Introduction

The conception of this lecture came from the convergence of three related issues. First, the recent legislation enacted to counter money laundering and terrorism.1 Secondly, the recent case of barrister Robert Pang, which highlighted the interface between lawyers’ statutory duties and the principles of confidentiality and legal professional privilege; and finally, the case of English solicitor Robert Duff who was sent to prison for failing to report his suspicions that his client was involved in money laundering. This paper looks, therefore, at the degree to which legal professional privilege has been undermined by legislation enacted to make our society a safer place in which to live.

A tension has, of necessity, arisen between increased measures to ensure national security and the preservation of long established civil liberties. One view maintains that, to uphold the values of confidentiality and legal professional privilege, the values of the Basic Law and the Bill of Rights must also be upheld; to deny it must erode the rule of law.

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1 Hong Kong now has three major anti-money laundering, anti-organized crime and anti-terrorist statutes: The Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405), enacted in 1989; The Organized and Serious Crimes Ordinance (Cap 455), enacted in 1994; and The United Nations (Anti-Terrorism Measures) Ordinance (Cap 575), enacted in 2002.
itself. The contrary view maintains that the paramount needs of security must, of necessity, override even such fundamental liberties.

The lawyer's duty of confidentiality and the doctrine of legal professional privilege have long constituted a fundamental element in the relationship of lawyer and client. They exist in the interests of justice and have been recognised and enforced both by the common law and the solicitors' rules of professional conduct. However, the protection they afford to clients and lawyers is not absolute; rather, they are subject both to common law and statutory limitations. Of late, the extent of the protection has been brought into debate by its apparent erosion by the enactment of those statutes aimed at protecting society from serious criminal harm in the form of money laundering, drug trafficking and terrorism.

Two of the main anti-terrorist, anti-money laundering and anti-organized crime statutes are The Drug Trafficking (Recovery of Proceeds) Ordinance (DTROP) (Cap 405) and the Organized and Serious Crimes Ordinance (OSCO) (Cap 455) (1994). These Ordinances originally called for significant incursions into legal professional privilege by imposing a duty on legal practitioners to report their clients' suspicious transactions to relevant authorities. Indeed, failure to comply could lead to criminal consequences. This duty was far from clear and, at times it was, or still is, difficult for lawyers to understand the extent of these duties. For example, there was uncertainty as to when the positive duty properly arises as it falls within a grey area between clients openly confessing to crime and the a vague suspicion of criminal activity. The intrusions into the confidentiality of the lawyer-client relationship and the importation of uncertainty into the law led Hong Kong's Legislative Council in 2002 to enact amendments to the legislation providing, inter alia, that nothing in the Ordinances would restrict the law applicable to legal professional privilege.3 Surprisingly this recent development seems

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2 Per Lord Brougham LC in Greenough v Gaskell (1833) 1 My & K 618, 620.

3 The Drug Trafficking and Organized Crimes (Amendment) Ordinance, Ordinance No 26 of 2002, came into effect as from 1 Jan 2003 (see Legal Notice No 145 of 2002). The amendments in respect of legal professional privilege are found in Schedule 1 (amending the Drug Trafficking (Recovery of Proceeds) Ordinance and in Schedule 2 (amending the Organized and Serious Crimes Ordinance).
not to be widely known amongst Hong Kong’s legal profession despite the fact that it clarifies some of the concerns relating to the impact of the impugned legislation on legal professional privilege.

It is to be noted however that the amendments discussed above do not put the issue entirely to rest since several other Ordinances that restrict the scope of legal professional privilege remain unamended. The degree of restriction will be analysed in the body of this article. The most recent of these is the United Nations (Anti-Terrorism Measures) Ordinance (Cap 575) enacted on 12 July 2002 in response to the horrific terrorist activities of 11 September 2001. The events of that day have galvanized a global response to fight terrorism. Many countries have enacted stringent measures to restrict terrorist activities and the laundering of terrorist funds. It is interesting to note that, in the context of such enactments, the doctrine of legal professional privilege is also increasingly being recognised as a fundamental human right.

In the first part of this article, we consider the solicitor’s retainer, the scope of the solicitor’s duty of confidentiality and the doctrine of legal professional privilege. Secondly, we identify the common law and statutory limitations upon them and highlight the effects of the recent legislation on confidentiality and legal professional privilege along with amendments to the DTROP and OSCO statutes that seek to protect legal professional privilege. This trend of apparently restricting the scope of the duty of confidentiality and the doctrine of legal professional privilege is not confined to Hong Kong, but has been seen in other common law jurisdictions. We then examine developments in the United Kingdom and Canada in order to ascertain, by way of comparison, the position in Hong Kong. Finally we state our conclusions.

The Solicitor's Retainer, the Duty of Confidentiality and Legal Professional Privilege

The Solicitor's Retainer
The ethical position of a solicitor who is approached by a potential client whom he suspects of being involved in criminal activities is clear; he must refuse to accept the retainer. Thus the Solicitors' Guide
provides that a solicitor must not act or must cease to act, where to do so would involve him in a breach of the law or professional misconduct.\(^4\) If the solicitor accepts the retainer without suspicion that he will later be involved in criminal activities, but subsequently becomes suspicious that his services are being used, for example, to further criminal activities such as drug trafficking or terrorism or to conceal or invest funds to be used for such criminal purposes by way of money laundering, then he must immediately cease to act.\(^5\) This means that, in deciding whether or not to accept a retainer, the solicitor cannot simply shut his eyes to the apparent purpose of the retainer and should pay careful attention to the nature of the instructions, the circumstances surrounding the instructions and the demeanour of the potential client. As we shall see, failure to do so could lead, not only to disciplinary consequences, but to criminal conviction.

An instructive illustration of the considerations involved can be found in \(Re a Solicitor\) (2000) CACV No 117 of 2000. A solicitor was retained by a client to draft a mortgage in respect of property purchased from the Housing Authority. The execution of such a mortgage was, however, illegal under section 27A of the \(Housing Ordinance\) unless it had the prior approval of the Housing Authority, which it did not. The solicitor was charged with professional misconduct in that he had aided and abetted the client in the commission of the criminal offence by drafting the mortgage. Keith JA, when considering the duty of the solicitor to ascertain whether his client was giving instructions to carry out an illegal act said:

“We appreciate that there are grey areas of the law in which the law is uncertain. But that is precisely where solicitors must be particularly circumspect ... it may be entirely appropriate for the solicitor to be charged with professional misconduct if he carried out his instructions recklessly or imprudently ie without giving any thought to whether they might involve a breach of the law.”

\(^4\) Principle 5.02, Solicitors' Guide.

\(^5\) \(Ibid.,\) Commentary 2.
The Solicitor’s Duty of Confidentiality

A solicitor has a duty at law to keep confidential information passing between solicitor and client in the course of their relationship and this duty exists by reason of the terms, express or implied, of the contractual retainer and by reason of the common law. A solicitor also has an ethical duty to hold in strict confidence all information concerning the business and affairs of his client acquired in the course of the professional relationship. He must not divulge such information unless disclosure is, expressly or impliedly authorised by the client or required by law, or expressly or impliedly waived by the client. The rationale for the existence of the duty is that a solicitor could not render effective professional service to his client unless there exists full and unreserved communication between them. Breach of this duty could lead to disciplinary proceedings against the solicitor.

