

立法會
Legislative Council

LC Paper No. CB(2)755/08-09

Ref : CB2/SS/5/08

Paper for the House Committee meeting on 6 February 2009

**Report of the Subcommittee on
Mutual Legal Assistance in Criminal Matters (Indonesia) Order,
Mutual Legal Assistance in Criminal Matters (Japan) Order and
Mutual Legal Assistance in Criminal Matters (Sri Lanka) Order**

Purpose

This paper reports on the deliberations of the Subcommittee on Mutual Legal Assistance in Criminal Matters (Indonesia) Order, Mutual Legal Assistance in Criminal Matters (Japan) Order and Mutual Legal Assistance in Criminal Matters (Sri Lanka) Order.

Background

2. The Secretary for Security gave notice to move three motions at the meeting of the Legislative Council on 10 December 2008 to seek the Council's approval of the following Orders made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (the Ordinance) –

- (a) Mutual Legal Assistance in Criminal Matters (Indonesia) Order (the Indonesia Order);
- (b) Mutual Legal Assistance in Criminal Matters (Japan) Order (the Japan Order); and
- (c) Mutual Legal Assistance in Criminal Matters (Sri Lanka) Order (the Sri Lanka Order).

3. The Ordinance provides the necessary statutory framework for implementing mutual legal assistance agreements and enables the 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 Orders

The Indonesia Order

4. The Indonesia 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 Indonesia, and the modifications to the Ordinance. 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 Indonesia (HKSAR/Indonesia Agreement) which was signed on 3 April 2008. The Agreement is reproduced in Schedule 1 to the Order, and the modifications are set out in Schedule 2 to the Order.

The Japan Order

5. The Japan Order sets out the scope and procedures in relation to the provision of mutual legal assistance in criminal matters applicable between Hong Kong and Japan, and the modifications to the Ordinance. The Order is made in consequence of the agreement for mutual legal assistance entered into by Hong Kong and Japan (HK/Japan Agreement) which was signed on 23 May 2008. The Agreement is reproduced in Schedule 1 to the Order, and the modifications are set out in Schedule 2 to the Order.

The Sri Lanka Order

6. The Sri Lanka Order sets out the scope and procedures in relation to the provision of mutual legal assistance in criminal matters applicable between HKSAR and the Democratic Socialist Republic of Sri Lanka, and the modifications to the Ordinance. The Order is made in consequence of the agreement for mutual legal assistance entered into by the HKSAR Government and the Government of Democratic Socialist Republic of Sri Lanka (HKSAR/Sri Lanka Agreement) which was signed on 16 June 2008. The Agreement is reproduced in Schedule 1 to the Order, and the modifications are set out in Schedule 2 to the Order.

7. The commencement date of each of the three Orders will be appointed by the Secretary for Security by notice published in the Gazette.

The Subcommittee

8. At the meeting of the House Committee on 28 November 2008, members agreed that a Subcommittee should be formed to study the three Orders. At

the request of the House Committee, the Secretary for Security withdrew his notice for moving the motions at the Council meeting on 10 December 2008 to allow time for the Subcommittee to study in detail the three Orders.

9. The membership list of the Subcommittee is in **Appendix**. Under the chairmanship of Hon James TO, the Subcommittee has held two meetings with the Administration.

Deliberations of the Subcommittee

Comparison with the Model Agreement

10. In examining the three Orders, the Subcommittee has made an article-by-article comparison of the provisions of the Orders with those in the model agreement for HKSAR on mutual legal assistance in criminal matters.

The Indonesia Order

Article 6 – Limitations on Assistance

11. Article 6.2(b) of the HKSAR/Indonesia Agreement provides for refusal of assistance on the ground that the Requested Party is of the opinion that the provision of the assistance would impose an excessive burden on the resources of the Requested Party.

12. The Subcommittee has expressed concern about the resources involved in processing the requests for mutual legal assistance in criminal matters under the Ordinance. The Administration has advised that the provision was found in similar agreements on mutual legal assistance and is usually included as one of the matters to be considered by the Requested Party in its consideration of its essential interests, but the provision has never been formally invoked. Should excessive expenses be incurred, the expenses will in effect be settled between the Requested Party and the Requesting Party after consultation.

