

United Nations (Anti-Terrorism Measures) Ordinance

Summary of views from deputations/individual

		General views	Administration's responses
1.	Implementation of United Nations Security Council Resolution 1373 and Special Recommendations of Financial Action Task Force on Money Laundering	<p><u>Justice - the Hong Kong Section of the International Commission of Jurists</u></p> <p>(a) The United Nations (Anti-Terrorism Measures) Ordinance (the Ordinance) as it stands goes beyond the requirements of the United Nations Security Council Resolution (UNSCR) 1373 and the Special Recommendations of the Financial Action Task Force on Money Laundering (FATF); and</p> <p>(b) FATF Recommendation III expressly refers to the implementation of measures to freeze funds or other assets of terrorists, those who finance terrorism and terrorist organisations in accordance with the United Nations resolutions relating to the prevention and suppression of the financing of terrorist acts. It is therefore clear that nothing in FATF requires any country or territory to go beyond what is required by UNSCR 1373.</p>	<p>The United Nations (Anti-Terrorism Measures) Ordinance (the Ordinance) (Cap. 575) and the United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003 (the Bill) are intended to implement UNSCR 1373, the Special Recommendations of the FATF, the International Convention for the Suppression of Terrorist Bombings, the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf. A number of connected or incidental matters also have to be dealt with. It should be noted that UNSCR 1373 and the Special Recommendations of the FATF specify obligations in general terms. In other words, a broad framework for domestic</p>

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			<p>legislation is set out, and each individual jurisdiction should provide the detail against the background of its own legal system. This is why there are differences between the implementing legislation of various jurisdictions. The content of the Ordinance and the Bill should be viewed in the light of these considerations. Tables which cross reference provisions in the Ordinance and the Bill to one of the instruments referred to (where relevant) are nevertheless separately prepared for Members' reference.</p> <p>We agree that UNSCR 1373 and the FATF Special Recommendations do not require prohibition of the acts covered by section 11 of the Ordinance. However, we consider enactment of the section necessary to criminalize wilful dissemination of false information on terrorist attacks or placing/despaching dubious articles/substances with the intention of causing alarm to the public. We accepted the Hon Selina CHOW's Committee Stage</p>

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			<p>amendment that expressly provided for the above intention. This is the only instance where the provisions have not directly arisen from the need to implement UNSCR 1373 and the FATF Special Recommendations.</p>
<p>2.</p>	<p>Propriety of the Ordinance</p>	<p><u>Justice - the Hong Kong Section of the International Commission of Jurists</u></p> <p>(a) Where criminalisation is concerned, paragraph 1(b) of UNSCR 1373 only requires States to criminalise the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts; and</p> <p>(b) These important qualifications have however been completely ignored in the implementation of UNSCR 1373 in the Ordinance (as seen in sections 7 and 8) and a much broader formulation has been adopted which does not require knowledge or intent to fund terrorist activity before a person can be found guilty of committing an offence. This is objectionable, as innocent and ignorant conduct may be criminalised.</p>	<p>Sections 7 and 8 of the Ordinance give effect to paragraphs 1(b) <u>and</u> (d) of UNSCR 1373. Paragraph 1(d) requires all States to “prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons”. The purpose is to curb financial support for terrorists and terrorist associates. The proposal that the</p>

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			<p>offender must have the knowledge or intention for the funds to be used for carrying out terrorist acts falls short of the above requirement to criminalize provision of funds to all terrorists and terrorist associates.</p> <p>The Ordinance does not criminalise “innocent and ignorant conduct”. Sections 7, 8 and 9 provide that the offender must “know” or “have reasonable grounds to believe” that the recipient of the funds or weapons concerned is a terrorist or terrorist associate. “Knowledge” is a subjective mental element. “Having reasonable grounds to believe” is an established objective mental element which attracts criminal liability pursuant to existing criminal laws, and requires the prosecution to prove both an objective and a subjective element -</p> <p>(a) objective element – there were grounds that a common sense, right-thinking member of the community would consider as sufficient to lead a person to the belief; and</p>

