

Hong Kong's Anti-Terrorism Measures Under Fire

Simon N.M. Young

Centre for Comparative and Public Law

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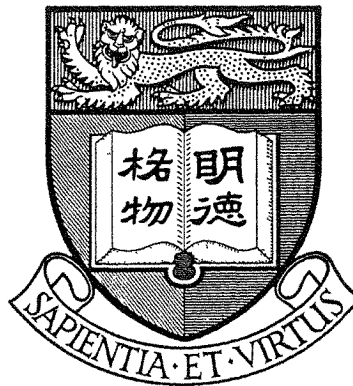
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Simon N.M. Young**

Introduction

Following behind other jurisdictions, Hong Kong tabled its post September 11th anti-terrorism legislation for first reading on April 17, 2002.¹ The United Nations (Anti-Terrorism Measures) Bill (hereinafter the "Bill"), was aimed at implementing the mandatory requirements of Resolution 1373, adopted by the Security Council under Chapter VII of the United Nations Charter on September 28, 2001. With the amount of time available for drafting the Bill, one might have expected a comprehensive, balanced and carefully reasoned piece of proposed legislation. However, the Bill failed to satisfy these expectations. It was the subject of intense criticism by legislators, legal professionals, public interest and human rights groups. In response to these criticisms, the government promptly proposed many substantial amendments, thereby confirming its numerous defects.

The central problem with the original Bill was that, in trying to satisfy international obligations to curtail terrorist activity and terrorist financing, the proposed scheme over-reached this objective by imposing many unnecessary coercive powers and procedures. Essentially, there were inadequate safeguards for the protection of human rights and property rights of innocent persons. To compound these problems, the government attempted to rush the Bill through the Legislative Council before the summer 2002 recess, notwithstanding some vocal opposition in favour of more time for consideration and public consultation.² The government's expedient approach to the Bill left legislators and members of the community with very little opportunity to ponder the implications of the numerous ad hoc changes that were being proposed. In the end the government succeeded and the original Bill was passed, after some being substantially amended, on July 12,

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¹ United Nations (Anti-Terrorism Measures) Bill, Hong Kong Gazette L.S. No. 3, Issue 15, Vol. 6, 2002, p. C491. The anti-terrorism legislation of most major nations (e.g. Canada, United Kingdom, United States, Australia) was enacted and brought into force before 2002. See Legal Services Division (LegCo Secretariat), "A comparison of Overseas Anti-Terrorism Legislation on Listing Process", LC Paper No. LS 98/01-02, which can be found at <http://www.legco.gov.hk/yr01-02/english/bc/bc59/papers/bc590603cb2-ls98-e.pdf>, for a list of the commencement dates of various anti-terrorism laws enacted by other countries.

² When the Administration gave notice on July 10th to resume the Second Reading of the Bill, the Bills Committee unanimously passed a motion expressing "deep regret", because taking such action before the scrutiny of the Bill was completed was "at variance with the established practice of the Legislative Council." See "Report of the Bills Committee on the United Nations (Anti-Terrorism Measures) Bill" (28 June 2002), LC Paper No. CB(2)2401/01-02, which can be found at <http://www.legco.gov.hk/yr01-02/english/hc/papers/hc0628cb2-2401.pdf>.

2002, only 87 days after first reading. About half of the provisions in the United Nations (Anti-Terrorism Measures) Ordinance (Cap 575) (hereinafter “the Ordinance”), particularly the ones not dependent on the passage of subsidiary legislation, was brought into operation on August 17, 2002.³

The political process behind the passing of the Bill is as much a subject of criticism as the Bill itself. This paper documents critical commentary on the Bill in the context of its legislative history. The author, having participated in the consultation process, gained a unique and first-hand perspective into the legislative process. This paper reproduces the author’s written submissions provided to the Bills Committee on two occasions in June 2002, as well as comments by the government in reply to the first submission.⁴

By juxtaposing these submissions between the text of the original Bill and the final Ordinance, a picture of how the Bill evolved in light of concerns for fundamental freedoms and human rights emerges. For the most part, the picture shows the government heeding the criticisms and making concessions, most likely because the Bill was so severely flawed in the first place and the felt urgency to have the Ordinance passed before the summer recess. However, the picture is not entirely satisfactory as there remain some provisions that may trap the innocent, particularly the new offence which makes it a crime to “become a member of, or begin to serve in any capacity with” a person specified as a UN designated terrorist.⁵ This issue and other unanswered questions about the potential breadth of the Ordinance are documented in this paper. The submissions are organized under the following headings:

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³ All provisions are in operation except ss. 3 (as it relates to ss. 8 and 10), 5, 6, 8, 10, 13, 14(1) (as it relates to s. 8), 14(2) and (3), 14(4) (as it relates to s. 10), 15, 17 and 18. See L.N. 137 of 2002.

⁴ The documents referred to here were before the Bills Committee and can be found on the Bills Committee’s website at <http://www.legco.gov.hk/english/>.

⁵ United Nations (Anti-Terrorism Measures) Ordinance (Cap 575), s. 10(1)(b). For more, see discussion at *infra* note 16.

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A. Scheme for Specifying and Revoking Specifications of ‘Terrorists’, ‘Terrorist Associates’, ‘Terrorist Property’

The Bill introduced four new terms to the laws of Hong Kong: ‘terrorist’, ‘terrorist act’, ‘terrorist associate’, and ‘terrorist property’. The Bill, however, did not make it an offence to be a ‘terrorist’ or ‘terrorist associate’, or even to commit a ‘terrorist act’. Instead, according to the Secretary for Security, the Bill was meant “to implement, through a minimalist approach, resolution 1373 of the United Nations Security Council...and certain recommendations of the Financial Action Task Force on Money Laundering (FATF).”⁶ It was the government’s intention to consider at a later stage implementing the other elements of the UN Resolution and FATF recommendations and provisions from the latest international conventions against terrorism, e.g., the International Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppression of the Financing of Terrorism.⁷ Consequently, the content of the Bill and Ordinance was concerned mostly with the financing and money laundering dimensions of terrorism. It did not contain the more controversial measures seen in the anti-terrorism legislation of other countries, such as new offences prohibiting terrorist activities, preventive detention, trials in military courts, and wiretap authorization.

⁶ Regina Ip’s speech made in moving the second reading of the United Nations (Anti-Terrorism Measures) Bill on April 17, 2002 in the Legislative Council can be found in Press Release: “LC: United Nations (Anti-Terrorism Measures) Bill second reading” at <http://www.info.gov.hk/gia/general/200204/17/0417208.htm>.

⁷ *Ibid.* The International Convention for the Suppression of Terrorist Bombings, G.A. Res. 164, U.N. GAOR, 52d Sess., 72d mtg., Annex, Agenda Item 152, U.N. Doc. A/RES/52/164 (1998), reprinted in 37 I.L.M. 249, was ratified by the People’s Republic of China on November 13, 2001. Its application to Hong Kong was extended on the same date. However, the International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, 54th Sess., U.N. Doc. A/RES/54/109, Annex (2000), which entered into force Apr. 10, 2002, was only signed by the People’s Republic of China on November 13, 2001, and its application has not been extended to Hong Kong. Many of the other multilateral treaties targeting specific terrorist activities, such as hijacking, hostage taking, crimes against internationally protected persons, and use of plastic explosives, apply to and are incorporated in Hong Kong. The implemented provisions can be found in Aviation Security Ordinance, Cap. 494, Fugitive Offenders (Safety of Civil Aviation) Order, L.N. 204 of 1997, L.S. No 2 to Gazette No 19/1997, Internationally Protected Persons and Taking of Hostages Ordinance, Cap 468, and Fugitive Offenders (Internationally Protected Persons and Hostages) Order, L.N. 205 of 1997, L.S. No. 2 to Gazette No 19/1997.

To deal effectively with the problem of terrorist financing and money laundering, the Bill employed the idea of specification, which is new to the law of money laundering in Hong Kong. Specification serves two main purposes: (a) it permits a court to presume persons or things to be terrorists, terrorist associates, or terrorist property (as the case may be), unless the contrary is proven, thereby making the task of proof much easier for the government when related coercive actions are taken; and (b) it notifies the public of persons and things to be cautious of when trying to comply with the legislation.

Specification at the domestic level also allows for a convenient interface with the international system of designating persons and entities connected with terrorist activities undertaken by a United Nations Security Council Committee since 1999. While it is true that no immediate coercive consequences arise from a specification alone, it is the indirect effects on persons and property that gives rise to the need for close scrutiny of the processes underlying both the making and revoking of specifications.

United Nations (Anti-Terrorism Measures) Bill

(First Reading April 17, 2002)

2. Interpretation

(1) In this Ordinance, unless the context otherwise requires---

...

"entity" (實體) means any body of persons (including individuals), whether corporate or unincorporate;

...

"terrorist" (恐怖分子) means a person who commits, or attempts to commit, a terrorist act or who participates in or facilitates the commission of a terrorist act;

"terrorist act" (恐怖主義行為)---

(a) subject to paragraph (b), means the use or threat of action where---

(i) the action---

- (A) involves serious violence against a person;
- (B) involves serious damage to property;
- (C) endangers a person's life, other than that of the person committing the action;
- (D) creates a serious risk to the health or safety of the public or a section of the public;
- (E) is designed seriously to interfere with or seriously to disrupt an electronic system; or
- (F) is designed seriously to interfere with or seriously to disrupt an essential service, facility or system, whether public or private; and

(ii) the use or threat is---

(A) designed to influence the Government or to intimidate the public or a section of the public; and

(B) made for the purpose of advancing a political, religious or ideological cause;

(b) in the case of paragraph (a)(i)(F), does not include the use or threat of action in the course of any advocacy, protest, dissent or stoppage of work;

"terrorist associate" (與恐怖分子有聯繫者) means---

- (a) an entity owned or controlled, directly or indirectly, by a terrorist; or
- (b) a person who is designated by the Committee of the Security Council of the United Nations established pursuant to the United Nations Resolution 1267 of 15 October 1999;

"terrorist property" (恐怖分子財產) 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 to 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;

...

4. Specification of persons and property as terrorists, terrorist associates or terrorist property

- (1) Where the Chief Executive has reasonable grounds to believe that a person is a terrorist, the Chief Executive may publish a notice in the Gazette specifying the name or names of the person.
- (2) Where the Chief Executive has reasonable grounds to believe that a person is a terrorist associate, the Chief Executive may publish a notice in the Gazette specifying the name or names of the person.
- (3) Where the Chief Executive has reasonable grounds to believe that any property is terrorist property, the Chief Executive may publish a notice in the Gazette specifying the property.
- (4) For the avoidance of doubt, it is hereby declared that a notice under subsection (1), (2) or (3) is not subsidiary legislation.
- (5) Subject to section 16(3)(a), for the purposes of this Ordinance, it shall be presumed, in the absence of evidence to the contrary, that -
 - (a) a person specified in a notice under subsection (1) is a terrorist;
 - (b) a person specified in a notice under subsection (2) is a terrorist associate;
 - (c) property specified in a notice under subsection (3) is terrorist property.
- (6) Where -
 - (a) a person or property is specified in a notice under subsection (1), (2) or (3), as the case may be; and
 - (b) either -
 - (i) the Chief Executive ceases to have reasonable grounds to believe that the person or property is a terrorist, terrorist associate or terrorist property, as the case may be; or
 - (ii) the Court of First Instance has granted an application under section 16 which relates to the person or property, as the case may be,then the Chief Executive shall, as soon as is practicable, by notice published in the Gazette, revoke the notice to the extent that it relates to the person or property, as the case may be.
- (7) A notice under subsection (1), (2) or (3) which has not been revoked under subsection (6) shall expire on the 3rd anniversary of the date of its publication in the Gazette.
- (8) For the avoidance of doubt, it is hereby declared that neither subsection (6) nor (7) shall operate to prevent the Chief Executive from again exercising the Chief Executive's power under subsection (1), (2) or (3) in respect of a person or property who or which has ceased to be specified in a notice under subsection (1), (2) or (3) by virtue of the operation of subsection (6) or (7).

...

16. Applications to Court of First Instance

- (1) Where a notice has been published under section 4(1), (2) or (3), or a notice given under section 5(1), then -
- (a) in the case of a notice under section 4(1) or (2), any person specified in the notice, or any person acting for or on behalf of the person so specified, may at any time make an application to the Court of First Instance for the notice to be revoked to the extent that it relates to the person so specified;
 - (b) in the case of a notice under section 4(3), any person by, for or on behalf of whom any property specified in the notice is held may at any time make an application to the Court of First Instance for the notice to be revoked to the extent that it relates to the property so specified;
- ...
- (2) A person who makes an application under subsection (1)(a), (b) or (c) shall give a copy of the application and any affidavit and other relevant documents in support -
- (a) to the Secretary for Justice and, in the case of an application under subsection (1)(b) or (c), to any other person by, for or on behalf of whom the property or funds concerned is or are held; and
 - (b) not later than 7 days before the date fixed for the hearing of the application.
- (3) On an application under subsection (1)(a), (b) or (c) -
- (a) the presumption mentioned in section 4(5) shall not be applicable to the proceedings; and
 - (b) the Court of First Instance shall grant the application unless it is satisfied that -
 - (i) where subsection (1)(a) is applicable, the Chief Executive had and continues to have reasonable grounds to believe that the person specified in the notice concerned under section 4(1) or (2) is a terrorist or terrorist associate;
 - (ii) where subsection (1)(b) is applicable, the Chief Executive had and continues to have reasonable grounds to believe that the property specified in the notice concerned under section 4(3) is terrorist property;
- ...
- (4) For the avoidance of doubt, it is hereby declared that section 14 of the High Court Ordinance (Cap. 4) [NB: right of appeal in civil matters] shall apply to any judgment or order of the Court of First Instance arising from proceedings under this section.

First Written Submission to Bills Committee dated June 14, 2002

1. The Administration has not chosen a scheme involving prior judicial authorization; instead, the specifications of 'terrorist', 'terrorist associate' and 'terrorist property' are made by the executive on an undemonstrated basis of "reasonable grounds to believe". It is left to affected individuals to bring applications before a judge to have the Chief Executive's specification reviewed in the Court of First Instance (CFI).

