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Paper for the House Committee meeting on 6 June 2008

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

Purpose

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

Background

2. The Secretary for Security gave notice to move a motion at the meeting of the Legislative Council on 21 May 2008 to seek the Council's approval of the Mutual Legal Assistance in Criminal Matters (Finland) Order (the Finland Order) made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (MLAO).

3. MLAO 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 Finland Order

4. The Finland 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 Finland, and the modifications to MLAO. The Order is made in consequence of the agreement for mutual legal assistance entered into by the HKSAR Government and the Government of the Republic of Finland (the Agreement) and signed in Helsinki on 4 October 2007. The Agreement is reproduced in Schedule 1 to the Order, and the modifications are set out in Schedule 2 to the Order.

5. The Finland 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 9 May 2008, Members formed a subcommittee to study the Finland Order. At the request of the House Committee, the Secretary for Security withdrew his notice for moving the motion at the Council meeting on 21 May 2008 to allow time for the Subcommittee to study the Order in detail.

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

Deliberations of the Subcommittee

Comparison with the Model Agreement

8. In examining the Finland 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. Article 4(1)(g) of the Agreement provides that the Requested Party shall refuse assistance if in the case of requests involving compulsory measures 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 for which compulsory measures are allowed.

10. The Administration has explained that the provision was proposed by Finland to reflect the requirement under its domestic law. Under the law of Finland, where compulsory measures are requested or where the request otherwise involves the use of compulsory measures, such measures shall not be used, where not permitted under Finnish law, had the offence to which the requests related been committed in Finland in similar circumstances. As far as Hong Kong is concerned, assistance will be refused in the absence of double criminality where compulsory measures are required in execution of the request.

Article 12 - Service of Documents

11. Article 12(6) of the Agreement provides that a person who fails to comply with any process served on him shall not thereby be liable to any penalty or coercive measure pursuant to the law of the Requesting Party or Requested Party unless he subsequently voluntarily enters the territory of the Requesting Party and is there again duly summoned.

12. The Administration has explained that, for instance, where a person is served any document in Hong Kong upon a request from Finland, the person will not be liable for any penalty for non-compliance with the requirements in the document. However, if the person subsequently enters Finland of his own free will and is duly summoned by the Finland authority, the person cannot claim protection on the ground that he has been served the document in Hong Kong. This provision is modelled on Article 8 of the European Convention on Mutual Legal Assistance.

Article 15 - Transfer of Persons in Custody

13. Under Article 15(1) of the Agreement, a person in custody in the Requested Party whose presence is requested in the Requesting Party as a witness pursuant to this Agreement shall, if the Requested Party consents, be transferred from the Requested Party to the Requesting Party for that purpose, provided the person consents and the Requesting Party has guaranteed the maintenance in custody of the person and his subsequent return to the Requested Party. The Subcommittee has enquired about the scope of assistance provided by "witness" covered by the Article.

14. The Administration has advised that a witness referred to in the provision is a person required to give evidence in any pre-trial or judicial proceedings of the Requesting Party. At the request of the Subcommittee, the Administration will explain such a coverage when moving the motion on the Finland Order.

15. Responding to the Subcommittee's enquiry as to whether written consent of a witness is required if his presence in the Requesting Party is requested, the Administration has explained that apart from Article 15(1), Article 16(1) of the Agreement provides for the Requested Party to invite the witness or expert to appear and advise the Requesting Party of the reply from the witness or expert. All witnesses, including those in the custody of the Requested Party, will only be transferred to the Requesting Party on a voluntary basis and their consent is required as explicitly specified in the Agreement. This is consistent with sections 16(1)(b)(iii) and 23(1)(d)(ii) of MLAO, requiring that the transfer of prisoners or other persons to or from Hong Kong to give assistance in relation to criminal matters will only be effected where the Secretary for Justice is of the opinion that such persons have given their consent to give such assistance. For transfer of a person out of Hong Kong, the Requesting Party will be required to provide undertakings on the immunities the person to be transferred will be given on arrival in the Requesting Party. As required by section 23(1)(d)(ii) of MLAO, a copy of the undertakings has to be provided to the subject person who may then indicate in writing whether he consents to the transfer.

For transfer of a person to Hong Kong, the HKSAR will give undertakings on the immunities such person is entitled for agreeing to travel to Hong Kong to give assistance. The undertakings are provided to the Requested Party for passing on to the person from whom assistance is sought. Consent of the person to be transferred is usually given in writing and is obtained by the overseas Requested Party.

Article 21 - Entry into Force and Termination

16. Article 21(2) provides that the Agreement shall apply to offences committed before as well as after its entry into force. It permits Hong Kong and Finland to make requests for legal assistance in respect of offences committed before or after the entry into force of the Agreement.