13. The Subcommittee has noted that Article 6.3 provides that assistance shall not be refused solely on the ground of secrecy of banks and similar financial institutions or that the offence is also considered to involve fiscal matters. The Administration has explained that the provision is added principally for the avoidance of doubt.

14. Hon James TO has enquired about the execution of the request if the banks and similar financial institutions are obliged under the domestic law to keep confidentiality of the fiscal information of their clients. The Administration has advised that Article 6.3 relates to fiscal information which the Requested Party needs to provide solely for the purposes of criminal

offences. The Administration has further advised that it is stipulated in the Ordinance that the request for assistance will be refused if the fiscal information sought is used by the Requesting Party for investigation into an offence relating to taxation, unless the Requesting Party provides information that the primary purpose of the request is not for the assessment or collection of tax.

15. Referring to the omission of Article IV(3) of the model agreement from the HKSAR/Indonesia Agreement which provides for the safeguard against the death penalty, the Administration has advised that the omission was made at the request of Indonesia. The Administration has further advised that both Parties have agreed that assistance in respect of offences carrying the death penalty could be refused pursuant to the ground of impairment of "essential interests" under Article 6.1(e). Hong Kong has made clear to Indonesia that Hong Kong will refuse to provide assistance if the request relates to an offence which carries death penalty in Indonesia unless Indonesia gives sufficient assurances that the death penalty will not be imposed or carried out. Indonesia has accepted Hong Kong's position, and the agreed approach has been properly documented.

Article 17- Proceeds of Crime

16. Article 17.5 provides that the Requested Party shall dispose of confiscated proceeds in accordance with its law. Where these proceeds derive from offences of corruption relating to public funds or property, the Requested Party shall, having deducted the expenses incurred in recovering the proceeds, return the balance of the proceeds to the Requesting Party.

17. The Subcommittee has enquired about the reason for adding the second sentence of Article 17.5, and sought clarification on the meaning of "proceeds of crime" as defined in the HKSAR/Indonesia Agreement. The Administration has explained that the second sentence of Article 17.5 is included at the request of Indonesia to reflect the obligations of the Parties under the United Nations Convention Against Corruption 2003 which applies to both HKSAR and Indonesia. Even if it is not included, both Parties will provide assistance according to the relevant provision in the Convention. Regarding the meaning of "proceeds of crime" in the Agreement, the Administration has explained that the term is in line with the definition of "external confiscation order" in section 2 of the Ordinance, which will be disposed of according to the domestic law of the Requested Party.

The Japan Order

Title and preamble

18. The Administration has pointed out that the HK/Japan Agreement is

signed between the two places i.e. Hong Kong and Japan and not between the Governments of the two places. This arrangement is made at the request of Japan due to its constitutional requirements.

Article 3

19. The Administration has advised that the word "may" is used in the chapeau of Article 3(1) of the HK/Japan Agreement, as opposed to "shall" in Article IV(1) of the model agreement. The Administration has explained that the arrangement is made at the request of Japan to allow flexibility in individual cases. Under such arrangement, Japan may refuse assistance in relation to requests under the specified circumstances. For Hong Kong, in practice, it shall refuse assistance under the specified circumstances if it is required by its law to do so. The Administration has further explained that Hong Kong's legal position is preserved in Article 3(4), which provides that nothing in the Agreement shall require either Party to execute a request if it is required by its law to refuse assistance on any of the grounds specified in Article 3(1).

20. The Subcommittee notes that Article IV(1)(c) of the model agreement in relation to military offences is omitted in the Agreement. The Administration has advised that the relevant provision is not included in the Agreement as neither Hong Kong nor Japan has military law.