2. In considering whether this is an acceptable scheme, it is important to note the implications of specifying someone as a 'terrorist' or 'terrorist associate' and something as 'terrorist property'. It is to be noted that these implications follow irregardless of whether the specified individual has already been convicted and punished for the offences forming the basis of the specification. The implications are many and serious:

- (a) all property of a specified terrorist and terrorist associate is liable to be seized and forfeited (s. 13, Schedule 3: s. 2);
- (b) all property of a specified terrorist and terrorist associate is liable to be restrained,

without prior judicial authorization, and forfeited (ss. 5, 13, 19);

- (c) the homes, vehicles and bodies of specified terrorists and terrorist associates are liable to be searched without warrant for the purpose of identifying terrorist property (Schedule 3: s. 2);
- (d) when terrorist property is found on an aircraft, ship, vehicle, or in any place or premises, all other persons on or in the same aircraft, ship, vehicle, place or premises may be detained and searched (Schedule 3: s. 2);
- (e) all specified terrorists and terrorist associates can be detained and searched by an authorized officer at any time (on the reasonable assumption that the specified person will generally have some kind of property in his or her physical possession) (Schedule 3: s. 2(f));
- (f) all persons who have had commercial dealings with a specified terrorist or terrorist associate (whether they knew that person's specified status or not) may have to forfeit any property given to them by the specified persons (s. 2: part (b)(ii) of "terrorist property", s. 13);
- (g) all persons who have had commercial dealings with specified persons will have legal duties to report their knowledge of or reasonable grounds to suspect the existence of terrorist property (s. 11).

3. Given the significant implications for human rights and property rights of both specified and non-specified individuals, the scheme must provide sufficient safeguards to prevent abuse and undue impairment of rights. In principle, there is nothing inherently wrong with the executive listing of specified persons and property. Indeed many countries have chosen to implement Security Council Resolution 1373 in this manner. This kind of system offers a very expeditious means of securing the objectives of Resl'n 1373 and has an effective way of integrating with the existing system of designation used by the Security Council Committee. But such a system will only be acceptable if it provides adequate in-built safeguards. Imposing the burden of proof on the government to justify its specification when an application is brought by an affected person is a good and necessary safeguard. However, having regard to all the serious implications of the proposed system, I believe there are more safeguards that should be in place:

- (a) The three year expiry period is too long. One of the most important purposes of having an expiry date is that it forces the Administration to review its original determination and to correct any errors originally made. This error-correction function is essential and should not have to wait three years. As well, a short expiry period will also force the Administration to keep its list current with the designations of the Security Council Committee or any other body or country. *It is recommended that the expiry period be shortened to one or two years at most.*
- (b) When an application is brought under s. 16, it is clear that the Secretary for Justice carries the burden of proof to justify the continued specifications. However, it is not clear what the standard of proof should be. *If it is intended that the standard should be the civil standard of balance of probabilities, then it is best to spell this out, possibly right after the words "unless it is satisfied" in s. 16(2)(b).* One reason for this is that these proceedings are rather extraordinary,

and I am sure the judiciary would appreciate as much guidance as possible. But more importantly, I think by spelling out this standard, it highlights the important onus on the government to produce admissible evidence to convince a judge that the Chief Executive (CE) had reasonable grounds to believe. In other words, the nature of the review should not be to simply ‘rubber-stamp’ the reasons given by the CE but to assess the credibility and truth-worthiness of the evidence tendered to determine if grounds to believe genuinely existed and whether those grounds were reasonable.

- (c) In cases where an application is granted under s. 16, it is unclear who has the decisive power to revoke a notice. Is it the CFI under s. 16(3)(b) or the CE under s. 4(6)? *If it is intended to be the former, then sub-paragraph 4(6)(b)(ii) should be deleted to avoid confusion.* From the point of view of safeguards, this is a necessary amendment.
- (d) Under the present scheme, there is nothing to prevent the CE from re-specifying a person or property, which has already been the subject of a revocation order made by the CFI. Conceivably, rather than trying to appeal an unfavourable ruling [assuming such a right of appeal exists], the government could simply try to have the CE re-specify the person or property without there having been any material change in circumstances. Arguably such conduct could constitute an abuse of process, but realistically to achieve such vindication would require an applicant to bring another court proceeding. *To prevent such abuses, it is recommended that there be some limits imposed on the ability of the CE to re-specify persons or property previously the subject of a revoked notice.* Perhaps the most reasonable limit is to *require that there be a material change in circumstances before the re-specification can take place.*

In light of these comments and those from others, the Administration significantly revamped the scheme for making and revoking specifications. As described below in the Second Written Submission, the revamped scheme involved two mechanisms of making specifications: one was purely by executive fiat while the other involved prior judicial authorization. As for the revocation mechanism, initially, the Administration proposed that *ex parte* court ordered specifications be reviewed in the Court of Appeal. As the comments below illustrate, this was highly controversial as it effectively turned the Court of Appeal into a fact-finding court of first instance. In its draft Committee Stage Amendments of June 28, 2002, the Administration recognized this problem and changed the initial court of review to the Court of First Instance.

Second Written Submission to Bills Committee dated June 22, 2002

1. The scheme has been substantially modified. There are now two methods to specify ‘terrorists’, ‘terrorist associates’ and ‘terrorist property’. The first method, under s. 4, is by the Chief Executive’s (CE’s) published notice. This method is limited to persons and property designated by the United Nations (UN). While the CE’s power to specify here is discretionary,

there is no express obligation on the CE to verify or confirm the factual basis of each UN designation. But in practice, the CE will need to have regard to the reliability of both the specific designation and the system of designation in properly exercising his or her discretion.

2. Revocation of specifications made under this first method is possible in only one instance: when the UN ceases to maintain the relevant designation. When this occurs, the CE must “as soon as practicable” revoke the notice by publishing a new notice in the Gazette. The revocation does not take effect until the new notice has been published. It is unclear why the revocation needs to await the publication of the new notice. Since the CE’s specification is almost wholly dependent on whether there exists an applicable UN designation, it would seem that the cessation of the UN designation should automatically trigger a revocation under our domestic law. An automatic revocation will help prevent any unjustified enforcement measures from being taken in the period pending the CE’s publication of the new notice. *It is recommended that s. 4(6) be amended to provide for the automatic revocation of the CE’s notice upon the cessation of designation by the relevant UN Committee. It is further recommended that the duty and power of the CE in s. 4(6) to revoke be replaced with the lesser authority of “specifying that the original notice has been revoked”, much like in s. 4A(7).*

3. The second method of specification, under s. 4A, is by application to the Court of First Instance (CFI) for an order making the relevant specification. The CFI must believe on reasonable grounds that the person or property the subject of the application is a “terrorist, terrorist associate or terrorist property, as the case may be” before making the order. I believe this newly added method, which involves a system of prior judicial authorization, is a positive amendment and should be maintained.

4. However, the avenues for revoking orders made under this method are somewhat problematic. There are two ways of seeking a revocation. The first way allows the Secretary for Justice, on behalf of the CE, to make an application in the CFI to have the order revoked. There is no suggestion that the application must go before the same CFI judge who made the original order. The second way allows affected persons to bring applications to the Court of Appeal (CA) to have the order revoked. There are no express rights conferred for appealing these CA decisions to the Court of Final Appeal (CFA), so presumably any available appeal rights will be governed by the Hong Kong Court of Final Appeal Ordinance.

5. I see a number of problems with this proposed system of revocation. It strikes me as being illogical, unworkable in practice, inefficient, and unfair to specified and other affected persons. Indeed, I find the previous s. 16, which provided for review applications in the CFI, as being preferable. A distillation of various points is provided below:

a. I am unclear why there is not simply a single avenue of review in the CFI available to both the government and affected persons for the purposes reviewing and possibly revoking the original order. Indeed, such an arrangement is *the norm in criminal procedure* where the original order was made *ex parte*. For example, under the existing money laundering laws (Drug Trafficking (Recovery of Proceeds) Ordinance and Organized and Serious Crimes Ordinance), an *ex parte* application in the CFI to restrain property is usually followed by an *inter partes* motion in the CFI to have the merits of the restraint order reviewed.

b. *By forcing affected persons to bring their review in the CA, the scheme*

effectively denies an affected person the right to appeal the review decision to a higher court. While it may be possible to bring a further appeal to the CFA, given that Court's stringent leave requirement, such appeals are more theoretical than real. By having a single avenue of review in the CFI, however, allows for more regular appeals of CFI reviews to the CA. It would also be a good idea to confer an equal right of appeal to both the government and affected persons given the overall importance of these specifications.

- c. *The scheme effectively turns the CA into a 'court of first instance' when it comes to reviewing specifications.* The wording of s. 16 suggests that the CA is not simply to perform an appellate review function of the original judge's order, but rather to make a *de novo* determination of whether there exists reasonable grounds to believe that a person is a 'terrorist' or 'terrorist associate' or property is 'terrorist property'. The necessary implication of this is that the CA must perform a fact-finding role, which is rather extraordinary given the amount of time this function normally requires. Burdening the CA with this jurisdiction is not a wise decision, especially at this moment when there has been recent reports that the caseload of the CA has sharply increased.⁸

In the result, the Ordinance maintained the dual system of specification: (a) specification of UN designates by Chief Executive (s. 4); and (b) specification by court order (s. 5). With the latter form of specification, the government appeared to recognize the need to have adequate safeguards against arbitrary and unrestrained use of this stigmatizing mechanism. Specification by court order involves prior judicial authorization, which is perhaps the most important safeguard that was added to the original proposal. As well, the government reduced the duration of a specification from three years to two (s. 5(8)). While one might ask whether this is still too long, the presence of other safeguards and the likelihood that the use of this specification mechanism will be exceptional in the context of Hong Kong tends to lessen the concern.

There is a presumption that the initial authorization will occur in the context of an *inter partes* court proceeding (s. 5(9)). The occasions when a court may proceed *ex parte* are to be specified in the rules of court. It is hoped that those occasions be restricted to situations where the individual concerned fails to attend despite receiving notice or cannot be notified with reasonable efforts because the individual's location is unknown or outside the jurisdiction. If the specification occurs *ex parte*, persons specified or affected may challenge the order in an *inter partes* hearing (s. 17(1)). The language of s. 17(3)(b), that the court "shall grant the application unless...satisfied" the person or property is a terrorist, terrorist associate, or terrorist property, seems to make clear that the burden of justifying the specification is on the government. It is also clear that a right of appeal lies to the Court of Appeal for all parties from an *inter partes* decision on specification (s. 2(7)).

⁸ See A. Lo & P. Moy, "Caseload triples for appeal court judges", S.C.M.P., 3 Dec 2001.

Even if no private person challenges a specification, the Chief Executive has a duty to apply to the court to have the specification revoked if it receives information that undermines the original grounds for believing the person or property is a terrorist, terrorist associate, or terrorist property (s. 5(5)).

By contrast, what is of greater concern with the specification system is the absence of safeguards in the mechanism for specifying UN designated persons and property. It involves no prior judicial authorization as it is the Chief Executive who retains the exclusive power to specify and to revoke a specification. The rights to bring judicial challenges to the specification, by way of application or appeal, do not exist for these specifications. It would seem the only way to challenge the specification in a Hong Kong court is by judicial review, but the bases for review would likely be limited to jurisdictional grounds without going behind the reasons for the specification (unless somehow the complaint amounted to a violation of a constitutional right). There is no limited time duration for a specification, and there is no duty on the Chief Executive to revoke the specification if it receives information to doubt its factual basis. Indeed, the only express method of revocation is if the person or property ceases to be designated by the relevant UN Committee (s. 4(6)).

This mechanism of specification by Chief Executive is an interesting example of a domestic legal order intermeshing with the international legal order to the extent that events at the international level almost dictate legal consequences at the domestic level. The qualifier ‘almost’ is used because on paper the Chief Executive’s power to specify a UN designated person is discretionary; but in practice, it is hard to imagine that there will be anything less than a wholesale adoption of the entire UN list, especially given the impetus of UN Security Council Resolutions 1267 (1999), 1333 (2000), 1373 (2001) and 1390 (2002). With the domestic dependence on the international system, persons affected by the specifications made in Hong Kong may have to focus their attention not on the subservient processes at the domestic level but rather on the processes of the decision-making body at the international level. Essentially, this raises the fundamental question of how names come to be placed on and removed from lists prepared by the UN Security Council Committees.

United Nations (Anti-Terrorism Measures) Ordinance (Cap 575)

(Enacted July 18, 2002; partially in operation August 23, 2002⁹)

2. Interpretation

(1) In this Ordinance, unless the context otherwise requires---

“Committee” (聯合國委員會) means-

(a) the Committee of the United Nations Security Council established pursuant to the United Nations Security Council Resolution 1267 of 15 October 1999; or

⁹ For details, see *supra* note 3.

- (b) any other committee-
- (i) of the United Nations;
 - (ii) established pursuant to a United Nations Security Council Resolution made, or a United Nations Convention which has entered into force, after 15 October 1999; and
 - (iii) the function of which, in whole or in part, is to designate persons or property as terrorists, terrorist associates or terrorist property, as the case may be;

"entity" (實體) means any body of persons (including individuals), whether corporate or unincorporate;

...

"terrorist" (恐怖分子) means a person who commits, or attempts to commit, a terrorist act or who participates in or facilitates the commission of a terrorist act;

"terrorist act" (恐怖主義行爲)-

(a) subject to paragraph (b), means the use or threat of action where-

(i) the action (including, in the case of a threat, the action if carried out)-

(A) causes serious violence against a person;

(B) causes serious damage to property;

(C) endangers a person's life, other than that of the person committing the action;

(D) creates a serious risk to the health or safety of the public or a section of the public;

(E) is intended seriously to interfere with or seriously to disrupt an electronic system; or

(F) is intended seriously to interfere with or seriously to disrupt an essential service, facility or system, whether public or private; and

(ii) the use or threat is-

(A) intended to compel the Government or to intimidate the public or a section of the public; and

(B) made for the purpose of advancing a political, religious or ideological cause;

(b) in the case of paragraph (a)(i)(D), (E) or (F), does not include the use or threat of action in the course of any advocacy, protest, dissent or industrial action;

"terrorist associate" (與恐怖分子有聯繫者) means an entity owned or controlled, directly or indirectly, by a terrorist;

"terrorist property" (恐怖分子財產) 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 to 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;

...

