

立法會
Legislative Council

LC Paper No. LS47/09-10

**Paper for the House Committee Meeting
on 26 February 2010**

**Legal Service Division Report on
Proposed Resolution under section 12A of the
United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575)**

The Secretary for Security (the Secretary) has given notice to move a motion at the Council meeting of 10 March 2010, seeking the Council's approval of the Code of Practice for requiring persons to furnish information or produce material (the Code) under Section 12A of the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) (the Ordinance).

Background

2. The Ordinance was enacted in 2002 to give effect to the mandatory elements of the United Nations Security Council Resolution (UNSCR) 1373 and the Special Recommendations of the Financial Action Task Force on Money Laundering (FATF). The Ordinance was amended by the United Nations (Anti-Terrorism Measures) (Amendment) Ordinance 2004 (the Amendment Ordinance) to:

- (a) give full effect to the requirements of the UNSCR 1373 on anti-terrorism;
- (b) implement the FATF Special Recommendations on combating the financing of terrorism; and
- (c) implement other international conventions against terrorism.

3. Section 12A of the Ordinance, as added by the Amendment Ordinance, provides that the Secretary for Justice (SJ) may, for the purpose of investigating an offence against the Ordinance, apply *ex parte* to the Court of First Instance (the Court) for an order authorizing the SJ to require a particular person or persons of a particular description (the relevant person):

- (a) to answer questions or otherwise furnish information with respect to any matter that reasonably appears to an authorized officer¹ to be relevant to the investigation; and/or
- (b) to produce any material², or any material of a class, that reasonably appears to the SJ to be relevant to the investigation.

¹ "Authorized officer" is defined in Cap. 575 to mean a police officer, a member of Customs and Excise, a member of the Immigration Service or an officer of the Independent Commission Against Corruption.

² "Material" is defined in Cap. 575 to include any book, document, or other record in any form whatsoever, and any article or substance.

4. Under section 12A(5) and (6) of the Ordinance, where an order is made by the Court under section 12A(2), the SJ may by notice in writing served on the relevant person require him to attend before an authorized officer to answer questions, furnish information or produce materials relevant to the investigation of an offence under the Ordinance. Section 12A(14) of the Ordinance provides that the Secretary shall prepare a code of practice in connection with the exercise of powers and the discharge of duties under section 12A, and any such code is required to be laid before the Council for its approval.

5. Section 12A and other provisions of the Ordinance, as amended by the Amendment Ordinance, have not been brought into operation pending the making of rules of court and the Code to be made for the Ordinance. The rules of court which set out the procedures for applications to the Court for specification of persons and property as terrorists, terrorist associations or terrorist property, forfeiture of terrorist property, production of information and material, etc. were published in the Gazette on 9 October 2009 (L.N. 186 of 2009) and had been studied by a subcommittee formed under the House Committee. Those rules will come into operation on the day appointed for the commencement of the remaining provisions of the Ordinance (including section 12A).

Comments

6. The Code mainly sets out: (a) the procedures for interviewing relevant persons required under section 12A to answer questions or otherwise furnish information; (b) the guidelines for the production of material under section 12A; and (c) the complaint procedures for relevant persons. It also sets out the rights of the interviewees. Under section 12A(14) of the Ordinance, the Code may only be promulgated upon the Council's approval. The main provisions of the Code are summarized below.

Procedures for requiring persons to answer questions or furnish information

7. The Preamble requires a copy of the Code to be given to the relevant person on whom the SJ has served a notice pursuant to section 12A (5) or (6). Under paragraph 1, the Code must be readily available in English and Chinese at all places where relevant persons may be required to answer questions, furnish information or produce material.

8. Paragraph 3 of the Code states that an authorized officer is required to explain to the relevant person that he is not under arrest or detention but is required to answer questions, furnish information or produce material, failing which he may be liable to a fine and to imprisonment under section 14 of the Ordinance.

9. Under paragraph 4, an authorized officer must remind the relevant person that without prejudice to his legal privilege or privilege against self-incrimination, he must furnish information or produce material despite any secrecy obligation or other restriction imposed by statute or otherwise upon the disclosure of information or material.

10. Paragraph 5 provides that a supervisory officer of at least the rank of Chief Inspector of Police, Assistant Superintendent of Customs & Excise (C&E), Chief Immigration Officer or Chief Investigator of the Independent Commission Against Corruption (ICAC) shall be responsible for the supervision of the interview and treatment of the relevant person and the handling of material produced by him.

11. Paragraph 9 allows the relevant person to be accompanied by, and to consult privately with, a barrister and/or a solicitor during an interview, and to make at least one telephone call for a reasonable time.

12. Paragraph 10 provides that an interview should be conducted in the mother tongue of the relevant person unless he chooses to use another language in which he is proficient. If necessary, an interpreter qualified for court purposes should be engaged to make a record of the interview in the language used by the relevant person.

13. Paragraphs 11 to 14 provide for the procedures for interviewing persons under 16 years of age or suffering from a mental, hearing, speech or visual disability.

14. Paragraph 15 requires the relevant person to be interviewed in reasonable comfort and privacy, and to be provided with short refreshment breaks. Paragraph 16 provides that an interview should not normally exceed 6 hours.

15. Paragraphs 17 to 22 require that an accurate interview record must be made and signed, and that the relevant person and his accompanying persons be given the opportunity to read, sign and make necessary alterations to the record.

Production of material

16. Paragraphs 23 to 26 deal with material produced by a relevant person under section 12A. In certain specified circumstances, such material may be retained by the investigation authority, and the relevant person or his representative must be allowed supervised access to the material to examine it or have it photographed or copied, unless a supervisory officer reasonably believes that such access is likely to prejudice the investigation of an offence against the Ordinance or any criminal proceedings.

Supervision and complaints

17. Paragraphs 27 to 29 provide that a relevant person may complain of any non-compliance with the Code to a supervisory officer who shall report the complaint to a senior officer³ as soon as reasonably practicable. The Code is, however, silent as to how the complaint will be investigated and when the investigation results will be communicated to the relevant person. In response to the Legal Service Division's query, the Administration has explained that complaints filed by interviewees will be followed up and investigated in accordance with the existing complaint mechanisms established by the relevant law enforcement agencies.

18. Upon the Legal Service Division's suggestion, the Administration has also agreed to make certain textual amendments to clarify the drafting of the Code. The textual amendments will be submitted to the Legislative Council in due course.

Consultation with LegCo Panel

19. The Administration briefed the Panel on Security on the proposed rules of court and the Code to be made under the Ordinance at its meeting on 2 December 2008. Some members were concerned about the rights of interviewees under the Code. They considered that the Code should be made more flexible with a view to soliciting more cooperation from the interviewees. The Administration advised that it noted the view that the interview should be conducted in a non-confrontational manner to avoid any possible adverse impact on the interviewee. The Administration agreed to take into account the views and concerns of members. Members may wish to refer to the minutes of the meeting (LC Paper No. CB(2)738/08-09) for further information.

Commencement

20. According to paragraph 5 of the Secretary's draft speech, the Administration proposes to bring the Code into operation on the day appointed for the commencement of section 12A of the Ordinance.

Conclusion

21. Subject to Members' views as to whether a subcommittee should be formed to study the Code, the Legal Service Division will issue a further report after receiving the Administration's proposed textual amendments.

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25 February 2010

³ A "senior officer" is defined in the Code to mean an officer of at least the rank of Superintendent of Police, Superintendent of C&E, Assistant Principal Immigration Officer or Principal Investigator of ICAC.