

**Subcommittee on the draft Criminal Jurisdiction Ordinance
(Amendment of Section 2(2) Order) 2002**

Purpose

This paper sets out the Administration's views on how to take forward the draft Criminal Jurisdiction Ordinance (Amendment of Section 2(2) Order) 2002 (the draft Order).

Background

2. We introduced the draft Order into the Legislative Council (LegCo) in November 2002. The draft Order implements a recommendation of the Inter-departmental Working Group on Computer Related Crime¹, seeking to add the following three computer offences to the list of offences in section 2(2) of the Criminal Jurisdiction Ordinance (CJO) (Cap. 461) -

- (a) "unauthorized access to computer by telecommunications" under section 27A of the Telecommunications Ordinance (Cap. 106);
- (b) "destroying or damaging property" relating to the misuse of a computer under sections 59 and 60 of the Crimes Ordinance (Cap. 200); and
- (c) "access to computer with criminal or dishonest intent" under section 161 of the Crimes Ordinance (Cap. 200).

The purpose is to enable Hong Kong courts to exercise jurisdiction over the three offences when they are committed or planned outside the geographical boundaries of Hong Kong but have an effect on Hong Kong, or when they are committed or planned in Hong Kong but have an effect

¹ The Inter-departmental Working Group on Computer Related Crime was set up in March 2000 to recommend measures to improve the regime on computer crime legislation, enforcement and prevention. One of the Working Group's recommendations is to cover the computer offences under the Criminal Jurisdiction Ordinance (Cap. 461), so that extended jurisdictional rules may apply to these offences.

outside Hong Kong. The intention is mainly to deal with some “pure” or “direct” transborder offences of interference with computers (e.g. hacking), where the computers are the main subjects of, and not merely incidental to, the offences.

Justifications for covering the three computer offences under the CJO

Traditional jurisdictional rules

3. In the physical world, the perpetrator of a crime is usually present at or near the scene of crime. Therefore, traditionally the concept of jurisdiction is closely associated with geographical boundaries. The jurisdiction of the court is limited to acts done within the geographical boundaries of a country or territory unless otherwise specified. At common law, an offence is regarded as being committed where the last act or event necessary for its completion took place, and jurisdiction is exercised where the offence is committed. In relation to inchoate offences such as conspiracy and attempt, the common law rules would enable a perpetrator in one jurisdiction to plan and organize the commission of offences elsewhere, safe from prosecution in that jurisdiction.

The CJO

4. The advent of communication has bred cross-border offences together with the jurisdictional problem associated with such offences which involve transactions and events having taken place in more than one jurisdiction. In this regard, the CJO was enacted in 1994 to provide a framework for enabling Hong Kong courts to exercise jurisdiction over specified offences in the following circumstances -

- (a) Hong Kong courts will have jurisdiction if any of the conduct (including an omission) or part of the results that are required to be proved for conviction of the offences takes place in Hong Kong;
- (b) an attempt to commit the offences in Hong Kong is triable in Hong Kong whether or not the attempt was made in Hong Kong or elsewhere and irrespective of whether it had an effect in Hong Kong;

- (c) an attempt or incitement in Hong Kong to commit the offences elsewhere is triable in Hong Kong;
- (d) a conspiracy to commit in Hong Kong the offences is triable in Hong Kong wherever the conspiracy is formed and whether or not anything is done in Hong Kong to further or advance the conspiracy; or
- (e) a conspiracy in Hong Kong to do elsewhere that which if done in Hong Kong would constitute the offences is triable in Hong Kong provided that the intended conduct was an offence in the jurisdiction where the object was intended to be carried out.

5. Simply put, if a person in Hong Kong perpetrates a specified offence outside Hong Kong, or if a person outside Hong Kong perpetrates that offence in Hong Kong, that person is triable in Hong Kong courts.

6. The offences to which the CJO applies are specified in its section 2(2). At present, there are 18 offences so specified. Section 2(4) of the CJO provides that the Chief Executive in Council may, by order in the Gazette, amend section 2(2) by adding or removing any offence. Section 2(5) provides that no order shall be made under section 2(4) unless a draft of it has been laid before and approved by resolution of the Legislative Council. The CJO has been an effective means to extend the jurisdictional rules for established offences.

