

LEGISLATIVE COUNCIL BRIEF

Fugitive Offenders Ordinance (Chapter 503)

Mutual Legal Assistance in Criminal Matters Ordinance (Chapter 525)

FUGITIVE OFFENDERS (SOUTH AFRICA) ORDER

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (SOUTH AFRICA) ORDER

INTRODUCTION

At the meeting of the Executive Council on 20 April 2010, the Council ADVISED and the Chief Executive ORDERED that –

- _____ (a) the Fugitive Offenders (South Africa) Order, at **Annex A**, should be made under section 3 of the Fugitive Offenders Ordinance to implement the bilateral agreement on surrender of fugitive offenders (SFO) signed with South Africa; and
- _____ (b) the Mutual Legal Assistance in Criminal Matters (South Africa) Order, at **Annex B**, should be made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance, with the approval of the Legislative Council, to implement the bilateral agreement on mutual legal assistance in criminal matters (MLA) signed with South Africa.

JUSTIFICATIONS

2. Hong Kong is fully committed to international cooperation in combating serious crime. In this connection, we have been expanding our network of bilateral agreements with other jurisdictions on SFO and MLA. These agreements enhance international cooperation in the fight against transnational crime and ensure reciprocal assistance between the contracting parties.

3. The Fugitive Offenders Ordinance (Cap. 503) and the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) respectively provide for the necessary statutory framework for implementing the SFO and MLA arrangements. Specifically, Cap. 503 provides for the surrender to certain places outside Hong Kong of persons wanted for prosecution, or for the imposition or enforcement of a sentence. It also provides for the treatment of persons surrendered to Hong Kong. Cap. 525 regulates the provision and obtaining 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 Fugitive Offenders (South Africa) Order

4. Section 3(1) of Cap. 503 provides that the Chief Executive in Council may, in relation to any SFO arrangements, by order direct that the procedures in Cap. 503 shall apply as between Hong Kong and the place outside Hong Kong to which the arrangements relate, subject to the limitations, restrictions, exceptions and qualifications contained in the order. We signed the SFO agreement with South Africa on 20 February 2009. The Fugitive Offenders (South Africa) Order to be made under section 3(1) of Cap. 503, which includes the agreement as a schedule, will enable the agreement to be brought into force and provide that the procedures in Cap. 503 shall apply as between Hong Kong and South Africa, subject to the terms of the agreement.

The Mutual Legal Assistance in Criminal Matters (South Africa) Order

5. Section 4(1) of Cap. 525 provides that the Chief Executive in Council may, with the approval of the Legislative Council, in relation to any arrangements for MLA, by order direct that Cap. 525 shall, subject to such modifications as may be specified in the order, apply as between Hong Kong and the place outside Hong Kong to which the arrangements relate. The MLA agreement with South Africa was signed on 20 February 2009. The Mutual Legal Assistance in Criminal Matters (South Africa) Order to be made under section 4(1) of Cap. 525 will enable the agreement to be brought into force and Cap. 525 to be applicable as between Hong Kong and South Africa. Schedule 1 to the Order contains a copy of the bilateral agreement.

6. There are certain variations between the agreement and Cap. 525 which necessitate modifications to Cap. 525 to enable Hong Kong to comply with the obligations in the agreement. Such modifications are specified in Schedule 2 to the Order in accordance with section 4(3) of the Ordinance. An explanatory statement in relation to the modifications to Cap. 525 is at **Annex C**.

Conformity and Commencement

7. Section 3(9) of Cap. 503 and section 4(2) of Cap. 525 provide that the Chief Executive in Council shall not make an order under the respective Ordinances unless the arrangements for SFO or MLA, as the case may be, to which the order relates are substantially in conformity with the provisions of the relevant Ordinance. The two agreements do so conform.

8. The commencement date of the two Orders will be appointed by the Secretary for Security by notice in the Gazette. This date will coincide with the date on which the relevant agreement enters into force and depend upon when the necessary domestic procedures of South Africa are completed. We shall settle the date after consultation with South Africa.

LEGISLATIVE TIMETABLE

9. The legislative timetable for the two Orders will be -

Fugitive Offenders (South Africa) Order

Publication in the Gazette	30 April 2010
Tabling in the Legislative Council	5 May 2010

Mutual Legal Assistance in Criminal Matters (South Africa) Order

Introduction into the Legislative Council	19 May 2010
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IMPLICATIONS OF THE ORDERS

10. The Orders are in conformity with the Basic Law, including the provisions concerning human rights. They will not affect the current binding effect of Cap. 503 and Cap. 525. They have no sustainability, economic or financial implications. Additional workload arising from the implementation of the two Orders would be absorbed from within the existing resources of the concerned bureaux/departments.

PUBLIC CONSULTATION

11. The Orders will permit the two agreements to be brought into force in accordance with the existing legal framework. Public consultation is, therefore, considered not necessary.

PUBLICITY

12. A Legislative Council brief has been issued. A spokesman will be available to answer enquiries.

BACKGROUND

13. Seventeen Orders in relation to bilateral SFO arrangements signed with foreign jurisdictions have been made under section 3(1) of Cap. 503. These jurisdictions are the Netherlands, Canada, Australia, Malaysia, the Philippines, the USA, Indonesia, India, the UK, Singapore, New Zealand, Sri Lanka, Portugal, Finland, Germany, South Korea and Ireland.

14. Twenty-five Orders in relation to bilateral MLA arrangements signed with foreign jurisdictions have been made under section 4(1) of Cap. 525. These jurisdictions are Australia, the USA, France, the UK, New Zealand, Italy, South Korea, Switzerland, Canada, the Philippines, Portugal, Ireland, the Netherlands, Ukraine, Singapore, Belgium, Denmark, Poland, Israel, Germany, Malaysia, Finland, Indonesia, Japan and Sri Lanka.

ENQUIRES

15. Enquires on this brief should be directed to –

	<u>Telephone No.</u>
Mr David Lau Principal Assistant Secretary for Security	2810 2329
Ms Veronica Wong Assistant Secretary for Security	2810 3523

Security Bureau
28 April 2010

FUGITIVE OFFENDERS (SOUTH AFRICA) ORDER

(Made by the Chief Executive in Council under section 3 of the Fugitive Offenders Ordinance (Cap. 503))

1. Commencement

This Order comes into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

2. Procedures in Ordinance to apply between Hong Kong and South Africa

In relation to the arrangements for the surrender of fugitive offenders the terms of which are recited in the Schedule, it is directed that the procedures in the Ordinance apply as between Hong Kong and the Republic of South Africa subject to the limitations, restrictions, exceptions and qualifications contained in the terms of the arrangements.

