

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

Purpose

This note addresses the issues set out in the paper (LC Paper No. CB(2)1113/02-03(04)) prepared by the Legislative Council Secretariat.

Issues

Section 2 – Interpretation

Definition of “terrorist act”

2. The definition of “terrorist act” in the United Nations (Anti-Terrorism Measures) Ordinance (the Ordinance) (Cap. 575) 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. The element of “threat” is also provided for in the United States Code Title 18, the Singaporean United Nations (Anti-Terrorism Measures) Regulations 2001 and the Australian Suppression of the Financing of Terrorism Act 2002. It can be noted that the definition of “terrorist act” in the Ordinance is consistent with the international trend.

3. We have difficulty in accepting the proposed deletion of the element of “threat” in the definition of “terrorist act” in the Ordinance. Our view is that “threat of terrorist act” will cause public panic, irrespective of whether the terrorist act is actually committed. For example, a terrorist may threaten to fly an airplane and run it into a famous building in Hong Kong if the Government does not release a certain prisoner. However, he does not actually commit the threatened act. In this case, if the element of “threat” was excluded from the definition of “terrorist act”, the terrorist’s act would not constitute a “terrorist act” and those who had financed his act would not be criminalized under the Ordinance. The effectiveness of the Ordinance in combating terrorist financing would be significantly compromised.

4. We do not see any difficulty in the inter-relation between the definitions of “terrorist” and “terrorist act”. A person who threatens action within the meaning of the definition of “terrorist act” will commit a terrorist act (as the threat of action can constitute a terrorist act within the meaning of the definition).

Definition of “terrorist property”

5. The Ordinance provides that “terrorist property” means -

- (a) the property of a terrorist or terrorist associate; or
- (b) any other property consisting of funds that –
 - (i) is intended to be used or 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.

6. We cannot agree that the definition of “terrorist property” be narrowed to “any property including funds that is intended to be used to finance or otherwise assist the commission of a terrorist act” (thus excluding the provisions set out in paragraph 5(a) and (b)(ii) above), the reason being that this cannot fulfill the requirements under United Nations Security Council Resolution (UNSCR) 1373 (paragraph 1(c) requires the freezing of funds etc. of terrorists) and the Special Recommendations of the Financial Action Task Force on Money Laundering (FATF) (Special Recommendation III requires the seizure and confiscation of funds etc.).

Definition of “prescribed interest” in section 2(1) and application of the provisions to safeguard legal privilege and privilege against self-incrimination under section 2(5)

7. The definition of “prescribed interest” and section 2(5) have been added to provide that the rules of court to be made under the Ordinance may prescribe persons not directly holding or owning the property concerned as persons having a “prescribed interest”. Those persons will therefore become entitled to lodge appeals pursuant to section 17 of the Ordinance.

Section 5 – Specification by Court of First Instance of persons and property as terrorists, terrorist associates or terrorist property

8. We consider that the two-year (which was shortened from three years based on the suggestion of the majority of the then Bills Committee) validity period of a specification order under section 5 is not too long in the light of the available appeal procedures. For specification orders made ex parte, section 17 already provides for an appeal mechanism for specified persons or other affected persons to apply to the Court of First Instance for the orders to be revoked. For specification orders made inter partes, section 2(7) provides that appeals can be made to the Court of Appeal pursuant to section 14 of the High Court Ordinance (Cap. 4). The Administration bears the burden of proof in these appeal proceedings involved. We therefore consider that sufficient judicial safeguards are stipulated.

Section 6 – Freezing of funds

9. We consider it vital that freezing action can be taken speedily to combat terrorist financing, taking into account the availability of modern technology that allows funds to be transferred from one jurisdiction to another almost instantly. In this respect, section 6(1) requires the Secretary for Security (S for S) to have “reasonable grounds to suspect” that any funds are terrorist property before she can freeze the funds. Section 6(5) provides that S for S shall not re-freeze the same funds unless there has been a material change in the grounds. Section 17 further provides for an appeal mechanism for the affected persons to apply to the Court of First Instance to have a freezing notice issued under section 6 revoked. On appeal the Administration will bear the burden of satisfying the Court that there are reasonable grounds to suspect that the frozen funds etc. are terrorist property. This ensures effective safeguards against abuse and wrongful exercise of the freezing power.

10. We appreciate the humanitarian intention of providing that the freezing of funds shall not affect the making available of the funds to the affected persons solely for the purposes of feeding, clothing, housing, satisfying medical needs, obtaining legal advice etc. However, we consider that such provision of funds needs to be regulated to avoid creating a loophole allowing the holder of funds to make those funds available on spurious humanitarian grounds. It should be noted that section 15 already allows S for S to grant a licence enabling the use of the frozen funds for the above purposes. In the event that S for S refuses to

issue a licence or the affected persons are not satisfied with the conditions specified in a licence, section 17 further provides that an application can be made to the Court of First Instance for the grant or variation of a licence.

