立法會
Legislative Council

LC Paper No. CB(2)262/19-20
(These minutes have been seen by the Administration)

Ref : CB2/PL/SE

Panel on Security

Minutes of meeting
held on Tuesday, 4 June 2019, at 2:30 pm
in Conference Room 1 of the Legislative Council Complex

Members present	**:**	Hon CHAN Hak-kan, BBS, JP (Chairman) Hon Jeffrey LAM Kin-fung, GBS, JP Hon Starry LEE Wai-king, SBS, JP Hon CHAN Kin-por, GBS, JP Dr Hon Priscilla LEUNG Mei-fun, SBS, JP Hon WONG Kwok-kin, SBS, JP Hon Paul TSE Wai-chun, JP Hon Claudia MO Hon Frankie YICK Chi-ming, SBS, JP Hon YIU Si-wing, BBS Hon MA Fung-kwok, SBS, JP Hon Charles Peter MOK, JP Hon CHAN Chi-chuen Hon CHAN Han-pan, BBS, JP Hon LEUNG Che-cheung, SBS, MH, JP Hon Kenneth LEUNG Hon Alice MAK Mei-kuen, BBS, JP Hon KWOK Wai-keung, JP Hon Dennis KWOK Wing-hang Hon Christopher CHEUNG Wah-fung, SBS, JP Dr Hon Fernando CHEUNG Chiu-hung Dr Hon Elizabeth QUAT, BBS, JP Hon POON Siu-ping, BBS, MH Hon CHUNG Kwok-pan Hon Alvin YEUNG Hon CHU Hoi-dick Hon Jimmy NG Wing-ka, JP Dr Hon Junius HO Kwan-yiu, JP

Hon LAM Cheuk-ting
Hon Holden CHOW Ho-ding
Hon YUNG Hoi-yan
Hon CHAN Chun-ying, JP
Hon CHEUNG Kwok-kwan, JP
Hon HUI Chi-fung
Dr Hon CHENG Chung-tai
Hon AU Nok-hin
Hon Tony TSE Wai-chuen, BBS

Members attending : Hon Tommy CHEUNG Yu-yan, GBS, JP
Hon WU Chi-wai, MH
Dr Hon KWOK Ka-ki
Dr Hon Helena WONG Pik-wan
Hon Martin LIAO Cheung-kong, SBS, JP
Hon SHIU Ka-fai
Hon KWONG Chun-yu
Hon Jeremy TAM Man-ho
Hon Gary FAN Kwok-wai

Members absent : Hon James TO Kun-sun (Deputy Chairman)
Hon Michael TIEN Puk-sun, BBS, JP
Hon HO Kai-ming
Hon SHIU Ka-chun

Public Officers attending : Item III

Mr John LEE Ka-chiu, SBS, PDSM, PMSM, JP
Secretary for Security

Mr LAU Wai-ming
Administrative Assistant to Secretary for Security

Mr Watson HAU Lai-man
Assistant Secretary for Security E3

Mr Paul TSANG Keung, SBS
Law Officer (International Law)
Department of Justice

		Ms Linda LAM Mei-sau Deputy Law Officer (Mutual Legal Assistance) Department of Justice
		Miss Sandy SHUM Tik Senior Government Counsel (Acting) Department of Justice
		Ms Fanny IP Fung-king Deputy Law Draftsman II Department of Justice
		Mr Peter SZE Chun-fai Senior Assistant Law Draftsman (Acting) Department of Justice
		Mr Llewellyn MUI Kei-fat Deputy Solicitor General (Constitutional Affairs) Department of Justice
		Mr Paul HO Wing-kwong Deputy Director of Public Prosecutions (II) Department of Justice
Clerk in attendance	**:**	Miss Betty MA Chief Council Secretary (2) 1
Staff in attendance	**:**	Mr Timothy TSO Senior Assistant Legal Adviser 1
		Ms Gloria TSANG Senior Council Secretary (2) 7
		Mr Ronald LAU Council Secretary (2) 1
		Miss Lulu YEUNG Clerical Assistant (2) 1

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I. Information papers issued since the last meeting
(LC Paper Nos. CB(2)1395/18-19(01), CB(2)1471/18-19(01) and CB(2)1564/18-19(01))

Members noted that the following papers had been issued since the last meeting:

(a) Administration's response to issues raised in the letter dated 11 April 2019 from Dr Elizabeth QUAT and the joint letter dated 17 April 2019 from Mr Charles MOK, Mr Dennis KWOK and Mr Alvin YEUNG;

(b) Administration's response to a letter dated 8 April 2019 from Dr Elizabeth QUAT; and

(c) letter dated 28 May 2019 from Dr Elizabeth QUAT.

