

立法會
Legislative Council

LC Paper No. LS6/01-02

**Paper for the House Committee Meeting
of the Legislative Council
on 12 October 2001**

**Legal Service Division Report on
Resolutions under Section 4 of the
Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)**

**Mutual Legal Assistance in Criminal Matters (Canada) Order
Mutual Legal Assistance in Criminal Matters (Philippines) Order
Mutual Legal Assistance in Criminal Matters (Portugal) Order**

The Secretary for Security has given notices to move three motions at the LegCo's meeting to be held on 31 October 2001 to approve the following Orders :

- (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"),

made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) ("the Ordinance").

2. Section 4(1) of the Ordinance provides that the Chief Executive in Council may, with the approval of the LegCo, in relation to any arrangements for mutual legal assistance, by order to which is annexed a copy of the arrangements direct that the Ordinance shall, subject to such modifications thereto as may be specified in the order, apply as between Hong Kong and the place outside Hong Kong to which the arrangements relate. Section 4(2) of the Ordinance provides that the Chief Executive in Council shall not make an order unless the arrangements for mutual legal assistance to which the order relates are substantially in conformity with

the provisions of the Ordinance. Section 4(3) requires that the modifications be summarized in a Schedule to the order. Section 4(7) restricts the LegCo's power under section 35(b) of the Interpretation and General Clauses Ordinance (Cap. 1) to amend the whole or any part of the subsidiary legislation by only allowing LegCo to accept or repeal the whole subsidiary legislation.

3. Schedule 1 to each of the Orders exhibits the bilateral arrangements entered into between Hong Kong with Canada, the Philippines and Portugal for mutual legal assistance in criminal matters.

4. Schedule 2 to each of the Orders sets out the modifications to the Ordinance.

The Canada Order

5. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Government of Hong Kong and the Government of Canada and signed in Hong Kong on 16 February 2001.

6. Schedule 1 specifies the scope and procedures in relation to the provision of mutual legal assistance in criminal matters. It also provides for safeguards of the rights of persons involved in criminal proceedings.

7. Schedule 2 specifies the modifications to the Ordinance. Section 5(1)(e) of the Ordinance provides that the Secretary for Justice shall refuse assistance if the request relates to the prosecution of a person for an offence in respect of which he has been convicted, acquitted, pardoned or punished in the requesting jurisdiction. Article 5(2)(c) of the Hong Kong/Canada Agreement extends this protection to conviction, acquittal or pardon in the requested jurisdiction as well. The modification expands the scope of section 5(1)(e) to reflect the provision in the Agreement.

8. Section 17 of the Ordinance gives a person who comes to Hong Kong from another jurisdiction to render assistance certain immunities. These immunities cease to apply if the person has had the opportunity of leaving Hong Kong and has remained in Hong Kong otherwise than for the purpose of rendering assistance. Article 14(3) of the Hong Kong/Canada Agreement provides that the immunities will continue to be applicable for a period of thirty days after the person has had the opportunity of leaving Hong Kong. The modification reflects the protection in the Agreement by providing for a thirty days period in section 17.

The Philippines Order

9. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Government of Hong Kong and the Government of the Republic of the Philippines and signed in Hong Kong on 23 February 2001.

10. Schedule 1 specifies the scope and procedures in relation to the provision of mutual legal assistance in criminal matters. It also provides for safeguards of the rights of persons involved in criminal proceedings.

11. Schedule 2 specifies the modifications to the Ordinance. The modification to section 5(1)(e) of the Ordinance reflects Article IV(1)(e) of the Hong Kong/Philippines Agreement which extends the protection in section 5(1)(e) to conviction, acquittal or pardon in the requested state.

12. The modification to section 17 of the Ordinance is exactly the same as the modification provided for in the Canada Order except that the period is fifteen days. The modification reflects the additional protection in Article XVI(2) of the Hong Kong/Philippines Agreement.

13. We have sought clarification from the Administration, in particular, of the use of the term "pecuniary penalty" in Article I(2)(h), the reason for including the obligation to realize real property upon request in Article XVIII(4), the reason for not adopting the saving provision in relation to requests made before the termination of the agreement in Article XXI(3) and the reason for death penalty exception. Members may refer to the copies of correspondence at the **Annex** for reference.

The Portugal Order

14. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Government of Hong Kong and the Government of the Portuguese Republic and signed in Hong Kong on 24 May 2001.

15. Schedule 1 specifies the scope and procedures in relation to the provision of mutual legal assistance in criminal matters. It also provides for safeguards of the rights of persons involved in criminal proceedings.

16. Schedule 2 specifies the modifications to the Ordinance. Article 4(1)(e) of the Hong Kong/Portugal Agreement extends the protection in Section 5(1)(e) of the Ordinance to conviction, acquittal or pardon in the requested jurisdiction as well. The modification expands the scope of section 5(1)(e) to reflect the provision in the Agreement. Section 5(1)(e) is also modified to provide, additionally, for refusal of assistance if the relevant offence had been committed in

Hong Kong and could not as matter of Hong Kong law be prosecuted by reason of lapse of time. The modification also reflects Article 4(1)(e) of the Hong Kong/Portugal Agreement.

