

**For information**

**Sub-Committee on  
Rules of the High Court (Amendment) Rules 2009**

**Response to issues raised at the Sub-Committee meetings  
held on 13 and 16 November 2009**

At the Sub-committee meetings held on 13 and 16 November 2009, Members requested the Administration to provide supplementary information in respect of the Rules of the High Court (Amendment) Rules 2009 (“the Amendment Rules”). This note provides all the information requested by Members in accordance with the sequence of issues set out in the list as provided by the Clerk to the Sub-Committee.

**(a) Definition of “prescribed interest” and delegation of legislative power**

2. The Administration sees no problem with the validity and appropriateness of prescribing the definition of “prescribed interest” in the Amendment Rules for the purposes of the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) (“the Ordinance”). Relevant considerations are as follows –

- (i) The Legislative Council, after due consideration, passed the Ordinance in 2002 of which Section 2(1) sets out the definition of “prescribed interest” (訂明權益) as, in relation to any property, an interest in the property prescribed by rules of court as an interest for the purposes of this Ordinance.
- (ii) Section 20(1)(e) of the Ordinance empowers rules of court to be made to prescribe interests for the purposes of the definition of “prescribed interest”. As such, to provide a definition of “prescribed interest” in the Amendment Rules is wholly within the scope of the power conferred by the Section and is consistent with the provisions of the Ordinance.
- (iii) The definition is modelled on the definition of “interest” under Section 43(5) of the United Nation Office on Drugs and Crime (UNODC) Model Provisions on Money Laundering, Terrorist

Financing, Preventive Measures and Proceeds of Crime (for common law legal systems) 2009.

- (iv) We consider it appropriate to prescribe the definition of “prescribed interest” by way of subsidiary legislation. This does not violate any legislative policy (please see extracts of “Legislative Drafting” by G.C. Thornton and “Guidelines on Process and Content of Legislation, Legislation Advisory Committee, New Zealand Ministry of Justice” at **Annex A**).
- (v) In the context of local legislation, there are other examples of matters that might be regarded as relating to policy or principles being prescribed by subsidiary legislation. Variations to prescribed classes of persons to whom an Ordinance applies made by means of subsidiary legislation form a significant class of such examples.<sup>1</sup>

3. On the basis of the above, it is clear that whether the definition of “prescribed interest” is provided in the Ordinance or the subsidiary legislation of the Ordinance would not affect the legal effect and effectiveness of the definition. We consider it appropriate for the definition to be provided in the Amendment Rules.

**(b) Procedures for the Chief Executive to specify persons and property as terrorists, terrorist associates or terrorist property**

4. In paragraph 11 of our earlier submission (LC Paper No. CB(2)265/09-10(01) ), we have explained that law enforcement agencies (LEAs), acting on information, will conduct investigations with a view to ascertaining whether a person or property is a terrorist or terrorist associate or terrorist property as the case may be. As soon as there is sufficient evidence to support an application under Section 5 of the Ordinance, the LEA concerned will submit the grounds for the application to Department of Justice for legal advice. Subject to the advice of the Department of Justice, a submission will be made to the Chief Executive via the Secretary for Security to recommend a Section 5 application to be made to the Court. The Chief Executive would, based on the information presented, decide whether an application should be made. Similar administrative

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<sup>1</sup> For example, Section 19 of the Product Eco-responsibility Ordinance (Cap. 603) provides that Part 3 of the Ordinance (relating to plastic shopping bags) applies to **prescribed retailers** who are prescribed by Schedule 4 of that Ordinance, and Section 21 of that Ordinance stipulates that the Secretary for the Environment may, after consultation with the Advisory Council on the Environment, by **order published in the Gazette**, amend Schedule 4.

arrangements have been established for existing legislation such as Fugitive of Offenders Ordinance (Cap. 503), which aims to make provision for, among other things, the surrender to prescribed places outside Hong Kong of persons wanted for prosecution. The Chief Executive will, based on the advice of the Department of Justice, decide whether an order to surrender should be made.

**(c) Definition of “holder” in Rule 1(1), Order 117A**

5. Having considered the impact of the specification order and forfeiture order under Sections 5 and 13 of the Ordinance, we consider from policy perspectives that in a situation where the identity of the relevant holder(s) **cannot be reasonably ascertained**, no application should be made to specify or forfeit the property concerned. The inclusion of **“the applicant can reasonably ascertain to be”** in the definition of “holder” will make certain the intention that only property of which the holder can be identified will become the subject of an application under Sections 5(1)(b) or 13 of the Ordinance.

6. The definition of “holder” only applies in the context of an application made under Section 5(1)(b) (for a specification of terrorist order) or 13 (for a forfeiture order). It is a short form for the expression “person whom the applicant can reasonably ascertain to be a person by, for or on behalf of whom the property is held”. The use of the definition will avoid tedious repetition of the whole expression in those rules concerning the two types of applications. It does not mean that certain property does not have a holder where the holder or holders of the property cannot be reasonably ascertained.

