

Ref : CB2/SS/5/98

**Paper for the House Committee meeting
on 29 October 1999**

**Second Report of the Subcommittee on the five resolutions
made under section 4 of the
Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)**

Purpose

This paper sets out the Second Report of the Subcommittee on the five resolutions made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (the Ordinance). The report covers the Subcommittee's deliberations on the Mutual Legal Assistance in Criminal Matters (United States of America) Order (the "US Order").

Background

2. At the meeting of the Executive Council on 13 October 1998, the Council advised and the Chief Executive ordered that the US Order, along with another four Orders, be made under section 4(1) of the Ordinance. The other four Orders were -

- (a) Mutual Legal Assistance in Criminal Matters (Australia) Order (the "Australia Order");
- (b) Mutual Legal Assistance in Criminal Matters (France) Order (the "France Order");
- (c) Mutual Legal Assistance in Criminal Matters (New Zealand) Order (the "New Zealand Order"); and
- (d) Mutual Legal Assistance in Criminal Matters (United Kingdom) Order (the "UK Order").

3. The five Orders specify the scope and procedures in relation to the provision of assistance in criminal matters. They also provide for safeguards in

the rights of persons involved in criminal proceedings. They are substantially in conformity with the provisions in the Ordinance.

4. At the House Committee meeting held on 30 October 1998, members agreed that a Subcommittee should be formed to study the five Orders. A membership list of the Subcommittee is at the **Appendix**.

5. The Subcommittee had submitted a report for the House Committee meeting on 27 November 1998 recommending that the four resolutions on the Australia Order, France Order, New Zealand Order and UK Order be supported. The four resolutions were subsequently passed by the Council at the meeting on 9 December 1998.

Deliberations of the Subcommittee

6. The main deliberations of the Subcommittee on the US Order are set out in the following paragraphs.

The Death Penalty

7. Members have noted that there is no provision in the HKSAR/US Agreement (the Agreement) for refusal of assistance by the Requested Party if the request relates to an offence which carries death penalty within the jurisdiction of the Requesting Party.

8. The Administration has explained that it is not uncommon in international agreements to leave out the death penalty exception provision. For instance, neither the European Convention, the UN Model Agreement nor the Commonwealth Scheme provide for either a mandatory or discretionary death penalty exception. The international practice for mutual legal assistance is accordingly different from that for extradition, where individual liberty is directly at issue because the person affected is transferred to another jurisdiction; the provision of mutual legal assistance, on the other hand, does not involve the surrender of the person affected.

9. The Administration has further pointed out that there is an "essential interest" clause in the Agreement, and the US accepts that a jurisdiction which does not impose the death penalty may refuse assistance for an offence which carries the death penalty on the basis of the "essential interests" clause. According to the Administration, the US has advised that the "essential interests" exception should not be construed as a vehicle for a blanket prohibition of assistance in all cases that might theoretically involve the death penalty as this would unduly hamper law enforcement co-operation. Therefore, if the Secretary for Justice were to refuse a US request by the exercise of her discretion pursuant

to section 5(3)(c) of the Ordinance, the US authorities would not consider this refusal to be a breach of the Agreement.

10. On the application of the "essential interests" clause in Article 3(1) (b) of the Agreement, members have enquired whether the term "country" in the context of the extract from the report of the Senate Foreign Relations Committee (paragraph 5 of LC Paper No. CB(2) 2768/98-99(01)) should be taken to mean "jurisdiction". The Administration has explained that the term "country" in this context means "contracting party" and the HKSAR is clearly encompassed within its meaning. The HKSAR is therefore entitled to refuse assistance in death penalty cases pursuant to this Article of the Agreement.

11. A member has asked whether the fact that informal assistance is currently provided to the Mainland in death penalty cases will be a factor in deciding whether to grant assistance to the US. The Administration has clarified that such informal assistance provided to the Mainland is not relevant to the exercise of the Secretary for Justice's discretion to grant or refuse assistance to the US in relation to offences which carry the death penalty, and it is therefore not a factor which will influence a decision whether to grant assistance.

12. In response to a member's enquiry, the Administration has confirmed that assistance rendered to the US Government by the HKSAR Government during the investigation stage will not prejudice Hong Kong in resisting extradition of a person who was charged with a death penalty offence in the US, as the HKSAR Government is bound by the Fugitive Offenders Ordinance (Cap. 503) to refuse extradition of a person charged with a death penalty offence in another jurisdiction.

Double Criminality

13. The Administration has advised that section 5(1)(g) of the Ordinance provides that the Secretary for Justice shall refuse assistance if the offence in respect of which assistance is sought will not be an offence under Hong Kong law. The Administration has pointed out that Article 3(1)(d) of the Agreement creates an exception to this "double criminality" principle by requiring that assistance is 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 will also result in a criminal conviction in Hong Kong. The US Order accordingly provides for a modification to section 5(1)(g) of the Ordinance to give effect to the exception provided for in the Agreement.

14. The Administration has explained that the US Government initially would not agree to the inclusion of double criminality requirement in the Agreement on the grounds that none of their existing agreements include such a requirement and the prevailing international practice does not require double criminality to

exist before assistance could be provided. The provision in Article 3(1)(d) of the Agreement was included as a compromise instead of not having a double criminality requirement at all, in accordance with the international practice, and in order to meet US concerns that assistance should be available for certain serious offences which, by their nature, were regarded by the US as likely to require assistance from outside the US.

15. On the submission by the Hong Kong Society of Accountants (HKSA) that the double criminality test should apply to offences related to taxation, customs duties and foreign exchange control specified at Item (3) of the Annex to the Agreement. The Administration has explained that as the laws on taxation, customs duties as well as foreign import and export vary greatly in different jurisdictions, it is considered appropriate that double criminality requirement should not be applied to mutual legal assistance. The Administration has also pointed out that the provisions in the Ordinance restricting the rendering of assistance in relation to external offences related to taxation were not modified by the US Order.

16. Regarding the HKSA's concern as to the vagueness and potential scope of export control offences specified at Item (5) of the Annex to the Agreement, the Administration has explained that the considerations referred to in paragraph 15 above also apply to such offences as different jurisdictions will have in place different regimes of import/export control.

Recommendation

17. In the light of the clarifications provided by the Administration, the Subcommittee recommends that the US Order be supported. The Subcommittee further recommends that the Administration give notice to move the resolution on the US Order at the Council meeting on 10 November 1999.

Advice Sought

18. Members are invited to note the deliberations of the Subcommittee and support the recommendations in paragraph 17 above.

**Subcommittee on the five resolutions
made under section 4 of the
Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)**

Membership list

Hon James TO Kun-sun (Chairman)

Hon Margaret NG

Hon Jasper TSANG Yok-sing, JP

Hon Mrs Miriam LAU Kin-yee, JP

Total : 4 members