

For discussion

**Subcommittee on
Proposed Resolution under Section 12A of the
United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575)**

Purpose

Section 12A(14) of the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) (“the Ordinance”) requires the Secretary for Security to prepare a Code of Practice in connection with the exercise of the powers and the discharge of the duties under section 12A. This paper explains the proposed Code of Practice to be made.

Background

2. The purpose of the Ordinance and its Amendment Ordinance¹ is to fulfill Hong Kong’s international obligations to combat terrorist financing and acts of terrorism under United Nations Security Council Resolution (UNSCR) 1373², the Special Recommendations of the Financial Action Task Force on Money Laundering (FATF)³ and the relevant Conventions⁴.

¹ The United Nations (Anti-Terrorism Measures) (Amendment) Ordinance 2004

² UNSCR 1373 passed on 28 September 2001 aims at combatting international terrorism on various fronts, including measures against terrorist financing. UNSCR 1373 is binding on all Member States. The Central People’s Government gave instructions to the HKSARG in October 2001 to implement the resolution.

³ Hong Kong has been an active member of the FATF, an inter-governmental body which recommends standards and best practices in countering money laundering and terrorist financing. On 31 October 2001, FATF made eight Special Recommendations, setting out the key legislative and regulatory steps that the FATF considers countries/territories should adopt to stop terrorist financing. In October 2004, FATF made the ninth Special Recommendation.

⁴ The relevant Conventions include 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.

Code of Practice

3. Section 12A of the Ordinance provides that the Secretary for Justice 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 the Secretary for Security to prepare a Code of Practice in connection with the exercise of the powers and the discharge of the duties under section 12A. This Code is required to be laid before the Legislative Council (LegCo) for approval before promulgation.

4. The Code of Practice regulates the manner in which the law enforcement agencies conduct its interviews with persons who are required to answer questions, furnish information or produce material under section 12A. It also sets out the rights of the interviewees. The main provisions of the Code of Practice are to set out –

- (a) the procedures for the interviews of persons subject to an order under section 12A of the Ordinance who is required to answer questions or otherwise furnish information;
- (b) the guidelines for the production of material under section 12A of the Ordinance; and
- (c) the complaint procedures for persons subject to an order under section 12A of the Ordinance.

Response to Comments of LegCo Panel on Security and SOCO

5. In the preparation of the Code of Practice, we have carefully considered the comments of LegCo Members raised at the meeting of the Panel on Security in December 2008 and the submission of the Society for Community Organisation (“SOCO”) [Ref: LC Paper No. CB(2)389/08-09(01)]. The proposed Code of Practice has provided specific responses to various suggestions -

- (a) in respect of the rights of interviewees, paragraphs 7 to 16 of the Code of Practice have already put in place detailed

procedures for protecting the rights of interviewees, including the right to make telephone calls, the right to legal advice, the right to be interviewed in the mother tongue of the interviewee, the right to complain, the right to be interviewed in reasonable comfort and privacy for a reasonable period;

- (b) in response to members' request for considering whether the interviewee would be allowed to make further phone calls in the event that he/she could not get in touch with the person whom he or she wished to talk to, we have refined paragraph 9 of the Code of Practice to provide that, in the event that the interviewee could not get in touch with the person whom he or she wishes to talk to, the interviewee may request to make further phone calls unless the request would cause undue delay or hindrance is likely to be caused to the processes of the interview and relevant investigations;
- (c) regarding the situation where the interview does not share a common language with the authorized officer, paragraph 10 of the Code of Practice requires the provision of interpretation and translation to the interviewees;
- (d) paragraphs 11 and 12 of the Code of Practice also set out clearly the procedures for handling interviewees who are under the age of 16 or suffering from mental disability/incapacity;
- (e) additional procedures are also provided in paragraphs 13 and 14 of the Code of Practice to specify additional procedures respectively for interviewees with hearing or speech impaired, or who are visually handicapped; and
- (f) as for the interview record, paragraphs 17 to 22 of the Code of Practice require that an accurate record of the interview should be made and that the interviewee should be given a copy of the Code of Practice and the relevant sections of

the Ordinance. The interviewees would also be given an opportunity to read and sign the interview record, and to receive a copy of the record as soon as reasonably practicable.