SCHEDULE

[s. 2]

AGREEMENT BETWEEN THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA AND THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA CONCERNING SURRENDER OF FUGITIVE OFFENDERS

The Government of the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong Special Administrative Region") having been duly authorised to conclude this agreement by the Central People's Government of the People's Republic of China and the Government of the Republic of South Africa;

Desiring to make provision for the reciprocal surrender of fugitive offenders;

Have agreed as follows:

ARTICLE 1

OBLIGATION TO SURRENDER

- (1) The Parties agree to surrender to each other pursuant to the provisions of this Agreement and in accordance with their respective laws any person who is found in the jurisdiction of the Requested Party and who is wanted by the Requesting Party for prosecution or for the imposition or enforcement of a sentence in respect of an offence described in Article 2.
- (2) References in this Agreement to "surrender" shall for the purposes of South African law be interpreted as having the same meaning as "extradition" or "extradite".

ARTICLE 2

OFFENCES

- (1) Surrender shall be granted for an offence coming within any of the following descriptions of offences in so far as it is according to the laws of both Parties punishable by imprisonment or other form of detention for more than one year, or by a more severe penalty:
 - (1) murder or manslaughter including criminal negligence causing

- death; culpable homicide; assault with intent to commit murder;
- (2) aiding, abetting, counselling or procuring suicide;
 - (3) maliciously wounding; maiming; inflicting grievous or actual bodily harm; assault occasioning actual bodily harm; threats to kill; intentional or reckless endangering of life whether by means of a weapon, a dangerous substance or otherwise, offences relating to unlawful wounding or injuring;
 - (4) offences of a sexual nature including rape; sexual assault; indecent assault; unlawful sexual acts on children; statutory sexual offences;
 - (5) gross indecency with a child, a mentally defective or an unconscious person;
 - (6) kidnapping; abduction; false imprisonment; unlawful confinement; dealing or trafficking in slaves or other persons; taking a hostage;
 - (7) criminal intimidation;
 - (8) offences against the law relating to dangerous drugs including narcotics and psychotropic substances and precursors and essential chemicals used in the illegal manufacture of narcotic drugs and psychotropic substances and offences related to the proceeds of drug trafficking;
 - (9) obtaining property or pecuniary advantage by deception; theft;

robbery; burglary (including breaking and entering); embezzlement; blackmail; extortion; unlawful handling or receiving of property; false accounting; any other offence in respect of property or fiscal matters involving fraud; any offence against the law relating to unlawful deprivation of property;

- (10) offences against bankruptcy law or insolvency law;
- (11) offences against the law relating to companies including offences committed by officers, directors, and promoters;
- (12) offences relating to securities and futures trading;
- (13) any offence relating to counterfeiting; any offence against the law relating to forgery or uttering what is forged;
- (14) an offence against the laws relating to protection of intellectual property, copyrights, patents or trademarks;
- (15) an offence against the law relating to bribery, corruption, secret commissions, and breach of trust;
- (16) perjury and subornation of perjury;
- (17) offences relating to the perversion or obstruction of the course of justice;
- (18) arson; criminal damage or mischief including mischief in relation to computer data;

- (19) an offence against the law relating to firearms;
- (20) an offence against the law relating to explosives;
- (21) an offence against laws relating to environmental pollution or protection of public health;
- (22) mutiny or any mutinous act committed on board a vessel at sea;
- (23) piracy involving ships or aircraft, according to international law;
- (24) unlawful seizure or exercise of control of an aircraft or other means of transportation;
- (25) genocide or direct and public incitement to commit genocide;
- (26) facilitating or permitting the escape of a person from custody;
- (27) an offence against the laws relating to the control of exportation or importation of goods of any type, or the international transfer of funds;
- (28) smuggling; offences against the laws relating to import and export of prohibited items, including historical and archaeological items;
- (29) immigration offences including fraudulent acquisition or use of a passport or visa;
- (30) arranging or facilitating for financial gain, the illegal entry of

persons into the jurisdiction of the Requesting Party;

- (31) an offence relating to gambling or lotteries;
- (32) offences relating to the unlawful termination of pregnancy;
- (33) stealing, abandoning, exposing or unlawfully detaining a child and any other offences involving the exploitation of children;
- (34) offences against the laws relating to prostitution and premises kept for the purposes of prostitution;
- (35) offences involving the unlawful use of computers;
- (36) offences relating to fiscal matters, taxes or duties, notwithstanding that the law of the Requested Party does not impose the same kind of tax or duty or does not contain a tax, duty or customs regulation of the same kind as the Requesting Party;
- (37) offences relating to the unlawful escape from custody or mutiny in prison;
- (38) bigamy;
- (39) an offence relating to women and girls;
- (40) any offence against the law relating to false or misleading trade descriptions;

- (41) offences relating to the possession or laundering of proceeds obtained from the commission of any offence for which surrender may be granted under this Agreement;
 - (42) impeding the arrest or prosecution of a person who has or is believed to have committed an offence for which surrender may be granted under this Agreement;
 - (43) offences for which fugitive offenders may be surrendered under international conventions binding on the Parties or offences created as a result of decisions of international organisations which are binding on the Parties;
 - (44) conspiracy to commit fraud or to defraud;
 - (45) conspiracy to commit or any type of association to commit any offence for which surrender may be granted under this Agreement;
 - (46) aiding, abetting, counselling or procuring the commission of, inciting, being an accessory before or after the fact to, or attempting to commit any offence for which surrender may be granted under this Agreement; and
 - (47) any other offence which each Party has confirmed to the other, by notice in writing, is an offence for which surrender may be granted in accordance with its laws.
- (2) Where surrender is requested for the purpose of carrying out a sentence, a further requirement shall be that in the case of a period of

imprisonment or detention at least six months remain to be served.