17. The modification to section 17 of the Ordinance is exactly the same as the modification provided for in the Canada and Philippine Orders except that the period is forty-five days. The modification reflects the additional protection in Article 17(2) of the Hong Kong/Portugal Agreement.

18. We have sought clarification from the Administration of the reason for the inclusion of the right of denial of request relating to an offence which is punishable, according to the law of the Requesting Party, with life imprisonment or a sentence of undetermined duration in Article 4(3). Members may refer to the reply from the Administration at the Annex for reference.

The Chinese text of Article 5(6) of the Canada Order, Article VI(5) of the Philippines Order and Article 4(4) of the Portugal Order

19. The Articles concern the right of the Requested Party to postpone assistance if execution of the request would interference with an ongoing investigation or prosecution in the Requested Party. In this respect, we are still awaiting the Administration's reply to our concern about the accuracy of its Chinese translation.

20. The three Orders will come into operation on days to be appointed respectively by the Secretary for Security by notice in the Gazette.

Encl

Prepared by

Lam Ping-man, Stephen
Assistant Legal Adviser
Legislative Council Secretariat
10 October 2001

Annex

SBCR 3/5691/95 Pt. 19
LS/R/1/01-02
2869 9468
2877 5029

Secretary for Security
(Attn : Ms Angelina Kwan, Assistant Secretary)
Security Bureau
6/F Main and East Wings
Central Government Offices
Hong Kong

28 September 2001

BY FAX

Fax No. : 2524 3762
Total no. of page(s) : (1)

Dear Ms Kwan,

Mutual Legal Assistance in Criminal Matters (Philippines) Order

We are scrutinizing the legal and drafting aspects of the Order. It is noted that, unlike Article 5(5) of the Canada Order, there is no express provision in the Order to cover the situation of refusal of assistance if the request relates to an offence carrying death penalty in the Requesting Party. Is the observation correct? If yes, how does it reconcile with section 5(3)(c) of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525).

In facilitating us to report on the Order to the House Committee meeting to be held on 5 October 2001, it is appreciated that your reply in both languages could reach us by 3 October 2001.

Yours sincerely,

(Stephen Lam)
Assistant Legal Adviser

c.c. LA

SBCR 3/5691/95 Pt. 19
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2869 9468
2877 5029

Secretary for Security
(Attn : Ms Angelina Kwan, Assistant Secretary)
Security Bureau
6/F Main and East Wings
Central Government Offices
Hong Kong

4 October 2001

BY FAX
Fax No. : 2524 3762
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Dear Ms Kwan,

Mutual Legal Assistance in Criminal Matters (Canada) Order
Mutual Legal Assistance in Criminal Matters (Philippines) Order
Mutual Legal Assistance in Criminal Matters (Portugal) Order

Further to our letter of 28 September 2001, we have further queries relating to the above Orders.

The Canada Order

Preamble to Schedule 1 of the Chinese version

We suggest to add "事宜相互" before "司法協助的協定".

Article 5(6) of the Chinese version

We suggest to replace "正在被要求方" by "在被要求方境內正在".

The Philippines Order

Article I(2)(h)

Does the provision for assistance in recovery of pecuniary penalties in respect of offences exist in other mutual legal assistance agreements?

Article XVIII(4)

Does the provision for restraining and realizing real property exist in other mutual legal assistance agreements?

Article XXI(3)

Upon termination of the Agreement, would it be appropriate to include a saving provision, similar to Article 21(3) of the Canada Order, that requests for assistance which have been received prior to termination of the Agreement shall nevertheless be processed in accordance with the terms of the Agreement as if the Agreement were still in force.

Article VI(5) of the Chinese version

We suggest to add "在" before and "境內" after "被要求方" where it first appears.

The Portugal Order

Article 4(3)

Does the provision for denial of request relating to an offence which is punishable, according to the law of the Requesting Party, with life imprisonment or a sentence of undetermined duration exist in other mutual legal assistance agreements?

Article 4(4) of the Chinese version

We suggest to replace "正在被要求方" by "在被要求方境內正在".

It is appreciated that your reply in both languages could reach us by 8 October 2001.

Yours sincerely,

(Stephen Lam)
Assistant Legal Adviser

c.c. LA

SBCR 3/5691/95

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9 October 2001

Mr Stephen Lam
Legal Services Division
Legislative Council Secretariat
LegCo Building
8 Jackson Road, Central
Hong Kong

Dear Mr Lam,

Mutual Legal Assistance (MLA) Orders

I refer to your letters on the MLA (Canada, Philippines and Portugal) Orders of 28 September and 4 October. Our comments on your queries are set out as follows:

The Canada Order

Preamble to Schedule 1 of the Chinese Version

You propose an amendment to the Title of the Chinese text. The wording in the Canadian Agreement is the same as the wording in the Agreements with the USA, New Zealand, United Kingdom, France and Switzerland which have all been considered by Legislative Council. Although your proposed wording aligns more closely with the Philippines and Portugal Agreements, it is different to wording in the Agreements mentioned. We would accordingly prefer not to revert to the Central People's Government and Canada on this point.

