

Legislative Council Panel on Security

Proposed Rules of Court and Code of Practice to be made for the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575)

Purpose

This note sets out the salient features of the rules of court and the code of practice to be made for the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575).

Background

2. We adopted a two-stage approach in enacting legislation to implement relevant international requirements on the HKSARG regarding anti-terrorism. In stage one, the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) was enacted in July 2002 to give effect to the mandatory elements of United Nations Security Council Resolution (UNSCR) 1373¹ and the most pressing Special Recommendations of the Financial Action Task Force on Money Laundering (FATF)². In stage two, the United Nations (Anti-Terrorism Measures) (Amendment) Ordinance 2004 (the Amendment Ordinance) was enacted in July 2004 to amend Cap. 575 to -

- (a) give full effect to the requirements of UNSCR 1373;
- (b) implement the FATF Special Recommendations on freezing non-fund terrorist property; and

¹ UNSCR 1373 passed on 28 September 2001 aims at combatting international terrorism on various fronts, including measures against terrorist financing. UNSCR 1373 is binding on all Member States. The Central People's Government gave instructions to the HKSARG in October 2001 to implement the resolution.

² Hong Kong has been an active member of the FATF, an inter-governmental body which recommends standards and best practices in countering money laundering and terrorist financing. On 31 October 2001, FATF made eight Special Recommendations, setting out the key legislative and regulatory steps that the FATF considers countries/territories should adopt to stop terrorist financing. In October 2004, FATF made the ninth Special Recommendation.

- (c) implement other international conventions against terrorism, namely, the International Convention for the Suppression of Terrorist Bombings, the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf.

3. The following sections of Cap. 575 (as amended by the Amendment Ordinance) will take effect after the making of rules of court to provide for the procedural matters involved -

- (a) *section 5* empowering the Court of First Instance (CFI) by order to specify terrorists, terrorist associates and terrorist property not designated by the United Nations. Section 5(9) specifies that an application to the CFI shall be made inter partes except where the application falls within the circumstances specified in rules of court made for section 5;
- (b) *section 6* empowering the Secretary for Security (S for S) to freeze suspected terrorist property. Section 6(1) provides that S for S may direct that a person shall not deal with the frozen property except under the authority of a licence granted by S for S;
- (c) *section 8* prohibiting the making of any funds or financial services available to or for the benefit of terrorists or terrorist associates except under the authority of a licence granted by S for S;
- (d) *sections 12A to 12E* providing for various powers of investigation;
- (e) *sections 12F to 12J* providing for the seizure and detention of property suspected to be terrorist property;
- (f) *section 13* empowering the CFI to order the forfeiture of terrorist property representing proceeds arising from a terrorist

act, or which was or intended to be used to finance or otherwise assist the commission of a terrorist act;

- (g) *section 14* relating to the offences and penalties of contravening sections 6 and 12A to 12G;
- (h) *section 15* on the supplementary provisions applicable to the licences mentioned in section 6(1) or 8;
- (i) *section 17* providing for applications to the CFI to revoke an order made under section 5 or a freezing notice issued under section 6, or to grant or vary a licence mentioned in section 6(1) or 8;
- (j) *section 18* on compensation that the CFI may order the Government to pay to an affected party under specified circumstances;
- (k) *section 18A* preserving the common law remedies for an affected person.

4. Section 20(1) stipulates that provision may be made by rules of court with respect to applications made under section 5, 13, 17 or 18, and the circumstances in which applications mentioned in these sections shall be made *ex parte*. Section 20(2) specifies that rules of court shall provide for applications for the revocation or variation of an order under section 12A or 12B, and may provide for proceedings relating to sections 12A to 12C.

Rules of court

5. The rules of court mentioned in section 20 of Cap. 575 and the rules necessary for applications under sections 12G and 12H of Cap. 575 are to be made by the Rules Committee of the High Court (the Rules Committee). A description of the salient features of those rules is given in Annex A. In essence, those rules provide for the procedural matters in making the relevant applications to the CFI, including the

type of summons to be used for commencing the relevant proceedings in different circumstances; the timeframe for serving the summons, affidavit and order, as applicable; and to whom such documents should be served.

