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October 31, 2003

The Honourable Mr. James To
Chairman of the Bills Committee on the United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003
Legislative Council of the Hong Kong Special Administrative Region
8 Jackson Road
Central, Hong Kong

Dear Mr. To:

Re: Written Submissions on the United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003

Thank you for your invitation to make submissions on the above-mentioned proposed legislation. I am pleased to provide you with some preliminary comments, which, unfortunately due to time constraints, can only be stated briefly.

Freezing of Property

1. I recommend that the relatively unknown and uncertain scheme proposed for 'freezing' terrorist property be replaced in its entirety with the more familiar scheme used to restrain crime tainted property (e.g. see Hong Kong's Drug Trafficking (Recovery of Proceeds) Ordinance and Organized and Serious Crimes Ordinance and the Canadian Criminal Code, ss. 83.13, 462.33, 490.8). While the notion of freezing funds in a bank account is relatively clear, if the freezing scheme is extended to all potential terrorist property, it becomes muddled. In particular, the proposal allows the Secretary for Security to 'freeze' reasonably suspected terrorist property by directing that the property "not be made available, directly or indirectly, to any person". This restriction is difficult to apply in relation to immovable property and even to some movable property (e.g. chattel in a viable business). Oftentimes, the objective of 'freezing' is met by allowing those persons who are using the property to continue their use, while prohibiting them (and others) from disposing or otherwise dealing with the property. This is exactly what a restraint order does, but in a much clearer and more precise manner.

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2. It is hard to understand why a warrantless power to seize property is proposed for s. 6(10). Is there really a necessity for this power when a warrant based search power is already proposed for in Part 4B? There are inadequate safeguards to the exercise of this proposed power. It is not reserved for only exigent circumstances; neither is having reasonable grounds to suspect that the property will be removed from the HKSAR a pre-requisite condition – the proposal simply says that the directed officer can exercise the power for the "purpose of preventing any property the subject of the notice being removed from the HKSAR".

Section 10 Recruitment and Membership Offences

3. The proposed s. 10 offences can be greatly simplified and improved. The following is new proposal is suggested as an alternative to the government's proposal:

10. Prohibition on recruitment, etc. to terrorist associations specified in notices under section 4(1) and (2) or orders under section 5(2)

(1) A person shall not –

(a) recruit another person to become a member of;

(b) become a member of; or

(c) maintain his membership in,

a terrorist association, who the first mentioned person knows or has reasonable grounds to believe is specified in a notice under section 4(1) or (2), or specified in an order under section 5(2), published in the Gazette.

(2) It is a defence to a charge under paragraph 10(1)(c), if the person shows that he ceased his membership as soon as it was practicable after he knew or had reasonable grounds to believe that the terrorist association was specified in a notice under section 4(1) or (2), or specified in an order under section 5(2), published in the Gazette.

There are two consequential amendments:

1. All references in the Ordinance to "terrorist associate" are changed to "terrorist association".
2. The reference to s. 10(2) in s. 14(4) can be deleted as s. 10(2) no longer provides for an offence.

This new proposal has a number of distinct advantages:

(i) It is easier to read and understand in its plain language.

(ii) It uses the term 'terrorist association' which more accurately and clearly describes the intended meaning of 'terrorist associate' in s. 2.

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(iii) It adds the new offence of maintaining one's membership in a terrorist association, which fills a possible gap in the government's proposal. There is a potential lacuna in the government's proposal in respect of individuals who were already members of a specified terrorist association but did not realize this when they became a member. When they realize they are a member of a specified group, it cannot be said that their realization coincided with their 'becoming a member' – this would mean they could not be guilty under s. 10(1)(b). But fairness also requires that a reasonable opportunity be given to such persons to withdraw their membership after coming to their realization. This is the purpose of s. 10(2), which reflects the spirit of the government's proposed s. 10(2). The combined effect of s. 10(1)(c) and (2) also addresses the other concerns of the proposed s. 10(2).

(iv) The new proposal requires proof of an actual specified terrorist association as an *actus reus* element of the offence. This goes beyond the government's proposal, which arguably only requires that the person knows or have reasonably grounds to believe that he was becoming a member, etc., of a specified group. While I recognize that this is the structure of our existing money laundering offence, good reasons exist to think that this offence should be treated differently. This association-based offence only presents an appreciable harm to the public if the criminal association in fact exists. It is the existence of such a group and its added membership which must be proscribed and deterred. However, there is relatively little risk of societal harm where a person thinks he is joining a criminal association which in fact is not. The situation is different for money laundering. The fact that there exist persons who are prepared to launder proceeds of crime presents an obvious danger to society in itself. It is irrelevant whether the property is in fact proceeds of crime.

(v) Another problem with the government's proposal is the difficulty in determining when 'a body of persons' is known to be specified in a notice or order published in the Gazette. Is it enough that one member of that body of persons is specified? In that case, would there be an offence if I became a member of a university alumni association knowing that another member of that association had been specified. It seems that this would fall within the terms of the government's proposal, but clearly falls outside of the kind of conduct or harm that the proposal intends to eradicate. This ambiguity arises due to the failure of the government's proposal to recognize that under the Ordinance, only terrorists, terrorist associates and terrorist property are the subject of specifications. It follows that the s. 10 offence should be orientated towards specified 'terrorist associates' (which I proposed

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should be changed in name to 'terrorist associations' for the sake of clarity).

