The Law Society's Constitutional Affairs Committee comments on the United Nations (Anti-Terrorism Measures) Bill

1. **"Interpretation Clause"**
   "Terrorist Act"
   Concern was expressed over the wide scope of the activities listed in the interpretation clause. The drafting should reflect the principle of minimum interference of existing rights. The clause, as drafted, is too broad as "normal political activism" can be easily targeted, e.g. the activities described in (A) and (B) could target the Falun Gong; whilst those in (F) could have a "chilling" effect on the existing rights of such activists as Greenpeace and Animal rights activists.

2. **Clause 10**
   Prohibition against false threat of terrorist act
   This equates to "false news" which was rejected when attempts were made to introduce similar provisions a decade ago.

3. **Section 16 Applications to Court of First Instance ("CFI")**
   Section 16(3)(b)(i) of the Bill places the onus on the person seeking leave "to prove his innocence". This is unacceptable. The onus should be on the Government to prove at the CFI that the person whose name is placed on the list "is a terrorist". Placing a person's name on the List of Terrorists can be regarded as an administrative punishment and a stigma until proven.

The Law Society of Hong Kong
Constitutional Affairs Committee
30 April 2002

The Law Society refers to its earlier comments dated 30 April 2002 and has additional observations on the Bill: -

Section 16 Applications to the Court of First Instance

In order to protect an innocent party, whose name has been wrongly gazetted, the Committee considers it appropriate for the Government to provide compensation.

The Court hearing should be :-

1. Expedited; and

2. The Judge should have a statutory discretion to award compensation on the setting aside of the Section 4 Notice in the Gazette.

Members were of the opinion that although an innocent party has common law remedies to seek compensation, the anti-terrorism measure of gazetting a person's name as a terrorist imposes significant hardships on innocent parties. In the ordinary course of events, an innocent party would have to launch separate civil proceedings in order to receive compensation. It could take a significant amount of time and money before the hearing for assessment of damages. In addition, an innocent party may well be out of pocket in pursuing the civil remedy as the standard award of cost in civil proceedings is on a "party and party basis" which usually results in a 60% recovery of actual costs incurred.

The Law Society therefore considers that a "right to compensation" should be included in the Bill. This will enable the Judge hearing the Section 16 application to consider whether immediate relief can be awarded to an innocent party.

The Law Society of Hong Kong
Constitutional Affairs Committee
29 May 2002

The Law Society has reviewed the draft Committee Stage Amendments ("CSAs") and has the following comments:

Clauses 4 and 4A

1. At this stage, there is no evidence of terrorist activities in HK which cannot be dealt with under the existing law. There is no urgency or justification to enact additional legislation beyond the requirements under the United Nations Security Council Resolutions. The "minimalist approach" should be adopted. The Administration has failed to justify the need for the Clause 4A and related procedures. The procedures in Clause 4 covering terrorist and terrorist property specified by the UN Committee are sufficient for our purpose to meet Hong Kong's obligations.

2. The proposal that the Administration will seek Court approval before gazettal of the terrorist's name is no more than an attempt to provide legitimacy to the procedure, without providing real safeguards to individual rights. In particular, the test of "reasonable grounds to believe" proposed by the Administration provides an unacceptably low threshold given the dire consequences of being specified a terrorist or terrorist property under the proposed legislation. An analogy can be drawn from the criminal procedure law: a low threshold of "reasonable grounds to believe/suspect [a person having committed a crime]" is adopted for exercising the power of arrest; a higher threshold of a "prima facie" case is adopted for committing a person for trial; and

an onerous burden of "beyond reasonable doubt" is required for convicting the accused at the substantive trial. Even for the determination of civil rights, the Administration should prove its case on the "balance of probabilities', which is much higher than the threshold of "reasonable grounds to believe".

3. Hence, without prejudice to our primary submission that the Clause 4A and related procedures are unnecessary, we submit that the test of "reasonable grounds to believe" proposed by the Administration should be changed to one of "beyond reasonable doubt" or at the very least a "balance of probabilities" or "prima facie" case.

4. We believe it is envisaged that the rules to be promulgated under Clause 17(1) may provide for *ex parte* applications by the Secretary for Justice in certain circumstances. In cases of interim orders made *ex parte*, it may be acceptable to adopt a lower threshold of "reasonable grounds to believe". We however submit that an *inter partes* hearing before a Court of First Instance ("CFI") judge should follow to determine the continuation of the order and at that hearing, a higher threshold as suggested above should be adopted.

Clause 10(1)

5. This clause should be deleted.

Clause 11

6. The Law Society welcomes the CSA in relation to the proposed Clause 2(5).

Clause 13

7. In Clause 13, the CFI may make an order to forfeit property of the "terrorist". These provisions are similar to the freezing orders in civil proceedings, namely Mareva Injunctions. The Bill fails to make any provisions for subsistence or maintenance from the frozen assets to enable the "named terrorist" to meet normal living expenses or to allocate reasonable sums in relation to legitimate legal expenses. The Administration should review these provisions to enable such "named terrorists" to have access to sufficient funds should they challenge the order. The practice in Mareva proceedings could be adapted as a model.

Clause 16A

8. It is inappropriate for the Court of Appeal to perform a fact-finding role which should be exercised by the CFI.

Constitutional Affairs Committee
The Law Society of Hong Kong
20 June 2002

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