II. Date of next meeting and items for discussion
(LC Paper Nos. CB(2)1582/18-19(01) and (02))

Regular meeting in July 2019

2. Members agreed that the following items would be discussed at the next regular meeting on 9 July 2019 at 2:30 pm:

(a) Follow-up on the Court of Final Appeal's judgment on *Secretary for Justice v Cheng Ka Yee & 3 Others* about section 161 of the Crimes Ordinance;

(b) Drug situation in Hong Kong in 2018; and

(c) Developing the Fire and Ambulance Services Academy as a regional training centre for emergency rescue and a local platform for community emergency preparedness education.

3. Referring to the proposed discussion item in paragraph 2(a) above, the Chairman said that it was related to the letter from Dr Elizabeth QUAT on combating clandestine photo-taking and the joint letter from Mr Charles MOK, Mr Dennis KWOK and Mr Alvin YEUNG on prosecutions instituted under "access to computer with criminal or dishonest intent" and enactment of legislation against the offence of voyeurism, which were mentioned in

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paragraph 1(a) above. The Chairman noted Dr Elizabeth QUAT's suggestion of inviting relevant organizations to give views on the item.

4. The Chairman further said that the proposed items in paragraph 2(b) and (c) were originally scheduled for discussion at the June regular meeting. However, to allow more time for discussion on issues relating to the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019 ("the Bill"), it was subsequently decided to defer the discussion on these two items to the regular meeting in July.

(*Post-meeting note*: With the concurrence of the Chairman, the Panel meeting originally scheduled for 9 July 2019 was cancelled due to safety and security reasons. Members were informed vide LC Paper No. CB(2)1776/18-19 on 3 July 2019.)

III. Issues relating to the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019

(Ref : SB CR 1/2716/19, LC Paper Nos. CB(2)1236/18-19(01), CB(2)1355/18-19(01), CB(2)1449/18-19(01) and CB(2)1578/18-19(01))

Meeting arrangements

5. In light of the wide public concern on the Bill, Mr KWONG Chun-yu expressed grave dissatisfaction at the repeated absence of the Secretary for Justice ("SJ") from the meetings of the Panel held to discuss issues relating to the Bill. The Chairman said that Members' views on the matter had been conveyed to the Administration at previous meetings. As a matter of fact, representatives from the Department of Justice ("DoJ") had been working hard to provide clear and detailed explanation to ease Members' concerns at these few meetings. Secretary for Security ("S for S") supplemented that seven professional officers from DoJ were attending the meeting today to clarify and explain the contents of the Bill. Mr KWONG Chun-yu and Mr Dennis KWOK took the view that SJ should attend the Panel meetings to clarify the legal aspects of the Bill. The Chairman conveyed Members' request to S for S again.

6. Mr Dennis KWOK further said that 30 members of the Legal Subsector of the Election Committee had recently invited the Chief Executive ("CE") and other government officials to a meeting to discuss the Bill. However, the Administration stated in its reply that members of the public, including the Legal Subsector Election Committee members, were welcome

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to channel their questions and comments on the Bill through the Panel meetings. As such, he and Mr Alvin YEUNG had submitted a joint letter requesting the Panel to hold meetings to receive public views on the Bill. In response, the Chairman said that the suggestions of holding a public hearing and inviting two legal professional bodies to give views on the Bill were considered and negatived at the Panel meetings on 31 May and 1 June 2019 respectively. Members' attention was drawn to rule 24(n) of the House Rules which stated the "the decisions of a committee should not be reopened for discussion, unless with the permission of the committee". S for S also pointed out that these 20-hour-meetings provided an appropriate and pragmatic platform to address Members' concerns and queries on the Bill. Members of the public were also welcome to submit their views in writing to the Administration. The Chairman added that about 180 written submissions provided by organizations and individuals on the Bill had been circulated for Members' reference.

7. Dr Fernando CHEUNG asked whether the Administration would be able to provide written response to Members' concerns submitted in writing before the resumption of the Second Reading debate on the Bill. The Chairman said that Members' letters raising concerns on the Bill were immediately forwarded to the Administration for response upon receipt. He further said that Members could still send in written concerns and queries after the last meeting of the 20-hour-meeting was held on 5 June 2019. S for S remarked that the Administration would endeavour to provide all the written responses, as early as practicable, before the resumption of the Second Reading debate on the Bill.

