

立法會
Legislative Council

LC Paper No. CB(2)1853/09-10
(These minutes have been seen
by the Administration)

Ref : CB2/SS/5/09

**Subcommittee on Fugitive Offenders (South Africa) Order and
Mutual Legal Assistance in Criminal Matters (South Africa) Order**

**Minutes of the second meeting
held on Thursday, 27 May 2010 at 12:45 pm
in Conference Room B of the Legislative Council Building**

Members present : Hon James TO Kun-sun (Chairman)
Dr Hon Margaret NG
Hon LAU Kong-wah, JP

Public Officers attending : Agenda item I

Security Bureau

Mr David LAU Kam-kuen
Principal Assistant Secretary for Security A

Ms Veronica WONG Hoi-yee
Assistant Secretary for Security A2

Department of Justice

Ms Elizabeth LIU Zoo-ring
Senior Government Counsel, International Law Division

Miss Emma WONG
Senior Government Counsel, Law Drafting Division

Clerk in attendance : Miss Odelia LEUNG
Chief Council Secretary (2)6

Staff in attendance : Ms Clara TAM
Assistant Legal Adviser 9

Ms Catherina YU
Senior Council Secretary (2)7

Miss Jenny LEE
Legislative Assistant (2)6 (Acting)

Action

I. Meeting with the Administration

- LC Paper No. CB(2)1634/09-10(01) -- List of follow-up actions arising from the discussion at the first meeting on 20 May 2010
- LC Paper No. CB(2)1634/09-10(02) -- The Administration's response to LC Paper No. CB(2)1634/09-10(01)
- File Ref: SBCR 3/5691/95 Pt.46 and SBCR 1/2716/89 Pt.25 -- Legislative Council Brief
- LC Paper No. CB(3)643/09-10 -- Proposed resolution on the Mutual Legal Assistance in Criminal Matters (South Africa) Order
- LC Paper No. LS61/09-10 -- Legal Service Division Report on the Fugitive Offenders (South Africa) Order
- LC Paper No. LS62/09-10 -- Legal Service Division Report on the proposed resolution on the Mutual Legal Assistance in Criminal Matters (South Africa) Order
- LC Paper No. CB(2)1568/09-10(01) -- Article-by-article comparison of the Fugitive Offenders (South Africa) Order with the model agreement on surrender of fugitive offenders provided by the Administration
- LC Paper No. CB(2)1568/09-10(02) -- Model agreement on surrender of fugitive offenders provided by the Administration

Action

LC Paper No. CB(2)1568/09-10(03) -- Article-by-article comparison of the Mutual Legal Assistance in Criminal Matters (South Africa) Order with the model agreement on Mutual Legal Assistance in Criminal Matters provided by the Administration

LC Paper No. CB(2)1568/09-10(04) -- Model agreement on Mutual Legal Assistance in Criminal Matters provided by the Administration

The Subcommittee deliberated (index of proceedings attached at **Annex**).

Deliberations on the Mutual Legal Assistance in Criminal Matters (South Africa) Order ("MLA Order")

Article 3

2. Members enquired about the reasons for applying the principle of double criminality only in respect of a request made by the Republic of South Africa ("South Africa") to Hong Kong as specified in item (i) of paragraph 1. Members asked whether South Africa had to provide assistance to Hong Kong if the acts or omissions alleged to constitute the offence would not have constituted an offence in South Africa.

3. Senior Government Counsel, International Law Division ("SGC/ILD") said that the provision was included at the request of South Africa. Unlike the case in Hong Kong, there was no double criminality requirement in South Africa. South Africa should not refuse assistance if Hong Kong made a request in respect of an offence which would not have constituted an offence in South Africa.

Article 4

4. Members considered paragraph (3) a very reasonable provision as it set out the detailed description of information to be supplied in support of a request for assistance. Such a provision would not only facilitate execution of the request but also avoid fishing for information, particularly in cases where sensitive information was involved. Members suggested that as it would be in the interest of Hong Kong to have such a provision, the Administration should have such inclusion in future MLA agreements as far as possible. The Administration noted members' suggestion.