The Doctrine of Legal Professional Privilege

Legal professional privilege exists in two different circumstances. The first is in respect of communications between client and solicitor for the purpose of giving or receiving legal advice (legal advice privilege). The true scope of legal advice privilege was explained by Taylor LJ in Balabel v Air India [1988] Ch 317 at 330:

“Although originally confined to advice regarding litigation the privilege was extended to non-litigious business. Nevertheless, despite that extension, the purpose and scope of the privilege is still to enable legal advice to be sought and given in confidence. In my judgment,

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6 See Diplock LJ in Parry-Jones v Law Society [1968] 1 All ER 177, CA, where the learned judge said at 180, “What we are concerned with here is the contractual duty of confidence, generally implied though sometimes expressed, between a solicitor and client.”

7 See, for example, China Light & Power Co Ltd v Michael Ford (1994) HCA No A6382/93, where a barrister disclosed confidential instructions given to him by the instructing solicitor to another law firm, so as to commence proceedings against the company on whose behalf he had been originally instructed. Sears J awarded damages against the barrister for breach of confidentiality.

8 Principle 8.01, Solicitors’ Guide.

9 Ibid., Commentary 2.

10 Ibid., Commentary 5.
therefore, the test is whether the communication or other document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or be appropriate on matters great or small at various stages. There will be a continuum of communications between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach ... Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.”

The second branch of legal professional privilege embraces communications between third persons and the solicitor or the client where the dominant purpose of such communications is the furtherance of litigation that is either pending or anticipated (litigation privilege). The scope of litigation privilege was clearly explained by Lord Denning MR in \textit{Buttes Gas and Oil Co v Hammer (No 3)} [1981] QB 223 at 243-4:

“Privilege in aid of litigation can be divided into two distinct classes: the first is legal professional privilege properly so called. It extends to all communications between the client and his legal adviser for the purpose of obtaining legal advice. It exists whether litigation is anticipated or not. The second only attaches to communications which at their inception come into existence with the dominant purpose of being used in aid of pending or contemplated litigation. That was settled by the House of Lords in \textit{Waugh v British Railways Board} [1980] AC 521. It is not necessary that they should have come into existence at the instance of the lawyer. It is sufficient if they have come into existence at the instance of the party himself – with the dominant purpose of being used in the anticipated litigation.”
It was also made clear by Lord Denning MR in Attorney-General v Mulholland [1963] 2 QB 477 at 489, that the privilege is that of the client, not the lawyer, but the solicitor has a duty to assert the privilege.\textsuperscript{11}

Legal professional privilege has also been recognised in the Solicitors' Guide.\textsuperscript{12} It can be readily seen, therefore, that the scope of confidentiality is considerably wider than the scope of legal professional privilege and much information passing from a client to his solicitor will be confidential, but not protected from disclosure by legal professional privilege. This distinction is significant since many statutes exclude from their ambit communications that are privileged; matters that are merely confidential, but which cannot be said to be privileged, are not protected from disclosure.

Limitations Upon Confidentiality and Legal Professional Privilege
Under the Common Law and the Solicitors' Guide

We have already noted that the duty of confidentiality and the scope of legal professional privilege are not absolute. The common law has identified several important situations in which a solicitor is released from his duty of confidentiality and may be compelled to testify by way of revealing privileged information. These exceptions have been recognised by the Solicitors' Guide.

\textit{Waiver: Express, Implied and Imputed}

The duty to keep information confidential and the right to claim legal professional privilege may be waived by the client.\textsuperscript{13} Waiver may either be express or be implied from conduct. It may also be imputed from the relevant circumstances.

\textsuperscript{11} Ibid., Commentary 8.

\textsuperscript{12} Commentary 8 of Principle 8.01 states that a client has the right to refuse to disclose, even to a court, confidential communications with his lawyer made for the purpose of obtaining legal advice. This right to resist disclosure is a privilege granted to a client and so may be abandoned only be him. A solicitor is bound to assert this privilege on behalf of his client. A solicitor has no authority unilaterally to waive a client's privilege; consent of the client or a court order must be obtained.

\textsuperscript{13} See n 12 above.
No Duty of Confidentiality or Protection by Way of Legal Professional Privilege Where Communication Made in Furtherance of a Future or Continuing Criminal Act

A second very important limitation upon the duty of confidentiality and the doctrine of legal professional privilege is that the duty and privilege do not extend to any communication made in furtherance of a future or continuing crime or fraud. Thus Stephen J has said in *R v Cox and Railton* (1884) 14 QBD 153, 167:

"The reason on which the rule [of confidentiality and legal professional privilege] is said to rest cannot include the case of communications, criminal in themselves, or intended to further any criminal purpose, for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice, and to those of the administration of justice. Nor do such communications fall within the terms of the rule. A communication made in furtherance of a criminal purpose does not ‘come within the ordinary scope of professional employment.’"

The scope of this exception was recently confirmed in *C v C* [2001] 3 WLR 446, CA, where the English Court of Appeal concluded that legal professional privilege did not extend to communications which are either "criminal in themselves or intended to further any criminal purpose."

The Solicitors' Guide also provides that communications made by a client to his solicitor before the commission of a crime or during the commission of a continuing crime for the purpose of being guided or helped in the commission of it are not confidential, since such communications do not come within the scope of the professional

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14 Further, on the position at common law, Templeman L] said in *Gamlem Chemical Co (UK) Ltd v Rochem Ltd* [1979] CA Transcript 777: "In the present case the plaintiffs seek discovery and disclosure of communications between the defendants and their solicitors. In the light of the existing evidence and without knowing if, at the trial, that evidence will be disproved, we must ... determine whether it seems probable that the defendants may have consulted their legal advisers before the commission of fraud and for the purpose of being guided and helped unwittingly or unwittingly in committing the fraud. A fortiori, if the defendants embarked upon a fraudulent activity, communications between the defendants and the solicitors, made in the course of that activity, cannot be entitled to privilege and must be disclosed."
retainer. The Guide further provides that the solicitor may, in exceptional circumstances, breach his duty of confidentiality to the extent of revealing information that he believes necessary to prevent his client or any other person from committing or continuing a criminal act that the solicitor believes on reasonable grounds involves or is likely to result in serious violence to a person. Even then, the solicitor must exercise his professional judgment and decide whether there are any other means of preventing the crime and, if not, whether the public interest in protecting persons at risk from serious harm outweighs his duty to his client. No similar exception exists, however, either at common law or in the Solicitors' Code, in respect of past crimes committed by a client. These must remain confidential.

It is important to note that the provisions of the common law and Solicitors' Guide cited above do not place a positive obligation upon solicitors to inform on their clients. They merely provide that the solicitor may take such a course of action without rendering himself or herself liable to civil or disciplinary action at the hands of the profession. As we shall see below, recent statutory provisions have imposed upon solicitors a positive duty to inform upon clients in a variety of situations.

