

立法會
Legislative Council

LC Paper No. CB(2)506/01-02

Ref : CB2/SS/3/01

Paper for the House Committee meeting on 30 November 2001

**Report of the Subcommittee on
Mutual Legal Assistance in Criminal Matters (Canada) Order,
Mutual Legal Assistance in Criminal Matters (Philippines) Order and
Mutual Legal Assistance in Criminal Matters (Portugal) Order**

Purpose

This paper reports on the deliberations of the Subcommittee formed to study the Mutual Legal Assistance in Criminal Matters (Canada) Order, the Mutual Legal Assistance in Criminal Matters (Philippines) Order and the Mutual Legal Assistance in Criminal Matters (Portugal) Order.

Background

2. The Secretary for Security gave notice to move motions at the meeting of the Legislative Council on 17 October 2001 to seek the Council's approval for the following Orders made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (the Ordinance) by the Chief Executive in Council on 18 September 2001 -

- (a) Mutual Legal Assistance in Criminal Matters (Canada) Order (the Canada Order);
- (b) Mutual Legal Assistance in Criminal Matters (Philippines) Order (the Philippines Order); and
- (c) Mutual Legal Assistance in Criminal Matters (Portugal) Order (the Portugal Order).

The Orders

The Canada Order

3. The Canada Order sets out the scope and procedures in relation to the provision of mutual legal assistance in criminal matters applicable between the Hong Kong Special Administrative Region (HKSAR) and Canada, and the modifications to the Ordinance. It also provides for safeguards of the rights of persons involved in criminal proceedings.

4. The Order is made consequential upon the agreement to the arrangements for mutual legal assistance signed by the Government of the HKSAR and the Government of Canada (HKSAR/Canada Agreement) on 16 February 2001.

The Philippines Order

5. The Philippines Order sets out the scope and procedures in relation to the provision of mutual legal assistance in criminal matters applicable between the HKSAR and the Republic of the Philippines, and the modifications to the Ordinance. It also provides for safeguards of the rights of persons involved in criminal proceedings.

6. The Order is made consequential upon the agreement to the arrangements for mutual legal assistance signed by the Government of the HKSAR and the Government of the Republic of the Philippines (HKSAR/ Philippines Agreement) on 23 February 2001.

The Portugal Order

7. The Portugal Order sets out the scope and procedures in relation to the provision of mutual legal assistance in criminal matters applicable between the HKSAR and the Portuguese Republic, and the modifications to the Ordinance. It also provides for safeguards of the rights of persons involved in criminal proceedings.

8. The Order is made consequential upon the agreement to the arrangements for mutual legal assistance signed by the Government of the HKSAR and the Government of the Portuguese Republic (HKSAR/Portugal Agreement) on 24 May 2001.

The Subcommittee

9. At the meeting of the House Committee on 12 October 2001, Members agreed that a subcommittee be formed to study the three Orders. At the request of the House Committee, the Secretary for Security withdrew her notice for moving the motions at the Council meeting on 17 October 2001 to allow time for the Subcommittee to study the Orders.

10. The membership list of the Subcommittee is in the **Appendix**. Under the chairmanship of Hon James TO, the Subcommittee has held two meetings with the Administration.

Deliberations of the Subcommittee

11. In studying the three Orders, the Subcommittee has made article-by-article comparison of the provisions of each Order with those of the model agreement on mutual legal assistance in criminal matters.

The Canada Order

Assistance in respect of offences against a law related to taxation

12. Under Article 1(3) of the HKSAR/Canada Agreement, assistance may be granted in connection with offences against a law related to taxation. The Administration has clarified that if the primary purpose of assistance is for the collection of taxation, the request for assistance would be refused.

Grounds for refusal of assistance

13. Article 5(1)(a) provides that the Requested Party shall refuse assistance if in the case of Canada, the request for assistance would, in the opinion of the Government of Canada, impair its sovereignty, security or public order or, in the case of the HKSAR, the request would, in the opinion of the Central People's Government of the People's Republic of China (PRC), impair the sovereignty, security or public order of the PRC. Members have asked why the security or public order of the HKSAR is not referred to in Article 5(1)(a).

14. The Administration has explained that security and public order of the PRC encompasses the security and public order of the HKSAR and other parts of the PRC. In addition, Article 5(1)(b) provides that the Requested Party shall refuse assistance if it is of the opinion that the granting of the request would seriously impair its essential interest. The security and public order of HKSAR are also covered under essential interest in this Article.