**(d) Relationship between Rules 7 and 8**

7. Rule 7(1) stipulates in effect that the Rule applies to all inter parte applications. The procedures set out in Rules 7(2) to (7) are to be followed irrespective of whether the whereabouts of all of the respondents are known. However, in certain inter parte applications, special circumstances may occur, and special rules have to be made to cater for them. These special circumstances are stipulated in Rule 8(1)(a) and (b) and Rule 8 is meant to make additional provisions to deal with those circumstances.

**(e) Notice made under Section 5(1)(b)**

8. We have reservation about the idea of posting a notice at the property where the Chief Executive intends to make an application to specify the property as a “terrorist property” under Section 5(1)(b) of the Ordinance. In particular, we are mindful that the owner of the property concerned could be openly “stigmatised” as owner of a “terrorist property”. The tenant (if any) and neighbours may be alarmed and the property sales of the neighbouring flats may be affected. Likewise, posting a notice of intention to forfeit the property at the property address before forfeiture would stigmatise the property, even if the forfeiture application is eventually unsuccessful.

**(f) To serve an order made under Section (5)5 of the Ordinance**

9. Under Section 5(7) of the Ordinance, a revocation order made under Section 5(5) of the Ordinance is required to be published in the Gazette. As a matter of standard practice, the Administration will serve a copy of the revocation order to the other party/parties to the court proceedings.

**(g) Application under Section 12A, 12B, 12C or 12G**

10. The powers under Sections 12A, 12B, 12C and 12G are not comparable with the powers to intercept communications or carry out covert surveillance under the Interception of Communications and Surveillance Ordinance (Cap. 589). Sections 12A, 12B, 12C and 12G of the Ordinance set out in details the conditions and requirements for an application made under the different provisions. An applicant has to comply with all the requirements before he can apply to court in accordance with Rule 14 of Order 117A. Law enforcement agencies (LEAs) would prepare all the necessary documents and apply to court under Rule 14(2). Since the LEAs have to prove to the judge that all the conditions for granting the relevant orders or warrants under Sections 12A(4), 12B(5), 12C and 12G are complied with, documents and evidence in writing would in any event need to be produced before the judge.

**(h) To apply for a claim of legal privilege under Rules 16 and 17**

11. In the case of an exercise of powers under an order under Section 12A or 12B, certain period of time would be allowed in practice for the person concerned to produce the relevant materials. Therefore, ample

discussion can be made on the subject of legal privilege before an application has to be made to the Court under Rule 16. Under Section 12C, a warrant for search may only be issued if attempts to obtain the relevant materials through an order made under Section 12A or 12B have become unsuccessful. In the circumstances, to allow for a longer period of time for the preparation for a claim of legal privilege may further delay the investigation. Under Section 12G, a warrant may be issued if there is reasonable cause to suspect that there is terrorist property or there is evidence of a terrorism related offence in any place. In the circumstances, the issue of claim of legal privilege should be dealt with as expeditiously as possible.

12. In practice, if a claim of legal privilege is made only in respect of certain files stored in a computer, only those files will be required to be deposited with the Court (after, for example, storing the files in portable devices). If the information is in a networked computer that cannot be removed, the pertinent information will be retrieved, stored in a storage device and properly sealed. In both cases, examination will only be conducted after the issue of legal privilege is resolved.

**(i) A judge to make an order for information/item subject to legal privilege under Rule 18(3)(a)**

13. Under Rule 18(2), immediately on the determination of the application under Section 12A, 12B, 12C or 12G as the case may be (“the relevant section”), the confidential documents are required to be placed in a packet and sealed by order of the judge by whom the application under the relevant section was heard. In the event that any party later considers it necessary to open the sealed packet or to have its contents removed after the completion of the original proceedings, that party will need to apply for such an order by a judge by way of a summons.

**(j) Ex parte applications under Rule 19(1)**

14. Property seized under a Section 12G warrant may be detained for a period of not more than 30 days. The use of ex parte application for continued detention under Section 12H(2) and Rule 19 is because such matter has to be dealt with expeditiously before the expiration of 30 days (given the nature of possible terrorist acts, seriousness of possible damages and urgency of taking preventive actions if possible). Otherwise, the investigation may likely be prejudiced if the order for continued detention of the property cannot be obtained in time.

15. In any event, the person from whom the property was seized, the holder of the property or a person who otherwise has an interest in the property may apply to the court under Section 12H(4) for release of the property while the property is being detained.

**(k) Application for release of seized property**

16. It is necessary to apply to Court for a direction to release the seized property when the detention order expires as the Court has to be satisfied that no other proceedings are instituted or no other steps that have been taken in relation to the property as mentioned in Section 12H(5) before the property could be released.

17. It is the Administration's intention that such hearings of the application for release of property should be dealt with expeditiously so that the property would be released to the person from whom the property was sized as soon as possible. It would not be appropriate for the Court to deal with any disputes regarding the ownership of the property in the hearing for the release of the property. Any other persons not known to the Court but who have an interest in the property are free to institute any separate civil proceedings to dispute the ownership or claim any interest in the property.