4. Specification by Chief Executive of persons and property as terrorists, terrorist associates or terrorist property

(1) Where a person is designated by the Committee as a terrorist, the Chief Executive may publish a notice in the Gazette specifying the name or names of the person.

(2) Where a person is designated by the Committee as a terrorist associate, the Chief Executive may publish a notice in the Gazette specifying the name or names of the person.

(3) Where any property is designated by the Committee as terrorist property, the Chief Executive may publish a notice in the Gazette specifying the property.

(4) For the avoidance of doubt, it is hereby declared that a notice under subsection (1), (2) or (3) is not subsidiary legislation.

(5) For the purposes of this Ordinance, it shall be presumed, in the absence of evidence to the contrary, that-

(a) a person specified in a notice under subsection (1) is a terrorist;

(b) a person specified in a notice under subsection (2) is a terrorist associate;

(c) property specified in a notice under subsection (3) is terrorist property.

- (6) Where-
- (a) a person or property is specified in a notice under subsection (1), (2) or (3), as the case may be; and
 - (b) the person or property ceases to be designated by the Committee as a terrorist, terrorist associate or terrorist property, as the case may be,
- then-
- (c) immediately upon the occurrence of that cesser, the notice shall be deemed to be revoked to the extent that it relates to the person or property, as the case may be; and
 - (d) the Chief Executive shall, as soon as is practicable and for information purposes, publish a notice in the Gazette stating that the first-mentioned notice has been revoked to the extent that it relates to the person or property, as the case may be (or words to the like effect).

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

- (1) The Chief Executive may make an application to the Court of First Instance for an order to specify-
- (a) the person the subject of the application as a terrorist or terrorist associate; or
 - (b) the property the subject of the application as terrorist property.
- (2) Where an application is made under subsection (1), the Court of First Instance shall only make the order sought by the application if it is satisfied that the person or property the subject of the application is a terrorist, terrorist associate or terrorist property, as the case may be.
- (3) The Chief Executive shall cause an order under subsection (2) to be published in the Gazette.
- (4) Where an order under subsection (2) is published in the Gazette, then, subject to section 17(3)(a), for the purposes of this Ordinance, it shall be presumed, in the absence of evidence to the contrary, that-
- (a) a person specified in the order as a terrorist is a terrorist;
 - (b) a person specified in the order as a terrorist associate is a terrorist associate;
 - (c) property specified in the order as terrorist property is terrorist property.
- (5) Where-
- (a) a person or property is specified in an order under subsection (2) published in the Gazette; and
 - (b) the Chief Executive receives information which causes him to have reasonable grounds to believe that the person or property is not, or is no longer, a terrorist, terrorist associate or terrorist property, as the case may be,
- then the Chief Executive shall, as soon as is practicable, make an application to the Court of First Instance for the order to be revoked to the extent that it relates to the person or property, as the case may be.
- (6) The Court of First Instance shall grant an application under subsection (5).
- (7) Where-
- (a) a person or property is specified in an order under subsection (2) published in the Gazette; and
 - (b) the Court of First Instance has granted an application-
 - (i) under subsection (6) which relates to the person or property, as the case may be; or
 - (ii) under section 17(3)(b) which relates to the person or property, as the case may be,
- then the Chief Executive shall, as soon as is practicable, cause a notice to be published in the Gazette specifying that the order has been revoked to the extent that it relates to the person or property, as the case may be.
- (8) An order under subsection (2) published in the Gazette which has not been revoked in its

entirety by virtue of the granting of an application under subsection (6) or section 17(3)(b) shall expire on the 2nd anniversary of the date of its publication in the Gazette.

(9) For the avoidance of doubt, it is hereby declared that an application under subsection (1) shall be made inter partes except where the application falls within the circumstances specified in rules of court made for the purposes of this section.

17. Applications to Court of First Instance

(1) Where-

(a) an application under section 5(1) has been made ex parte and in consequence thereof an order under section 5(2) has been published in the Gazette, then-

(i) any person specified in the order, or any person acting for or on behalf of the person so specified, may at any time make an application to the Court of First Instance for the order to be revoked to the extent that it relates to the person so specified;

(ii) any person by, for or on behalf of whom any property specified in the order is held, or any other person in respect of whom the Court of First Instance is satisfied that the person is affected by the order, may at any time make an application to the Court of First Instance for the order to be revoked to the extent that it relates to the property so specified;

...

(2) A person who makes an application under subsection (1) shall give a copy of the application (and an affidavit, if any, and other relevant documents, if any, in support)-

(a) to the Secretary for Justice and, in the case of an application under subsection (1)(a)(ii) or (b), to any other person by, for or on behalf of whom the property or funds concerned is or are held; and

(b) not later than 7 days before the date fixed for the hearing of the application or such shorter period as the Court of First Instance may permit pursuant to rules of court.

(3) On an application under subsection (1)-

(a) in the case of an application under subsection (1)(a)(i) or (ii), the presumption mentioned in section 5(4) shall not be applicable, whether for the purposes of the proceedings or otherwise, immediately upon the initiation of the proceedings and until the conclusion of the proceedings (including the conclusion of any appeal arising out of the proceedings); and

(b) the Court of First Instance shall grant the application unless-

(i) where subsection (1)(a)(i) is applicable, the Court of First Instance is satisfied that the person specified in the order concerned under section 5(2) is a terrorist or terrorist associate, as the case may be;

(ii) where subsection (1)(a)(ii) is applicable, the Court of First Instance is satisfied that the property specified in the order concerned under section 5(2) is terrorist property;

...

2. Interpretation

...

(7) For the avoidance of doubt, it is hereby declared-

(a) that section 14 of the High Court Ordinance (Cap 4) [NB: right of appeal in civil matters] shall apply to any judgment or order of the Court of First Instance arising from proceedings-

(i) under section 5 in the case of an application under section 5(1) made inter partes; or

ii) under section 13, 17 or 18;

B. Scheme for Freezing Terrorist Funds

United Nations (Anti-Terrorism Measures) Bill

(First Reading April 17, 2002)

5. Freezing of funds

(1) Where the Secretary has reasonable grounds to suspect that any funds held by any person are terrorist property, the Secretary may, by notice in writing specifying the funds, direct that the funds not be made available, directly or indirectly, to any person except under the authority of a licence granted by the Secretary for the purposes of this section.

(2) Where -

(a) funds are specified in a notice under subsection (1); and

(b) either -

(i) the Secretary ceases to have reasonable grounds to suspect that the funds are terrorist property; or

(ii) the Court of First Instance has granted an application under section 16 which relates to the funds,

then the Secretary shall, as soon as is practicable, by notice in writing revoke the notice to the extent that it relates to the funds.

(3) A notice under subsection (1) which has not been revoked under subsection (2) shall expire on the 3rd anniversary of the date on which it was signed by the Secretary.

(4) For the avoidance of doubt, it is hereby declared that -

(a) neither subsection (2) nor (3) shall operate to prevent the Secretary from again exercising the Secretary's power under subsection (1) in respect of funds which have ceased to be specified in a notice under subsection (1) by virtue of the operation of subsection (2) or (3);

(b) the revocation under subsection (2), or the expiry under subsection (3), of a notice under subsection (1) shall not affect the application of section 7 to the funds which were specified in the notice.

(5) A notice under subsection (1) or (2) shall be given to the person holding the funds concerned ("the recipient"), and shall require the recipient to send a copy of the notice without delay to the person whose funds they are, or for or on whose behalf the funds are held ("the owner").

(6) A recipient shall be treated as complying with subsection (5) if, without delay, he sends a copy of the notice mentioned in that subsection to the owner at his last-known address or, if he does not have an address for the owner, he makes arrangements for a copy of the notice to be supplied to the owner at the first available opportunity.

14. Offences

...

(2) A person who contravenes a notice under section 5(1) commits an offence and is liable -

(a) on conviction on indictment to a fine and to imprisonment for 7 years;

(b) on summary conviction to a fine at level 6 and to imprisonment for 1 year.

(3) A person who contravenes a requirement under section 5(5) commits an offence and is liable on conviction to a fine at level 6 and to imprisonment for 3 months.

...

(11) Summary proceedings for an offence under this Ordinance, being an offence alleged to have been committed outside the HKSAR, may be commenced at any time not later than 12 months from

the date on which the person charged first enters the HKSAR after committing the offence.

(12) No proceedings for an offence under this Ordinance shall be instituted in the HKSAR except by or with the consent of the Secretary for Justice.

16. Applications to Court of First Instance

(1) Where a notice has been...given under section 5(1), then -

...

- (c) in the case of a notice under section 5(1), any person -
 - (i) by, for or on behalf of whom any funds specified in the notice are held; or
 - (ii) who otherwise has an interest -
 - (A) in the funds so specified; and
 - (B) prescribed by rules made under section 17as an interest for the purposes of this paragraph,
may at any time make an application to the Court of First Instance for the notice to be revoked to the extent that it relates to the funds so specified.

(2) A person who makes an application under subsection (1)(a), (b) or (c) shall give a copy of the application and any affidavit and other relevant documents in support -

- (a) to the Secretary for Justice and, in the case of an application under subsection (1)(b) or (c), to any other person by, for or on behalf of whom the property or funds concerned is or are held; and
- (b) not later than 7 days before the date fixed for the hearing of the application.

(3) On an application under subsection (1)(a), (b) or (c) -

- (a) the presumption mentioned in section 4(5) shall not be applicable to the proceedings; and
- (b) the Court of First Instance shall grant the application unless it is satisfied that -

...

- (iii) where subsection (1)(c) is applicable, the Secretary had and continues to have reasonable grounds to suspect that the funds specified in the notice concerned under section 5(1) are terrorist property.

(4) For the avoidance of doubt, it is hereby declared that section 14 of the High Court Ordinance (Cap. 4) [NB: right of appeal in civil matters] shall apply to any judgment or order of the Court of First Instance arising from proceedings under this section.

First Written Submission to Bills Committee dated June 14, 2002

4. A scheme similar to the one used for specification is used for freezing terrorist funds. Given the nature of the power involved and the immediate interference with property rights, there are inherent difficulties with using a scheme, which does not require any prior judicial authorization, for freezing assets. Indeed, under the existing money laundering laws of Hong Kong (i.e. Drug Trafficking (Recovery of Proceeds) Ordinance & Organized and Serious Crimes Ordinance), restraint and charging orders can only be obtained with prior authorization from a judicial officer who makes his or her decision upon sworn information. Also, within the Bill itself, where it provides for the search and seizure of terrorist property in a specific place or premise, it contemplates the prior issuance of a warrant by a magistrate unless impracticable (see Schedule 3: s. 2). What makes the scheme even more alarming is that the Secretary for Security can freely delegate her powers to “any person” with or without restrictions (s. 15(3)).

5. From the Administration’s perspective, the justification for using such a scheme would

probably lie in the need to take expeditious and effective steps to restrain terrorist funds. As well, it might be pointed out that the practical effect of executing a direction to freeze involves little or no inference with an individual's bodily integrity or privacy – unlike search warrants. Accepting for the moment this justification (especially having regard to the latter point), if this scheme is to be credible, as with the specification scheme, there must be adequate safeguards to prevent abuse and minimize interference with rights. From this perspective, the present proposal is lacking in many respects:

- (a) The only way to access frozen funds pending forfeiture or revocation is by way of “the authority of a licence granted by the Secretary for the purposes of this section” (s. 5(1)). In other words, there is no way to go before a court to try to obtain partial release of the funds (for legitimate purposes) or a variation of the conditions of the direction. The only option is to try to seek relief from the very adversarial party that sought the freeze in the first place. This is unacceptable from a natural justice point of view. *Without a means to seek relief from an impartial arbiter, I believe the present scheme risks violating Article 10 (right to an independent and impartial tribunal) of the Hong Kong Bill of Rights and Article 35 (right of access to courts and judicial remedies) of the Basic Law.*

Administration's Response to Comment (21 June 2002)

Judicial Review is available in respect of a decision by S for S to not issue a licence.

- (b) The expression “authority of a licence...for the purposes of this section” is an ambiguous expression; it is given no elaboration in the Bill, and there seems to be no indication that such elaboration will be forthcoming in subsidiary legislation. There are a number of problems with this lack of direction:
1. Affected persons need to know if they can obtain a licence to access the funds for legitimate purposes (such as for paying reasonable living and legal expenses). The discretionary practice of releasing restrained or charged property for these purposes under the existing money laundering regime is well established (see Order 115, r. 4 of the Rules of the High Court). It is to be noted that the restraint power under the Bill is quite broad as it encompasses all property of a specified terrorist or terrorist associate – the property is tainted by mere association with the specified person. Thus, *there is good reason to offer some mitigation from the possible harsh consequences of these measures from the point of view of legal representation and the innocent family dependents of the affected persons.*

Administration's Response to Comment (21 June 2002)

The circumstances under which the Secretary for Security will grant a licence under Clause 5 have to be considered on a case-by-case basis. Some examples are the funds are required to support the affected person's family or subject to bankruptcy or winding-up proceedings.

2. Innocent third parties who have ignorantly had commercial dealings with terrorists and terrorist associates need to know if their acquired property is safe. The definition of ‘terrorist property’ is exceptionally broad and includes funds that were “used to finance or otherwise assist the commission of a terrorist act”. It is conceivable that the money paid by a terrorist to a third party supplier of goods (e.g. plane, car, etc.) which are ultimately used in a terrorist act will be considered ‘terrorist property’ regardless of whether the supplier knew or had reasonable grounds to suspect the malevolent intentions of the purchaser. *It is recommended that the funds acquired by innocent suppliers be exempted from the freezing scheme.*

Administration’s Response to Comment (21 June 2002)

If a terrorist buys a car from an innocent supplier, the car will be “terrorist property” but the funds used to purchase the car will have lost their character as “terrorist property”. Please also refer to the Administration’s response to issues raised by the Hong Kong Association of Banks.

