

立法會
Legislative Council

LC Paper No. LS17/08-09

**Paper for the House Committee Meeting
on 28 November 2008**

**Legal Service Division Report on three
Proposed Resolutions under section 4 of the
Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)**

**Mutual Legal Assistance in Criminal Matters (Indonesia) Order
Mutual Legal Assistance in Criminal Matters (Japan) Order
Mutual Legal Assistance in Criminal Matters (Sri Lanka) Order**

The Secretary for Security (the Secretary) has given notice to move three motions at the Legislative Council meeting of 10 December 2008. The purpose of the motions is to seek the Legislative Council's approval of the following three 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).

2. Section 4(1) of the Ordinance provides that the Chief Executive in Council may, with the approval of the Legislative Council, in relation to any arrangements for mutual legal assistance, by order to which is annexed a copy of the arrangements direct that the Ordinance shall, subject to such modifications thereto as may be specified in the order, apply as between Hong Kong and the place outside Hong Kong to which the arrangements relate. Section 4(2) of the Ordinance provides that the Chief Executive in Council shall not make an order unless the arrangements for mutual legal assistance to which the order relates are substantially in conformity with the provisions of the Ordinance. Section 4(3) requires that the modifications be summarized in a Schedule to the order. Under section 4(7), the Legislative Council's power to amend the orders is confined to repealing them only.

3. Schedule 1 to the Indonesia Order, the Japan Order and the Sri Lanka Order exhibits respectively the bilateral arrangements entered into between the

Government of the Hong Kong Special Administrative Region ("HKSAR") and the Government of the Republic of Indonesia, the Government of Japan and the Government of the Democratic Socialist Republic of Sri Lanka for mutual legal assistance in criminal matters.

4. Schedule 2 to each of the three Orders sets out respectively the modifications to the Ordinance.

The Indonesia Order

5. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the HKSAR Government and the Government of the Republic of Indonesia and signed in Hong Kong on 3 April 2008.

6. Schedule 1 specifies the scope and procedures in relation to the provision of mutual legal assistance in criminal matters. It also provides for safeguards of the rights of persons involved in criminal proceedings.

7. Schedule 2 specifies the modifications to the Ordinance. Section 5(1)(e) of the Ordinance provides that the Secretary for Justice shall refuse assistance if the request relates to the prosecution of a person for an offence for which he has been convicted, acquitted, pardoned or punished in the requesting jurisdiction. Article 6(1)(c) of the Hong Kong/Indonesia Agreement extends this protection in relation to convictions etc in the requested jurisdiction. The modification to section 5(1)(e) of the Ordinance reflects the provision in the Agreement by extending the protection to cover convictions etc in the requested jurisdiction.

8. Section 17 of the Ordinance gives certain immunities to a person who comes to Hong Kong from another jurisdiction to provide assistance. 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 providing assistance. Article 14(2) of the Hong Kong/Indonesia Agreement provides that the immunities will continue to apply 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 modification reflects the additional protection provided in the Agreement by providing for a 15-day period in section 17(3)(b) of the Ordinance.

The Japan Order

9. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the HKSAR Government and the Government of Japan and signed in Hong Kong on 23 May 2008.

10. Schedule 1 specifies the scope and procedures in relation to the provision of mutual legal assistance in criminal matters. It also provides for safeguards of the rights of persons involved in criminal proceedings.

11. Schedule 2 specifies the modifications to the Ordinance. Section 5(1)(e) of the Ordinance provides that the Secretary for Justice shall refuse assistance if the request relates to the prosecution of a person for an offence for which he has been convicted, acquitted, pardoned or punished in the requesting jurisdiction. Article 3(1)(7) of the Hong Kong/Japan Agreement extends this protection in relation to convictions etc in the requested jurisdiction. The modification to section 5(1)(e) of the Ordinance reflects the provision in the Agreement by extending the protection to cover convictions etc in the requested jurisdiction.

12. Section 17 of the Ordinance gives certain immunities to a person who comes to Hong Kong from another jurisdiction to provide assistance. 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 providing assistance. Article 15(2)(1)(a) of the Hong Kong/Japan Agreement provides that the immunities will continue to apply for a period of 15 days after the person has been notified that his appearance is no longer required. The modification reflects the additional protection provided in the Agreement by providing for a 15-day period in section 17(3)(b) of the Ordinance.

13. Article 15(2)(1)(c) of the Hong Kong/Japan Agreement provides that immunities will cease to apply "when the person fails to appear before the appropriate authority on the scheduled appearance date unless there are compelling reasons". The modification reflects the additional requirement in the Agreement by stipulating such requirement in section 17(3)(c).

14. Sections 17(1)(ii) and 23(2)(a)(ii) of the Ordinance provide for immunity from civil suits where a person is rendering assistance in Hong Kong or in a place outside Hong Kong. Such immunity is not provided in the Hong Kong/Japan Agreement. According to the Administration, the reason for not providing for this immunity in the Agreement is that immunity from civil suits is not available under Japanese law. The modifications to sections 17(1) and 23(2)(a) reflect the non-availability of this immunity.

The Sri Lanka Order

15. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the HKSAR Government and the Government of the Democratic Socialist Republic of Sri Lanka and signed in Hong Kong on 16 June 2008.

16. Schedule 1 specifies the scope and procedures in relation to the provision of mutual legal assistance in criminal matters. It also provides for safeguards of the rights of persons involved in criminal proceedings.