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			<p>(b) subjective element – those grounds were known to the accused.</p> <p>If the Court accepts that those grounds were unknown to the accused, the accused commits no offence as the prosecution fails to prove <i>mens rea</i> at (b) above.</p> <p>We consider it appropriate for both elements of “knowledge” and “having reasonable grounds to believe” to be applied in the Ordinance. The prosecution bears the burden of proving either element beyond reasonable doubt.</p>
3.	Definitions of “terrorist”, “terrorist act” and “terrorist property”	<p><u>Justice - the Hong Kong Section of the International Commission of Jurists</u></p> <p>The definitions of "terrorist", "terrorist act" and "terrorist property" all require amendments as do many of the existing provisions of the Ordinance. In particular, the definition of "terrorist act" must require the specific intention to cause an outcome listed in section 2(1)(a)(i). At present, only the disruption outcomes under section (a)(i)(E) and (F) are required to be intended.</p>	<p>The definition of “terrorist act” in the Ordinance is based on the definition of “terrorism” in the United Kingdom Terrorism (United Nations Measures) Order 2001 and the definition of “terrorist activity” in the Canadian Anti-Terrorism Act. It is consistent with international trends.</p>

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		<p><u>The Bar Association of Hong Kong</u></p> <p>The definitions of "terrorist", "terrorist act" and "terrorist property" need to be re-visited. Criminalisation of conduct should be confined to the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts. The Ordinance remains objectionable insofar as innocent and ignorant conduct may be criminalised.</p>	<p>Please refer to our response to item 2.</p>
<p>4.</p>	<p>Freezing of property</p>	<p><u>Justice - the Hong Kong Section of the International Commission of Jurists</u></p> <p>The use of "reasonable grounds to suspect" as a test to freeze property under section 6 of the Ordinance remains objectionable, as the Secretary for Security could freeze any property which is merely suspected to be terrorist property.</p>	<p>We consider that "reasonable grounds to suspect" is an appropriate test for the power to freeze under section 6 bearing in mind that we are dealing with urgent situations where intelligence from overseas will frequently have to be assessed.</p> <p>"Reasonable suspicion" cannot be supported solely on the basis of personal factors. The test as to whether reasonable grounds for suspicion to justify a freezing action exist is partly subjective, in that the Secretary for Security must have formed a genuine suspicion</p>

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			<p>that the property concerned is terrorist property, and partly objective, in that there had to be reasonable grounds for forming such a suspicion; such grounds could arise from information received from another, provided that a reasonable person, having regard to all circumstances, would regard them as reasonable grounds for suspicion.</p> <p>Any decision to freeze on that basis is appealable under section 17 and, on appeal, the prosecution will have to satisfy the court that "reasonable grounds to suspect" in fact exist. This effective safeguards against abuse and wrongful exercise of the freezing power.</p>
5.	Mens rea of offences	<p><u>Justice - the Hong Kong Section of the International Commission of Jurists</u></p> <p>(a) The use of "reasonable grounds to believe" in the existing offence of sections 7, 8 and 9 remains objectionable. In particular, setting the intent at this low level makes arrest, charge and the institution of criminal proceedings a matter of "objective" justification rather than "classical</p>	Please refer to our response to item 2.

