

Society for Community Organization

**Protection of human rights
under the
United Nations (Anti-terrorism Measures)
(Amendment) Ordinance
(Cap. 575)**

**the Proposed Code of Practice to be made for the United Nations
(Anti-terrorism Measures) Ordinance (Cap. 575)**

Submission to Panel on Security on .

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A. Introduction

This document represents Society for Community Organization's comments on the government's outline of the Proposed Code of Practice to be made for the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) ("the proposed code") as outlined in Annex B of LC Paper No. CB(2)347/08-09(07)¹ titled: "Salient features of the proposed code of practice for requiring persons to furnish information or produce materials under section 12A of the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575). Annex B will be referred to as "the outline".

Society for Community Organization (SoCO) welcomes the government's objective of protecting Hong Kong from terrorism. However, we are concerned about the wide powers given to the law enforcement agencies. In order to ensure adequate protection of human rights, it is of outmost importance that law enforcement officers are provided with accurate guidelines for the protection of these rights.

As those people who may potentially be held under the United Nations (Anti-terrorism Measures) (Amendment) Ordinance 2004 (Cap. 575) ("the ordinance"), would likely be people of foreign origin, sensitivity to such issues of language should play a crucial role in such guidelines. Awareness of people with special needs, such as the hearing impaired, visually handicapped, people unable to read, and people suffering from mental disability should not be overlooked either.

Secondly, protection of rights, such as the right to legal advice and legal aid, not to be held incommunicado, and the rights of foreign nationals should also be added to the code.

Section 12A (1) of the United Nations (Anti-terrorism Measures) (Amendment) Ordinance 2004 (Cap. 575) states that the Secretary for Justice can make an application to the court for an order under section 12A (2) to require a person to answer questions or otherwise furnish information with the matters that an authorized officer finds relevant to an investigation.

According to section 14(7E) any person who without reasonable excuse fails to comply with a requirement on him under section 12A commits an offence and is liable on conviction to a fine at level 6 and to imprisonment for 1 year.

As such person is neither under arrest or detention, and because of the severity of the punishment in case of non-compliance, the code should in detail state the rights of

¹ Legislative Council, Panel on Security: "*Background brief prepared by the Legislative Council Secretariat for the meeting on 2 December 2008. Anti-terrorism legislation*" (26 November 2008)

persons subject to a section 12A order.

SoCO would like to draw the attention to some overseas codes of practice, as they may provide guidance for a more detailed code of practice and with a strong emphasis on human rights. These are the:

1. *Code of Practice for the Detention, Treatment and Questioning of Persons Detained Under the Terrorism Act 2000* (Northern Ireland)

2. *Police & Criminal Evidence Act 1984(PACE): Code H. Code of Practice in Connection with the Detention, Treatment and Questioning by Police Officers of Persons under Section 41 of, and Schedule 8 to, the Terrorism Act 2000* (United Kingdom)

These provide a systematic approach to incorporating and documenting rights and could serve as inspiration for Hong Kong's code of practice, so that officers can act with due respect for the rights of persons and to have regard for any special needs that they may have, whilst at the same time complying with their obligations to prevent terrorism.

B. Comments on the outline of the proposed code

1. Time

Section 12(A)(5) of the ordinance states that requires that the interviewee shall attend before an authorized officer for investigation at specified times and places.

The outline does not mention any time frame. As such persons are not under arrest or detention, the code of practice should emphasize that all persons must be dealt with expeditiously.

2. Availability of code of practice

Paragraph 1 of the outline only states that the code should be available in English and Chinese.

Regarding availability, the code should emphasize that all persons held under section 12A should be presented with the code. The code should be presented to the interviewee when requested. It should further be available for consultation for appropriate adults and solicitors.

As for language, the code should also be available in other languages, especially for the major ethnic minority languages in Hong Kong and also for the major languages of those countries from which the government suspect that terrorist organizations may

originate from.

It is further recommended that the code should be available in Braille, large print format and audiocassette.

Documentation

A record should be signed by both the authorized officer and the person subject to the section 12A order that it has been provided to the person held. The record should note in what language it has been provided and whether attention to special needs has been given.