- (3) For the purposes of this Article, 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 without reference to the elements of the offence prescribed by the law of the Requesting Party.
- (4) For the purposes of paragraph (1) of this Article, an offence shall be an offence according to the laws of both Parties if the conduct constituting the offence was an offence against the law of the Requesting Party at the time it was committed and an offence against the law of the Requested Party at the time the request for surrender is received.
- (5) Where the surrender of a fugitive offender is requested for the purpose of carrying out a sentence the Requested Party may refuse to surrender the fugitive if it appears that the conviction was obtained in the fugitive's absence, unless the fugitive has the opportunity to have the case retried in the fugitive's presence, in which case the fugitive shall be considered as an accused person under this Agreement.

ARTICLE 3

SURRENDER OF NATIONALS

The Government of the Hong Kong Special Administrative Region reserves the right to refuse the surrender of nationals of the People's Republic of China. The Government of the Republic of South Africa reserves the right to refuse the surrender of its nationals.

ARTICLE 4

DEATH PENALTY

- (1) If the offence for which surrender of a fugitive offender is requested under this Agreement is punishable according to the law of the Requesting Party with the death penalty, and if in respect of such an offence the death penalty is not provided for by the law of the Requested Party or is not normally carried out, surrender may be refused unless the Requesting Party gives such assurances as the Requested Party considers sufficient that this penalty will not be imposed or, if imposed, will not be carried out.
- (2) In instances in which a Requesting Party provides assurances in accordance with this Article the death penalty if imposed by the courts of the Requesting Party, shall not be carried out.

ARTICLE 5

BASIS FOR SURRENDER

A person shall be surrendered only if the evidence is found to be sufficient according to the law of the Requested Party either to justify the committal for trial of the person sought if the offence of which that person is accused had been committed in the territory of the Requested Party or to prove that the person sought is the person convicted by the courts of the Requesting Party.

ARTICLE 6

REFUSAL OF SURRENDER

- (1) A fugitive offender shall not be surrendered if the Requested Party has substantial grounds for believing:
 - (a) that the offence of which that person is accused or was convicted is an offence of a political character;
 - (b) that the request for surrender (though purporting to be made on account of an offence for which surrender may be granted) is in fact made for the purpose of prosecution or punishment on account of race, religion, gender, nationality or political opinions; or
 - (c) that the person might, if returned, be prejudiced at that person's trial or punished, detained or restricted in his or her personal liberty by reason of race, religion, gender, nationality or political opinions.
- (2) Surrender may be refused if the Requested Party considers that:
 - (a) the offence is, having regard to all the circumstances, an offence of a trivial nature;
 - (b) there has been excessive delay, for reasons which cannot be

imputed to the person sought, in bringing charges, in bringing the case to trial or in making the person serve his or her sentence or the remainder thereof;

- (c) the offence for which surrender is sought was committed within the jurisdiction of its courts and the Requested Party has indicated that the person sought will be proceeded against;
 - (d) in the case of a person whose surrender is sought for the purposes of trial, that person would not receive at trial in the Requesting Party the minimum guarantees contained in Article 14 of the International Covenant on Civil and Political Rights or, in the case of a person whose surrender is sought for an offence of which that person has been convicted, that person did not receive such guarantees at trial;
 - (e) there are substantial grounds for believing that the person whose surrender is sought would be in danger of being subjected in the Requesting Party to torture or cruel, inhuman or degrading treatment or punishment; or
 - (f) in the circumstances of the case, the surrender would be incompatible with humanitarian considerations in view of the age, health or other personal circumstances of the person sought.
- (3) The Requested Party shall refuse surrender for offences under military law that are not offences under ordinary criminal law.

ARTICLE 7

PRIOR PROCEEDINGS

- (1) A fugitive offender who has been finally acquitted, convicted or pardoned or whose conviction has been set aside under the law of the Requesting or Requested Party for any offence set out in the request shall not be surrendered for that offence.

- (2) Surrender may be refused if the competent authorities of the Requested Party have decided -
 - (a) not to prosecute the person sought for the acts or omissions for which surrender is requested;

 - (b) to discontinue any criminal proceedings which have been instituted against the person sought for those acts or omissions;
or

 - (c) to investigate the person sought for the same acts or omissions.

ARTICLE 8

POSTPONEMENT AND TEMPORARY SURRENDER

- (1) If the person sought is being proceeded against or is under punishment in the jurisdiction of the Requested Party for any offence other than that for which surrender is requested, surrender may be granted or deferred until the conclusion of the proceedings and the execution of any

punishment imposed.

- (2) (a) If the request to surrender is granted in the case of a person who is being prosecuted or is serving a sentence in the Requested Party, that Party may temporarily surrender the person sought to the Requesting Party for the purpose of prosecution.
- (b) Where a person so surrendered is serving a sentence, the person shall be kept in custody in the jurisdiction of the Requesting Party and shall be returned to the Requested Party after the conclusion of the proceedings against that person, in accordance with conditions to be determined by mutual agreement between the Requesting and Requested Parties.
- (3) A person serving a sentence in the Requested Party who is surrendered under this Article shall, whilst in custody in the Requesting Party, be regarded as continuing to serve the sentence imposed in the Requested Party.

ARTICLE 9

THE REQUEST AND SUPPORTING DOCUMENTS

- (1) Requests for surrender and related documents shall be transmitted –
 - (a) in the case of requests by the Hong Kong Special Administrative Region, directly to the Minister for Justice and Constitutional Development in South Africa; or

(b) in the case of requests by the Republic of South Africa, directly to the Secretary for Justice in Hong Kong,

or through such channels as may be agreed upon by the Parties from time to time.

(2) The request shall be accompanied by:

(a) as accurate a description as possible of the person sought, together with any other information which would help to establish that person's identity, nationality and location;

(b) a statement of each offence for which surrender is sought and a statement of the acts and omissions which are alleged against the person in respect of each offence; and

(c) the text of the legal provisions, if any, creating the offence, and a statement of the law setting out the punishment which can be imposed therefor and any time limit on the institution of proceedings, or on the execution of any punishment for that offence.

(3) If the request relates to an accused person it shall also be accompanied by a copy of the warrant of arrest issued by a judge, magistrate or other competent authority of the Requesting Party and by such evidence whether taken in the jurisdiction of the Requesting Party or elsewhere as, according to the law of the Requested Party, would justify committal for trial if the offence had been committed within the jurisdiction of the Requested Party.