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		<p>guilty" conduct, thereby permitting the criminalisation of innocent behaviour; and</p> <p>(b) As is obvious to all, terrorists and terrorist organisations do not carry a label proclaiming themselves to be terrorists. It is therefore wrong to criminalise an ordinary citizen unless he or she knows that. If the case cannot be proved on that basis, the ordinary citizen should not be held guilty of any offence. The gazettal of an organisation as a terrorist organisation is an insufficient and unsafe basis upon which to criminalise persons as having reasonable grounds to believe that the person or organisation with which he or she is dealing is the organisation specified in the Gazette. Since it can be assumed that terrorist organisations will be operating under the appearance of a legitimate organisation, knowledge that the organisation or person with whom one is dealing is in fact the specified organisation or person must be a necessary ingredient of the offence.</p> <p><u>The Bar Association of Hong Kong</u></p> <p>As is obvious to all, terrorists and terrorist organisations do not carry a label proclaiming themselves to be terrorists. It is therefore wrong to criminalise an ordinary citizen unless he or she knows that. If the case cannot be proved on that basis, the ordinary citizen should not be held guilty of any offence. The gazettal of an organisation as a terrorist organisation is an insufficient and unsafe basis upon which to criminalise</p>	<p>The Ordinance does <u>not</u> provide that a person is presumed to know of the existence or contents of a notice or an order published in the Gazette. The purpose of the presumption as provided for under sections 4(5) and 5(4) is to relieve the prosecution of the requirement to prove that the specified persons or property are terrorists, terrorist associates or terrorist property as appropriate, in the absence of evidence to the contrary. However, if a person is charged with an offence relating to a terrorist or terrorist associate (as for example, under sections 7, 8 or 9), the prosecution will still need to prove that the person knew, or had reasonable grounds to believe, that he was dealing with such a person. The fact that the specification has been published in the Gazette does not create a presumption or proof that the accused person had the requisite <i>mens rea</i>.</p>

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		<p>persons as having reasonable grounds to believe that the person or organisation with which he or she is dealing is the organisation specified in the Gazette. Since it can be assumed that terrorist organisations will be operating under the appearance of a legitimate organisation, knowledge that the organisation or person with whom one is dealing is in fact the specified organisation or person must be a necessary ingredient of the offence.</p> <p><u>Mr Simon YOUNG of the University of Hong Kong</u></p> <p>The use of "reasonable ground to believe" in the existing offence of sections 7, 8 and 9 remains objectionable. In a recent House of Lords case, R v G and Another, the prosecution has to prove recklessness beyond reasonable doubt on subjective grounds.</p>	<p>Please refer to our response to item 2. The judgment of <u>Regina v G and another</u> focuses on the statutory construction of "recklessness" as a mental element in section 1 of the United Kingdom Criminal Damage Act 1971, and has overruled <u>R v Caldwell</u> [1982] AC 341. Lord Bingham of Cornhill has said, in paragraph 28 of the judgment, that "In so expressing the question I mean to make it as plain as I can that I am not addressing the meaning of 'reckless' in any other statutory or common law context". Lord Hutton has also said, in paragraph 69 of the judgment, that "It does not follow, however, that Lord Diplock's broader concept of</p>

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			recklessness was undesirable in terms of legal policy”. In any event, the judgment is not directly relevant to the provision of “reasonable grounds to believe”.
6.	Specification by Court of First Instance	<p><u>Justice - the Hong Kong Section of the International Commission of Jurists</u></p> <p>(a) The Court of First Instance (the Court) should not be involved in specification for constitutional reasons. This principle was finally accepted in the context of proscription under the now withdrawn National Security (Legislative Provisions) Bill. Principle and logic now demands that an amendment be made to the Ordinance to restore the Court to its normal role of being a check against abuse by the Executive; and</p> <p>(b) It is equally undesirable that such decisions with such draconian consequences should be taken by non-elected government officials. If the specification scheme is to remain, the Administration should amend the Ordinance to provide for an independent body to carry out that task. The same applies to forfeiture of property under section 13.</p> <p><u>The Bar Association of Hong Kong</u></p> <p>The Court should not be involved in specification for constitutional reasons. This principle was finally</p>	<p>The role of the Court of First Instance under sections 5 and 13 of the Ordinance is to receive, assess and adjudicate on evidence placed before it. This is entirely consistent with its role within the constitutional framework of Hong Kong. The Court is to be presented with evidence that the subject of an application is a terrorist, terrorist associate or terrorist property. If not satisfied the Court must reject an application. This is a normal function of the Court. There is no constitutional principle against it carrying out this role.</p> <p>It is not correct to say that any principle of non-involvement of the Court was accepted in the context of the National Security (Legislative Provisions) Bill.</p>