Making verbatim records

8. Given the wide concern on the Bill in the legal sector, the society and the international community, as well as the possibility of subsequent legal proceedings, Mr LAM Cheuk-ting suggested that verbatim records of the recent five Panel meetings relating to the Bill be made. Mr Kenneth LEUNG supported the making of verbatim records. He further said that if verbatim records of meetings would not be made, a similar format of minutes of meeting prepared for Bills Committee meetings, i.e. with proceedings of meetings, could be considered.

9. Mr LEUNG Che-cheung considered that verbatim records of meetings were unnecessary. Members who requested verbatim records could make such records themselves. Mr Tommy CHEUNG recalled that verbatim records would be made during the resumption of the Second Reading

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debate on a bill and the Third Reading at the Council meetings, and those records could be used as important references by the court, if necessary. Mr Jeffrey LAM shared a similar view. He said that the Administration's speeches and relevant policy statements would be properly recorded in the official records of proceedings of the relevant Council meetings.

10. Mr WU Chi-wai, however, pointed out that the Administration would only give a consolidated response to Members' concerns during the Council meetings, which was completely different from the question and answer session at the Panel meetings. In view of the extensive discussions and diverse views on the Bill in the community, he did not see any reasons for not making verbatim records of the Panel meetings.

11. The Chairman said that pursuant to paragraphs 8.10 and 8.11 of the Handbook for Chairmen of Panels, verbatim records were not normally prepared for a meeting. However, with the agreement of the Panel, the Chairman could determine that a verbatim record of a meeting be made and such a request should be submitted to The Legislative Council Commission with justifications for record. As there were divided views among members, he ordered that a vote be taken on the proposal of making verbatim records. The result was that eight members voted for and 15 members voted against the proposal. The Chairman declared that the proposal was negatived.

12. As regards Mr Kenneth LEUNG's suggestion of preparing the minutes of the five Panel meetings in a format similar to those of Bills Committee meetings, Mr Tommy CHEUNG said that as it was not a Bills Committee, the format of the minutes of meeting should be identical to that of other Panel meetings. Having regard to the decision of the House Committee to rescind its decision made on 12 April 2019 under Rule 75(4) of the Rules of Procedure ("RoP") to form the Bills Committee on the Bill, Dr Priscilla LEUNG hoped that the Secretariat would record the five Panel meetings relating to the Bill in a detailed and professional manner. The Chairman concluded that the matter would be handled by the Clerk in accordance with established practice.

The test of "wrong, unjust or oppressive" in considering whether a person should be surrendered

13. Senior Assistant Legal Adviser 1 ("SALA1") referred Members to the case of *CHENG Chui Ping v The Chief Executive of the Hong Kong Special Administrative Region and the United States of America*, HCAL 1366/2001 (which was provided for Members' reference by the Administration), and

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sought clarification from the Administration as to whether the test of "wrong, unjust or oppressive" in considering whether a person should be surrendered could be applied by a magistrate in committal proceedings under section 10 of the Fugitive Offenders Ordinance (Cap. 503) ("FOO"), or the test could only be applied by CE. In addition, he referred to the case of *CHENG Chui Ping v The Chief Executive of the Hong Kong Special Administrative Region and the United States of America*, CACV 138/2002 (which was also provided by the Administration), and sought clarification as to whether the court, in considering applications for judicial review ("JR") relating to orders made by CE for the surrender of fugitive offenders ("SFO"), was precluded from looking at the merits of the relevant decisions. He also asked the Administration to clarify whether the court could consider factors or safeguards (e.g. those relating to human rights) which were not expressly provided for in FOO nor in the proposed special surrender arrangements ("SSAs") under the Bill. Mr Alvin YEUNG requested SALA1 to provide the above issues in writing after the meeting.

SALA1

(*Post-meeting note*: The letter from SALA1 to the Administration seeking clarifications on a number of legal issues was circulated vide LC Paper No. CB(2)1615/18-19 on 6 June 2019. The Administration's reply dated 13 June 2019 was circulated vide LC Paper No. CB(2)1655/18-19.)

14. Law Officer (International Law), DoJ ("LO(IL)/DoJ") responded that basically the test of "wrong, unjust or oppressive" could only be applied by CE. Nevertheless, CE's decisions were subject to scrutiny by the court by way of JR. In such JR cases, the court did not look at the merits of CE's decision concerned, but those traditional bases for seeking JR, such as illegality, irrationality or procedural impropriety. It was also highlighted that CE's power in any SFO requests was exercised in accordance with the law, including the Basic Law ("BL"), the Hong Kong Bill of Rights Ordinance (Cap. 383) and FOO. Furthermore, CE could need to provide the reasons for a decision if the circumstances of the case requiring the giving of reasons. At Dr Priscilla LEUNG's request, LO(IL)/DoJ undertook to provide relevant court cases for Members' reference.

