

立法會
Legislative Council

LC Paper No. LS35/10-11

**Paper for the House Committee Meeting
on 4 March 2011**

**Legal Service Division Report on
Proposed Resolution under section 4 of the Mutual Legal Assistance in
Criminal Matters Ordinance (Cap. 525)**

The Secretary for Security (the Secretary) has given notice to move a motion at the Legislative Council meeting of 16 March 2011 to seek the Legislative Council's approval of the Mutual Legal Assistance in Criminal Matters (India) Order (the Order) made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (the Ordinance) by the Chief Executive in Council on 15 February 2011.

2. Section 4(1) of the Ordinance provides that the Chief Executive in Council may, with the approval of the Legislative Council, in relation to any arrangements for mutual legal assistance (MLA), by order to which is annexed a copy of the arrangements direct that the Ordinance shall, subject to such modifications thereto as may be specified in the order, apply as between Hong Kong and the place outside Hong Kong to which the arrangements relate. Section 4(3) of the Ordinance provides that if the order specifies modifications, the modifications shall be summarized in a Schedule to the order.

3. Section 4(2) of the Ordinance provides that the Chief Executive in Council shall not make an order unless the arrangements for MLA are substantially in conformity with the provisions of the Ordinance. Section 4(7) of the Ordinance restricts the Legislative Council's power to amend such an order so that the Legislative Council may only repeal the whole order but not amend any part of it.

The Order

4. The Order is made in consequence of the agreement between the Government of the Hong Kong Special Administrative Region and the Government of the Republic of India signed on 14 September 2009 (the

Agreement), which is reproduced in Schedule 1 to the Order. It specifies the scope and procedures in relation to the provision of mutual legal assistance in the investigation and prosecution of criminal offences and in proceedings related to criminal matters. It also provides for safeguards of the rights of persons involved in criminal proceedings.

5. Schedule 2 specifies the modifications to sections 5 and 17 of the Ordinance, and these modifications are summarized in Schedule 3 to the Order to comply with section 4(3) of the Ordinance more clearly. Section 5(1)(e) of the Ordinance provides that the Secretary for Justice shall refuse assistance to a place outside Hong Kong if the request relates to the prosecution of a person for an external offence in a case where a person has been convicted, acquitted or pardoned by a competent court or other authority in the place, or has undergone the punishment provided by the law of that place, in respect of that offence or of another external offence constituted by the same act or omission as that offence. The modification to section 5(1)(e) of the Ordinance reflects the provision in Article 4(1)(f) of the Agreement and extends the Secretary for Justice's power to refuse assistance if-

- (a) 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 Hong Kong, or has undergone the punishment provided by the law of Hong Kong, in respect of that offence or of another external offence constituted by the same act or omission as that offence; or
- (b) the request relates to the prosecution of a person 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.

6. Section 17 of the Ordinance provides certain immunities to a person who comes to Hong Kong from another jurisdiction to render assistance in a criminal matter. The modification to section 17(3)(b) of the Ordinance reflects the provision in Article 16(6) of the Agreement which provides that such immunities shall not apply if the person, being free to leave Hong Kong, has not left within a period of 30 days after being notified that his presence is no longer required.

7. Members may note that this Order is the first MLA Order in which the Administration has summarized the modifications to the Ordinance in the form of a Schedule (in addition to Schedule 2) to the Order. According to paragraph 7 of the LegCo Brief dated 23 February 2011 issued by the Security Bureau (File Ref.: SBCR 3/5691/95 Pt.49), a summary was not included in the 26

MLA Orders that have been enacted, but such summary was set out in the explanatory statements annexed to LegCo Briefs of the Orders. The Administration considers that the summary would serve as an aid to facilitate reading and interpretation of the modifications in an MLA Order and will consider adding relevant summaries to the MLA Orders in future amendment exercises.

8. The Order will come into operation on a day to be appointed by the Secretary by notice published in the Gazette. According to paragraph 9 of the LegCo Brief, the commencement date will be settled after consultation with the Republic of India.

9. The Panel on Security has not been consulted on the Order.

10. The Legal Service Division has asked the Administration to clarify certain matters which may be of interest to Members. The correspondence between the Legal Service Division and the Administration is attached in the Annex for Members' reference.

Encl.