- (4) If the request relates to a person already convicted or sentenced, it shall also be accompanied by:
- (a) a copy of the judgment or a record of the conviction or sentence or, if a copy is not available, a statement by a judicial officer or other competent authority that the person has been convicted or a copy of any record of conviction that reflects the charge and the conviction;
 - (b) if the person was convicted but not sentenced, a statement to that effect by the appropriate court and a copy of the warrant of arrest; or
 - (c) if the person was sentenced, a statement indicating that the sentence is enforceable and how much of the sentence has been carried out.

ARTICLE 10

AUTHENTICATION

- (1) Documents supporting a request for surrender shall be admitted in evidence as proof of the facts contained therein if duly authenticated. Documents are duly authenticated if they are signed or certified by a judge, magistrate or an official of the Requesting Party and sealed with the official seal of a competent authority of the Requesting Party.
- (2) Any translation of documents submitted in support of a request for

surrender provided by the Requesting Party shall be admitted for all purposes in proceedings for surrender.

ARTICLE 11

LANGUAGE OF DOCUMENTATION

All documents submitted in accordance with this Agreement shall be in, or translated into, a language acceptable to the Requested Party.

ARTICLE 12

ADDITIONAL INFORMATION

- (1) If the information communicated by the Requesting Party is found to be insufficient to allow the Requested Party to make a decision in pursuance of this Agreement, the latter Party shall request the necessary supplementary information and may fix a time-limit for receipt thereof.
- (2) If the person whose surrender is sought is under arrest and the additional information furnished is not sufficient in accordance with this Agreement or is not received within the time specified, the person may be discharged. Such discharge shall not preclude the Requesting Party from making a fresh request for the surrender of the person.

ARTICLE 13

PROVISIONAL ARREST

- (1) In urgent cases the person sought may, at the discretion of the Requested Party and in accordance with its law, be provisionally arrested on the application of the Requesting Party.
- (2) The application for provisional arrest shall contain an indication of intention to request the surrender of the person sought, a statement of the existence of a warrant of arrest or a judgment of conviction against that person, information concerning identity, nationality and probable location, a description of the person, a brief description of the offence and the facts of the case and a statement of the sentence that can be or has been imposed for the offence and, where applicable, how much of that sentence remains to be served.
- (3) An application for provisional arrest may be transmitted in writing in the same manner as provided for in Article 9(1). The facilities of the International Criminal Police Organization (INTERPOL) may also be used to transmit such a request.
- (4) The provisional arrest of the person sought shall be terminated upon the expiration of 60 days from the date of arrest if the request for surrender and supporting documents have not been received. The release of a person pursuant to this paragraph shall not prevent the institution or continuation of surrender proceedings if the request and the supporting documents are received subsequently.

ARTICLE 14

CONCURRENT REQUESTS

If the surrender of a person is requested concurrently by one of the Parties and another jurisdiction with whom the Hong Kong Special Administrative Region or the Republic of South Africa, whichever is being requested, has agreements or arrangements for the surrender of accused and convicted persons, the Requested Party shall make its decision having regard to all the circumstances. These circumstances shall include whether the concurrent request was made pursuant to an agreement for the surrender of fugitive offenders, the relevant provisions of the agreements or arrangements, the relative seriousness and place of commission of the offences, the respective dates of the requests, the nationality and ordinary place of residence of the person sought and the victim and the possibility of subsequent surrender to another jurisdiction. The Requested Party shall notify the Requesting Party of its decision.

ARTICLE 15

REPRESENTATION AND COSTS

- (1) The Requested Party shall make all necessary arrangements for, and meet the costs of, any proceedings arising out of a request for surrender and shall otherwise represent the interests of the Requesting Party.
- (2) If it becomes apparent that exceptional expenses may be incurred as a result of a request for surrender the Parties shall consult with a view to

deciding how these expenses will be met.

- (3) The Requested Party shall bear the expenses arising out of the arrest and detention of the person whose surrender is sought until that person is surrendered. The Requesting Party shall bear all subsequent expenses.
- (4) The Requesting Party shall pay all the expenses incurred in the translation of documents relating to the surrender of a fugitive offender and in conveying the person from the territory of the Requested Party.

ARTICLE 16

ARRANGEMENTS FOR SURRENDER

- (1) The Requested Party shall, as soon as a decision on the request for surrender has been made, communicate that decision to the Requesting Party.
- (2) If the request for surrender is granted, the relevant authorities of the Requesting and Requested Parties shall agree on the date and place for the surrender of the person sought.
- (3) Subject to the provisions of paragraph (4) of this Article, the Requesting Party shall remove the person within the period specified by the Requested Party and if the person is not removed within that period the Requested Party may refuse to surrender that person for the same offence.

- (4) If circumstances beyond its control prevent a Party from surrendering or taking over the person to be surrendered, it shall notify the other Party. In that case, the two Parties shall agree on a new date for surrender and the provisions of paragraph (3) of this Article shall apply.

ARTICLE 17

SURRENDER OF PROPERTY

- (1) To the extent permitted under the law of the Requested Party, when a request for surrender of a fugitive offender is granted, the Requested Party:
- (a) shall seize and hand over to the Requesting Party all articles, including sums of money which may serve as proof of the offence, or which have been acquired by the person sought as a result of the offence and are in that person's possession or are discovered subsequently;
 - (b) may, if the articles in question are liable to seizure or confiscation within the jurisdiction of the Requested Party in connection with pending proceedings, temporarily retain them or hand them over on condition they are returned.
- (2) The provisions of paragraph (1) of this Article shall not prejudice the rights of the Requested Party or of any person other than the person sought. 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.

- (3) The articles in question shall, if the Requesting Party so requests, be surrendered to that Party even if the surrender cannot be carried out due to the death or escape of the person sought.

ARTICLE 18

SPECIALTY AND RESURRENDER

- (1) A fugitive offender who has been surrendered shall not be proceeded against, sentenced, detained or subjected to any other restriction of personal liberty by the Requesting Party for any offence committed prior to that person's surrender other than:
 - (a) the offence or offences in respect of which surrender was granted;
 - (b) an offence, however described, based on substantially the same facts in respect of which surrender was granted, provided such offence is one for which the fugitive offender could be surrendered under this Agreement, and provided further such offence is punishable by a penalty no more severe than the penalty for the offence for which the fugitive offender was surrendered;
 - (c) any other offence for which surrender may be granted under this Agreement in respect of which the Requested Party may consent to the fugitive offender being dealt with;

unless the fugitive offender has first had an opportunity to exercise the right to leave the jurisdiction of the Party to which that person has been surrendered and has not done so within 40 days or has voluntarily returned to that jurisdiction after having left it.