15. Members note that all the mandatory grounds for refusal of assistance set out in section 5(1) of the Ordinance are covered in the Agreement.

Safeguard against self-incrimination

16. Article 9(1) provides that where a request is made that evidence be taken for the purpose of an investigation, prosecution of a criminal offence or proceeding in relation to a criminal matter, the Requested Party shall, to the extent not prohibited by its laws,

arrange to take such evidence. Members have asked whether there are safeguards to the person, who is required to give evidence, against self-incrimination.

17. The Administration has explained that the safeguards are provided in Article 9(6). This Article provides that a person who is required to give evidence in the Requested Party pursuant to a request for assistance may decline to give evidence where either the law of the Requested Party would permit that witness to decline to give evidence in similar circumstances in proceedings which originated in the Requested Party, or the law of the Requesting Party would permit that person to decline to give evidence in such proceeding in the Requesting Party. Under section 10(10) of the Ordinance, a person who is required to give evidence for the purposes of a criminal matter in a place outside the HKSAR could not be compelled to give evidence on the ground that to do so might tend to incriminate him.

The Philippines Order

Pecuniary penalty

18. Under Article I(2)(h) of the HKSAR/Philippines Agreement, assistance shall be provided for recovering pecuniary penalties in respect of offences. Reference to such penalties is also found in Article XVIII dealing with restraint, forfeiture and confiscation of property. Members note that reference to the term "pecuniary penalty" is not found in the mutual legal assistance agreements signed with other jurisdictions.

19. The Administration has explained that the reference to pecuniary penalty is to reflect the fact that under the legal system of the Philippines, the confiscation of criminal proceeds is achieved by the making of pecuniary penalties. The Administration has pointed out that pursuant to the Ordinance, the HKSAR will only be able to enforce a pecuniary penalty imposed in the Philippines if it falls within the meaning of "external confiscation order" defined in section 2 of the Ordinance. This means that the HKSAR will only be able to enforce pecuniary penalties which are directed towards confiscating the proceeds of crime. Hence, the use of the term does not accordingly widen the scope of the agreement with the Philippines beyond that of the model agreement and other signed agreements.

Forfeiture and confiscation of property

20. Article XVIII(3) provides that the Requested Party shall give effect to a final decision by a court of the Requesting Party imposing a pecuniary penalty or ordering confiscation or forfeiture and shall return or deliver the property to the Requesting Party unless otherwise agreed between the Parties. Under Article XVIII(4), if the property is real property, the Requested Party shall sell that property and deliver the proceeds of the sale to the Requesting Party. Members note that these provisions differ from those in the model agreement.

21. The Administration has explained that Article XVIII(3) in effect provides that if there is no agreement between the Parties, the property confiscated or forfeited shall be returned to the Requesting Party. However, in the model agreement, the Requested Party shall retain confiscated proceeds unless otherwise agreed. The variation is made as the Philippines has insisted, because of the Marcos experience, that the proceeds should generally be returned to the Requesting Party. The Administration has also advised that the sharing of proceeds other than those which have been used to acquire real property are permitted under Article XVIII(3) and (4).

22. Members also note that the confiscation of proceeds in Article XVIII is applicable to all crimes.

The Portugal Order

23. Members note that the HKSAR/Portugal Agreement is substantially the same as the model agreement.

Motions on the Orders

24. As the Subcommittee has concluded scrutiny of the three Orders, the Administration proposes that the motions on the Canada Order, the Philippines Order and the Portugal Order be moved by the Secretary for Security at the Council meeting on 19 December 2001. The Subcommittee expresses agreement for the Administration's proposal.

Advice Sought

25. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 2
Legislative Council Secretariat
27 November 2001

**Subcommittee on
Mutual Legal Assistance in Criminal Matters (Canada) Order,
Mutual Legal Assistance in Criminal Matters (Philippines) Order and
Mutual Legal Assistance in Criminal Matters (Portugal) Order**

Membership list

Chairman Hon James TO Kun-sun

Members Hon Margaret NG
Hon Jasper TSANG Yok-sing, JP
Hon Audrey EU Yuet-mee, SC, JP

(Total : 4 Members)

Clerk Mrs Sharon TONG LEE Yin-ping

Legal Adviser Mr Stephen LAM

Date 30 November 2001