

立法會
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Paper for the House Committee meeting on 6 June 2008

Report of the Subcommittee on Fugitive Offenders (Ireland) Order

Purpose

This paper reports on the deliberations of the Subcommittee on Fugitive Offenders (Ireland) Order.

The subsidiary legislation

2. The Fugitive Offenders (Ireland) Order (L.N. 96 of 2008) (the Order) was made by the Chief Executive in Council under section 3 of the Fugitive Offenders Ordinance (Cap. 503) (the Ordinance). It directs that the procedures in the Ordinance for the surrender of fugitive offenders shall apply between Hong Kong and Ireland. The Order is made in consequence of the arrangements for the surrender of fugitive offenders entered into by Hong Kong and Ireland and signed in Dublin on 5 October 2007 (the Agreement). The Agreement is recited in the Schedule to the Order. Under section 2 of the Order, the relevant procedures are subject to the limitations, restrictions, exceptions and qualifications contained in the Agreement.

3. The Order is subject to a mechanism of scrutiny by the Legislative Council (LegCo) provided in section 3(2) to (6) of the Ordinance under which LegCo has the power only to repeal the Order.

4. The scrutiny period of the Order has been extended from 4 June 2008 to 25 June 2008 by a resolution of the Council.

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

The Subcommittee

6. At the meeting of the House Committee on 9 May 2008, members agreed that a Subcommittee should be formed to study the Order.

7. Under the chairmanship of Hon James TO, the Subcommittee held a meeting with the Administration. The membership list of the Subcommittee is in the **Appendix**.

Deliberations of the Subcommittee

Offences under the Order

8. Article 2(2) of the Agreement sets out that a revenue offence is an extraditable offence. In response to Hon James TO's enquiry, the Administration has clarified that for the purpose of Article 2(2), a "revenue offence" means an offence connected with taxes or duties even where the requested Party does not impose the same kind of tax or duty or its law does not contain the same type of rules as regards taxes, duties and customs as the requesting Party. A person shall not be surrendered for matters relating to the assessment or collection of tax which is not an offence under the law of the requested Party. In response to Hon James TO's further enquiry, the Administration has pointed out that the provision that a request for assistance in respect of an external offence relating to taxation shall be refused if the primary purpose of the request is the assessment or collection of tax is contained in the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525).

9. Under Article 2(4) of the Agreement, in determining whether an offence is an offence punishable under the laws of both Parties, the totality of the acts or omissions alleged against the person whose surrender is sought shall be taken into account.

10. Noting that this provision is not in the model agreement on the surrender of fugitive offenders, Hon James TO has asked whether the term "totality of the acts" is adopted in other agreements on surrender of fugitive offenders and the purpose of adding "totality of the acts" to the Agreement. Hon Miriam LAU has asked whether "totality of the acts" has a wider meaning than the offences listed in Article 2(1).

11. The Administration has explained that the offences listed under Article (2)1 are consistent with the description of extraditable offences listed in Schedule 1 to the Ordinance. Article 2(4) reflects the principle of to double jeopardy, which is added to the Agreement at the request of Ireland to ensure that the offence shall be punishable under the laws of both Parties and is determined by the totality of the acts rather than the legal elements of the

offence concerned. A similar formulation is adopted in the agreement on surrender of fugitive offenders with Sri Lanka at the request of the latter. This safeguard is consistent with Article 2(1) which is substantially the same as the model agreement. Article 2(5) also spells out that the offence must be an offence against the law of both Parties at the time the request is received.

Reference to "third country"

12. Article 6(3) states that surrender may be refused where the person sought has been finally acquitted or convicted in a third country for the same offence for which surrender is requested. Hon James TO considers that it would be more appropriate to adopt the term "third jurisdiction" instead of "third country", having regard to the status of Hong Kong in signing bilateral agreements on the surrender of fugitive offenders. The Administration has noted Mr TO's views and agreed to consider in future agreements on surrender of fugitive offenders the appropriateness to use the word "jurisdiction".

