HONG KONG BAR ASSOCIATION
Secretariat: LG2 Floor, High Court, 38 Queensway, Hong Kong
DX-180053 Queensway 1 E-mail: info@hkba.org Website: www.hkba.org
Telephone: 2869 0210 Fax: 2869 0189

(panel_s@legco.gov.hk)

2 April 2019

The Hon. CHAN Hak-kan, BBS, JP
Panel on Security
Legislative Council Complex
1 Legislative Council Road,
Central, Hong Kong.

Dear Mr Chan,

Please find a copy of the "Observations of the Hong Kong Bar Association on the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019", dated 2 April 2019, for the consideration of the Panel on Security.

Yours sincerely,

Philip Dykes, SC
Chairman

香港大律師公會
香港金鐘道三十八號高等法院低層二樓

Chairman 主席：
Mr. Philip J. Dykes, S.C. 戴啟思
Vice Chairmen 副主席：
Mr. José-Antonio Maurellet, S.C. 毛樂禮
Mr. Edwin W.B. Choy, S.C. 蔡維邦
Honorary Secretary & Treasurer 名譽秘書及財政：
Mr. Jonathan T.Y. Chang 張天任
Deputy Honorary Secretary 副名譽秘書：
Ms. Po Wing Kay 布穎琪
Administrator 行政幹事：
Ms. Dora Chan 陳少琼

Council Members 執行委員會委員：
Mr. Lawrence Lok, S.C. 駱應淦
Mr. Johannes M.M. Chan, S.C. (Hon) 陳文敏
Mr. Stewart K.M. Wong, S.C. 黃繼明
Ms. Anita H.K. Yip, S.C. 葉巧琦
Mr. Jeremy J. Bartlett, S.C. 包智力
Mr. Derek C.L. Chan, S.C. 陳政龍
Mr. Erik Sze-Man Shum 沈士文
Mr. Andrew Y.S. Mak 麥業成
Mr. Bruce C.H. Tse 謝志浩
Mr. Jonathan Wong 黃若鋒
Ms. Pauline P.L. Leung 梁寶琳
Mr. Robin Gregory D'Souza 蘇諾賢
Mr. Randy Shek 石書銘
Mr. Jeffrey C.K. Tam 譚俊傑
Mr. Lester H.L. Lee 李曉亮
Ms. Kim M. Rooney 甘婉玲
Mr. Hugh T.T. Kam 金晉亭
Ms. Lorraine H.M. Tsang 曾希雯
Ms. Fiona Fok Ching Chong 臧菁瀞
Ms. Christy Yuen Pui Wong 黃宛蓓

Observations of the Hong Kong Bar Association ("HKBA") on the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019

---

1. After the Security Bureau proposed amending the Fugitive Offenders Ordinance (Cap.503; "**FOO**") and the Mutual Legal Assistance in Criminal Matters Ordinance (Cap.525; "**MLA**") in February 2019, the HKBA submitted observations on the proposed changes. They were not supportive. The HKBA maintains its views on the proposed legislative changes notwithstanding the recent revisions to the proposal and explanations given by the Government about the effect of the new legislation.

2. The Fugitive Offenders and Mutual Legal Assistance in Criminal Matters (Amendment) Bill was gazetted on 29th March 2019 and the First and Second Reading of the bill will take place in the Legislative Council on 3rd April 2019.

3. As with the HKBA's earlier views, the focus of this paper will be on the proposed changes to the FOO referred to here as the "**Fugitives Bill**".

Case-based Arrangements

4. Under the current FOO regime, one-off case-based surrender arrangements are potentially available to all jurisdictions with which Hong Kong has no long-term arrangements except the rest of the PRC. There is no "loophole" that would prevent Hong Kong from

entering into any case-based arrangements with those jurisdictions, except the rest of the PRC.

5. This restriction against any surrender arrangements with the rest of the PRC, whether under a long-term formal arrangement or case-based arrangements, is not a "loophole", as repeatedly, and in our view, misleadingly, asserted by the senior Government officials (namely the Chief Executive, the Secretary for Justice, and the Secretary for Security) on various occasions and now in the LegCo Brief.[1] It was a deliberate decision by the legislature when enacting the FOO in 1997 not to provide for the application of the FOO to rendition arrangements with the rest of the PRC, particularly in light of the fundamentally different criminal justice system operating in the Mainland and concerns over the Mainland's track record on the protection of fundamental rights.

