

L. N. 376 of 1998

MUTUAL LEGAL ASSISTANCE IN CRIMINAL
MATTERS (NEW ZEALAND) 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
Special Administrative Region
and New Zealand

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

(a) which are applicable to the Government of the Hong Kong Special Administrative
Region and the Government of New Zealand; 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 the Hong Kong Special
Administrative Region and New Zealand.

SCHEDULE 1 [s. 2]

Agreement Between
the Government of the Hong Kong Special
Administrative Region of
the People's Republic of China
and
the Government of New Zealand
Concerning
Mutual Legal Assistance in
Criminal Matters

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

Desiring to improve the effectiveness of cooperation between the Parties in the
investigation, prosecution and prevention of crime and the issuing and enforcement
of orders relating to property used in or derived from crime;

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) Such assistance shall include:

- (a) identifying and locating persons;
- (b) serving documents;
- (c) obtaining and providing evidence, articles or documents;
- (d) executing requests for search and seizure;
- (e) making arrangements for the transfer of persons to give evidence or assist investigations;
- (f) obtaining and providing judicial or official records, and other information, documents and records;
- (g) tracing, restraining and confiscating property used in or derived from crime;
- (h) delivery of property, including lending of exhibits;
- (i) 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 relating to taxation, customs duties, foreign exchange control or other revenue matters but not in connection with non-criminal proceedings relating thereto.

(4) This Agreement is intended solely for mutual assistance between the Parties and shall not give rise to any right on the part of any private person to make a request under this Agreement.

(5) This Agreement shall not apply to Tokelau unless the Parties have exchanged Notes through the diplomatic channel agreeing the terms on which this Agreement shall so apply.

ARTICLE II

Central Authority

(1) Each Party shall establish a Central Authority.

(2) The Central Authority for New Zealand shall be the Attorney-General. The Central Authority for the Hong Kong Special Administrative Region shall be the Secretary for Justice. Each Party shall notify the other of any change of its Central Authority.

(3) Requests for assistance shall be made through the Central Authority which shall deal with the requests in accordance with the provisions of this Agreement.

ARTICLE III

Other Assistance

This Agreement shall not prevent the Parties from providing assistance to each other 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 New Zealand or, in the case of the Hong Kong Special Administrative Region, the People's Republic of China;
 - (b) the request for assistance relates to an offence of a political character;
 - (c) the request for assistance relates to an offence 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 race, colour, ethnic origin, 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 that person has been convicted, acquitted or pardoned by a competent tribunal or authority or has undergone punishment provided by law;
 - (f) it is of the opinion that the granting of the request would seriously impair its essential interests;
 - (g) the Requesting Party cannot comply with any conditions in relation to confidentiality or limitation as to the use of material provided; or
 - (h) 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) For the purpose of paragraph (1)(f) of this Article 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.
- (3) 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 is 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.
- (4) The Requested Party may refuse assistance if the request relates to the prosecution or punishment of a person for an offence which, had it been committed within the jurisdiction of the Requested Party, could no longer be prosecuted by reason of lapse of time.
- (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 Requested 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) of this Article, it shall comply with those terms and conditions.

(8) The Requested Party shall promptly inform the Requesting Party of a decision to deny in whole or in part a request for assistance and the reasons for that decision.

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, 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 and the reasons therefor;

(h) details of any particular procedure the Requesting Party wishes to be followed including details of the manner and form in which any evidence, information, document or item is to be supplied to the Requesting Party;

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

(j) information as to the allowances and expenses to which a person travelling to the Requesting Party will be entitled.

(3) All documents submitted in support of a request shall be accompanied by a translation in the language of the Requested Party and by certification or authentication required by the Requested Party.

(4) If the Requested Party considers that the information contained in the request is not sufficient to enable the request to be dealt with, it may request additional

information.

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 may postpone the delivery of material requested if such material is required for criminal or civil proceedings in its jurisdiction. The Requested Party shall, upon request, provide certified copies of relevant documents.

(4) 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.

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 within its jurisdiction, except:

- (a) fees of counsel retained at the request of the Requesting Party;
- (b) fees of experts;
- (c) expenses of translation; and
- (d) travel and accommodation expenses and allowances of persons.

(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

Limitations on Use

(1) The Requested Party shall use its best efforts to keep confidential a request and its contents except when otherwise authorised 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.

(4) The Requesting Party, if so requested, shall use its best efforts to ensure that the information or evidence is protected against loss and unauthorised access, use, modification, disclosure or other misuse.

ARTICLE IX

Location or Identity of Persons

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

ARTICLE X

Obtaining Statements of Persons

(1) 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, with the consent of that person, to obtain that statement.

(2) For the purposes of a request under this Article the Requesting Party shall specify the subject matter about which the statement is to be taken, including any questions it seeks to be put.

ARTICLE XI

Obtaining of Evidence, Articles or Documents

(1) Where a request is made that evidence be taken for the purpose of the prosecution of a criminal offence or proceedings in relation to a criminal matter in the Requesting Party, the Requested Party shall, subject to its law, arrange to have such evidence taken and transmitted to the Requesting Party.

(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 subject matter about which witnesses are to be examined, and may also specify any questions to be put to them as well as the manner and form in which evidence should be taken.

(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 law 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 or require 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 or require that person to decline to give evidence in such proceedings in the Requesting Party.

(6) If any person claims that there is a right or obligation to decline to give evidence under the law of the Requesting Party, the Requested Party shall with respect thereto obtain a certificate from the Central Authority of the Requesting Party.