**(l) Time limits**

18. The time limits in Order 117A are consistent with the time limits as stipulated in the Originating Summons Procedures as set out in Order 28 of the Rules of the High Court (Cap.4A), as well as the rules of court for Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) and the Organized and Serious Crimes Ordinance (Cap. 455) in Orders 116 and 115 of Cap.4A respectively. We see a need to maintain consistency with the standards already set in other existing legislation. A table setting out the time limits for various applications under Order 117A and the relevant precedents, if any, is at the **Annex B**.

G.C. Thornton in Legislative Drafting<sup>1</sup> states that -

“However, the traditional rules restricting delegated legislation to procedure and detail do not allow adequately for the practical needs of modern government, for there are undoubtedly factors which in certain circumstances make delegated legislation on matters of substance both legitimate and desirable. These include

- legislative schemes, such as those involving economic controls, that demand a high degree of flexibility for their successful operation;
- circumstances where considerable flexibility may be needed to modify a legislative scheme to meet local or exceptional circumstances requiring special treatment ;
- circumstances where the technical context of laws is such that they are incomprehensible to anybody without
- knowledge in the field (laws on telecommunications or the operation of aircraft for example);
- schemes of a kind that several tiers of legislation are necessary to make them work. Matters such as town and country planning, public health, merchant shipping and civil aviation fall within this class;
- the necessity to cope with emergencies of various kinds.”

Further, the Guidelines on Process and Content of Legislation, Legislation Advisory Committee, New Zealand Ministry of Justice<sup>2</sup>, provides that -

“the distinction between principle and detail and policy and implementation can be both confusing and circular, not least because there is a significant overlap between those general descriptions. For example, Acts sometimes contain matters of

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<sup>1</sup> Legislative Drafting (G.C. Thornton 4<sup>th</sup> Edition , Butterworths, p.329-330)

<sup>2</sup> Guidelines on Process and Content of Legislation, Legislation Advisory Committee, New Zealand Ministry of Justice ([http://www2.justice.govt.nz/lac/pubs/2001/legislative\\_guide\\_2000/chapter\\_10.html](http://www2.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_10.html))

detail and, conversely, delegated legislation may contain matters of principle. Also, the concept of “policy” has a number of facets, ranging from high-level policy ... to matters of low-level policy ...”

**Time limits for various applications under Order 117A**

**Applications under Rule 4**

- service of expedited originating summons: not less than 7 clear days before hearing;
- service of affidavit in opposition: within 28 days after service of expedited originating summons ;

consistent with Order 28, Rule 1A (4)

**Applications under Rule 7**

- service of expedited originating summons: not less than 7 clear days before hearing;
- service of affidavit in opposition: within 28 days after service of expedited originating summons;
- service of additional affidavit : within 7 days after filing of additional affidavit;

consistent with Order 28, Rule 1A (4)

**Applications under Rule 10**

- service of summons/expedited originating summons: not less than 14 clear days before hearing;
- service of affidavit in opposition: within 28 days after service of expedited originating summons;
- service of additional affidavit : within 7 days after filing of additional affidavit;

consistent with Order 28, Rule 1A (4)

**Applications under Rule 14**

precedent: Order 116, Rule 4, The Rules of the High Court (Cap. 4A)

**Applications under Rule 15**

- service of summons: not less than 3 clear days before hearing;

precedent: Order 116, Rule 6, The Rules of the High Court (Cap. 4A)

### **Applications under Rule 16(1)**

- apply to court : within 3 days of making claim of legal privilege;
- service of summons: not less than 3 clear days before hearing;

precedent: Order 116, Rule 7(1), The Rules of the High Court (Cap. 4A)

### **Applications under Rule 16(2)**

- apply to court : within 3 days of depositing material with Court;
- service of summons: not less than 3 clear days before hearing;

precedent : Order 116, Rule 7(2), The Rules of the High Court (Cap. 4A)

### **Applications under Rule 17**

- apply to court: within 3 days of making claim of legal privilege;
- service of summons: not less than 3 clear days before hearing;

precedent: Order 116, Rule 8 , The Rules of the High Court (Cap. 4A)

### **Applications under Rule 18**

precedent: Order 116, Rule 5, The Rules of the High Court (Cap. 4A)

### **Applications under Rule 19**

precedent : Order 115, Rules 24 and 25 , The Rules of the High Court (Cap. 4A)

### **Applications under Rule 20**

- service of summons: not less than 5 clear days before hearing;
- service of affidavit evidence in opposition: not less than 2 clear days before hearing;

precedent: Order 115, Rules 26 and 27, The Rules of the High Court (Cap. 4A)

**Applications under Rule 21(1)**

- service of summons: not less than 5 clear days before hearing;

precedent: Order 115, Rule 28, The Rules of the High Court (Cap. 4A)

**Applications under Rule 23**

- service of summons/ expedited originating summons: not later than 7 days before hearing ( under Section 17(2)(b) of Cap. 575);

**Applications under Rule 24**

- service of summons /expedited originating summons: not later than 7 days before date of hearing ( under Section 17(5)(b) of Cap. 575);
- service of affidavit in opposition: not less than 3 clear days before hearing;

**Application under Rule 25**

- service of summons/expedited originating summons: not less than 14 clear days before hearing;
- service of affidavit in opposition: not less than 7 clear days before hearing