

立法會  
*Legislative Council*

LC Paper No. CB(2) 2767/98-99  
(These minutes have been seen by  
the Administration)

Ref : CB2/SS/5/98

**Minutes of the first meeting of the  
Subcommittee on five resolutions made under section 4  
of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)  
held on Tuesday, 17 November 1998 at 2:30 pm  
in Conference Room B of the Legislative Council Building**

**Mutual Legal Assistance in Criminal Matters (Australia) Order  
Mutual Legal Assistance in Criminal Matters (France) Order  
Mutual Legal Assistance in Criminal Matters (New Zealand) Order  
Mutual Legal Assistance in Criminal Matters (United Kingdom) Order  
Mutual Legal Assistance in Criminal Matters (United States of America) Order**

**Members** : Hon James TO Kun-sun (Chairman)  
**Present** Hon Margaret NG  
Hon Jasper TSANG Yok-sing, JP  
Hon Mrs Miriam LAU Kin-ye, JP

**Public Officers** : Mr John Hunter  
**attending** Deputy Principal Government Counsel (International Law)  
  
Mrs Carrie Willis  
Principal Assistant Secretary (Security) A

**Clerk in** : Mr LAW Wing-lok  
**Attendance** Chief Assistant Secretary (2) 5

**Staff in** : Mr Stephen LAM  
**Attendance** Assistant Legal Adviser 4  
  
Miss Mary SO  
Senior Assistant Secretary (2)8

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**I. Election of Chairman**

Mr James TO was elected Chairman of the Subcommittee.

**II. Meeting with the Administration**

2. Members agreed that the Legal Service Division's Report (LC Paper No. LS 56/98-99), which set out the background to the making of the five Orders and the reasons for the modifications to the Mutual Legal Assistance in Criminal Matters Ordinance (the Ordinance) detailed in the Schedules to the Orders, should be used as the basis for discussion.

The Australia Order

3. In response to members' enquiries on the modifications to the Ordinance set out in Schedule 2 to the Australia Order, Deputy Principal Government Counsel (International Law) (Dep PGC) advised that the modifications reflected areas in which the Hong Kong/Australia Agreement varied from the Ordinance. These variations reflected Australian practice and legislation. Such modifications to the Ordinance were necessary to enable Hong Kong to comply with the obligations in the Agreement.

4. Dep PGC explained that section 5(1)(e) of the Ordinance provided that the Secretary for Justice was obliged to refuse assistance if the request related to the prosecution of a person for an offence in respect of which he had been convicted, acquitted, pardoned or punished in the requesting jurisdiction. Article IV(1)(e) of the Agreement extends this protection to convictions etc. in the requested jurisdiction as well. The modification expands the scope of section 5(1)(e) of the Ordinance and reflects the provision in the Agreement.

5. Dep PGC further explained that under section 17 of the Ordinance a person who came to Hong Kong from another jurisdiction to render assistance was given certain immunities. These immunities ceased to apply if the person had had the opportunity of leaving Hong Kong and had remained in Hong Kong otherwise than for the purpose of rendering assistance. Article XVII(2) of the Agreement provided that the immunities would continue to be applicable for a period of fifteen days after the person had had the opportunity of leaving Hong Kong. The modification reflected the protection in the Agreement by providing for a fifteen days' period in section 17.

6. In response to the Chairman's query concerning paragraph 2 in Article IV of the Agreement, Dep PGC pointed out that this paragraph was new to the model agreement and provided for three discretionary grounds for refusing assistance. The model agreement did not deal with the "lapse of time" issue

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as there was hardly any serious offence in Hong Kong which could not be prosecuted by reason of lapse of time. The inclusion of paragraph 2(a) in Article IV was made in response to the Australian Government's request that the Agreement should provide for discretionary ground for refusing assistance in the rare case where an offence, had it been committed within the jurisdiction of the Requested Party, could not be prosecuted by reason of lapse of time.

7. As regards paragraph 2(b) in Article IV, Dep PGC pointed out that Article VIII of the Agreement dealt with confidentiality and limitations of use of material. The Australian Government had requested that it should be made clear in Article IV, which dealt with limitations on compliance, that the Requested Party might refuse assistance if the Requesting Party could not guarantee that the material provided could be treated confidentially. In reply to members' question as to how the provisions in Article VIII would apply in relation to court proceedings in Hong Kong which were held in open court, Dep PGC explained that such proceedings could be held in camera.

8. Dep PGC also explained that the discretionary ground for refusing assistance in paragraph 2(c) in Article IV, which covered offences committed outside the area under the jurisdiction of the Requesting Party, was an extension of the double criminality requirement.

The France Order

9. Members noted that the first of the two modifications set out in Schedule 2 to the France Order were identical to the modification in the Australia Order, which extended the protection in section 5(1)(e) of the Ordinance relating to conviction, acquittal or pardon in the requested jurisdiction.