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(*Post-meeting note*: The information provided by the Administration was circulated to Members vide LC Paper No. CB(2)1608/18-19 on 5 June 2019.)

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Human rights and procedural safeguards under the proposed special surrender arrangements

15. Mr CHAN Han-pan sought clarification on whether a person criticizing the Mainland or even committing an offence in Hong Kong would be surrendered to the Mainland for trial. S for S stressed that any persons committing offences in Hong Kong would be tried and prosecuted in Hong Kong according to the law. Besides, freedom of speech, the press, publication, religious belief, engagement in academic research, literary and artistic creation were well protected under BL. Any person committing acts which did not constitute a criminal offence in Hong Kong would not be surrendered according to the principle of "double criminality". Mr CHAN appealed to the Administration to continue clarifying the public misunderstanding about the Bill.

16. Ms Starry LEE said that compared with zero handling of any SFO requests from jurisdictions that did not have long-term surrender agreements with the Hong Kong Special Administrative Region ("HKSAR"), the Bill would improve the existing FOO and the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) ("MLAO") such that offenders of serious crimes would not be given ways to escape justice. Hence, she considered that withdrawal of the Bill would be too extreme. Nevertheless, in view of the wide concern and different views on the Bill in the community, she expressed support for the Administration's recent proposed refinements to the Bill, including raising the threshold requirement for applicable offences from imprisonment for more than three years to not less than seven years and adding safeguards that were in line with general human rights protection to the activation of SSAs. She asked about the legal effect of the administrative statement on additional safeguards to be provided and sought relevant examples.

17. S for S responded that under the existing FOO, the case-based surrender mechanism had never been activated due to practical operational difficulties. The Bill sought to improve the case-based surrender arrangements to handling serious offences, including serious sexual offences, with a view to upholding justice. Furthermore, inclusion of additional safeguards in FOO and MLAO involved a comprehensive review of the two Ordinances, which was not the policy objective of the current legislative exercise. Such inclusion might also, to some extent, affect the existing SFO and MLA agreements that Hong Kong had signed. LO(IL)/DoJ added that more restrictions on the activation of SFO could be provided in SSAs, which would then have legal effect pursuant to the proposed new section 3A(1)

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under clause 4 of the Bill, and the court would take into account such restrictions when considering a request. With reference to the international practice in SFO, the requesting party would be asked to provide assurance, if considered necessary, to protect the rights and interests of surrendered persons. It was noteworthy that the court would not accept such arrangement if the requesting party did not have a good record of honouring its assurances.

18. Ms Claudia MO said that the lack of confidence in the Mainland legal system was the crux of the problem of the current legislative proposals. As public worries and doubts persisted, she asked whether the Bill could be withdrawn for the time being. S for S reiterated that the Bill, which had been drawn up upon careful and comprehensive consideration, aimed to handle the Taiwan homicide case and plug the loopholes in the existing juridical assistance system. He noted that there were diverse views in the society. Ms MO, however, said that the Taiwan side had repeatedly stated its view of not accepting any SFO arrangements based on the premise that Taiwan was a part of the People's Republic of China ("PRC"). Hence, she considered that there was no urgency in the passage of the Bill at all. S for S advised that once the Bill was passed, the Administration had the legal basis and would proactively communicate with the Taiwan side on its request for the surrender of the suspect of the Taiwan homicide case in a pragmatic and respectful manner.

19. Given that freedom of the press was suppressed on the Mainland, Mr Jeremy TAM did not understand why S for S had previously remarked that the media would play a scrutiny role of handling SFO requests on the Mainland. He expressed grave dissatisfaction at such sayings. S for S responded that the press and journalists worldwide should professionally reflect the facts and exercise their power enshrined under "the fourth estate".

20. Dr Junius HO said that "the fourth estate" existed everywhere, including on the Mainland, but the degree and influence varied in different places. He further said that the legal system on the Mainland had been improving over the years. The Bill, which involved only two simple amendments to the existing FOO and MLAO, sought to uphold justice by plugging loopholes in the existing juridical assistance system.

21. Mr Holden CHOW said that it was necessary to plug the loopholes in the juridical assistance system, with a view to protecting the safety of the public and the society. He was confident that the court would act as a gatekeeper in handling SFO requests to ensure that human rights and

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procedural safeguards were upheld. He further sought the Administration's view on the issue of time-bar for prosecution or punishment of an offence in considering whether a person should be surrendered.

