

**Extract from Minutes of Meeting of the Bills Committee on  
Mutual Legal Assistance in Criminal Matters Bill on 22 May 1997**

X X X X X X X X

Clause 10 - Requests to Hong Kong for taking of evidence, etc

10. As far as the compellability of persons to give evidence at the investigation stage of an external criminal matter was concerned, the Administration proposed to substitute clause 10(9) by "For the purposes of this section, a person is not compellable to give evidence, or produce a thing, for the purposes of a criminal matter in place outside Hong Kong that the person could not be compelled to give or produce, as the case may be, in Hong Kong if that matter were a trial of a person for a Hong Kong offence or proceedings to determine whether a person should be tried for such an offence." Miss NG opined that such safeguard was not sufficient as it had not removed the compellability on persons to give evidence at the investigation stage.

11. To prevent fishing expeditions by overseas investigation authorities, the Administration proposed to add clause 10(10) to specify that a person giving evidence or producing a thing for a criminal matter outside Hong Kong should not be required to state what things relevant to that matter were or had been in his possession or control, or to produce any things other than that as specified by the magistrate conducting the proceedings concerned. Members had no objection.

12. In response to Miss LAU's concern expressed at the previous meeting on the admissibility of evidence taken, the Administration proposed an additional clause 10(11) which stipulated that evidence taken under clause 10 was not admissible in evidence for criminal matters in Hong Kong except against the person who gave that evidence for the offence of perjury in respect of that evidence. In response to Miss NG's query, SALD undertook to revise the clause to the effect that the evidence taken could not be admissible in evidence, or otherwise used, for the purposes of any criminal matter, civil proceedings, disciplinary proceedings, or other proceedings, in Hong Kong except for the offence of perjury or contempt of court in respect of the evidence.

X X X X X X X X

**Extract from Report of the Bills Committee on Mutual Legal Assistance in  
Criminal Matters Bill to the House Committee on 13 June 1997**

X X X X X X X X

The power to take evidence at investigation stage

12. The power to take evidence and compellability of witnesses to give evidence at the investigation stage have been the focal points of discussion of the Bills Committee. Members are aware that under the laws of Hong Kong, a witness will be compelled to answer questions only in the course of a trial or hearing. However, under the provisions of the Bill, a witness in Hong Kong has to answer questions, even when the criminal matter in the requesting jurisdiction is at the investigation stage. As the enactment of the Bill will result in a fundamental change in the policy and principle governing the taking of evidence, members are concerned that the rights of silence of witnesses will be infringed upon. While acknowledging the need to cooperate in the combat against international crimes, members are of the view that the rights and protection of Hong Kong citizens should be adequately safeguarded.

13. There is also the general concern that the Bill will give rise to the extension of the law of the requesting party in the taking of evidence under the terms of bilateral agreements in such a way that the power of a requesting overseas jurisdiction will surpass that of local authorities in Hong Kong.

14. The Administration contends that compulsory powers to take evidence at the investigation stage have been provided for under the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405), the Organized and Serious Crimes Ordinance (Cap. 445), the Companies Ordinance (Cap. 32), the Securities and Futures Commission Ordinance (Cap. 24) and the Prevention of Bribery Ordinance (Cap. 201).

15. The reason why amendments were proposed to the Evidence Ordinance (Cap. 8) in 1996 to specifically provide that evidence could be taken at the investigation stage was that some jurisdictions could not positively assert that it was likely that proceedings would be instituted if the evidence was obtained. The Administration points out that where international cooperation is involved, the overwhelming international practice is to supply evidence at the investigation stage. To illustrate this point, the Administration has made comparisons with different countries on the power to take evidence for the purpose of foreign investigations of criminal matters. With the exception of New Zealand, most countries such as United Kingdom, Australia, Canada and US provide legal assistance to foreign jurisdictions for the taking of evidence at the investigation stage. The majority of jurisdictions have accepted that in the area of international cooperation, compulsory powers should be able to be used at the investigation stage.

16. The Administration reiterates that if the Bill does not permit evidence to be taken at the investigation stage, the MLA agreements already entered into with Australia and US will not be able to be brought into force. It is doubtful whether the

Hong Kong Government would be able to successfully negotiate other agreements if an obligation to take evidence at the investigation stage has to be excluded. Moreover, if Hong Kong cannot take evidence at foreign request at the investigation stage, it will not be able to obtain evidence from abroad because it will not be able to conclude agreements or offer reciprocity.

17. Acknowledging members' concern about the need for safeguards to be provided in the Bill to ensure that the rights and protection of witnesses will not be eroded, the Administration has included the following provisions in relation to requests to Hong Kong for the taking of evidence -

(a) clause 10(2A)

This will provide the Magistrate discretionary powers to conduct proceedings in camera when assisting in a foreign request for taking of evidence.