17. Schedule 2 specifies the modifications to the Ordinance. Section 5(1)(e) of the Ordinance provides that the Secretary for Justice shall refuse assistance if the request relates to the prosecution of a person for an offence for which he has been convicted, acquitted, pardoned or punished in the requesting jurisdiction. Article 4(1)(e) of the Hong Kong/Sri Lanka Agreement extends this protection in relation to convictions etc in the requested jurisdiction. The modification to section 5(1)(e) of the Ordinance reflects the provision in the Agreement by extending the protection to cover convictions etc in the requested jurisdiction.

18. Article 4(1)(e) of the Hong Kong/Sri Lanka Agreement provides that a requested party shall refuse assistance if the request 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 or requesting party. The addition of sub-section (ea) to section 5(1) of the Ordinance reflects such protection.

19. Section 17 of the Ordinance gives certain immunities to a person who comes to Hong Kong from another jurisdiction to provide assistance. 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 providing assistance. Article 17(2) of the Hong Kong/Sri Lanka Agreement provides that the immunities will continue to apply 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 modification reflects the additional protection provided in the Agreement by providing for a 15-day period in section 17(3)(b) of the Ordinance.

20. Sections 17(1)(ii) and 23(2)(a)(ii) of the Ordinance provide for immunity from civil suits where a person is rendering assistance in Hong Kong or in a place outside Hong Kong. Such immunity is not provided in the Hong Kong/Sri Lanka Agreement. According to the Administration, the reason for not providing for this immunity in the Agreement is that immunity from civil suits is not available under the law of Sri Lanka. The modifications to sections 17(1) and 23(2)(a) reflect the non-availability of this immunity.

21. Members may refer to the LegCo Brief (File Ref.: SBCR 3/5691/95 Pt.44) issued by the Security Bureau on 19 November 2008 for background information on the above three Orders.

22. The three Orders will come into operation on days to be appointed respectively by the Secretary for Security by notice published in the Gazette.

23. The Panel on Security has not been consulted on the three Orders.

24. The Legal Service Division has asked the Administration to clarify certain matters which may be of interest to Members. The correspondence between the

Legal Service Division and the Administration is attached in the Annex for Members' reference.

Encl.

Prepared by
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Legislative Council Secretariat
25 November 2008

LS/R/3/08-09

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By Fax (2524 3762)

21 November 2008

Secretary for Security
(Attention: Ms Jane Lee, Assistant Secretary (S)A2)
Security Bureau
6th Floor, Main and East Wings
Central Government Offices
Hong Kong

Dear Ms Lee,

Mutual Legal Assistance in Criminal Matters (Indonesia) Order
Mutual Legal Assistance in Criminal Matters (Japan) Order
Mutual Legal Assistance in Criminal Matters (Sri Lanka) Order

I am scrutinising the above Orders with a view to advising Members and should be grateful if you could clarify the following matters:

The Japan Order

Article 3

Section 5(1)(e) of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) 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. Is there any reason why the scenario where a person is pardoned or has undergone the punishment is not included in Article 3(1)(7)?

The Sri Lanka Order

Article 4

Similarly, is there any reason why the scenario where a person has undergone the punishment is not included in Article 4(1)(e)?

All three Orders

In line with the usual practice, please provide an article-by-article comparison of the agreements between the Government of the Hong Kong Special Administrative Region and the Government of the Republic of Indonesia, the Government of Japan and the Government of the Democratic Socialist Republic of Sri Lanka, and the model agreement for Members' reference.

I would appreciate it if you could let us have the Administration's reply in both languages on or before 25 November 2008.

Yours sincerely,

(Timothy TSO)
Assistant Legal Adviser

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Mutual Legal Assistance in Criminal Matters (Indonesia) Order
Mutual Legal Assistance in Criminal Matters (Japan) Order
Mutual Legal Assistance in Criminal Matters (Sri Lanka) Order

The Administration's Reply to
LegCo Secretariat's Letter of 21 November 2008

The Japan Order: Article 3

The Sri Lanka Order: Article 4

In processing a request for mutual legal assistance in criminal matters (MLA) from Japan or Sri Lanka, Hong Kong will observe all the safeguards as specified under section 5 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525), subject to the modifications as set out in the respective Schedule 2 of the Japan and the Sri Lanka Orders. All the statutory safeguard under section 5(1)(e) of Cap. 525 and Schedule 2 of the Japan / Sri Lanka Orders will be preserved. Accordingly, a request by Japan or Sri Lanka for assistance shall be refused if, in the opinion of the Secretary for Justice, the request relates to the prosecution of a person for an external offence in a case where the person-

- (i) has been convicted, acquitted or pardoned by a competent court or other authority in Japan or Sri Lanka (as the case may be) or Hong Kong in respect of that offence or of another external offence constituted by the same act or omission as that offence; or
- (ii) has undergone the punishment provided by the law of Japan or Sri Lanka (as the case may be) or Hong Kong, in respect of that offence or of another external offence constituted by the same act or omission as that offence.

2. It should be noted that Article 4(1)(e) of the MLA Agreement with Sri Lanka is similar to the equivalent Articles in a number of MLA agreements such as the ones with Belgium, Israel, Italy and Germany. Provisions similar to Article 3(1)(7) of the MLA Agreement with Japan may be found in other MLA agreements such as the agreements with Poland and the USA. In any case, Hong Kong will not make or execute an MLA request which relates to the prosecution of a person for an offence in a case where the person has been convicted, acquitted, pardoned or has undergone punishment in respect of the offence or another offence constituted by the same act or omission as that offence.

Article-by-article comparison

3. Same as the practice for other MLA agreements, we will provide article-by-article comparisons between each of the three agreements and the model agreement for Members' reference at the subcommittee stage should such subcommittees be set up to examine the concerned MLA Orders.

Security Bureau
November 2008