- (2) A fugitive offender who has been surrendered shall not be re-surrendered to another jurisdiction for an offence committed prior to the fugitive offender's surrender unless:
 - (a) the Requested Party consents to such surrender; or
 - (b) the fugitive offender has first had an opportunity to exercise the right to leave the jurisdiction of the Party to which that person has been surrendered and has not done so within 40 days or has voluntarily returned to that jurisdiction having left it.
- (3) A Party considering requests for consent under paragraphs (1)(c) or (2)(a) of this Article may require the submission of any document or statement referred to in Article 9, and any statement made by the surrendered person on the matter.

ARTICLE 19

WAIVER

If the person sought consents to be surrendered to the Requesting Party the Requested Party shall, subject to its domestic law, surrender the person as expeditiously as possible. Article 18 shall apply to a person surrendered pursuant to this Article.

ARTICLE 20

TRANSIT

- (1) Either Party may authorize transportation through its jurisdiction of a person surrendered to the other Party by a third Party.
- (2) A request for transit shall be transmitted in the same manner as provided for in Article 9(1).
- (3) The request for transit shall contain -
 - (a) a description of the person together with any information that may help to establish his or her identity and nationality; and
 - (b) a brief statement of the facts of the case, and a list of the offences for which the person was surrendered by the third Party.
- (4) Permission for the transit of a person shall, subject to the law of the Requested Party, include permission for the person to be held in custody during transit. If transportation is not continued within 48 hours the executive authority of the Party in whose jurisdiction the person is being held may direct that the person be released.
- (5) Authorization is not required when air transportation is used by one Party and no landing is scheduled on the territory of the other Party. If

an unscheduled landing does occur, the Party in whose jurisdiction such landing occurs may require a request for transit to be made pursuant to paragraph (2) of this Article, and it may detain the person subject to the provision of its law, until the request for transit is received and the transit is effected.

ARTICLE 21

CONSULTATION

The Departments of Justice of the Hong Kong Special Administrative Region and the Republic of South Africa or persons designated by the respective Departments of Justice may consult each other directly in connection with processing of individual cases and in furtherance of efficient implementation of the Agreement.

ARTICLE 22

ENTRY INTO FORCE, SUSPENSION AND TERMINATION

- (1) This Agreement shall enter into force 30 days after the date on which the Parties have notified each other in writing that their respective requirements for the entry into force of this Agreement have been complied with.
- (2) The provisions of this Agreement shall apply to requests made after its entry into force regardless of the date of the commission of the offence or offences set out in the request.

- (3) Either Party may suspend or terminate this Agreement at any time by giving notice to the other in the same manner as provided for in Article 9(1). Suspension shall take effect on receipt of the relevant notice. In the case of termination the Agreement shall cease to have effect six months after the receipt of notice to terminate; provided that the Parties may by mutual consent agree to terminate the Agreement with immediate effect.

In witness whereof the undersigned, being duly authorised by their respective governments have signed this Agreement.

Done at Hong Kong this 20th day of February, Two thousand and Nine in the Chinese and English languages, each text being equally authentic.

Clerk to the Executive Council

COUNCIL CHAMBER

2010

Explanatory Note

This Order applies the procedures for the surrender of fugitive offenders set out in the Fugitive Offenders Ordinance (Cap. 503) as between Hong Kong and the Republic of South Africa. The Order is made in consequence of the arrangements for the surrender of fugitive offenders entered into by the Government of the Hong Kong Special Administrative Region and the

Government of the Republic of South Africa and signed in Hong Kong on 20 February 2009. The terms of those arrangements are recited in the Schedule to the Order. Those procedures are subject to the limitations, restrictions, exceptions and qualifications contained in the terms so recited.

**MUTUAL LEGAL ASSISTANCE IN CRIMINAL
MATTERS (SOUTH AFRICA) ORDER**

(Made by the Chief Executive in Council under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) with the approval of the Legislative Council)

1. Commencement

This Order comes into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

2. Ordinance to apply between Hong Kong and South Africa

In relation to the arrangements for mutual legal assistance a copy of which is annexed at Schedule 1, it is directed that the Ordinance, subject to the modifications specified in Schedule 2, applies as between Hong Kong and the Republic of South Africa.

SCHEDULE 1

[s. 2]

AGREEMENT BETWEEN THE GOVERNMENT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
OF THE PEOPLE'S REPUBLIC OF CHINA AND THE
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA
CONCERNING MUTUAL LEGAL ASSISTANCE
IN CRIMINAL MATTERS

The Government of the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong Special Administrative Region") having been duly authorised by the Central People's Government of the People's Republic of China and the Government of the Republic of South Africa;

Desiring to extend to each other the widest measure of co-operation in criminal matters and to improve the effectiveness of law enforcement of both Parties in the investigation, prosecution and prevention of crime and the confiscation of criminal proceeds;

Have agreed as follows:

ARTICLE 1

SCOPE OF ASSISTANCE

- (1) The Parties shall provide, in accordance with the provisions of this Agreement, mutual assistance in the investigation and prosecution of criminal offences and in proceedings related to criminal matters.
- (2) Assistance shall include:
 - (a) identifying and locating persons;
 - (b) serving of documents;
 - (c) the obtaining and delivery of statements, evidence, articles or documents, including the execution of letters rogatory and lending of exhibits;

- (d) executing requests for search and seizure;
 - (e) facilitating the personal appearance of witnesses;
 - (f) effecting the temporary transfer of persons in custody to appear as witnesses;
 - (g) obtaining production of judicial or official records;
 - (h) tracing, restraining, forfeiting and confiscating the proceeds and instrumentalities of criminal activities; and
 - (i) providing information, documents and records.
- (3) Assistance under this Agreement may be granted in connection with offences against a law related to taxation, customs duties, foreign exchange control or other revenue matters but not in connection with non-criminal proceedings relating thereto.
- (4) This Agreement is intended solely for mutual assistance between the Parties. The provisions of this Agreement shall not give rise to any right on the part of any private person to obtain, suppress or exclude any evidence or to impede the execution of a request.
- (5) The Parties may provide assistance pursuant to other agreements, arrangements or practices.