(b) clause 10(9)

This will provide for further protection of persons giving evidence in Hong Kong by enabling them to rely on all existing rights to refuse to answer questions under Hong Kong laws, including the right of not incriminating themselves.

(c) clause 10(11)

This will prevent fishing expeditions by overseas investigations, which are of much concern to both the Law Society and the HKSA. It will confine the production of evidence and materials to those as specified by the Magistrate conducting the proceedings.

(d) clause 10(12)

This will prevent evidence obtained by overseas jurisdictions from being used as evidence in any proceeding in Hong Kong except in proceedings for the offences of perjury or contempt of court in respect of the evidence given.

18. Members have generally accepted that the proposed safeguards have afforded greater protection for persons giving evidence at investigation stage.

X X X X X X X X

**Extract from Official Record of Proceedings of Legislative Council  
on 23 June 1997**

**X X X X X X X X**

**SECRETARY FOR SECURITY:** Mr President, I would like to thank the Chairman of the Bills Committee, the Honourable James TO, and other members of the Committee for their careful, and speedy, examination of the Bill. I am also grateful to the Committee for their support of the principles of the Bill, and for the constructive suggestions which they have made to further refine the provisions of the Bill. In the light of their suggestions, I will move amendments to the Bill at the Committee stage.

The Bill provides a statutory framework to implement the bilateral agreements on mutual legal assistance which we are concluding with other jurisdictions. It sets out conditions and procedures for providing assistance in the areas of taking of evidence, search and seizure, production of material, transfer of persons to give evidence and confiscation of the proceeds of crime. This Bill is important in enabling Hong Kong to co-operate with other jurisdictions in the fight against international crime.

As I mentioned earlier, members have made suggestions to further refine the Bill. We have responded positively to these suggestions and I will move relevant amendments at the Committee stage. I shall explain the major amendments here.

Firstly, the Bill gives power to take evidence at the investigation stage. The Bills Committee was concerned that under the Bill, a person compelled to give evidence at this stage should have appropriate protections. To better protect individual's rights, we will introduce more safeguards by way of amendments to subclauses (2A), (9), (11) and (12) of clause 10. These amendments will enable witnesses to refuse to answer questions which they could refuse to answer under Hong Kong law if the proceedings were Hong Kong proceedings, in particular, the privilege against self-incrimination is preserved. Evidence obtained at foreign request will not be able to be used in Hong Kong proceedings except for the offences of perjury or contempt of court. We believe the amendments strike the right balance between the need to provide assistance to foreign investigations and protection of the basic right of individuals.

Secondly, on investigation into tax offences, the existing Bill is only intended to allow assistance to be given if the requests relate to offences and not the assessment or collection of tax. However, it was pointed out by Members that it was very difficult to differentiate between requests for investigations of tax offences and those for tax assessment or collection. In view of this, I will move amendments to clause 3(3) to put it beyond doubt that the Bill cannot override the secrecy provisions of the Inland Revenue Ordinance. Additionally, a new clause 5(1A) places a positive duty on the Attorney General to refuse a request in relation to an investigation into a taxation offence if the requesting jurisdiction is not a prescribed place or if he is satisfied that the primary purpose of the request is the assessment or collection of tax. Amendments to clauses 10(10), 12(12) and 15(9)(aa) provide that tax advisers or

auditors are not required to give evidence which is or relates to tax documents or subject any tax documents to search and seizure or production orders.

Thirdly, the Bill provides that Orders implementing bilateral agreements can modify the Bill. The Administration is of the view that modifications in these Orders are necessary as mutual legal assistance practices varies from jurisdiction to jurisdiction. However, I shall move amendments to clause 4 to put it beyond doubt that the bilateral agreements must be substantially in conformity with the provisions of the Bill. All the modifications will be summarized in a schedule to the Order for the Legislative Council to consider. Further amendments will require that such Orders will not be able to operate unless they are positively approved by this Council.

Fourthly, on the transmission of original documents to foreign jurisdictions, I shall move amendments to clause 10 to restrict the transmission of original documents to the requesting jurisdiction unless the Attorney General is given an unqualified undertaking that the original will be returned. This amendment will protect individuals in Hong Kong.

Finally, the Bill does not prohibit the rendering of assistance to countries with which Hong Kong does not have a bilateral agreement. On the advice of the Bills Committee, we will introduce an amendment to the effect that where there is no bilateral agreement assistance shall be refused unless sufficient assurances of reciprocity for future requests by Hong Kong are received.

These amendments are designed to ensure that the basic rights of individuals in Hong Kong affected by requests by foreign jurisdiction are appropriately safeguarded, while at the same time permitting Hong Kong to be able to co-operate with our law enforcement partners overseas in combating trans-boundary crime. It is important that the Bill be enacted so that Hong Kong can discharge its obligations under the bilateral agreements we are concluding.

Mr President, with these remarks, I recommend the Bill to this Council.

**X X X X X X X X**