Prepared by
YICK Wing-kin
Assistant Legal Adviser
Legislative Council Secretariat
2 March 2011

LS/R/3/10-11
2869 9707
2877 5029

By Fax (2524 3762)

1 March 2011

Mr David LAU
Prin AS (Security) A
Security Bureau
A Division
6th floor, Main and East Wings
Central Government Offices

Dear Mr LAU,

Mutual Legal Assistance in Criminal Matters (India) Order

We are scrutinising the legal and drafting aspects of the above Order and should be grateful if you could clarify the following matters -

- (a) It is noted that in the Mutual Legal Assistance Agreement entered into between the HKSAR Government and the Government of the Republic of India (the Agreement) on 14 September 2009, no provision is made for a refusal of assistance (by the HKSAR) if a request relates to an external offence punishable with death. What is the reason for not making such provision in the Agreement?
- (b) Section 5(1)(e) of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (the Ordinance) provides that a request for assistance shall be refused if 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 has undergone the punishment provided by the law of that place. Is there any reason why the scenario where a person has undergone the punishment provided by the law of the requested party (i.e. HKSAR) is not included or reflected in the relevant Article 4(1)(f) of the Agreement? Would

such omission cause an inconsistency with or ambiguity of the modifications specified in section 1 of the Schedule 2 to the Order (which modify section 5(1)(e) of the Ordinance)?

In line with the usual practice, please provide an article-by-article comparison of the Agreement and the model agreement for Members' reference.

It is appreciated that your reply in both languages could reach us as soon as possible, preferably on or before the House Committee meeting on 4 March 2011.

Yours sincerely,

(YICK Wing-kin)
Assistant Legal Adviser

cc. Security Bureau (Ms Veronica WONG, AS (Security) A2)
DoJ (Attn.: Miss Emma WONG, Sr Govt Counsel (By Fax: 2869 1302))
LA
SALA1

政府總部
香港下亞厘畢道



GOVERNMENT SECRETARIAT

LOWER ALBERT ROAD

HONG KONG

URGENT

BY FAX

(Your Fax.: 2877 5029)

本函檔號 OUR REF: SBCR 2/16/1476/74

來函檔號 YOUR REF: LS/S/1/09-10

電話號碼 Our Tel.: 2810 3523

傳真號碼 Our Fax.: 2524 3762

2 March 2011

Mr YICK Wing-kin
Assistant Legal Adviser
Legal Service Division
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road, Central
Hong Kong

Dear Mr Yick,

Mutual Legal Assistance in Criminal Matters (India) Order

I refer to your letter dated 1 March 2011 and set out below our response to the issues raised.

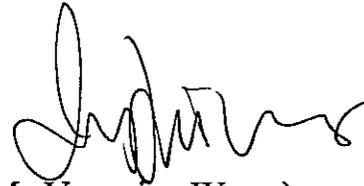
(a) Refusal of Assistance in relation to Death Penalty

The discretionary provision to refuse assistance in relation to requests that relate to offences punishable with death was excluded from the Mutual Legal Assistance Agreement between the HKSAR Government and the Government of the Republic of India ("the Agreement") at the request of the India side due to the judicial authority to impose death penalty rests solely with its courts and its administration cannot undertake on behalf of the courts that death penalty will not be imposed. Neither is its administration legally empowered to undertake not to carry out the death penalty if the punishment is imposed by its courts. That notwithstanding, it has been agreed between the HKSAR Government and the Government of the Republic of India that requests relating to death penalty may be refused on the ground of "essential

interests” under Article IV (1) of the Agreement. Similar arrangements can be found in the Mutual Legal Assistance Agreements with Japan, Malaysia and Singapore.

(b) Refusal of Assistance under Section 5(1)(e) of Cap.525

Conviction encompasses punishment as there cannot be any punishment without a conviction. It is therefore immaterial whether or not the provision relating to punishment is incorporated in the Agreement. In fact, the majority of the Mutual Legal Assistance Agreements adopted similar formulation, except only those with Indonesia, Malaysia and the Philippines which included the punishment/sentence provision. In the premises, the omission of the provision of punishment will not cause inconsistency or ambiguity to the modification specified in Schedule 2 to the Order.



(Ms Veronica Wong)
for Secretary for Security

c.c.

DoJ

(Attn: Ms Susana Sit
Miss Emma Wong)

Fax: 2523 7959

Fax: 2869 1302