

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

Purpose

This paper addresses the issues raised in the submission of 29 October 2003 (CB(2)204/03-04(04)) from JUSTICE, the Hong Kong Section of the International Commission of Jurists.

Implementation of United Nations Security Council Resolution 1373 and Special Recommendations of Financial Action Task Force on Money Laundering

2. We have adopted the minimalist approach in enacting the United Nations (Anti-Terrorism Measures) Ordinance (the Ordinance) (Cap. 575), creating offences to implement the mandatory elements of United Nations Security Council Resolution (UNSCR) 1373 and the more pressing Special Recommendations of the Financial Action Task Force on Money Laundering (FATF). The purpose is to fulfill Hong Kong's international obligations in combating terrorism financing.

3. Sections 7 and 8 of the Ordinance 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 knowledge or 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.

4. We understand that UNSCR 1373 and the FATF Special Recommendations do not require prohibition of the acts covered by section 11 of the Ordinance. However, we consider enactment of the section necessary to criminalize wilful dissemination of false information on 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.

Propriety of the Ordinance

5. We do not agree that the Ordinance criminalizes “innocent and ignorant conduct”. The definition of “terrorist act” in the Ordinance 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 offences under the Ordinance have provided for the appropriate *mens rea*. We are satisfied that the anti-terrorism measures in the Ordinance are consistent with international practices, and comply with the requirements under the International Covenant on Civil and Political Rights.

Mens rea of offences

6. Sections 7, 8 and 9 of the Ordinance provide that the offender must “know” or “have 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. The prosecution bears the burden of proving either element beyond reasonable doubt.

7. The Ordinance does not provide that a person is presumed to know of the existence or contents of a notice or an order published in the Gazette. The purpose of the presumption as provided for under sections 4(5) and 5(4) is to relieve the prosecution of the requirement to prove that the specified persons or property are terrorists, terrorist associates or terrorist property as appropriate, in the absence of evidence to the contrary. However, if a person is charged with an offence relating to a terrorist or terrorist associate (as for example, under sections 7, 8 or 9), the prosecution will still need to prove that the person knew, or had reasonable grounds to believe, that he was dealing with such a person. The fact that the specification has been published in the Gazette does not create a presumption or proof that the accused person had the requisite *mens rea*.

Public consultation and review of the Ordinance

8. We always attach great importance to comments from the public on any legislative proposals. In this regard, we are grateful that the then Bills Committee had conducted a total of 15 meetings in scrutinizing the Ordinance before its passage, during which we had received numerous suggestions from Members, professional organizations as well as interested individuals. Many of these suggestions have in fact been incorporated into the Ordinance. We therefore believe that the purpose of public consultation had been achieved during the legislative process involved.

9. We would also emphasize that the fact that Hong Kong is not under immediate terrorist threat does not negate the urgency of putting the Ordinance in place. Indeed, as Hong Kong is a global financial centre, it would be prudent not to underestimate the possibility of terrorists making use of Hong Kong as a channel of raising finance. With this in mind, we consider that it is in the interest of Hong Kong to avoid becoming “the weakest link” and to keep up with its international partners in legislating against terrorism financing as soon as practicable. Failure to discharge our international obligations may possibly attract censure from the international community and counter measures from FATF.

10. 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.

Specification by Court of First Instance

11. The role of the Court of First Instance under sections 5 and 13 of the Ordinance is to receive, assess and adjudicate on evidence placed before it. This is entirely consistent with its role within the constitutional framework of Hong Kong. The Court is to be presented with evidence that the subject of an application is a terrorist, terrorist

associate or terrorist property. If not satisfied the Court must reject an application. This is a normal function of the Court. There is no constitutional principle against it carrying out this role.

