

立法會
Legislative Council

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Paper for the House Committee meeting on 29 June 2007

**Report of the Subcommittee on
Mutual Legal Assistance in Criminal Matters (Malaysia) Order**

Purpose

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

Background

2. The Secretary for Security gave notice to move a motion at the meeting of the Legislative Council on 6 June 2007 to seek the Council's approval of the Mutual Legal Assistance in Criminal Matters (Malaysia) Order (the Malaysia Order) made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (the Ordinance).

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 Malaysia Order

4. The Malaysia 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 Government of Malaysia, and the modifications to the Ordinance. The Order is made consequential to the agreement for mutual legal assistance entered into by the HKSAR Government and the Government of Malaysia (the Agreement) on 17 October 2006.

5. The Malaysia Order will come into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

The Subcommittee

6. At the House Committee meeting on 25 May 2007, Members formed a subcommittee to study the Malaysia Order. At the request of the House Committee, the Secretary for Security withdrew his notice for moving the motion at the Council meeting on 6 June 2007 to allow time for the Subcommittee to study the Order in detail.

7. The membership list of the Subcommittee is in **Appendix I**. Under the chairmanship of Hon James TO, the Subcommittee has held one meeting with the Administration on 15 June 2007.

Deliberations of the Subcommittee

Comparison with the Model Agreement

8. In examining the Malaysia Order, the Subcommittee has made an article-by-article comparison of the provisions of the Order with those in the Model Agreement for the HKSAR on mutual legal assistance in criminal matters.

Article 4 - Limitations on Compliance

9. Referring to the omission of Article 4(3) of the Model Agreement from the Malaysia Order which provided for the safeguard against the death penalty and having regard to the fact that Hong Kong does not have the death penalty charge, the Subcommittee has asked whether Hong Kong can refuse to provide assistance to Malaysia if the request relates to an offence which carries death penalty in Malaysia.

10. The Administration has advised that the omission was made at the request of Malaysia. Malaysia has difficulty in giving assurance that death penalty will not be imposed or carried out as the award of punishment at the end of the trial rests entirely with the judiciary. Upon discussion, both Parties agreed that assistance for death penalty offences could be refused pursuant to "essential interest" provision under Article 4(1)(f) of the Malaysia Order. Hong Kong has made clear to Malaysia that Hong Kong will refuse to provide assistance if the request relates to an offence which carries death penalty in Malaysia unless Malaysia gives sufficient assurances that the death penalty will not be imposed or carried out. Malaysia has accepted Hong Kong's position. The Administration has further advised that the same approach was agreed with the United States, Philippines and Singapore.

Article 8 - Limitations on Use

11. Article 8(3) of the Malaysia Order provides that in an investigation, prosecution or proceeding where the charge is altered, the information or evidence provided may continue to be used in that investigation, prosecution or proceeding so far as the offence, as charged, is an offence of which mutual legal assistance could be provided under the Agreement.

12. The Subcommittee has asked whether the information or evidence provided by the Requested Party for a particular offence may continue to be used by the Requesting Party in an investigation, prosecution or proceeding of another charge whose nature is completely different from the original charge so long as the altered offence as charged is an offence of which mutual legal assistance could be provided under the Agreement.

13. The Administration has advised that in considering how Article 8(3) operates in practice, this article should be read together with other relevant provisions in the Agreement. Article 8(2) stipulates that the Requesting Party shall not disclose or use information or evidence furnished for purposes other than those stated in the request without the prior consent of the Central Authority of the Requested party. Article 4(1)(h) further provides that the Requested Party shall refuse assistance if the Requesting Party fails to undertake that the item requested will not be used for a matter other than the criminal matter in respect of which the request was made, and the Requested Party has not consented to waive such undertaking. Similar provisions on the limitation of use of information or evidence can be found in the agreements with other jurisdictions. This is consistent with the mutual legal assistance practice in Hong Kong in that in providing assistance to Requesting Parties, Hong Kong will specify the condition that the information provided should only be used for the criminal matter as set out in their requests. The relevant undertaking is included in requests seeking assistance from Hong Kong. An extract of a request seeking assistance from the United States is given in **Appendix II**.

14. The Administration has further advised that it follows that if Malaysia requests to use the information or evidence concerned in accordance with Article 8(3), it will need to seek Hong Kong's prior consent. In considering Malaysia's request, Hong Kong will ask for detailed information as required under Article 6 and ensure that the request is subject to the safeguards set out in Article 4.