ARTICLE 2

CENTRAL AUTHORITY

- (1) Requests under this Agreement shall be made by the Central Authority of the Requesting Party to the Central Authority of the Requested Party.
- (2) The Central Authority of the Hong Kong Special Administrative Region shall be the Secretary for Justice or his or her duly authorised officer. The Central Authority for the Republic of South Africa shall be the Director-General of the Department of Justice and Constitutional Development. Either Party may, at any time, change its Central Authority in which case it shall notify the other of the change.
- (3) The Central Authorities may communicate directly with one another for the purposes of this Agreement.

ARTICLE 3

LIMITATIONS ON COMPLIANCE

- (1) The Requested Party shall refuse assistance if:
 - (a) the request for assistance impairs the sovereignty, security or public order of the Republic of South Africa or, in the case of the Government of the Hong Kong Special Administrative Region, the People's Republic of China;

- (b) the request for assistance relates to an offence of a political character;
- (c) the request for assistance relates to an offence under military law which would not be an offence under the ordinary criminal law of the Requested Party;
- (d) there are substantial grounds for believing that the request for assistance will result in a person being prejudiced on account of his race, gender, religion, nationality or political opinions;
- (e) the request for assistance relates to the prosecution of a person for an offence in respect of which the person has been convicted, acquitted or pardoned in the Requesting or Requested Party or for which the person could no longer be prosecuted by reason of lapse of time according to the law of the Requesting Party;
- (f) the execution of the request would prejudice the public order or similar essential interests of the Requested Party;
- (g) the Requesting Party cannot comply with any conditions in relation to confidentiality or limitation as to the use of material provided;
- (h) the execution of the request may prejudice the safety of witnesses or victims; or
- (i) in the case of a request by the Republic of South Africa the acts or omissions alleged to constitute the offence would not, if they had taken place within the jurisdiction of the Hong Kong Special Administrative Region, have constituted an offence.

- (2) The Requested Party may refuse assistance if the request relates to an offence which carries the death penalty in the Requesting Party but in respect of which the death penalty is either not provided for in the Requested Party or not normally carried out unless the Requesting Party gives such assurances as the Requested Party considers sufficient that the death penalty will not be imposed or, if imposed, not carried out.
- (3) In instances in which the Requesting Party provides an assurance in accordance with paragraph (2) of this Article, the death penalty, if imposed by the courts of the Requesting Party, shall not be carried out.
- (4) The Requested Party may postpone assistance if execution of the request would interfere with an ongoing investigation or prosecution in the Requested Party.
- (5) Before denying or postponing assistance pursuant to this Article, the Requested Party, through its Central Authority –
 - (a) shall promptly inform the Requesting Party of the reason for considering denial or postponement; and
 - (b) shall consult with the Requesting Party to determine whether assistance may be given subject to such terms and conditions as the Requested Party deems necessary.
- (6) If the Requesting Party accepts assistance subject to the terms and conditions referred to in paragraph (5)(b) of this Article, it shall comply with those terms and conditions.

ARTICLE 4

REQUESTS

- (1) Requests shall be made in writing.
- (2) Requests for assistance shall include:
 - (a) the name of the authority on behalf of which the request is made;
 - (b) a description of the purpose of the request and the nature of the assistance;
 - (c) a description of the nature of the investigation, prosecution, offence or criminal matter and whether or not proceedings have been instituted;
 - (d) where proceedings have been instituted, details of the proceedings;
 - (e) a summary of the relevant facts and laws;
 - (f) any requirements for confidentiality;
 - (g) details of any particular procedure the Requesting Party wishes to be followed; and
 - (h) details of the period within which the request should be complied with.
- (3) To the extent necessary and possible, a request shall also include:

- (a) information in respect of the identity and location of any person from whom evidence is sought;
- (b) information on the identity and location of any person to be served, that person's relationship to the proceedings, and the manner in which service is to be effected;
- (c) information on the identity and whereabouts of any person to be located;
- (d) a precise description of any place or person to be searched and of any articles to be seized;
- (e) a description of the manner in which any testimony or statement is to be taken and recorded;
- (f) a list of questions to be asked of a witness;
- (g) a description of any particular procedure to be followed in executing the request;
- (h) information as to the allowances and expenses to which a person asked to appear in the Requesting Party will be entitled;
- (i) any other information to facilitate execution of the request; and
- (j) a court order if any, or certified copy thereof, which is to be enforced and a statement to the effect that it is a final order.

- (4) Except when otherwise authorized by the Requesting Party, the Requested Party shall use its best efforts to keep confidential a request and its contents and shall where necessary ensure the safety of witnesses and victims. If the request cannot be executed without breaching such confidentiality, the Central Authority of the Requested Party shall so inform the Central Authority of the Requesting Party, which shall then determine whether the request should nevertheless be executed.
- (5) All documents submitted in support of a request shall be in or translated into a language acceptable to the Requested Party.

ARTICLE 5

EXECUTION OF REQUESTS

- (1) The Central Authority of the Requested Party shall promptly execute the request or arrange for its execution through its competent authorities.
- (2) Requests shall be executed in accordance with the law of the Requested Party. However, the method of execution specified in the request shall be followed except insofar as it is not permitted by the law of the Requested Party.
- (3) The Requested Party shall promptly inform the Requesting Party of any circumstances which are likely to cause a significant delay in responding to the request.

- (4) The Requested Party shall promptly inform the Requesting Party of a decision not to comply in whole or in part with a request for assistance and the reason for that decision.
- (5) The Central Authority of the Requested Party shall respond to reasonable inquiries by the Central Authority of the Requesting Party concerning progress towards the execution of the request.

ARTICLE 6

REPRESENTATION AND EXPENSES

- (1) The Requested Party shall make all necessary arrangements for the representation of the Requesting Party in any proceedings arising out of a request for assistance and shall otherwise represent the interests of the Requesting Party.
- (2) The Requested Party shall assume all ordinary expenses of executing a request within its boundaries, except:
 - (a) fees of counsel retained at the request of the Requesting Party;
 - (b) fees of experts;
 - (c) expenses of translation;
 - (d) expenses of transcription; and
 - (e) travel expenses and allowances of persons.

