



HONG KONG BAR ASSOCIATION

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30th March 2010

Ms. Mary So
 Clerk to Sub-committee
 Legislative Council Building
 8 Jackson Road, Central
 Hong Kong.

Dear Ms. So,

Re: Subcommittee on Proposed Resolution under
 Section 12A of the United Nations (Anti-Terrorism Measures) Ordinance

We refer to your letter of 23 March 2010 to our Administrator whereby you on behalf of Hon Ip Kwok-him sought the Bar's views on the Code of Practice to be made under section 12A of the United Nations (Anti-Terrorism Measures) Ordinance.

The Bar has the following comments on the draft Code of Practice:-

1. Provision of the Code to persons affected, and the Language of the Code:-

- a. The Preamble of the draft Code provides that "*A copy of this Code of Practice must be given to every person who is required to answer questions, furnish information...*"
- b. It should be made clear that all the Annexes to the Code should also be supplied;
- c. Paragraph 1 of the draft Code provides that "*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...*"
- d. Given the context of the Ordinance and the types of actions which it seeks to prevent, it is likely that some of those persons subject to a s.12A order may know neither English nor Chinese;
- e. The Department of Justice is urged to translate the Code into other commonly used languages to enhance understanding by those whose mother tongues are neither Chinese nor English.

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2. **Legal professional privilege, and right against self-incrimination:-**

- a. Section 2(5) of the Ordinance provides that:-
*" 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."*
- b. Section 12A(9) of the new section provides that:-
"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."
- c. Paragraph 4 of the draft Code reads:-
"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"
- d. As drafted, paragraph 4 of the draft Code only expressly imposes upon an authorised officer the obligation to explain to an interviewee the effects of section 12A(9). In relation to the part of paragraph 4 underlined above, it is not clear whether it is only a statement of the law or whether it also imposes upon an authorised officer similarly an obligation to explain the effects of section 2(5) to the interviewee. It is suggested that this should be clarified, and that the 2nd sentence of paragraph 4 should read "An authorized officer shall also remind the person subject to a section 12A order that Section 2(5) makes it clear...",
- e. As drafted, the Code does not contain any protocol as to:-
 - i. how legal professional privilege ("LPP") or privilege against self-incrimination can or should be asserted. This should be made clear;
 - ii. how possible disputes between the interviewee and/or his or her legal advisers on the one part and the authorised/supervisory/senior officer on the other in relation to whether certain answers, information or material is covered by LPP should be resolved. In the absence of a proper protocol (e.g. disputed material to be sealed pending resolution by the court), the authorised/supervisory/senior officer might erroneously reject claims for LPP and look at the disputed material concerned. The interviewee's rights and privilege will already have been infringed, and irreparable damage done, even though subsequently a court declares that the relevant material is actually protected by LPP;
 - iii. the Department of Justice is therefore urged to set out in the Code a full protocol on how such disputes will be handled and resolved.

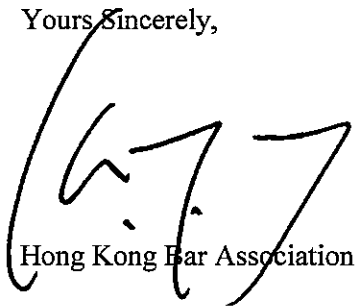
3. **Right to make telephone call:-**

The Department of Justice is urged to clarify whether the right to make one telephone call under paragraph 9 of the draft Code is one which entitles the interviewee to make the call in private, or that the phone call shall be made under supervision.

4. **Retention of material:-**

- a. Paragraph 24 of the draft Code stipulates that "*Material produced under a section 12A order shall be retained only for as long as is necessary in the circumstances...*"
- b. The draft Code is however silent as to how the material should be handled afterwards - for example, whether such material should be returned to the interviewee or otherwise. The Department of Justice is urged to clarify;
- c. Similarly, the draft Code is also silent as to how any photographs or copies of material which an authorized officer may have taken pursuant to s.12A(8) of the Ordinance should be handled afterwards - for example, whether they should be destroyed. The Department of Justice is similarly urged to clarify.

Yours Sincerely,



Hong Kong Bar Association

30th March 2010