22. LO(IL)/DoJ said that according to the observation of Mr Hartmann, former non-permanent judge of the Court of Final Appeal ("CFA") in a JR case, an applicant could rely on the submission that it would be wrong, unjust or oppressive to order the surrender if it could be demonstrated that in the particular circumstances of the case, an applicant's arguments as to time-bar would not receive a full, fair and impartial hearing. He added that CE could take into account humanitarian grounds, legal and other relevant factors before deciding to make a surrender order.

23. SALA1 sought further clarification as to whether CE and/or the court, in considering whether a person should be surrendered, could consider the issue of time-bar for the prosecution of an offence for which extradition was sought. Dr Priscilla LEUNG asked whether CE could consider the effective limitation period of an offence when deciding to make a surrender order.

24. Deputy Law Officer (Mutual Legal Assistance)/DoJ ("DLO(MLA)/DoJ") explained that although the issue of time-bar was not a statutory restriction on surrender under FOO and other existing long-term SFO agreements that Hong Kong had signed, there might be possible issue of abuse of process raised with CE in the executive stage if the prosecution of an offence pursued by a requesting party was time-barred. In addition, if it was provided in the relevant surrender arrangements that prosecution within the limitation period under the law of the requesting party was a condition for surrender, the provision would be relevant for consideration by CE in the exercise of her power in the executive stage. Failure to take it into account would run a real risk of a JR challenge. This was an example of the additional safeguards for the proposed SSAs, which were to be given legal effect in the proposed new section 3A(1) under clause 4 of the Bill.

25. Dr Helena WONG expressed concern about the risk of prosecuting the surrendered person for additional offence(s) during trial upon surrender to the Mainland, and sought information on the Administration's liability if the requesting party failed to adopt the additional safeguards as required by the HKSAR Government. She further asked about the mechanism of being aware of the post-surrender situation of the surrendered persons.

26. Mr Gary FAN said that the need to deal with the Taiwan homicide case did not fully justify pursuing the Bill. Although it was repeatedly stated by

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the Administration that SFO was an international practice to fight against organized and cross-boundary crimes, he pointed out that the Model Treaty on Extradition promulgated by the United Nations had stipulated that extradition should be refused if a person would not receive the minimum guarantees in criminal proceedings as set out in Article 14 of the International Covenant on Civil and Political Rights. As such, he did not understand why the additional safeguards were not expressively provided for in the Bill.

27. S for S said that although the additional safeguards were not stipulated in the Bill, more restrictions on the activation of SFO could be provided in SSAs and such restrictions would have legal effect under the proposed new section 3A(1) under clause 4 of the Bill. Such arrangement aimed to provide flexibility according to the needs of individual cases and the circumstances of different jurisdictions. He highlighted that the texts of SSAs would be submitted to the court at the committal hearing conducted in open court, such that the public could have knowledge of the court's hearing. In respect of every single order issued including a decision on surrender procedures or a surrender order, the person involved had the right to apply for JR and might lodge appeals all the way to CFA. To take better care of the interests of the surrendered persons, the Administration would negotiate with the requesting jurisdictions on the issue of post-surrender visits on a case-by-case basis, including visits by consuls and officials, or other special cooperation arrangements. The Administration was also willing to make available information in respect of the surrendered cases and the post-surrender situation on an annual basis. S for S reiterated that the Bill involved minor amendments and that the existing long-term SFO and MLA agreements that Hong Kong had signed would not be affected. In addition, PRC had signed SFO agreements with 55 jurisdictions and the operation had been smooth so far, indicating that PRC had fully fulfilled the agreements and international obligations.

28. Mr LAM Cheuk-ting asked whether a Hong Kong resident, who had never been to the Mainland but being charged of conspiracy to commit an offence in relation to harbouring another person on the Mainland, would be surrendered if the general surrender requirements under FOO were satisfied. S for S reiterated that the principle of "double criminality" had to be complied with and stressed that it was necessary to consider the facts of a case in considering whether the principle was met. Deputy Director of Public Prosecutions (II), Department of Justice supplemented that the hypothetical facts provided by Mr LAM did not constitute a criminal offence in Hong Kong. DLO(MLA)/DoJ added that harbouring another person was not an offence listed in the 37 categories of offences to which SSAs applied

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and that according to the law of Hong Kong, extra-territorial jurisdiction could be exercised if anyone outside Hong Kong conspired to commit an offence in Hong Kong.

29. Mr KWONG Chun-yu said that many people lacked confidence in the Mainland legal system. He expressed concern about section 24(3)(b) of FOO and asked what CE would do when the Central People's Government ("CPG") gave an instruction to CE to take an action on the ground that if the instruction were not complied with the interests of PRC in matters of defence or foreign affairs would be significantly affected. Mr CHU Hoi-dick asked whether CE's decision could be overridden by CPG in accordance with section 24(3) of FOO.

