragraph (b) and substituting –

“(b) in subsection (5), by repealing “Nothing in” and substituting “Nothing in Part 4A, 4B or any other provision of”.”.

4 By deleting the clause.

5 In paragraph (g) by adding –

“(11) The Secretary may exercise the powers under subsection (10) only if he has reasonable cause to suspect that the relevant property will be removed from the HKSAR.”.

New By adding –

“5A. Prohibition on provision or collection of funds to commit terrorist acts

Section 7 is amended –

- (a) in paragraph (a), by repealing “directly or indirectly supplied to or otherwise used by” and substituting “used”;
- (b) in paragraph (b) –
 - (i) by repealing “or having reasonable grounds to believe”;
 - (ii) by repealing “directly or indirectly supplied to or otherwise used by” and substituting “used”;
- (c) by repealing “a person who the first-mentioned person knows or has reasonable grounds to believe is a terrorist or terrorist associate” and substituting “to commit a terrorist act (whether or not the funds are actually so used)”.

5B. Prohibition on making funds, etc. available to terrorists and terrorist associates

Section 8 is amended by repealing everything after “person” where it secondly appears and substituting “knowing that, or being reckless as to whether, such person is a terrorist or terrorist associate.”.

5C. Section substituted

Section 9 is repealed and the following substituted –

“9. Prohibition on supply of weapons to terrorists and terrorist associates

A person shall not provide or collect, by any means, directly or indirectly, weapons –

- (a) with the intention that the weapons be directly or indirectly supplied to or otherwise used;
- (b) knowing that the weapons will be directly or indirectly supplied to or otherwise used; or
- (c) being reckless as to whether the weapons would be directly or indirectly supplied to or otherwise used,

by a person, and knowing that, or being reckless as to whether, such person is a terrorist or terrorist associate.”.”.

“10. Prohibition on recruitment, etc. to a body specified in a section 4(1) or (2) notice or a section 5(2) order

(1) A person shall not –

- (a) recruit another person to become a member; or
- (b) become a member,

of a body specified in a notice published in the Gazette under section 4(1) or (2) or an order published in the Gazette under section 5(3), knowing that, or being reckless as to whether, it is a body specified in such a notice or order (as the case may be).

(2) Where a person is a member of a body specified in a notice published in the Gazette under section 4(1) or (2) or an order published in the Gazette under section 5(3), the person shall, as soon as practicable after it comes to his knowledge or he has reasonable grounds to believe that the body is specified in such a notice or order (as the case may be), take all practicable steps to cease to be such a member.

(3) In this section, “body” () means a body of persons, whether corporate or unincorporate.”.

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(a) In the proposed section 11B –

- (i) in subsection (1) by adding “unlawfully and intentionally” after “not”;
- (ii) in subsection (2) by adding “unlawfully and intentionally” after “not”;
- (iii) in subsection (2)(a) by deleting “the destruction of all or part” and substituting “extensive destruction”;

- (iv) by deleting subsection (2)(b) and substituting –
 - “(b) where such destruction results in or is likely to result in major economic loss.”.
- (b) In the proposed section 11E(1) by deleting “without lawful excuse,” and substituting “unlawfully and”.
- (c) In the proposed section 11F(1) by deleting “without lawful excuse,” and substituting “unlawfully and”.

8 In the proposed section 12(6) –

- (a) in paragraph (a) by adding “, for the purpose of preventing and suppressing the financing of terrorist acts” after “Corruption”;
- (b) by deleting paragraph (b) and substituting –
 - “(b) by any authorized officer to the authorities or persons responsible for investigating or preventing terrorist acts, or handling the disclosure of knowledge or suspicion that any property is terrorist property, of any place outside the HKSAR which the authorized officer thinks fit, for the purpose of preventing and suppressing the financing of terrorist acts.”.

9 (a) In the proposed section 12A –

- (i) in subsection (1) by deleting “An authorized officer” and substituting “The Secretary for Justice”;
- (ii) in subsection (3)(c) –

- (A) by deleting “authorized officer” where it first appears and substituting “Secretary for Justice”;
- (B) in subparagraph (i) by deleting “the authorized officer” and substituting “an authorized officer”;
- (C) by deleting subparagraph (ii) and substituting –
 - “(ii) to produce any material, or any material of a class, that reasonably appears to the Secretary for Justice to be relevant to the investigation.”;
- (iii) in subsection (5) –
 - (A) by deleting “an authorized officer” where it first appears and substituting “the Secretary for Justice”;
 - (B) by deleting “the authorized officer” where it first appears and substituting “an authorized officer”;
 - (C) by deleting “the authorized officer” where it secondly appears and substituting “the Secretary for Justice”;
- (iv) by deleting subsection (6) and substituting –
 - “(6) Where an order under subsection (2) authorizes the Secretary for Justice to require a person to produce any material that reasonably appears to the