6. In drawing up the proposed court rules, we have taken into account comments from the Rules Committee, including the need to bring the mode of commencement of proceedings under the new court rules in line with the recommendations in the Final Report on Civil Justice Reform. The court rules are subsidiary legislation subject to the negative vetting procedure.

Code of practice

7. Section 12A of Cap. 575 provides that the Secretary for Justice may make an application to the CFI for an order to require the relevant persons to answer questions, furnish information or produce materials relevant to the investigation of an offence under Cap. 575. Section 12A(14) requires S for S to prepare a code of practice in connection with the exercise of the powers and the discharge of the duties under section 12A. This code is required to be laid before the Legislative Council (LegCo). The salient features of the code of practice are set out at Annex B. In essence, the code regulates the manner in which the law enforcement agencies conduct its interviews with persons who are required to answer questions, furnish information or produce material. It also sets out the rights of the interviewees. The code may only be promulgated upon LegCo's approval.

8. Section 3 of the Organized and Serious Crimes Ordinance (Cap. 455) confers similar powers of investigation as those provided under section 12A of Cap. 575 on the law enforcement agencies with regard to organized crimes under Cap. 455, and the exercise of such powers is governed by a code of practice promulgated under section 3(19) of Cap. 455. We have taken the opportunity to update the code of practice under Cap. 455 to ensure procedural consistency.

Way forward

9. Subject to Members' views, we shall invite the Rules Committee to make the court rules and submit them to LegCo for vetting. We shall also seek LegCo's approval for the code of practice under Cap. 575 and the revised code of practice under Cap. 455.

Security Bureau
November 2008

**Salient features of the proposed rules of court for the
United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575)
("the Ordinance")**

(Note: A section referred to by number in this Annex means the section so numbered in Cap. 575)

Application to specify person as terrorist or terrorist associate or to specify property as terrorist property under section 5(1)

An application under section 5(1) may be made ex parte and using an ex parte originating summons supported by an affidavit if –

- (a) there exist circumstances of urgency; or
- (b) the whereabouts of the intended respondent are not known to the Government or, where there are more than one intended respondent, the whereabouts of none of them are known to the Government, the Government has taken reasonable steps to ascertain the whereabouts of such intended respondent(s), and has published notice of the Government's intention to make the application in a Chinese newspaper and an English newspaper which circulate generally in Hong Kong.

2. Otherwise, the application is to be made inter partes by an expedited originating summons supported by an affidavit. The court rules specify the timeframe for serving the summons and affidavit by the applicant as well as for the serving of any affidavit evidence in opposition by the respondent.

Application for forfeiture of certain terrorist property under section 13

3. Where the circumstances for ex parte applications as described in the first paragraph exist, an application under section 13 is to be made by a summons supported by an affidavit (if in the court there are existing proceedings conducted under the Ordinance in respect of the

property) or by an ex parte originating summons supported by an affidavit (if there are no such proceedings). Otherwise, the application is to be made inter partes by a summons supported by an affidavit (if in the court there are existing proceedings conducted under the Ordinance in respect of the property) or by an expedited originating summons supported by an affidavit (if there are no such proceedings). The court rules specify the timeframe for serving the summons and affidavit by the applicant as well as for the serving of any affidavit evidence in opposition by the respondent.

Where certain respondent's whereabouts are not known or have become unknown in an inter partes application under section 5(1) or 13

4. In an inter partes application under section 5(1) or 13, if the Government cannot serve the summons or expedited originating summons (as the case may be) on a respondent because the whereabouts of the respondent have become unknown after the application is made, or (in the case of an application under section 5(1)(b) or 13) if there are more than one intended respondent and the whereabouts of one or more, but not all, of the intended respondents are not known, the Government may, after having taken reasonable steps to ascertain the whereabouts of the respondent(s) or intended respondent(s) and published notice of the Government's intention to make or proceed with the application in a Chinese newspaper and an English newspaper which generally circulate in Hong Kong, file with the court an additional affidavit stating the relevant facts. Where such an additional affidavit is filed, the court may direct that the application be heard in the absence of the respondent(s) whose whereabouts are not known or have become unknown if, having regard to the nature and circumstances of the application, it thinks it just and expedient so to do.