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		<p>accepted in the context of proscription under the now withdrawn National Security (Legislative Provisions) Bill. Principle and logic now demands that an amendment be made to the Ordinance to restore the Court to its normal role of being a check against abuse by the Executive. The same applies to forfeiture of property under section 13.</p>	<p>Under the proposals in that Bill, the courts would have become more involved in relation to proscription by way of an avenue of appeal. In that context the Administration accepted that the Chief Justice had a different constitutional position from that of the Lord Chancellor in the United Kingdom. Where, under the proposals, the Chief Justice was to have a rule making power in respect of procedures for appeals against proscription, it was not appropriate that the rule making power should extend to special procedures to protect national security. This was especially so as the special procedures might themselves be subject to legal challenge.</p>
7.	<p>Disclosure of knowledge or suspicion that property is terrorist property</p>	<p><u>Justice - the Hong Kong Section of the International Commission of Jurists</u></p> <p>(a) The disclosure requirements in section 12 and its related offence under section 14(1) of failing to disclose a suspicion of terrorist property remains objectionable. They create a "thought crime", committed even if the property in question turns out not to have been terrorist property; and</p>	<p>FATF Special Recommendation IV requires that "if financial institutions, or other businesses or entities subject to anti-money laundering obligations, suspect or have reasonable grounds to suspect that funds are linked or related to, or are to be used for terrorism,</p>

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		<p>(b) The "gag" provision in section 12(5) is in terms providing for strict liability. There is no reason why this provision should not follow the "gag" provision in section 25A(6) of the Organized and Serious Crimes Ordinance (OSCO) which prohibits such disclosure without lawful authority or reasonable excuse and provides for the specific, subjective defences of lack of knowledge or suspicion of likely prejudice to the investigation.</p>	<p>terrorist acts or by terrorist organizations, they should be required to report promptly their suspicions to the competent authorities". Section 12 of the Ordinance implements this recommendation.</p>
<p>8.</p>	<p>Compensation</p>	<p><u>Justice - the Hong Kong Section of the International Commission of Jurists</u></p> <p>Proof of serious default by some person concerned in obtaining the relevant specification should not be a prerequisite for the obtaining of compensation where an application is made under section 18. All civil remedies should be preserved.</p> <p><u>The Bar Association of Hong Kong</u></p> <p>Proof of serious default by some person concerned in obtaining the relevant specification should not be a prerequisite for the obtaining of compensation where an application is made under section 18. All civil remedies should be preserved.</p>	<p>We have reviewed the compensation provision under section 18 of the Ordinance. Our conclusion is that it is proportionate and reasonable, in that it is commensurate with the position at common law and is consistent with established compensation criteria adopted in other existing ordinances.</p> <p>The Bills Committee suggested at its meeting on 5 December 2003 that section 18 be amended to provide for a compensation arrangement that was better than the common law position, in view of the Administration's wide freezing power under section 6.</p>

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			We are considering the suggestion in detail.
9.	Review of the Ordinance	<p><u>Justice - the Hong Kong Section of the International Commission of Jurists</u></p> <p>A thorough review of the Ordinance should be conducted to bring it in line with minimum human rights standards and to ensure that it does no more than UNSCR 1373 requires.</p>	<p>Please refer to our response to item 1.</p> <p>We would like to reaffirm that preserving Hong Kong citizens' rights and freedoms guaranteed under the Basic Law is a guiding principle in drawing up our legislative proposals. In the process of the enactment of the Ordinance, we had ensured that the provisions therein had maintained a proper balance between protecting personal freedom and human rights and ensuring public safety. Indeed, the measures in the Ordinance are consistent with international practices, and comply with the requirements on protection of rights and freedoms under the Basic Law and the International Covenant on Civil and Political Rights. Strong and effective judicial and procedural safeguards in respect of the specification of terrorists, terrorist associates and</p>

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			<p>terrorist property, and mechanisms for the aggrieved to lodge appeals and seek compensation are provided for under the Ordinance.</p> <p>A table which explains the legal effect of individual provisions in the Ordinance and how they are consistent with the requirements on the protection of human rights are separately prepared for Members' reference.</p>

Security Bureau
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