A record should be made whenever the person makes a request for the code and whether the code was provided to the person held.

3. Availability of ordinance

Paragraph 2-3 of the outline states that the officer shall explain what the order requires of the person subject to a section 12A order.

The code should specify that a copy of the ordinance should be made available to the interviewee. In particular a copy of section 12A, under which he is held should be presented to him. Again, there must be sensitivity to people with special needs as regards to languages and disabilities.

Documentation

Record should be made whenever there is a request to consult the ordinance and whether the ordinance was provided to the person held. The record should note in what language it has been provided and whether attention to special needs has been given.

4. Written notice setting out the rights

The outline does not mention that the person should be given a copy of his rights. It is important that the person subject to a section 12A order knows as soon as possible what his rights are. Therefore the code should state that the person should be informed about these rights in writing when a) the Secretary of Justice serves a notice in writing to him requiring him to attend before an authorized officer for interview, according to section 12(A)(5) of the ordinance and b) prior to the interview.

The notice should especially include:

- (a) The right to protection of identity;
- (b) The right to have someone informed about him being subject to a section 12A order;

- (c) Foreign nationals shall have the rights of communication with his High Commission, Embassy or Consulate;
- (d) The right to consult a solicitor/barrister and the fact that he may apply for legal aid;
- (e) The right to interpretation/translation, sign language etc whenever communication is needed, not only for the interview, but also for communication between the person held and his lawyer, and in other matters;
- (f) The right to consult the code of practice and the ordinance;
- (g) The right to obtain a copy of the interview records;
- (h) The right to complain and information about the complaints procedures;
- (i) The right not to being subject to torture or inhuman or degrading treatment;
- (j) The right to request medical examination.

Documentation

The same requirements as specified in paragraph 2 of this document should apply.

5. Separate section on rights in code

The code should clearly state all the rights of the person subject to the section 12A order. The outline of the code does mention some rights², but firstly these are scattered around in the document, and does not provide a clear picture of right, secondly the outline does not provide details and also misses out on some other important rights.

Rights that should be clearly mentioned in the code should include:

5.1. Right not to be held incommunicado:

- a. Any person subject to the order has the right, on public expense, to inform a person about his whereabouts as soon as practicable.

² These can be construed as:

- a. The officer must take reasonable measures to protect the identity of the interviewee;
- b. The interviewee is allowed to have a barrister/solicitor present and to consult with him privately;
- c. Allowed to make one telephone call for a reasonable time;
- d. If aged under 16, he shall be interviewed in presence of guardian or other people responsible for his care;
- e. If suffering from mental disability the interviewee shall be interviewed in presence of relative or guardian;
- f. If interviewee does not share a common language with the authorized officer interpretation should be arranged;
- g. The hearing impaired should have assistance of a sign language interpreter;
- h. The interviewee shall be interviewed in reasonable comfort and privacy. There should be refreshment and short breaks every 2 hours;
- i. The interviewee should be able to read the interview record and sign it;
- j. The interviewee shall receive a copy of the interview;
- k. If material is retained the person shall get a receipt and also have supervised access to the material.

- b. *Documentation* of requests and action taken on it should be made.

5.2 *Right to legal advice:*

- a. The person subject to the order shall be entitled to consult a solicitor/barrister as soon as is reasonable practicable, during the interview, privately and at any time.
- b. The person should be informed about the availability of legal aid and also be provided with a list of solicitors willing to provide legal advice.
- c. Officers should not do anything with the intention to dissuade the person from obtaining legal advice.
- d. *Documentation* of requests for legal advice should be made and what action was taken.

5.3 *Right of foreign nationals*

- a. Foreign nationals have a right to communicate at any time with their High Commission, Embassy or Consulate, to explain to them their whereabouts, and the grounds for being subject to the section 12A order.
- b. Foreign nationals have a right to receive visits from the consular officers. Such visits shall take place without the hearing of the authorized officer
- c. In cases where the person held is a refugee or seeking asylum at the UNHCR or making a Convention Against Torture (CAT) claim at the Immigration Department, a consular shall not be informed of the person held except at the person's express request.
- d. *Documentation*: Records of requests and communication with a High Commission, Embassy or Consulate should be made.