- (3) If during the execution of the request it becomes apparent that expenses of an extraordinary nature, including the expense of managing property, are required to fulfil the request, the Parties shall consult to determine the terms and conditions under which the execution of the request may continue.

ARTICLE 7

LIMITATIONS OF USE

- (1) The Requested Party may require, after consultation with the Requesting Party, that information or evidence furnished be kept confidential or be disclosed or used only subject to such terms and conditions as it may specify.
- (2) The Requesting Party shall not disclose or use information or evidence furnished for purposes other than those stated in the request without the prior consent of the Central Authority of the Requested Party.
- (3) Nothing in this Article shall preclude the use or disclosure of information to the extent that there is an obligation to do so under the law of the Requesting Party. The Requesting Party shall notify the Requested Party in advance of any such proposed disclosure.

ARTICLE 8

OBTAINING OF EVIDENCE, ARTICLES OR DOCUMENTS

- (1) Where a request is made that evidence be taken for the purpose of an investigation, prosecution or proceeding in relation to a criminal matter in the jurisdiction of the Requesting Party, the Requested Party shall arrange to have such evidence taken.
- (2) A request for assistance in obtaining evidence made to the Central Authority of the Republic of South Africa shall be accompanied by a statement by or on behalf of the Central Authority of the Hong Kong Special Administrative Region in which it is certified:
 - (a) that proceedings have been instituted in a court or tribunal exercising jurisdiction in the Hong Kong Special Administrative Region; or
 - (b) that there are reasonable grounds for believing that an offence has been committed in the Hong Kong Special Administrative Region or that it is necessary to determine whether an offence has been so committed, and that an investigation in respect thereof is being conducted in the Hong Kong Special Administrative Region.
- (3) For the purposes of this Agreement, the giving or taking of evidence shall include the production of documents, records or other material.
- (4) Where, pursuant to a request for assistance, a person is to give evidence for the purpose of proceedings in the Requesting Party, the parties to the relevant proceedings in the Requesting Party, their legal representatives or

representatives of the Requesting Party may, subject to the laws of the Requested Party, appear and question the person giving that evidence.

- (5) A person who is required to give evidence in the Requested Party pursuant to a request for assistance may decline to give evidence where either:
 - (a) the law of the Requested Party would permit that witness to decline to give evidence in similar circumstances in proceedings which originated in the Requested Party; or
 - (b) where the law of the Requesting Party would permit him to decline to give evidence in such proceedings in the Requesting Party.
- (6) If any person claims that there is a right to decline to give evidence under the law of the Requesting Party, the Requested Party shall with respect thereto rely on a certificate of the Central Authority of the Requesting Party.
- (7) The Requesting Party may request that documents, records, and any other items that are produced or that are the subject of evidence taken under this Article in the Requested Party be certified in accordance with requirements specified in the request.

ARTICLE 9

RETURN OF ITEMS AND OBJECTS

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.

ARTICLE 10

SERVICE OF DOCUMENTS

- (1) The Requested Party shall use its best efforts to effect service of any document transmitted to it for the purpose of service.
- (2) The Requesting Party shall transmit a request for the service of a document pertaining to a response or appearance in the Requesting Party a reasonable time before the scheduled response or appearance.
- (3) A request for the service of a document pertaining to an appearance in the Requesting Party shall include such information as the Central Authority of the Requesting Party is reasonably able to provide of outstanding warrants or other judicial orders in criminal matters against the person to be served.
- (4) The Requested Party shall, subject to its law, return proof of service in the manner required by the Requesting Party.
- (5) A person who fails to comply with any process served on him or her which requires his or her appearance in the Requesting Party shall not if he or she fails to appear, be liable to any penalty or coercive measures in the Requesting Party or Requested Party.

ARTICLE 11

PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS

- (1) Subject to its law the Requested Party shall provide copies of publicly available documents.
- (2) The Requested Party may provide copies of any document, record or information in the possession of a government department or agency, but not publicly available, to the same extent and under the same conditions as such document, record or information would be available to its own law enforcement and judicial authorities.

ARTICLE 12

CERTIFICATION AND AUTHENTICATION

Documents, transcripts, records, statements, court orders or other material which are to be transmitted to the Requesting Party, and which the Requesting Party requires to be authenticated:

- (a) are authenticated if they purport to be signed by or on behalf of the Central Authority of the Requested Party; and
- (b) need be certified or authenticated by consular or diplomatic officers only if the law of the Requesting Party so requires.

ARTICLE 13

TRANSFER OF PERSONS IN CUSTODY

- (1) A person in custody in the Requested Party whose presence is required in the Requesting Party for the purposes of providing assistance 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 person transferred shall, whilst in custody in the Requesting Party, be regarded as continuing to serve the sentence imposed in the Requested Party.
- (2) Where the sentence of imprisonment of a person transferred pursuant to this Article is likely to expire whilst the person is in the jurisdiction of the Requesting Party, the Requested Party shall so advise the Requesting Party which shall ensure the person's release from custody upon the expiration of the sentence.

ARTICLE 14

TRANSFER OF OTHER PERSONS

- (1) The Requesting Party may request the assistance of the Requested Party in making a person available for the purpose of providing assistance pursuant to this Agreement.

- (2) The Requested Party shall, if satisfied that satisfactory arrangements for that person's security will be made by the Requesting Party, request the person to travel to the Requesting Party to provide assistance.

ARTICLE 15

SAFE CONDUCT

- (1) A person who consents to provide assistance pursuant to Articles 13 or 14 shall not be prosecuted, detained, or restricted in his personal liberty in the Requesting Party for any criminal offence or civil matter which preceded his departure from the Requested Party.
- (2) Paragraph (1) shall not apply if the person, not being a person in custody transferred under Article 13, and being free to leave, has not left the Requesting Party within a period of 15 days after being notified that his presence is no longer required, or having left the Requesting Party, has returned.
- (3) A person who consents to give evidence under Articles 13 or 14 shall not be subject to prosecution based on his testimony, except for perjury or contempt of court.
- (4) A person who consents to provide assistance pursuant to Articles 13 or 14 shall not be required to give evidence in any proceedings other than the proceedings to which the request relates.

