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Paper for the House Committee meeting on 5 October 2007

**Report of the Subcommittee on
Subsidiary Legislation to Implement the Obligations under
the United Nations Convention Against Corruption**

Purpose

This paper reports on the deliberations of the Subcommittee on Subsidiary Legislation to Implement the Obligations under the United Nations Convention Against Corruption in relation to the Fugitive Offenders (Corruption) Order (the FO Order).

Background

2. The Central People's Government of the People's Republic of China has ratified the United Nations Convention Against Corruption (the Convention) which came into force for the People's Republic of China, including Hong Kong, on 12 February 2006. The Convention introduces a comprehensive set of standards, measures and rules that States Parties can apply, in order to strengthen the legal and regulatory regimes to fight corruption. The Convention calls for preventive measures and the criminalisation of various forms of corruption in both the public and private sectors. It also introduces the fundamental principle and framework for stronger cooperation between states to prevent corruption.

3. To implement the obligations under the Convention in Hong Kong, legislative amendments are required in relation to the confiscation of proceeds of crimes, extradition and mutual legal assistance in criminal matters.

The subsidiary legislation

The Fugitive Offenders (Corruption) Order (L.N. 100 of 2007)

4. The FO Order is made by the Chief Executive in Council under section 3 of the Fugitive Offenders Ordinance (Cap. 503) (FOO) for the purpose of implementing the

extradition requirements under Article 44 of the Convention. FOO provides for the surrender to certain places outside Hong Kong of persons who are wanted for prosecution, or for the imposition or enforcement of a sentence, in respect of certain offences against the laws of those places. It also provides for the treatment of persons wanted for prosecution, or for the imposition or enforcement of a sentence, in respect of certain offences against the law of Hong Kong who are surrendered from certain places outside Hong Kong.

5. The objective of the FO Order is, in relation to the extradition provisions of the Convention, to apply as between Hong Kong and the places outside Hong Kong to which the Convention relates the procedures for the surrender of fugitive offenders set out in FOO. The procedures are subject to the limitations, restrictions, exceptions and qualifications contained in the terms of the Convention as recited in the Schedule to the FO Order.

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

The Organized and Serious Crimes Ordinance (Amendment of Schedule 2) Order 2007

7. The Chief Secretary for Administration gave notice to move a motion at the Council meeting on 20 June 2007 to seek the Council's approval of the Organized and Serious Crimes Ordinance (Amendment of Schedule 2) Order 2007 (the OSCO Order). Made by the Chief Executive in Council under section 31 of the Organized and Serious Crimes Ordinance (Cap. 455) (OSCO), the OSCO Order amends Schedule 2 to OSCO by adding to that Schedule the offences under sections 4(2), 5(2), 6(2) and 9(1) of the Prevention of Bribery Ordinance (Cap. 201) in order to better fulfil the requirements under Article 31 of the Convention. Under the amendments, the proceeds or property derived from those offences may be subject to a restraint order, charging order or confiscation order made under OSCO.

8. There is no express commencement provision in the OSCO Order. According to section 20(2) of the Interpretation and General Clauses Ordinance (Cap. 1), the OSCO Order shall come into operation on the day when it is published in the Gazette.

The Mutual Legal Assistance in Criminal Matters (Corruption) Order

9. The Secretary for Security gave notice to move a motion at the Council meeting on 20 June 2007 to seek the Council's approval of the Mutual Legal Assistance in Criminal Matters (Corruption) Order (the MLA Order). Made by the Chief Executive in Council under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (MLAO), the MLA Order seeks to fulfil the requirements under Articles 46 and 57 of the Convention. The MLA Order directs that, in relation to the mutual legal assistance provisions of the Convention, MLAO shall, subject to the modifications specified in Schedule 2 to the Order, apply as between Hong Kong and

the places outside Hong Kong to which the Convention relates. The Convention is recited in Schedule 1 to the MLA Order.

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

The Subcommittee

11. At the House Committee meeting on 1 June 2007, Members formed a subcommittee to study the FO Order. Members agreed at the House Committee meeting on 8 June 2007 that the subcommittee should also study the OSCO Order and the MLA Order.

12. To allow more time for the Subcommittee to study the FO Order, the scrutiny period of the Order has been extended from 27 June 2007 to the first Council meeting of the 2007-2008 session (i.e. 10 October 2007) by a resolution of the Council passed on 20 June 2007. At the request of the House Committee, the Chief Secretary for Administration and the Secretary for Security withdrew their notices for moving the motions at the Council meeting on 20 June 2007 to allow more time for the Subcommittee to study the OSCO Order and the MLA Order in detail.

13. The membership list of the Subcommittee is in the **Appendix**. Under the chairmanship of Hon Margaret NG, the Subcommittee has held two meetings with the Administration.

Deliberations of the Subcommittee

How the obligations under the Convention have been fulfilled

14. At the Subcommittee's request, the Administration has provided a paper explaining how the obligations under the Convention have been fulfilled. According to the Administration, save for Articles 31, 44, 46 and 57 which require legislative amendments for fulfilling the obligations regarding confiscation of proceeds of crime, extradition and mutual legal assistance in criminal matters, all other requirements under the Convention can be fulfilled through existing legislation and administrative measures.

