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## National Security Law in Hong Kong: Implementation Rules for Article 43

On 30 June 2020, the *Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region* ("**NSL**") came into operation in the Hong Kong Special Administrative Region ("**HKSAR**"). Broadly speaking, the NSL criminalizes four types of acts: (1) secession, (2) subversion, (3) terrorist activities, and (4) collusion with a foreign country or with external elements to endanger national security.

The HKSAR Police Force has set up a designated department in-charge of offences endangering national security ("**National Security Offences**"). Article 43 of the NSL empowers the Police Department to take specific measures when handling cases concerning National Security Offences. These measures are in addition to the ones currently available under Hong Kong law for investigating serious crimes.

Article 43 authorizes the Chief Executive of the HKSAR, in conjunction with the Committee for Safeguarding National Security of the HKSAR, to make relevant implementation rules for the purpose of applying the measures under Article 43.

### Implementation Rules for Article 43

On 7 July 2020, the Implementation Rules for Article 43 came into operation. The Rules consist of 115 pages set out in seven schedules and detail provisions applicable to each of the seven categories of specific measures under Article 43 as summarized below:

- A police officer may exercise the power to search places for evidence (**Schedule 1**).
- A police officer may exercise the power to restrict a person suspected of having committed an offence endangering national security and under investigation from leaving the HKSAR (**Schedule 2**).
- The Secretary for Justice, the Secretary for Security or a police officer may exercise the power to freeze, restrain, confiscate and forfeit property relating to the commission of an offence endangering national security (**Schedule 3**).
- A police officer may exercise the power to remove messages endangering national security, and require a platform service provider, a hosting service provider and a network service provider to provide assistance (**Schedule 4**).
- The Secretary for Security and the Commissioner of Police may exercise the power to require a foreign or Taiwan political organization, or a foreign or Taiwan agent, to provide information by reason of activities concerning the HKSAR (**Schedule 5**).
- An officer of the Police Force may apply for the authorization to conduct interception of communications and covert surveillance for preventing or detecting offences endangering national security or for protecting national security (**Schedule 6**).
- A police officer may exercise the power to require a person to furnish information and produce material (**Schedule 7**).



We have provided additional details of the seven Schedules under the Rules below.

## 1 Rules relating to search of places for evidence

- 1.1 The Police Department may, **with a warrant**, enter and search any place, including any vehicle, vessel, aircraft, and electronic equipment, and inspect, examine, search, seize, remove and detain any evidence.
- 1.2 If for any reason it would not be reasonably practicable to obtain a warrant, the search may be conducted **without warrant** provided that the authorized officer is satisfied that there is reasonable ground for (i) suspecting that any specified evidence is in the relevant place, and (ii) believing that the evidence is necessary for investigating a National Security Offence, procuring and preserving evidence of such an offence or protecting the safety of any persons.

## 2 Rules relating to restriction on persons under investigation from leaving the HKSAR

- 2.1 A magistrate may require a person, who is the subject of an investigation in respect of a National Security Offence, by written notice, to surrender to a police officer any **travel document** (i.e., a passport or other document establishing the identity or nationality of a holder) in the person's possession.
- 2.2 The person must comply **immediately** upon personal service of the notice. A person who fails to comply immediately may be **arrested**. An arrested person, who does not comply immediately or satisfy the magistrate that they do not possess a travel document, must (by warrant) be **committed** to prison for a maximum of 28 days.
- 2.3 The person must not leave the HKSAR before the expiry of a period of 6 months from the date of the notice (whether or not it has been served). A surrendered travel document may be detained for 6 months from the date of the notice (which may be extended for a further 3 months).
- 2.4 A person, who has surrendered a travel document, may apply for **return of the travel document** or **permission to leave** the HKSAR. The application may only be granted if the applicant would otherwise suffer unreasonable hardship, and may be subject to conditions (e.g., to appear at a certain time and place in the HKSAR) and provision of security (e.g., a money deposit).