Article 17 - Safe Conduct

15. The Subcommittee has asked whether a person who has consented to give evidence under Article 15 or 16 and traveled to Malaysia but subsequently withdrew his consent would be prosecuted for contempt of court under Article 17(3).

16. The Administration has advised that a person consenting to give evidence under Article 15 or 16 provides assistance on a voluntary basis. Article 17(3) offers protection to that person by stipulating that "he shall not be subjected to prosecution based on his testimony, except for perjury or contempt of court." Under Article 17(3), any possible

prosecution for perjury or contempt of court shall be related to the testimony given by the person only and it does not extend to his act of withdrawal of consent. Article 17(5) further provides that “A person who does not consent to provide assistance pursuant to Article 15 or 16 shall not by reason thereof be liable to any penalty or coercive measure by the courts of the Requesting Party or Requested Party.”

Article 27 - Entry Into Force and Termination

17. Article 27(2) of the Malaysia Order provides that the Agreement shall apply to requests presented after the date of its entry into force irrespective of whether the relevant acts or omissions constituting the offence occurred before or after that date.

18. The Subcommittee notes that Article 27(2) is adopted at the request of Malaysia to clarify that the Agreement applies to requests presented after the date of operation of the Agreement irrespective of the time when acts or omissions constituting the relevant offence occurred. The Subcommittee has asked whether Malaysia's request for assistance would be entertained in the following three scenarios -

- (a) an act or omission constituted an offence in Malaysia before the Agreement enters into force but has been de-criminalised in Malaysia after the Agreement enters into force, while such act or omission constitutes an offence in Hong Kong both before and after the Agreement enters into force;
- (b) an act or omission constitutes an offence in Malaysia both before and after the Agreement enters into force, while such act or omission constituted an offence in Hong Kong before the Agreement enters into force but has been de-criminalised in Hong Kong after the Agreement enters into force; and
- (c) an act or omission constituted an offence in both Malaysia and Hong Kong before the Agreement enters into force, but has been de-criminalised in both Malaysia and Hong Kong after the Agreement enters into force.

19. The Administration has advised that Article 1(1) of the Agreement stipulates that the Parties shall, in accordance with the provisions of the Agreement and in conformity with their respective laws, render to one another mutual legal assistance in connection with investigations, prosecutions and proceedings that pertain to offences over which the Requesting Party has jurisdiction at the time the assistance is requested. Article 4(1)(g) further specifies that the Requested Party shall refuse assistance if the acts or omissions alleged to constitute the offence would not, if they had taken place within the jurisdiction of the Requested Party, have constituted an offence against the law of the Requested Party. Having regard to the above mentioned provisions, for the scenario set out in paragraph 18(a) above, Malaysia's request will not be entertained as Malaysia will not have jurisdiction over the act or omission concerned at the time the assistance is requested. For the scenario set out in paragraph 18(b) above, Malaysia's request will not be entertained as the act or omission as de-criminalised no longer constitutes an offence in Hong Kong. For the scenario set out in paragraph 18(c) above, Malaysia's

request will not be entertained as Malaysia will not have jurisdiction over the act or omission concerned at the time the assistance is requested and the act or omission as de-criminalised no longer constitutes an offence in Hong Kong.

Motion on the Malaysia Order

20. The Subcommittee has concluded scrutiny of the Malaysia Order. The Subcommittee supports the Secretary for Security giving fresh notice to move the motion on the Malaysia Order at a future Council meeting.

Advice Sought

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

Council Business Division 2
Legislative Council Secretariat
28 June 2007

**Subcommittee on
Mutual Legal Assistance in Criminal Matters (Malaysia) 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 Mary SO

Legal Adviser Kelvin LEE

Date 15 June 2007

美國提出的請求的有關部分
Extract of a request for MLA from the United States

VII. UNDERTAKINGS

The U.S. Central Authority confirms that this request:

- A. Does not relate to the prosecution or punishment of a person for a criminal offense that is, or is by reason of the circumstances in which it is alleged to have been committed or was committed, an offense of a political character;
- B. Is not made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of that person's race, religion, nationality, or political opinions;
- C. Does not relate to the prosecution of a person for an offense in a case in which the person has been convicted, acquitted, or pardoned by a competent court or other authority of the United States of America, or has undergone punishment provided by law of the United States of America, in respect of that offense or of another offense constituted by the same act or omission as that offense;
- D. The documents, information and responses to questions sought will only be used in connection with the above-described investigation and prosecution in the United States.