The Construction of Statutory Provisions Excluding or Limiting Confidentiality and Legal Professional Privilege; Legal Professional Privilege as a Fundamental Human Right

The Position in England

Considerable assistance as to the proper approach of the courts in construing statutory provisions involving confidentiality and legal

15 Commentary 16, Principle 8.01, Solicitors' Guide.
16 Ibid., Commentary 15.
17 Ibid.
18 Thus Lord Sumner said in O'Rourke v Darbyshire [1920] AC 581, HL: “To consult a solicitor about an intended course of action, in order to be advised whether it is legitimate or not, or to lay before a solicitor the facts relating to a charge of fraud, actually made or anticipated, and make a clean breast of it with the object of being advised about the best way to meet it, is a very different thing from consulting him in order to learn how to plan, execute or stifle an action for fraud.”
professional privilege has been afforded by the House of Lords in its recent judgment in *R v Special Commissioner, ex parte Morgan Grenfell* [2002] 2 WLR 1299, HL. This case involved section 20(1) of the *Taxes Management Act*, 1970, which empowers an inspector, by notice in writing, to require a person to deliver to him such documents as are in his possession or power and as contain information relevant to any tax liability. An inspector had issued such a notice to Morgan Grenfell asking to see documents relating to the advice that Morgan Grenfell had obtained from counsel and solicitors concerning a particular tax avoidance scheme. Morgan Grenfell objected on the grounds that such documents were protected from disclosure by legal professional privilege and sought judicial review of the notice on the grounds that it was *ultra vires*. There was no provision in the Act that excluded from its purview documents that were subject to legal professional privilege. Their Lordships first concluded that legal professional privilege was a fundamental human right (or basic tenet of the law) long established by the common law. It was a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice could not be effectively obtained unless the client was able to put all the facts before his adviser without fear that they might afterwards be disclosed and used to his prejudice. An intention to override such rights had to be expressly stated in primary legislation or appear by necessary implication. Since that section of the Act under scrutiny contained no express reference to legal professional privilege, the question was whether its exclusion had necessarily to be implied.

Their Lordships, having noted that there was an express provision in the Act preserving legal professional privilege in respect of documents

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19 Per Lord Hobhouse.
21 See *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, HL, per Lord Hoffmann: “Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights ... in the absence of express language or necessary implication to the contrary, the courts ... presume that even the most general words were intended to be subject to the basic rights of the individual.”
22 See *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, HL.
in the possession of lawyers, questioned whether it would be rational to have such protection for documents in the hands of a taxpayer's lawyers where such protection would not apply to the same documents in the hands of the taxpayer himself. Their Lordships concluded that the exclusion of legal professional privilege was not necessarily to be implied and, notwithstanding the absence of any express statutory provision to that effect, the documents in question were protected from disclosure by legal professional privilege.

Lord Hoffmann went on to consider what the position would be if there had been an express exclusion of legal professional privilege. The learned judge noted that it could be argued that such exclusion would be incompatible with the right to privacy established by article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. It had been held in Foxley v United Kingdom (2001) 31 EHRR 25, at 647 that legal professional privilege was a fundamental human right which could only be invaded in exceptional circumstances. Such exclusion would only be legitimate where its exclusion could be shown to be necessary in a democratic society.

In the recent case of R v Duff [2002] EWCA Crim 2117, CA, solicitor Jonathan Duff was imprisoned for six months for not reporting a suspicion of money laundering contrary to section 52(1) of the Drug Trafficking Act, 1994. That section stated that it was not an offence for a legal adviser to fail to disclose information under privileged circumstances. Mr Duff had received on behalf of his firm money from a client who was subsequently convicted of drug trafficking. The court concluded that the fact that the money involved was not received in connection with the giving or receiving of legal advice or in contemplation of legal proceedings despite the fact that a retainer existed excluded legal professional privilege as an adequate defence. The publicity surrounding this case created a considerable degree of uncertainty into the law relating to lawyers' duties to their clients and the obligations of lawyers to report suspicious transactions. However, it is clear from this judgement that the disclosure of information protected by legal professional was not at issue. Other than to say that this recent
conviction makes it essential for solicitors to study the relevant legislation carefully and ensure that they comply, the position in England would, therefore, appear to be:

(i) Legal professional privilege has been recognised as a fundamental human right.
(ii) Legal professional privilege can only be excluded by express provision in primary legislation or by necessary implication.
(iii) Even where legal professional privilege has been excluded either expressly or by necessary implication, the courts would (perhaps) only give effect to such exclusion where it could be shown to be necessary in a democratic society.

The Position in Canada
The courts in Canada have also taken the position that legal professional privilege is a fundamental constitutional right. It was referred to by Gonthier J in *Law Society (British Columbia) v Mangat* 2001 SCC 67 as “a principle of fundamental justice” and, recently in *Lavallee, Rackel & Heintz v Canada (Attorney General)* 2002 SC 61 the Supreme Court confirmed that solicitor-client privilege is a principle of fundamental justice and a civil right of supreme importance in Canadian law.

An interesting series of judicial determinations in Canada has been taking place in response to the issue: where a statute imposes a positive obligation upon lawyers to report certain illegal activities of their clients, but the statute nonetheless expressly excludes matters covered by legal professional privilege, should that provision imposing the duty still be struck down as impairing lawyers’ independence. The issue had been considered by way of interlocutory application in four cases: *Law Society (British Columbia) v Canada (Attorney General)* [2002] 3 WWR 455 (British Columbia Supreme Court); *Federation of Law Societies of Canada v Canada (Attorney General)* [2001] AJ No 1697 (Alberta QB); *Federation of Law Societies of Canada v Canada (Attorney General)* 57 OR (3d) 383 (Ontario Superior Court) and *Federation of Law Societies of Canada v Canada (Attorney General)* 2002 NSSC 95 (Nova Scotia Supreme Court). They all involved the *Proceeds of Crime (Money Laundering) Act*, enacted in 2000, which requires all persons, including
lawyers, to report suspicious transactions to the authorities.\footnote{The Criminal Code was amended in a similar manner to require individuals, including lawyers, to disclose to the appropriate authorities any property that they might have in their possession or control that they believe may be linked to terrorist activities. The purpose of this legislation, which was enacted following the events of 11 Sept 2001, is to cut-off the supply of funds to terrorist organisations. See further "A Note on the Terrorism Financing Offences", Unice Machado, \textit{University of Toronto Faculty of Law Review}, Vol 60, No 1, 2002.} Section 11 of the Act provides that: "nothing in the Act requires a legal counsel to disclose any communication that is subject to solicitor-client privilege". The petitioner Law Societies sought a declaration that such provisions were inconsistent with the Canadian Constitution. They also applied for interlocutory injunctions. The petitioners contended that the requirements of the Acts to proactively report suspicious transactions put lawyers in a dilemma. A lawyer who failed to report a suspicious transaction because of concerns of breaching solicitor-client privilege could be charged under the legislation; alternatively, a lawyer who believed (as it turned out subsequently to be wrong) that a transaction with a client did fall within the description and who duly reported the transaction, relying wrongly on the apparent protection afforded by section 11 of the Act, might be disciplined by the Law Society for a breach of his professional duties and be liable to his client in damages. The provisions also placed lawyers in a profound conflict of interest between their duty to their clients to maintain confidentiality and their duty to report that client to the authorities. Further, public confidence in the bar would be shaken and lawyer-client relationships irreparably damaged. Cullity J (in giving his judgment in the Ontario case) observed:

"In imposing a duty on legal practitioners to give secret reports of their clients' transactions to a government agency, the legislation clearly impinges on, or alters, the traditional relationship between solicitors, or counsel, and their clients. It does not merely override a lawyer's ethical duty of confidentiality – something that has always been possible in legal proceedings with respect to matters not subject to solicitor-client privilege – it strikes at the lawyer's duty of loyalty and the client's privilege of self-incrimination as well as the principle that lawyers should be independent of the government."
The duty of loyalty is affected not only by the obligation to make secret reports to government about a client's transactions and personal details, but also because of the inevitable involvement of the lawyer's personal interests and potential liability to severe penalties when decisions whether to report are made."

