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Mrs Sharon Tong
Clerk to Bills Committee on
National Security (Legislative
Provisions) Bill
Legislative Council
Hong Kong

Dear Mrs Tong,

**National Security (Legislative Provisions) Bill: proscribed organisations**

I refer to Paper No. 103 of June 2003 from the Department of Justice purporting to be "a response to points" raised by me in a Note accompanying my letter to the Secretary for Security dated 12 June 2003, which I understand you have circulated to all the members of the Bills Committee.

Let me say at the outset that the Paper from the Department, with the exception of the query in the last paragraph of my letter to the Secretary, has not dealt with *any* of the defects which I identified in my Note.

I shall comment on the “response” below by reference to the heading of its various sections.

Registered companies

My point about the exclusion of the application of section 290 of the Companies Ordinance resulting in “cold comfort to those creditors who have not yet taken or able to take action against the company or towards whom liabilities incurred by the company have not yet accrued or crystallised” as appearing in the first paragraph on page 3 of my Note (and as further explained in the two subsequent paragraphs on the same page) has not been addressed at all.

First, the fact that “there are no reform proposals in respect of [Part XIIIA of the Companies Ordinance]” as asserted in paragraph 5 of the Paper is neither a proper remedy for the defect mentioned above nor evidence that that part of the Ordinance is perfect and calls for no amendments. Otherwise, there is no purpose to be served by setting up the Law Reform Commission or any of its Sub-Committees.

Secondly, as acknowledged by the Registrar of Companies in paragraph 7 of the Paper, the fact remains that only “the property and rights of the company shall, upon the striking off, vest in the Official Receiver…” It is, therefore, an implied admission that there is no

provision in Part XIIIA of the Companies Ordinance for the vesting of the liabilities of a struck off company (which does not exist at law) so as to enable creditors or members to commence proceedings to redress their grievances. Under Part V of the Ordinance for the compulsory winding-up of companies by the Court or voluntary winding up, which does not apply to proscribed registered companies, a company so wound up remains in existence at law and pending proceedings against it may continue with the leave of the Court or is liable to be sued (cf. sections 186 and 199(1)(a)). It is only upon the conclusion of the winding up of the company, but not before then, that dissolution is permitted to take place.

Thirdly, although unliquidated claims are provable in a winding up as adumbrated by the Registrar in the Paper, it is not a panacea either since the Registrar admits that unliquidated claims are only provable "when converted in a quantified claims by becoming liquidated by *judgment*…" (my emphasis). Thus, if neither the dissolved company nor the Official Receiver can be sued, there is no way to quantify the claim.

Unregistered companies

The fact that the Companies Ordinance accords different treatments to different types of companies does not mean that the unfairness should be perpetuated by the

Bill. It is claimed in paragraph 8 of Paper No. 73 that section 360D to 360M "provide a much more elaborate, and a fairer, system" for dealing with a proscribed company registered under the Companies Ordinance when compared to those provisions relating to dissolution of defunct companies. This is not the case when contrasted with proscribed unregistered companies.

It is true that exclusion of section 290 was the only example employed in my Note for the purpose of demonstrating the unfairness in the different treatments of registered and unregistered companies. However, I qualified at the end of this part of my Note at the foot of page 6 that the determination of the Administration to rush through the Bill regardless of the views of the general public had prevented me from giving further consideration to the other aspects of the highly unsatisfactory or unworkable regime contemplated in paragraphs 1 and 2 of Schedule 2 to the Bill. After all, it is the duty of both the Administration and the Department of Justice to ensure that the provisions in the Bill are not defective rather than relying on any member of the public to do the job for them.

Dissolution before winding up

The Registrar acknowledged in paragraph 11 of the Paper that "Dissolution of a company *usually* comes after

completion of a liquidation procedure" (my emphasis). That is misleading as my criticism was directed to the adoption of Part V of the Ordinance for the winding up of unregistered companies in Part X. Under Part V of the Ordinance, dissolution must (and not just "usually") come after *completion* of the liquidation and there is no room for doubt if Part V is to be adopted. Nowhere in the Paper did the Registrar dispute my statement in the last paragraph at the bottom of page 5 to the top of page 6 of my Note to this effect. If the proposed amendments have the effect of turning that part of the Companies Ordinance on its head, I do not know how the Registrar can persist in disagreeing with me that the whole scheme is unworkable. The vast majority of the provision in Part V will be inapplicable.

Lastly, the comparison of proscribed companies to defunct companies in paragraph 11 of the Paper is wholly inapt as paragraphs 1 and 2 of Schedule 2 to the Bill, supported by paragraphs 2 and 3 of Paper No. 73, clearly contemplate that proscribed companies may well be trading companies or companies which are going concerns and their creditors and members are entitled to share in their assets after dissolution.

Before concluding this letter, I ought to point out that as yet, the Registrar of Companies has singularly failed to explain to the Bills Committee the manner in which a potential claimant may commence proceedings against a dissolved registered or unregistered company

for the purpose of filing a proof of debt and to identify the relevant provisions in the Companies Ordinance as incorporated in paragraphs 1 and 2 of Schedule 2 to the Bill. This demonstrates the inability of the Administration to address the issue of how innocent third parties are adversely affected by the Bill and its proposed amendments.

Yours sincerely,

Winston Poon, QC

cc. Mrs Regina Ip, Secretary for Security