3. *The clause which qualifies the power to grant a licence, (i.e. “for the purposes of this section”) is unclear and should be deleted.* There is a risk that this clause will be used in an arbitrary fashion to prevent the access to frozen funds for legitimate purposes.

Administration’s Response to Comment (21 June 2002)

We agree.

- (c) As remarked in relation to the specification scheme, the three year expiry date is much too long. Under the freeze scheme, there is a greater reason for imposing a shorter expiry period: the ability to forfeit ‘terrorist property’ under s. 13. In other words, a shorter expiry period will force the government to act diligently either in seeking forfeiture or to release frozen funds if there are insufficient grounds to bring a forfeiture case. *It is recommended that freeze notices should expire at six months or a year unless proceedings have been brought under s. 13 to have the funds forfeited.*

Administration’s Response to Comment (21 June 2002)

The amended Clause 5 in the draft Committee Stage Amendments (CSAs) addresses this issue.

- (d) As with the specification scheme, there is a lack of clarity concerning who has the decisive power to revoke. *It is recommended that subparagraph 5(2)(b)(ii) be deleted.*

Administration's Response to Comment (21 June 2002)

Clause 5(2)(b) sets out the circumstances when the Secretary for Security shall revoke her earlier notice. We do not consider that subparagraph (ii) should be deleted.

- (e) As remarked in relation to the specification scheme, where a court revokes a notice to freeze funds, there must be limits imposed on the ability of the Secretary for Security to re-freeze those same funds. *It is recommended that the hurdle of finding a 'material change in circumstances' be added.*

Administration's Response to Comment (21 June 2002)

The amended Clause 5(3B) in the CSAs addresses this issue.

- (f) Not all funds frozen by notice will already be in an interest bearing account. As with seized funds (see s. 4 of Schedule 3), the Secretary for Justice should be given the power to direct that the funds be deposited into an interest bearing account. *Without taking such steps to preserve the value of the asset, it could very well be that if the direction to freeze turns out to be unjustified, the government will be liable to pay the innocent party the interest that could have been earned during the period of restraint.*

Administration's Response to Comment (21 June 2002)

We do not consider it necessary to do so. The new Clause 16A of the draft CSAs enables the affected person to apply for compensation.

Second Written Submission to Bills Committee dated June 22, 2002

6. It seems the Administration has made little changes to the Freezing Schemes. Accordingly, I maintain my previous comments and concerns with the proposals. Additionally, the proposal would make the CA the first judicial body to consider the merits of the freezing order. For the reasons given in the previous paragraph, this arrangement is highly problematic and makes even less sense in the context of restraining property.

7. *For the reasons I stated in paragraph 5(c) of my previous letter, I believe the two year expiry period is still too long when it comes to freezing orders.* In the Bill Committee proceedings for the Drug Trafficking and Organized Crimes (Amendment) Bill 2000, it appears the Administration has agreed to an expiry period of six months for restraint orders made where a defendant has been arrested and released on bail (see http://www.legco.gov.hk/yr00-01/english/bc/bc53/papers/bc53_0527cb2-2044-1e.pdf). It is hard to understand how a freezing order with respect to property of a person who has not even been arrested can be allowed to stand for two years without expiration.

United Nations (Anti-Terrorism Measures) Ordinance (Cap 575)

(Enacted July 18, 2002; partially in operation August 23, 2002¹⁰)

6. Freezing of funds

(1) Where the Secretary has reasonable grounds to suspect that any funds held by any person are terrorist property, the Secretary may, by notice in writing specifying the funds, direct that the funds not be made available, directly or indirectly, to any person except under the authority of a licence granted by the Secretary.

(2) Where-

(a) funds are specified in a notice under subsection (1); and

(b) either-

(i) the Secretary ceases to have reasonable grounds to suspect that the funds are terrorist property; or

(ii) the Court of First Instance has granted an application under section 17 which relates to the funds,

then the Secretary shall, as soon as is practicable, by notice in writing revoke the notice to the extent that it relates to the funds.

(3) Subject to subsection (4), a notice under subsection (1) which has not been revoked under subsection (2) shall expire on the 2nd anniversary of the date on which it was signed by the Secretary.

(4) Where an application under section 13 has been made to the Court of First Instance-

(a) in respect of funds, or part thereof, specified in a notice under subsection (1); and

(b) before the expiration of the notice under subsection (3),

then, subject to subsection (2), the notice shall not expire in relation to the funds, or part thereof, as the case may be, until the date, if any, on which-

(c) proceedings relating to the application (including proceedings relating to any appeal) are no longer pending; and

(d) the funds, or part thereof, as the case may be, have not been forfeited in consequence of those proceedings.

(5) Where a notice under subsection (1) has been revoked under subsection (2) or has expired under subsection (3) or (4), the Secretary shall not again exercise the power under subsection (1) in respect of the funds specified in the notice unless there has been a material change in the grounds in respect of which the Secretary proposes to again exercise that power in respect of the funds.

(6) For the avoidance of doubt, it is hereby declared that the revocation under subsection (2), or the expiry under subsection (3) or (4), of a notice under subsection (1) shall not affect the application of section 8 to the funds which were specified in the notice.

(7) A notice under subsection (1) or (2) shall be given to the person holding the funds concerned ("the recipient"), and shall require the recipient to send a copy of the notice without delay to the person whose funds they are, or for or on whose behalf the funds are held ("the owner").

(8) A recipient shall be treated as complying with subsection (7) if, without delay, he sends a copy of the notice mentioned in that subsection to the owner at his last-known address or, if he does not have an address for the owner, he makes arrangements for a copy of the notice to be supplied to the owner at the first available opportunity.

¹⁰ For details, see *supra* note 3.

14. Offences

...

- (2) A person who contravenes a notice under section 6(1) commits an offence and is liable-
- (a) on conviction on indictment to a fine and to imprisonment for 7 years;
 - (b) on summary conviction to a fine at level 6 and to imprisonment for 1 year.

- (3) A person who, without reasonable excuse, contravenes a requirement under section 6(7) commits an offence and is liable on conviction to a fine at level 6 and to imprisonment for 3 months.

...

- (8) Summary proceedings for an offence under this Ordinance, being an offence alleged to have been committed outside the HKSAR, may be commenced at any time not later than 12 months from the date on which the person charged first enters the HKSAR after committing the offence.

- (9) No proceedings for an offence under this Ordinance shall be instituted in the HKSAR except by or with the consent of the Secretary for Justice.

15. Supplementary provisions applicable to licences mentioned in section 6(1) or 8

- (1) Without prejudice to the generality of conditions and exceptions which may be specified in a licence mentioned in section 6(1)-

- (a) such conditions may relate to specifying the manner in which the funds to which the licence relates shall be held from time to time; and
- (b) such exceptions may relate but are not limited to-
 - (i) the reasonable living expenses;
 - (ii) the reasonable legal expenses; and
 - (iii) the payments liable to be made under the Employment Ordinance (Cap 57), of any person by, for or on behalf of whom the funds are held.

- (2) Without prejudice to the generality of conditions and exceptions which may be specified in a licence mentioned in section 8, such exceptions may relate to the reasonable living expenses, reasonable legal expenses and the payments liable to be made under the Employment Ordinance (Cap 57) of the person second-mentioned in that section to which the licence relates.

17. Applications to Court of First Instance

- (1) Where-

...

- (b) a notice has been given under section 6(1), then any person by, for or on behalf of whom any funds specified in the notice are held, or any other person in respect of whom the Court of First Instance is satisfied that the person is affected by the notice, may at any time make an application to the Court of First Instance for the notice to be revoked to the extent that it relates to the funds so specified.

- (2) A person who makes an application under subsection (1) shall give a copy of the application (and an affidavit, if any, and other relevant documents, if any, in support)-

- (a) to the Secretary for Justice and, in the case of an application under subsection (1)(a)(ii) or (b), to any other person by, for or on behalf of whom the property or funds concerned is or are held; and
- (b) not later than 7 days before the date fixed for the hearing of the application or such shorter period as the Court of First Instance may permit pursuant to rules of court.

- (3) On an application under subsection (1)-

...

- (b) the Court of First Instance shall grant the application unless-

...

(iii) where subsection (1)(b) is applicable, the Court of First Instance is satisfied that there are reasonable grounds to suspect that the funds specified in the notice concerned under section 6(1) are terrorist property.

(4) An application for-

- (a) the grant of a licence mentioned in section 6(1) or 8 may be made by any person affected by the operation of that section; or
- (b) the variation of a licence mentioned in section 6(1) or 8 may be made by any person affected by the licence.

(5) A person who makes an application under subsection (4) shall give a copy of the application (and affidavit, if any, and other relevant documents, if any, in support)-

- (a) to the Secretary for Justice and to any other person affected by the operation concerned of section 6(1) or 8, or the licence concerned, as the case may be; and
- (b) not later than 7 days before the date fixed for the hearing of the application or such shorter period as the Court of First Instance may permit pursuant to rules of court.

(6) The Court of First Instance shall not grant an application under subsection (4) unless it is satisfied that it is reasonable in all the circumstances of the case to do so.

(7) Where-

- (a) proceedings relating to an application under subsection (4) (including proceedings relating to any appeal) are no longer pending; and
- (b) the licence to which the application relates-
 - (i) is, or is still, required to be granted; or
 - (ii) is, or is still, required to be varied,as the case may be,

then the Secretary shall, as soon as is practicable, cause the licence to be granted or varied, as the case may be, accordingly.

C. Scheme for Freezing Property Other than Funds

United Nations (Anti-Terrorism Measures) Bill

(First Reading April 17, 2002)

19. Regulations - freezing of property (other than funds)

(1) The Secretary may make regulations for the purposes of enabling persons to be prohibited from dealing with any property (other than funds) -

- (a) that the Secretary has reasonable grounds to suspect is terrorist property; and
- (b) except under the authority of a licence granted by the Secretary for the purposes of the regulations.

(2) Without limiting the generality of subsection (1), regulations made under this section may provide for applications to be made to, and orders to be made by, the Court of First Instance for the purposes mentioned in subsection (1).

(3) Regulations made under this section may -

- (a) prescribe offences in respect of contraventions of the regulations (including contravention of any orders made under the regulations); and
- (b) provide for the imposition in respect of any such offence of -
 - (i) on conviction on indictment, a fine and imprisonment for not more than 7 years;
 - (ii) on summary conviction, a fine at not more than level 6 and imprisonment for not more than 1 year.

First Written Submission to Bills Committee dated June 14, 2002

6. The scheme for executive freezing of terrorist property other than funds suggested in s. 19 is similar to the scheme for freezing funds, but it suffers from the same deficiencies and has even more shortcomings given its lack of elaboration.

7. One fundamental difference in the two schemes is that under s. 19, property is frozen by way of subsidiary legislation made by the Secretary for Security rather than by way of written notice. One consequence of this difference is that s. 16, which provides for court review of the Secretary's decision, is unavailable to affected persons. Indeed it is unclear if there will be any means to have statutory judicial review of the freezing regulations. Section 19(2) states that the regulations may provide for applications to be made to, and orders to be made by, the CFI "for the purposes mentioned in subsection (1)". Those purposes would seem to include only the power to freeze subject to a licence – there is no obvious power to revoke mentioned in subsection (1). *It is recommended that there be greater clarification in the main body of the legislation as to the availability of judicial review.*

Administration's Response to Comment (21 June 2002)

The Regulations to be made under Clause 19 are subsidiary legislation which shall be subject to the scrutiny of the Legislative Council. Sub-clause (2) provides that the Regulations may provide for applications to be made to the Court.

8. There is a complete absence of any safeguards in s. 19, and there is no indication that safeguards will be forthcoming in the regulations. It is recommended that provisions be added either in the main body of the legislation or in the regulations to ensure adequate safeguards against the abuse of executive power and undue interference with rights. *In particular, safeguards providing for a reasonable expiry period, notice to affected persons, judicial review and supervision, release of property for legitimate purposes, re-freezing of property only after a material change in circumstances, should be included.*

Administration's Response to Comment (21 June 2002)

It is envisaged that any Regulations made pursuant to Clause 19 (which, as indicated are subsidiary legislation and subject to scrutiny by Legislative Council) will replicate Clause 5 and the relevant parts of Clauses 16 and 16A in the draft CSAs.

9. Finally, *I think the Administration should reconsider its approach of using regulations to freeze property other than funds.* It strikes that this move has been driven more by expediency than by logic or principle. I do not believe there is any essential difference between a scheme to freeze funds and a scheme to freeze property other than funds. Both involve such extreme powers that they deserve elaboration in primary legislation rather than mere subsidiary legislation. And the scheme for freezing other property requires elaboration **now** in order for legislators to make an informed decision as to whether to accept the Bill in its entirety. It should

not be assumed that a scheme of this importance is a matter of mere detail to be worked out in the future.

Administration's Response to Comment (21 June 2002)

The suggestion is noted. However we do not see the need to deal with the freezing of property, other than funds, at the present stage.

United Nations (Anti-Terrorism Measures) Ordinance (Cap 575)

(Enacted July 18, 2002; partially in operation August 23, 2002¹¹)

19. Regulations

- (1) The Secretary may make regulations for the purposes of enabling persons to be prohibited from dealing with any property (other than funds)-
- (a) that the Secretary has reasonable grounds to suspect is terrorist property; and
 - (b) except under the authority of a licence granted by the Secretary for the purposes of the regulations.
- (2) The Secretary may make regulations for the purposes of-
- (a) facilitating the obtaining of evidence and information for the purpose of securing compliance with or detecting evasion of this Ordinance;
 - (b) facilitating the obtaining of evidence in relation to the commission of an offence under this Ordinance; and
 - (c) enabling property suspected of being terrorist property to be seized and detained while its origin or derivation is further investigated or consideration is given to the institution (whether in the HKSAR or elsewhere) of proceedings-
 - (i) against any person in relation to an offence with which the property is connected; or
 - (ii) which may result in the property being specified in a notice under section 6(1) or which may result in the forfeiture or other confiscation of the property.
- (3) The Secretary may make regulations for the purposes of authorizing public officers to perform functions or exercise powers under regulations made under this section.
- (4) The Secretary may make regulations for the purposes of providing compensation to be paid, on grounds specified in the regulations, to a person who has suffered loss in consequence of any act done or omission made under regulations made under this section in respect of any property.
- (5) Regulations made under this section may provide for applications to be made to, and orders to be made by, a magistrate or court for any purposes mentioned in subsection (1), (2) or (4).
- (6) Regulations made under this section may-
- (a) prescribe offences in respect of contraventions of the regulations (including contravention of any orders made under the regulations); and
 - (b) provide for the imposition in respect of any such offence of-
 - (i) on conviction on indictment, a fine and imprisonment for not more than 7 years;
 - (ii) on summary conviction, a fine at not more than level 6 and imprisonment for not more than 1 year.
- (7) Regulations made under this section shall be subject to the approval of the Legislative Council.