In all the above cases the applications for a declaration were stayed pending the outcome of a test case set down for hearing in the British Columbia Supreme Court. We will, unfortunately, not receive the judicial response because the Canadian Federal Government on 25 March 2003 announced that lawyers would be exempted from these statutory provisions. In the series of judicial determinations pertaining to the interlocutory applications one can conclude, however, that the courts have taken the position that exemption of lawyers from the legislation would minimally impair the legislative intent of Parliament for the following reasons:

(i) The Act remains intact and applicable to all the other persons enumerated in the legislation.
(ii) Even without the obligations imposed by this legislation, lawyers are subject to codes of conduct and ethical obligations imposed by Law Societies and to provisions in the Criminal Code whereby they cannot engage in money laundering schemes or be a party of any transactions with clients that conceal or convert property or proceeds that they believe to involve money laundering.

In conclusion, the position in Canada is that while the Government's goal of deterring and prosecuting money laundering offences is laudatory, the fundamental values of the Canadian Constitution must be protected.

25 The case was to be heard by Supreme Court Chief Justice Donald Brenner, but is now likely to be either adjourned by consent or dismissed as academic. The decision undermines the prior refusal of former Chief Minister Anne McLennan to narrow the law because it would create "a gaping ... and unacceptable loophole" in the enforcement of the anti-money laundering legislation.
and legal professional privilege has become one of those fundamental values.

The Position in Hong Kong
It is only recently that judicial consideration has been given to this issue in the judgment of Hartmann J in Pang Yiu Hung Robert v Commissioner of Police (2002) HCAL No 133 of 2002. This case concerned the duties of a barrister, but it is suggested that the principles set out in the judgment apply with equal force to solicitors. Robert Pang (the applicant) was a barrister who had been instructed by a firm of solicitors to advise one of their clients in the sale of certain securities valued at around HK$9 million. He was subsequently arrested by members of the Organized Crime and Triad Bureau on the grounds that he had committed an offence under section 25A of the Organized and Serious Crimes Ordinance. Section 25A provides that:

“(1) Where a person knows or suspects that any property
(a) in whole or in part directly or indirectly represents any person’s proceeds of;
(b) was used in connection with; or
(c) is intended to be used in connection with,
   an indictable offence, he shall as soon as it is reasonable for him to do so disclose that knowledge or suspicion, together with any matter on which that knowledge or suspicion is based, to an authorized officer.

(2) ...
(3) A disclosure referred to in section (1) -
   (a) shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract or by any enactment, rule of conduct or other provision
   (b) ...”

Subsection (1) is intended to inhibit, *inter alia*, money laundering. Legal practitioners are not exempted from the provision, nor did the Ordinance expressly make this particular provision subject to the doctrine of legal professional privilege, although other sections of the
Ordinance were expressly made subject to the doctrine. Subsection (3)(a) does, however, provide some protection to lawyers who provide the required information. The applicant applied for judicial review contesting the lawfulness of his arrest. He also sought a declaration that section 25A did not extend to communications that were covered by legal professional privilege.

By way of decision the judge concluded that the arrest of the applicant had been unlawful since the arresting officer had no reasonable grounds for suspecting that the applicant had committed an offence under section 25A of the Ordinance. The learned judge also considered whether section 25A of the Ordinance was subject to legal professional privilege. He first noted that legal professional privilege had been recognised as a fundamental human right. In reaching this conclusion he noted the judgment of the House of Lords in R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax [2002] 2 WLR 1299, HL (see above). He also noted that article 35 of the Basic Law guaranteed that “Hong Kong residents shall have the right to confidential legal advice ...”. Further legal professional privilege, which had been central to the administration of justice in Hong Kong prior to the change of sovereignty in July 1997, had been preserved by article 87 of the Basic Law, which provided that “in criminal and civil proceedings in the Hong Kong Special Administrative Region, the principles previously applied in Hong Kong and the rights previously enjoyed by parties to proceedings shall be maintained”. He concluded by saying “Legal professional privilege is an ancient rule of common law, a rule which reflects a fundamental right of confidentiality between a client and his legal advisor, a right protected by the Basic Law. It is a rule recognised as constituting one of the pillars upon which the administration of justice rests in an open society”.

The learned judge then went on to consider whether such a fundamental right could be taken away or restricted by common law or statute. He noted that the doctrine had long been limited by common law in that it did not extend to communications involving future criminal or

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26 Note the changes effected by the Drug Trafficking and Organized Crimes (Amendment) Ordinance, Ordinance No 26 of 2002, taking effect from 1 Jan 2003, which provides in Schedule 2 that, subject to subsection 19, nothing in the Organized and Serious Crimes Ordinance would require the disclosure of any items subject to legal professional privilege.
fraudulent purposes. A mere suspicion of such purposes did not, however, strip communications of this nature of the duty of confidentiality.

Finally, Hartmann J considered whether section 25A overrode legal professional privilege. As we have seen, the Ordinance did not expressly provide that section 25A was subject to legal professional privilege. He concluded, following the decision of the House of Lords in R (Morgan Grenfell) v Special Commissioner of Income Tax, that legal professional privilege could only be limited statutorily by express provision or necessary implication. The same conclusion had been reached in New Zealand in Auckland District Law Society v B [2002] 1 WLR 721. Here there was no express exclusion of legal professional privilege nor had it been excluded by necessary implication. Further, it had not been included in section 25A(3)(a), since it did not fall within the description "contract", "enactment" or "rule of conduct". If section 25A had been intended by necessary implication to abrogate legal professional privilege, it would surely have been included in section 25A(3)(a) as giving rise to possible liability for a lawyer.

In summary Hartmann J held that:

(i) Legal professional privilege is a fundamental human right protected both by the common law and the Basic Law.
(ii) Legal professional privilege can only be excluded by express statutory provision or by necessary implication. Neither was applicable on the facts.

The Legislation

We must now look briefly at those Hong Kong statutes which continue to impinge upon solicitors' duties of confidentiality and legal professional privilege.


The Prevention of Bribery Ordinance (Cap 201)

The Prevention of Bribery Ordinance was enacted in 1971 and is perhaps the first Ordinance that makes significant inroads into the solicitor's duty of confidentiality. The original purpose of the Ordinance was to prevent bribery, but its terms have been extended in an attempt to stamp out money laundering.

Duty to Produce Documents and to Disclose Information
By way of facilitating the investigation of bribery and money laundering, the Ordinance makes provision for all persons, including lawyers, to produce documents and disclose information to authorised officers.

In particular, section 13(1) of the Ordinance provides that, where the Commissioner is satisfied that there is reasonable cause to believe that an offence under the Ordinance might have been committed by a particular person and that certain materials are likely to be relevant for the purpose of investigating that offence, he may require for the purposes of investigation any person to produce to an authorised officer any accounts, books, documents and other articles for inspection. Section 13(2) provides further for an authorised officer to require any person to provide certain information relating to the location of documents etc.

Section 14(1) permits the Commissioner to apply to the High Court ex parte for an order that a person suspected of having committed an offence provide specified information to the Commissioner as to his property, expenditure and liabilities. Additionally, under section 14(1) (d), the court may grant leave for the Commissioner to require any other person to provide to the investigating officers all information in his possession relevant to the investigation. The extent to which this provision affects solicitors is discussed below.

