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Paper for the House Committee

Report of the Subcommittee on Rules of the High Court (Amendment) Rules 2009

Purpose

This paper reports on the deliberations of the Subcommittee on Rules of the High Court (Amendment) Rules 2009 (the Amendment Rules).

Background

2. The United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) (the Ordinance) was enacted in July 2002 to give effect to the mandatory elements of United Nations Security Council Resolution (UNSCR) 1373 and the Special Recommendations of the Financial Action Task Force on Money Laundering (FATF).

3. The United Nations (Anti-Terrorism Measures) (Amendment) Ordinance 2004 (the Amendment Ordinance) was enacted in July 2004 to amend the Ordinance to -

(a) give full effect to the requirements of UNSCR 1373;

(b) implement the FATF Special Recommendations on freezing non-fund terrorist property; and

(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.

4. The following sections of the Ordinance (as amended by the Amendment Ordinance) can only take effect when the Amendment Rules providing for the related procedural matters commence operation -

(a) *section 5* empowering the Court of First Instance (the Court) 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 Court 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 Court 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(2), (3), (7E) to (7J)* relating to the offences and penalties for contravening sections 6 and 12A to 12G;

(h) *section 15* on the supplementary provisions applicable to the licences in section 6(1) or 8;

(i) *section 17* providing for applications to the Court 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 Court may order the Government to pay to an affected party under specified circumstances; and

(k) *section 18A* preserving the common law remedies for an affected person.

The Amendment Rules

5. The Amendment Rules were made by the Rules Committee of the High Court (the Rules Committee) under section 54 of the High Court Ordinance (Cap. 4) and section 20 of the Ordinance on 28 September 2009. The purpose of the Amendment Rules is to add a new Order 117A to the Rules of the High Court (Cap. 4 sub. leg. A), setting out the procedures for applications to the Court under section 5, 12A, 12B, 12C, 12G, 12H, 13, 17 or 18 of the Ordinance. Furthermore, the Amendment Rules also amend Order 1, rule 2(3) of the principal Rules to ensure that other provisions of

the principal Rules, if appropriate, apply in respect of applications that may be made under the Ordinance.

6. The Amendment Rules will come into operation on the day appointed for the commencement of sections 5, 6, 8, 13, 17 and 18 of the Ordinance and of sections 5, 7, 12, 13, 16 and 17 of the Amendment Ordinance. In respect of section 12 of the Ordinance, it can only take effect after a code of practice in connection with the exercise of the powers and the discharge of the duties under section 12A is approved by the Legislative Council (LegCo). Section 12A provides that the Secretary for Justice (SJ) may make an application to the Court for an order to require the relevant persons to answer questions, furnish information or produce materials relevant to the investigation of an offence under the Ordinance. Section 12A(14) requires S for S to prepare the code of practice under section 12A, which is required to be laid before the Council.

7. The scrutiny period of the Amendment Rules has been extended from 11 November 2009 to 2 December 2009 by a resolution of the Council.

The Subcommittee

8. At the meeting of the House Committee on 16 October 2009, members agreed that a subcommittee should be formed to study the Amendment Rules. Under the chairmanship of Dr Hon Margaret NG, the Subcommittee held seven meetings with the Administration. The membership list of the Subcommittee is in **Appendix I**.

Deliberations of the Subcommittee

Scope of "prescribed interest"

9. Rule 1(4) of the new Order 117A provides that "prescribed interest" (訂明權益), in relation to any property, means -

(a) a legal or equitable estate or interest in the property; or

(b) a right, power or privilege in connection with the property.

10. Members consider that in view of the wide powers given to the Chief Executive (CE) to apply for an order to specify persons and property as terrorists, terrorist associates or terrorist property, to S for S to freeze property suspected to be terrorist property and to the law enforcement agencies (LEAs) to investigate and seize and detain property suspected to be terrorist property under sections 5, 6 and 12A-J of the Ordinance respectively, the scope of "prescribed interest" in rule 1(4) of the new Order 117A should cover all affected persons so as to allow them to apply to the Court for an order to revoke a specification order, to release the property being frozen, and to seek compensation from the Government. Hon Paul TSE and Hon James TO have also urged the Administration to amend the Ordinance, as the existing construction of

the Ordinance for the affected persons to take legal action is convoluted and fails to strike a proper balance between the wide powers of the Government and the rights of the affected persons.

11. The Administration has advised that the scope of "prescribed interest" is very wide and would cover persons who own, control or have a right to possess the property concerned and those persons who have an interest and rights in the property enforceable at common law and at equity. This would, for example, include mortgagors, mortgagees, trustees, beneficiaries under a trust, lessors and lessees, and a person having a chose in action in respect of the property, etc. Nevertheless, some categories of persons may have to be determined by the Court on a case-by-case basis in accordance with the facts of each case as to whether the persons have a "prescribed interest", e.g. beneficiaries under a discretionary trust and licencees.