ARTICLE XII

Service of Documents

(1) The Requested Party shall, in accordance with its law, arrange for service of any document transmitted to it for that purpose.

(2) The Requesting Party shall transmit a request for the service of a document pertaining to a response to 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 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.

(5) A person who fails to comply with any process served on that person shall not on that account be subject to any penalty, liability, or coercive measure pursuant to the law of the Requesting Party or Requested Party.

ARTICLE XIII

Publicly Available and Official Documents

(1) Subject to its law the Requested Party shall on request provide copies of publicly available documents.

(2) The Requested Party may also provide copies of any document, record or information in the possession of a government department or agency, but not publicly available, to the extent its laws permit.

ARTICLE XIV

Certification and Authentication

Documents, transcripts, records, statements or other material which are to be transmitted to the Requesting Party shall be certified or authenticated if the Requesting Party so requests. The certification or authentication shall be in the

manner and form required by the Requesting Party to the extent permitted by the law of the Requested Party. Material 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 required in the Requesting Party for the purposes of giving evidence in criminal proceedings pursuant to this Agreement shall, if the Requested Party consents, be transferred from the Requested Party to the Requesting Party for that purpose. No assistance shall be given under this Article unless the person consents and the Requesting Party has agreed to comply with any conditions required by the Requested Party as to the custody or security of such person.

(2) Where a person transferred pursuant to this Article is no longer required to be held in custody, the Requested Party shall so advise the Requesting Party which shall ensure that person's release from custody.

(3) The provisions of this Article shall also apply to persons who, although not at the material time in custody, are subject to a sentence imposed for an offence other than a sentence of a monetary nature.

ARTICLE XVI

Transfer of Other Persons

(1) The Requesting Party may request the transfer of persons other than those to whom Article XV of this Agreement applies to the Requesting Party for the purpose of providing assistance pursuant to this Agreement.

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

ARTICLE XVII

Safe Conduct

(1) A person who consents to provide assistance pursuant to Article XV or XVI of this Agreement shall not be prosecuted, punished, detained, or restricted in personal liberty in the Requesting Party for any criminal offence or civil matter which preceded that person's departure from the Requested Party.

(2) Paragraph (1) of this Article shall cease to apply if the person being free and able to leave, has not left the Requesting Party within a period of 21 days after being notified that such person's presence is no longer required, or having left the Requesting Party, has returned.

(3) A person who consents to give evidence pursuant to Article XV or XVI of this Agreement shall not be subject to prosecution based on that person's testimony, except

for perjury, contempt or the making of false declarations.

(4) A person who consents to provide assistance pursuant to Article XV or XVI of this Agreement shall not be required to give evidence or assist in any matter other than the matter to which the request relates.

(5) A person who does not consent to provide assistance pursuant to Article XV or XVI of this Agreement shall not by reason thereof be subject to any penalty, liability or coercive measure, notwithstanding any contrary statement in the request or in any document accompanying the request.

(6) A person who gives evidence or assistance pursuant to Article XV or XVI of this Agreement shall be returned to the Requested Party, in accordance with arrangements agreed by the Requested Party, as soon as practicable after the evidence or assistance has been given.

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.

(2) The Requested Party shall provide such information as may be required by the Requesting Party concerning the result of any search, the place of seizure, the circumstances of seizure, and the subsequent custody of the property seized.

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

ARTICLE XIX

Property Used in or Derived from Crime

(1) The Requested Party shall, upon request, endeavour to ascertain whether any property used in or derived from crime is 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 property may be located in the latter's jurisdiction.

(2) Where the Requesting Party so requests, the Requested Party shall take such measures as are permitted by its law to:

(a) prevent any dealing in, transfer or disposal of property, pending a final determination as to that property by a court of the Requesting Party;

(b) monitor accounts or other mechanisms through which illegal transactions are suspected of being carried out;

(c) obtain production of any documents or other materials which may enable property to be located.

(3) Upon request, the Requested Party shall, to the extent its laws permit, give

effect to a final order forfeiting or confiscating property made by a court of the Requesting Party.

(4) Property confiscated pursuant to this Agreement shall be retained by the Requested Party unless otherwise agreed upon between the Parties.

(5) In the application of this Article, the rights of bona fide third parties shall be given effect to the extent permitted by the laws of the Requested Party.

(6) For the purposes of this Article, "property" includes property of any description which has been used for the commission of an offence or which is, or represents, the proceeds of an offence.

ARTICLE XX

Consultation

The Parties shall consult promptly, at the request of either of them, concerning any issue relating to the interpretation, application or implementation of this Agreement either generally or in relation to a particular case.

ARTICLE XXI

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 XXII

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 to the other. In that event the Agreement shall cease to have effect three months after the date of 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 the Hong Kong Special Administrative Region this third day of April One thousand nine hundred and ninety eight in the Chinese and English languages, both texts equally authentic.

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---

(i)* 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, another place outside

Hong Kong or Hong Kong, or has undergone the punishment provided by the law of that-----** the___* place, another place outside Hong Kong or Hong Kong*, in respect

of that offence or of another external offence constituted by the same act or omission as that offence;

(ii) in respect of an act or omission that, if it had occurred in Hong Kong, could no

longer be prosecuted in Hong Kong by reason of lapse of time;*

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, 21 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 the Hong Kong Special Administrative Region and New Zealand. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Hong Kong Special Administrative Region and New Zealand and signed in Hong Kong on 3 April 1998. 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.