5.4 *Right to communicate in mother tongue*

Section 8 of the proposed code specifies that communication relating to the interview must be conducted in the mother tongue of the interviewee.

However, besides from the interview situation, there are other situations and areas where language may act as a barrier to communication and to equal access to justice for persons under a section 12A order. The code should therefore be sensitive to overcoming any language barriers:

- a. A person subject to a section 12A order has a right to communicate both orally and in writing in his own mother tongue. This applies not only to the interview but in all situations and communication with his solicitor/barrister, medical officers, authorized officers and other relevant persons. Persons should expressly be made aware of this right.

- b. All documents, including the code of practice, the ordinance, and the written notice of rights should be translated. Also all records that require the signature or to be read by the person should be translated or interpreted to him.
- c. All communication, including all situations outside the interview, with the person should be in his mother tongue including communication
- d. *Documentation* of requests for translation, interpretation should be made. Record should be made that all documents served to the person have been interpreted/translated should be made. These should be signed by the officer and the person.

5.5 *Right to complain*

- a. A person subject to a section 12A order should be informed about the right to complain, and the procedures.
- b. The complaint mechanism should be made by an independent authority.
- c. The details of the complaint procedure should be laid out in the code of practice.
- d. *Documentation*: Records of complaints should be signed by the person subject to the section 12A order, and should be made available for inspection by his solicitor/barrister, the courts, and the authority investigating the complaint.

5.6 *Right to not being subject to torture or other degrading treatment*

- a. The code should emphasize that no officer may try to obtain answers to questions or to elicit a statement by the use of oppression or creating an oppressive or intimidating atmosphere or by the use of torture, inhuman or degrading treatment, violence or the threat of violence.
- b. The code should make specific reference to the Convention Against Torture (CAT), relevant rights in the International Covenant on Civil and Political Rights (ICCPR) and the Hong Kong Bill of Rights Ordinance (Bill of Rights).
- c. *Documentation*: Documentation should be made that the person subject to the section 12A order has been made aware of his rights under CAT, ICCPR and the Bill of Rights.

6. Complete interview records

Paragraph 12(g) of the outline of the proposed code only requires that *material* points covered in the interview should be recorded.

- a. The code should specify that the *whole interview* must be accurately recorded no matter where the interview takes place.
- b. The interview record should be made during the course of the interview. If it is not made during the course of the interview it should be made as soon as possible and reasons should be stated for why it has not been made during the interview.
- c. The interview person should be informed about the right to have the interview video or audio-recorded.
- d. *Documentation* should be made that the person has received a copy of the interview records. Records should be made of any alterations. Also it should be documentation that the person has been informed about the right to receive a copy of the interview records and that he has a right to have the interview recorded in video or audio form should be made. The records should be signed by both the officer and the person subject to the section 12A order.

C. Recommendations

1. The code should include the following rights:
 - a. Right not to be held incommunicado;
 - b. Right to legal advice, including legal aid;
 - c. Right of foreign nationals have a right to communicate at any time with their High Commission, Embassy or Consulate;
 - d. Right to communicate in mother tongue;
 - e. Right to complain to an individual authority;
 - f. Right to not being subject to torture or other degrading treatment.
2. The code should specify that officers must ensure that they can communicate fully in writing and orally with the person subject to the order. Sensitivity to the interpretation and translation needs of people of foreign origin should be highlighted. Also awareness of the special needs of the hearing impaired, visually handicapped, unable to read, people suffering from mental disability should not be overlooked either.
3. The code should specify that all persons must be dealt with expeditiously
4. The code should state that the person subject to a section 12A order should be given a copy of the code of practice, relevant parts of the ordinance, a written notice setting out the rights of the person, and a copy of the interview records.
5. The code should state that the interview records should record an *accurate and detailed* account of all communication during the interview.
6. In order to ensure transparency, the code should detail what procedures must be followed in order to document that relevant procedural guidelines and the code of practice have been followed.