12. The Administration has pointed out that even if the Court determines that certain categories of persons do not have the "prescribed interest" as defined in the Amendment Rules (e.g. bare licencee who has no right, power or privilege of any kind in the property), the Court may still, under section 2(6) of the Ordinance, of its own motion or on application order that any person who may be affected by an application (a) under section 5 in the case of an application under section 5(1) made inter partes, or (b) under section 13, 17 or 18, be joined as a party to the proceedings.

13. The Administration has further advised that the formulation of the definition of "prescribed interest" is modelled on the definition of "interest" under section 43(5) of the United Nations Office on Drugs and Crime Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (for common law legal systems) 2009. Such formulation has been adopted and put to operation by Australia in its Proceeds of Crime Act 2002.

14. Notwithstanding that the coverage of persons under the definition of "prescribed interested" in rule 1(4) of the new Order 117A is very wide, Dr Hon Margaret NG has expressed concern that the definition would inevitably delimit certain categories of persons who have an interest in the property. Moreover, the definition of "prescribed interest" may not be easily comprehended by members of the general public as to whether they are eligible to apply to the Court to have the relevant order or notice revoked, to release the property being frozen and to seek compensation from the Government. Dr NG has pointed out that section 2(1) of the Ordinance does not stipulate that there must be a definition of "prescribed interest" as such.

15. The Administration has explained that during the passage of the United Nations (Anti-Terrorism Measures) Bill (the Bill) in 2002, the majority of members of the Bills Committee on United Nations (Anti-Terrorism Measures) Bill (the Bills Committee) endorsed that the meaning of "prescribed interest" should be prescribed by rules of court, and that the meaning prescribed by rules of court would provide the basis for the interpretation of the relevant provisions under the Bill. Hence, the Administration proposed, and Members agreed that 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. The purpose is to empower the Court to prescribe that a

person who has a "prescribed interest" may include the affected persons who do not directly hold or own the relevant property and that the meaning of "prescribed interest" will provide the basis for the interpretation of the relevant provisions. Accordingly, section 2(1) of the Ordinance provides that "prescribed interest" (訂明權益), in relation to any property, means an interest in the property prescribed by rules of court as an interest for the purposes of the Ordinance. Further, section 2(4) of the Ordinance provides that "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". The expression "by, for or on behalf of whom the property is held" (and similar expressions) is used in sections 6, 12H(4)(a)(ii), 15(1)(b), 17 and 18 of the Ordinance.

16. Hon Miriam LAU has asked whether any person who considers that he is affected by an application under section 5, 13, 17 or 18 of the Ordinance could only join as a party to the proceedings after the subject person has made an application to the Court.

17. The Administration has replied that the affected person may be ordered by the Court to be joined as a party to those proceedings under section 2(6) after CE or SJ (as the case may be) has made those applications. In the case of an application to specify certain property as terrorist property under section 5, the applicant will be CE and in the case of an application to forfeit terrorist property under section 13, the applicant will be SJ. The Legal Adviser to the Subcommittee has also advised that any person affected by an order made under section 5 or by a notice made under section 6 may at any time apply to the Court to revoke the order under section 17(1)(a)(ii) or the notice under section 17(1)(b) of the Ordinance. Although section 18 does not appear to cover affected persons who do not have a prescribed interest in the property concerned for seeking compensation to be paid by the Government, section 2(6) of the Ordinance provides that the Court may order that any person who may be affected by an application under section 18 be joined as a party to the proceedings.

18. Hon James TO has sought confirmation on whether persons joined as a party to the proceedings under section 2(6) of the Ordinance to an application under section 18 of the same could be awarded compensation to be paid by the Government.

19. The Administration has advised that the Ordinance does not define under what circumstances a person (say "X") is regarded as "affected" within the meaning of section 2(6). Obviously, if X has a prescribed interest in the property concerned which competes with the prescribed interest of another person (say "Y") who has taken out an application under section 18 for statutory compensation, X is properly to be regarded as "affected" by the said application. In that event, it makes sense for the Court to have the power to join X as the "affected" person in the proceedings already commenced by Y without the need for X to start another set of proceedings under section 18. Alternative to the aforesaid example, if, after Y has taken out an application under section 18, the Court is satisfied that X, though not having a prescribed interest in the property concerned, may be a person affected by the application within the meaning of section 2(6), the Court may allow X to join as a

party to the section 18 proceedings commenced by Y. Absent any prescribed interest in the property concerned, X is not entitled to claim statutory compensation in the proceedings. Section 18A(1) provides that, subject to subsection (2) thereof, nothing in section 18 affects any remedy to a person at common law. If X asserts any claim for damages at common law in the section 18 proceedings commenced by Y, the Court can deal with X's claim in the proceedings. If no application under section 18 in respect of any property concerned has ever been commenced by any one, a person who has no prescribed interest in the property concerned but who asserts a claim for damages at common law may take out an application on his own for the Court's adjudication in accordance with general legal principles.