21. The Subcommittee also notes that Article IV(3) of the model agreement, which provides for the safeguard against the death penalty, is not included in the Agreement. The Administration has advised that both Parties have agreed that assistance for death penalty offences could be dealt with under the category of "essential interests" of the Requested Party in accordance with Article 3(1)(2). Similar arrangement is found in the HKSAR/Indonesia Agreement. The agreed approach has been properly documented.

Article 15

22. Article 15 provides that a person who consents to give evidence or provide assistance pursuant to Articles 13 and 14 shall not be subject to prosecution, detention or any restriction of personal liberty in the Requesting Party by reason of any conduct or conviction that preceded his departure from the Requested Party, and that the person who consents to provide assistance shall not be required to give evidence in any proceeding or to assist in any investigation other than the proceeding or investigation which is specified in the request.

23. The Administration has advised that Article 15(1) is basically the same as the model agreement except for the absence of the immunity in respect of civil matters, as Japanese law does not permit such kind of immunity. The

Administration has further advised that Article XVII(3) of the model agreement is not included in the HK/Japan Agreement which provides that a person who consents to give evidence shall not be subject to prosecution based on his testimony, except for perjury.

24. The Subcommittee has expressed concern about the safeguards for a person who consents to give evidence if the immunity provision is not included in the Agreement. The Administration has assured members that the legal position of the witness will be governed by the domestic law of the Requesting Party. The safeguards to protect the legal rights of a person transferred to or from Hong Kong are contained in sections 17(1)(iv) and (v), 19 and 23(2)(b) of the Ordinance. If a request for a person to give evidence is made by Japan, the Secretary for Justice may, pursuant to section 23(2)(b) of the Ordinance, need to be satisfied that Japan has given adequate undertakings that any statement made by a person to be transferred from Hong Kong to give evidence or provide assistance in relation to the criminal matter will not be subject to prosecution in Japan for an external offence other than perjury. If the request is made by Hong Kong, the limitation on use of statement made by a person who consents to give evidence pursuant to this Agreement is spelt out in section 19 of the Ordinance. The transfer must be agreed upon by both Parties as well as the person being transferred. A person not satisfied with the proposed arrangements has the option of not giving consent at all.

25. In relation to the legal rights of a person who consents to give evidence or provide assistance, Hon James TO has requested the Administration to consider providing the person with information on the scope of legal advice available or the safeguards to protect his legal rights before consenting to give evidence or provide assistance pursuant to the agreements on mutual legal assistance.

Article 16

26. Under Article XII(3) of the model agreement, a request for the service of a document pertaining to an appearance in the Requesting Party shall include such notice as the Requesting Party is able to provide of outstanding warrants or other judicial orders in criminal matters against the person to be served. The Administration has advised that this Article is not included in the HK/Japan Agreement as Japan is unable to give effect to such provision under its law. The Administration has stressed that this does not in any way affect the service of documents under the Agreement nor section 31(3) of the Ordinance which provides that failure to comply with any process served under the Agreement would not constitute an offence under the law of Hong Kong.

The Sri Lanka Order

Article 17 – Safe conduct

27. Article 17 of the HKSAR/Sri Lanka Agreement provides that a person who consents to provide assistance pursuant to Articles 15 or 16 of the Agreement shall not be prosecuted, detained, or restricted in his personal liberty in the Requesting Party for any criminal offence which preceded his departure from the Requested Party. The Administration has pointed out that this Article is substantially the same as Article XVII of the model agreement, except that the reference to "civil matter" is not included in the Agreement to reflect the Sri Lankan law.

28. Dr Hon Margaret NG has enquired about the reason for and the effect of not providing immunity from civil matters in the Agreement. The Administration has explained that the immunity provision is not included in the Agreement, as immunity from civil suit is not available under the law of Sri Lanka. Section 23(2)(a) of the Ordinance is accordingly modified to reflect this arrangement. Conversely, where a person from a foreign jurisdiction renders assistance in Hong Kong pursuant to a request made by Hong Kong, that person is normally entitled to immunity from civil suit pursuant to section 17 of the Ordinance. To ensure parity of treatment, the Administration has taken the opportunity to modify section 17 of the Ordinance so that immunity from civil suit will not be available for a person rendering assistance in Hong Kong pursuant to the Agreement. As regards the practical implications of removing immunity from civil suit, one example is that a person rendering assistance in Hong Kong pursuant to the Agreement may be served with civil process by a litigant in Hong Kong, whereas if the person were not in Hong Kong, the litigant may have to seek the leave of the Court to serve process on him/her in Sri Lanka, and such leave may or may not be granted by the Court.