Finally, under section 14(2), the Commissioner, acting in pursuance of a court order, may require any person who has acted for or is acting for any party to a property transaction to provide the names and addresses of clients, how they are to be located, the consideration and fees paid and the terms and conditions linked to the sale or purchase of land or property.

The obligations laid down in sections 13 and 14 apply to all persons including solicitors. Do these provisions override the solicitor's
duty of confidentiality and legal professional privilege? Section 15(1) says that, save as is provided in section 15, nothing in this Ordinance shall require the disclosure by a legal adviser of any privileged information, communication, book, document or other article. The answer, therefore, is that legal professional privilege will generally be a reason for refusing production and disclosure as required under section 13(1) and section 14(1). Special considerations, however, apply to the giving of information by solicitors under section 14(1)(d) and these are discussed separately below.

Special (and rather complex) provisions apply to the supply of confidential information under sections 13(2) and 14(2). Section 15(2) provides that, subject to subsection (4), the information referred to in section 13(2) and in section 14(2) may be required from a legal adviser as from any other person, notwithstanding that the effect of compliance with such a requirement would be to disclose any privileged information or communication. Section 15(4), however, provides:

“(4) Nothing in subsection (2) or (3) shall require a legal adviser to comply with any such requirement to the extent to which such compliance would disclose any privileged information or communication which came to his knowledge for the purpose of any proceedings, begun or in contemplation, before a court or to enable him to give legal advice to his client.”

The outcome is, therefore, that legal professional privilege does still apply to information to be supplied under sections 13(2) and 14(2), but only to the extent identified in section 15(4). It follows, for example, that information communicated by a client in a context other than the giving and receiving of legal advice or for the purpose of legal proceedings will not be protected by privilege. Of course, if the information or documents sought constitute a communication made in furtherance of the commission of a crime, legal professional privilege will always be inapplicable. Information that is merely confidential is not so protected.

29 Legal adviser is defined in section 15(5) as meaning counsel or a solicitor.
Special Duties Upon Lawyers

Section 15(3) of the Ordinance imposes particularly onerous duties upon lawyers. It provides:

“(3) Subject to subsection (4), a legal adviser may be required by notice under section 14(1)(d)-
(a) to state whether, at any time during such period as is specified in the notice, he has acted on behalf of any person named or otherwise identified in the notice in connection with -
(i) the transfer by such person of any moneys out of Hong Kong; or
(ii) the investment by such a person within or outside Hong Kong of any moneys; and
(b) if so, to furnish information in his possession with respect thereto, being information as to -
(i) the date of the transfer or investment;
(ii) the amount of the transfer or investment;
(iii) in the case of a transfer, the name and address of the bank and the name and number (if any) of the account to which the money was transferred;
(iv) in the case of an investment, the nature of the investment notwithstanding that the effect of compliance with such a requirement would be to disclose any privileged information or communication.”

It can be seen that section 15(3) appears to make considerable inroads into client confidentiality and legal professional privilege. The provision is, however, subject to subsection (4), which has been set out in full above. Legal professional privilege has, therefore, been preserved to the extent identified in section 15(4).

The Inland Revenue Ordinance (Cap 112)

The Duty of Disclosure
A further inroad into the solicitor’s duty of confidentiality and legal professional privilege has been made by the Inland Revenue Ordinance.
Section 51(4) provides that, in order to obtain full information affecting a taxpayer's liability, an assessor or inspector may require any person whom he considers to be in possession of relevant documents to produce them for examination.\(^{30}\) This provision applies to solicitors.\(^{31}\) It is further provided in section 51(4A) that the powers conferred by section 4 include the power to require information from any person who acted for any party to a land transaction or has received a fee in connection with any such transaction. The information required is as to the names of parties to any land transaction, information as to how to locate them, the consideration received and the terms of the transaction.

**Applicability of Legal Professional Privilege**

Section 51(4A) of the Ordinance deals with the question whether such information when provided by a solicitor is protected by legal professional privilege. The section says:

"[T]he existence in respect of any communication, whether oral or written, of privilege from disclosure shall not constitute any excuse for the non-disclosure of information as to any of matters specified ... where disclosure thereof is required ... but except as aforesaid nothing in subsection (4) shall require disclosure by counsel or solicitor of any privileged information or communication given or made to him in that capacity."

It can be seen, therefore, that legal professional privilege has been expressly excluded to the limited extent identified in section 51(4A).

**The Legal Practitioners Ordinance (Cap 159)**

The *Legal Practitioners Ordinance* governs, *inter alia*, the conduct of solicitors and provides for the manner in which solicitors' conduct is

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30 Inland Revenue Ordinance, s 51(4).
31 According to the proviso to s 51(4)(a), Inland Revenue Ordinance, where the production by a solicitor is required of any account kept by the solicitor relating to the affairs of his clients, the solicitor may produce a certified copy of all such entries.
regulated and monitored by the Council of the Law Society. Such regulation inevitably involves interference in matters that are confidential and protected by legal professional privilege. Such interference, however, is clearly in the interests of the community, the legal profession and clients.

*Intervention by the Council and an Inspector Appointed by the Council Where Suspicion That Solicitor is Unfit to Practise or has Failed to Comply with his Professional Obligations*

There are several provisions in the *Legal Practitioners Ordinance* which make inroads into a solicitor's duty of confidentiality and the scope of legal professional privilege by way of empowering the Council of the Law Society to intervene in a solicitor's practice and call for and inspect his records and documents. For example, the Council is empowered to examine all the documents in the possession of a solicitor in any case where it considers that the solicitor may be unfit to practise.32 Further, the Council may appoint an inspector to check whether a solicitor has complied with his obligations under the *Legal Practitioners Ordinance* or any Practice Direction issued by the Law Society and the inspector may require the production of all documents in the possession of the solicitor.33 In both the above cases the documents must be produced notwithstanding any claim to confidentiality or legal professional privilege, although these documents may only be used for the purposes of the investigation.34

This is a case where legal professional privilege has clearly been excluded by statute. Documents that are merely confidential will similarly not be protected from production.

*Disciplinary Proceedings*

Further, when conducting disciplinary proceedings, the Solicitors' Disciplinary Tribunal is empowered to compel the production of documents.35

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32 *Legal Practitioners Ordinance*, s 8A.
33 *Ibid.*, s 8AA.
34 *Ibid.*, s 8B(2).
Powers of Council Where Solicitor Suspected of Acting Dishonestly or with Undue Delay

Finally, where the Council of the Law Society has, inter alia, reason to suspect that a solicitor has been guilty of dishonesty,\(^{36}\) has become bankrupt,\(^{37}\) has been committed to prison\(^{38}\) or been guilty of undue delay in connection with his practice,\(^{39}\) the powers set out in Schedule 2 to the Ordinance become exercisable. Under those powers it may, inter alia, require the production of the solicitor’s documents and books of account\(^{40}\) and, in the case of an investigation into dishonesty, in accordance with an order of the court, take possession of the solicitor’s mail.\(^{41}\)

It is noteworthy that, whereas section 8B(2) overrides legal professional privilege so far as the inspectors’ powers under section 8A and section 8AA extend, there is no such exclusion with regard to the Disciplinary Tribunal’s and the Council’s powers set out above. It is suggested that recent judicial pronouncements – in particular the House of Lords’ decision in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] 2 WLR 1299, HL and the Hong Kong decision in *Pang Yiu Hung Robert v Commissioner of Police* (2002) HCAL No 133 of 2002 – show that, to be effective, the overriding of the privilege must be effected expressly or by necessary implication. Is there such a necessary implication here? It can be argued that there must be such a necessary implication where the purpose of the legislation is unequivocally directed at requiring that such privileged material be revealed. It is suggested that the powers of investigation and production expressly granted to the Disciplinary Tribunal and the Council in respect of a solicitor’s practice necessarily by inference override the privilege. The legislation could not be effective otherwise. This conclusion is supported by *Inland Revenue Commissioners, ex parte Taylor (No 2)* [1989] 3 All ER 353. In that case objections to disclosure on grounds of privilege were rejected.