Validity and appropriateness of prescribing the definition of "prescribed interest" in the Amendment Rules

20. Some members, including Dr Hon Margaret NG and Hon Ronny TONG, have asked whether it is consistent with general legislative principle to determine who should or should not have the right to make an application to the court by means of a definition proved in a subsidiary legislation, namely the definition of "prescribed interest" in rule 1(4) of the new Order 117A. They consider that such matters should be determined in the primary legislation.

21. The Administration has pointed out that the Ordinance does not contain any express provision to restrict the power of the Rules Committee to prescribe the meaning of "prescribed interest". The remaining question is whether there is any restriction or qualification on the scope of meaning which may be implied from the provisions of the Ordinance. In section 17(1)(a)(ii) and (b) of the Ordinance, which provides for the classes of applicants who may make an application to the Court to revoke a specification order or a freezing notice, two classes of persons are contemplated. The first class consists of persons by, for or on behalf of whom the property concerned is held (i.e. all persons having a prescribed interest in the property are covered). The second class consists of persons in respect of whom the Court is satisfied that they are affected by the order or notice concerned (who may be a person who has no prescribed interest in the property concerned). If the scope of the definition of "prescribed interest" as given in the court rules is so wide that a distinction cannot be made between the two classes of applicants, the definition may be considered as being inconsistent with the provisions of the Ordinance. However, the Administration considers that the existing definition allows for a distinction to be made between the two classes of applicants. It is the intention of the Ordinance that a person who has a prescribed interest in property is to be regarded as a person who holds property (section 2(4)). It is also stipulated in the Ordinance that what constitutes prescribed interest is to be prescribed by rules of court (definition of "prescribed interest" in section 2(1) and section 20(1)(e)). Hence, the Administration considers that the existing definition of "prescribed interest" does not contravene any possible restriction provided for in, or implied from, the provisions of the Ordinance.

22. The Legal Adviser to the Subcommittee has advised that other than the requirement of consistency stipulated in section 28(1)(b) of the Interpretation and General Clauses Ordinance (Cap. 1) which provides that "no subsidiary legislation

shall be inconsistent with the provisions of any Ordinance", and that subsidiary legislation must be within the scope of the enabling provision, there is no legal principle which would prohibit prescribing the definition of "prescribed interests" by subsidiary legislation instead of in the principal Ordinance. It is however questionable as a matter of legislative policy, whether it is appropriate and desirable to prescribe the definition of "prescribed interest" by subsidiary legislation instead of in the principal Ordinance, albeit the interests of all persons having a prescribed interest in the property would remain the same regardless of whether the definition is prescribed in the Amendment Rules or in the Ordinance (assuming that the definition is the same). As it appears that the definition of "prescribed interest" has an impact on the class of persons who may make applications, say, under sections 17(1) and 18(1)(d) of the Ordinance, the definition of "prescribed interest" seems to be a matter of principle and policy. The Legal Adviser has also pointed out 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, 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 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.

23. Some members, including Dr Hon Margaret NG, Hon James TO and Hon Ronny TONG, have requested the Administration to consider amending the Ordinance to include the definition of "prescribed interest" in the Ordinance, in the light of the principles of the delegation of legislative power and the operation of the Ordinance relating to "prescribed interest".

24. On review, 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 Ordinance in that whether the definition is provided in the Ordinance or in the subsidiary legislation would not affect the legal effect and effectiveness of the definition. Nor does prescribing the definition of "prescribed interest" by way of subsidiary legislation violate any legislative policy. The Administration has quoted G. C. Thornton in Legislative Drafting (4th Edition, Butterworths, p. 329-330) which 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 -
>
> (a) legislative schemes, such as those involving economic controls, that demand a high degree of flexibility for their successful operation;
>
> (b) circumstances where considerable flexibility may be needed to modify a legislative scheme to meet local or exceptional circumstances requiring special treatment;

(c) 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);

(d) 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;

(e) the necessity to cope with emergencies of various kinds."

25. Dr Hon Margaret NG, Hon James TO and Hon Ronny TONG are not convinced by the Administration's explanation. They have pointed out that none of the situations (a) to (e) in the textbook above applies in the present case. They remain of the view that the Administration should amend the Ordinance to include the definition of "prescribed interest" in the Ordinance, instead of in the Amendment Rules. Mr TO also disagree with the Administration's view that prescribing the definition of "prescribed interest" in the Amendment Rules seems to fall under the circumstances mentioned in paragraph 24 above, as the definition could only be said to be a general definition.