Modifications to the Mutual Legal Assistance in Criminal Matters Ordinance

29. The Subcommittee has examined the modifications to the Ordinance as contained in Schedule 2 to the Indonesia Order, the Japan Order and the Sri Lanka Order.

30. Section 5(1)(e) of the Ordinance provides that a request for assistance shall be refused if the request relates to the prosecution of a person for an external offence in a case where the person has been convicted, acquitted or pardoned by a competent court or other authority in the place or has undergone the punishment provided by the law of that place. The Subcommittee notes that Article 6.1(c) of the HKSAR/Indonesia Agreement, Article 3(1)(7) of the HK/Japan Agreement and Article 4(1)(e) of the HKSAR/Sri Lanka Agreement extend this protection to cover convictions or acquittals in the requested jurisdiction.

31. The Subcommittee also notes that section 5(1) of the Ordinance is further modified in respect of the Sri Lanka Order 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 modification seeks to reflect the reciprocal arrangement under Article 4(1)(e) of the HKSAR/Sri Lanka Agreement, or otherwise Hong Kong may be obliged to provide assistance in circumstances where the statutory time limit for prosecution would have lapsed.

32. Section 17(1) of the Ordinance gives certain immunities to a person who comes to Hong Kong from another jurisdiction to provide assistance. Section 17(3)(b) of the Ordinance provides that these immunities cease to apply if the person has had the opportunity of leaving Hong Kong and has remained in Hong Kong otherwise than for the purpose of giving assistance. Article 14.2 of the HKSAR/Indonesia Agreement, Article 15(2) of the HK/Japan Agreement and Article 17(2) of the HKSAR/Sri Lanka Agreement provide that such immunities will continue to be applicable for a period of 15 days after the person, being free to leave Hong Kong, has been notified that his presence is no longer required. The Administration has advised that modifications to section 17(3)(b) of the Ordinance reflect the additional protection provided in the three Agreements.

33. The Subcommittee also notes that section 17(3) of the Ordinance is further modified in respect of the Japan Order by adding a subsection to reflect the arrangement under Article 15(2)(1)(c) of the HK/Japan Agreement under which the reasons for failing to appear on the scheduled date must be overriding.

34. Sections 17(1)(ii) and 23(2)(a)(ii) of the Ordinance relate to immunity from civil suits where a person is giving assistance in Hong Kong or in a place outside Hong Kong. Such immunity is omitted from the Agreements with Japan and Sri Lanka, as immunity from civil suit is not provided for under the domestic laws of Japan and Sri Lanka. The modifications to sections 17(1) and 23(2)(a) of the Ordinance reflect the omission of such immunity.

Motion on the Orders

35. The Subcommittee has concluded scrutiny of the three Orders. The Subcommittee supports the Secretary for Security giving fresh notice to move the motions on the Indonesia Order, the Japan Order and the Sri Lanka Order at a future Council meeting.

Advice sought

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

Council Business Division 2
Legislative Council Secretariat
5 February 2009

**Subcommittee on
Mutual Legal Assistance in Criminal Matters (Indonesia) Order,
Mutual Legal Assistance in Criminal Matters (Japan) Order and
Mutual Legal Assistance in Criminal Matters (Sri Lanka) Order**

Membership List

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|----------------------|---|
| Chairman | Hon James TO Kun-sun |
| Members | Dr Hon Margaret NG Hon LAU Kong-wah, JP (Total : 3 Members) |
| Clerk | Miss Betty MA |
| Legal adviser | Mr Timothy TSO |
| Date | 12 December 2008 |