10. Dep PGC explained that the other modification to section 5(1)(e) was to provide for refusal of assistance if the offence, had it occurred in Hong Kong, could no longer be prosecuted by reason of lapse of time. This modification reflected Article IV(1)(f) of the Hong Kong/France Agreement. The French Government had asked for the inclusion of the "lapse of time" provision in the Agreement as there were a number of offences under the Continental legal system where a statutory time limit for prosecution was specified.

11. Members pointed out that the modification to section 17 concerning the period of immunity in the France Order was different from that provided for in the Australia Order. Dep PGC explained that this reflected the different practices adopted in the countries concerned.

12. In reply to the Chairman's enquiry, Dep PGC advised that paragraph 1(g) of Article IV of the Agreement was a variation to the model agreement which modified the double criminality requirement to the effect that where assistance

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did not involve the use of compulsory measures (e.g. taking evidence, executing requests for search and seizure, confiscating the proceeds of crime) assistance could nevertheless be granted. In practical terms this meant that the only assistance which did not require double criminality was “informal assistance” such as the provision of information regarding a person’s whereabouts. This assistance was in any event normally provided through INTERPOL. The variation was accordingly of little practical significance. Dep PGC further explained that if the French Government requested the Police in Hong Kong to interview a person in a police station, the person was under no compulsion to provide information and could refuse to cooperate.

13. Dep PGC advised that Article IX of the Agreement was derived from Article IX(4) of the model agreement. It was included as a separate Article since under the French law all requests were executed by judicial authorities and persons could attend these requests, such as attending an application for the issue of a search warrant. It was therefore decided that, in the light of French law, this provision should be of general application and not limited to requests for the taking of evidence. Members were of the view that Article IX protected the rights of the individual and they considered that this Article should be of general application and included as a separate Article in the Agreement.

The New Zealand Order

14. Dep PGC pointed out that the first modification to section 5(1)(e) of the Ordinance set out in Schedule 2 to the New Zealand Order extended the protection in relation to conviction, acquittal or pardon in the requesting state to convictions in the requested state and third jurisdictions to reflect Article IV(1)(e) of the Agreement. Article IV(1)(e) was included as the New Zealand law provided protection in relation to previous conviction etc. in the requested jurisdiction and third jurisdictions. The HKSAR Government initially had some reservations about extending this protection to third jurisdictions, but given that the types of mutual legal assistance were mainly confined to identifying and locating persons, taking evidence and executing requests for search and seizure etc. and did not involve extradition which was provided for in other legislation, the HKSAR Government eventually agreed to include such provision in the Agreement.

15. Members noted that -

- (a) the further modification to section 5(1)(e) was the same as the modification provided for in the France Order. This reflected the provision in Article IV(4) of the Agreement; and
- (b) the modification to section 17 was the same as the modification provided

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for in the Australia Order except that the period of immunity was twenty one days. This reflected the additional protection in Article XVII(2) of the Agreement.

The United Kingdom (UK) Order

16. Members noted that -

- (a) the first modification to section 5(1)(e) of the Ordinance was exactly the same as the modification provided for in the France Order. This reflected the provision in Article IV(1)(e) of the HKSAR/UK Agreement; and
- (b) the further modification to section 5(1)(e) was exactly the same as the modification provided for in the France Order. This reflected the provision in Article IV(1)(e) of the Agreement.

17. In response to members' enquiries concerning the new paragraph (h) added to section 5(1), Dep PGC explained that the new paragraph provided that the Secretary for Justice would refuse assistance if the request related to confiscation of the proceeds of crime and the underlying offence would not be a basis for confiscation in Hong Kong had the offence occurred in Hong Kong. The new paragraph was included at the request of the UK Government as they had indicated that they had limited capacity, under UK laws to enforce foreign confiscation orders. The modification reflected Article IV(1)(h) of the Agreement.

18. Members noted that the modification to section 17(3) of the Ordinance was exactly the same as the modification provided for in the Australia Order. This reflected the additional protection in Article XVII(2) of the Agreement.

19. Dep PGC also advised that section 17 gave various immunities to persons who came to Hong Kong to provide assistance. Section 23 was designed to ensure that persons who travelled from Hong Kong to other jurisdictions to render assistance received immunities. Immunity from civil suit was one of the specific immunities in sections 17 and 23. The modifications to sections 17(1) and 23(2) removed this immunity since it was not provided for in the Agreement. This was because the UK legislation did not give any guarantee that a person who travelled to UK to render assistance in a criminal case would not be prosecuted in a civil suit. In response to Miss Margaret NG's enquiry, Dep PGC explained that there was no provision under the Ordinance requiring a person to travel to UK to render assistance in a criminal case. The rendering of such assistance was entirely voluntary.