26. Hon James TO has pointed out that although the provision for the meaning of "prescribed interest" to be prescribed by rules of court was passed by the Council during the resumption of Second Reading debate on the Bill in July 2002, the proposal had not been thoroughly discussed by members of the Bills Committee due to lack of time. The Administration had emphasised that it was important to have the Bill enacted before the end of the 2001-2002 legislative session, as there might be serious reputational risk as FATF might publicly announce the jurisdictions which failed to comply with certain Special Recommendations. This would reflect badly on Hong Kong given Hong Kong's position as a major financial centre and leading role as the then President of FATF. Against this background, Mr TO opines that it is incumbent upon the Administration to re-visit those issues which had not been thoroughly discussed and/or satisfactorily addressed by the Bills Committee, such as defining "prescribed interest" by way of subsidiary legislation. Nevertheless, the Administration remains of the view that whether the definition of "prescribed interest" is provided in the Ordinance or in the subsidiary legislation of the Ordinance would not affect the legal effect and effectiveness of the definition. Hence, it is appropriate for the definition to be provided in the new Order 117A.

Definition of "holder"

27. Rule 1(1) of the new Order 117A provides that "holder"(持有人), in relation to any subject property, means a person whom the applicant can reasonably ascertain to be a person by, for or on behalf of whom the property is held.

28. Some members, including Dr Hon Margaret NG, Hon Ronny TONG, Hon LAU Kong-wah, Hon IP Wai-ming and Hon James TO, have pointed out that the definition of "holder" is illogical in that the fact that the applicant cannot reasonably ascertain someone to be the holder of a property does not mean that the property is

without a holder. They have suggested amending the definition or the content of other provisions in the Amendment Rules in which the definition appears.

29. The Administration considers that from the policy perspective, no application should be made to specify or forfeit the property concerned if the identity of the relevant holder(s) cannot be reasonably ascertained, having regard to the impact of the specification order and forfeiture order under sections 5 and 13 of the Ordinance. 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. The definition of "holder" only applies in the context of an application made under section 5(1)(b) (for a specification of terrorist property 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 if the holder or holders of the property cannot be reasonably ascertained.

30. Dr Hon Margaret NG does not accept the existing definition of "holder". She considers it wrong to use a definition to distort the meaning of a word just for convenience sake. The Administration disagrees with Dr NG's view and has explained that the definition of "holder" in no way represents the distortion of facts as implied. The Administration has also quoted examples from the Ordinance and from other local enactment to show that the use of a definition in the present manner is not uncommon.

Procedures for CE to specify persons and property as terrorists, terrorist associates or terrorist property

31. The Administration has advised that 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 the Department of Justice (DoJ) for legal advice. Subject to the advice of DoJ, a submission will be made to CE via S for S to recommend a section 5 application to be made to the Court. CE would, based on the information presented, decide whether an application should be made. Similar administrative arrangements have been established for existing legislation such as Fugitive of Offenders Ordinance (Cap. 503), which aims to make provisions for, among other things, the surrender to prescribed places outside Hong Kong of persons wanted for prosecution. CE will, based on the advice of DoJ, decide whether an order to surrender should be made.

Application to specify property as terrorist property

32. An application under section 5(1) of the Ordinance may be made ex parte and using an ex parte originating summons supported by an affidavit under rule 6 of the

new Order 117A if -

(a) there exist circumstances of urgency; or

(b) the whereabouts of the intended respondent are not known to the applicant or, in the case of an application under section 5(1)(b), where there are more than one intended respondent, the whereabouts of none of them are known to the applicant, the applicant has taken reasonable steps to ascertain the whereabouts of such intended respondent, and has published notice of the applicant's intention to make the application in a Chinese newspaper and an English newspaper that circulate generally in Hong Kong.

Otherwise, the application is to be made inter partes by an expedited originating summons supported by an affidavit under rule 7 of the new Order 117A. The Amendment Rules specify the timeframe for serving the summons and affidavit by the applicant as well as for the service of any affidavit evidence in opposition by the respondent.

33. In an inter partes application under section 5(1) of the Ordinance, if the applicant cannot serve the expedited originating summons 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) 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, rule 8 of the new Order 117A provides that the applicant may, after having taken reasonable steps to ascertain the whereabouts of the respondent(s) or intended respondent(s) and published a notice of the applicant's intention to make or proceed with the application in a Chinese newspaper and an English newspaper that circulate generally 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.

34. Hon James TO considers that the existing drafting of rules 7 and 8 of the new Order 117A can be further improved to make the procedures for applications to the Court by CE to specify certain property as terrorist property more logical.

