

**Legislative Council Subcommittee on
Mutual Legal Assistance in Criminal Matters (Malaysia) Order**

Purpose

This note provides responses to the questions raised by the Subcommittee on the Mutual Legal Assistance in Criminal Matters (Malaysia) Order at its meeting on 15 June 2007.

Article 8 of the Hong Kong/Malaysia Agreement on Mutual Legal Assistance in Criminal Matters

2. The Subcommittee has requested the Administration to provide information as to the operation of Article 8(3) of the Hong Kong/Malaysia Agreement on Mutual Legal Assistance in Criminal Matters (MLA). Article 8(3) is adopted from the United Nations Model Treaty on Mutual Assistance in Criminal Matters. In considering how Article 8(3) operates in practice, this article should be read together with other relevant provisions in the Agreement.

3. 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 our MLA practice in that in providing assistance to Requesting Parties, we 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 as shown in the extract of a request from the United States at the Annex.

4. 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(3) of the Hong Kong/Malaysia Agreement on Mutual Legal Assistance in Criminal Matters

5. The Subcommittee has also requested the Administration to provide information on whether a person who has consented to give evidence under Article 15 or 16 and travelled to Malaysia but subsequently withdraws his consent would be prosecuted for contempt of court under Article 17(3).

6. 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: "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(2) of the Hong Kong/Malaysia Agreement on Mutual Legal Assistance in Criminal Matters

7. The Subcommittee has asked the Administration to explain how the principle of double criminality would apply in relation to the time of commission of an offence and the respective time when the act concerned was criminalized in Hong Kong and in Malaysia under Article 27(2).

8. Malaysia does not criminalize any act retrospectively. The Malaysian Federal Constitution provides that “No person shall be punished for an act or omission which was not punishable by law when it was done or made”. Therefore the question of Malaysia requesting assistance from Hong Kong for a committed act which was not a criminal offence in Malaysia before the entry into force of the Agreement does not arise. The same principle applies to the case of Hong Kong.

Security Bureau
Department of Justice
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.