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The United States of America (US) Order

20. In response to members' enquiries on the modifications to section 5(1)(g) of the Ordinance, Dep PGC advised that section 5(1)(g) provided that the Secretary for Justice would refuse assistance if the offence in respect of which assistance was sought would not be an offence under Hong Kong law. He pointed out that Article 3(1)(d) of the HKSAR/US Agreement created an exception to this "double criminality" principle by requiring that assistance was to be given in respect of certain serious offences listed in the Annex to the Agreement, irrespective of whether the acts constituting the offence in the US would also result in a criminal conviction in Hong Kong. The modification to section 5(1)(g) of the Ordinance reflected the provision in Article 3(1)(d) of the Agreement.

21. Dep PGC explained that the modification to section 5(1)(g) of the Ordinance was made at the request of the US Government. The US Government would not agree to the inclusion of double criminality requirement in the HKSAR/US Agreement on the basis that none of their existing agreements included such a requirement. The US Government was however content that there be such a requirement provided that certain serious offences were listed as offences for which assistance had to be given irrespective of whether double criminality existed.

22. Miss Margaret NG expressed concern that if the Government had given in on the double criminality requirement in one agreement, it would be difficult for the Government to insist on such requirement in future negotiations with other jurisdictions.

23. Dep PGC said that the international community did not believe double criminality was important for mutual legal assistance in criminal matters. For instance, the European Convention and the United Nations model agreement did not deal with double criminality, and the Commonwealth Scheme provided for double criminality to be a discretionary ground for refusal of assistance. As such, Hong Kong was not in a strong negotiating position to insist on mandatory double criminality for all offences.

24. Dep PGC advised that Article 1(3) of the Agreement specified that the Agreement would include assistance for criminal offences related to taxation, custom duties, foreign exchange control, or other revenue matters but would not include assistance for non-criminal proceedings relating thereto. Members recalled Mr Eric LI's views expressed during the scrutiny of the Mutual Legal Assistance in Criminal Matters Bill in 1997 that provision of assistance to foreign jurisdictions in relation to tax offences should have limitations if the case was only at the investigation stage.

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25. In response to members' comment that the offences listed in items (2) and (5) of the Annex to the Agreement too broad and generalised, Dep PGC said that details of the types of offences covered by these descriptions would be supplied to members.

26. In reply to members' enquiry on item (8) of the Annex to the Agreement which provided that further offences might from time to time be agreed upon by exchange of diplomatic notes following consultation between the Central Authorities, Dep PGC said he would ascertain whether the addition of further offences to the Annex would necessitate the making of a new Order requiring the Council's approval.

27. Members noted that the modification to section 17 of the Ordinance was exactly the same as the modification provided for in the Australia Order.

28. In regard to the modification to section 23 of the Ordinance, Dep PGC said that section 23 required the Secretary for Justice to be satisfied that persons who were to travel to other jurisdictions from Hong Kong to provide assistance received adequate immunities. The modification was made in response to the US Government's request and reflected the provision in Article 13(2) of the Agreement. The reason for the request was that in certain circumstances the US authorities would not, for political reasons, wish to grant immunities to a person who was, for instance, a terrorist. Article 13(2) was accordingly included in the agreement to permit the requesting jurisdiction to limit the immunities to be provided. The modification proposed to section 23 reflected the fact that there could be limitations on immunities. However, the person affected would be advised by the Requested Party of the nature of those limitations before he consented to travel.

29. Members noted that there was no provision in the Agreement for refusal of assistance by the Requested Party if the request related to an offence which carried death penalty within the jurisdiction of the Requesting Party. Dep PGC advised that it was not uncommon in international agreements to leave out the death penalty exception provision. In this case, the US Government did not wish to include a death penalty exception provision in the Agreement. The Government eventually acceded to the US's request given that the Agreement dealt with providing legal assistance and not with the extradition of a suspect to face a possible death penalty.

30. In response to Miss Margaret NG, Dep PGC said that the Secretary for Justice had the discretion to refuse assistance for offences punishable with death penalty under section 5(3)(c) of the Ordinance, and he would attempt to provide a written reply setting out the circumstances under which the Secretary for Justice would exercise such discretion.

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31. At the request of the Chairman, Dep PGC said he would write to the US Government requesting that the record of the Senate hearing on the deliberations of the Agreement be provided for the Subcommittee's information.

32. In conclusion, the Subcommittee agreed that -

- (a) a report be submitted to the House Committee on 27 November 1998 recommending that the Australia, France, New Zealand and UK Orders be supported;
- (b) the Administration give notices to move the resolutions on the four Orders mentioned in paragraph 32(a) above at the Council meeting on 9 December 1998; and
- (c) the Subcommittee would continue discussion on the US Order upon receipt of further details from the Administration on the aspects of the Order mentioned in paragraphs 25-26 and 30-31 above.

33. The meeting ended at 4:07 pm.

Legislative Council Secretariat

9 September 1999