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**Report of the Subcommittee on
Mutual Legal Assistance in Criminal Matters (Poland) Order and
Mutual Legal Assistance in Criminal Matters (Israel) Order**

Purpose

This paper reports on the deliberations of the Subcommittee on Mutual Legal Assistance in Criminal Matters (Poland) Order and Mutual Legal Assistance in Criminal Matters (Israel) Order.

Background

2. The Secretary for Security gave notice to move two motions at the meeting of the Legislative Council on 8 March 2006 to seek the 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).

3. The Ordinance provides the necessary statutory framework for implementing mutual legal assistance agreements and enables provision of assistance in the investigation and prosecution of criminal offences, which includes the taking of evidence, search and seizure, production of material, transfer of persons to give evidence and confiscation of the proceeds of crime.

The Orders

The Poland Order

4. The Poland 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 the Republic of Poland, and the modifications to the Ordinance. It also provides for safeguards of the rights of persons involved in criminal proceedings.

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 (HKSAR/Poland Agreement) and signed in Hong Kong on 26 April 2005.

The Israel Order

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

7. 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 (HKSAR/Israel Agreement) and signed in Hong Kong on 26 July 2005.

Commencement dates of the Orders

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

The Subcommittee

9. At the House Committee meeting on 26 February 2006, Members formed a subcommittee to study the two Orders. At the request of the House Committee, the Secretary for Security withdrew his notice for moving the motions at the Council meeting on 8 March 2006 to allow time for the Subcommittee to study in detail the two Orders.

10. The membership list of the Subcommittee is in the **Appendix**. Under the chairmanship of Hon James TO, the Subcommittee has held one meeting to discuss with the Administration.

Deliberations of the Subcommittee

Modifications to the Mutual Legal Assistance in Criminal Matters Ordinance

11. The Subcommittee has examined the modifications to the Ordinance as contained in Schedule 1 to the Poland Order and the Israel Order.

12. 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. The Subcommittee notes that Article 3(1)(e) of the Hong Kong/Poland Agreement and Article 4(1)(f) of the Hong Kong/Israel Agreement extend this protection to cover convictions or acquittals in the requested jurisdiction.

13. Section 17(1) of the Ordinance gives certain immunities to a person who comes to Hong Kong from another jurisdiction to render assistance. Section 17(3)(b) provides that 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 12(3) of the Hong Kong/Poland Agreement and Article 16(2)(f) the Hong Kong/Israel Agreement provide that such 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 to section 17(3)(b) of the Ordinance reflects the additional protection provided in the Agreements.

14. Sections 17(1)(ii) and 23(2)(a)(ii) of the Ordinance relate to immunity from civil suits where a person is rendering assistance in Hong Kong (section 17) or in a place outside Hong Kong (section 23). Such immunity is omitted from the Agreements with Poland and Israel, as immunity from civil suits is not available under the laws of Poland and Israel. The modifications to sections 17(1) and 23(2)(a) of the Ordinance reflect the omission of such immunity.

Article-by-article comparison with the Model Agreement

15. The Subcommittee has made an article-by-article comparison of the provisions of each Order with those in the HKSAR Model Agreement on mutual legal assistance in criminal matters.

The Poland Order

16. Article 7(3) of the Hong Kong/Poland Agreement provides that nothing in the Article shall preclude the use or disclosure of information to the extent that such information is exculpatory to the defendant in a criminal prosecution. The

Requesting Party shall notify the Requested Party in advance of any such proposed disclosure. Hon James TO, Chairman of the Subcommittee, suggested that the Administration should consider making this a standard provision in future agreements with other jurisdictions. The Administration agrees that this is a useful provision and will bear it in mind when negotiating future agreements.

17. Article 11(2) of the Agreement provides that a person in the custody of the Requesting Party whose presence in the Requested Party is sought for the purposes of assistance under the Agreement shall be temporarily transferred from the Requesting Party to the Requested Party if the person consents and if the Central Authorities of both Parties agree. Hon James TO has expressed concern about the safeguards to protect the legal rights of a person transferred under this Article.

18. The Administration has explained that the safeguards to protect the legal rights of a person transferred to or from Hong Kong are contained in sections 17 and 23 of the Ordinance. These include rights not to be detained or prosecuted for any prior offence, not to give assistance for any criminal matter other than the matter for which the person was transferred, and not to answer questions or produce documents should lawful privileges apply. The transfer must be agreed upon by both Parties to the Agreement as well as the person being transferred. It is therefore a consensual arrangement and a person not satisfied with the proposed arrangements has the option of not giving consent at all.

The Israel Order

19. Hon Margaret NG has expressed concern whether the reference to “prevention of offences” in Article 1 (Scope of Assistance) of the HKSAR/Israel Agreement is consistent with the ambit of the Ordinance, and whether Hong Kong may be requested to provide assistance on matters which are not criminal or where no offence has taken place.

20. The Administration has explained that inclusion of the reference to “prevention of offences” in the Scope of Assistance under Article 1 of the Agreement is not inconsistent with the ambit of the Ordinance. The Ordinance requires that assistance may only be provided in respect of a “criminal matter” which is defined in section 2 to mean an investigation, prosecution or ancillary criminal matter (i.e. a matter relating to restraint and confiscation measures). Any request for assistance must also be processed in accordance with the requirements under the Ordinance. By taking such actions to investigate, prosecute and restrain/confiscate criminal proceeds, the Parties implicitly provide assistance to prevent further offences from happening. For example, if a criminal syndicate is successfully interrupted by criminal investigation and prosecution, or its assets are lawfully confiscated, the risk of the same syndicate committing further and on-going serious offences will be significantly reduced.