35. On review, the Administration considers that the existing drafting of rules 7 and 8 of the new Order 117A is appropriate. 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.

Publication of a notice of intention to make an application under sections 5(1)(a), 5(1)(b) and 13

36. Some members, including Hon LAU Kong-wah and Hon James TO, are of the view that merely requiring the applicant, CE or SJ as the case may be, to publish a notice of intention to make an application under sections 5(1)(a), 5(1)(b) and 13 of the Ordinance in a Chinese newspaper and an English newspaper that circulate generally in Hong Kong if the whereabouts of the subject person are not known to the applicant is far from adequate.

37. The Administration has advised that the purpose of the publication is to give notice of the ex parte application to the subject person whose whereabouts are not known to the applicant. Upon having notice of the application, the subject person may, subject to directions of the Court, apply to join the proceedings. In fact, the requirement to publish a notice of application/order/decision/disciplinary orders, etc. in newspapers in order to inform the subject persons or any other affected persons is very common in local legislation. For example, section 3(2)(c)(ii)(B) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) (DTRPO) and section 8(3)(c)(i)(B)(II) of the Organized and Serious Crimes Ordinance (Cap. 455) (OSCO) require the publication of a notice of application for confiscation of proceeds of drug trafficking or crime. Further, section 37E of the Immigration Ordinance (Cap. 115), section 34A of the Merchant Shipping Ordinance (Cap. 281) and section 52 of the Merchant Shipping (Local Vessels) Ordinance (Cap. 548) provide for the publication of notice of seizure of vessel or ships. Section 153E of the Crimes Ordinance (Cap. 200) also provides for the publication of declaration of forfeiture of vessels made by a court or magistrate. The Administration has further advised that publishing a notice in two newspapers in Hong Kong is the minimum action that the authority would take to notify the subject person. Other means, such as publishing the notice on the Internet, would be explored, where appropriate.

38. The Administration has reservation about Hon James TO's suggestion of posting a notice at the property where CE intends to make an application to specify the property as terrorist property under section 5(1)(b) of the Ordinance, as 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.

39. Members consider the Administration's explanation unacceptable, as a notice of intention to specify a property as terrorist property and a notice of intention to forfeit the property must be published in a Chinese newspaper and an English newspaper that circulate generally in Hong Kong. Dr Hon Margaret NG has pointed out that it is of paramount importance that persons affected by the order made under section 5(1)(a), 5(1)(b) or 13 of the Ordinance are made fully aware as soon and as far as practicable that their properties have been specified as terrorist properties and/or being put before forfeiture, so that they could defend their rights.

40. The Administration has pointed out that CE or SJ, as the case may be, must publish the specification or forfeiture order in the Gazette. Moreover, as a matter of standard practice, the Administration will serve a copy of the specification or forfeiture order to the other party/parties to the court proceedings.

41. Hon James TO urges the Administration to at least consider posting a notice of intention to specify a property as terrorist property and a notice of intention to forfeit the property at the property address through administrative means.

Service of an order made under section 5(5)

42. Hon James TO has suggested that an order to revoke a specification order under section 5(5) of the Ordinance should be served on all affected persons who are known to the applicant.

43. The Administration has advised that 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. Moreover, 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.

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

44. Hon James TO is of the view that rule 14 of the new Order 117A requiring authorised officers to lay an information on oath to the Court to apply 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 too simple in that it fails to make a distinction on the procedures for handling urgent and non-urgent applications and makes no mention of whether the information on oath has to be made in written form. In view of the intrusive powers to be provided to the authorised officers, consideration should be given to making reference to the Interception of Communications and Surveillance Ordinance (Cap. 589) which contains detailed procedures for authorised officers to apply to the Court for similar powers under sections 12A(1), 12B(1), 12C(1) and 12G(1) of the Ordinance, instead of modelling rule 14 of the new Order 117A on the Rules of the High Court (Order 116, rule 4) relating to OSCO which was enacted over 10 years ago.

45. The Administration has advised that the powers under sections 12A, 12B, 12C and 12G are not comparable with the powers to intercept communications or carry out covert surveillance under 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 the new Order 117A. LEAs would prepare all the necessary documents and apply to court under rule 14(2). Since 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.

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

46. Rules 16 and 17 of the new Order 117A 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 authorised officer access to material; and

(c) in the course of the execution by an authorised officer of a warrant issued under section 12C or 12G.

47. Hon James TO has expressed concern that the time limit for a person to make an application to the Court under rule 16(1)(a) of the new Order 117A within three days does not allow sufficient time for making the application, and should be prolonged, say, to within seven or 14 days. To model rule 16(1)(a) of the new Order 117A on rule 7 of Order 116 for OSCO may not be appropriate. It is also unclear as to whether non-judiciary members of the Rules Committee have consulted the legal profession in deciding the time limit for a person to make an application under rule 16(1)(a) of the new Order 117A.