Adding the three computer offences under the CJO

7. The addition of the three computer offences under the CJO will apply the rules set out in paragraph 4(a) to (e) to the offences, thus enabling Hong Kong courts to exercise jurisdiction over the offences when they are committed or planned outside the geographical boundaries of Hong Kong but are connected to or intended to cause damage in Hong Kong, or vice versa. In other words, the offences will be triable in Hong Kong if either the person who obtained access to the computer or the computer to which access was obtained is in Hong Kong.

Concerns of the Subcommittee

8. The Subcommittee examining the draft Order held four meetings from January 2003 to January 2004. While not disputing that transborder computer offences need to be dealt with, some Members have suggested

the Administration to consider the following two approaches -

- (a) drawing up a consolidated piece of legislation on computer offences and providing for extended jurisdiction in that legislation; or
- (b) whilst effecting the present proposed amendment through the CJO, extending territorial jurisdiction of any other offence through some other means in future.

The Administration's views

Adequacy of existing legislation to tackle computer offences

9. Regarding paragraph 8(a), our view is that the thrust of the legislative changes in 1993 to deal with computer crime is still along the right lines. Through amendments to the Telecommunications Ordinance (Cap. 106), the Crimes Ordinance (Cap. 200) and the Theft Ordinance (Cap. 210), new offences were created to cover computer crimes. In particular, the two offences of unauthorized access to computer by telecommunications (section 27A of the Telecommunications Ordinance) and access to computer with criminal and dishonest intent (section 161 of the Crimes Ordinance) have enabled many computer offences to be dealt with. In many cases, although no explicit reference to the cyber environment is made, the relevant legislation may be interpreted to cover both the physical and the virtual worlds. Given that the existing legislation is generally adequate in tackling computer offences, we do not consider it necessary to put in place a consolidated piece of legislation on computer offences at this stage.

CJO as the vehicle

10. The CJO has been specifically created to cater for circumstances to extend the normal jurisdictional rules for established offences. It is modelled on the United Kingdom Criminal Justice Act 1993. It is an appropriate vehicle to effect the changes intended under the draft Order.

11. We do not dispute that it would be legally feasible to effect the changes through amendments to the principal ordinances. However, to the extent that all subsidiary legislation may be made through primary legislation, we do not consider that this should in itself be the determining factor. Otherwise, carried to its logical end, it could lead to the

conclusion that all legislation should be effected through primary legislation.

12. Rather, we believe that each case should be considered on its own merits. To rule out using the CJO in future (paragraph 8(b) above) would amount to abrogating the CJO. We believe that this is outside the ambit of the draft Order, and is unreasonable from a legal policy point of view.

13. Some Subcommittee Members consider that the mechanism to amend the list of offences under the CJO, i.e. by an order made by the Chief Executive in Council with prior LegCo approval by way of an affirmative resolution, is not as desirable as a three-reading procedure. We believe, however, that the procedures for making the order provide for sufficient safeguards for ensuring effective legislative scrutiny. The order will only be made after an affirmative resolution by LegCo. If LegCo considers it necessary, it may convene a Subcommittee to scrutinize the draft order, invite the Administration to explain the draft order and invite views from the public and/or concerned parties. This applies to the draft Order currently under scrutiny.

Way forward

14. In view of the above considerations, the Administration remains of the view that the draft Order is the appropriate means to effect the intended changes to jurisdictional rules for the three offences in question. For future cases, without affecting the generality of the principle that each case should be considered on its own merits, we will adopt the following guidelines.

- (a) Careful consideration will be given to whether all the five principles set out in paragraph 4 (a) to (e) need to apply. Only where the answer is affirmative will the use of the CJO be contemplated.
- (b) If the legislative exercise involves not only jurisdictional rules but also other issues in a principal ordinance, e.g., the evidential rules and law enforcement powers related to an offence, then the general rule would be to effect all the changes, including those concerning jurisdictional rules, through an amending Bill. A

relevant example is the Theft (Amendment) Bill 1999, through which the offence of fraud was added to the list of offences under section 2(2) of the CJO, instead of through the mechanism under sections 2(4) and (5) of the CJO.

15. We will continue to consult the LegCo on legislative proposals involving jurisdictional rules.

Security Bureau
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