5. Referring to paragraph (4), members pointed out that proceedings were normally held in open court in Hong Kong. They enquired whether a request for assistance and its content were kept confidential in practice, how this could

Action

be achieved and about the circumstances under which proceedings could be held in camera.

6. SGC/ILD explained that the Requested Party was required to use its best efforts to keep the request and its contents confidential. The request would not be submitted to the court and its contents would not be disclosed unless the court made an order of disclosure. Proceedings would normally be held in open court except under certain conditions as specified in section 10(3) of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525). She drew members' attention to subsection (3)(c) which provided that a proceeding should be held in open court except where *"the criminal matter outside Hong Kong to which the proceeding relates is an investigation and the magistrate is satisfied that there are reasonable grounds for believing that it is in the interest of the person required to give evidence, or produce a thing, for the purposes of that matter that the proceeding be held in camera"*. She supplemented that an application for the holding of the proceedings in camera could only be made at the investigation stage but not at the prosecution stage. Where an application for an in-camera hearing was rejected, the Requesting Party could determine whether the request should nevertheless be executed.

Article 7

7. Members were concerned that notwithstanding the express limitations on the use and disclosure of information or evidence provided by the Requested Party, paragraph (3) permitted the use and disclosure of such information or evidence provided that the Requesting Party notified the Requested Party in advance of any such proposed disclosure.

8. SGC/ILD clarified that paragraph (3) concerned with the requirement for the information or evidence furnished by the Requested Party to the Requesting Party be kept confidential. Article 4(4) concerned with the requirement for the request for assistance from the Requesting Party and its contents be kept confidential. As required under paragraph (2) of Article 7, the Requesting Party could not disclose the information or evidence for the purposes other than those stated in the request without the prior consent of the Requested Party.

Article 8

9. Members sought explanation for the inclusion of paragraph (2).

10. SGC/ILD explained that the paragraph was added at the request of South Africa. In compliance with its law, South Africa had requested that Hong Kong should accompany its request with a statement certifying that court proceedings had been instituted or an investigation had commenced.

Action

Article 9

11. Referring to this Article which provided that "*the Central Authority of the Requested Party may require that the Central Authority of the Requesting Party return any item or object, including documents, records, or articles of evidence furnished to it in execution of a request under this Agreement as soon as possible*", members sought clarification of the meaning of the phrase "as soon as possible". Members enquired whether the Requesting Party had to return the documents, records, articles of evidence, etc. as soon as the Requested Party so requested, even if the proceedings were in progress.

12. SGC/ILD responded that as the items and objects were furnished for the purpose of the proceedings, the phrase "as soon as possible" in this Article should mean that the items and objects should be returned to the Requested Party as soon as the proceedings had been concluded. This provision included all items and objects, be they originals or copies, and its scope was wider than a similar provision in Cap. 525 which provided for the return of the originals only.

Admin

13. Members requested the Administration to clarify with South Africa whether it had the same understanding as the Administration and to advise the Subcommittee in writing.

Article 13

14. Referring to paragraph (1), members enquired whether the person in custody who was transferred to the Requesting Party for the purposes of providing assistance would also be held in custody after his transfer to the Requesting Party.

15. SGC/ILD replied in the affirmative.

Fugitive Offenders (South Africa) Order ("FO Order")

16. SGC/ILD took members through the Administration's response to issues raised about the FO Order at the last meeting as set out in LC Paper No. CB(2)1634/09-10(02). Members did not have further queries.

17. Members considered that the Administration had not provided detailed information in the article-by-article comparison. They requested the Administration to do so in future article-by-article comparisons to facilitate discussion. The Administration agreed.

Action

Conclusion

18. Members supported the FO Order and the MLA Order. Members noted that as the scrutiny period of the FO Order had been extended to 23 June 2010, the deadline for notice of amendment was 15 June 2010. Members also noted Assistant Legal Adviser 9's advice that the Legislative Council could only repeal the FO Order. Members agreed that the Subcommittee would report on its deliberations to the House Committee on 11 June 2010.