48. In view of the wide powers provided to the authorised officers in requiring any person(s) to furnish information and gaining access to material, Dr Hon Margaret NG, Hon James TO and Hon Cyd HO consider that more time is needed to ascertain how such powers would be exercised. For example, rule 16(2) of the new Order 117A, in its present form, requires the relevant person to secure the material, say, a computer in a sealed container for depositing with the Court, instead of only allowing an authorised officer to copy certain relevant files contained in the computer.

49. The Administration has advised that in the case of an exercise of powers under an order under section 12A or 12B of the Ordinance, 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 of the new Order 117A. Under section 12C of the Ordinance, 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 of the Ordinance, 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. 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.

50. Hon James TO maintains his view that the three days' time limit is far from adequate for a person to apply for a claim of legal privilege, as it could not be ruled out that the person concerned may be required to furnish information and/or produce the relevant material without prior discussion with authorised officers.

Opening of confidential documents under rule 18(3)(a)

51. Rule 18(2) of the new Order 117A specifies that immediately on the determination of the application under section 12A, 12B, 12C or 12G of the Ordinance, as the case may be, 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. Rule 18(3)(a) of the new Order 117A further specifies that the confidential documents must be kept in the custody of the Court in a place to which the public has no access or in such other place as the judge may authorise and must not be opened nor must its contents be removed except by order of a judge.

52. Noting that rule 18(3)(a) is modelled on rule 5(3)(a) of Order 116 for OSCO, Dr Hon Margaret NG has asked how the latter rule has operated in practice, including whether there is a room in the Judiciary for storing the confidential documents, as well as the circumstances under which the confidential documents would be opened under rule 18(3)(a) of the new Order 117A and the procedures involved.

53. Hon James TO considers that the Administration should re-visit the appropriateness of rule 18(3)(a) of the new Order 117A, having regard to the problems encountered in opening the confidential documents or removing their contents under Cap. 589.

54. The Administration has advised that at present, the courts already handle on a regular basis documents that need to be treated confidentially. The Judiciary has confirmed that the existing provisions of the Judiciary are sufficient to meet the requirements of rule 18(3) of the new Order 117A. The Judiciary envisages no difficulties in the security aspects. If necessary, the Judiciary would take steps to enhance the present arrangements.

Application for continued and further detention under section 12H

55. Under rule 19 of the new Order 117A, an application under section 12H(2) for an order to authorise the continued detention of seized property is to be made by an ex

parte originating summons supported by an affidavit. Under rule 20, an application under section 12H(3) for an order to authorise the further detention of seized property is to be made by a summons supported by an affidavit.

56. Dr Hon Margaret NG and Hon Miriam LAU have questioned why an application for continued detention of seized property under section 12H(2) of the Ordinance under rule 19(1) of the new Order 117A must be made by an ex parte originating summons, since the holder of the property and affected persons already know that the property is detained. Their views should be heard before the court decides whether detention should be prolonged.

57. The Administration has advised that 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. 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.

58. The Legal Adviser to the Subcommittee has advised that although rule 19(1) of the new Order 117A is modelled on rule 24 of Order 115 for DTRPO, the latter does not stipulate that an application under the rule must be made ex parte. There is also no mention in Cap. 575 that an application under section 12H(2) must be made by an ex parte originating summons. He has also pointed out that under section 24C(1) of DTRPO, seized property shall not be detained for a period of more than 10 working days in the case of such property being imported into Hong Kong, or seven working days in the case of such being exported from Hong Kong (which is shorter than the period of 30 days under section 12H(2) of the Ordinance), unless, before the expiration of that period, the continued detention of such property is authorised by an order under section 24C(2) of DTRPO.

59. Hon James TO and Hon Miriam LAU have suggested that a notice should at least be served on the holder of the seized property of the intention of an authorised officer to apply to the Court for continued detention of the property under section 12H(2) of the Ordinance. The Legal Adviser to the Subcommittee has advised that the Ordinance does not preclude the implementation of the suggestion. The Administration agrees to implement the suggestion by administrative means. Dr Hon Margaret NG however holds the view that applications for continued detention of seized property under section 12H(2) of the Ordinance must be made inter partes.

Application for release of seized property under section 12H

60. Under rule 21 of the new Order 117A, 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.

61. Dr Hon Margaret NG and Hon Miriam LAU have questioned why a person or an authorised officer has to apply to the Court under rule 21(1) or 21(3) of the new Order 117A to release the seized property, when the period for which the seized property could be detained has expired. It is also questionable why an application under rule 21(3) must be made ex parte, as the Court may not be able to direct the release of the seized property to affected persons who are not before the Court.