Bombings Conventions

4. The proposed bombing offences in s. 11B have deviated from the treaty provisions in several respects:
    a. The different modes of committing the offence in subsection 11B(1) should be preceded by the qualifier 'without lawful excuse, intentionally-' to reflect the intention of Art. 2(1) of the Bombings Convention. However, this is not a serious departure since the common law presumption of *mens rea* is clearly not rebutted by virtue of the inherent mental elements in the prescribed conduct elements.
    b. The reference and qualifier, 'extensive destruction' in Art. 2(1)(b) of the treaty should be included in s. 11B(2)(a). There is no reason why it should be left out.
    c. Section 11B(2)(b) does not accurately reflect the intention of Art. 2(1)(b), which envisages criminal liability where the conduct in fact causes major economic loss, although a risk of such loss did not exist. In this context, the 'thin skull' policy reflected in the treaty seems justifiable and should probably be maintained. Indeed, it would probably be safe to reproduce exactly what appears in the treaty.

Part 4B Search and Search of Terrorist Property

5. It is unclear why a magistrate has been given the authority of issuing search warrants for the purpose of seizing terrorist property. Recall the definition of 'terrorist property':

> (a) the property of a terrorist or terrorist associate; or
> (b) any other property consisting of funds that-
> (i) is intended to be used to finance or otherwise assist the commission of a terrorist act; or
> (ii) was used to finance or otherwise assist the commission of a terrorist act;

Given the very wide definition of 'terrorist property', it is best to leave determinations and disputes about its meaning and application to the Court of First Instance. This is the attitude of the Hong Kong law in respect of all other aspects of terrorist property and also in relation to property suspected to be proceeds of crime. This is also the policy in Canada, see Criminal Code, ss. 462.32 & 462.34 (except for Quebec), 83.13.

6. The present wording of proposed s. 12G(1) is convoluted and unclear. The clause, 'or with respect to which a relevant offence has been committed or is about to be committed', does not seem to make sense within the context of the

subsection. Is there a grammatical mistake? It seems to me that the section contemplates the issuance of the warrant in two different situations:

> (a) where there are reasonable grounds to suspect that terrorist property will be found in the premises to be searched; or
> (b) where there are reasonable grounds to suspect that
>> (i) a relevant offence has been committed or is about to be committed; and
>> (ii) evidence of that relevant offence will be found in the premises to be searched.

If this is the intention of the section, I recommend that the subsection be re-drafted to reflect this intention more closely.

7. Subsection 12G(2) presents even greater problems. Ordinarily, a police officer may only seize property lawfully in one of three ways: while acting under legal authorization (e.g. a warrant), where the property is abandoned, and where the owner consents to the seizure. Section 12G(2) proposes to give authorized police officers a very broad legal authorization to seize property. On its face, it is a warrantless seizure power that can be exercised at any time whenever an authorized officer has reason to suspect that the thing is terrorist property. With the wide definition of terrorist property, it would be dangerous to give officers this power without any judicial authorization. The exercise of such a power is sometimes known as a 'plain view' seizure. But such seizure powers are normally parasitic on another authorized search power, e.g. a search warrant. In other words, the police would be allowed to exercise this plain view power only in the course of executing a search warrant (see e.g. Canadian Criminal Code, s. 489). I recommend that the umbrella clause in s. 12G(3) should be used to also qualify the proposed power in s. 12G(2).

8. The power to search persons found in the targeted premises should not be allowed on the tenuous basis that suspected terrorist property is seized in those premises (see proposed s. 12G(3)(a)). This remote precondition could triggered an arbitrary, yet lawful, search of persons en masse found in such premises without any belief that such persons would have on their persons evidence of an offence or terrorist property.

9. Will affected persons be allowed to access seized property for the purposes of paying reasonable living and legal expenses pending forfeiture? It does not seem so judging from the terms of s. 12I. But providing such access has been Hong Kong's policy in relation to frozen terrorist property and in relation to restrained or charged proceeds of crime. To be consistent, this right of access should also be recognized here.

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10. In getting seized property released pursuant to the proposed s. 12I(4)(b) on grounds that the detention is no longer justified, it is unclear why only authorized officers may make such applications. Surely it should be open to affected persons to show that the authorities (whether in HK or abroad) have not been diligently pursuing an investigation. And if this is the case, it cannot be said that the detention is justified according to the criteria in s. 12I(2)(b).

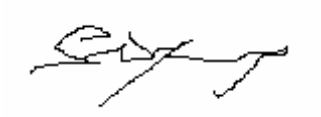
Compensation

11. The Government should re-consider removing the 'serious default' precondition for compensation in s. 18(2)(c) of the Ordinance and also where it appears in the existing anti-money laundering legislation in Hong Kong. It is useful to compare this compensation scheme with the one in Canada which has a lower threshold. Under ss. 462.32(6) and 462.33(7) of the Criminal Code, the Attorney General of the province must "give such undertakings as the judge considers appropriate with respect to the payment of damages or costs, or both" in relation to the issuance and execution of a warrant or a restraint order in respect of proceeds of crime. While few cases have considered the meaning of this undertaking, it is generally accepted by practitioners that the undertaking removes the Crown's immunity from civil suit and acts as a form of indemnity for damages and costs.

12. While the Government has said that the 'serious default' precondition is consistent with the common law of negligence, it is my opinion that it forms the threshold higher than simply showing negligence. If the official belief is that the 'serious default' precondition is tantamount to the common law negligence standard then it would probably be more acceptable if the word 'negligence' was inserted in place of the existing words 'serious default'.

Once again, I thank you for the opportunity to contribute to this important legislative exercise.

Sincerely,



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