Response to Questions and Suggestions of LegCo Legal Adviser

6. Regarding the questions on and suggested textual amendments to the Code in the letter from the LegCo legal adviser on 19 February 2010 [Ref: LC Paper No. CB(2)1126/09-10(03)] we have provided clarifications and agreed to the suggested textual amendments in our response of 24 February 2010 [Ref: LC Paper No. CB(2)1126/09-10(04)]. For Members' reference, suggested amendments are highlighted in revision mode at **Annex**.

Follow Up

7. Section 3 of the Organized and Serious Crimes Ordinance (Cap. 455) ("OSCO") confers powers of investigation for the law enforcement agencies with regard to crimes under OSCO. We will update the code of practice under OSCO after the proposed Code of Practice to be made under the Ordinance is endorsed by LegCo.

Security Bureau
March 2010

Code of Practice for Requiring Persons to Furnish Information or Produce Material under Section 12A of the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575)

Preamble

A copy of this Code of Practice must be given to every person who is required to answer questions, furnish information or produce material pursuant to a notice issued by the Secretary for Justice (a “Secretary for Justice’s Notice”) under section 12A(5) or (6) of the United Nations (Anti-Terrorism Measures) Ordinance (“the Ordinance”)(Cap. 575).

General

1. This Code of Practice must be readily available in English and Chinese at all places where persons may be required to answer questions or otherwise furnish information, or at which persons may be required to produce material, pursuant to an order made under section 12A of the Ordinance (a “section 12A order”). It contains important information for authorized officers as defined in the Ordinance, and for members of the public.
2. An “authorized officer” is defined in the Ordinance as a police officer, a member of the Customs and Excise Service established by section 3 of the Customs and Excise Service Ordinance (Cap. 342), a member of the Immigration Service established by section 3 of the Immigration Service Ordinance (Cap. 331), or an officer of the Independent Commission Against Corruption (ICAC) established by section 3 of the Independent Commission Against Corruption Ordinance (Cap. 204).
3. An authorized officer shall explain to the person subject to a section 12A order that he or she is not under arrest or detention but that the order requires him or her to answer questions or otherwise furnish information, or produce material, and that if he or she without reasonable excuse fails to comply with the order, or makes a statement that he or she knows to be false or misleading in a material particular, or recklessly makes a statement that is false or misleading in a material particular, he or she commits an offence under section 14 of the Ordinance and is liable on conviction to a fine and to imprisonment. A copy of sections 12A and 14 of the Ordinance is

at Annex A.

4. An authorized officer shall remind the person subject to a section 12A order that, in accordance with section 12A(9) of the Ordinance and subject to section 2(5) of the Ordinance, he or she is not excused from furnishing information or producing any material required under a section 12A order on the ground that to do so would breach an obligation as to secrecy or another restriction upon the disclosure of information or material imposed by statute or otherwise. Section 2(5) of the Ordinance makes it clear that nothing in the Ordinance shall require the disclosure of any items subject to legal privilege; authorize the search or seizure of any items subject to legal privilege; or restrict the privilege against self-incrimination. A copy of section 2(5) of the Ordinance is at Annex B.
5. A “supervisory officer” is an officer of at least the rank of Chief Inspector of Police, Assistant Superintendent of Customs and Excise, Chief Immigration Officer or Chief Investigator of ICAC, and shall be responsible for the supervision of the interview and treatment of a person subject to a section 12A order, and the handling of material produced under a section 12A order.
6. A “senior officer” is an officer of at least the rank of Superintendent of Police, Superintendent of Customs and Excise, Assistant Principal Immigration Officer or Principal Investigator of ICAC.

