

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

Purpose

This paper addresses the issues raised in the submission of 31 October 2003 (CB(2)210/03-04(02)) from Mr Simon N M Young, Assistant Professor, Faculty of Law, University of Hong Kong.

Freezing of property

2. We have duly considered the existing mechanisms for issuing restraints orders on property under the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) and the Organized and Serious Crimes Ordinance (Cap. 455). For freezing of terrorist property, including both funds and non-fund property, our view is that speed is of paramount importance. It will be prudent not to underestimate the effectiveness of modern arrangements which enable non-fund property to be quickly liquidated or physically transferred out of Hong Kong -

- (a) Some financial institutions do provide speedy re-financing of real property, thus allowing terrorists and terrorist associates to liquidate their property and transfer the realized cash to another jurisdiction immediately;
- (b) Some terrorists and terrorist associates may have established close relations with their financial institutions, and are able to make arrangements for their property to be speedily liquidated; and
- (c) Some non-fund property such as cars, yachts and precious stones can be physically transported out of Hong Kong almost instantly.

3. Upon careful deliberation on the fact that judicial procedures will alert the terrorists or terrorist associates and an appeal mechanism is available under section 17 of the United Nations (Anti-Terrorism Measures) Ordinance (the Ordinance) (Cap. 575), we therefore propose to apply the freezing mechanism for terrorist funds under the existing section 6 to non-fund terrorist property.

4. The new section 15(1)(a) in the United Nations (Anti-Terrorism Measures)(Amendment) Bill 2003 (the Bill) provides that the Secretary for Security (S for S) may issue a licence specifying the manner in which the frozen property shall be dealt with.

5. The new section 6(10) provides that S for S may in a freezing notice give a direction that an authorized officer may seize the property concerned. The intention, as stated in section 6(10)(a), is to prevent the terrorist property, which has already been frozen by S for S in the notice based on “reasonable grounds to suspect”, from being removed from Hong Kong. This provision is important in urgent situations where there is reason to believe that the terrorist property concerned is being physically transported out of Hong Kong.

6. The new Part 4B provides that an authorized officer may apply to a magistrate for a warrant for entering premises to seize and detain any suspected terrorist property. The provisions are intended to cater for a wider range of situations in which the law enforcement agencies may seize suspected terrorist property for the purpose of institution of proceedings (whether in Hong Kong or elsewhere) against any person in relation to an offence with which the property is connected, or steps which may result in a freezing notice given by S for S under the new section 6(1).

Section 10 – prohibition on recruitment for terrorist groups

7. The submission proposes an “alternative” formulation to the new section 10 in the Bill (the Bill formulation). We consider the “alternative” formulation not acceptable for the following reasons -

- (a) Under the Bill formulation, all the elements of the offence (in both sections 10(1) and (2)) have to be proved by the prosecution beyond reasonable doubt. There is no burden on the accused to prove any of the elements. The “alternative” formulation, in the form of a defence, shifts the burden of proof (on a balance of probabilities) onto the accused;
- (b) The offence of “maintaining membership” is already covered by section 10(2) of the Bill formulation. Under that section a person is required to take all practicable steps to cease membership as soon as he knows or has reasonable grounds to

believe that he is a member of a specified organization. This spells out clearly what is required of the person and is more precise than prohibiting “maintaining membership”;

- (c) Section 10(1) of the Bill formulation makes it clear that the offence can only be committed in respect of a body. The prosecution will, accordingly, have to prove that the body has been specified under section 4(1) or 4(2) or 5(2), and that the accused knew or had reasonable grounds to believe that the body had been so specified.

Apart from the “maintaining membership” issue (see paragraph 7(b) above), section 10(1) of the Bill formulation will be to the same effect as section 10(1) proposed in the submission;

- (d) The organization will be specified by its name. The offence under the new section 10 is becoming a member of or recruiting members for that named organization; and
- (e) The submission suggests “terrorist associate” be replaced by “terrorist association”. “Terrorist associate” is a defined term which will be interpreted with reference to the definition. We do not consider the proposed replacement necessary.

Bombings Convention

8. Our intention is for the offences in the new Part 3A in the Bill to follow substantially the offences proscribed by the Bombings Convention. We will take the suggestions in the submission into consideration and examine if any refinements to the Bill are necessary.

Part 4B – seizure and detention of suspected terrorist property

9. The new Part 4B in the Bill is based on Part IVA of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405). The new Part 4B is directed towards ensuring that terrorist property can be detained pending further action in relation to it. Part IVA of Cap. 405 is, in like fashion, directed towards money which represents the proceeds of drug trafficking which is in the process of being imported into or exported from Hong Kong. One significant difference is that under the new Part 4B in the Bill the terrorist property can only be seized if a

magistrate has issued a warrant; under Part IVA of Cap. 405 the drug money can be seized by an authorized officer without warrant. In both Parts the continued detention of the property must be authorized by the Court of First Instance (or a District Court for Cap. 405) after a certain period. In that light, and bearing in mind that a judicial warrant is not required under Part IVA of Cap. 405, we consider it acceptable for the warrant to be issued by a magistrate.

10. The new section 12G(1) is to enable search warrants to be issued to cover the following situations -

- (a) where there is reasonable cause to suspect that there is terrorist property in any premises;
- (b) where there is reasonable cause to suspect that a relevant offence has been committed with respect to any premises; and
- (c) where there is reasonable cause to suspect that a relevant offence is about to be committed with respect to any premises.

Noting the concerns in the submission, we will consider if the drafting of the provision needs to be improved.

11. The new section 12G(2) is not intended to provide for a warrantless seizure power. Its purpose is simply to put it beyond doubt that the law enforcement agencies when exercising the search power authorized under the new section 12G(1), upon uncovering relevant materials required to be produced under the new section 12A, 12B or 12C, are empowered to seize, remove and detain those materials if they are suspected to be terrorist property. We will consider if the drafting of the provision needs to be improved for clarifying the intention.

12. The new section 12G(3)(a) provides that the law enforcement agencies may stop and search any person found on any premises if in relation to the premises any suspected terrorist property has been seized pursuant to the new section 12G(1). The provision is similar to section 52(1)(f)(ii) of the Dangerous Drugs Ordinance (Cap. 134). Comparable provisions can be found in section 5 of the Biological Weapons Ordinance (Cap. 491), section 13 of the Crimes Ordinance (Cap. 200) and section 40 of the Firearms and Ammunition Ordinance (Cap. 238).

13. The new section 12I(5) is based on section 24C(5) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405). In practical terms, if property is detained pursuant to the new Part 4B, steps will be taken to have the property frozen pursuant to section 6. Section 15 already provides that access to frozen property can be granted by a licence.

14. The new section 12I(4) is based on section 24C(4) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405). It is considered that the grounds on which an affected person may challenge the continued detention of seized property are adequate. The basis on which an authorized officer may make application pursuant to the new section 12I(4)(b) need to be wider to cover a situation where it is decided not to take further steps to freeze the property or institute proceedings.

Compensation

15. 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.

16. 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.