



## **Comments on the Committee Stage Amendments of United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003**

The Law Society has reviewed the Committee Stage Amendments submitted by the Administration and has the following comments:

### **Threshold to freeze property**

1. We maintain our earlier criticism that the Secretary for Security (“S for S”) should not be able to freeze terrorist property based on his judgment that he is satisfied there are “reasonable grounds to suspect” as this threshold is too low to trigger the exercise of this power.
2. The triggering mechanism in Section 6, “Freezing of property”, is inconsistent with those in Section 13, “Forfeiture of certain terrorist property” and the new Part 4B, “Seizure and Detention of property suspected to be terrorist property”. Clarification is required.

### **Comparison of Section 6, Part 4B and Section 13**

	<b>Section 6 Freezing of terrorist property</b>	<b>Part 4B Seizure and Detention of property suspected to be terrorist property</b>	<b>Section 13 Forfeiture of certain terrorist property</b>
<b>Circumstances</b>	Any property held by any person is terrorist property	(a) In any premises there is terrorist property; (b) There is in any premises anything that is, or contains, evidence of a relevant offence	Any specified property (a) In whole or in part directly or indirectly represents any proceeds arising from a terrorist act; (b) Is intended to be used to finance or otherwise assist the commission of a terrorist act; or (c) Was used to finance or otherwise assist the commission of a terrorist act

	<b>Section 6</b>	<b>Part 4B</b>	<b>Section 13</b>
<b>Authorization</b>	S for S to specify	Authorized by the Court	Authorized by the Court
<b>Standard of proof</b>	Having reasonable grounds to suspect	There is reasonable cause to suspect	The standard of proof applicable to civil proceedings

### **Standard of proof applicable to civil proceedings**

3. In the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) and the Organized and Serious Crimes Ordinance (Cap. 455), restraint orders and charging orders are issued as “interim measures” before the defendant is charged with the offence. The property cannot be used, while the law enforcement agencies continue their investigation to gather sufficient evidence to charge the defendant or forfeit the property. Thus, when the Court of First Instance issues restraint or charging orders, it should be *“satisfied that, in all the circumstances of the case, there is reasonable cause to believe that the defendant may be charged with the offence after further investigation is carried out”* (s. 9(1)(ba) of Cap. 405 and s. 14(1)(ba) of Cap. 455).
4. The rationale should be the same for the freezing, seizing and detaining of terrorist property. When the S for S specifies the property, or when the Court issues a warrant to seize and detain property, the understanding should be that the property concerned will eventually be forfeited, after sufficient evidence has been obtained.
5. The standard of proof to freeze, seize and detain terrorist property should therefore be the same as that of forfeiting terrorist property in Section 13(4) of the United Nations (Anti-Terrorism Measures) Ordinance: *“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”*.

### **Section 6(1) and Section 12G(1)**

6. The Administration should clarify the relation between Section 6 and Section 12G(1).

#### Section 6 Freezing of property

- (1) *Where the Secretary has reasonable grounds to suspect that any property held by*

*any person is terrorist property, the Secretary may, by notice in writing specifying the property, direct that the property not be made available, directly or indirectly, to any person except under the authority of a licence granted by the Secretary*

#### Section 12G Issue of warrant

*(1) Where it appears to the Court upon the oath of any person that there is reasonable cause to suspect that –*

*(a) in any premises there is terrorist property; or*

*(b) there is in any premises any thing that is, or contains, evidence of a relevant offence, the Court may issue a warrant authorizing an authorized officer to enter the premises named in the warrant and there to search for and seize, remove and detain any terrorist property.*

- Will the use of one procedure trigger use of the other?
- What will be the criteria in the selection of either procedure?
- Can the S for S pick and choose whatever procedure is convenient to him?  
In theory, he can use Section 6 when the possibility of obtaining the Court's approval under Part 4B is questionable.

#### **Restraint Orders and Charging Orders**

7. The Administration should consider adopting the model of issuing restraint orders and charging orders in the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance. There is working experience of this model and these procedures would provide flexibility in freezing different types of property.

#### **Expiration of a freezing order under Section 6**

8. As shown in the table above, the S for S has very wide powers to freeze property belonging to suspected terrorists. The test as stated provides a low threshold, while that of the Court to seize, detain and forfeit terrorist property is limited to specified circumstances. Once the S for S freezes property belonging to suspected terrorists, it should be incumbent on him to proceed with an application to the Court to forfeit the property as soon as practicable. The length of the freezing order of two years is unreasonably long. The Administration should consider shortening this period, so that the risks of a wrongful freezing order can be properly balanced.

#### **“Warrantless search power”**

9. In Section 6(10) there is a proposal to enable the S for S to authorize

“warrantless searches” to seize terrorist property. There is concern over possible abuse by the Executive, therefore in relation to any decision on seizure it would be preferable to maintain a warrant-based power.

If the Administration maintains its view on “warrantless searches”, the Law Society is of the view that, as a minimum and in order to satisfy the threshold test in Section 6(11), namely “reasonable cause to suspect that the relevant property will be removed from the HKSAR”, the S for S should at the very least demonstrate, or better still provide proof that the property would be removed from Hong Kong before the authority can be exercised.

**The Law Society of Hong Kong**

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