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Urgent by fax (2524 3762)
30 April 2019

Ms CHUI Shih-yen, Joceline
Principal Assistant Secretary for Security (Special Duty)
Security Bureau
10/F, East Wing
Central Government Offices
2 Tim Mei Avenue
Tamar, Hong Kong

Dear Ms CHUI,

**Fugitive Offenders and Mutual Legal Assistance in
Criminal Matters Legislation (Amendment) Bill 2019**

We are scrutinizing the legal and drafting aspects of the captioned Bill and shall be grateful for your clarifications on the issues as stated in the **Appendix**.

We would appreciate it if you could let us have your reply (in both Chinese and English and with soft copy to Miss Canny CHAN at cchan@legco.gov.hk) as soon as practicable, preferably by 14 May 2019.

Yours sincerely,

(Timothy TSO)
Senior Assistant Legal Adviser

Encl.

c.c. Department of Justice
(Attn: Mr SZE Chun-fai, Peter) (By Fax: 3918 4613)
Legal Adviser
Clerk to Bills Committee

General matters

Change in approach in dealing with surrender of fugitive offenders with the Mainland

1. As stated in paragraph 5 of the Legislative Council ("LegCo") Brief on the Fugitive Offenders Bill (which was subsequently enacted as the Fugitive Offenders Ordinance (Cap. 503)) (File Ref.: SBCR 1/2716/89) issued by the then Security Branch on 23 October 1996, the fugitive offenders legislation as applied to Hong Kong was derived from the United Kingdom ("UK") and would lapse on 1 July 1997. Therefore, it was considered necessary to introduce localized fugitive offenders legislation which could continue after the handover to provide appropriate legal backing for new bilateral agreements. At the meeting of the Bills Committee (formed to scrutinize the Fugitive Offenders Bill) on 14 January 1997, the then Chairman enquired about the effects of deleting the words in brackets "other than the People's Republic of China or any part thereof" from the definition of "arrangements for the surrender of fugitive offenders" in clause 2(1) (see paragraph 21 of the minutes (LegCo Paper No. CB(2)1662/96-97)). The Administration explained that the purpose of the Fugitive Offenders Bill was to localize the then existing arrangements which were UK based and which did not include the People's Republic of China ("PRC"). To delete the said wordings would mean that the scope of the Bill would exceed localization and substantial changes had to be made to the Bill. It was also mentioned by the Administration that the matter of surrender of fugitive offenders between Guangdong and Hong Kong was being discussed separately and there would have to be separate legislation to cover the arrangements. It thus appears from the above that the policy intent of Cap. 503 was to exclude PRC from the arrangements for the surrender of fugitive offenders under Cap. 503. Moreover, it was envisaged that a formal rendition arrangement with the Mainland for the surrender of fugitive offenders would be separately established at a subsequent stage (see paragraph 1 of LC Paper No. CB(2)748/98-99(02)). In the circumstances, please clarify whether there has been a change in approach by proposing in the Bill "special surrender arrangements" (instead of a "formal rendition arrangement") in dealing with surrender of fugitive offenders with the Mainland, and if so, the reason(s) for the change.

Ad hoc arrangements for the surrender of fugitive offenders under the existing Fugitive Offenders Ordinance (Cap. 503)

2. At the LegCo meeting of 19 March 1997, the then Secretary for Security said the following during the Second Reading debate on the Fugitive Offenders Bill:

"[o]n the scope of the Bill, the Administration will move an amendment to the definition of 'arrangements for the surrender of fugitive offenders' in clause 2(1). The purpose is to permit arrangements to be made for the surrender of a particular person with a jurisdiction with which Hong Kong does not have a bilateral agreement. Such ad hoc arrangements will supplement the system of bilateral agreements for the surrender of fugitive offenders. For practical reasons, the provision of ad hoc surrender in the Bill would increase the number of jurisdictions with which we can co-operate on this important issue. Of course, all the procedures and safeguards in the Bill will apply to such ad hoc surrenders."