30. S for S advised that to his understanding, notification under section 24(3) of FOO would only arise after the court had made a committal order. He drew members' attention to the fact that CE's power in any SFO requests was exercised in accordance with BL and FOO. If CE decided not to act on an SFO request at the preliminary stage, section 24(3) of FOO would not arise. LO(IL)/DoJ further explained that under section 24(1)(b) of FOO, CE should cause CPG to be given notice of any proceedings that had been instituted for the surrender of a person from Hong Kong to a prescribed place pursuant to prescribed arrangements where an order of committal had been made in relation to the person. It was also stipulated under section 24(3) of FOO that CE should comply with the instruction from CPG in accordance with law. However, such instruction was subject to the proviso in section 24(3) requiring that the instruction should not operate to affect the responsibilities that CE should discharge in accordance with law in dealing with any case. The proviso specified the importance of handling SFO matters in accordance with the law. As SFO might involve matters relating to defence or foreign affairs and it was stipulated under BL that the defence and foreign affairs of HKSAR were the responsibilities of CPG, he considered that section 24(3) of FOO served to balance the interests of all parties.

31. Dr KWOK Ka-ki sought information on Article 88 of PRC's Criminal Law about the exceptions to the limitation period, and the duties of the Supreme People's Court as stated under《最高人民檢察院職能配置、內設機構和人員編制規定》. S for S said that he was not a legal expert. With regard to the international practice in handling SFO requests, the requesting party was required to provide their domestic laws for consideration. The requesting party must also provide assurance that the effective limitation period, if any, of the relevant offence had not expired. SALA1 sought

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clarification as to whether the requirement on the provision of such assurance would be expressively included in every SSA. S for S responded in the affirmative and assured members that relevant safeguards would be stated in the Administration's policy statement.

32. Mr MA Fung-kwok acknowledged the Administration's effort to explain the contents of the Bill at a briefing organized for the sports, performing arts, culture and publication industry. He said that the briefing definitely helped ease the industry's worries and concerns. Nevertheless, he expressed the industry's grave concern about the use of trumped-up charges and forged evidence to conduct prosecutions and surrender of political nature, and sought the safeguards provided in this respect.

33. S for S said that the Administration had been and would continue adopting extremely stringent procedures in handling and examining SFO requests. In view of the public concern about the quality of requests by requesting parties, it was thus proposed that only requests from the central authority of a place should be processed. DLO(MLA)/DoJ supplemented that evidence could be adduced by a wanted person for the purposes of substantiating that the person brought before the court of committal or any other court was not the person identified in the request for surrender in accordance with section 23(5) of FOO. Besides, the person involved was entitled to make representations to CE opposing the surrender, including whether it was wrong, oppressive or unjust to order the surrender, and that the surrender would violate other humanitarian grounds or safeguards provided in the applicable law or relevant surrender arrangements. Furthermore, DoJ would not recommend the processing of a request and the court would not commit a person if it was known that the requesting party knowingly failed to discharge the duty of candour.

34. Mr Jeffrey LAM did not subscribe to the view that the Bill would undermine the principle of "one country, two systems". He sought details on CE's power under a special surrender request. S for S said that CE could only activate SSAs by issuing a certificate to proceed with the holding of a committal hearing. The court would then make decision on the person's surrender independently and impartially, based on the relevant provisions of FOO and evidence of the case. CE had no right to intervene with the judicial process. If the court made a committal order, CE could still take into account grounds other than those under FOO before deciding to make an order for surrender. He added that the additional safeguards which were in line with general human rights protection under SSAs would be stated in a policy statement by the Administration during the resumption of the Second

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Reading debate on the Bill, and would be uploaded on the Administration's webpage accordingly.

35. Mr CHAN Chun-ying sought clarification about some sayings that a list of persons requested by other jurisdictions had been kept by the Administration such that they would be detained or surrendered if they transited through Hong Kong. S for S stressed that they did not have such a list, adding that the Administration had adopted stringent procedures in activating a special surrender procedure. Besides, transit passengers should not be worried about the Bill if they had not committed serious criminal offence(s) punishable with imprisonment for not less than seven years.

36. Dr Priscilla LEUNG sought clarification as to whether the offence of "重大責任事故罪" as stipulated in Article 134 of PRC's Criminal Law was excluded after raising the threshold imprisonment requirement to not less than seven years. S for S affirmed that the offences to which SSAs would apply should be those punishable with imprisonment for not less than seven years, both in Hong Kong and in the requesting party.

