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Paper for the House Committee meeting on 15 April 2011

**Report of the Subcommittee on
Mutual Legal Assistance in Criminal Matters (India) Order**

Purpose

This paper reports on the deliberations of the Subcommittee on Mutual Legal Assistance in Criminal Matters (India) Order ("the Order").

Background

2. The Secretary for Security gave notice to move a motion at the meeting of the Legislative Council of 16 March 2011 to seek the Council's approval of the Order made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) ("MLAO").

3. MLAO provides the necessary statutory framework for implementing agreements on mutual legal assistance in criminal matters ("MLA") and enables the provision of assistance in the investigation and prosecution of criminal offences, which includes the taking of evidence, search and seizure, production of material, transfer of persons to give evidence and confiscation of the proceeds of crime.

The Order

4. The Order sets out the scope and procedures in relation to the provisions of MLA applicable between the Hong Kong Special Administrative Region ("HKSAR") and the Republic of India, and the modifications to MLAO. The Order is made in consequence of the MLA agreement entered into by the HKSAR Government and the Government of the Republic of India ("the Agreement") and

signed on 14 September 2009. The Agreement is reproduced in Schedule 1 to the Order. Schedule 2 specifies the modifications to sections 5 and 17 of MLAO, and these modifications are summarized in Schedule 3 to the Order.

5. The Order will come into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette. According to the Administration, the commencement date will be settled after consultation with the Republic of India.

The Subcommittee

6. At the House Committee meeting on 11 March 2011, Members formed a subcommittee to study the Order. At the request of the House Committee, the Secretary for Security withdrew his notice for moving the motion at the Council meeting of 16 March 2011 to allow time for the Subcommittee to study the Order in detail.

7. The membership list of the Subcommittee is in the **Appendix**. Under the chairmanship of Dr Hon Margaret NG, the Subcommittee has held one meeting with the Administration.

Deliberations of the Subcommittee

Comparison with the Model Agreement

8. In examining the Order, the Subcommittee has made an article-by-article comparison of the provisions of the Order with those in the Model MLA Agreement for the HKSAR.

Article IV - Limitations on Compliance

9. The Subcommittee has noted that Article IV(3) of the Model Agreement, which is related to death penalty, has not been included in the Order. The Administration has explained that the HKSAR Government and the government of the Republic of India have agreed that the Requested Party may refuse providing assistance in death penalty cases on the ground of "essential interests" under Article IV(1)(b) of the Agreement. Members have requested the Administration to highlight this point in the speech of the Secretary for Security during the moving of the resolution on the Order.

Article X - Obtaining of Evidence, Articles or Documents

10. Article X(3) of the Agreement provides that for the purposes of requests under the Article, the Requesting Party shall specify the questions to be put to the witness or person giving evidence and the subject matter about which they are to be examined. Article X(4) of the Agreement provides that, if necessary, any questions additional to those specified in Article X(3) may be put to the witness or person giving evidence by the competent authority of the Requested Party, either of its own volition or if requested by any of the persons referred to in Article IX of the Agreement. Hon James TO has expressed concern about the possible broad scope of the additional questions put to the witness or person giving evidence by the competent authority of the Requested Party under Article X(4), especially when such additional questions could be out of the original scope of those questions specified in Article X(3).

11. According to the Administration, Article X(4) of the Agreement refers to questions additional to those specified in Article X(3), and it has to be read in the context of Article X(3) of the Agreement so that any additional questions raised under Article X(4) of the Agreement should be within the original scope of questions specified under Article X(3). The Subcommittee has requested the Administration to highlight this point in the speech of the Secretary for Security during the moving of the resolution on the Order.

Article XVIII - Proceeds and Instruments of Crime

12. Article XVIII of the Agreement provides that where a request is made for assistance in securing the confiscation of proceeds or instruments of crime, such request shall be executed pursuant to the laws of the Requested Party. Members have enquired whether the meaning of "instruments of crime" referred to in the Article follows the meaning in the laws of the Republic of India or the laws of Hong Kong. The Administration has explained that the definition of "instruments of crime" in Article XVIII(6) of the Agreement is drawn from the definition of "external confiscation order" under MLAO and is to be interpreted under the laws of Hong Kong when Hong Kong is the Requested Party. At the request of members, the Administration has provided information on relevant precedent court cases of other commonwealth jurisdictions on whether immovable property (such as a boat or a house) was considered by the court as "instrument of crime" or "location of crime".

Modifications to the Mutual Legal Assistance in Criminal Matters Ordinance

13. Schedule 2 specifies the modifications to sections 5 and 17 of MLAO, and these modifications are summarized in Schedule 3 to the Order to comply with section 4(3) of MLAO. Section 5(1)(e) of MLAO 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 MLAO reflects the provision in Article IV(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.

14. Section 17 of MLAO provides certain immunities to a person who comes to Hong Kong from another jurisdiction to render assistance in a criminal matter. The Subcommittee has noted that the modification to section 17(3)(b) of MLAO reflects the provision in Article XVI(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.

15. Members have noted that the Order is the first MLA Order in which the Administration has summarized the modifications to MLAO in the form of a Schedule (in addition to Schedule 2) to the Order. The Administration has explained that a summary was not included in the 26 MLA Orders enacted in the past, but such summary was set out in the explanatory statements annexed to the Legislative Council Briefs on the MLA Orders. The Administration considers that the summary would serve as an aid to facilitate reading and interpretation of the modifications in a MLA Order. The Administration has advised that it will include relevant summaries in the form of a schedule in future MLA Orders and consider the need to add summaries to existing MLA Orders as appropriate.

Mutual legal assistance in respect of death inquests

16. In light of the Coroner's inquest into the death of eight victims of the Manila incident on 23 August 2010 involving a tour group from Hong Kong, Hon James TO has expressed concern that while legal assistance in respect of criminal matters and civil matters are currently provided for under existing laws, there is currently no legal framework which provides for legal assistance in respect of death inquest which is considered neither a criminal nor a civil matter. He is of the view that the Administration should consider establishing a legal framework for assistance between Hong Kong and overseas jurisdictions on death inquests and report the results of its study on the matter to the Panel on Security or the relevant Panel for follow up. Hon LAU Kong-wah has no objection to the suggestion. However, he considers that the Administration should study the matter prudently, having regard to the implications, if any, on other matters. The Administration has undertaken to consider providing a legal framework to facilitate assistance between Hong Kong and overseas jurisdictions on death inquests, having regard to the impact on other matters, and report the results of its study on the matter to the Panel on Administration of Justice and Legal Services for follow-up.

Conclusion

17. The Subcommittee is in support of the Order and supports the Administration to give fresh notice for moving the motion on the Order.

Advice sought

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

Appendix

Subcommittee on Mutual Legal Assistance in Criminal Matters (India) Order

Membership list

Chairman	Dr Hon Margaret NG
Members	Hon James TO Kun-sun Hon LAU Kong-wah, JP (Total : 3 Members)
Clerk	Mr Raymond LAM
Legal Adviser	Mr YICK Wing-kin
Date	24 March 2011