

**Hong Kong Bar Association's comments on
United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003**

- 1 Generally, the Hong Kong Bar Association supports the implementation of measures to give effect to Hong Kong's obligations arising from the United Nations Security Council Resolution 1373. Firm and clear anti-terrorism measures are an important and necessary part of Hong Kong's contribution to the fight against terrorism.
- 2 Anti-terrorism legislation must be consistent with the rights and freedoms guaranteed under the Basic Law. We do not accept that the diminution of those rights and freedoms is either a proper or necessary price to pay in the cause of the fight against terrorism. We believe that the government can be armed with effective anti-terrorist legislative weapons without requiring Hong Kong residents to surrender rights and freedoms. The enactment and application of the USA-PATRIOT Act demonstrates that where substantial inroads into basic rights are made, there is little, if any, real gain in as regards the effectiveness of the fight Against Terrorism.
- 3 The position of the Hong Kong Bar Association is that the present draft of the United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003 does not provide a proper balance between effectiveness and the rights and freedoms of members of the Hong Kong community. The Bill as drafted provides the potential for serious abuse of individual rights. We invite the Administration to think again.
- 4 Part of the problems is to be found in the present Ordinance. The definitions of "terrorist", "terrorist act" and "terrorist property" need to be looked at again. 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. This is wrong in principle.

- 5 As is obvious to all, terrorists and terrorist organisations do not wear a convenient label proclaiming themselves to be terrorists. It is wrong in principle 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 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 with which a person is dealing is in fact the specified organisation or person must be necessary ingredient of the offence.
- 6 The court should not be involved in the specification of terrorist organisations for constitutional reasons. The principle was finally accepted in the context of the proscription under the now withdrawn National Security (Legislative Provisions) Bill. Principle and logic now demands that an amendment to be made to the Ordinance to be amended in the present exercise to restore the court to its normal role of being a check against abuse by the executive. The same principle applies in relation to forfeiture of property under section 13.
- 7 Proof of serious default by some person concerned in obtaining the relevant specification should not be a prerequisite for obtaining of compensation where an application is made under section 18 of the Ordinance. All civil remedies should be preserved.
- 8 In relation to the proposed amendments, the Hong Kong Bar Association is of the view that the proposed changes to the existing section 10 of the Ordinance whereby "reasonable grounds for belief" may become a basis for conviction should not be made.
- 9 It is not clear why the new Part 3A and Part 3B are necessary. All of the conduct which is rendered criminal within these two new parts is already criminal under the existing law. Doubtless if the old law was employed, the fact that the attack was on

part of Hong Kong's infrastructure would be a matter which was highly relevant to sentence in the event that a person was convicted.

- 10 The proposed section 12D is objectionable because it permits, in effect, the unrestricted passing of information which has been obtained under compulsion. While it is accepted that it is desirable that law-enforcement agencies co-operate on an international basis, there should be proper controls on the passing of information thus acquired.
- 11 The amendments to the existing section 18 of the Ordinance are objectionable. It should not be necessary for a person making a claim for compensation under the Ordinance to prove serious default on the part of the person concerned with the seizure or detention of the property concerned.
- 12 Many of the amendments which are described in the Bill as consequential amendments are not truly such. They enable information disclosed under the guise of one Ordinance to be freely available for the use under another Ordinance. This leaves open the real possibility for abuse in the passing of what could well be private information.
- 13 The proposed section 12A of the Ordinance empowers the executive to apply to a court on an *ex parte* basis for an order which permits an authorised officer to require a person to answer questions or furnish information in relation to any matter that reasonably appears to the authorised officer of to be relevant to his investigations under the Ordinance. There is little in the way of protection afforded to the person who is to be the subject of the order. There is no provision for permitting the person named to seek to set aside the order. There are a number of concerns in relation to a proposed section 12 may and they include:
 - If the proposed section provides that a court order extends not only to a person who is specifically identified in the application but also to "persons of a particular description". This seems unnecessarily wide and will produce a high degree of vagueness. Members of the class of persons who come within the category of a person "of a particular description" do not have the opportunity to challenge the order either on its merits or on the basis that they do not fall within a particular description. Such an order could create a very wide class of

persons who would be liable to compulsory interrogation at a time and place of the choosing of the executive. There is no time limit on the order and in theory it could last years. There is no limit on the duration of the interrogation. There is no right to have a lawyer present.

- The proposed section 12A(11) could be construed as abrogating legal professional privilege. While section 2(5) of the present Ordinance purports to preserve legal professional privilege, the plain words of proposed section 12A(11) are entirely inconsistent with section 2(5) because it is in the very nature of legal professional privilege that a lawyer is "excused from furnishing information or producing any material required under this section on the ground that to do so would breach an obligation as to secrecy". If this is correct it is both wrong in principle and violates the Basic Law. On that premise, a person who seeks legal advice as to his activities cannot be confident that he will obtain confidential advice because this provision means that his lawyer could be required to answer questions but, by reason of section 12A(11) could not rely on confidentiality as a basis for refusing to disclose that which would normally be subject to legal professional privilege. While it is to be noticed that proposed section 12A(9) refers to section 2(5) of the current Ordinance, there is no such reference in proposed section 12A(11). In any event, there is no justification for proposed section 12A(9) which imposes an obligation on a lawyer to give the name and address of his client. That is capable of being privileged information.
- The protection proposed section 12A(12) is very little protection at all. This clause provides that "a statement by a person in response to a requirement imposed by virtue of this section may not be used against him in criminal proceedings...". While his answers may not be available as *evidence* against him the information that he provides may provide the interrogator with information from which he can build a case against the person being interrogated. Further there is an exception to the provision in subsection 12 in that the material may be used "for the purpose of impeaching his credibility in proceedings in respect of any offence where in giving evidence he makes a statement inconsistent with [the statement]". This will have the practical effect of making it very difficult for a person to give evidence without revealing the existence of the statement to the jury if he gives a version which is not consistent with what he told the investigators. This will have a real and practical effect on the right of an accused to testify or not to testify.
- There is little in the way of practical means of ensuring that a judge who hears an application under proposed section 12A will have a proper and truthful factual basis for deciding whether to grant a member of the executive this extraordinary power of compulsory interrogation. While the officer who gives facts to a court of first instance in support of an application under proposed section 12A would be subject to the ordinary laws of perjury, that provides little scope for checking whether what the officer says is true or accurate. The affidavit will be confidential and will never see the light of day. The material supplied by the officer might be selective. It is wrong to assume that such officers always tell the absolute and full truth or represent material facts in a fair

and proper context. The court is not itself equipped to test the assertions of the officer except, perhaps, when what is asserted is inherently unlikely. The officer might sincerely believe in the truth of what he says. He might be genuinely mistaken. In short the court has no practical way of checking whether the assertions of the officer contains are lies, distortions, spin or simple honest mistakes. Recent experience in relation to views expressed by government officials in Britain and the United States in relation to the existence of weapons of mass destruction in Iraq when compared to the failure to find such weapons in that country demonstrate that there is a real danger in permitting a court to proceed only on the untested assertions of a government officer. That is particularly so with their assertions were based on "intelligence received".

- 14 The possible introduction of a code of conduct is not of much comfort. Any breach of such a code would not have any real effect on any individual.
- 15 There is no doubt that Hong Kong needs to do its part in fighting terrorism. Anti-terrorist legislation is undoubtedly necessary. However, there is an urgent need for the Administration to carefully review critical aspects of the proposed legislation.

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