

立法會
Legislative Council

LC Paper No. LS37/05-06

**Paper for the House Committee Meeting
on 24 February 2006**

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

**Mutual Legal Assistance in Criminal Matters (Poland) Order
Mutual Legal Assistance in Criminal Matters (Israel) Order**

The Secretary for Security ("the Secretary") has given notice to move two motions at the Legislative Council meeting of 8 March 2006. The purpose of the motions is to seek the Legislative Council's approval of the following Orders made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) ("the Ordinance"):

- (a) Mutual Legal Assistance in Criminal Matters (Poland) Order ("the Poland Order"); and
- (b) Mutual Legal Assistance in Criminal Matters (Israel) Order ("the Israel Order").

2. Section 4(1) of the Ordinance provides that the Chief Executive in Council may, with the approval of the Legislative Council, 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 Legislative Council's power to amend orders made so that the Legislative Council may only repeal the whole order but not amend any part of it.

3. Schedule 2 to the Poland Order and the Israel Order respectively exhibit the bilateral arrangements entered into between the Government of the Hong Kong Special Administrative Region ("HKSAR") and the Government of the Republic of Poland and the Government of the State of Israel for mutual legal assistance in criminal matters.

4. Schedule 1 to the two Orders respectively set out the modifications to the Ordinance.

The Poland Order

5. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the HKSAR Government and the Government of the Republic of Poland and signed in Hong Kong on 26 April 2005

6. Schedule 2 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 1 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 for which he has been convicted, acquitted, pardoned or punished in the requesting jurisdiction. Article 3(1)(e) of the Hong Kong/Poland Agreement extends this protection in relation to convictions or acquittals in the requested jurisdiction. The modification to section 5(1)(e) of the Ordinance reflects the provision in the Agreement by extending the protection to cover convictions or acquittals in the requested jurisdiction.

8. Section 17 of the Ordinance gives certain immunities to a person who comes to Hong Kong from another jurisdiction to provide assistance. 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 providing assistance. Article 12(3) of the Hong Kong/Poland Agreement provides that the immunities will continue to apply for a period of 15 days after the person, being free to leave Hong Kong, has been notified that his presence is no longer required. The modification reflects the additional protection provided in the Agreement by providing for a 15-day period in section 17(3)(b) of the Ordinance.

9. Sections 17(1)(ii) and 23(2)(a)(ii) of the Ordinance provide for immunity from civil suits where a person is rendering assistance in Hong Kong or in a place outside Hong Kong. Such immunity is not provided in the Hong Kong/Poland Agreement. According to the Administration, the reason for not providing for this immunity in the Agreement is that immunity from civil suits is not available under Polish law. The modifications to sections 17(1) and 23(2)(a) reflect the omission of this immunity.

The Israel Order

10. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the HKSAR Government and the Government of the State of Israel and signed in Hong Kong on 26 July 2005.

11. Schedule 2 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.

12. Schedule 1 specifies the modifications to the Ordinance. According to the Administration, the modification to section 5(1)(e) of the Ordinance reflects the provision in Article 4(1)(f) of the Hong Kong/Israel Agreement by extending the scope of protection in section 5(1)(e) to cover convictions, acquittals or pardons in the requested jurisdiction.

13. Section 17(3)(b) of the Ordinance provides that the immunities under section 17(1) of the Ordinance cease to apply if a person who comes to Hong Kong from another jurisdiction to render assistance has had the opportunity of leaving Hong Kong and has remained in Hong Kong otherwise than for the purpose of rendering assistance. Article 16(2) of the Hong Kong/Israel Agreement provides that the immunities will continue to be applicable for a period of 15 days after the person, being free to leave Hong Kong, has been notified that his presence is no longer required. The modification reflects the additional protection in the Agreement by providing for a 15-day period in section 17(3)(b) of the Ordinance.

14. Sections 17(1)(ii) and 23(2)(a)(ii) of the Ordinance provide for immunity from civil suits where a person is rendering assistance in Hong Kong or in a place outside Hong Kong. Such immunity is not provided in the Hong Kong/Israel Agreement. According to the Administration, the reason for not providing for this immunity in the Agreement is that immunity from civil suits is not available under Israeli law. The modifications to sections 17(1) and 23(2)(a) reflect the omission of such immunity.

