

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

Purpose

This note sets out the Administration's response to the issues raised by the Legislative Council Subcommittee on the Poland Order and the Israel Order at its meeting on 17 March 2006.

The Poland Order

- (a) To consider whether Article 7(3) in the Agreement in relation to the use or disclosure of information exculpatory to the defendant in a criminal prosecution should be made a standard provision in future agreements to be negotiated with other jurisdictions

The Administration's response:

The Administration agrees that Article 7(3) is a useful provision, and will bear it in mind when negotiating future agreements.

- (b) To provide information on the safeguards to protect the legal rights of a person transferred under Article 11(2)

The Administration's response:

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 Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525). 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. In practice, the person will be advised of his rights prior to any transfer. 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

- (c) In relation to Article 1(1), to explain whether the reference to the scope of assistance for “prevention of offences”, is consistent with the ambit of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)

The Administration’s response:

Inclusion of the reference to “prevention of offences” in “Scope of Assistance” of the Agreement is not inconsistent with the ambit of Cap. 525. Cap. 525 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 Cap. 525. By taking such actions to investigate, prosecute and restrain/confiscate criminal proceeds the Parties implicitly provide assistance to prevent further offending. 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.

Indeed, the reference to “prevention of offences” or “prevention of crime” has appeared in the preamble and/or “Scope of Assistance” of a number of other bilateral Mutual Legal Assistance in Criminal Matters agreements Hong Kong has signed with foreign jurisdictions. Such reference can be found in the agreements with Australia, France, New Zealand, the USA, South Korea, Canada, Portugal, Ireland, Ukraine, Belgium and Denmark.

- (d) In relation to Article 4(1), to consider undertaking that Hong Kong would not request for assistance if according to the laws of Hong Kong, assistance should be refused where the request related to the grounds set out in that Article

The Administration's response:

As the Administration explained at the Sub-committee meeting on 17 March 2006, the chapeau in Article 4(1) was drafted to take into account 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(a) to (f) and (h)) are mandatory grounds for refusal. Cap. 525 requires 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". "Criminal matter" is defined in section 2 to mean an investigation, a prosecution or an ancillary criminal matter (i.e. a matter relating to restraint and confiscation measures). "Investigation" is in turn defined to mean, among others, an investigation into an offence against a law of Hong Kong, while "prosecution" is defined to mean, among others, a trial of a person for an offence against a law of Hong Kong. "Hong Kong confiscation order" means an order made under a law of Hong Kong for the purpose of recovering payments, reward, property derived etc in connection of an offence against a law of Hong Kong. Essentially, the above provisions in conjunction 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.

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. Indeed, the grounds under Article 4(a) and (b), (h) of the Agreement are perhaps more properly for Israel to consider in the case of any request made by Hong Kong. However, the grounds under Article 4(c) to (f) 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.

- (e) In relation to Article 4(1)(g), to advise whether it was a mandatory provision under Cap. 525 to deny assistance on grounds of confidentiality

The Administration's response:

Section 6 of Cap. 525 allows Hong Kong to provide assistance subject to conditions, and where an agreement exists any conditions must be consistent with that agreement. Section 6 does therefore provide 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.

- (f) In relation to Article 7(4), to provide information on the criteria for awarding compensation under the laws of Israel

The Administration's response:

Following the Sub-committee meeting on 17 March 2006, the Administration 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 assets or restraining orders pursuant to the Agreement.

**Security Bureau
Department of Justice
April 2006**