¹¹ For details, see *supra* note 3.

D. The New Criminal Prohibitions

United Nations (Anti-Terrorism Measures) Bill

(First Reading April 17, 2002)

PART 3
PROHIBITIONS RELATING TO TERRORISTS,
TERRORIST ASSOCIATES AND TERRORIST PROPERTY

6. Prohibition on supply of funds to terrorists and terrorist associates

A person shall not provide or collect, by any means, directly or indirectly, funds -

- (a) with the intention that the funds be directly or indirectly supplied to or otherwise used by; or
- (b) knowing or having reasonable grounds to believe that the funds will be directly or indirectly supplied to or otherwise used by,

a person who the first-mentioned person knows or has reasonable grounds to believe is a terrorist or terrorist associate.

7. Prohibition on making funds, etc. available to terrorists and terrorist associates

No person shall, except under the authority of a licence granted by the Secretary for the purposes of this section, make any funds or financial (or related) services available, directly or indirectly, to or for the benefit of a person who the first-mentioned person knows or has reasonable grounds to believe is a terrorist or terrorist associate.

8. Prohibition on supply of weapons to terrorists and terrorist associates

A person shall not provide or collect, by any means, directly or indirectly, weapons -

- (a) with the intention that the weapons be directly or indirectly supplied to or otherwise used by; or
- (b) knowing or having reasonable grounds to believe that the weapons will be directly or indirectly supplied to or otherwise used by,

a person who the first-mentioned person knows or has reasonable grounds to believe is a terrorist or terrorist associate.

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

(1) A person shall not -

- (a) recruit another person to become a member of, or to serve in any capacity with; or
- (b) become a member of, or begin to serve in any capacity with,

a person specified in a notice under section 4(1) or (2).

(2) Where a person is a member of, or is serving in any capacity with, a person specified in a notice under section 4(1) or (2) immediately before the date of publication in the Gazette of the notice, the first-mentioned person shall take all practicable steps to cease to be such a member or to cease to so serve, as the case may be.

10. Prohibition against false threats of terrorist acts

(1) A person shall not communicate or make available by any means any information which he

knows or believes to be false to another person with the intention of inducing in him or any other person a false belief that a terrorist act has been, is being or will be carried out.

(2) A person shall not -

- (a) place any article or substance in any place; or
- (b) despatch any article or substance by post, rail or by any other means of sending things from one place to another, with the intention of inducing in another person a false belief that -
- (c) the article or substance is likely to explode or ignite and thereby cause personal injury or damage to property; or
- (d) the article contains or the substance consists of -
 - (i) any dangerous, hazardous, radioactive or harmful substance;
 - (ii) any toxic chemical; or
 - (iii) any microbial or other biological agent, or toxin, that is likely to cause death, disease or personal injury or damage to property.

(3) For the purposes of subsections (1) and (2), a reference to a person inducing in another person a false belief does not require the first-mentioned person to have any particular person in mind as the person in whom he intends to induce the false belief.

...

14. Offences

(1) Any person who contravenes section 6, 7 or 8 commits an offence and is liable -

- (a) on conviction on indictment to a fine and to imprisonment for 14 years;
- (b) on summary conviction to a fine at level 6 and to imprisonment for 2 years.

...

(4) A person who contravenes section 9(1) or (2) or 10(1) or (2) commits an offence and is liable -

- (a) on conviction on indictment to a fine and to imprisonment for 7 years;
- (b) on summary conviction to a fine at level 6 and to imprisonment for 1 year.

...

(10) Where any body corporate is guilty of an offence under this Ordinance, and that offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he, as well as the body corporate, shall be guilty of that offence, and shall be liable to be proceeded against and punished accordingly.

(11) Summary proceedings for an offence under this Ordinance, being an offence alleged to have been committed outside the HKSAR, may be commenced at any time not later than 12 months from the date on which the person charged first enters the HKSAR after committing the offence.

(12) No proceedings for an offence under this Ordinance shall be instituted in the HKSAR except by or with the consent of the Secretary for Justice.

First Written Submission to Bills Committee dated June 14, 2002

10. In principle, I have some reservations about the imposition of the quasi-objective forms of liability in the offences set out in ss. 6 to 8. This is especially so when Resol'n 1373 only requires criminalization on purely subjective *mens rea* standards. Nevertheless, I recognize that these standards will not depart from the norm in Hong Kong in respect of existing money laundering

offences.

11. Operative paragraph 1(a) of Resl'n 1373 requires all States to "prevent and suppress the financing of terrorist acts". I wonder if the Administration has done all that is possible to give effect to this requirement. Particularly, do the existing provisions do enough to prevent carelessness on the part of possible lending agents or institutions in identifying a terrorist or terrorist associate whose name appears on the CE's notices? *It may be necessary to create a regulatory offence to ensure that persons in a position to lend or leverage funds take reasonable care (at minimum) to check for the client's name on the CE's notices.* Given that this would be an offence with a purely objective standard of *mens rea*, I would not impose any penal sanction but rather a significant fine to convey the need to exercise due diligence.

Administration's Response to Comment (21 June 2002)

We do not consider it necessary to impose additional legal requirements upon concerned parties as suggested. Clause 11 (as amended in the draft CSAs) will require a person to make a report if he knows or suspects that property is terrorist property.

Second Written Submission to Bills Committee dated June 22, 2002

8. Section 9 makes it an offence for a person to "become a member of a person" specified in a notice or order. How does one 'become a member of a person'? If 'person' is simply referring to a corporate person than this makes sense. But what if we take 'person' in the individual sense? Is mere association enough? If so, then the offence has been drawn quite broadly. What about family relations? Does the offence automatically engulf all family members of terrorists and terrorist associates? *I recommend more consideration be given to s. 9 and to the use of more precise language in carving out an offence that is tailored to the mischief that is targeted.*

In the Bills Committee's progress Report to the House Committee at its meeting on June 28, 2002, the following was reported:

44. In response to comments raised by Mr Simon YOUNG, Assistant Professor, Faculty of Law, The University of Hong Kong and JUSTICE on clause 9, the Administration will amend clause 9 to limit the ambit of the clause to recruitment of persons to become members of bodies of persons which the recruiter knows or has reasonable grounds to believe have been specified.

Furthermore, in introducing her amendment to clause during the second reading debates, the Secretary for Security stated the following:

The purpose of clause 9 is very clear and simple. It prohibits a person from recruiting

another person to become a member of a terrorist organization or from becoming a member thereof. During the scrutiny of the Bill, some Members and legal experts pointed out that the wording of clause 9 was not clear enough regarding the requirement "A person shall not recruit another person to become a member of a person specified in a notice" and that the public would find it difficult to tell under what circumstances a person would be recruited as a member of another person. Moreover, the clause states that a person shall not begin "to serve in any capacity with" a terrorist organization. This would cover a scope that is too wide and would unnecessarily involve many people who are completely unrelated to terrorist organizations. For instance, a cleaning company may carry out general cleaning work for a terrorist organization but is in fact not a member of it.

We think this is a reasonable comment and so propose an amendment to clause 9, stating clearly that a person shall not recruit another person to become a member of a body of persons who are terrorists, rather than recruiting another person to become members of another person. And a person shall not become a member of a terrorist organization, rather than of another person. In addition, we have deleted "to serve in any capacity with" to make the provision clearer.¹²

United Nations (Anti-Terrorism Measures) Ordinance (Cap 575)

(Enacted July 18, 2002; partially in operation August 23, 2002¹³)

**PART 3
PROHIBITIONS RELATING TO TERRORISTS, TERRORIST
ASSOCIATES AND TERRORIST PROPERTY**

7. Prohibition on supply of funds to terrorists and terrorist associates

A person shall not provide or collect, by any means, directly or indirectly, funds-

- (a) with the intention that the funds be directly or indirectly supplied to or otherwise used by; or
- (b) knowing or having reasonable grounds to believe that the funds will be directly or indirectly supplied to or otherwise used by,

a person who the first-mentioned person knows or has reasonable grounds to believe is a terrorist or terrorist associate.

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

No person shall, except under the authority of a licence granted by the Secretary, make any funds or financial (or related) services available, directly or indirectly, to or for the benefit of a person who the first-mentioned person knows or has reasonable grounds to believe is a terrorist or terrorist associate.

9. Prohibition on supply of weapons to terrorists and terrorist associates

A person shall not provide or collect, by any means, directly or indirectly, weapons-

- (a) with the intention that the weapons be directly or indirectly supplied to or otherwise used by; or
- (b) knowing or having reasonable grounds to believe that the weapons will be directly or indirectly supplied to or otherwise used by,

a person who the first-mentioned person knows or has reasonable grounds to believe is a terrorist

¹² See *Official Record of Proceedings of the Hong Kong SAR Legislative Council*, July 11, 2002, 8990.

¹³ For details, see *supra* note 3.

or terrorist associate.

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

(1) A person shall not-

- (a) recruit another person to become a member of, or to serve in any capacity with; or
- (b) become a member of, or begin to serve in any capacity with, a person specified in a notice under section 4(1) or (2).

(2) Where a person is a member of, or is serving in any capacity with, a person specified in a notice under section 4(1) or (2) immediately before the date of publication in the Gazette of the notice, the first-mentioned person shall take all practicable steps to cease to be such a member or to cease to so serve, as the case may be.

11. Prohibition against false threats of terrorist acts

(1) A person shall not communicate or make available by any means any information which he knows or believes to be false to another person with the intention of causing alarm to the public or a section of the public by a false belief that a terrorist act has been, is being or will be carried out.

(2) A person shall not-

- (a) place any article or substance in any place; or
- (b) despatch any article or substance by post, rail or by any other means of sending things from one place to another, with the intention of causing alarm to the public or a section of the public by a false belief that-
- (c) the article or substance is likely to explode or ignite and thereby cause personal injury or damage to property; or
- (d) the article contains or the substance consists of-
 - (i) any dangerous, hazardous, radioactive or harmful substance;
 - (ii) any toxic chemical; or
 - (iii) any microbial or other biological agent, or toxin,that is likely to cause death, disease or personal injury or damage to property.

...

14. Offences

(1) Any person who contravenes section 7, 8 or 9 commits an offence and is liable-

- (a) on conviction on indictment to a fine and to imprisonment for 14 years;
- (b) on summary conviction to a fine at level 6 and to imprisonment for 2 years.

...

(4) A person who contravenes section 10(1) or (2) or 11(1) or (2) commits an offence and is liable-

- (a) on conviction on indictment to a fine and to imprisonment for 7 years;
- (b) on summary conviction to a fine at level 6 and to imprisonment for 1 year.

(5) A person who contravenes section 12(1) commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 3 months.

...

(8) Summary proceedings for an offence under this Ordinance, being an offence alleged to have been committed outside the HKSAR, may be commenced at any time not later than 12 months from the date on which the person charged first enters the HKSAR after committing the offence.

(9) No proceedings for an offence under this Ordinance shall be instituted in the HKSAR except by or with the consent of the Secretary for Justice.

Oddly enough, despite the Administration's acknowledgement of the problems with the original s. 10 offence involving membership, in the result it was the original offence which was enacted and not the amended one. When voting on the Secretary for Security's amendment was conducted, there were only 40 legislators present; twenty voted in favour of the amendment while 19 voted against it. Without a clear majority of votes, the amendment did not pass.¹⁴ It was reported that when the vote was held many of the absent legislators had gone on a dinner break.¹⁵ The Administration is aware of the problems with this provision and has stated that it will not bring it into operation until it is properly amended.¹⁶

E. The Reporting Duty and Offence

United Nations (Anti-Terrorism Measures) Bill

(First Reading April 17, 2002)

PART 4 DISCLOSURE OF KNOWLEDGE OR SUSPICION THAT PROPERTY IS TERRORIST PROPERTY

11. Disclosure of knowledge or suspicion that property is terrorist property

(1) Where a person knows or has reasonable grounds to suspect that any property is terrorist property, then the person shall disclose to an authorized officer the information or other matter -

- (a) on which the knowledge or suspicion is based; and
- (b) as soon as is practicable after that information or other matter comes to the person's attention.

(2) If a person who has made a disclosure referred to in subsection (1) does any act in contravention of section 6 or 7 (whether before or after the disclosure), and the disclosure relates to that act, the person does not commit an offence under section 14(1) in respect of that contravention if -

- (a) that disclosure is made before the person does that act and the person does that act with the consent of an authorized officer; or
- (b) that disclosure is made -
 - (i) after the person does that act;
 - (ii) on the person's initiative; and
 - (iii) as soon as it is practicable for the person to make it.

(3) A disclosure referred to in subsection (1) -

¹⁴ See *Official Record of Proceedings of the Hong Kong SAR Legislative Council*, July 11, 2002, 8990-9004 for the relevant debate on clause 9.

¹⁵ See A. Leung, A. Li & A. Lau, "Embarrassing hiccup for terror bill", *South China Morning Post*, 12 July 2002.

¹⁶ See Legal Service Division (Legislative Council), "Legal Service Division Report on Subsidiary Legislation Gazetted on 23 August 2002", which is Annex III of Legislative Council, "Paper for the House Committee Meeting on 4 October 2002" (prepared by S. Lam Ping-man, 2 Oct 2002: LC Paper No. LS 131/01-02), which can be found on the Hong Kong Legislative Council website.