Procedures and statistics relating to surrender of fugitive offenders under the existing Fugitive Offenders Ordinance

37. Mr Tommy CHEUNG asked whether CE, after considering the relevant documents prepared and examined by DoJ, had the right to activate or refuse to activate the surrender procedures. S for S replied in the affirmative. Mr CHEUNG then sought details about the handling of SFO requests upon CE's activation. DLO(MLA)/DoJ advised that CE would issue an authority to proceed with the holding of a committal hearing before a magistrate. The person concerned would be made known of the supporting documents in the form of affidavits or affirmations of witnesses. The court of committal would decide whether to make a committal order independently and impartially based on the relevant provisions of FOO and evidence of the case. If the court made a committal order, CE could still take into account grounds other than those under FOO in considering whether to make a surrender order. It was highlighted that CE's decision to order surrender was subject to scrutiny by the court by way of JR. Besides, the person involved would not be surrendered until the expiration of 15 days beginning with the day on which the committal order was made. As such, Mr CHEUNG held the view that any decisions on surrender were not solely made by CE, and the court did play a key gatekeeping role.

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38. Given the different legal systems adopted in different jurisdictions, Mr Tony TSE said that he understood the worries and concerns about the Bill in the community. However, he was confident in Hong Kong's legal system and believed that the court would handle SFO requests in a professional and impartial manner. Pointing out that SFO was an international consensus to fight against organized and cross-boundary crimes and was a commonly accepted means to reduce crimes effectively, Mr TSE sought information on the legal benefits to the requested and requesting parties.

39. S for S said that in the past 22 years, Hong Kong had surrendered offenders committing serious offences, such as drug-related offences, robberies, homicide, rape and other sexual-related offences, money laundering and use of forged banknotes, to other jurisdictions and vice versa. He also pointed out that to effectively fight cross-boundary crimes, it was inevitable that fugitive offenders would be surrendered to other jurisdictions of different legal systems and different rankings in terms of rule of law. For example, the United States of America ("USA") and the United Kingdom ("UK") had signed SFO agreements with over 100 jurisdictions, which included some countries with lower rankings in terms of rule of law. He stressed that SFO served the purpose of transferring fugitive offenders to another jurisdiction for trial or service of sentence to prevent them from making use of judicial loophole to evade legal responsibility and, at the same time, protecting their rights.

40. Mr YIU Si-wing sought information on the human rights safeguards in relation to SFO requests of political character under the existing FOO, as well as statistics of requests from the Mainland which were of political nature. He further asked whether being a spy was regarded as a political offence. Mr Jeffrey LAM sought details on the circumstances under which a surrender request would be refused under the existing FOO, and the relevant human rights and procedural safeguards to protect the interests and rights of surrendered persons.

41. S for S explained that in any SFO requests, the court had to be satisfied that the conduct underlying the offence would constitute an offence specified in the description of offences under Schedule 1 to FOO, i.e. 46 categories of offences in the long-term SFO arrangements and 37 categories of offences in the proposed SSAs. As the existing FOO did not apply to the Mainland, Taiwan and Macau, no fugitive offenders had been surrendered to the Mainland. DLO(MLA)/DoJ added that the court of committal, before making a decision of a committal order, had to be satisfied that the restrictions under section 5 of FOO did not apply. They included

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prosecution or punishment on account of the wanted person's race, religion, nationality, or political opinions, or a person being prejudiced at trial or punished by the said reasons, double jeopardy and conviction in absentia. There had been an appeal case in which the court had considered a section 5 restriction and finally decided that the restriction was not made out. As regards the issue of spy, DLO(MLA)/DoJ stressed that the conduct underlying an offence that one was accused of, rather than his identity, was the prime consideration for the decision of making a committal order. Furthermore, if the court made a committal order, CE had the residual power to refuse to surrender a person. For instance, CE could refuse to do so if she considered that it would be wrong, unjust or oppressive to order the surrender. It was highlighted that CE's decision to order a surrender was subject to scrutiny by the court by way of JR.

42. Dr Priscilla LEUNG asked whether the court or the executive authority could decide that an SFO request was in relation to offences of a political character in accordance with section 5 of FOO. DLO(MLA)/DoJ said that upon receiving a surrender request, DoJ would examine and consider the request in detail, including consideration of whether the offence involved was of a political character before submitting the request to CE for a decision on the issue of an authority to proceed and for the court to hold a committal hearing. FOO provided that both CE and the court of committal could consider the restrictions in section 5 of FOO.