Recovery of exceptional expenses borne by the requested party for surrender of fugitive offenders

13. The Subcommittee notes that Article 14(2) is added to the Agreement to provide for a mechanism for consultation with a view to deciding how exceptional expenses will be met by the requested and requesting Parties. Hon James TO is of the view that Hong Kong should not meet the costs for the arrest and detention of a fugitive offender under Article 14(1), in the event that the requesting Party does not agree to meet the exceptional expenses. Hon Miriam LAU considers that in normal circumstances, the requesting Party will bear the exceptional expenses, if any, as it is the party who has put up the request for surrender of fugitive offenders.

14. The Administration has pointed out that Article 14 of the Agreement obliges a requested Party to bear expenses for the arrest and detention of a fugitive offender and for conduct of legal proceedings for processing of a request for surrender of the offender. The requesting Party will bear all subsequent expenses, including the expenses incurred in conveying the person from the requested Party. Should exceptional expenses be incurred, the requested Party will discuss with the requesting Party how these expenses will be met. A similar provision is found in the bilateral agreements on surrender of fugitive offenders signed between Hong Kong and Australia, Canada, India, Indonesia, Malaysia, New Zealand, the Philippines, Portugal, Singapore and the United Kingdom respectively. The Administration has advised that the provision has never been invoked. In practice, the exceptional expenses may be shared between the requested Party and requesting Party after consultation.

Power of the court in handling property

15. Article 16(2) sets out that the rights of the requested Party or of third parties in the property shall be preserved. Where such rights exist, the articles shall on request be returned to the requested Party without charge as soon as practicable after the end of the proceedings.

16. Noting that the court is empowered under section 9 of the Ordinance to decide that the property should be sent to the jurisdiction requesting the surrender of the fugitive concerned, or the property should be disposed of in such other manner as the court may specify, Hon James TO has expressed concern whether the court has full discretion under section 9 of the Ordinance in handling property in which third parties have rights as covered under Article 16 of the Agreement. Hon James TO and Hon Miriam LAU have asked whether the court has discretion in deciding that the articles could be retained by the third parties.

17. The Administration has clarified that Article 16(1)(a) of the Agreement provides that to the extent permitted under the law of the requested Party, when a request for surrender of a fugitive is granted, the requested Party shall, if the requesting Party so requests, hand over to the requesting Party all articles, including sums of money, which may be required as evidence or have been acquired by the fugitive as a result of the offence and are in his possession or are discovered subsequently, and which have been specified by the requesting Party. This provision is consistent with section 8 of the Ordinance.

18. The Administration has further advised that Article 16(2) of the Agreement preserves the rights of third parties in the articles covered under Article 16(1)(a), and provides that when such rights exist, the articles shall on request be returned to the requested Party without charge as soon as practicable after the end of the proceedings. As Article 16(1)(a) stipulates that the handover of the articles concerned to the requesting Party is subject to the permission under the law of the requested Party, Article 16 in its entirety, as read with section 9(2)(a) of the Ordinance, in effect provides that the disposal of the articles concerned in which third parties have rights will be handled by the court in accordance with section 9(2)(a) of the Ordinance. The court may, upon consideration of the representations put forward by the third parties in question and the request of the requesting Party, decide that the articles concerned should be sent to the requesting Party, or disposed of in such manner as the court may specify to take into account the third parties' rights. In other words, the court has full discretion in specifying that the articles concerned should be retained by the third parties in question, or handed over to the requesting Party and returned to Hong Kong after the end of the proceedings in the requesting Party.

Recommendation

19. The Subcommittee recommends that the Fugitive Offenders (Ireland) Order be supported.

Advice sought

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

Council Business Division 2
Legislative Council Secretariat
4 June 2008

Subcommittee on Fugitive Offenders (Ireland) Order

Membership List

Chairman Hon James TO Kun-sun

Members Hon Margaret NG

Hon LAU Kong-wah, JP

Hon Miriam LAU Kin-ye, GBS, JP

(Total : 4 Members)

Clerk Miss Betty MA

Legal adviser Mr Kelvin LEE

Date 19 May 2008