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\(^{36}\) *Ibid*, s 26A(1)(a).


\(^{38}\) *Ibid*, s 26A(1)(e).

\(^{39}\) *Ibid*, s 26C

\(^{40}\) Schedule 2, para 7(1)

\(^{41}\) Schedule 2, para 8.
where statute authorised the Revenue to issue a notice requiring a
taxpayer, who was a solicitor, to deliver all documents relating to his
business and private accounts. Lord Denning MR held that the particu-
lar rule was valid and that it "overrides any privilege or confidence which
might otherwise subsist ...". Here the legislation mandates the Law
Society to regulate solicitors' conduct and, if legal professional privilege
were to constitute a ground for resisting disclosure, the purpose of the
legislation would be rendered nugatory. Documents that are merely
confidential will similarly not be protected from disclosure.

The Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405)

This Ordinance was enacted in 1989 for the purpose of providing for the
tracing, confiscation and recovery of the proceeds of drug trafficking.

Duty to Disclose Knowledge or Suspicion

Perhaps the provision in the Ordinance that most affects solicitors is
section 25A, which provides that:

"(1) Where a person knows or suspects that any property
(a) in whole or in part directly or indirectly represents any
person's proceeds of;
(b) was used in connection with; or
(c) is intended to be used in connection with,
drug trafficking, he shall as soon as is reasonable for him to do
so disclose that knowledge or suspicion, together with any mat-
ter on which that knowledge or suspicion is based, to an
authorised officer.

(2) ...
(3) A disclosure referred to in section (1) -
(a) shall not be treated as a breach of any restriction upon the
disclosure of information imposed by contract or by any
enactment, rule of conduct or other provision;
(b) shall not render the person who made it liable in damages
for any loss arising out of:
As we have seen above, a recently enacted amendment to the DTROP\textsuperscript{42} states: “Subject to section 15, nothing in this Ordinance shall require the disclosure of any items subject to legal privilege within the meaning of section 22”. This provision is intended to reflect the common law position regarding legal professional privilege and to alleviate concerns as to whether lawyers are protected under section 10 (dealing with restraint orders), section 11 (dealing with charging orders) and section 25A (dealing with the reporting of suspicious transactions). Even without this amendment, applying the reasoning of Hartmann J in Pang Yiu Hung Robert v Commissioner of Police (2002) HCAL No 133 of 2002, legal professional privilege would still apply and thereby restrict the duty to disclose. It is suggested, therefore, that solicitors have no duty to make disclosure under this provision if the information was obtained in circumstances giving rise to the application of the doctrine of legal professional privilege. It must be borne in mind, however, that the doctrine will be inapplicable where the information was passed by way of furthering the commission of the crime of drug trafficking or concealing or laundering the proceeds thereof. Nor are communications that are merely confidential exempted from the ambit of the Ordinance.

It is instructive here to note the only case in England – R v Duff [2002] EWCA Crim 2117 – here a solicitor has to date been convicted under similar (but far from identical) English provisions. A solicitor, Mr Duff, received on behalf of his firm sums of money from a client. The client was subsequently convicted of drug trafficking. Following the conviction the solicitor became suspicious as to the origin of the sums of money he had received, but concluded that there was no duty to disclose those sums to the police because, the legislation related to present

\textsuperscript{42} See the Drug Trafficking and Organized Crimes (Amendment) Ordinance, which came into effect on 1 Jan 2003 (see Legal Notice No 145 of 2002).
and continuing drug related activities and not to past activities. He was arrested and charged with failing to disclose knowledge or suspicion of money laundering contrary to section 52(1) of the Drug Trafficking Act 1994. That provision stated that a person was guilty of an offence if he knows or suspects that another person is engaged in drug money laundering. The information came to him in the course of his profession or employment and he had not disclosed it to a police officer as soon as reasonably practicable after it came to his attention. Section 52(2) of the Act (unlike the statutory provision in Hong Kong) further provided that it was not an offence for a legal adviser to fail to disclose information under privileged circumstances. “Privileged circumstances” are defined in the Act as follows:

“... if [the information] is communicated or given to him

(a) by, or by a representative of, a client of his in connection with the giving by the adviser of legal advice to the client;

(b) by, or by a representative of, a person seeking legal advice from the adviser; or

(c) by any person

(i) in contemplation of, or in connection with, legal proceedings; and

(ii) for the purpose of those legal proceedings.”

The defendant pleaded guilty, contending in mitigation that he had innocently misunderstood the effect of the law. He was sentenced to six months’ imprisonment and the sentence was upheld on appeal.43

It is clear from this judgment that the mere fact that a retainer exists will not provide a defence to a solicitor unless the sum of money involved is handed over in connection with the giving or receiving of legal advice or in contemplation of legal proceedings. This was, apparently, not the case here. This reasoning is equally applicable in Hong Kong.

43 It should be noted that the solicitor, inter alia, acted as a conduit for the sale of his client’s cars under rather suspicious circumstances since the cars were all sold at a loss! For example, he sold one of his client’s cars, a Chrysler Viper, which the client had bought for £120,000 for a mere £89,000!
Powers of Search and Seizure
A further provision in the Ordinance affects solicitors. Section 21 empowers an authorised officer to search private premises to facilitate his investigation into drug trafficking. Section 21(5), however, provides that, where an authorised officer has entered premises in the execution of a warrant issued under section 21, he may seize and retain any material, other than items subject to legal professional privilege, which is likely to be of substantial value to the investigation. Items subject to legal privilege are defined in section 22(2) as follows:

"'items subject to legal privilege' means:
(a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;
(b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purpose of such proceedings; and
(c) items enclosed with or referred to in such communications and made:
   (i) in connection with the giving of legal advice; or (ii) in connection with or in contemplation of legal proceedings and for the purpose of such proceedings, when they are in the possession of a person who is entitled to possession of them, but excluding, in any case, any such communications or items held with the intention of furthering a criminal purpose."

Clearly items held for the purpose of furthering a criminal purpose or held other than in connection with giving or receiving legal advice or in connection with actual or contemplated legal proceedings will not be protected from seizure. Nor will documents that are merely confidential and fall outside the ambit of privilege.
The Organized and Serious Crimes Ordinance (Cap 455)

The Organized and Serious Crimes Ordinance was enacted in 1994 to create new powers of investigation into organised crimes and to provide a mechanism for the confiscation of the proceeds of serious crimes.