Service of order obtained ex parte or in the absence of respondent under sections 5(2) or 13

5. Where an order under section 5(2) or 13 has been obtained by an ex parte application, the order, summons or ex parte originating summons (as the case may be) and affidavit in support must be served as

soon as practicable on the person who is the subject of the application or on the holder(s) of the property that is the subject of the application (as the case may be). Where the order has been obtained by an application heard in the absence of any respondent(s) in the circumstances described in paragraph 4 above, such documents must be served on such respondent(s) as well if the whereabouts of the respondent(s) have become known to the applicant.

Revocation of order specifying person as terrorist or terrorist associate or specifying property as terrorist property

6. An application under section 5(5) to revoke, in whole or in part, an order under section 5(2) is to be made ex parte by a summons supported by an affidavit.

Application under section 12A, 12B, 12C or 12G

7. An application for an order under section 12A(1) (to furnish information or produce material) or 12B(1) (to make material available) or for a warrant under section 12C(1) (for entry and search of premises) or 12G(1) (for entry and search of premises and seizure, removal and detention of terrorist property) is to be made by laying an information on oath.

Revocation or variation of order made under section 12A or 12B

8. An application under section 12A(13) for the revocation or variation of an order under section 12A(2), or an application under section 12B(8) for the revocation or variation of an order under section 12B(2) or (7), is to be made by a summons supported by an affidavit.

Claim of legal privilege in relation to an order under section 12A or 12B or a warrant under section 12C or 12G

9. The court rules specify the handling procedures if a claim of legal privilege is made in respect of any relevant information/material/thing in the following circumstances:

- (a) in the course of the exercise of powers conferred by an order under section 12A to require any person(s) to answer questions or otherwise furnish information;
- (b) in the course of the exercise of powers conferred by an order under section 12A or 12B to require any person(s) to produce material or to give an authorized officer access to material; and
- (c) in the course of the execution by an authorized officer of a warrant issued under section 12C or 12G to search premises and search for, seize, remove and detain terrorist property.

10. The court rules stipulate the procedures for the person making the claim to apply to the court by a summons supported by an affidavit for a declaration that the information/material/thing in question is an item subject to legal privilege and for the material/thing for which a claim is made to be secured meanwhile.

Application to be heard in camera

11. An application under section 12A, 12B, 12C or 12G must be heard in camera.

Application for continued and further detention and release of seized property under section 12H

12. An application under section 12H(2) for an order to authorize the continued detention of seized property is to be made by an ex parte originating summons supported by an affidavit.

13. An application under section 12H(3) for an order to authorize the further detention of seized property is to be made by a summons supported by an affidavit.

14. An application under section 12H(4)(a) for the release of seized property detained by an order under section 12H(2) or (3) is to be made by a summons supported by an affidavit stating the grounds on which

the application is made. An application under section 12H(4)(b) for the release of seized property detained by an order under section 12H(2) or (3) is to be made ex parte by a summons supported by an affidavit stating the grounds on which the application is made.

15. The court rules specify the timeframe for the serving of summons, affidavit and order, as applicable, in respect of an application under sections 12(H)2, 12(H)3 and 12(H)4(a).

Application to court to revoke order made under section 5(2) or notice given under section 6(1)

16. An application under section 17(1)(a) to revoke, in whole or in part, an order under section 5(2) which has been made ex parte is to be made by a summons.

17. An application under section 17(1)(b) to revoke, in whole or in part, a notice under section 6(1) is to be made , if in the court there are existing proceedings conducted under the Ordinance in respect of the funds that are the subject of the application, by a summons, or if there are no such proceedings, by an expedited originating summons.