6. Under the current proposals, a new case-based arrangement (termed "special surrender arrangement" under the Fugitives Bill) will apply to all jurisdictions without a long-standing arrangement with Hong Kong, including the rest of the PRC.

7. The practical effect of the introduction of a new special surrender arrangement is to remove the restriction against surrendering persons in Hong Kong to the rest of the PRC and combined with that, and as further explained below, to enable the Chief Executive to become the sole decision-maker in concluding case-based arrangements with another jurisdiction, regardless of whether that

[1] See, for instance, §§8, 9, 14(a), 20 of the LegCo Brief on the Bill.

jurisdiction provides minimum standards for rights protection in its criminal justice system.

8. The HKBA observes that the concerns over the significant differences between the judicial and criminal justice systems practised in Hong Kong and the Mainland in terms of protection of fundamental human rights have not been answered by the HKSAR Government.

9. There has been a failure by the Government to explain why it considers that circumstances have changed since 1997 (in terms of both the human rights record and the criminal justice system in the Mainland) to justify a departure from LegCo's decision to exclude the rest of the PRC from any surrender arrangements. For instance, it has been noted by the Court of Appeal in **HKSAR v Hon Ming Kong**[2] that in the context of MLA, there is need for each system to develop understanding and more importantly trust in the other system before introducing MLA between Hong Kong and Mainland China:

> *"I am furthermore satisfied that art.95 of the Basic Law does not impose an obligation on the HKSAR to 'maintain relations with the judicial organs of other parts of [the PRC]' or 'to render assistance to each other'. It is an enabling provision and is, no doubt for good reason, not couched in mandatory terms.* ***The Basic Law was promulgated in 1990 when the Criminal Law and Criminal Procedure Law of the PRC was in its infancy and it was no doubt envisaged that it would take time for the system to***

[2] [2014] 2 HKLRD 710 at §591

mature, region by region, towards and beyond 1997 to a stage when the separate systems would sufficiently understand how each other worked and could commence and then develop cooperation one with other, with safeguards satisfactory to each separate entity. *Effective cooperation in many areas have developed but not yet in the realm of mutual legal assistance in criminal matters"* (Emphasis added)

10. It is obvious that the two systems are still very far from developing any meaningful understanding of "how each other worked", let alone a sufficient understanding allowing cooperation "with safeguards satisfactory to each separate entity".

11. Coupled with the application of the case-based procedure for concluding "special arrangements" with the rest of the PRC, the Government proposes to retain the restriction against Hong Kong entering into any long-term arrangements with the rest of the PRC.

12. Should the Government consider that circumstances in the rest of the PRC have changed such that the time has come for arrangements to be made to render fugitives thereto, the proper course is to start negotiations for long-term general arrangements and for such proposed long-term arrangements to be considered by LegCo and the public. The Government, however, has not suggested that that is its considered view.

13. As it stands, proposals under the Fugitives Bill's case-based "special arrangements", if enacted, will almost certainly become the norm for Hong Kong to respond to requests from the rest of the PRC and there will no longer be any incentive to conclude a considered long-

term arrangement, with built-in safeguards for fair trial and rights protection, with the rest of the PRC. The proposed new regime offers indefinite uncertainty with no settled criteria and procedures for accepting and processing a request.

<u>Removing LegCo Negative Vetting with No Increased Scrutiny by the Courts</u>

14. Unlike long-term arrangements, case-based "special arrangements" will be initiated by the Chief Executive by way of issuing a certificate without the need to go through any negative vetting process before LegCo. Then, with an authority to proceed from the Chief Executive, the Court may issue an arrest warrant for the suspect the subject of the special arrangement.

15. The Chief Executive thus becomes, in all such cases, the only body that determines whether a special arrangement is to be concluded with a requesting jurisdiction. The Chief Executive alone formulates the substantive provisions of a special arrangement. Without negative vetting by LegCo, there is no way to hold the Government accountable and to ensure that adequate safeguards are in place before the extradition process commences.

