

L. N. 372 of 1998

MUTUAL LEGAL ASSISTANCE IN CRIMINAL
MATTERS (AUSTRALIA) ORDER

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

1. Commencement

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

2. Ordinance to apply between Hong Kong
and Australia

In relation to the arrangements for mutual legal assistance---

(a) which are applicable to the Government of Hong Kong and the Government of Australia; and

(b) a copy of which is annexed at Schedule 1,

it is hereby directed that the Ordinance shall, subject to the modifications to the Ordinance summarized in Schedule 2, apply as between Hong Kong and Australia.

SCHEDULE 1 [s. 2]

Agreement between the
Government of Hong Kong
and

the Government of Australia
Concerning Mutual Legal Assistance
in Criminal Matters

The Government of Hong Kong, having been duly authorised by the sovereign government responsible for the foreign affairs relating to Hong Kong, and the Government of Australia,

Desiring 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 I

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 of evidence, articles or documents, including the execution of letters rogatory;
- (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 property used in or derived from criminal activities and the proceeds of criminal activities;
- (i) providing information, documents and records;
- (j) delivery of property, including lending of exhibits; and
- (k) other assistance consistent with the objects of this Agreement which is not inconsistent with the law of the Requested Party.

(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) Assistance shall not include:

- (a) the surrender of any fugitive offender;
- (b) the execution in the Requested Party of criminal judgments imposed in the Requesting Party except to the extent permitted by the law of the Requested Party and this Agreement; and
- (c) the transfer of persons in custody to serve sentences.

Article II

Central Authority

- (1) Each Party shall establish a Central Authority.
- (2) The Central Authority of Hong Kong shall be the Attorney General or his duly authorised officer. The Central Authority for Australia shall be the Attorney-General's Department, Canberra.
- (3) Requests under this Agreement shall be made only by the Central Authority of the Requesting Party to the Central Authority of the Requested Party.

Article III

Other assistance

The Parties may provide assistance pursuant to other agreements, arrangements or practices.

Article IV

Limitations on compliance

- (1) The Requested Party shall refuse assistance if:

(a) the request for assistance impairs the sovereignty, security or public order of Australia or, in the case of Hong Kong, of the State which is responsible for the foreign affairs relating to Hong Kong;

(b) the request for assistance relates to an offence of a political character;

(c) the request for assistance relates to an offence only under military law;

(d) there are substantial grounds for believing that the request for assistance will result in a person being prejudiced on account of that person's race, sex, 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 has served the sentence imposed in either Party;

(f) it is of the opinion that the granting of the request would seriously impair its essential interests; or

(g) the acts or omissions alleged to constitute the offence would not, if they had taken place within the jurisdiction of the Requested Party, have constituted an offence.

(2) The Requested Party may refuse assistance if:

(a) the request for assistance relates to the prosecution or punishment of a person who could no longer be prosecuted by reason of lapse of time or for any other reason if the offence had been committed within the jurisdiction of the Requested Party;

(b) the Requesting Party cannot comply with any conditions relating to confidentiality or limitation as to the use of material provided; or

(c) the request for assistance relates to the prosecution or punishment of a person for an offence which is committed outside the area under the jurisdiction of the Requesting Party and the law of the Requested Party does not provide for the punishment of an offence committed in similar circumstances.

(3) For the purpose of paragraph (1)(f) the Requested Party may include in its consideration of essential interests whether the provision of assistance could prejudice the safety of any person or impose an excessive burden on the resources of the Requested Party.

(4) 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.

(5) The Requested Party may postpone assistance if execution of the request would interfere with an ongoing investigation or prosecution in the Requested Party.

(6) 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.

(7) If the Requesting Party accepts assistance subject to the terms and conditions referred to in paragraph (6) (b), it shall comply with those terms and conditions.

Article V

Requests

(1) Requests shall be made in writing except in urgent cases. In urgent cases, requests may be made orally, but shall be confirmed in writing within 10 days thereafter.

(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 requested;

(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) the court order, if any, or a certified copy thereof, sought to be enforced and a statement to the effect that it is a final order;

(f) a summary of the relevant facts and laws;

(g) any requirements for confidentiality;

(h) details of any particular procedure the Requesting Party wishes to be followed; and

(i) details of the period within which the request should be complied with.

(3) Requests, and all documents submitted in support of requests, shall be accompanied by a translation in the language of the Requested Party.

Article VI

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) A request shall be executed in accordance with the law of the Requested Party and, to the extent not prohibited by the law of the Requested Party, in accordance with the directions stated in the request so far as practicable.

(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) Where required by the Requested Party, the Requesting Party shall return the material provided under this Agreement when no longer needed for the relevant investigation or proceeding.

Article VII

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 except:

(a) fees of counsel retained at the request of the Requesting Party;

(b) fees of experts;

(c) expenses of translation;

(d) the expenses associated with conveying any person to or from the Requested Party, and any fees, allowances or expenses payable to that person whilst in the Requesting Party pursuant to a request under this Agreement; and

(e) the expenses associated with conveying custodial or escorting officers.

(3) If during the execution of the request it becomes apparent that expenses of an extraordinary nature 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 VIII

Confidentiality and limitations of use

(1) The Requested Party shall use its best efforts to keep confidential a request, its contents and the fact that it has been granted, except when otherwise authorized by the Requesting Party. If the request cannot be executed without breaching confidentiality, the Requested Party shall so inform the Requesting Party which shall then determine whether the request should nevertheless be executed.

(2) 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.

(3) 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.

Article IX

Obtaining of evidence, articles or documents

(1) Where a request is made that evidence be taken for the purpose of an investigation, a prosecution of a criminal offence or a proceeding in relation to a criminal matter in the jurisdiction of the Requesting Party the Requested Party shall, subject to its laws, arrange to take such evidence.