Application to court for grant of licence, or variation of licence, mentioned in section 6(1) or 8

18. An application under section 17(4) for the grant of a licence, or the variation of a licence, mentioned in section 6(1) or 8 is to be made, if in the court there are existing proceedings conducted under the Ordinance in respect of the property, funds or financial services that is or are the subject of the application, by a summons, or if there are no such proceedings, by an expedited originating summons.

Application for compensation under section 18

19. An application for an order for compensation under section 18 is to be made , if in the court there are existing proceedings conducted under the Ordinance in respect of the person or property to whom or which the application relates, by a summons, or if there are no such

proceedings, by an expedited originating summons. The court rules specify the timeframe for serving the summons or expedited originating summons, and affidavit in support, if any, on the Secretary for Justice and any other person on whose part, it is alleged, there has been default, as well as for the serving of any affidavit in opposition by the Secretary for Justice.

Service out of jurisdiction

20. The service of any document under the rules of court out of the jurisdiction is permissible with the leave of the court.

**Salient features of the proposed code of practice for requiring
persons to furnish information or produce materials
under section 12A of the
United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575)**

General

1. The code of practice must be readily available in English and Chinese at all places where persons may be required to answer questions or otherwise furnish information, or at which persons may be required to provide material, under a section 12A order.
2. An authorized officer¹ shall explain to a person subject to a section 12A order that he or she is not under arrest or detention but that the order requires him or her to answer questions or otherwise furnish information, or produce material, and that if he or she without reasonable excuse fails to comply with the order, he or she commits an offence.
3. An authorized officer shall remind the person that pursuant to section 12A(9) of Cap. 575, he or she is not excused from furnishing information or producing any material required under a section 12A order on the ground that to do so would breach an obligation as to secrecy or another restriction upon the disclosure of information or material imposed by statute or otherwise.

¹ An “authorized officer” is defined in Cap. 575 as a police officer, a member of the Customs and Excise Service established by section 3 of the Customs and Excise Service Ordinance (Cap. 342), a member of the Immigration Service established by section 3 of the Immigration Service Ordinance (Cap. 331), or an officer of the Independent Commission Against Corruption (ICAC) established by section 3 of the Independent Commission Against Corruption Ordinance (Cap. 204).

Procedures for requiring persons to answer questions or otherwise furnish information

4. The authorized officer and the supervisory officer² must take reasonable measures to protect the identity of the interviewee.
5. The interviewee, if he or she wishes, is allowed to have a barrister and/or a solicitor to be present during the interview and to consult privately with the barrister and/or solicitor. He or she shall also be allowed to make one telephone call for a reasonable time. The time taken for the private consultation and telephone call is not counted as part of the interview period.
6. If the interviewee is or appears to the authorized officer to be under the age of 16 years, he or she should be interviewed in the presence of a parent, guardian or other person responsible for his or her care or, if such a person is unavailable, in the presence of an adult who is independent of the investigating authority and, where reasonably practicable, knows the interviewee. That person, if he or she so wishes, is allowed to have a barrister and/or a solicitor to be present during the interview and to consult privately with the barrister and/or solicitor.
7. If the interviewee appears to the authorized officer to be suffering from a mental disability or incapacity and may not understand the nature of questions put to him or her, or his or her replies, that person should only be interviewed in the presence of:
 - (a) a relative, guardian or other person responsible for his or her care;
 - (b) or in the absence of such a person, a person who has experience or training in the care of mentally handicapped persons, and who is independent of the investigating authority and, where reasonably practicable, knows the interviewee.

² A “supervisory officer” is an officer of at least the rank of Chief Inspector of Police, Assistant Superintendent of Customs and Excise, Chief Immigration officer or Principal Investigator of ICAC, and shall be responsible for the supervision of the interview and treatment of a person subject to a section 12A order, and the handling of material produced under a section 12A order.

Such person attending with the interviewee, if he or she so wishes, is allowed to have a barrister and/or a solicitor to be present during the interview and to consult privately with the barrister and/or solicitor.