16. The HKSAR Government's concerns over leaking sensitive information to the public in the LegCo negative vetting process, which purports to justify side-stepping LegCo, can be adequately dealt with by the existing Legislative Council Rules and Procedures as stated in HKBA's first set of Observations. Concerns over delay can be addressed by fine-tuning the operation of a request such as

making provisional arrest warrants available sooner which could ensure confidentiality of such information in the possession of the LegCo in the meantime. It is an exaggeration for the Government to assert that the existing regime for ad hoc arrangement is "operationally impracticable and not enforceable".

17. The proposed removal of legislative scrutiny is not accompanied by any proposal to expand the role of the Courts in vetting extradition requests for rights compliance in the requesting jurisdiction.

18. Although the Courts have a limited role in reviewing and rejecting the extradition process if the matters under s.5 of the FOO are satisfied, including under subsection (1)(d) that the suspect might, if surrendered, "be prejudiced at his trial", this does not compensate for the removal of legislative scrutiny as to matters such as whether the requesting jurisdiction is one which offer basic standards in the protection of rights.

19. It is noted that under the Extradition Act 2003 (UK), for instance, the court is expressly required to "decide whether the person's extradition would be compatible with the Convention[3] rights within the meaning of the Human Rights Act 1998" and that if the Court decides the question in the negative then it "must order the person's discharge".

20. The Government has not proposed any like provision, such as to enable the Court to disallow the extradition of a person if the extradition does not comply with the provisions under the Hong Kong Bill of Rights (Cap.383).

[3] European Convention on Human Rights

Supporting Documents

21. Further, an important requirement to prevent executive abuse of the rendition regime is that supporting documents must be authenticated by a judge or magistrate certifying the same. This is provided for under s.23(2)(a) of the existing FOO. This reflects the belief that judicial oversight is important in this area.

22. The Fugitives Bill adds a sub-clause (2A) to the existing s.23 of the FOO which essentially dispenses with the prescribed methods of authenticating supporting documents by a judicial officer of the requesting jurisdiction. Instead, it is proposed under the said sub-clause (2A) that authentication can be by way as provided under the special arrangement in question.

23. The Government has not explained why it is now acceptable to insert this provision which allows the removal of judicial oversight and sanctions requests made by law enforcement agencies of the requesting jurisdiction.

24. In ***See Cherk Ching v. Superintendent of Lai Chi Kok Reception Centre & Another***[4], it was held by Hartmann J (as he then was) that Hong Kong and its extradition partners may agree on the manner in which evidence will be supplied "provided only that such agreement complies with the [FOO]; an agreement may be more restrictive ***but not broader than*** the language of the Ordinance permits" (§96; emphasis added). In other words, the requirements set out under

[4] [2005] 4 HKLRD 105

s.23(2) of the current FOO provides the minimum standards for the authentication of supporting documents for the extradition of a person.

25. By the proposed sub-clause (2A) the Government is in effect doing away with the judicial authentication requirement but without explaining why. Enacting sub-clause (2A) would not have been necessary unless the intention is to bring in requirements that are more lax than the existing one because it is clear under case law that the requirements to be made under an arrangement may not be lower than the minimum requirements set out in s.23(2).

Exemption of Certain Offences

26. The Fugitives Bill exempts nine offences[5] from Schedule 1 to the FOO, plus a further four offences in so far as they are related to any of the nine exempted. There is no principled basis for such exclusions and the Government has not given any explanation for proposing such exclusions except to say it was "after taking into account all factors of considerations and views received."

[5] These 13 Schedule 1 offences are: 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; 14. Offences against the law relating to protection of intellectual property, copyrights, patents or trademarks; 21. Offences against the law relating to environmental pollution or protection of public health; 27. Offences against the law relating to the control of exportation or importation of goods of any type, or the international transfer of funds; 35. Offences involving the unlawful use of computers; 36. Offences relating to fiscal matters, taxes or duties; 41. Offences relating to the possession or laundering of proceeds obtained from the commission of any offence described in this Schedule; 42. Impeding the arrest or prosecution of a person who has or is believed to have committed an offence described in this Schedule; 45. Conspiracy to commit, or any type of association to commit, any offence described in this Schedule; 46. Aiding, abetting, counselling or procuring the commission of, inciting, being an accessory before or after the fact to, or attempting to commit an offence described in this Schedule.

27. If the exclusions are motivated by concerns over the proposed changes to the extradition regime enabling rendition of persons to the rest of the PRC, these concerns should apply to all offences and not just some. That is only logical. The truncated list only highlights the fundamental unease which led to such proposal in the first place and does not deal with the fundamental issues underlying rendition of suspects to the rest of the PRC.