- (a) shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract or by any enactment, rule of conduct or other provision;
- (b) shall not render the person who made it liable in damages for any loss arising out of -
 - (i) the disclosure;
 - (ii) any act done or omitted to be done in relation to the property concerned in consequence of the disclosure.

(4) Where a person knows or has reasonable grounds to suspect that a disclosure has been made under subsection (1), the person shall not disclose to another person any information or other matter which is likely to prejudice any investigation which might be conducted following that first-mentioned disclosure.

...

14. Offences

...

(5) A person who contravenes section 11(1) commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 3 months.

(6) A person who contravenes section 11(4) commits an offence and is liable -
 (a) on conviction on indictment to a fine and to imprisonment for 3 years;
 (b) on summary conviction to a fine at level 6 and to imprisonment for 1 year.

(7) In proceedings against a person for an offence under subsection (6), it is a defence to prove -
 (a) that he did not know or suspect that the disclosure concerned was likely to be prejudicial in the way referred to in section 11(4); or
 (b) that he had lawful authority or reasonable excuse for making that disclosure.

...

First Written Submission to Bills Committee dated June 14, 2002

12. The reporting obligation and offence in s. 11 follows the same format and standards proposed for similar offences in the Drug Trafficking and Organized Crimes (Amendment) Bill 2000. When considering s. 11, one quickly realizes some very significant problems when it comes to the disclosures expected of legal counsel in respect of the affairs of their clients. Given the very broad definition of 'terrorist property', whenever a specified terrorist or terrorist associate (and possibly members of their immediate family) retain a lawyer for any matter, that lawyer will have to disclose any information he or she comes across regarding the client's property. And given the 'tipping off' prohibition in s. 11(4), these disclosures will likely be secret. *These obligations, if taken seriously, pose significant intrusions on the traditional solicitor-client relationship and will probably adversely affect the ability of specified persons to obtain confidential legal assistance. Such consequences may have Bill of Rights and Basic Law implications.*

13. Other jurisdictions have taken this problem quite seriously. For example, in Canada, following the introduction of similar reporting duties on lawyers in 2001, the law societies across the country applied for court exemptions in each province from having to comply with the obligations pending a court challenge to their constitutional validity. (See website of the Federation of Law Societies of Canada for more details:

<http://www.flsc.ca/english/whatsnew/whatsnew.htm>) Many, if not all, of the courts hearing these applications granted these temporary exemptions. The comments by one of the judges in these cases are instructive in setting out the importance of the issue:

In imposing a duty on legal practitioners to give secret reports of their clients' transactions to a government agency, the legislation clearly impinges on, and alters, the traditional relationship between solicitors, or counsel, and their clients. It does not merely override a lawyer's ethical duty of confidentiality – something that has always been possible in legal proceedings with respect to matters not subject to solicitor-client privilege – it strikes at the lawyer's duty of loyalty and the client's privilege against self-incrimination as well as the principle that lawyers should be independent of government. The duty of loyalty is affected not only by the obligation to make secret reports to government about a client's transactions and personal details but, also, because of the inevitable involvement of the lawyer's personal interests and potential liability to severe penalties when decisions whether to report are to be made. [*Federation of Law Societies of Canada v. Attorney General of Canada* (2002), 57 O.R. (3d) 383 at 400 (S.C.J., per Cullity J.)]

14. Recognizing the importance of this issue, *it is recommended that there be an exemption from disclosure in situations where the legal advisor genuinely believes the disclosure will undermine the trust and confidentiality in the relationship that is essential to the effective representation of the client.*

Administration's Response to Comment (21 June 2002)

The new Clause 2(5) in the draft CSAs already addresses the issue.

The Clause 2(5) in the draft CSA referred to in the Administration's Response is as follows,

- 2(5) It is hereby declared that nothing in this Ordinance shall operate to restrict the law applicable to –
- (a) legal professional privilege;
 - or
 - (b) privilege against incrimination of self.

Second Written Submission to Bills Committee dated June 22, 2002

9. I want to highlight that my concerns with having lawyers make secret disclosures of suspected terrorist property is not simply a concern about disclosing privileged information. This is because confidential information about the client may not necessarily be covered by legal professional privilege, but would have to be secretly disclosed to the State if it formed the basis of the suspicion. It is the secret disclosure itself which hampers the essential trust in the relationship necessary for the full and effective representation of the client. *It follows that the new s. 2(5) will not adequately address these concerns. The only adequate solution to*

the problem is an express exemption from disclosure.

In the Administration's proposed Amendments of June 28, 2002, clause 2(5) has been modified further:

- 2(5) Nothing in this Ordinance shall –
- (a) require the disclosure of any items subject to legal privilege;
 - (b) authorize the search or seizure of any items subject to legal privilege; or
 - (c) restrict the privilege against self-incrimination.

“items subject to legal privilege” has the same meaning as in section 2(1) of the Organized and Serious Crimes Ordinance (Cap. 455);

United Nations (Anti-Terrorism Measures) Ordinance (Cap 575)

(Enacted July 18, 2002; partially in operation August 23, 2002¹⁷)

**PART 4
DISCLOSURE OF KNOWLEDGE OR SUSPICION THAT
PROPERTY IS TERRORIST PROPERTY**

12. Disclosure of knowledge or suspicion that property is terrorist property

(1) Where a person knows or suspects that any property is terrorist property, then the person shall disclose to an authorized officer the information or other matter-

- (a) on which the knowledge or suspicion is based; and
- (b) as soon as is practicable after that information or other matter comes to the person's attention.

(2) If a person who has made a disclosure referred to in subsection (1) does any act in contravention of section 7 or 8 (whether before or after the disclosure), and the disclosure relates to that act, the person does not commit an offence under section 14(1) in respect of that contravention if-

- (a) that disclosure is made before the person does that act and the person does that act with the consent of an authorized officer; or
- (b) that disclosure is made-
 - (i) after the person does that act;
 - (ii) on the person's initiative; and
 - (iii) as soon as it is practicable for the person to make it.

(3) A disclosure referred to in subsection (1)-

- (a) shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract or by any enactment, rule of conduct or other provision;
- (b) shall not render the person who made it liable in damages for any loss arising out of-
 - (i) the disclosure;
 - (ii) any act done or omitted to be done in relation to the property concerned in consequence of the disclosure.

(4) In the case of a person who was in employment at the relevant time, this section shall have effect in relation to disclosures to the appropriate person in accordance with the procedure established by his employer for the making of such disclosures as it has effect in relation to

¹⁷ For details, see *supra* note 3.

disclosures to an authorized officer.

(5) Where a person knows or suspects that a disclosure has been made under subsection (1) or (4), the person shall not disclose to another person any information or other matter which is likely to prejudice any investigation which might be conducted following that first-mentioned disclosure.

(6) In this section, "authorized officer" (獲授權人員) means a public officer authorized in writing by the Secretary for the purposes of this section.

...

14. Offences

...

(5) A person who contravenes section 12(1) commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 3 months.

(6) A person who contravenes section 12(5) commits an offence and is liable-

- (a) on conviction on indictment to a fine and to imprisonment for 3 years;
- (b) on summary conviction to a fine at level 6 and to imprisonment for 1 year.

(7) In proceedings against a person for an offence under subsection (6), it is a defence to prove-

- (a) that he did not know or suspect that the disclosure concerned was likely to be prejudicial in the way referred to in section 12(5); or
- (b) that he had lawful authority or reasonable excuse for making that disclosure.

(8) Summary proceedings for an offence under this Ordinance, being an offence alleged to have been committed outside the HKSAR, may be commenced at any time not later than 12 months from the date on which the person charged first enters the HKSAR after committing the offence.

(9) No proceedings for an offence under this Ordinance shall be instituted in the HKSAR except by or with the consent of the Secretary for Justice.

2. Interpretation

"items subject to legal privilege" (享有法律特權的品目) has the same meaning as in section 2(1) of the Organized and Serious Crimes Ordinance (Cap 455);

...

(5) Nothing in this Ordinance shall-

- (a) require the disclosure of any items subject to legal privilege;
- (b) authorize the search or seizure of any items subject to legal privilege; or
- (c) restrict the privilege against self-incrimination.

...

F. Coercive Powers to Obtain Evidence and Information

United Nations (Anti-Terrorism Measures) Bill

(First Reading April 17, 2002)

12. Obtaining of evidence and information, etc.

(1) Schedule 2 shall have effect in order to -

- (a) facilitate the obtaining of evidence and information for the purpose of securing compliance with or detecting evasion of this Ordinance;
- (b) facilitate the obtaining of evidence in relation to the commission of an offence under this Ordinance.

(2) Schedule 3 shall have effect in order to enable property suspected of being terrorist property to be seized and detained while its origin or derivation is further investigated or consideration is given to the institution (whether in the HKSAR or elsewhere) of proceedings -

- (a) against any person in relation to an offence with which the property is connected; or
- (b) which may result in the property being specified in a notice under section 5(1) or which may result in the forfeiture or other confiscation of the property.

...

SCHEDULE 2 EVIDENCE AND INFORMATION

1. Authorized officer may require person to furnish information, etc.

(1) Without prejudice to any other provision of this Ordinance or any other law, an authorized officer may request any person in or resident in the HKSAR to furnish to him any information, or to produce to him any material in his possession or control, which he may require for the purpose of securing compliance with or detecting evasion of this Ordinance, and any person to whom such a request is made shall comply with it within such time and in such manner as may be specified in the request.

(2) Nothing in subsection (1) shall be taken to require any person who has acted as counsel or solicitor for any person to disclose any privileged communication made to him in that capacity.

(3) Where a person is convicted of failing to furnish information or produce material when requested so to do under this section, the magistrate or court may make an order requiring him, within such period as may be specified in the order, to furnish the information or produce the material.

(4) The power conferred by this section to request any person to produce material shall include the power to take copies of or extracts from any material which is a document so produced and to request that person or, where that person is a body corporate, any other person who is a present or past officer of, or is employed by, the body corporate, to provide an explanation of such document.

2. Issue of warrant

(1) If any magistrate or judge is satisfied by information on oath given by any police officer, customs officer or authorized officer that --

- (a) there is reasonable ground for suspecting that an offence under this Ordinance has been or is being committed and that evidence in relation to the commission of the offence is to be found on any premises specified in the information, or in any vehicle, ship or aircraft so specified; or
- (b) any material that ought to have been produced under section 1 and has not been so produced is to be found on any such premises or in any such vehicle, ship or aircraft,

he may grant a search warrant authorizing any police officer, customs officer or authorized officer, together with any other persons named in the warrant and any other police or customs officers, to enter the premises specified in the information or, as the case may be, any premises upon which the vehicle, ship or aircraft so specified may be, at any time within one month from the date of the warrant and to search the premises or, as the case may be, the vehicle, ship or aircraft.

(2) Before or on exercising any power conferred by subsection (1), a person authorized by any such warrant shall, if requested so to do, produce evidence of his identity and authority.

(3) A person authorized by any such warrant to search any premises or any vehicle, ship or aircraft may search every person who is found in, or whom he has reasonable ground to believe to have recently left or to be about to enter, those premises or that vehicle, ship or aircraft and may seize any material found on the premises or in the vehicle, ship or aircraft or on such person that he has

reasonable ground to believe to be evidence in relation to the commission of an offence referred to in subsection (1) or any other material that he has reasonable ground to believe ought to have been produced under section 1 and may take in relation to any such material any other steps that may appear necessary for preserving it and preventing interference with it:

Provided that no person shall in pursuance of any warrant issued under subsection (1) be searched except by a person of the same sex.

(4) Where, by virtue of this section, a person is empowered to enter any premises, vehicle, ship or aircraft, he may use such force as is reasonably necessary for that purpose.

(5) Any material or article of which possession is taken under this section may be retained for a period of 3 months or, if within that period there are commenced any proceedings for an offence referred to in subsection (1)(a) to which it is relevant, until the conclusion of those proceedings.

(6) No information furnished or material produced (including any copy of or extract from any material which is a document produced) by any person in pursuance of a request made under this Schedule, and no material seized under subsection (3) shall be disclosed except --

(a) with the consent of the person by whom the information was furnished or the material was produced or the person from whom the material was seized:

Provided that a person who has obtained information or is in possession of a material only in his capacity as a servant or agent of another person may not give consent for the purposes of this paragraph but such consent may instead be given by any person who is entitled to that information or to the possession of that material in his own right;

(b) to any person who would have been empowered under this Schedule to request that it be furnished or produced;

(c) on the authority of the Chief Executive, subject to the information or material being transmitted through and with the approval of the Ministry of Foreign Affairs of the People's Republic of China, to any organ of the United Nations or to any person in the service of the United Nations or to the Government of any place outside the People's Republic of China for the purpose of assisting the United Nations or that Government in securing compliance with or detecting evasion of measures in relation to a terrorist or terrorist associate decided upon by the Security Council of the United Nations;

or

(d) with a view to the institution of, or otherwise for the purposes of, any proceedings for an offence under this Ordinance.

3. Offences

Any person who--

(a) without reasonable excuse, refuses or fails within the time and in the manner specified (or, if no time has been specified, within a reasonable time) to comply with any request made under this Schedule by any person who is empowered to make it;

(b) intentionally or recklessly furnishes any information, explanation or document which is false in a material particular to any person exercising his powers under this Schedule;

(c) intentionally obstructs any person in the exercise of his powers under this Schedule; or

(d) with intent to evade this Schedule, destroys, mutilates, defaces, secretes or removes any material, shall be guilty of an offence.

4. Meaning of "material"

In this Schedule, "material" (物料) includes any book, document or other record in any form whatsoever, and any article or substance.

SCHEDULE 3 SEIZURE AND DETENTION OF PROPERTY SUSPECTED TO BE TERRORIST PROPERTY

1. Interpretation

“court” (法庭) means the Court of First Instance;

“exported” (輸出), in relation to any property, includes the property being brought to any place in the HKSAR for the purpose of being exported;

“seized property” (被檢取的財產) means any property seized under section 2.

