

**Bills Committee on  
United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003**

**Purpose**

This paper addresses the applicability of “recklessness” test to the offence under the new section 10(2), and the issues raised at the Bills Committee meeting on 6 May 2004.

**New section 10(2) – offence of failing to cease to a member of a gazetted terrorist group**

2. We have earlier advised that we accept the suggestion of replacing the mental element of “having reasonable grounds to believe” with “recklessness” in sections 8, 9 and the new section 10(1). We have now further examined the appropriateness of applying “recklessness” to the offence under the new section 10(2).

3. The reason for amending the original section 10(2) is to require a person to take steps to cease to be a member of a gazetted terrorist group only after he has the mental element of knowledge or reasonable grounds to believe that the group has been gazetted under section 4 or 5. Therefore, the offence is failing to take steps to discontinue membership as soon as practicable **after** a person knows or has reasonable grounds to believe that the group is gazetted under section 4 or 5. The equivalent offence in relation to “recklessness” would be an offence of failing to take steps to discontinue membership as soon as practicable after the person ceases to be reckless as to whether the group is gazetted under section 4 or 5. Such an offence would make little sense. We, therefore, do not propose to apply “recklessness” to the offence under the new section 10(2).

**New section 11D – Part 3B not to apply to certain ships**

4. The Bills Committee has requested more information on how “a ship that has been withdrawn from navigation or is laid up” in the new section 11D(c) should be construed. Members will wish to note that a ship which is indefinitely moored with no navigational crew, or which is undergoing a major overhaul or extensive repair in a drydock or shipyard during such time she is not ready for a voyage, is generally regarded as

having been withdrawn from navigation. A ship is considered laid up if it remains or is to remain in the waters of a jurisdiction through the lack of employment or pending the outcome of any legal proceedings before any court.

### **New section 11E – prohibitions relating to ships**

5. A Member has requested more details on the interpretation of “intimidation” in the new section 11E(1)(a). The relevant provision in Hong Kong domestic law is section 24 (prohibiting certain acts of intimidation) of the Crimes Ordinance (Cap. 200), which reads -

“Any person who threatens any other person-

(a) with any injury to the person, reputation or property of such other person; or

(b) with any injury to the person, reputation or property of any third person, or to the reputation or estate of any deceased person; or

(c) with any illegal act,

with intent in any such case-

(i) to alarm the person so threatened or any other person;  
or

(ii) to cause the person so threatened or any other person to do any act which he is not legally bound to do; or

(iii) to cause the person so threatened or any other person to omit to do any act which he is legally entitled to do,

shall be guilty of an offence.”

6. In *R v Lo Tong-kai* [1977] HKLR 193 at 196 McMullin J held -

“What the prosecution must show upon a charge under section 24 of the Crimes Ordinance is that the person making the threat or that the threat itself is of such a kind that a person of ordinary firmness would be affected by it. In deciding these matters, as

it seems to me, the context of the circumstances out of which the threat has arisen are of paramount importance to be considered.”

It is considered likely that a Hong Kong court would take into account a similar approach in relation to the new section 11E.

### **New sections 12A and 12B – requirement to furnish information or produce material, and order to make material available**

7. The Assistant Legal Adviser of the Legislative Council has advised the Bills Committee that the operation of Part XII of the Interpretation and General Clauses Ordinance (Cap. 1), which concerns search and seizure of “journalistic material”, is not applicable to the new sections 12A and 12B.

8. It is possible that a journalist may be required by a court order to furnish information or produce materials under the new sections 12A and 12B. In this regard, it should be noted that the new sections 12A and 12B provide that the Court will only issue an order if the objective tests set out in the new sections 12A(4) and 12B(5) respectively are met -

- (a) there are reasonable grounds for suspecting that the relevant offence under investigation has been committed;
- (b) there are reasonable grounds for suspecting that a particular person/persons of a particular description, has/have information, or is/are in possession of material, likely to be relevant to the investigation;
- (c) there are reasonable grounds for believing that the material concerned is likely to be relevant to the investigation; and
- (d) there are reasonable grounds for believing that it is in the public interest that an order should be made, having regard to the seriousness of the relevant offence under investigation; whether the relevant offence could be effectively investigated if an order is not made; the benefit likely to accrue to the investigation if the information is disclosed or the material is obtained; and the circumstances under which the person/persons may have acquired, or may hold, the information or material.

9. The new sections 12A(15) and 12B(9) provide that any person on whom a requirement is imposed under an order may apply for the revocation or variation of the order.

10. The above tests are substantially the same as those under Part XII of Cap. 1 which stipulates the conditions to be fulfilled for making a court order requiring production of “journalistic material” -

- (a) there are reasonable grounds for believing that an arrestable offence has been committed;
- (b) the material is likely to be of substantial value to the investigation of the arrestable offence, or relevant evidence in proceedings for the arrestable offence;
- (c) other methods of obtaining the material have been tried and failed or have not been tried because they were unlikely to succeed or would be likely to seriously prejudice the investigation; and
- (d) there are reasonable grounds for believing that it is in the public interest that an order should be granted, having regard to the benefit likely to accrue to the investigation and the circumstances under which a person in possession of the material holds it.

11. In view of the above, we consider that the new sections 12A and 12B are already subject to sufficient judicial safeguards.

**New section 12H – seized suspected terrorist property may be detained**

12. The new section 12H provides that an authorized officer may detain any seized suspected terrorist property. As the new section 12G already provides for such seizure and detention, we consider that the new section 12H can be deleted and have prepared the necessary Committee Stage Amendment (CSA) accordingly.

**New section 12I – period for which seized suspected terrorist property may be detained**

13. The Bills Committee has requested more information on the rationale for stipulating that seized suspected terrorist property can be detained for not more than 30 days under the new section 12I(1). As we have previously explained, the provision of not more than 30 days is based on operational considerations of the time required to substantiate the origin or derivation of the seized property, or to take forward any proceedings in Hong Kong or elsewhere against any person in relation to the seized property, or to institute the steps for freezing the seized property in accordance with section 6.

14. The seizure and detention of suspected terrorist property envisaged under the new sections 12G and 12I will most likely be taken on the basis of overseas intelligence. To further confirm the origin or derivation of the seized property, it is expected that additional information or evidence will need to be sought from the relevant overseas jurisdictions through such procedures as the mutual legal assistance arrangements, so as to facilitate any proceedings in Hong Kong or elsewhere, or the freezing of the property concerned under section 6. The provision of not more than 30 days under the new section 12I(1) is considered reasonable taking into account the time required for taking forward the procedures mentioned above.

**New sections 14(7H) and 14(7J) - penalties**

15. The Bills Committee has suggested amending the new sections 14(7H) and 14(7J) to the effect that a person who “intentionally” and “without reasonable excuse” obstructs an authorized officer in the execution of a warrant under the new section 12C or 12G respectively commits an offence. We agree to this suggestion and have prepared the necessary CSAs accordingly.

**Draft**

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

**COMMITTEE STAGE**Amendments 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.”.