28. It is apparent from the description of these exempted offences that they intend to provide a level of protection to those who are engaged in business activities with, and in, the rest of the PRC. The HKBA takes the view that the protection that appears to be given is likely to be illusory.

29. For instance, circumstances giving rise to an allegation of a securities trading offence, an exempted offence, can often also give rise to allegations of fraud, which is not an exempted office. Similarly, an allegation of infringing intellectual property protection laws (exempted) can also give rise to allegations of obtaining pecuniary advantage by deception (not exempted). These alternative offences can still render a person liable to be surrendered to the rest of the PRC under the proposed special arrangement.

30. More importantly, these exemptions under the Fugitives Bill would make it impossible for any jurisdiction that does not have a long-term arrangement with Hong Kong to request the surrender of anyone accused of having committed these exempted offences. Noting that such requests are currently possible under the existing

FOO regime, the Fugitives Bill is a step backwards from the perspective of international cooperation in criminal justice.

Increase of Punishment Threshold

31. Although increasing the punishment threshold from 12 months to 3 years would prevent surrender of suspects alleged to have committed minor offences, the new threshold continues to cover most existing offences in Hong Kong that are not purely matters for the magistrates court. Under the Fugitives Bill it is possible that a request could be made against a suspect for offences such as drink driving (maximum imprisonment term of 3 years) or dangerous driving causing grievous bodily harm (maximum imprisonment term of 7 years).

32. Moreover, this threshold also covers white-collar or commercial crimes such as theft (maximum imprisonment term of 10 years), fraud and conspiracy to defraud (maximum imprisonment term of 14 years), forgery (maximum imprisonment term of 14 years), bribery (maximum imprisonment term of 7 years), and accepting advantage by an agent (maximum imprisonment term of 7 years). Not only does the increased threshold fail to address the fundamental objection to the Fugitives Bill, it offers little assurance to citizens and the people in Hong Kong who are legitimately concerned with the criminal and judicial systems in the rest of the PRC, particularly the Mainland.

Concurrent Jurisdictions

33. Considering the close ties between Hong Kong and rest of the PRC, whether in terms of physical proximity or commercial activities, cases involving circumstances that give both Hong Kong courts' and other courts in the PRC jurisdiction to try these cases can easily be foreseen.

34. In those cases, it is unclear which jurisdiction will receive priority in seizure of the matter and whether the arrested person will be given an opportunity to express his or her wish as to which jurisdiction should undertake the trial.

35. In the absence of a long-term arrangement that sets out the essential safeguards to the subject's fundamental rights, and to ensure the subject of a surrender request will receive those protections currently available under the Hong Kong criminal justice system, the HKBA takes the view that the Fugitives Bill needs to include provisions giving Hong Kong Courts priority in trying the matter or provide that the subject of the request may apply for the matter to be tried in Hong Kong. In addition the Courts in the HKSAR should be able to decline extradition if it appears to the Court that the requesting jurisdiction cannot offer a fair trial with the minimum rights that approximate to those provided in the Hong Kong Bill of Rights.

The Taiwan Angle

36. The Government has repeatedly asserted that the reason for proposing these amendments is to deal with the homicide case in Taiwan. At §11 of the LegCo Brief, the Government refers to three

occasions on which Taiwan has written to the Hong Kong Government requesting legal assistance and surrender of the suspect and asserts that: "If the proposed legislative amendments are passed before July 2019, we will then have a legal basis to cooperate with Taiwan with a view to reaching a case-based arrangement in tackling the Taiwan murder case".

37. Nonetheless, the Government has so far failed to address the Taiwan Government's position that it "would not sign any extradition deal with Hong Kong that would have implications for the one-China principle, under which both Beijing and Taipei claim to be the legitimate government of China"[6].

38. Given that the Government cannot give any assurance that the proposed amendments will result in a favourable resolution, there is no reason for the Government to rush into these controversial and worrying proposals which undermine the international reputation of Hong Kong. Instead it should engage the public in a full and wide-ranging consultation.

HONG KONG BAR ASSOCIATION

2nd April 2019

[6] "Hong Kong pro-democracy group travels to Taiwan to discuss fugitive extradition proposal, risking wrath from Beijing", SCMP, 6 March 2019