43. Dr KWOK Ka-ki was confused why the Administration would regard Hong Kong as "the paradise of fugitive offenders". He sought information on the statistics in respect of case-based surrender requests over the past 22 years. S for S drew members' attention to the fact that the case-based surrender mechanism under the existing FOO had not been activated in the past 22 years due to practical operational difficulties. Apart from the Taiwan homicide case, there were other cases involving fugitive offenders which could not be properly dealt with. These included, among others, three cases involving homicide in which the victims were Hong Kong residents, and a case in which a Hong Kong resident alleged of committing serious offence in another jurisdiction could not be surrendered to that jurisdiction. Besides, nine surrender requests were rejected by Hong Kong because of the lack of long-term SFO agreements. In light of the frequent contacts between Hong Kong and the Mainland, S for S said that it would be risky if offenders committing serious criminal offences on the Mainland could seek refuge in Hong Kong and evade their legal responsibilities. He appealed to members' and the public's understanding that the aim of the Bill was to plug the loopholes in the legal system to uphold justice, adding that it

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was an international obligation to fight cross-boundary crimes by SFO arrangement. Dr KWOK, however, pointed out that the crux of the problem was the lack of confidence in the Mainland legal system.

Issues relating to the Mutual Legal Assistance in Criminal Matters Ordinance

44. Given that a person who was requested to be surrendered was provided with various procedural safeguards, such as applying for habeas corpus, making a torture claim and applying for JR during the course of all proceedings, Mr CHAN Chun-ying asked whether the suspected proceeds of crime, if any, were required to be frozen independently before the completion of various procedural matters as recommended by the Financial Action Task Force ("FATF").

45. DLO(MLA)/DoJ explained that MLAO provided the statutory framework to regulate the provision and obtaining of assistance in the investigation and prosecution of criminal offences, including the taking of evidence, transfer of persons to give evidence and confiscation of the proceeds of crime. In practice, a restraint order could be applied for if legal proceedings had been commenced in another jurisdiction. The court would grant restraint order if it was shown that the suspect had assets within Hong Kong and an external confiscation order might be made upon the completion of relevant legal proceedings in the requesting jurisdiction. This arrangement served to temporarily freeze one's assets to prevent it from being removed until the completion of the foreign proceedings.

46. Mr Gary FAN pointed out that according to paragraph 3.49 of the Hong Kong Money Laundering and Terrorist Financing Risk Assessment Report issued by the Financial Services and the Treasury Bureau in April 2018, some of our requests for taking of evidence in support of money laundering prosecutions had been successfully processed by the Mainland and Macau authorities under Parts VIII and VIIIA of the Evidence Ordinance (Cap. 8) ("EO"). He asked whether assistance for evidence-taking was rendered to or sought from other parts of PRC pursuant to EO.

47. S for S said that in accordance with paragraph 852 of the Mutual Evaluation Report in respect of Anti-money Laundering and Combating the Financing of Terrorism issued by FATF in 2008, the types of assistance available under EO were comparatively limited, and MLAO was more frequently used. It was further mentioned in paragraph 929 of the report that formal arrangements for extradition between Hong Kong, Macau and the Mainland were recommended to be concluded as a matter of priority. He

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said that it was an international obligation to fulfill FATF's recommendations, and that SFO and MLA were important tools to fight money laundering and terrorist financing. Although it was factually correct that requests for taking of evidence for money laundering prosecutions could be successfully processed with the Mainland and Macau authorities using EO, DLO(MLA)/DoJ said that restraint and confiscation of proceeds of crime could not be pursued without amending MLAO.

Other issues

48. Mr Holden CHOW sought information on the impact on Hong Kong's counter-terrorism work upon passage of the Bill. S for S said that the International Convention for the Suppression of Terrorist Bombings, the International Convention on the Suppression of the Financing of Terrorism and the United Nations Convention against Transnational Organized Crime applied to Hong Kong. SFO requests in relation to terrorism from any places would be operationally practicable upon passage of the Bill.

49. Dr Priscilla LEUNG sought clarification on whether there was a jury in committal hearings held in SFO cases. DLO(MLA)/DoJ advised that the magistrate, sitting as the court of committal, would conduct the hearings. There was no jury present in such hearings. The evidential requirement for committing a person to custody is the making of a prima facie case, namely, the evidence was such that if a jury, when properly directed, could convict on the basis of the evidence brought before the court. S for S added that adopting a jury system in committal hearings would involve a comprehensive review of FOO, which was not the policy objective of the current legislative exercise.

50. There being no other business, the meeting ended at 6:28 pm.

Council Business Division 2
Legislative Council Secretariat
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