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Dear Mrs Chan,

**Review of compensation provision under
the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575)**

I refer to the meeting of the Panel on Security on 20 February 2003, at which the Hon Albert Ho suggested that the Administration should further consider relaxing the criterion of “serious default” in the existing section 18 of the United Nations (Anti-Terrorism Measures) Ordinance (the Ordinance)(Cap. 575) for compensating a person who has suffered loss as a result of a wrongful specification under section 5 or 6, having regard to the following circumstances –

- (a) the Chief Executive (CE) could expeditiously specify a person or property not designated by the United Nations as terrorist/terrorist associate or terrorist property, albeit with prior court authorization, if he was satisfied that the person or property was terrorist/terrorist associate or terrorist property. Similarly, the Secretary for Security could expeditiously freeze funds if she had reasonable grounds to suspect that the funds were terrorist funds. It could be envisaged that such specification and freezing actions would most probably be based on intelligence from overseas jurisdictions instead of the Administration’s own information. It was not common for the Administration to be statutorily empowered to proceed with such

expeditious actions based mainly on second-hand information from overseas, which could pose serious consequences to persons affected by the actions;

- (b) In view of the grave consequences of terrorist acts and the need to protect public interest, the court would be inclined to approve applications from CE to specify a person or property as terrorist/terrorist associate or terrorist property; and
- (c) Given the dire consequences of being specified as terrorist/terrorist associate, it was unfair to require a person who was wrongfully specified as terrorist/terrorist associate to prove that there had been some “serious default” on the part of the Government, as it was difficult for the person concerned to satisfy the court that the Government had acted in bad faith or negligently.

We have carefully looked into the points made by the Hon Ho as well as our review of the compensation provision under the Ordinance as set out in LC Paper No. CB(2)846/02-03(04). Our conclusion remains that section 18 is proportionate and reasonable, in that it is consistent with the position at common law and is based on established compensation criteria adopted in other existing ordinances. It is also noteworthy that anti-terrorism laws in other jurisdictions do not, generally speaking, provide for compensation for “wrongful” Government specifications.

Separately, the Legislative Council Assistant Legal Adviser has requested in her letter of 21 February 2003 our clarification of the following -

- (a) whether the right to claim damages under section 18 of the Ordinance is intended to be additional to the right to claim damages under the common law;
- (b) if that is the policy intent, and on the basis that the test of “serious default” is more stringent than the common law test of negligence or lack of good faith, kindly review whether section 18, as it now stands, may possibly replace the remedy available at common law. Reference could be made to section 102 of the Bills of Exchange Ordinance (Cap. 19) for an alternative way of drafting that would give effect to the intent and remove any doubt; and
- (c) if that is not the policy intent, please explain the policy and justifications for it.

We would like to re-affirm that section 18 is not intended to exclude other common law remedies a person may take against the Government. We are prepared nonetheless to discuss further with Members the need for an additional provision to be included in the Ordinance to clarify that other common law remedies are still available. We would also like to reiterate that section 18 is consistent with the common law position. Paragraph 14 of LC Paper No. CB(2)846/02-03(04) aims at addressing the view expressed by some Members that no other conditions should be imposed except for the requirement that the person has in consequence of the relevant specification suffered loss. The position at common law is however clearly spelt out in paragraphs 11 to 13 of the paper. On reflection, paragraph 14 may not have made this point clear, hence your view that the test of “serious default” is more stringent than the common law position. The last sentence of paragraph 14 would have been more appropriately worded as “it is consistent with the common law position that something more than negligence has to be established on the part of the Government.”

Yours sincerely,

(Mrs Margaret Chan)
for Secretary for Security