2. Powers of authorized officers

(1) For the purposes of this Ordinance, any authorized officer may --

- (a) stop, board and search any ship, aircraft, vehicle or train which has arrived in the HKSAR (not being a ship of war or a military aircraft), and remain thereon as long as it remains in the HKSAR;
- (b) search any person arriving in the HKSAR or about to depart from the HKSAR;
- (c) search any thing imported into or to be exported from the HKSAR;
- (d) stop, board and search any ship, aircraft, vehicle or train if he has reason to suspect that there is therein any terrorist property;
- (e) without a warrant issued under subsection (2) where it would not be practicable to obtain such a warrant, enter and search any place or premises if he has reason to suspect that there is therein any terrorist property; or
- (f) stop and search any person, and search the property of any person, if --
 - (i) he has reason to suspect that such person has in his actual custody any terrorist property; or
 - (ii) such person is found in any ship, aircraft, vehicle, train, place or premises in which any terrorist property is found.

(2) Where it appears to any magistrate upon the oath of any person that there is reasonable cause to suspect that in any place there is any terrorist property, or with respect to which an offence has been committed or is about to be committed against the provisions of this Ordinance, the magistrate may, by his warrant directed to any authorized officer, empower the officer by day or by night to enter the place named in the warrant and there to search for and seize, remove and detain any terrorist property.

(3) For the purpose of enabling a ship or aircraft to be searched under subsection (1)--

- (a) the Commissioner of Customs and Excise or the Commissioner of Police may, by order in writing under his hand, detain a ship for not more than 12 hours or an aircraft for not more than 6 hours; and
- (b) the Chief Secretary for Administration may, by order in writing under his hand, detain a ship or aircraft for further periods of not more than 12 hours in the case of a ship or not more than 6 hours in the case of an aircraft.

Any order made under this subsection shall state the times from which and for which the order is effective.

(4) Any authorized officer may seize, remove and detain any thing if he has reason to suspect that such thing is terrorist property.

(5) Any authorized officer may --

- (a) break open any outer or inner door of or in any place or premises which he is empowered by this section to enter and search;
- (b) forcibly board any ship, aircraft, vehicle or train which he is empowered by this section to board and search;
- (c) remove by force any person or thing who or which obstructs any entry, search, inspection, seizure, removal or detention which he is empowered by this section to make;
- (d) detain every person found in any place or premises which he is empowered by this section to search until the same has been searched; and
- (e) detain every person on board any ship, aircraft, vehicle or train which he is empowered by this section to search, and prevent any person from approaching or boarding such ship, aircraft, vehicle or train, until it has been searched.

(6) No person shall be searched under this section except by a person of the same sex.

(7) No person shall be searched under this section in a public place if he objects to being so searched.

(8) Any person who intentionally obstructs any person in the exercise of his powers under this section shall be guilty of an offence.

(9) In this section --

“Commissioner of Customs and Excise” (香港海關關長) includes a Deputy Commissioner of Customs and Excise and an Assistant Commissioner of Customs and Excise;

“Commissioner of Police” (警務處處長) includes a deputy, assistant or senior assistant commissioner of police.

3. Period for which seized property may be detained

(1) Seized property shall not be detained for a period of more than 30 days unless, before the expiration of that period, the continued detention of the property is authorized by an order under subsection (2).

(2) A court may, upon application made to it by the Secretary for Justice or an authorized officer, by order authorize the continued detention of seized property where it is satisfied that --

(a) there are reasonable grounds for suspecting that the property is terrorist property; and

(b) the detention of the property is justified while its origin or derivation is further investigated or consideration is given to the institution (whether in the HKSAR or elsewhere) of proceedings --

(i) against any person in relation to an offence with which the property is connected; or

(ii) which may result in a notice under section 5(1) of this Ordinance in respect of the property or which may result in the forfeiture or other confiscation of the property.

(3) An order under subsection (2) shall authorize the continued detention of the seized property to which it relates for such period, not exceeding 3 months beginning with the date of the order, as is specified in the order and a court, upon application made to it by the Secretary for Justice or an authorized officer and if satisfied as to the matters referred to in subsection (2)(a) and (b), may thereafter from time to time by order authorize the further detention of the property but so that --

(a) no period of detention specified in an order under this subsection shall exceed 3 months beginning with the date of the order; and

(b) the total period of detention shall not exceed 2 years from the date of the order under subsection (2).

(4) At any time while seized property is being detained by an order under subsection (2) or (3) a court may direct its release if satisfied --

(a) on an application made by --

(i) the person from whom it was seized;

(ii) a person by or on whose behalf it was being imported or exported; or

(iii) a person who otherwise has an interest in it,

that there are no, or are no longer, any such grounds for its detention as are referred to in subsection (2); or

(b) on an application made by the Secretary for Justice or an authorized officer, that its detention is no longer justified.

(5) If, at any time when any seized property is being detained by virtue of an order under subsection (2) or (3), proceedings are instituted (whether in the HKSAR or elsewhere) --

(a) against any person in relation to an offence with which the property is connected; or

(b) which may result in a direction being given under section 5(1) of this Ordinance in respect of the property or which may result in the forfeiture or other confiscation of the

property,
the property shall not be released until the proceedings have been concluded.

4. Interest

Seized property which is money and which is detained in pursuance of an order under section 3(2) or (3) shall, unless required as evidence of an offence, be held in an interest-bearing account and the interest accruing thereon shall be added to the property on its release.

5. Procedure

(1) An order under section 3(2) shall provide for notice to be given to persons affected by the order.

(2) Subject to section 17(3) of this Ordinance, Order 115, rules 24, 25, 26, 27, 28, 30, 31, 32 and 33, of the Rules of the High Court (Cap. 4 sub. leg.) shall, with all necessary modifications, apply to and in relation to section 3(2), (3) and (4) as it applies to and in relation to section 24C(2), (3) and (4) respectively of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405).

First Written Submission to Bills Committee dated June 14, 2002

15. *Subsection 12(2) should make clear that Schedule 3 enables property “reasonably” suspected of being terrorist property to be seized and detained.* At present, it seems to suggest that Schedule 3 tolerates a standard of mere suspicion, which is not true.

Administration’s Response to Comment (21 June 2002)

The powers to seize and detain property suspected to be terrorist property are drawn from Schedule 3 of the Bill. Clause 12(2) only describes the purpose and scope of the Schedule.

16. I have a number of concerns about the powers contained in Schedules 2 and 3. I generally think these powers go too far and risk being abused at the cost of infringing civil liberties and rights. I have a real concern that overly broad powers will be used not on a principled basis within the objectives of the legislation, but rather on arbitrary and irrational cause – particularly on racially motivated grounds. *I believe race, gender, age, ethnic origin, and place of birth, either taken alone or in combination, can never form the basis of a reasonable suspicion for the purposes of exercising any of the powers in Schedules 2 and 3.* In the anti-terrorism era, post September 11th, one of the negative by-products of the war against terrorism is the stigmatization and demonization of certain individuals based solely on their race and ethnic origin. This is unfortunate, and I think governments have a responsibility in their anti-terrorism efforts to ensure that this by-product does not materialize. *To this end, I recommend that an overriding provision be added to the Bill (in the main part – not in the Schedule) clearly stating that the powers in Schedules 2 and 3 be exercised by authorized officers without any discrimination based on race, colour, sex, language, religion, national or social origin, and birth.* Such a provision will ensure greater adherence to the requirements of Articles 1, 5, 14, and 23 of the Hong Kong Bill of Rights.

Administration's Response to Comment (21 June 2002)

It should be noted that the provisions of Schedules 2 and 3 are modelled on existing provisions of our laws. We do not consider it necessary to explicitly include an overriding provision as suggested. Similar to the enforcement of other Hong Kong laws, the powers in the Schedules will be exercised in accordance with the provisions of the Bill and the Hong Kong Bill of Rights Ordinance.

17. I now turn to some of the specific problems I see with Schedules 2 and 3:

- (g) *It is unclear to what extent the power in s. 1 of Schedule 2, to compel the production of information and materials, abrogates the common law privilege against self-incrimination.* While s. 12(1) of Part 5 and s. 1 of Schedule 2 indicate that the power is supposed to be exercised for “securing compliance with or detecting evasion of [the] Ordinance”, this express limiting purpose is unhelpful in suggesting non-abrogation. This is because the use of self-incriminatory evidence in a subsequent prosecution against the incriminated person may in fact be a very effective way to secure compliance with the Bill. Another sign of abrogation is s. 2(6)(d) (at least insofar as prosecutions under the Bill are concerned), as this paragraph provides an exception to the non-disclosure of compelled information and materials for the purposes of proceedings for an offence under the Bill. Yet if the legislation intended to override the common law privilege, it could be made clearer. In addition, where this privilege is abrogated, serious thought must be given to whether some form of ‘use immunity’ should be conferred on a person forced to incriminate himself/herself. It may in fact be that direct use immunity is required for a fair trial under the dictates of Article 10 of the Hong Kong Bill of Rights (see *Lee Ming Tee* (2001 CFA)). If however it was not intended to abrogate the privilege against self-incrimination then this as well could and should be made clearer (e.g. having an express provision which states that nothing herein abrogates the privilege against self-incrimination).

Administration's Response to Comment (21 June 2002)

The new Clause 2(5) in the draft CSAs applies to Schedule 2.

- (h) The powers provided in s. 2(1)(b) and (c) of Schedule 3 can be exercised without any articulated reasons and purely on the pretense of pursuing the purposes of the Bill. Such powers invite arbitrary and invidious treatment of people. I am most concerned about paragraph (b) which permits, for the purposes of the Bill, the detention and search of anyone arriving in and departing from the HKSAR. Officers exercising such powers are not required to think rationally and are not precluding from allowing erroneous stereotypical and discriminatory beliefs to inform their decision-making. *In today's climate of constitutional and human rights, it is difficult to conceive of a search power more raw and unrestrained in nature. I have little doubt that if challenged in an appropriate case, these powers will be found to be inconsistent with the Bill of Rights and Basic*

Law, and any incriminating evidence obtained as a result of the rights infringement will likely be ruled inadmissible either under those instruments or the common law residual discretion.

Administration's Response to Comment (21 June 2002)

Clause 2(1) of Schedule 3 is modelled on section 52(1) of the Dangerous Drugs Ordinance. The powers provided under subparagraphs (b) and (c) are absolutely necessary to ensure effective border control given the large volume of passengers and goods passing through the HKSAR.

I do not believe it is answer to say that such powers already exist under the Dangerous Drugs Ordinance. Those statutory powers probably suffer from the same deficiencies. *In light of these concerns, I recommend that all search powers in s. 2 of Schedule 3 be made subject (at minimum) to a standard of reasonable grounds to suspect evidence of an offence under the Bill or the presence of terrorist property.*

- (i) The powers in s. 2(5) of Schedule 3, authorizing the use of force in executing search powers, are not qualified by any requirement that the force used be reasonable. It is not clear why there is this absent qualification when it is provided in s. 2(4) of Schedule 2 (e.g. "may use force as is reasonably necessary for that purpose"). If the absence was deliberate, can this at all be justified? *It is my opinion that any search, even if authorized by law, will infringe the privacy rights in the Bill of Rights and Basic Law if executed in an unreasonable manner. Qualified language should be added to prevent unreasonable uses of the powers.*

Administration's Response to Comment (21 June 2002)

It should be noted that Clause 2(5) of Schedule 3 is modelled on section 52(8) of the Dangerous Drugs Ordinance.

- (j) The search powers in Schedule 3 make no distinction between intrusive and non-intrusive searches of the person – they are treated all the same. I believe this is problematic. Intrusive searches, such as strip searches, body cavity searches, seizures of bodily samples, involve greater interferences with a person's dignity and bodily integrity. These searches deserve greater legal and judicial vigilance. I believe unless there exists very pressing reasons (e.g. personal safety, need to safeguard evidence or terrorist property), intrusive searches should only be done with prior judicial authorization. Such authorizations would allow for the imposition of strict limiting conditions to protect privacy interests and to minimize the level of intrusion to only what is necessary. *I recommend that provisions be added in Schedule 3 to provide for the prior judicial authorization of intrusive bodily searches.*

Administration's Response to Comment (21 June 2002)

Section 2(b) of Schedule 3 is a standard provision appearing in many Hong Kong Ordinances.

- (k) As with my comments in relation to frozen funds and property, I believe there needs to be a scheme for affected persons to apply for release of seized property pending forfeiture for legitimate purposes, e.g. to pay reasonable legal and living expenses of the applicant and his or her dependents. *It is recommended that this jurisdiction to release all or part of the detained property be included in s. 3(4) of Schedule 3.*

Administration's Response to Comment (21 June 2002)

We will consider.

Second Written Submission to Bills Committee dated June 22, 2002

10. Other than preserving the privilege against self-incrimination, the Administration has not made any substantial changes to the powers contained in Schedules 2 and 3. This is extremely unfortunate. As mentioned in my previous letter, these powers are coercive, and lacking in proportionality and rational restriction. They invite abuse.

In the Security Bureau's June 29th, 2002, paper attached to its proposed Committee Stage Amendments of June 28, 2002, it is reported that the Administration will move to have s. 12 and Schedules 2 and 3 deleted as it intends to rely on powers of investigation, seizure and detention under existing laws.

United Nations (Anti-Terrorism Measures) Ordinance (Cap 575)

(Enacted July 18, 2002; partially in operation August 23, 2002¹⁸)

NB: Schedules 2 and 3 do not appear in the Ordinance. However, there is some suggestion in s. 19 that coercive investigative powers may re-appear in the Regulations.

19. Regulations

...

- (2) The Secretary may make regulations for the purposes of-
- (a) facilitating the obtaining of evidence and information for the purpose of securing compliance with or detecting evasion of this Ordinance;
 - (b) facilitating the obtaining of evidence in relation to the commission of an offence under

¹⁸ For details, see *supra* note 3.

this Ordinance; and

(c) enabling property suspected of being terrorist property to be seized and detained while its origin or derivation is further investigated or consideration is given to the institution (whether in the HKSAR or elsewhere) of proceedings-

- (i) against any person in relation to an offence with which the property is connected; or
- (ii) which may result in the property being specified in a notice under section 6(1) or which may result in the forfeiture or other confiscation of the property.