- (5) A person who does not consent to provide assistance pursuant to Articles 13 or 14 shall not by reason thereof be liable to any penalty or coercive measure by the courts of the Requesting Party or Requested Party.

ARTICLE 16

SEARCH AND SEIZURE

- (1) The Requested Party shall, insofar as its law permits, carry out requests for search, seizure and delivery of any material to the Requesting Party which is relevant to a proceeding or investigation in relation to a criminal matter.
- (2) The Requested Party shall provide such information as may be required by the Requesting Party concerning the result of any search, the place of seizure, the circumstances of seizure, and the subsequent custody of the property seized. The Requesting Party may request that each official who has had custody of a seized item certify the identity of the item, the continuity of custody, and the integrity of its condition in accordance with requirements specified in the request.
- (3) The Requesting Party shall observe any conditions imposed by the Requested Party in relation to any seized property which is delivered to the Requesting Party.

ARTICLE 17

PROCEEDS OF CRIME

- (1) The Requested Party shall, upon request, endeavour to ascertain whether any proceeds of a crime against the law of the Requesting Party are located within its jurisdiction and shall notify the Requesting Party of the result of its inquiries. In making the request, the Requesting Party shall notify the Requested Party of the basis of its belief that such proceeds may be located in its jurisdiction.
- (2) Where pursuant to paragraph (1) suspected proceeds of crime are found the Requested Party shall take such measures as are permitted by its law to prevent any dealing in, transfer or disposal of, those suspected proceeds of crime, pending a final determination in respect of those proceeds by a court of the Requesting Party.
- (3) Where a request is made for assistance in securing the confiscation of proceeds such assistance shall be given by whatever means are appropriate. This may include enforcing an order made by a court in the Requesting Party and initiating or assisting in proceedings in relation to the proceeds to which the request relates.
- (4) Proceeds confiscated pursuant to this Agreement shall be retained by the Requested Party unless otherwise agreed upon between the Parties.

ARTICLE 18

SETTLEMENT OF DISPUTES

If any dispute arising out of the interpretation, application or implementation of this Agreement cannot be resolved through consultation between the Central Authorities of the Parties, the Parties shall by mutual consent resort to diplomatic channels.

ARTICLE 19

ENTRY INTO FORCE AND TERMINATION

- (1) This Agreement shall enter into force thirty days after the date on which the Parties have notified each other in writing that their respective requirements for the entry into force of the Agreement have been complied with.
- (2) Either Party may terminate this Agreement at any time by giving notice to the other. In that event the Agreement shall cease to have effect on receipt of that notice. Requests for assistance which have been received prior to termination of the Agreement shall nevertheless be processed in accordance with the terms of the Agreement as if the Agreement was still in force.

In witness whereof the undersigned, being duly authorised by their respective governments have signed this Agreement.

Done at Hong Kong, this 20th day of February, Two thousand and Nine in the Chinese and English languages, each text being equally authentic.

SCHEDULE 2

[s. 2]

MODIFICATIONS TO THE ORDINANCE

1. Section 5(1)(d) of the Ordinance is modified to read as follows –
 - “(d) there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of the person’s race, gender,* religion, nationality or political opinions;”.

2. Section 5(1)(e) of the Ordinance is modified to read as follows –
 - “(e) 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 the place,** 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 that place or Hong Kong*,** in respect of that offence or of another external offence constituted by the same act or omission as that offence;”.

3. Section 5(1) of the Ordinance is modified by adding –
 - “(ea) the request relates to the prosecution of a person in respect of an act or omission that can no longer be prosecuted in the place by reason of lapse of time under the law of the place;**”.

4. Section 17(3)(b) of the Ordinance is modified to read as follows –

- “(b) the person, being free to leave Hong Kong, has not left Hong Kong within a period of 15 days after being notified that the person’s presence is no longer required for any of the following purposes* ~~has had an opportunity of leaving Hong Kong and has remained in Hong Kong otherwise than for**~~ –
- (i) the purpose to which the request relates; ~~or**~~
 - (ii) the purpose of giving assistance in relation to a criminal matter in Hong Kong certified in writing by the Secretary for Justice to be a criminal matter in relation to which it is desirable that the person give assistance.”.

* The words underlined are added. (The underlining is for ease of identifying the modification).

** The words crossed out are deleted. (The crossing out is for ease of identifying the modification).

Clerk to the Executive Council

COUNCIL CHAMBER

2010

Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (“the Ordinance”) applies as between Hong Kong and the Republic of South Africa. The Order is made in consequence of the

arrangements for mutual legal assistance entered into by the Government of the Hong Kong Special Administrative Region and the Government of the Republic of South Africa and signed in Hong Kong on 20 February 2009. A copy of those arrangements is annexed at Schedule 1 to the Order. The Ordinance is to apply subject to the modifications specified in Schedule 2 to the Order.

**Explanatory Statement on the Modifications to the
Mutual Legal Assistance in Criminal Matters Ordinance**

**Mutual Legal Assistance in
Criminal Matters (South Africa) Order**

Prejudice to a Person

Section 5(1)(d) of the Ordinance provides that the Secretary for Justice shall refuse assistance if there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of the person's race, religion, nationality or political opinions. Article 3(1)(d) of the Hong Kong / South Africa Agreement provides for this protection to the person if he / she is being prejudiced on account of his / her gender as well. The modification to section 5(1)(d) of the Ordinance reflects the provision in the Agreement by extending the protection to cover the person's gender.

Previous Convictions etc

2. 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 in respect of which he has been convicted, acquitted, pardoned or punished in the requesting jurisdiction. The former part of Article 3(1)(e) of the Hong Kong / South Africa Agreement provides for this protection in relation to conviction etc in the requested jurisdiction as well. 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.

Lapse of Time

3. The latter part of Article 3(1)(e) of the Hong Kong / South Africa 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 according to the law of the requesting party. The addition of subsection (ea) to section 5(1) of the Ordinance reflects such protection.

Immunities

4. Section 17(1) of the Ordinance gives certain immunities to a person who comes to Hong Kong from another jurisdiction to render 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 rendering assistance. Article 15(2) of the Hong Kong / South Africa Agreement provides that the immunities will continue to be applicable within a period of 15 days after the person has been notified that his presence is no longer required. The modification reflects the additional protection in the Agreement by providing for a period of 15 days in section 17(3)(b) of the Ordinance.