The Duty to Furnish Information and Produce Material

In accordance with the Ordinance, by way of facilitating the investigation of organised crime, the court may make an order that a particular person furnishes specified information or produces specified material to officers of the legal department. This requirement will apply to solicitors. Section 3(9) of the Ordinance, however, provides that:

“(9) A person shall not be required under this section to furnish any information or produce any document relating to items subject to legal privilege, except that a lawyer may be required to furnish the name and address of his client.”

It is clear, therefore, that the doctrine of legal professional privilege has not been excluded by the Ordinance and will still apply to solicitors who are required to furnish information as to their clients. The only exception relates to the name and address of the client. It is well established that, although clients' addresses should be kept confidential, they are not generally privileged information unless the client specifically instructs his solicitor to keep this information confidential and it seems very unlikely that the courts might strike out this exception as running contrary to articles 35 and 87 of the Basic Law.

44 Organized and Serious Crimes Ordinance, s 3.
45 The meaning of the expression “items subject to legal privilege” is stated in section 2(1) of the Ordinance. This is the same definition as provided in the Organized and Serious Crimes Ordinance which has been set out in full beginning on page 82.
46 Commentary 28, Principle 8.01, Solicitors' Guide.
47 Re Bell, ex parte Lees (1980) 146 CLR 141 (Austr HCt); Re an Application by Messrs Ip and Willis [1990] 1 HKLR 154, 163, per Sears J. See also International Credit and Investment Co (Overseas) Ltd v Adham [1998] BCC 134; the court held that it enjoyed exceptional inherent jurisdiction to order a solicitor, as an officer of the court, to disclose the name and address of his client.
An authorised officer’s right to search lawyer’s offices is also similar-ly circumscribed, since section 5(5) of the Ordinance provides that where an authorised officer has entered premises in the execution of a warrant, he may seize and retain any material other than items subject to legal privilege. Material that is merely confidential and fall outside the ambit of privilege will not be similarly protected from seizure.

The Duty to Inform
Perhaps the most important section of the Ordinance from the point of view of lawyers’ duties is section 25A that provides that:

“(1) Where a person knows or suspects that any property
(a) in whole or in part directly or indirectly represents any person’s proceeds of;
(b) was used in connection with; or
(c) is intended to be used in connection with,

an indictable offence, he shall as soon as it is reasonable for him to do so disclose that knowledge or suspicion, together with any matter on which that knowledge or suspicion is based, to an authorized officer.

(2) ...
(3) A disclosure referred to in section (1) -
(a) shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract or by any enactment, rule of conduct or other provision;
(b) shall not render the person who made it liable in damages for any loss arising out of:
(i) the disclosure;
(ii) any act done or omitted to be done in relation to the property concerned in consequence of the disclosure.”

As we noted earlier, the recent amendment introduced by the Drug Trafficking and Organized Crimes (Amendment) Ordinance, now provides as follows: “Subject to sub-section 19, nothing in this Ordinance shall

48 Organized and Serious Crimes Ordinance, s 5.
require the disclosure of any items subject to legal privilege”. Therefore, even though section 25A of the Ordinance imposes a positive duty on solicitors to report certain confidential information to an authorised officer, that information is subject to legal professional privilege. Even without this amendment, subsection s(3)(a) and (b) affords protection to lawyers who provide the required information. Also, as noted earlier, the duties of solicitors under section 25A were considered by Hartmann J in Pang Yiu Hung Robert v Commissioner of Police (2002) HCAL No 133 of 2002. The applicant barrister, who had been arrested and charged with an offence under section 25A, applied for judicial review contesting the lawfulness of his arrest. He also sought a declaration that section 25A did not extend to communications that were covered by legal professional privilege. Although the learned judge concluded that the arrest of the applicant had been unlawful since the arresting officer had no reasonable grounds for suspecting that the applicant had committed an offence under section 25A of the Ordinance, he went on to consider the effect of the section on legal professional privilege.

Was the barrister protected from criminal liability if the communication fell within the doctrine of legal professional privilege? As we have seen, at the time the Ordinance did not expressly provide that section 25A was subject to legal professional privilege. Hartmann J concluded, following the decision of the House of Lords in R (Morgan Grenfell) v Special Commissioner of Income Tax, that legal professional privilege could only be excluded statutorily by express provision or necessary implication. Here there was no express exclusion of legal professional privilege, nor had it been excluded by necessary implication. This conclusion was supported by the fact that it had not been included in section 25A(3)(a), since it did not fall within the description “contract”, “enactment” or “rule of conduct”. If section 25A had been intended by necessary implication to abrogate legal professional privilege, it would surely have been included in section 25A(3)(a) as giving rise to possible liability for a lawyer. The learned judge, therefore, concluded that legal professional privilege would still govern a lawyer's duty under section 25A since, at the time, it had neither been excluded expressly or by necessary implication.

The amendment to the Ordinance providing that the duty to report is subject to legal professional privilege will not, therefore, alter the
present duty of solicitors. Communications that are merely confidential and fall outside the ambit of privilege, however, will not attract similar protection.

*Duty Not to Inform Client that Disclosure Made*

A further statutory obligation rests upon the person making the disclosure in that the person must not disclose to another person any matter which is likely to prejudice any investigation which might be conducted following the disclosure.\(^49\) It is further provided that it is a defence to a breach of this duty to establish that the person did not know or suspect that the disclosure concerned was likely to be prejudicial or that he had lawful authority or reasonable excuse for making the disclosure.\(^50\) This provision, of course, runs counter to a solicitor's normal contractual and ethical duty to pass on all information to his client which is material to the subject matter of the retainer regardless of the source of that information.\(^51\) It is suggested that the existence of such a contractual and ethical duty would not constitute a defence to a charge of having breached the statutory duty.

The consequence of this provision is that, once a solicitor has informed on a client, he may feel unable to continue with the retainer since a conflict of interest has resulted and the relationship of trust and loyalty, which constitutes an essential element of the retainer, has broken down. Helpful guidance as to what the solicitor should do in such circumstances has been given by way of a Guidance Note issued by the Law Society.

The United Nations (Anti-Terrorism) Ordinance (Cap 575)

This Ordinance was enacted in 2002, its purpose being to implement a decision of the United Nations Security Council to promulgate measures to prevent terrorist activities. It provides for the designation of

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\(^{50}\) *Ibid.*, s 25A(6)(a), (b).

\(^{51}\) Principle 8.03, Solicitors' Guide.
certain persons as terrorists, the freezing of terrorist funds, the prevention of supply of funds and weapons to terrorist organisations and a duty to report any knowledge or suspicion that property is terrorist property. Several provisions of the Ordinance significantly affect the duty of solicitors in Hong Kong.

**Acting for Terrorists**

The Ordinance provides that a person shall not begin to serve in any capacity with any person who has been specified by the Chief Executive as a terrorist and this prohibition clearly encompasses a solicitor serving a terrorist client. On its face this prohibition would seem to extend to prohibiting a person who is charged with a terrorist offence from retaining legal representation by way of his defence, but such a ridiculous effect could not possibly be intended. Presumably the purpose of this prohibition is to prohibit a solicitor from serving a terrorist client in a way that such service may further the ends of terrorism.