Procedures for Requiring Persons to Answer Questions or Otherwise Furnish Information

7. A person subject to a section 12A order who is required to answer questions or otherwise furnish information is referred to below as the “interviewee”.
8. The authorized officer and the supervisory officer must take reasonable measures to protect the identity of the interviewee.
9. The interviewee, if he or she wishes, is allowed to have a barrister and/or a solicitor to be present during the interview and to consult privately with the barrister and/or solicitor. He or she shall also be allowed to make one telephone call for a reasonable time. The time taken for the private consultation and telephone call is not counted as part of the interview period. In the event that the interviewee could not get in touch with the person whom he or she wishes to talk to, the

interviewee may request to make further phone calls. However, a supervisory officer may refuse the request of an interviewee for making further phone calls if the supervisory officer has reasonable grounds to believe that undue delay or hindrance is likely to be caused to the processes of the interview and relevant investigations. In such case, the supervisory officer shall make a record stating the grounds for refusal.

10. If the interviewee does not share a common language with the authorized officer:
 - (a) whenever possible, an interview should be conducted in the mother tongue of the interviewee unless he or she chooses to use another language in which he or she is proficient;
 - (b) the record of interview should be made in the language used by the interviewee;
 - (c) when necessary an interpreter should be obtained who will make a record of the interview in accordance with paragraph 17 in the language used by the interviewee. Only those language interpreters qualified for court purposes should be engaged;
 - (d) where an interview is recorded in a language other than English or Chinese, a certified English or Chinese translation should be made.
11. If the interviewee is or appears to the authorized officer to be under the age of 16 years, he or she should be interviewed in the presence of a parent, guardian or other person responsible for his or her care or, if such a person is unavailable, in the presence of an adult who is independent of the investigating authority and, where reasonably practicable, knows the interviewee. Such adult, if he or she so wishes, is allowed to have a barrister and/or a solicitor to be present during the interview and to consult privately with the barrister and/or solicitor.
12. If the interviewee is or appears to the authorized officer to be suffering from a mental disability or incapacity and may not understand the nature of questions put to him or her, or his or her replies, that person should only be interviewed in the presence of:
 - (a) a relative, guardian or other person responsible for his or her

care;

- (b) or in the absence of such a person, a person who has experience or training in the care of mentally handicapped persons, and who is independent of the investigating authority and, where reasonably practicable, knows the interviewee.

Such person attending with the interviewee, if he or she so wishes, is allowed to have a barrister and/or a solicitor to be present during the interview and to consult privately with the barrister and/or solicitor.

13. Where an interviewee is or appears to an authorized officer to be a hearing or speech impaired person, he or she should only be interviewed with the assistance of a sign language interpreter, or a friend or relative who normally communicates with the interviewee. Only those sign language interpreters qualified for court purposes should be engaged.
14. Where an interviewee is or appears to an authorized officer to be visually handicapped, the interview should be audio and/or video recorded. If the interviewee so wishes, he or she should be allowed to have a friend or relative who normally communicates with the interviewee ~~or a barrister and/or a solicitor~~ to be present during the interview.
15. The interviewee should be interviewed in reasonable comfort and privacy and adequate refreshment should be provided when reasonably requested. Short breaks ~~for refreshment~~ shall be provided at intervals of approximately two hours.
16. Pursuant to a Secretary for Justice's Notice, the interview shall last for only a reasonable period. What is a reasonable period depends on all the circumstances of the case, but it shall not exceed a period of 6 hours, except where a further period of not more than 4 hours has been approved by a senior officer who is not personally in charge of the investigation. The reason for any such further period must be recorded by the senior officer.
17. An accurate record of the following matters should be made as soon as reasonably practicable:
 - (a) the fact that a copy of the Code of Practice (in English and Chinese) has been given to the interviewee;