17. The Subcommittee has expressed concern whether the provision for application of offences committed before the entry into force of the Agreement would be in compliance with MLAO and whether it is consistent with the human rights protections provided under the Hong Kong Bill of Rights Ordinance (Cap. 383).

18. The Administration has explained that MLAO regulates the provision and obtaining of assistance in criminal matters between Hong Kong and places outside Hong Kong. Places outside Hong Kong consist of two categories, namely -

- (a) prescribed places (as defined in section 2) with which Hong Kong has entered into prescribed arrangements on mutual legal assistance by virtue of orders made under section 4 of MLAO; and
- (b) non-prescribed places with which Hong Kong has not entered into prescribed arrangements on mutual legal assistance.

A prescribed place may make a request to Hong Kong pursuant to a prescribed arrangement implemented by an order made under section 4. In the absence of a prescribed arrangement, a non-prescribed place may obtain legal assistance from Hong Kong under section 5(4) of MLAO if that place gives a reciprocity undertaking to Hong Kong that it will, subject to its law, comply with a future request by Hong Kong to that place for legal assistance.

19. The Administration has advised that section 6 of MLAO allows Hong Kong to provide legal assistance to a place outside Hong Kong, be it a prescribed place or a non-prescribed place, and regardless of whether the offences covered by a request are committed before or after the entry into force of any arrangement. Section 7 of MLAO allows Hong Kong to make a request to a prescribed place or a non-prescribed place outside Hong Kong for legal assistance. It does not limit such requests to offences committed after the entry into force of any arrangement. Under sections 6 and 7 of MLAO, requests for legal assistance are not subject to any limitations relating to the timing of the entry into force of any agreement on mutual legal assistance. Indeed, the

requirement for a reciprocity undertaking from a non-prescribed place under section 5(4) reinforces the construction that a prescribed place is not limited to making requests in respect of offences committed after the entry into force of a prescribed arrangement. Otherwise, a prescribed place would be subject to more restrictions and hence be placed in a less advantageous position than a non-prescribed place. Article 21(2) of the Agreement is therefore consistent with MLAO.

20. The Administration has also informed the Subcommittee that provisions similar to Article 21(2) of the Agreement appear in the agreements on mutual legal assistance signed by Hong Kong with Australia, Belgium, Canada, Korea, the Netherlands, New Zealand, Philippines, Singapore and the United States, and are implemented by the relevant orders made under section 4 of MLAO.

21. Regarding human rights safeguards, the Administration has explained that the scope of assistance under the Agreement is restricted to the investigation and prosecution of crimes committed before or after the entry into force of the Agreement, and the related proceedings. It does not in any way create retrospective criminal liability or penalty. Article 21(2) of the Agreement is in conformity with Hong Kong law concerning human rights.

Modifications to the Mutual Legal Assistance in Criminal Matters Ordinance

22. Section 5(1) of MLAO shall be modified by adding a subsection providing for refusal of assistance if the request relates to the prosecution of a person in respect of an act or omission that, if it had occurred in Hong Kong, could no longer be prosecuted in Hong Kong by reason of lapse of time. The Subcommittee has enquired about the reason for the modification.

23. The Administration has explained that the modification reflects Article 4(1)(e) of the Agreement. Article 4(1)(e) provides that the Requested Party shall refuse assistance if the request for assistance relates to the prosecution of a person for an offence for which the person could no longer be prosecuted by reason of lapse of time if the offence had been committed within the jurisdiction of the Requested Party. The "lapse of time" provision is included in the Agreement to reflect the requirements in the domestic law of Finland. Modification is made to section 5(1) of MLAO to reflect the reciprocal arrangement, or otherwise Hong Kong may be obliged to provide assistance in circumstances where the statutory time limit for prosecution has lapsed.

24. The Administration has also explained the modifications to section 5(1)(e) of MLAO which provides for refusal of assistance in a case where a person has been previously convicted or acquitted in Hong Kong and to section 17(3)(b) to spell out the duration of immunity protection a person who comes to Hong Kong to render assistance will receive. The modifications are made to implement Article 4(1)(e) and Article 17(2) of the Agreement. The Administration has advised that the modifications are commonly found in other orders made under section 4 of MLAO.

Conclusion

25. The Subcommittee is in support of the Finland Order. The Administration will give fresh notice for moving the motion on the Order.

Advice Sought

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

Council Business Division 2
Legislative Council Secretariat
4 June 2008

**Subcommittee on
Mutual Legal Assistance in Criminal Matters (Finland) 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 (Total : 4 Members)
Clerk	Mrs Sharon TONG LEE Yin-ping
Legal Adviser	Mr LEE Ka-yun, Kelvin
Date	19 May 2008