**The Duty to Inform as to Terrorist Property**

Secondly, under the Ordinance a statutory duty falls upon all persons, including solicitors, to disclose to an authorised officer, as soon as practicable, information where the solicitor knows or suspects that any property is terrorist property. The solicitor is required to disclose the information or matter on which the knowledge or suspicion is based. This obligation might be potentially activated, for example, where the solicitor is asked by a client, whom he suspects may be involved in terrorist activities, to pay client's money into the law firm's account or where the solicitor is asked by a "suspicious" client to incorporate a company or chain of companies, either in Hong Kong or offshore, into whose name the client's property (or the property of others) will be transferred.

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52 *United Nations (Anti-Terrorism Measures) Ordinance*, s 10(1)(b) A person may be specified as a terrorist by the Chief Executive where that person has been designated as a terrorist by a Committee of the United Nations: see section 4(1) and section 2(1) (definition of "Committee").
Does this mean that a solicitor, who harbours suspicions that the property that forms the subject matter of the retainer is terrorist property, has an immediate obligation to pick up the telephone and inform the relevant authorities of these suspicions? Such a course of action would, on its face, breach the solicitor's duty of confidentiality and his retainer as well as the solicitor's professional duties. Of course, it must be born in mind that the duty of confidentiality is not absolute and the duty at common law does not extend to any communication made in furtherance of a future or continuing crime or fraud. For this purpose the pursuit of terrorist activities clearly falls within a "criminal purpose".

Notwithstanding the provisions of the common law and the Solicitors' Guide, which permit a solicitor to breach confidentiality in relation to communications from clients made in furtherance of a criminal purpose, the Ordinance provides additional statutory protection to solicitors who "inform" on such clients. Section 12(3) of the Ordinance further provides that:

“(3) a disclosure referred to in sub-section (1)
(a) shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract or by any enactment, rule of conduct or other provision;
(b) shall render the person who made it liable in damages for any loss arising out of:
(i) the disclosure; or
(ii) any act done or omitted to be done in relation to the property concerned in consequence of the disclosure.”

The effect of this provision is that a solicitor, who makes a disclosure as to suspected terrorist property, will not be liable for any consequential breach of contract, breach of his ethical code of conduct or for common law damages.

A further important provision (section 2(5)) makes it clear that legal professional privilege will continue to apply:

55 See R v Cox and Railton (1884) 14 QBD 153, 167
“(5) Nothing in this Ordinance shall -
(a) require the disclosure of any items subject to legal privilege;\textsuperscript{56}
(b) authorise the search or seizure of any items subject to legal privilege; or
(c) restrict the privilege against self-incrimination.”\textsuperscript{57}

Of course, just as in the case of confidentiality, this privilege is inapplicable to communications made for the purpose of furthering illegal or fraudulent activities. This same position has now been given statutory recognition in the Ordinance.\textsuperscript{58} No similar protection is given in respect of information that is merely confidential and falls outside the ambit of privilege.

**Duty not to Inform Client that Disclosure Made**

A further statutory obligation rests upon the person making the disclosure in that the person must not disclose to another person any information which is likely to prejudice any investigation which might be conducted following the disclosure.\textsuperscript{59} This provision, of course, runs counter to a solicitor’s normal contractual and ethical duty to pass on all information to his client which is material to the subject matter of the retainer regardless of the source of that information. The consequence of this provision is that, once a solicitor has informed on a client, he may feel unable to continue with the retainer since a conflict of interest has resulted and the relationship of trust and loyalty, which constitutes an essential element of the retainer, has broken down.

As in the case of other legislative provisions considered above, a positive duty is imposed upon solicitors to report certain confidential information to an authorised officer. Whether this provision offends articles 35 and 87 of the *Basic Law* remains to be seen.

\textsuperscript{56} For the meaning of “items subject to legal privilege” see page 75 above.
\textsuperscript{57} *United Nations (Anti-Terrorism Measures) Ordinance*, s 2(5).
\textsuperscript{58} See the definition of “items subject to legal privilege” in s 2(1) of the *Organized and Serious Crimes Ordinance* set out above.
\textsuperscript{59} *United Nations (Anti-Terrorism Measures) Ordinance*, s 12(5).
Conclusions

The duty of confidentiality owed by a solicitor to his client and the doctrine of legal professional privilege are deeply entrenched in the common law and form an important part of every retainer. Their observance also constitutes a significant professional duty falling upon solicitors.

It can be readily ascertained from the case law that the scope of confidentiality is considerably wider than the scope of legal professional privilege and much information passing from a client to his solicitor will be confidential but not protected from disclosure by legal professional privilege. This distinction is significant, since many statutes exclude from their ambit communications that are privileged; matters that are confidential but fall outside the ambit of privilege are not, however, protected from disclosure.

The courts in England, Canada and Hong Kong have confirmed in no uncertain terms that the doctrine of legal professional privilege is a fundamental human right that must be protected by the courts. Whilst recognising that increased terrorist and drug-related activities have necessitated draconian legislation, they have made it clear that such considerations must not be permitted to override this well-established fundamental right.

The scope of legal professional privilege must not, however, be exaggerated. It applies only in two situations: first, as between client and legal adviser, in circumstances where a solicitor is giving and the client is receiving legal advice; secondly, as between a solicitor or client and a third party where the dominant purpose of the communication is the furtherance of actual or contemplated litigation.

The doctrine of legal professional privilege is not, however, absolute and has been modified from time to time by the common law and the professional codes of lawyers. It does not extend, for example, to communications made in furtherance of criminal activities.

Several statutes have been enacted which expressly exclude or modify confidentiality and legal professional privilege. Their purpose is very varied. They fall in the areas of tax collection, regulation of the conduct of solicitors and the prevention of bribery, drug trafficking and organised and serious crimes. More recently, such provisions have been enacted in legislation aimed at the prevention of money
laundering. They also constitute a significant aspect of the global measures to combat terrorism. Unfortunately, many of the provisions are far from clear and, at times, it is difficult for solicitors to understand the extent of their duties. Some statutes expressly exclude privileged information. Other statutes make no mention of whether legal professional privilege is excluded. This calls for a judgment by solicitors as to whether privilege is excluded by necessary implication. For solicitors to have to make this judgment is far from satisfactory. It is suggested that draftsmen should never leave such an important matter for individual construction, but should always expressly exclude privilege when this is intended.

In construing statutory provisions affecting legal professional privilege several clear principles have emerged:

(i) As a general principle legal professional privilege will continue to apply where a statute is silent as to whether it continues to apply or does not apply. Legal professional privilege can only be excluded by express provision in primary legislation or by necessary implication.

(ii) Even where legal professional privilege has been excluded by statute either expressly or by necessary implication, the courts will, perhaps, only give effect to such exclusion where it can be shown to be necessary in a democratic society. Further judicial attention to this point is awaited.

(iii) Where statute imposes a positive duty to inform authorities of matters affecting clients that fall within the proper scope of legal professional privilege, such provisions may offend basic constitutional rights. This issue is not yet finally resolved.

Where statute does impose a positive duty upon solicitors to inform upon their clients, this inevitably presents considerable difficulty for solicitors. Most legislation of this nature further prohibits the solicitor from informing his client as to the action he has taken. This combination of events will almost certainly give rise to a conflict of interest between the solicitor and the client requiring him to withdraw from further representation. Clearly the duty of loyalty owed by solicitors to clients has been fundamentally breached.
Finally, the recent conviction of an English solicitor, Mr Jonathan Duff, for failing to report on his client in a case involving money laundering of drug money and the sentence of six months' imprisonment imposed on him makes it essential for solicitors to study the relevant legislation carefully and ensure that they comply.