- (b) the place of interview;
 - (c) the time the interview begins and ends;
 - (d) the time and duration of any breaks for rest, refreshment or other reason;
 - (e) the names of those present;
 - (f) the name and rank of the supervisory officer;
 - (g) the material points covered in the interview; and
 - (h) the time the record is made.
18. The record shall be signed by the authorized officer conducting the interview and countersigned by the supervisory officer. Where the record is made by an interpreter under paragraph 10, the interpreter shall also sign the record.
19. The interviewee must be given the opportunity to read the record and be invited to sign it; to record whether he or she considers it accurate; and, if not, to indicate where he or she considers it inaccurate and to make the necessary alterations.
20. The following persons must also be given an opportunity to read and sign the record:
- (a) an adult attending with an interviewee who is or appears to an authorized officer to be under 16;
 - (b) a person attending with an interviewee who is or appears to an authorized officer to be suffering from mental disability or incapacity;
 - (c) a person attending with an interviewee who is or appears to an authorized officer to be a hearing or speech impaired person;
 - (d) a person attending with an interviewee who is or appears to an authorized officer to be visually handicapped;
 - (e) a barrister and/or solicitor present with the interviewee.

21. A refusal of the interviewee or any of the persons referred to in paragraph 20 above to sign the record must be recorded by an authorized officer.
22. The interviewee is entitled, as soon as reasonably practicable, to receive a copy of the record made in accordance with paragraph 17. Where the interview is video or audio recorded by the investigating authority, the interviewee is entitled, as soon as reasonably practicable, to receive a copy of the tape.

Production of Material

23. "Material" is defined in the Ordinance to include any book, document or other record in any form whatsoever, and any article or substance.
24. Material produced under a section 12A order shall be retained only for as long as is necessary in the circumstances. It may be retained, amongst other purposes:
 - (a) for use as evidence in proceedings for a relevant offence as defined in the Ordinance;
 - (b) for forensic examination or for other investigation in connection with a relevant offence as defined in the Ordinance; or
 - (c) where there are reasonable grounds for believing that it has been stolen or unlawfully obtained, in order to establish its lawful owner.
25. Where material is retained, the person who produced it in accordance with a section 12A order shall be given a receipt as soon as reasonably practicable, and must on request be provided with a list or description of the material so retained within a reasonable time.
26. A person who has produced material in accordance with a section 12A order or his representative must be allowed supervised access to the material to examine it or have it photographed or copied, or must be provided with a photograph or copy of the material. The person is normally entitled to this within a reasonable time of his or her request and at his or her own expense. However, this does not apply if a supervisory officer has reasonable grounds for believing that this

is likely to prejudice the investigation of a relevant offence or any criminal proceedings. In this case, a record of the grounds must be made and supplied by the supervisory officer to the person who produced the material or his or her representative.

Supervision and Complaints

27. A person subject to a section 12A order may complain to a supervisory officer if any provision of this Code has not been complied with.
28. A record of the time and details of the complaint must be made and signed by the maker of the record and the supervisory officer to whom the complaint has been made.
29. The person making the complaint must be provided with an opportunity to read and sign the record of complaint. A refusal to sign the record of complaint must be recorded by the supervisory officer. The supervisory officer shall report the complaint to a senior officer as soon as reasonably practicable.

UNITED NATIONS (ANTI-TERRORISM
MEASURES) (AMENDMENT) ORDINANCE

Ord. No. 21 of 2004

12A. Requirement to furnish information or produce material

(1) The Secretary for Justice may, for the purpose of an investigation into a relevant offence, make an ex parte application to the Court for an order under subsection (2) in relation to a particular person or to persons of a particular description.

(2) The Court may, if on such an application it is satisfied that the conditions referred to in subsection (4)(a), (b) and (d) or subsection (4)(a), (c) and (d) are fulfilled, make an order complying with subsection (3) in respect of the particular person, or persons of the particular description, to whom the application relates.