11. We consider that the two-year validity period of a freezing notice under section 6 is appropriate, having regard to the time required for investigation, obtaining relevant information and, perhaps, evidence from other jurisdictions through mutual legal assistance arrangements and institution of legal proceedings for the purpose of forfeiting the funds concerned.

Section 7 – Prohibition on supply of funds to terrorists and terrorist associates

Section 8 – Prohibition on making funds, etc. available to terrorists and terrorist associates

Section 9 – Prohibition on supply of weapons to terrorists and terrorist associates

12. Sections 7, 8 and 9 already provide for the appropriate *mens rea*, namely, “knowledge” or “having 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. We consider it appropriate for both elements to be applied in the Ordinance.

13. Sections 7 and 8 give effect to paragraphs 1(b) and (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 offender must have the 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. It also creates a loophole allowing funds to be legally provided to terrorists and terrorist

associates as long as the provider does not intend the funds be used for terrorist acts.

14. We consider that it would be clearly inappropriate to replace the objective mental element of “has reasonable grounds to believe” with the subjective mental element of “believes on reasonable grounds” in section 9. “Belief” would have to be proved by the prosecution irrespective of the existence of “reasonable grounds”.

Section 10 – Prohibition on recruitment, etc. to persons specified in notices under section 4(1) and (2)

15. The United Nations (Anti-Terrorism Measures)(Amendment) Bill 2003 (the Bill) introduces a new section 10 to replace the existing section 10 of the Ordinance. The purpose is to introduce improvements in the following two areas -

- (a) improving the language of the provision by making it clear that recruitment of members for or becoming members of terrorist **bodies** is prohibited; and
- (b) providing for the appropriate *mens rea* such that a recruiter or a member will be criminalized only when he “knows” or “has reasonable grounds to believe” that the organization concerned is a terrorist organization published in the Gazette.

16. We cannot accept the proposed exclusion of the mental element of “having reasonable grounds to believe”, for the same reasons as set out in paragraphs 12 and 14 above.

Section 11 – Prohibition against false threats of terrorist acts

17. While noting that UNSCR 1373 and the FATF Special Recommendations do not require prohibition of the acts covered by section 11, we consider enactment of the section necessary to criminalize wilful dissemination of false threats of 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 amendment that expressly provided for the above intention.

Section 12 – Disclosure of knowledge or suspicion that property is terrorist property

18. 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, terrorist acts or by terrorist organizations, they should be required to report promptly their suspicions to the competent authorities”. In the context of Hong Kong, under section 25A of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) and the Organized and Serious Crimes Ordinance (Cap. 455), the anti-money laundering obligation of reporting suspicious transactions is placed on everybody. It follows that the reporting obligation under FATF Special Recommendation IV, in the case of Hong Kong, should also be observed by everybody. Section 12 is therefore consistent with the FATF’s requirement.

19. Having considered comments from the relevant industry, we have substituted the original objective mental element of “having reasonable grounds to suspect” with the subjective mental element of “suspect”. We do not consider it appropriate to replace “suspect” with “suspect on reasonable grounds” in the absence of consultation with the industry concerned.

Section 13 – Forfeiture of certain terrorist property

20. Accepting the then Bills Committee’s proposal, we have replaced the original standard of proof of “the balance of probabilities” with “the standard of proof applicable to civil proceedings in a court of law”. The suggested application of the criminal standard of proof to civil forfeiture under section 13 is neither reasonable nor practicable, and will render the provision inoperable.

Section 18 - Compensation

21. The result of our review of the compensation provision under section 18 has been set out in the paper (CB(2)846/02-03(04)) and the letter (CB(2)1971/02-03(01)) submitted to the Panel on Security in January and May 2003 respectively. Our conclusion is that section 18 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.

22. The right to claim damages is already available under common law. Subject to further discussion at the Bills Committee, we are prepared to consider the need for an additional provision to clarify that common law remedies are not excluded by section 18.

Section 19 - Regulations

23. The necessary law enforcement powers are provided for under the Bill.

Section 21 – Proceedings inter partes shall be held in open court unless otherwise ordered by the court

24. Section 21 provides that proceedings inter partes shall be held in open court unless the court orders otherwise in the interests of the security, defence or external relations of Hong Kong, or the administration of justice. Such interests could quite conceivably arise in proceedings under the Ordinance. “External relations” is used instead of “international relations” to cover the People’s Republic of China and Macau.

Review of the Ordinance

25. We have undertaken to review the anti-terrorism measures in the Ordinance periodically to ensure that they are in line with the international trend. In this respect, we have set out our findings and observations on the recent revisions of the anti-terrorism laws in some overseas common law jurisdictions in the paper (CB(2)1113/02-03(03)) submitted to the Panel on Security in February 2003. It can be noted that some jurisdictions have introduced new terrorism offences and enhanced enforcement powers. The provisions in the Ordinance are consistent with international practices.

Undertakings made by S for S

26. We have set out how we have taken forward S for S’ undertakings in the paper (CB(2)1113/02-03(03)) submitted to the Panel on Security in February 2003.

Security Bureau
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