Fugitive Offenders (Corruption) Order

15. The Subcommittee has enquired how the FO Order gives effect to the extradition provisions under the Convention, the effect of including the Convention in the Order and whether such drafting practice has been used for similar orders.

16. The Administration has explained that Article 44 of the Convention requires States Parties to extradite a person for offences established in accordance with the Convention. Article 44(8) of the Convention provides that extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, *inter alia*, conditions relating to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition. The FO Order, which sets out the Convention in a schedule, provides that in relation to the extradition provisions of the Convention, the extradition procedures in FOO shall apply as between Hong Kong and the foreign States Parties to the Convention, subject to the limitations, restrictions, exceptions and qualifications contained in the extradition provisions of the Convention. The Order enables the extradition provisions under Article 44 of the Convention to be brought into force in Hong Kong. It does not have the effect of implementing the non-extradition related provisions of the Convention.

17. The Administration has further explained that section 3(9) of FOO provides that an order shall not be made unless the arrangements for surrender of fugitive offenders to which the order relates are substantially in conformity with the provisions of FOO. The extradition arrangements under the Convention do so conform. Seven similar orders implementing the extradition provisions under other international conventions have previously been made, and the relevant international conventions are recited in the respective orders. These orders are -

- (a) the Fugitive Offenders (Safety of Civil Aviation) Order (Cap.503G) giving effect to the extradition provisions under the Convention for the Suppression of Unlawful Seizure of Aircraft, the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation and the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation;
- (b) the Fugitive Offenders (Internationally Protected Persons and Hostages) Order (Cap. 503H) giving effect to the extradition provisions under the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents and the International Convention Against the Taking of Hostages;
- (c) the Fugitive Offenders (Torture) Order (Cap. 503I) giving effect to the extradition provisions under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- (d) the Fugitive Offenders (Drugs) Order (Cap. 503J) giving effect to the extradition provisions under the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances;

- (e) the Fugitive Offenders (Genocide) Order (Cap. 503K) giving effect to the extradition provisions under the Convention on the Prevention and Punishment of the Crime of Genocide;
- (f) the Fugitive Offenders (Safety of United Nations and Associated Personnel) Order (L.N. 61 of 2007) giving effect to the extradition requirements under the Convention on the Safety of United Nations and Associated Personnel; and
- (g) the Fugitive Offenders (Suppression of the Financing of Terrorism) Order (L.N. 83 of 2007) giving effect to the extradition requirements under the International Convention for the Suppression of the Financing of Terrorism.

18. Hon James TO has expressed reservations about the inclusion of the Convention in the FO Order. Mr TO is of the view that since the FO Order is made to implement the extradition requirements under Article 44(8) of the Convention, the Schedule should only contain Article 44(8). He has asked the Administration to consider -

- (a) deleting everything in the Schedule to the FO Order except Article 44(8);
- (b) deleting everything in the Schedule to the FO Order except Article 44; or
- (c) giving an undertaking or a statement to emphasise that Article 44(8) is the only operative provision in the Schedule to the FO Order.

19. The Administration has responded that under section 3 of FOO, the Chief Executive in Council may, in relation to any arrangements for the surrender of fugitive offenders, by order reciting or embodying the terms of the arrangements, direct that the procedures in the Ordinance shall apply as between Hong Kong and the place outside Hong Kong to which the arrangements relate, subject to the limitations, restrictions, exceptions and qualifications, if any, contained in the order. The terms of the arrangements are recited or embodied in the Convention and for this reason the Convention is included as a schedule to the FO Order. This approach is consistent with that taken in the making of orders in relation to the surrender of fugitive offenders provisions in all other multilateral agreements under FOO so far, including the Orders referred to in paragraph 17(a) to (g) above.

20. The Administration does not consider it appropriate to limit the provisions of the Schedule to the FO Order to Article 44(8) or Article 44 of the Convention, as some other provisions of the Convention are relevant in certain contexts. The Administration has mentioned that Article 44(1) provides that Article 44 shall apply to offences established in accordance with the Convention. Those offences are found elsewhere in the Convention (Articles 15 to 30) and it is considered helpful to have the Convention scheduled to achieve a full understanding of the FO Order. The Administration has

re-affirmed that the FO Order does not have the effect of implementing the non-extradition related provisions of the Convention.

Conclusion

21. Most members of the Subcommittee are in support of the FO Order. Hon James TO has reservations about the inclusion of the Convention in the FO Order. He has indicated that he may consider moving a motion to repeal the Order.

22. The Subcommittee will continue with its scrutiny of the OSCO Order and the MLA Order, and will provide a report to the House Committee when ready.

Advice Sought

23. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 2
Legislative Council Secretariat
3 October 2007

**Subcommittee on Subsidiary Legislation to Implement the Obligations under
the United Nations Convention Against Corruption**

Membership list

Chairman Hon Margaret NG

Members Hon James TO Kun-sun
Hon Howard YOUNG, SBS, JP
Hon LAU Kong-wah, JP

(Total : 4 Members)

Clerk Mrs Sharon TONG LEE Yin-ping

Legal Adviser Mr Timothy TSO

Date 12 June 2007