(3) The Secretary may make regulations for the purposes of authorizing public officers to perform functions or exercise powers under regulations made under this section.

(4) The Secretary may make regulations for the purposes of providing compensation to be paid, on grounds specified in the regulations, to a person who has suffered loss in consequence of any act done or omission made under regulations made under this section in respect of any property.

(5) Regulations made under this section may provide for applications to be made to, and orders to be made by, a magistrate or court for any purposes mentioned in subsection (1), (2) or (4).

(6) Regulations made under this section may-

(a) prescribe offences in respect of contraventions of the regulations (including contravention of any orders made under the regulations); and

(b) provide for the imposition in respect of any such offence of-

- (i) on conviction on indictment, a fine and imprisonment for not more than 7 years;
- (ii) on summary conviction, a fine at not more than level 6 and imprisonment for not more than 1 year.

(7) Regulations made under this section shall be subject to the approval of the Legislative Council.

G. Forfeiture of Terrorist Property

United Nations (Anti-Terrorism Measures) Bill

(First Reading April 17, 2002)

13. Forfeiture of certain terrorist property

(1) The Court of First Instance may, if satisfied on an application made by or on behalf of the Secretary for Justice that any property specified in the application is terrorist property -

- (a) mentioned in paragraph (a) of the definition of "terrorist property" and which also -
 - (i) in whole or in part directly or indirectly represents any proceeds arising from a terrorist act;
 - (ii) is intended to be used to finance or otherwise assist the commission of a terrorist act; or
 - (iii) was used to finance or otherwise assist the commission of a terrorist act; or
- (b) mentioned in paragraph (b) of the definition of "terrorist property",

order, subject to subsection (2), the forfeiture of the property.

(2) Where the Court of First Instance makes an order under subsection (1) in respect of any property, the Court shall specify in the order so much, if any, of the property in respect of which the Court is not satisfied as mentioned in that subsection.

(3) An order may be made under this section whether or not proceedings are brought against any person for an offence with which the property concerned is connected.

(4) The standard of proof on an application under this section shall be on the balance of probabilities.

(5) Subject to section 17(3), Order 115, rule 29, of the Rules of the High Court (Cap. 4 sub. leg.) shall, with all necessary modifications, apply to and in relation to subsection (1) as it applies to and in relation to section 24D(1) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405).

...

17. Procedure

(1) Provision may be made by rules of court -

(a) with respect to applications under -
(i) section 13;

...

(b) without limiting the generality of paragraph (a), with respect to the circumstances in which applications mentioned in that paragraph shall be -

(i) held in camera, whether in whole or in part, in the interests of -

(A) the security, defence or international relations of the HKSAR; or

(B) any witnesses giving evidence in the proceedings; or

(ii) where paragraph (a)(i), (iii) or (iv) is applicable, made *ex parte*;

(c) without limiting the generality of paragraph (a), with respect to expediting, on grounds specified in the rules, the hearing of applications mentioned in that paragraph;

(d) with respect to the division, conversion or disposal of property for the purposes of satisfying an order under section 13(1) to which the property is subject where -

(i) section 13(2) is applicable; and

(ii) the property is not readily divisible for those purposes;

(e) without limiting the generality of paragraph (a) -

(i) with respect to persons who may be joined as a party to any proceedings arising from any of the applications mentioned in that paragraph;

(ii) prescribing interests for the purposes of section 16(1)(c) that enable persons to make applications under that section;

(f) generally with respect to the procedure under this Ordinance before any court.

First Written Submission to Bills Committee dated June 14, 2002

18. Section 13 provides a scheme of civil forfeiture of terrorist property. I have a number of comments and concerns about the scheme:

- (a) There is some suggestion in s. 17 that some forfeiture hearings may be brought *ex parte* and *in camera*. I think that these types of hearings should be extremely exceptional. *I believe the rules must be framed to ensure that the government takes all reasonable steps to notify interested persons about the potential forfeiture of alleged terrorist property.*

Administration's Response to Comment (21 June 2002)

The suggestion is noted. The Rules Committee of the Judiciary will make the

Clause 13. These rules will be subsidiary legislation and subject to the scrutiny of the Legislative Council.

- (b) There is no protection in the existing scheme for innocent third parties, e.g. innocent suppliers who were paid with funds or property for goods or services used in the commission of a terrorist act. This problem was previously mentioned with respect to frozen funds. *It is recommended that there be included provisions for discretionary relief to innocent third parties holding terrorist property.*

Administration's Response to Comment (21 June 2002)

Please see answer to paragraph 5(b)(2) above. The new Clause 16A(3) in the draft CSAs also provides for compensation to be paid by the Government under certain circumstances where suspected terrorist property is seized under the provisions of Schedule 3 and is not forfeited under Clause 13.

- (c) *Subsection 13(5) can be worded more clearly by deleting the last clause, "as it applies to and in relation to section 24D(1) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405)".* I do not believe it adds anything and only leads to confusion.

Administration's Response to Comment (21 June 2002)

This is a drafting matter. We consider it desirable to retain the existing wording.

- (d) It is not clear that there is any right of appeal from a forfeiture order. This is to be contrasted with rulings made under s. 16, wherein subsection 16(4) removes any doubt that the appeal rights in s. 14 of the High Court Ordinance apply. Given that that this is a civil forfeiture order, it is difficult to characterize the order as part of a 'sentence' for appeal purposes. *It is recommended that a clear right of appeal be provided in the Bill for aggrieved persons.*

Administration's Response to Comment (21 June 2002)

We can include in the provision dealing with compensation a sub-clause declaring that Section 14 of the High Court Ordinance shall apply to any judgment or Order of the Court arising from proceedings under the provision.

United Nations (Anti-Terrorism Measures) Ordinance (Cap 575)

(Enacted July 18, 2002; partially in operation August 23, 2002¹⁹)

Part 5 Forfeiture and Offences

13. Forfeiture of certain terrorist property

(1) The Court of First Instance may, if satisfied on an application made by or on behalf of the Secretary for Justice that any property specified in the application is terrorist property-

- (a) mentioned in paragraph (a) of the definition of "terrorist property" and which also-
 - (i) in whole or in part directly or indirectly represents any proceeds arising from a terrorist act;
 - (ii) is intended to be used to finance or otherwise assist the commission of a terrorist act; or
 - (iii) was used to finance or otherwise assist the commission of a terrorist act; or
 - (b) mentioned in paragraph (b) of the definition of "terrorist property",
- order, subject to subsection (2), the forfeiture of the property.

(2) Where the Court of First Instance makes an order under subsection (1) in respect of any property, the Court shall specify in the order so much, if any, of the property in respect of which the Court is not satisfied as mentioned in that subsection.

(3) An order may be made under this section whether or not proceedings are brought against any person for an offence with which the property concerned is connected.

(4) The standard of proof on an application under this section shall be the standard of proof applicable to civil proceedings in a court of law.

(5) Subject to section 20(3), Order 115, rule 29, of the Rules of the High Court (Cap 4 sub. leg.) shall, with all necessary modifications, apply to and in relation to subsection (1) as it applies to and in relation to section 24D(1) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405).

...

20. Procedure

(1) Provision may be made by rules of court-

- (a) with respect to applications under-

...

- (ii) section 13;

...

(b) without limiting the generality of paragraph (a), with respect to the circumstances in which applications mentioned in that paragraph shall be made *ex parte*;

(c) without limiting the generality of paragraph (a), with respect to expediting, on grounds specified in the rules, the hearing of applications mentioned in that paragraph;

(d) with respect to the division, conversion or disposal of property for the purposes of satisfying an order under section 13(1) to which the property is subject where-

- (i) section 13(2) is applicable; and

- (ii) the property is not readily divisible for those purposes;

(e) without limiting the generality of paragraph (a), prescribing interests for the purposes of the definition of "prescribed interest";

(f) generally with respect to the procedure under this Ordinance before any court.

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

¹⁹ For details, see *supra* note 3.

(1) Subject to subsection (2), proceedings inter partes in respect of applications mentioned in section 20(1)(a) shall be held in open court unless the court otherwise orders, upon application made by any party to the proceedings, that all or part of the proceedings shall be held in chambers or in camera.

(2) The court shall not make an order that proceedings mentioned in subsection (1) shall be held in chambers or in camera unless the court is satisfied that the order is reasonably necessary in the interests of-

- (a) the security, defence or external relations of the HKSAR; or
- (b) the administration of justice.

(3) In this section, "court" (法庭) includes a magistrate.

2. Interpretation

...

(7) For the avoidance of doubt, it is hereby declared-

- (a) that section 14 of the High Court Ordinance (Cap 4) [NB: right of appeal in civil matters] shall apply to any judgment or order of the Court of First Instance arising from proceedings-

...

- (ii) under section 13, 17 or 18;

...

H. Other Issues

1. Retrospectivity

First Written Submission to Bills Committee dated June 14, 2002

19. **Retrospectivity.** The Bill fails to address the issue of retrospective application, which I foresee as I being a live issue. The central issue will be whether conduct which occurs prior to the coming into force of this Bill can be considered a 'terrorist act' for the purposes of the Bill. For example, will property linked to the September 11th attacks be subject to restraint, seizure or forfeiture under the Bill once passed? Under ordinary rules of interpretation, substantive provisions are presumed not to apply retrospectively unless the legislation clearly indicates otherwise.

20. I think this is a very difficult issue because retrospective application of laws having criminal or quasi-criminal consequences will likely have Bill of Rights implications (Art. 12). It may be that retrospective application will be unnecessary since the specification scheme by the CE avoids the need for such application. However, for property that is not specified, retrospectivity issues may arise.

Administration's Response to Comment (21 June 2002)

The clear intention of the Bill is that a person who has committed the "terrorist

acts” before the Bill comes into force will be a “terrorist” within the meaning of the Bill (see definition of “terrorist” and the power of the Chief Executive to specify persons designated by the UN Committee).

United Nations (Anti-Terrorism Measures) Ordinance (Cap 575)

(Enacted July 18, 2002; partially in operation August 23, 2002²⁰)

NB: No express provision relating to retrospective application was included.

2. Compensation

First Written Submission to Bills Committee dated June 14, 2002

21. **Compensation:** Recently, there has been much discussion about including a provision for ordering compensation to innocent aggrieved persons. I believe this is a good idea as it acts as an important safeguard against improper use of the legislation. However, *there are good reasons why the Administration should not adopt the schemes in the existing money laundering legal regime wholesale.*

- (a) *The existing scheme requires showing “some serious default on the part of any person concerned in the investigation or prosecution” as a pre-requisite to obtaining compensation. This requirement should not be included under this legislation.* This is because the erroneous specification of an individual or property, or the erroneous restraint or seizure of property, in itself should be enough to constitute a serious default. In a system without any prior judicial authorization, a strict compensation system is needed to ensure self-compliance with the law. Another reason for not having this pre-requisite is that it may be very difficult for individuals to find ‘serious default’ or bad faith in a scheme which provides for quick and expeditious executive action at the highest level.

Administration’s Response to Comment (21 June 2002)

We consider that the Government should only be held responsible when there has been “serious default” on the part of any person concerned in obtaining the specification under Clause 4A(2) or 5(1). This a reasonable standard and is necessary to protect the interest of the Government and public revenue; it replicates existing law (Section 27 of Cap. 405; section 29 of Cap. 455).

- (b) *If the ‘serious default’ requirement is removed than there is no reason*

²⁰ For details, see *supra* note 3.

to keep the proviso used in s. 29(3) of the *Organized and Serious Crimes Ordinance*. This proviso states that compensation should not be given if the investigation would have been continued, or the proceedings would have been instituted or continued if the serious default had not occurred.

Administration's Response to Comment (21 June 2002)

See answer to paragraph 21(a) above.

- (c) The existing compensation schemes provide for only pecuniary and proprietary loss. *In the context of anti-terrorism and the specification system used in the Bill, it is necessary to consider whether compensation should be extended to reputational loss.* The specification system is quite extraordinary from the point of view of criminal justice. It publicly lists and stigmatizes individuals by name. If it turns out that the specification was unjustified, one can imagine the hurt and the damage to reputation and commercial relations felt by the specified person and his or her immediate family.

Administration's Response to Comment (21 June 2002)

New Clause 16A in the draft CSAs provides that the amount of compensation to be paid under this section shall be such as the Court of First Instance thinks just in all the circumstances of the case.

United Nations (Anti-Terrorism Measures) Ordinance (Cap 575)

(Enacted July 18, 2002; partially in operation August 23, 2002²¹)

18. Compensation

(1) Subject to subsection (2), where-

(a) a person has ceased to be specified as a terrorist or terrorist associate under section 5(2); or

(b) property has ceased to be-

(i) specified as terrorist property under section 5(2); or

(ii) specified in a notice under section 6(1),

then the Court of First Instance may, on application by-

(c) in the case of paragraph (a), the person who was so specified, or any person acting for or on behalf of the person who was so specified;

(d) where paragraph (b) is applicable, any person by, for or on behalf of whom the property that was so specified is held,

order compensation to be paid by the Government to the applicant if, having regard to all the circumstances, it considers it appropriate to make such an order.

²¹ For details, see *supra* note 3.

(2) The Court of First Instance shall not order compensation to be paid under subsection (1) unless it is satisfied-

- (a) where subsection (1)(a) is applicable, that at no time when the person concerned was specified as a terrorist or terrorist associate under section 5(2) was the person either a terrorist or terrorist associate;
- (b) where subsection (1)(b) is applicable, that at no time when the property was specified as terrorist property under section 5(2), or was specified in a notice under section 6(1), as the case may be, was the property terrorist property;
- (c) that there has been some serious default on the part of any person concerned in obtaining the relevant specification under section 5(2) or 6(1); and
- (d) the applicant has, in consequence of the relevant specification and the default mentioned in paragraph (c), suffered loss.

(3) The amount of compensation to be paid under this section shall be such as the Court of First Instance thinks just in all the circumstances of the case.

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