(2) For the purposes of this Agreement, the giving or taking of evidence shall include the production of documents, records or other material.

(3) For the purposes of requests under this Article the Requesting Party shall specify the questions to be put to the witnesses or the subject matter about which they are to be examined.

(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 the person 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.

Article X

Obtaining statements of persons

Where a request is made to obtain the statement of a person for the purpose of an investigation or proceeding in relation to a criminal matter in the Requesting Party, the Requested Party shall endeavour to obtain such statement.

Article XI

Location or identity of persons

The Requested Party shall, if requested, endeavour to ascertain the location or identity of any person specified in the request.

Article XII

Service of documents

(1) The Requested Party shall serve 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 within 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 notice 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 may effect service of any document by mail or, if the Requesting Party so requests, in any other manner required by the law of the Requesting Party which is not inconsistent with the law of the Requested Party.

(5) The Requested Party shall, subject to its law, return a proof of service in the manner required by the Requesting Party. If service cannot be effected, the Requesting Party shall be so informed and advised of the reasons.

(6) Persons who fail to comply with any process served on them shall not thereby be liable to any penalty or coercive measure pursuant to the law of the Requesting Party.

Article XIII

Publicly available and official documents

(1) Subject to its law the Requested Party shall provide copies of publicly available documents, records or information.

(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 XIV

Certification and authentication

(1) Documents or materials supporting a request for assistance involving the use of compulsory measures or the forfeiture or confiscation of the proceeds of crime shall be admissible in proceedings in the Requested Party if they---

(a) purport to be signed or certified by a Judge, Magistrate or other officer in or of the Requesting Party; and

(b) purport to be sealed with an official or public seal of the Requesting Party or an officer of the Requesting Party.

(2) Documents or materials furnished in response to a request shall only be signed or certified and sealed if requested. Other documents or materials shall be certified or authenticated by consular or diplomatic officers only if the law of the Requesting Party specifically so requires.

Article XV

Transfer of persons in custody

(1) A person in custody in the Requested Party whose presence is requested 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 their subsequent return to the Requested Party.

(2) Where the sentence of imprisonment of a person transferred pursuant to this Article expires whilst the person is in the Requesting Party the Requested Party shall so advise the Requesting Party which shall ensure the person's release from custody and that the person is treated as a person referred to in Article XVI.

Article XVI

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 consent to travel to and remain in the Requesting Party to provide assistance.

Article XVII

Safe conduct

(1) A person who consents to provide assistance pursuant to Articles XV or XVI shall not be prosecuted, detained, or restricted in their personal liberty in the Requesting Party for any criminal offence or proceeded against on a civil matter which preceded their departure from the Requested Party.

(2) Paragraph (1) shall not apply if the person, not being a person in custody transferred under Article XV, and being free to leave, has not left the Requesting Party within a period of 15 days after being notified that their presence is no longer required, or having left the Requesting Party, has returned.

(3) A person who consents to give evidence under Articles XV or XVI shall not be subject to prosecution based on that person's testimony, except for perjury and contempt.

(4) A person who consents to provide assistance pursuant to Articles XV or XVI shall not be required to give evidence or to assist any investigation other than the proceeding or investigation to which the request relates.

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

Article XVIII

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 provided that the information supplied would justify such action under the law of the Requested Party.

(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 material seized.

(3) The Requesting Party shall observe any conditions imposed by the Requested Party in relation to any seized material which is delivered to the Requesting Party.

Article XIX

Proceeds of crime

(1) The Requested Party shall, upon request, endeavour to ascertain whether any proceeds of 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) Upon request, the Requested Party shall, to the extent its laws permit, give effect to a final order forfeiting or confiscating proceeds of crime made by a court of the Requesting Party.

(4) In the application of this Article, the rights of bona fide third parties shall be respected under the law of the Requested Party.

(5) Proceeds confiscated pursuant to this Agreement shall be retained by the Requested Party unless otherwise decided by the Parties in a particular case.

(6) In this Article "proceeds of crime" includes:

(a) property used in connection with the commission of an offence;

(b) property derived or realized, directly or indirectly, from the commission of an offence; or

(c) property which represents the value of property and other benefits derived from the commission of an offence.

Article XX

Settlement of disputes

Any dispute arising out of the interpretation, application or implementation of this Agreement shall be resolved through diplomatic channels if the Central Authorities

are themselves unable to reach agreement.

Article XXI

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) This Agreement shall apply to requests whether or not the relevant acts or omissions occurred prior to this Agreement entering into force.

(3) Each of the Parties may terminate this Agreement at any time by giving notice in writing to the other. In that event the Agreement shall cease to have effect three months after the date of the 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 thereto by their respective Governments, have signed this Agreement.

Done at Sydney, Australia, this twenty-third day of September one thousand nine hundred and ninety six, in Chinese and English, both texts being equally authentic.

SCHEDULE 2 [s. 2]

Modifications to the Ordinance

1. Section 5(1)(e) of the Ordinance shall be 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 has been convicted, acquitted or pardoned by a competent court or other authority in the place or Hong Kong*, or 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;"

2. Section 17(3)(b) of the Ordinance shall be modified to read as follows---

"(b) the person has had an opportunity of leaving Hong Kong, 15 days have expired since that opportunity* and the person* 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 Attorney General** 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).

Mable CHAN

Clerk to the Executive Council

Council Chamber

13 October 1998

Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) shall apply as between Hong Kong and Australia. The Order is made in consequence of the arrangements for mutual legal assistance entered into by Hong Kong and Australia and signed in Sydney, Australia, on 23 September 1996. A copy of those arrangements is annexed at Schedule 1 to the Order. It should be noted that the Ordinance is subject to the modifications summarized in Schedule 2 to the Order.