62. The Administration has explained that rule 21(1) and 21(3) of the new Order 117A deal with an application under section 12H(4)(a) and section 12H(4)(b) for release of seized property while the property is being detained by an order under section 12H(2) or section 12H(3). Before the order expires, it is necessary for the holder of the property, etc. to apply to the Court for the release of the property. Rule 22 of the new Order 117A provides that if an order under section 12H(2) or (3) for detention of seized property has expired or when a direction is obtained for the release of seized property under section 12H(4), then the property must be forthwith released, subject to section 12H(5) and any direction of the Court. Under rule 22, if the condition under paragraph (a) or (b) of that rule applies and section 12H(5) of the Ordinance does not apply, no application to the Court is required for the release of the property concerned. Under section 12H(5), if, during the seized property is being detained, there are proceedings instituted (in the Hong Kong Special Administrative Region (HKSAR) or elsewhere) against any person in relation to an offence with which the property is connected or steps have been taken (in HKSAR or elsewhere) which may result in a direction being given under section 6(1) in respect of the property or which may result in the forfeiture or other confiscation of the property, the property shall not be released until the proceedings or steps have been concluded.

63. 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 seized 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.

Application for compensation under section 18

64. Under rule 25 of the new Order 117A, an application for an order for compensation under section 18 of the Ordinance 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 Amendment Rules specify the timeframe for serving the summons or expedited originating summons, and affidavit in support, if any, on SJ 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 SJ on the applicant.

65. Hon Cyd HO has asked whether CE and S for S would be covered by rule 25(2) (b) of the new Order 117A which specifies that the summons or expedited originating summons must also be served on any other person on whose part, it is alleged, there has been default.

66. The Administration has explained that rule 25(2)(b) of the new Order 117A is not restricted to any particular class of person who might have been alleged to have made a mistake in connection with specifying persons and property as terrorists, terrorist associates or terrorist property or with the exercise of powers under a warrant issued under section 12G of the Ordinance.

67. Hon Cyd HO and Hon IP Wai-ming have expressed concern that the applicant may not know the person who might have been at fault in carrying out the seizure order or detention order under the Ordinance. To enable the applicant to initiate court proceedings to seek compensation to be paid by the Government under section 18 of the Ordinance, Ms HO has suggested lowering the requirements that the summons or expedited originating summons, and affidavit in support, could either be served on SJ or any other person on whose part, it is alleged, there has been default. Hon Audrey EU has also suggested adding "if known" to rule 25(2)(b).

68. The Administration has advised that the substantive right to statutory compensation under section 18 of the Ordinance is premised on there having been some default on the part of any person concerned and the applicant has, in consequence of such specification, seizure or detention and the default, suffered loss. Rule 25(2) provides for the procedural steps for making such an application, including that the applicant must serve the application together with the affidavit in support on SJ and "on any other person on whose part, it is alleged, there has been default". The liability to pay statutory compensation, if and when established to the satisfaction of the Court, lies with the HKSAR Government. Where the applicant alleges any default on the part of the Government as a whole, the allegations will be brought to the notice of the Government when SJ is served under rule 25(2)(a). If, however, the applicant alleges specifically that there has been default on "any other person" relevant to his claim, it is considered fair and appropriate that rule 25(2)(b) requires the application to be served on such other person so that he can rebut any specific allegation against him as he thinks fit.

69. The Administration has further advised that the procedure under rule 25(2) cannot have the effect of depriving an applicant of his right to compensation under section 18 if he is otherwise entitled as a matter of substantive law. Provided that the allegations of default on the part of the Government are sufficiently set out in his application and affidavit in support, the Court will be in a position to adjudicate the applicant's claim for compensation. In the event that provision of additional information or documents by the applicant or the Government, as the case may be, should be necessary, the Court can give any direction as appropriate. The Administration does not consider that an applicant is procedurally barred from making the application for compensation under section 18 merely because the applicant does not allege or know who the other persons covered by rule 25(2)(b) are. In short, even though the applicant does not specifically name a person who is in default and therefore does not serve the relevant documents in accordance with rule 25(2)(b), this fact alone does not prevent him from proceeding with his claim under section 18 and rule 25 of the new Order 117A. Further, in a case where the applicant does not know the whereabouts of any such other person mentioned in rule 25(2)(b) such that no address is available for effecting service of the application under section 18, there is a provision of general application in Order 65 rule 9 that the relevant document needs not be served on that person unless the Court otherwise directs or any of the court rules otherwise provides. Accordingly, rule 25 does not purport to impose, by way of rule 25 (2)(b), any procedural hindrance against the making of an application otherwise entitled under section 18.