21. The Administration has also pointed out that the reference to “prevention of offences” or “prevention of crime” has appeared in the preamble and/or the Scope of Assistance of a number of other bilateral agreements on mutual legal assistance signed with foreign jurisdictions. Such references can be found in the agreements with Australia, France, New Zealand, the United States, South Korea, Canada, Portugal, Ireland, Ukraine, Belgium and Denmark.

22. The Subcommittee has noted that there is no provision in Article 4 of the Agreement 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, and has enquired how a request for assistance will be dealt with if it relates to an offence of such nature. The Administration has explained that “lapse of time” is not a ground of refusal under the Ordinance and hence the issue will not ordinarily arise when mutual legal assistance requests are being processed. Article 3 of the Mutual Legal Assistance Agreement between Hong Kong and the United States has similar omission.

23. The Subcommittee has noted that the chapeau in Article 4(1) makes the denial of assistance either mandatory or discretionary depending on the law of the Requested Party. The Administration has explained that this has taken into account of the fact that under Israeli law, all grounds of refusal are discretionary whilst under Hong Kong law, a number of grounds are mandatory grounds of refusal.

24. In relation to Article 4(1), Hon James To has requested the Administration to consider undertaking that Hong Kong will not request for assistance if according to the laws of Hong Kong, assistance shall be refused where the request relates to the grounds set out in that Article. Hon James TO has pointed out that as some of the grounds for refusal are mandatory in Hong Kong, Hong Kong should explicitly state that it will not make requests for assistance if the requests relate to these grounds.

25. In a written response to Hon James TO’s request, the Administration has stressed that the chapeau in Article 4(1) was drafted to take into account of the fact that under Israeli law, all grounds of refusal are discretionary, whilst under Hong Kong law, a number of grounds (i.e. Article 4(1)(a) to (f) and (h)) are mandatory grounds for refusal. The Ordinance provides that requests for assistance by Hong Kong may be made under section 9 (for taking of evidence), section 11 (for search and seizure), section 14 (for production of material), section 16 (for removal of persons) and section 25 (for enforcement of confiscation order). All these sections stipulate that requests may only be made for the purposes of a “criminal matter” or enforcement of a “Hong Kong

confiscation order”. These provisions, together with Article 5(1) of the Agreement, will oblige Hong Kong, when making a request to Israel for assistance, to clearly set out the description of the purpose of the request, the criminal offence in question, the criminal laws breached, the nature of the assistance requested, the connection between the assistance sought and the investigation or prosecution to which it relates.

26. The Administration has further advised that Hong Kong is obliged to honour its bilateral agreements in good faith and in all likelihood would not knowingly make a request if any of the mandatory grounds for refusal under Hong Kong law applied. Regarding the grounds set out in Article 4(1)(a), (b) and (h) of the Agreement, it may be more proper for Israel to consider in the case of any request made by Hong Kong. As regards the grounds under Article 4(1)(c) to (f), they would likely constitute grounds for a permanent stay of proceedings or acquittal on any subsequent prosecution in Hong Kong, and an affected party would have remedies before the Hong Kong trial court. In such circumstances, it would be difficult to envisage a situation where Hong Kong would knowingly proceed with any request for assistance in the first instance if such conditions applied. For example, Hong Kong would not make a request for assistance if it knew the person had already been acquitted or convicted of the offence, because any subsequent attempt at prosecution in Hong Kong would be futile.

27. Article 4(1)(g) provides for refusal of assistance on the ground that the Requesting Party cannot comply with any conditions of the Requested Party in relation to confidentiality or limitation as to use of the material provided. Hon James TO has asked whether it is a mandatory provision under the Ordinance to deny assistance on grounds of confidentiality. The Administration has explained that section 6 of the Ordinance allows Hong Kong to provide assistance subject to conditions, and where an agreement exists any conditions must be consistent with that agreement. Section 6 therefore provides a mechanism, in conjunction with Article 4(1)(g) of the Agreement, for Hong Kong to properly and lawfully refuse a request should it wish to impose a condition of confidentiality and should the Requesting Party be unable to meet that condition. This power would be exercised on a case-by-case basis.

28. The Subcommittee has noted that Article 7(4) provides for payment of compensation by the Requesting Party to an injured third party if compensation is ordered by the courts of the Requested Party, and that the provision is inserted at the request of the Israeli side. Hon James TO and Hon Miriam LAU have expressed concern about the financial implications arising from compensation ordered by a court of the Requested Party. In this connection, they have requested the Administration to obtain information from Israel on the criteria for awarding compensation under the laws of Israel.

29. The Administration has subsequently informed the Subcommittee that it has contacted the Israeli side for information on the issue of awarding compensation in such cases under Israeli law. The Israeli side has asked their experts to look into the matter. The Administration would take into account such information before making a request to Israel for seizure, immobilization or forfeiture of asset or restraining order pursuant to the Agreement.

Motions on the Orders

30. The Subcommittee has concluded scrutiny of the two Orders. The Subcommittee supports the Secretary for Security giving fresh notice to move the motions on the Poland Order and the Israel Order at a future Council meeting.

Advice Sought

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

Council Business Division 2
Legislative Council Secretariat
11 May 2006

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

Membership list

Chairman	Hon James TO Kun-sun
Members	Hon Margaret NG Hon LAU Kong-wah, JP Hon Miriam LAU Kin-yee, GBS, JP Hon Audrey EU Yuet-mee, SC, JP (Total : 5 members)
Clerk	Mrs Constance LI
Legal adviser	Ms Connie FUNG
Date	17 March 2006