15. The Security Bureau has issued a LegCo Brief on 15 February 2006 (File Ref.: SBCR 3/5691/95 Pt.34 and SBCR 1/2716/89(98) Pt. 21). Members may refer to the Brief for more background information.

16. The two Orders will come into operation on days to be appointed respectively by the Secretary by notice published in the Gazette.

17. The Legal Service Division has asked the Administration to clarify certain matters in respect of which Members may be interested. The correspondence between the Legal Service Division and the Administration is attached in the Annex for Members' reference.

Encl.

Prepared by

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Legislative Council Secretariat
22 February 2006

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Secretary for Security
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Security Bureau
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Hong Kong

17 February 2006

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Dear Miss Lee,

Mutual Legal Assistance in Criminal Matters (Poland) Order
Mutual Legal Assistance in Criminal Matters (Israel) Order

I am scrutinising the above Orders with a view to advising Members and should be grateful if you could clarify the following matters:

The Poland Order

Article 3

- (a) Section 5(1)(e) of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) provides that a request for assistance shall be refused if the request relates to the prosecution of a person for an external offence in a case where the person has been convicted, acquitted or pardoned by a competent court or other authority in the place. Is there any reason why the scenario where a person is pardoned is not included in Article 3(1)(e)?
- (b) As no provision is made to cater for the situation where a request for assistance relates to an offence for which a person could no longer be prosecuted by reason of lapse of time, please clarify how a request for assistance will be dealt with if it relates to an offence of this nature.

Articles 12.4 and 14.4

These two provisions are different from the corresponding provisions in the model Agreement in that the former do not make any reference to whether the relevant person is liable to penalty in the Requesting Party for non-compliance with any process served on him and non-appearance in the Requesting Party. What is the reason for departing from the model Agreement? Is the person liable to any penalty or coercive measure in the Requesting Party in such circumstances?

Article 21

Unlike the model Agreement, no saving provision is included in Article 21 to provide 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 was still in force. Is there any reason for not including this saving provision?

The Israel Order

Article 4(1)

Since there is no provision to cover the situation where a request for assistance relates to an offence for which a person could no longer be prosecuted by reason of lapse of time, please clarify how a request for assistance will be dealt with if it relates to an offence of this nature?

I would appreciate it if you could let us have the Administration's reply in both languages on or before the House Committee meeting on 24 February 2006.

Yours sincerely,

(Connie Fung)
Assistant Legal Adviser

cc: LA

SBCR 3/5691/95

LS/S/20/05-06

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22 February 2006

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(Attn: Ms Connie Fung)

Dear Ms Fung,

Mutual Legal Assistance in Criminal Matters (Poland) Order
Mutual Legal Assistance in Criminal Matters (Israel) Order

I refer to your letter of 17 February 2006. Our response to your questions on the above two Orders is set out as follows:-

The Poland Order

Article 3

The reference to “pardon” was deleted at the request of the Polish side. They took the view that only convicted persons would be pardoned, and that the reference in the context of Article 3(1) was therefore unnecessary. Reference to “pardon” is similarly deleted in Article 3(3)(b) of the Agreement between Hong Kong and the United States on Mutual Legal Assistance in Criminal Matters (MLA).

“Lapse of time” is not a ground of refusal under the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) and hence the issue will not ordinarily arise when MLA requests are being processed. Article 3 of the MLA Agreement between Hong Kong and the United States has similar omission.

Articles 12(4) and 14(4)

The Polish side did not wish to fetter the power of the Requesting Party under its own law by retaining reference in Articles 12(4) and 14(4) to “Requesting Party”. This is consistent with section 31(3) of Cap. 525 which provides protection only under Hong Kong law in relation to service of documents and failure to comply with the process referred to in that section.

Article 21

The Polish side preferred to adopt an alternative approach. Instead of making provision for termination of the Agreement with immediate effect, termination of the Agreement will take place three months after notification. This three-month period will allow for completion of requests in process as at the time of notification of termination. A similar approach has been adopted in Article XXI of the MLA Agreement between Hong Kong and the Philippines.

The Israel Order

Article 4(1)

“Lapse of time” is not a ground of refusal under Cap. 525 and hence the issue will not ordinarily arise when MLA requests are being processed. Article 3 of the MLA Agreement between Hong Kong and the United States has similar omission.

Yours sincerely,

(Miss Jane Lee)
for Secretary for Security

c.c.

D of J (Attn: Ms Amelia Luk and Mr Wayne Walsh)