70. Some members, including Dr Hon Margaret NG, Hon Cyd HO and Hon IP Wai-ming, have pointed out that the compensation provision under section 18 is of little practical benefit to someone who is wrongly specified as a terrorist or terrorist associate and whose property is wrongly specified as terrorist property, the main reason being that it would be difficult for the affected persons to satisfy the court that there has been default on the part of the Government. The Legal Adviser to the Subcommittee has pointed out that according to paragraph 59 of the report of the Bills Committee on United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003, the Administration considers that the provision of "default" as proposed to be adopted in section 18(2)(c) and new section 18(2B)(a) is consistent with the common law position that something more than negligence has to be established on the part of the Government.

Expedited originating summons

71. Members have raised query as to why all originating summons under the new Order 117A are in expedited form.

72. The Administration considers the use of expedited originating summons appropriate. Given the nature of the applications to specify terrorist/terrorist associate/terrorist property (section 5(1)), to forfeit terrorist property (section 13), to revoke a freezing notice (section 17(1)(b)), to revoke or vary a licence to deal with frozen terrorist property or make funds or financial services available to a terrorist/ terrorist associate (section 17(4)), or to obtain compensation (section 18), it is in the interests of both the applicants and respondents to have the applications processed as

expeditiously as possible. The Administration also does not consider the use of expedited summons in the relevant applications inconsistent with section 20(1)(c) of the Ordinance, which is qualified by the expression "without limiting the generality of section 20(1)(a)".

Time limits

73. Hon Miriam LAU has pointed out that the various time limits in the new Order 117A, such as the expedited originating summons and a copy of the affidavit in support having to be served on the subject person not less than seven clear days before the date fixed for the hearing of the application under rule 4(4), need to be rationalised to make the Amendment Rules more user-friendly.

74. The Administration has advised that the time limits in the new 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, as well as the rules of court for DTPRO and OSCO in Orders 115 and 116 of the Rules of the High Court respectively. The Administration considers that there is 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 the new Order 117A and the relevant precedents, if any, is in **Appendix II**.

The way forward

75. As more time is needed to scrutinise the Amendment Rules in detail, the Subcommittee agreed at its meeting on 16 November 2009 that members' view be sought by circulation of paper on a proposal for the Subcommittee Chairman to move a motion to repeal the Amendment Rules at the Council meeting on 2 December 2009, should the Administration refuse to move such a motion. The majority of members have indicated support for the proposal. Namely, Dr Hon Margaret NG, Hon James TO, Hon Audrey EU, Hon Ronny TONG and Hon Cyd HO have indicated support for the proposal, whereas three members, namely Hon LAU Kong-wah, Hon Miriam LAU and Hon IP Wai-ming have indicated otherwise. As the five members who have indicated support for the proposal have maintained their stance in supporting the proposal after considering the Administration's responses to the areas of concern raised by members, Dr Hon Margaret NG will, on behalf of the Subcommittee, move a motion to repeal the Amendment Rules at the Council meeting on 2 December 2009.

76. The Administration has appealed to members not to repeal the Amendment Rules in order that Hong Kong could fulfil its international obligations to combat terrorist activities as early as possible. Should the Amendment Rules be repealed, it would be impossible for Hong Kong to fully implement the mandatory elements of UNSCR 1373 and the recommendations of FATF. Apart from failing to honour Hong Kong's international obligation, it is also possible that Hong Kong may face further international criticisms, such as from FATF. Indeed, the last mutual evaluation exercise on Hong Kong conducted in June 2008 has made it clear that Hong Kong should implement the outstanding provisions that are still pending as soon as possible.

77. Dr Hon Margaret NG has pointed out that where property and liberty interests of the public are touched, LegCo is duty bound to apply careful scrutiny. She has explained that the Administration could have provided the Amendment Rules in draft form to LegCo earlier, so that a subcommittee could be formed under the House Committee to scrutinise the draft Rules in detail with less constraint of time before gazettal. Hon LAU Kong-wah however holds the view that it is not appropriate to repeal the Amendment Rules, as the Administration has responded to all areas of concern raised by the Subcommittee, albeit not to the satisfaction of some members.

Advice sought

78. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 2
Legislative Council Secretariat
24 November 2009

Appendix I

Subcommittee on Rules of the High Court (Amendment) Rules 2009

Membership list

Chairman	Dr Hon Margaret NG
Members	Hon James TO Kun-sun Hon LAU Kong-wah, JP Hon Miriam LAU Kin-yee, GBS, JP Hon Audrey EU Yuet-mee, SC, JP Hon Ronny TONG Ka-wah, SC Hon Cyd HO Sau-lan Hon IP Wai-ming, MH Hon Paul TSE Wai-chun (Total : 9 Members)
Clerk	Miss Mary SO
Legal Adviser	Mr Timothy TSO
Date	28 October 2009

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