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May 20, 2004

c/o Ms Mary So, Clerk
Bills Committee on United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003
Legislative Council
Central
Hong Kong

Dear Ms So:

Re: Proposed CSAs to United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003

You have invited my views on the above-mentioned proposed Committee Stage Amendments.

In general, I am pleased to see the many proposed improvements to the original Bill. Nevertheless, I believe there are still some areas that can be clarified and improved.

1. I maintain my criticisms of the freezing power and its present use of the phrase "not be made available, directly or indirectly, to any person". See my earlier submissions dated 31 October 2003 and 5 January 2004. The Administration may wish to consider the alternative proposal contained in paragraph 2 of the 5 January submission.

2. I have not seen a satisfactory answer to the question I raised in paragraphs 4-6 of the 5 January submission, namely, how can a government justify executive freezing of terrorist property that cannot be subject to forfeiture by a court? The answer does not lie in widening the forfeiture power. I believe the answer lies either in a timely expiry of the freeze notice or a narrowing of the freeze power itself (so that it becomes co-extensive with the forfeiture power).

3. I applaud the proposal to remove the objective *mens rea* standard of 'having reasonable grounds to believe' from the criminal offences. Ensuring a subjective standard of *mens rea* means that only the morally guilty will be punished and stigmatized. This is a principle of fundamental justice.

4. Nevertheless, the proposal to use a 'recklessness' standard is not free from difficulties because the old House of Lords case of *Commissioner of Police* v *Caldwell* [1982] AC 341 interpreted "reckless" in the context of criminal damage to property as an objective standard. *Caldwell* was overruled by the House of Lords on 16 October 2003 in *Regina* v *G* [2003] 3 WLR 1060 (HL). In Lord Bingham's decision in *Regina* v *G*, he found that the majority in *Caldwell* "fell into understandable but clearly demonstrable error" when it ignored relevant authority and construed 'reckless' as an objective standard.

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5. Lord Bingham did not rest his decision on only the misinterpretation by the *Caldwell* majority. At paragraph 35 of the decision, he makes it very clear that construing 'recklessness' as an objective standard is wrong as a matter of principle and can cause injustice:

> "If it were a misinterpretation that offended no principle and gave rise to no injustice there would be strong grounds for adhering to the misinterpretation and leaving Parliament to correct it if it chose. But this misinterpretation is offensive to principle and is apt to cause injustice. That being so, the need to correct the misinterpretation is compelling."

6. At paragraph 32, Lord Bingham made clear why having a objective standard for recklessness is so offensive to principle:

> "it is a salutary principle that conviction of serious crime should depend on proof not simply that the defendant caused (by act or omission) an injurious result to another but that his state of mind when so acting was culpable. This, after all, is the meaning of the familiar rule *actus non facit reum nisi mens sit rea*. The most obviously culpable state of mind is no doubt an intention to cause the injurious result, but knowing disregard of an appreciated and unacceptable risk of causing an injurious result or a deliberate closing of the mind to such risk would be readily accepted as culpable also. It is clearly blameworthy to take an obvious and significant risk of causing injury to another. But it is not clearly blameworthy to do something involving a risk of injury to another if (for reasons other than self-induced intoxication: *R v Majewski* [1977] AC 443) one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment."

7. In Lord Steyn's concurring decision, he added that maintaining the subjective form of recklessness "would fit in with the general tendency in modern times of our criminal law. The shift is towards adopting a subjective approach. It is generally necessary to look at the matter in the light of how it would have appeared to the defendant." (at para. 55)

8. Both Law Lords dismissed concerns that a subjective standard would create a loophole for persons who should be found guilty:

> "There is no reason to doubt the common sense which tribunals of fact bring to their task. In a contested case based on intention, the defendant rarely admits intending the injurious result in question, but the tribunal of fact will readily infer such an intention, in a proper case, from all the circumstances and probabilities and evidence of what the defendant did and said at the time. Similarly with recklessness: it is not to be supposed that the tribunal of fact will accept a defendant's assertion that he never though of a certain risk when all the circumstances and probabilities and evidence of what he did and said at the time show that he did or must have done." (per Lord Bingham at para. 39)
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> "…if a defendant closes his mind to a risk he must realise that there is a risk and, on the evidence, that will usually be decisive…One can trust the realism of trial judges, who direct juries, to guide juries to sensible verdicts and juries can in turn be relied on to apply robust common sense to the evaluation of ridiculous defences." (per Lord Steyn at para. 58)

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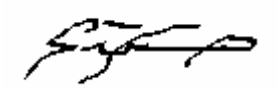
9. In the result, all the Law Lords agreed on the following interpretation of recklessness:
   "A person acts recklessly within the meaning of section 1 of the Criminal Damage Act 1971 with respect to-
   (i) a circumstance when he is aware of a risk that it exists or will exist;
   (ii) a result when he is aware of a risk that it will occur;
   and it is, in the circumstances known to him, unreasonable to take the risk."

10. Whether Hong Kong courts will adopt this new subjective form of recklessness for criminal damage to property is a question that has yet to be decided.

11. Without defining "reckless", the present CSAs leave too much uncertainty in the law. In accordance with the principles and reasoning articulated in *Regina* v *G*, I recommend that an express definition of "reckless" be included to avoid future argument and litigation. This definition should be framed in terms of a subjective awareness of risk as seen in *Regina* v *G* (see paragraph 9 above).

12. It follows that the remaining reference to 'he has reasonable grounds to believe' in the proposed s. 10(2) of the United Nations (Anti-Terrorism Measures) Ordinance should be changed to a subjective standard of either "belief" or "suspicion".

Yours truly,



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