(3) An order under subsection (2) shall—

- (a) give particulars of the relevant offence under investigation;
- (b) identify the particular person, or state the particular description of persons, in respect of whom the order is made;
- (c) authorize the Secretary for Justice to require the person or persons in respect of whom the order is made—
 - (i) to answer questions or otherwise furnish information with respect to any matter that reasonably appears to an authorized officer to be relevant to the investigation; or
 - (ii) to produce any material, or any material of a class, that reasonably appears to the Secretary for Justice to be relevant to the investigation,or both; and
- (d) contain such other terms (if any) as the Court considers appropriate in the public interest, but nothing in this paragraph shall be construed as authorizing the Court to order the detention of any person in custody without that person's consent.

(4) The conditions referred to in subsection (2) are—

- (a) that there are reasonable grounds for suspecting that the relevant offence under investigation has been committed;
- (b) where the application relates to a particular person, that there are reasonable grounds for suspecting that the person has information, or is in possession of material, likely to be relevant to the investigation;

- (c) where the application relates to persons of a particular description, that—
 - (i) there are reasonable grounds for suspecting that some or all persons of that description have such information or are in possession of such material; and
 - (ii) the relevant offence could not effectively be investigated if the application was required to relate to a particular person, whether because of the urgency of the investigation, the need to keep the investigation confidential or the difficulty in identifying a particular person who has the relevant information or material;
- (d) that there are reasonable grounds for believing that it is in the public interest, having regard—
 - (i) to the seriousness of the relevant offence under investigation;
 - (ii) to whether or not the relevant offence could be effectively investigated if an order under subsection (2) is not made;
 - (iii) to the benefit likely to accrue to the investigation if the information is disclosed or the material is obtained; and
 - (iv) to the circumstances under which the person or persons may have acquired, or may hold, the information or material (including any obligation of confidentiality in respect of the information or material and any family relationship with a person to whom the information or material relates),

that an order under subsection (2) should be made in respect of that person or those persons.

(5) Where an order under subsection (2) authorizes the Secretary for Justice to require a person to answer questions or otherwise furnish information with respect to any matter that reasonably appears to an authorized officer to be relevant to an investigation, the Secretary for Justice may by one, or more than one, notice in writing served on that person require him to attend before an authorized officer at a specified time and place, or at specified times and places, and answer questions or otherwise furnish information with respect to any matter that reasonably appears to the authorized officer to be relevant to the investigation.

(6) Where an order under subsection (2) authorizes the Secretary for Justice to require a person to produce any material that reasonably appears to the Secretary for Justice to be relevant to the investigation or be of a class that is so relevant, the Secretary for Justice may by one, or more than one, notice in writing served on that person require him to produce at a specified time and place, or at specified times and places, any specified material that reasonably appears to him to be so relevant or any material of a specified class that reasonably appears to him to be so relevant.

(7) A notice in writing imposing a requirement on a person under subsection (5) or (6) shall—

- (a) state that a court order has been made under this section and include—
 - (i) the date of the order;
 - (ii) the particulars of the relevant offence under investigation;
 - (iii) where the order is made in respect of that particular person, a statement to that effect;
 - (iv) where the order is made in respect of persons of a particular description and that person is of that particular description, a statement to that effect;
 - (v) a statement of the authorization given to the Secretary for Justice by the order; and
 - (vi) a statement of any other terms of the order relevant to that person;
- (b) have annexed to it a copy of the order under this section, but there may be excluded from such copy—
 - (i) any reference in the order to a particular person other than that person, or to persons of a particular description not including that person; and
 - (ii) any details in the order that relate only to such particular person or persons of a particular description; and
- (c) be substantially in the form specified in Schedule 2 in relation to such notice and in addition shall set out or have annexed to it subsection (8) and section 12E.

(8) An authorized officer may photograph or make copies of any material produced in compliance with a requirement under this section.

(9) Subject to section 2(5)(a), (b) and (c), a person is not excused from furnishing information or producing any material required under this section on the ground that to do so would breach an obligation as to secrecy or another restriction upon the disclosure of information or material imposed by statute or otherwise.

(10) A statement by a person in response to a requirement imposed by virtue of this section may not be used against him in criminal proceedings against him except in evidence in proceedings under section 14(7F) or under section 36 of the Crimes Ordinance (Cap. 200).