12. We would like to point out that it is not correct to say that any principle of non-involvement of the Court was accepted in the context of the National Security (Legislative Provisions) Bill. Under the proposals in the Bill, the courts would have become more involved in relation to proscription by way of an avenue of appeal. In that context it was accepted by the Administration that the Chief Justice had a different constitutional position from that of the Lord Chancellor in the United Kingdom. Where, under the proposals, the Chief Justice was to have a rule making power in respect of procedures for appeals against proscription, it was not appropriate that the rule making power should extend to special procedures to protect national security. This was especially so as the special procedures might themselves be subject to legal challenge.

Compensation

13. The result of our review of the compensation provision under section 18 of the Ordinance 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.

14. 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.

Definitions of “terrorist”, “terrorist act” and “terrorist property”

15. Our view on the definitions of “terrorist”, “terrorist act” and “terrorist property” is set out in the paper (CB(2)294/03-04(01)) submitted to the Bills Committee in November 2003.

The United Nations (Anti-Terrorism Measures)(Amendment) Bill 2003

New section 10 – prohibition of recruitment for terrorist groups

16. We cannot accept the proposed exclusion of the mental element of “having reasonable grounds to believe” from the new section 10 in the United Nations (Anti-Terrorism Measures)(Amendment) Bill 2003 (the Bill), for the same reasons as set out in paragraphs 6 and 7 above.

New Parts 3A and 3B – prohibitions relating to bombings of prescribed objects, ships and fixed platforms

17. Considerations of the necessity of making new legislative provisions for implementing the requirements in the International Convention for the Suppression of Terrorist Bombings, the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf are set out in Annexes A, B and C to the paper (CB(2)204/03-04(01)) submitted to the Bills Committee in October 2003.

New section 12D – disclosure of information

18. The purpose of the new section 12(6) is to enable the law enforcement agencies to transmit information in relation to terrorist property which they have acquired by virtue of “suspicious transaction” disclosures under section 12(1) to their local and overseas counterparts, for the purpose of promoting cooperation in preventing and suppressing terrorist financing. The purpose of the new section 12D is to enable information obtained by the law enforcement agencies by the use of compulsory powers to be similarly transmitted to their local and overseas counterparts and to permit such information to be transmitted to the United Nations provided that the Ministry of Foreign Affairs of the People’s Republic of China approves. It can be noted that the new section 12D is modelled on section 6 of the Organized and Serious Crimes Ordinance (Cap. 455). Section 6 of Cap. 455 permits the disclosure of information acquired under sections 3, 4 and 5. These sections correspond to the new sections 12A, 12B and 12C in the Bill.

19. Our intention is that the disclosure provisions in the Bill will enable the law enforcement agencies to share among themselves information obtained through enforcement actions for effective

prevention and investigation of terrorism financing offences. In any event, the provisions should be read subject to the more specific provisions for disclosure of personal data in the Personal Data (Privacy) Ordinance (Cap. 486). There will not be “unrestricted general disclosure” of the information concerned.

New sections 18(2A) and (2B) - compensation

20. Referring to paragraphs 13 and 14 above, we consider that “serious default” is the appropriate test for compensation. The new sections 18(2A) and (2B) extend the power in the existing section 18 to award compensation where property has been frozen (in circumstances where it should not have been) to the situation where property has been seized pursuant to the new section 12G. They in fact closely follow the wording of section 27(5A) and (5B) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405).

Schedule – consequential amendments

21. The new sections 25A(9) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) and the Organized and Serious Crimes Ordinance (Cap. 455) are modelled on the new section 12(6) in the Bill. All three new provisions are intended to permit information (in relation to terrorist property, the proceeds of indictable offences or drug trafficking) which has been disclosed to an authorized officer to be transmitted by that authorized officer -

- (a) within Hong Kong – to the law enforcement body which would be appropriate to deal with the information; and
- (b) outside Hong Kong – to the particular authority which deals with anti-terrorism, drug trafficking or serious crimes.

22. As such the provisions are simply directed towards ensuring that information disclosed pursuant to the three Ordinances ends up with the appropriate law enforcement body.