## 3 Rules relating to freezing, restraint, confiscation and forfeiture of property

- 3.1 The measures under Schedule 3 can be taken with regard to **movable** and **immovable** property in or outside the HKSAR.
- 3.2 The Secretary for Security may direct that a person must not, directly or indirectly, deal with a specified property except under the authority of a licence granted by the Secretary ("**Freezing Notice**"). The



Secretary must have reasonable grounds to suspect that any property held by any person is "**offence related property**", i.e., of a person who commits, or attempts to commit, or participates in or facilitates the commission of a National Security Offence, or any property that is intended to be used or was used to finance or otherwise assist the commission of such an offence.

- 3.3 Where the Secretary has reasonable cause to suspect that any **movable** property will be removed from the HKSAR, the Secretary may direct that a police officer may **seize** it.
- 3.4 Any person who knows or suspects that any property is "offence related property", must **disclose** to a police officer information or other matters on which the knowledge or suspicion is based and, as soon as is reasonably practicable after that, information or other matters that come to their attention.
- 3.5 Schedule 3 allows court applications for various orders relating to a beneficiary or proceeds arising from a National Security Offence. Schedule 3 regulates in detail who may apply, the circumstances in which the court can grant an order and other requirements:
  - (a) **Restraint order**: The court may restrain a person from dealing with any "realizable property".
  - (b) **Charging order**: The court may impose a charge on any interest in realisable property for securing payment to the Government.
  - (c) **Confiscation order**: The court may order a defendant to pay a specified amount within a specified time. The order must fix a term of imprisonment (maximum between 1 and 10 years) if the defendant fails to pay.
  - (d) **Forfeiture order**: The court may order forfeiture of any "offence related property" and fix a compensation to be paid at an amount which the CFI considers just in the circumstances of the case.
- 3.6 The **penalties** under Schedule 3 depend on the requirements that were not complied with. For example, a person who knowingly contravenes a Freezing Notice is liable to a fine and 7 years' imprisonment.

## 4 Rules on removing messages endangering national security and requiring assistance

- 4.1 Where the Police Department has reasonable ground for suspecting that a person has **published** an electronic message on an electronic platform (e.g., a website or online application) and the publication is likely to constitute or to cause the occurrence of a National Security Offence, the Police Department may require the person to **remove** the message and/or a service provider to take a **disabling action**.
- 4.2 The **service providers** concerned are the **platform** service provider and, if necessary, a **hosting** service provider and **network** service provider. The "disabling action" to be taken depends on the type of service provider. For example, the platform service provider must



either remove the message from the platform or restrict or cease access by any person, via the platform, to the message.

- 4.3 If a magistrate is satisfied that the **person** has failed to comply and it is necessary to remove the message to safeguard national security, it may issue a warrant authorizing a police officer to **seize an electronic device** of the person and take any reasonably necessary action on the device for removing the message from the platform.
- 4.4 In addition, the Police Department may require, with a magistrate's **warrant**, any service provider to provide the **identification record** or **decryption assistance**. The Police Department may proceed **without warrant** if, among other conditions, a delay caused by an application for a warrant is likely to defeat the purpose of obtaining the record or assistance, or for any reason it is not reasonably practicable to make the application.
- 4.5 A service provider can be required to provide the identification record or decryption assistance regardless of whether or not the record or decryption key is located **within or outside the HKSAR**.
- 4.6 The **penalty** for non-compliance with requirements under Schedule 4 is a HKD 100,000 fine and 1 year imprisonment (publishing person), and a HKD 100,000 fine and 6 months' imprisonment (service provider).

## 5 Rules on requiring foreign and Taiwan political organizations and agents to provide information by reason of activities concerning the HKSAR

- 5.1 Schedule 5 applies to requirements for foreign (and Taiwan) political organizations and foreign (and Taiwan) agents:
  - (a) A **foreign political organization** is a political party or any other organization outside the territory of the PRC that pursues political ends (it does not include a political organization that does not carry on activities in the HKSAR)
  - (b) A **foreign agent** is a person who carries on activities in the HKSAR and who has a specific relationship with a foreign government or political organization as further specified in Schedule 5. It excludes any person or body that is entitled to privileges and immunities in the HKSAR in accordance with Hong Kong law (e.g., a diplomatic agent or a consular officer).
- 5.2 **Information** that may be required to be provided includes the personal particulars of the organization's staff and members in the HKSAR, the organization's or agent's activities in the HKSAR and their assets, income, and sources of income in the HKSAR.
- 5.3 The obligations imposed on an organization is binding on every (i) office-bearer of the organization in the HKSAR, and (ii) person managing or assisting in the management of the organization in the HKSAR (provided they have been served with the notice).