(11) Where an order under subsection (2) has been made, the Secretary for Justice, or a person authorized in writing by the Secretary for Justice for the purpose of this subsection, may, after satisfying any conditions that may be prescribed by rules of court in this respect, obtain a copy of the order; but subject to the foregoing part of this subsection and to subsection (7)(b), no person is entitled to obtain a copy of the order or any part of the order.

(12) Where a requirement imposed on a person under this section relates to material which consists of information recorded otherwise than in legible form—

- (a) the requirement shall have effect as a requirement to produce the material in a form in which it can be taken away; and

- (b) an authorized officer may, by notice in writing served on the person, require the person to produce at a specified time and place, or at specified times and places, the material in a form in which it is visible and legible and can be taken away, and may by like notice release the person from any obligation under the requirement to produce the material in the form in which it is recorded.

(13) An application for the revocation or variation of an order under this section may be made by any person on whom a requirement is imposed under the order.

(14) The Secretary shall prepare a code of practice in connection with—

(a) the exercise of any of the powers conferred; and

(b) the discharge of any of the duties imposed,

by this section, and any such code shall be laid before the Legislative Council and shall not be promulgated until the code has been approved by the Legislative Council.

14. Offences

(1) Section 14(2) is amended by adding “knowingly” before “contravenes”.

(2) Section 14(4) is amended by repealing “or (2)” where it first appears.

(3) Section 14 is amended by adding—

“(7A) Any person who contravenes section 11B(1) or (2) commits an offence and is liable on conviction to imprisonment for life.

(7B) Any person who contravenes section 11E(1), (2)(b) or (3) or 11F(1), (2)(b) or (3) commits an offence and is liable—

(a) on conviction on indictment to a fine and to imprisonment for 14 years;

(b) on summary conviction to a fine at level 6 and to imprisonment for 2 years.

(7C) Any person who contravenes section 11E(2)(a) or 11F(2)(a) commits an offence and is liable on conviction to imprisonment for life.

(7D) Any master of a Hong Kong ship who, without reasonable excuse, contravenes section 11H(2), (3) or (4) commits an offence and is liable on conviction to a fine at level 2.

(7E) Any person who without reasonable excuse fails to comply with a requirement imposed 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.

(7F) Any person who, in purported compliance with a requirement under section 12A—

- (a) makes a statement that he knows to be false or misleading in a material particular; or
 - (b) recklessly makes a statement that is false or misleading in a material particular,
- commits an offence and is liable—

- (c) on conviction on indictment to a fine of \$500,000 and to imprisonment for 3 years;
- (d) on summary conviction to a fine at level 6 and to imprisonment for 1 year.

(7G) Any person who without reasonable excuse fails to comply with an order under section 12B(2) commits an offence and is liable on conviction to a fine at level 6 and to imprisonment for 1 year.

(7H) Any person who intentionally and without reasonable excuse hinders or obstructs an authorized officer in the execution of a warrant issued under section 12C commits an offence and is liable—

- (a) on conviction on indictment to a fine of \$250,000 and to imprisonment for 2 years;
- (b) on summary conviction to a fine at level 5 and to imprisonment for 6 months.

(7I) A person who contravenes section 12E(1) commits an offence and is liable—

- (a) on conviction on indictment to a fine and to imprisonment for 7 years;
- (b) on summary conviction to a fine of \$500,000 and to imprisonment for 3 years.

(7J) Any person who intentionally and without reasonable excuse obstructs any person in the exercise of his powers under a warrant issued under section 12G(1) commits an offence and is liable on conviction to a fine at level 6 and to imprisonment for 6 months.”.

UNITED NATIONS (ANTI-TERRORISM MEASURES) ORDINANCE

2. Interpretation

- (5) Nothing in this Ordinance shall-
 - (a) require the disclosure of any items subject to legal privilege;
 - (b) authorize the search or seizure of any items subject to legal privilege; or
 - (c) restrict the privilege against self-incrimination.