II. Any other business

19. The meeting ended at 1:32 pm.

Council Business Division 2
Legislative Council Secretariat
18 June 2010

**Proceedings of the second meeting of the
Subcommittee on Fugitive Offenders (South Africa) Order and
Mutual Legal Assistance in Criminal Matters (South Africa) Order
on Thursday, 27 May 2010 at 12:45 pm
in Conference Room B of the Legislative Council Building**

Time Marker	Speaker(s)	Subject(s)	Action required
000000 - 000910	Admin	<p>Briefing by the Administration on the MLA Order with reference to the article-by-article comparison of the Agreement between the Government of the HKSAR and the Government of Republic of South Africa and the Model Agreement [LC Paper No. CB(2)1568/09-10(03)].</p> <p><u>Article 1 to Article 2</u></p> <p>Members noted.</p>	
000911 - 001637	Admin Chairman Dr Margaret NG	<p><u>Article 3</u></p> <p>Members' concern that double criminality applied only to a request made by South Africa to Hong Kong as specified in paragraph (1)(i) and enquiry on whether South Africa had to provide assistance to Hong Kong for an offence that would not have constituted an offence in South Africa.</p> <p>SGC/ILD's response in the affirmative and explanation that there was no double criminality requirement in South Africa.</p>	
001638 - 002527	Admin Chairman Dr Margaret NG	<p><u>Article 4</u></p> <p>Members' suggestion on the inclusion of paragraph (3) in future MLA agreements in the interest of Hong Kong as it set out the detailed description of information to be supplied in support of a request.</p> <p>Members' enquiry on whether the request and its contents referred to in paragraph (4) were kept confidential in practice given the requirement to hold hearings in open court in Hong Kong.</p> <p>SGC/ILD's explanation of the conditions under which hearings could be held in camera under section 10(3) of Cap. 525.</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
002528 - 002929	Admin Chairman	<p><u>Article 5 to Article 6</u></p> <p>Members noted.</p> <p><u>Article 7</u></p> <p>Members' concern about paragraph (3) which permitted the use and disclosure of information or evidence furnished by the Requested Party provided that the Requesting Party notified the Requested Party in advance of any such proposed disclosure.</p> <p>SGD/ILD's clarification that the Requesting Party could not disclose the information without the prior consent of the Requested Party.</p> <p><u>Article 8</u></p> <p>Members' enquiry about the reasons for the inclusion of paragraph (2).</p> <p>SGC/ILD's explanation that South Africa had requested Hong Kong to accompany its request with a statement certifying that court proceedings had been instituted or an investigation had commenced in compliance with its law.</p>	
002930 - 003621	Admin Chairman Dr Margaret NG	<p><u>Article 9</u></p> <p>Members' query as to whether the Requesting Party had to return the documents, records, articles of evidence, etc to the Requested Party as soon as the Requested Party so requested.</p> <p>SGC/ILD's explanation that the items and objects should be returned to the Requested Party as soon as the proceedings had been concluded.</p> <p>Members' request for clarification with South Africa on whether it had the same understanding as the Administration and for written advice to the Subcommittee.</p>	Admin
003622 - 003712	Admin	<p><u>Article 10 to Article 12</u></p> <p>Members noted.</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
003713 - 003921	Admin Chairman	<u>Article 13</u> Members' enquiry on whether a person in custody who was transferred pursuant to paragraph (1) would also be in custody in the Requesting Party. SGC/ILD's response in the affirmative.	
003922 - 004049	Admin	<u>Article 14 to Article 19</u> <u>Schedule 2</u> Members noted.	
004050 - 004653	Chairman Admin	Briefing by the Administration on its response to issues raised about the FO Order at the last meeting as set out in LC Paper No. CB(2)1634/09-10(02).	
004654 - 004824	Chairman Admin ALA9	Members' support for the FO Order and MLA Order and agreement to report to the House Committee on 11 June 2010. ALA9's advice that the Legislative Council could only repeal the FO Order. Members' request for detailed information in future article-by-article comparisons.	Admin

Council Business Division 2
Legislative Council Secretariat
 18 June 2010