5.4 The **penalty** for non-compliance with a notice requiring to provide information is a HKD 100,000 fine and 6 months' imprisonment. If information provided is false, incorrect, or incomplete in a material particular, the penalty is a HKD 100,000 fine and 2 years' imprisonment.

## 6 Rules on application for authorization to conduct interception and covert surveillance

6.1 The Police Department may intercept communications and conduct covert surveillance on a person **suspected**, on reasonable grounds, of being involved in the commission of a National Security Offence.

6.2 Schedule 6 introduces some of the terms and mechanisms set out in the Interception of Communications and Surveillance Ordinance (Cap. 589):

- (a) **Interception** includes both postal and telecommunications interception. It may target communications made to or from specified premises, address or telecommunications service, and/or those to or used by a specific person.
- (b) **Covert surveillance** involves the use of surveillance device(s) for the purpose of a specific investigation or operation. It is conducted in a manner designed to obtain private information about the surveillance subject who is unaware of the surveillance. Schedule 6 distinguishes between Type 1 and Type 2 surveillance, whereby the latter type is less intrusive.

6.3 There are three types of authorization for interception and covert surveillance: authorization by (i) the Chief Executive ("**CE Authorization**"), (ii) an authorizing directorate officer designated by the Chief Executive ("**AO Authorization**"), and (iii) the Commissioner of Police in case of emergency ("**Emergency Authorization**"):

- (a) As a general rule, either CE or AO Authorization must be obtained, unless it is so urgent (e.g., imminent risk of serious threat to national security or loss of vital evidence) that it would not be reasonably practicable to apply. Emergency Authorization may only be granted for a maximum of 48 hours.
- (b) Authorization may encompass the use of interception or surveillance **devices** and **entry** into premises with use of reasonable force (if necessary).
- (c) Authorization may include conduct which is **necessary** and **incidental** to the carrying out of authorized conduct (e.g., use of enhancement equipment).
- (d) A prescribed authorization cannot authorize interception or covert surveillance which involves a **lawyer** or is likely to involve the provision of **legal advice to clients**, unless there are exceptional circumstances (e.g., reasonable grounds to believe that the lawyer has committed a National Security Offence).



- (e) Information which is subject to **legal professional privilege** will remain privileged even if it is obtained pursuant to a prescribed authorization.

## 7 Rules relating to requirement to furnish information and produce materials

7.1 The Police Department may require a person **suspected** on reasonable grounds of having in possession information or material relevant to an investigation, to answer questions and furnish such information or produce such material.

7.2 These measures require an **order** from the Court of First Instance ("CFI"):

- (a) The application must be made by the **Secretary for Justice** on an *ex parte* basis.
- (b) Schedule 7 sets out detailed conditions that must be met before the CFI can grant an order. For example, there must be reasonable grounds for suspecting that the National Security Offence has been committed and it must be in the public interest that an order should be made, having regard to factors such as the seriousness of the offence, and whether it could be effectively investigated without the order.
- (c) A person must not be required to furnish information or produce material **subject to legal professional privilege**, except that a lawyer may be required to furnish a client's name and address.
- (d) A person is **not excused** from furnishing information or producing material even if it might tend to incriminate the person or would breach their obligation as to secrecy or some other restriction on the disclosure of information.
- (e) The **penalty** for non-compliance with a requirement under Schedule 7 is a HKD 100,000 fine and 1 year imprisonment. The penalty for making a statement that the person knows to be false or misleading in a material particular, or recklessly making a statement that is false or misleading in a material particular is a HKD 500,000 fine and 3 years' imprisonment.

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