

立法會
Legislative Council

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**Paper for the Subcommittee on
Rules of the High Court (Amendment) Rules 2009**

Purpose

At the Subcommittee's meeting on 9 November 2009, the Legal Service Division was requested to advise whether it is against any legal principle to prescribe the definition of "prescribed interest" in subsidiary legislation, namely the Rules of the High Court (Amendment) Rules 2009 (L.N. 186 of 2009) (the Amendment Rules), instead of in primary legislation. This paper sets out the views of the Legal Service Division on this issue.

Relevant provisions in the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) and the Amendment Rules

2. Section 2(1) of the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) (the principal Ordinance) provides that "prescribed interest", in relation to any property, means an interest in the property prescribed by rules of court as an interest for the purposes of the principal Ordinance. Section 2(4) of the principal Ordinance provides that:

"For the purposes of this Ordinance, a person who has a prescribed interest in any property shall be deemed to be a person by, for or on behalf of whom the property is or was held."

3. Section 20(1)(e) of the principal Ordinance further provides that provision may be made by rules of court prescribing interests for the purposes of the definition of "prescribed interest".

4. The phrase "prescribed interest" is now defined in rule 1(4) of the new Order 117A (which is added by section 3 of the Amendment Rules) to mean, in relation to any property, (a) a legal or equitable estate or interest in the property; or (b) a right, power or privilege in connection with the property.

5. It is noted that the phrase "prescribed interest" is not used in the provisions of the principal Ordinance other than those mentioned in paragraphs 2 and 3 above. However, the phrase "by, for or on behalf of whom the property is or was held" or similar phrases are used in the substantive provisions of the principal Ordinance, e.g.

sections 6(7), 15(1)(b), 17 and 18, as well as section 12H(4)(a)(ii) introduced by the United Nations (Anti-Terrorism Measures) (Amendment) Ordinance 2004 (21 of 2004).

6. Members may note that the term "prescribed" has a definition under section 3 of the Interpretation and General Clauses Ordinance (Cap. 1). This section provides that "prescribed", when used in or with reference to any Ordinance, means prescribed by that Ordinance or by subsidiary legislation made under that Ordinance.

Analysis

7. For the present purposes, the following two issues will be considered in determining the legal validity of subsidiary legislation - first, whether the Amendment Rules is within the scope of the empowering provision, and second, whether it is inconsistent with the provisions of any Ordinance as provided in section 28(1)(b) of the Interpretation and General Clauses Ordinance. Since section 20(1)(e) of the principal Ordinance empowers rules of court to be made to prescribe interests for the purposes of the definition of "prescribed interest", to provide a definition of "prescribed interest" in the Amendment Rules should be within the scope of the power conferred by the section. Furthermore, there does not appear to be evidence suggesting that providing for the definition of "prescribed interest" in the Amendment Rules would be inconsistent with the provisions of the principal Ordinance or any Ordinance.

8. Other than the requirement of consistency stipulated in section 28(1)(b) of the Interpretation and General Clauses Ordinance, and that subsidiary legislation must be within the scope of the enabling provision, we are not aware of any legal principle which would prohibit prescribing the definition of "prescribed interest" by subsidiary legislation instead of in the principal Ordinance.

9. A further question members may consider is whether as a matter of legislative policy, it is appropriate and desirable to prescribe the definition of "prescribed interest" by way of subsidiary legislation instead of in the principal Ordinance. Since this question is related to the issue of delegation of legislative power, it may be helpful to refer to the general principles on this issue. G. C. Thornton stated at p.329 in *Legislative Drafting* (Tottel Publishing, Fourth Edition) that:

"The extent to which a power should be delegated always requires careful consideration. The power should not extend to matters of principle on which a decision of Parliament ought to be taken.

... the central and recurrent problem of delegated legislation is how to determine what is general and therefore should be left in the Bill for parliamentary consideration and what is particular and therefore should be left for governmental regulation.

The line traditionally drawn is between principle and detail, between policy and the details or technicalities of its implementation. The distinction is

based on the principle that representative democracy demands that supreme legislative authority should be exercised by persons directly responsible to the electorate."

10. In *Craies On Legislation* (Sweet & Maxwell, Ninth Edition), it was stated in paragraph 1.3.3 that:

"Much has been written and said over the years about the difficulty of achieving an ideal balance between primary and secondary legislation. In essence, the aim in striking a balance is to avoid leaving too much of significance to be determined by the executive or the courts while at the same time preventing the principal purpose of the primary legislation from being obscured by an excess of complicated detail. Like many balances between conflicting desiderata, this is both easy to state and impossible to achieve to everybody's satisfaction."

11. In considering whether the definition of "prescribed interest" is a matter of principle and policy, it may be helpful to refer to the operation of the principal Ordinance relating to "prescribed interest". For instance, under section 17(1) of the principal Ordinance, any person by, for or on behalf of whom any property specified in an order under section 5(2) (specifying property as terrorist property) or a notice under section 6(1) (freezing terrorist property), may apply to the Court of First Instance for the order or notice to be revoked. Further, under section 18(1)(d) of the principal Ordinance, any person by, for or on behalf of whom the property that was specified in the order under section 5(2) or the notice under section 6(1), may apply to the Court of First Instance for an order of compensation to be paid by the Government. As a person who has a "prescribed interest" in any property is deemed under section 2(4) of the principal Ordinance to be a person by, for or on behalf of whom the property is or was held, this means that any person who has a "prescribed interest" in the specified property may make the applications under sections 17 and 18 mentioned above. Thus, it appears that the definition of "prescribed interest" has an impact on the class of persons who may make such applications under the principal Ordinance. On this basis, the definition of "prescribed interest" seems to be a matter of principle and policy.

12. Based on the report of the Bills Committee on the United Nations (Anti-Terrorism Measures) Bill, there does not appear to be any record on the discussion of way of dealing with "prescribed interest" by the Bills Committee. We can only assume that the approach adopted in the principal Ordinance had not been queried by the Bills Committee. However, if members now consider that the definition of "prescribed interest" should be included in the principal Ordinance instead of in subsidiary legislation in the light of the principles on delegation of legislative power and the operation of the principal Ordinance relating to "prescribed interest" as mentioned in paragraphs 9 to 11 above, members may ask the Administration to consider amending the principal Ordinance accordingly. Members may note that in similar legislation in Australia, the term "interest" is defined in primary legislation (i.e. section 338 of the

Proceeds of Crime Act 2002)¹ and the term is also used in the substantive provisions of the Australian Act. Unlike the Australian Act, the expression "prescribed interest" is not used in the substantive provisions of the principal Ordinance. Instead, reference is made to "by, for or on behalf of whom the property is or was held" or similar expressions in those provisions.

Prepared by

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¹ Under section 338 of the Australian Proceeds of Crime Act 2002, "interest", in relation to property or a thing, means:

- (a) a legal or equitable estate or interest in the property or thing; or
- (b) a right, power or privilege in connection with the property or thing; whether present or future and whether vested or contingent.