Article 5(6) of the Chinese version

The amendment proposed to Article 5(6) of the Chinese text is, in our

view, not necessary since it is implicit in the existing text that the investigation is in fact taking place in the jurisdiction of the Requested Party. It should also be noted that the same wording is used in the Agreements with the UK [Article IV(5)], Australia [Article 4(5)], France [Article 4(3)], New Zealand [Article 4(5)] and Switzerland [Article 3(3)].

The Philippines Order

Article 1(2)(h)

Under the Philippines legal system the confiscation of criminal proceeds is achieved by the making of pecuniary penalties. There is accordingly a reference to such penalties in Article 1(2)(h) and Article XVIII dealing with RESTRAINT FORFEITURE AND CONFISCATION OF PROPERTY. Pursuant to the Mutual Legal Assistance in Criminal Matters Ordinance [CAP 525] Hong Kong will only be able to enforce a pecuniary penalty imposed in the Philippines if it comes within the meaning of "external confiscation order" [defined in section 2 of CAP 525]. In other words Hong Kong will only be able to enforce pecuniary penalties which are directed towards confiscating the proceeds of crime. Use of this term does not accordingly widen the scope of the Philippines Agreement beyond that of the model Agreement and other signed Agreements. The term "pecuniary penalty" is not used in Hong Kong's other signed Agreements.

Article XVIII(4)

The provisions of Article XVIII(4) relating to real property are not replicated in our other signed Agreements. The Philippines delegation were insistent, because of the Marcos experience, that proceeds should generally be returned to the Requesting Party. This is reflected in Article XVIII(3) and (4).

Article XXI(3)

A provision similar to Article 21(3) of the Canadian Agreement is not included in Article XXI of the Philippines Agreement. Such a provision derives from the Hong Kong model Agreement and is included in all our other signed Agreements. The Philippines would

not accept this provision. Their view was that if a situation ever developed that resulted in termination the circumstances would be so grave that assistance should not continue to be given.

Article VI(5) of the Chinese Version

We consider that the meaning of Article VI(5) of the Chinese text is clear and does not require the amendment proposed. The same formulation was used in Article 4(4) of the Korean Agreement.

Death Penalty Exception

The Philippines Agreement does not specifically provide for refusal of assistance in cases where the request relates to an offence which carries the death penalty. In 1993 the Philippines reintroduced the death penalty for certain "heinous offences", and the Philippines delegation said that, in that light, their Senate would not approve an MLA Agreement which provided for a specific death penalty exception. They nevertheless assured us that Hong Kong could refuse assistance in death penalty cases pursuant to Article IV(1)(f) of the Agreement which provides for refusal where "essential interests" would be severely impaired. The MLA (Philippines) Order does not, accordingly, modify Section 5(3)(c) of CAP 525. The same approach to death penalty cases was adopted with the USA; that approach was acceptable to Legislative Council.

The Portugal Order

Article 4(3)

Article 4(3) of the Portuguese Agreement, insofar as it deals with life imprisonment and sentences of undetermined duration, is not replicated in our other signed Agreements. These references are included because of provisions in the Portuguese Constitution. Article 30 of the Portuguese Constitution provides that no-one shall be subjected to a sentence that involves deprivation of liberty for life or for an unlimited term. And Article 33 provides that extradition may only be granted if an assurance is received that such sentences will not be imposed or carried out. Whereas Article 33 does not cover MLA the Portuguese were insistent that **Article 4(3)** be included in the Agreement to reflect Portugal's principles inherent in the Portuguese

Constitution.

Article 4(4) of the Chinese Version

The suggestion for revision of Article 4 of the Chinese text raises the same issue as the suggestion in relation to Article 5(6) of the Canadian Agreement.

Yours sincerely,

(Ms Angelina Kwan)
for Secretary for Security

c.c. Department of Justice (Attn: Mr John Hunter)

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Secretary for Security
(Attn : Ms Angelina Kwan, Assistant Secretary)
Security Bureau
6/F Main and East Wings
Central Government Offices
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10 October 2001

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Dear Ms Kwan,

Mutual Legal Assistance in Criminal Matters (Philippines) Order

Thank you for your letter of 9 October 2001.

In relation to our proposal to amend the Chinese version of Article 5(6) of the Canada Order, Article VI(5) of the Philippines Order and Article 4(4) of the Portugal Order, we are still of the view that the respective Chinese text does not accurately reflect the meaning of the corresponding English text. Since those Articles concern the right of the Required Party to postpone assistance, would it be more appropriate for the Chinese text to reflect expressly, rather than impliedly, the meaning of the English text?

We would be grateful if you would re-consider your position and reply to us, in both languages, by close of play today.

Yours sincerely,

(Stephen Lam)
Assistant Legal Adviser

c.c. LA