8. If the interviewee does not share a common language with the authorized officer:
 - (a) whenever possible, an interview should be conducted in the mother tongue of the interviewee unless he or she chooses to use another language in which he or she is proficient;
 - (b) the record of interview should be made in the language used by the interviewee;
 - (c) when necessary an interpreter should be obtained who will make a record of the interview in the language used by the interviewee. Only those language interpreters qualified for court purposes should be engaged;
 - (d) where an interview is recorded in a language other than English or Chinese, a certified English or Chinese translation should be made.
9. When an interviewee is a hearing impaired person, he or she should only be interviewed with the assistance of a sign language interpreter, or a friend or relative who normally communicates with the interviewee. Only those sign language interpreters qualified for court purposes should be engaged.
10. The interviewee should be interviewed in reasonable comfort and privacy and adequate refreshment should be provided when reasonably requested. Short breaks for refreshment shall be provided at intervals of approximately two hours.
11. An interview shall not exceed a period of 6 hours, except where a further period of not more than 4 hours has been approved by a

senior officer³ who is not personally in charge of the investigation. The reason for any such further period must be recorded by the senior officer.

12. An accurate record of the following matters should be made as soon as reasonably practicable –
 - (a) the fact that a copy of the code of practice has been given to the interviewee;
 - (b) the place of interview;
 - (c) the time the interview begins and ends;
 - (d) the time and duration of any breaks for rest, refreshment or other reason;
 - (e) the names of the persons present;
 - (f) the name and rank of the supervisory officer;
 - (g) the material points covered in the interview; and
 - (h) the time the record is made.
13. The record shall be signed by the authorized officer conducting the interview and countersigned by the supervisory officer. Where the record is made by an interpreter, the interpreter shall also sign the record.
14. The interviewee must be given the opportunity to read the record and be invited to sign it; to record whether he or she considers it accurate; and, if not, to indicate where he or she considers it inaccurate and to make the necessary alterations.

³ A “senior officer” is an officer of at least the rank of Superintendent of Police, Superintendent of Customs and Excise, Assistant Principal Immigration Officer or Assistant Director of ICAC.

15. The following persons must also be given an opportunity to read and sign the record:
 - (a) an adult attending with an interviewee who is under 16;
 - (b) a person attending with an interviewee who is suffering from mental disability or incapacity;
 - (c) a person attending with an interviewee who is a hearing impaired person;
 - (d) a barrister and/or solicitor present with the interviewee.
16. A refusal of the interviewee or any of the persons referred to in paragraph 16 above to sign the record must be recorded by an authorized officer.
17. The interviewee is entitled, as soon as reasonably practicable, to receive a copy of the record of interview. Where the interview is video or audio tape-recorded by the investigating authority, the interviewee is entitled, as soon as reasonably practicable, to receive a copy of the tape. The only exception is where a supervisory officer has reasonable grounds for believing that this is likely to prejudice the investigation of an offence under Cap. 575 or any criminal proceedings. In this case, a record of the grounds must be made and supplied by the supervisory officer to the interviewee or his or her representative.

Production of material

18. Material⁴ produced under a section 12A order shall be retained only for as long as is necessary in the circumstances.
19. Where material is retained, the person who produced it in accordance with a section 12A order shall be given a receipt as soon as reasonably practicable, and must on request be provided

⁴ "Material" is defined in Cap. 575 to include any book, document or other record in any form whatsoever, and any article or substance.

with a list or description of the material so retained within a reasonable time.

20. A person who has produced material in accordance with a section 12A order or his representative must be allowed supervised access to the material to examine it or have it photographed or copied, or must be provided with a photograph or copy of the material. However, this does not apply if the supervisory officer has reasonable grounds for believing that this is likely to prejudice the investigation of an offence under Cap. 575 or any criminal proceedings. In this case, a record of the grounds must be made and supplied by the supervisory officer to the person who produced the material or his or her representative.

Supervision and Complaints

21. A person subject to a section 12A order may complain to a supervisory officer if any provision of the code has not been complied with.
22. The person making the complaint must be provided with an opportunity to read and sign the record of complaint. A refusal to sign the record of complaint must be recorded by the supervisory officer. The supervisory officer shall report the complaint to a senior officer as soon as reasonably practicable.