

**For discussion**

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

**Response to issues raised at the Sub-Committee meeting  
held on 27 April 2010**

**Purpose**

At the Sub-committee meeting held on 27 April 2010, Members requested the Administration to provide supplementary information in respect of the Code of Practice for the purposes of the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) (“the Ordinance”). This note provides the information requested by Members.

**Legal Responsibility of Interviewee between 10 and under the age of  
16**

2. The age of criminal responsibility under the law of Hong Kong is 10 years. Hence, strictly speaking, children between 10 and under the age of 16 may be guilty of an offence under section 14(7E) of the Ordinance if he or she fails to comply with the section 12A order, or if he or she fails to comply with other local legislation to furnish information, he or she will commit the relevant offences under such local legislation. The special protection provided under the Code of Practice is not limited to children between 10 and under the age of 16. Rather, it is applicable to all interviewees under the age of 16. Such protection includes the presence of a parent, guardian or other person responsible for the care of the interviewee during an interview. 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.

3. Paragraph 12 of the “Statement of Prosecution Policy and Practice - Code for Prosecutors” of the Department of Justice deals with juvenile offenders. In general there is, in the case of juvenile offenders under the age of 16, a much stronger presumption in favour of the methods of

disposal which falls short of prosecution. The objective should be to divert juveniles from court wherever possible. Prosecution should always be regarded as a serious step. In deciding whether or not the public interest warrants the prosecution of a juvenile, regard should be given to various factors, e.g. the seriousness of the alleged offences, the available alternatives to prosecution (such as a Police Superintendents' Discretion Scheme power to issue a caution to juveniles), the juvenile's family circumstances (such as whether the parents of the juvenile is able and prepared to exercise effective discipline and control over the juvenile), the juvenile's antecedents (including the circumstances of any previous caution the juvenile may have been given, etc), etc.

4. Regarding relevant overseas legislation, the Code of Practice made under the Terrorism Act 2000 ("the Act") of the United Kingdom provides procedures for examining officers for the treatment of juvenile in the exercise of their power under the Act. The relevant procedures in the Code of Practice under the Act of the United Kingdom are similar to the procedures on the handling of an interviewee under the age of 16 in our Code of Practice for the Ordinance. For example, the Code of Practice made under the Act provides that a juvenile aged under 16 should not normally be examined in detail unless an adult is present. If a detailed examination on a juvenile aged under 16 is considered necessary, it should only take place in the presence of a parent, guardian, etc.

### **Making Phone Calls during an interview under a section 12A order**

5. Having considered the comments of the Subcommittee, we agree to allow more flexibility in considering the request of an interviewee in making phone calls during an interview pursuant to a section 12A order. In this regard, we may consider amending the content of paragraph 9 of the Code by removing the restriction on making one telephone call for a reasonable time whilst allowing the interviewee to make at least one telephone call for a reasonable time. If provided with reasonable justification, he or she may make further telephone calls.

6. For Members' reference, the revised Code of Practice, which consolidates the proposed amendments that we have agreed to make, is set out in revision mode at [Annex](#).

**May 2010**  
**Security Bureau**

**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 e~~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) should be provided with a copy of this Code of Practice and its Annexes at the time when the Secretary for Justice’s Notice is served.

### 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”). The Code of Practice will also be made available in Braille and in other languages. 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. The authorized officer shall also explain that where the person subject to a section 12A order is under the age of 10, such person and his/her parent/ guardian/ accompanying adult will not be held liable for an offence if such person fails to comply with the section 12A order. A copy of sections 12A and 14 of the Ordinance is at **Annex A**.

~~3. 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**.~~

4. The responsibility and privilege of a person subject to a section 12A order are as follows:

(a) he or she has an obligation to comply with the requirements to furnish information or produce material under section 12A and if he or she fails to comply without reasonable excuse he will be guilty of an offence (section 14(7E) of the Ordinance);

(b) an obligation of secrecy or restriction from furnishing information is not an excuse for refusing to comply with a section 12A order (section 12A(9) of the Ordinance);

(c) legal professional privilege and the privilege against self-incrimination are overriding and nothing in the Ordinance would require the interviewee to disclose anything that is subject to legal professional privilege, or anything that is self-incriminating (sections 2(5) and 12A(9) of the Ordinance). A copy of section 2(5) of the Ordinance is at **Annex B**; and

(d) if an interviewee does voluntarily furnish information or produce material under a section 12A order, the information/material cannot be used against him in criminal proceedings except in proceedings under section 14(7F) or under section 36 of the Crimes Ordinance (Cap. 200) concerning the making of false statements etc. (section 12A(10) of the Ordinance).

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. The interviewee may make at least one telephone call for a reasonable time. If provided with reasonable justification, he or she may make further telephone calls. 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) the interviewee will be provided with a language interpreter qualified for court purposes. Such ~~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; and~~

(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. If applicable, specify the language of the translated copy of the Code of Practice provided 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; ~~and~~
- (i) special request made and action taken (e.g. interpretation services, etc.)

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. A copy of the record of complaint should be provided to the person making the complaint.