Secretary for Justice to be relevant to the investigation or be of a class that is so relevant, the Secretary for Justice may by one, or more than one, notice in writing served on that person require him to produce at a specified time and place, or at specified times and places, any specified material that reasonably appears to him to be so relevant or any material of a specified class that reasonably appears to him to be so relevant.”:

- (v) in subsection (7)(a)(v) be deleting “an authorized officer” and substituting “the Secretary for Justice”;
 - (vi) in subsection (7)(c) by deleting “subsections (8), (9) and (10)” and substituting “subsection (8)”;
 - (vii) by deleting subsections (9) and (10);
 - (viii) in subsection (11) by deleting “A person” and substituting “Subject to section 2(5)(a), (b) and (c), a person”;
 - (ix) in subsection (12) by deleting everything after “except” and substituting “in evidence in proceedings under section 14(7F) or under section 36 of the Crimes Ordinance (Cap. 200).”.
- (b) In the proposed section 12B –
- (i) in subsection (1) –

- (A) by deleting “An authorized officer” and substituting “The Secretary for Justice or an authorized officer”;
 - (B) by deleting “elsewhere” and substituting “, in the case of an application by the Secretary for Justice, elsewhere”;
 - (ii) in subsection (2) by deleting “subsections (6) and (7)” and substituting “subsection (6)”;
 - (iii) in subsection (6) by adding “reasonably” before “practicable”;
 - (iv) by deleting subsections (7) and (12);
 - (v) in subsection (13) by deleting “A person” and substituting “Subject to section 2(5)(a), (b) and (c), a person”.
- (c) In the proposed section 12D –
- (i) in subsection (1) by adding “to the Secretary for Justice” after “authorized officer”;
 - (ii) in subsection (2) –
 - (A) in paragraph (a) by adding “, for the purpose of preventing and suppressing a relevant offence” after “Corruption”;
 - (B) by deleting paragraph (b) and substituting –
 - “(b) to any corresponding person or body, where the information appears to the Secretary for Justice to be likely to assist that person or body to discharge its

functions relating to preventing and suppressing offences of a similar nature to relevant offences; and”.

(d) In the proposed section 12G –

(i) by deleting subsection (1) and substituting –

“(1) Where it appears to the Court upon the oath of any person that there is reasonable cause to suspect that –

(a) in any premises there is terrorist property; or

(b) there is in any premises any thing that is, or contains, evidence of a relevant offence,

the Court may issue a warrant authorizing an authorized officer to enter the premises named in the warrant and there to search for and seize, remove and detain any terrorist property.

(1A) An authorized officer executing a warrant issued under subsection (1) may use such assistance and force as is reasonable and necessary for the purposes for which the warrant is issued.”;

(ii) in subsection (2) by deleting “Any authorized officer” and substituting “An authorized officer

who has entered any premises by virtue of a warrant issued under subsection (1)".

(e) By deleting the proposed section 12H.

11 (a) In the proposed section 14(7H) by adding "intentionally and without reasonable excuse" after "who".

(b) In the proposed section 14(7J) by adding "and without reasonable excuse" after "intentionally".

14 (a) By renumbering the clause as clause 14(2).

(b) By adding –

“(1) Section 18(2)(c) is amended by repealing “serious”.”.

(c) In subclause (2) in the proposed section 18(2B)(a) by deleting “serious”.

New By adding –

“14A. Section added

The following is added –

“18A. Saving of common law remedies

(1) Subject to subsection (2), nothing in section 18 affects any remedy available to a person at common law.

(2) Where a court orders any compensation under section 18 or damages at common law in respect of any such default, the court shall take into account, in reduction of the amount of compensation or damages, any amount awarded as

damages or ordered as compensation (as the case may be) in respect of that default.”.”.

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In the Form in the proposed Schedule 2 –

(a) in paragraph 4 –

(i) by deleting “an authorized officer” where it first appears and substituting “the Secretary for Justice”;

(ii) in subparagraph (b) by deleting everything after “appears to” and substituting “the Secretary for Justice to be relevant to the investigation or be of a class that is so relevant.”;

(b) by deleting “Authorized officer” and substituting “for and on behalf of the Secretary for Justice”.

Schedule,
section 1

In the proposed section 25A(9) –

(a) in paragraph (a) by adding “, for the purpose of combating drug trafficking” after “Corruption”;

(b) by deleting paragraph (b) and substituting –

“(b) by any authorized officer to the authorities or persons responsible for investigating or preventing drug trafficking, or handling the disclosure of knowledge or suspicion on property relating to drug trafficking, of any place outside Hong Kong which the authorized officer thinks fit, for the purpose of combating drug trafficking.”.

Schedule,
section 2

In the proposed section 25A(9) –

- (a) in paragraph (a) by adding “, for the purpose of combating crime” after “Corruption”;
- (b) by deleting paragraph (b) and substituting –
 - “(b) by any authorized officer to the authorities or persons responsible for investigating or preventing crime, or handling the disclosure of knowledge or suspicion on property relating to crime, of any place outside Hong Kong which the authorized officer thinks fit, for the purpose of combating crime.”.