It seems from the above that under the existing Cap. 503, ad hoc arrangements for the surrender of fugitive offenders supplement the system of bilateral agreements for the surrender of fugitive offenders, and that it was contemplated that such ad hoc arrangements would be required to be implemented by way of subsidiary legislation, i.e. an order made under section 3(1) of Cap. 503. Please clarify why the above requirement is now considered impracticable as stated in paragraph 7 of the LegCo Brief (File Ref.: SBCR 1/2716/19) issued by the Security Bureau in March 2019.

Guiding principles in devising a rendition arrangement with the Mainland

3. In respect of arrangements with the Mainland on surrender of fugitive offenders, it was stated in a paper submitted to the LegCo Panel on Security by the Security Bureau in 1998 (LC Paper No. CB(2) 748/98-99(02)) that there are five guiding principles in devising a rendition arrangement with the Mainland. One of these principles is that any rendition arrangement should take into account the "One Country Two Systems" principle and the differences in the legal and judicial systems of the two places. Please clarify whether these five guiding principles are applicable to the proposed special surrender arrangements of fugitive offenders under the Bill.

Similar overseas legislation

4. It is stated in paragraph 9 of the LegCo Brief that references have been drawn to similar case-based surrender arrangements which have been practised in UK and Canada for years, and similar models in countries like New Zealand and South Africa. Please provide details of such overseas legislation for members' reference.

Legal and drafting issues

Commencement

5. It is noted that the Bill, if passed, would come into operation on the day on which it is published in the Gazette as an Ordinance ("commencement date"). Please clarify whether the Bill, if passed, would apply to all eligible requests for surrender of fugitive offenders and provision of mutual legal assistance in criminal matters received on or after the commencement date, irrespective of the date(s) of commission of the offence(s) concerned.

Proposed amendments to the Fugitive Offenders Ordinance (Cap. 503)

6. Please clarify why an approach similar to that of the proposed amendments to the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525), namely by repealing the exception for other parts of PRC in the definition of "arrangements for the surrender of fugitive offenders" in section 2(1) of Cap. 503, is not adopted in the Bill in relation to Cap. 503.

Proposed special arrangements for surrender of fugitive offenders – new section 3A of the Fugitive Offenders Ordinance (Cap. 503) under clause 4

7. Please clarify whether the decision of the Chief Executive ("CE") to issue a certificate under the new section 3A(2) of Cap. 503 would be subject to judicial review. Please also clarify whether any reasons(s) would be given by CE in making the decision of issuing such a certificate. In considering whether to issue the certificate under the new section 3A(2), would CE consider section 3(9) of Cap. 503, namely whether the arrangements for the surrender of fugitive offenders are substantially in conformity with the provisions of Cap. 503?

8. What would be the implications of the proposed special surrender arrangements in the Bill on the existing ad hoc arrangements under Cap. 503? Would the existing ad hoc arrangements under Cap. 503 be rendered redundant or meaningless after the Bill is passed?

9. It is noted that in the proposed special surrender arrangements under the new section 3A of Cap. 503, in addition to the existing procedures in Cap. 503, there could be further limits (as contained in the arrangements) on the circumstances in which a person may be surrendered. What would these further limits be? Can they be explicitly stated

in the Bill? Who is the one to decide on these further limits? Please also clarify whether, and if so how, the public could know about these further limits contained in the special surrender arrangements.

10. Furthermore, since the proposed special surrender arrangements, unlike the existing ad hoc arrangements for the surrender of fugitive offenders under Cap. 503, would not be subject to scrutiny by LegCo, please clarify how the Government could be accountable to LegCo in this regard under Article 64 of the Basic Law. For example, would LegCo be informed of such arrangements?

Additional safeguards and grounds for refusal of surrender in respect of special surrender arrangements

11. It is noted that in Article 3(f) of the United Nations Model Treaty on Extradition, one of the mandatory grounds for refusal of extradition is that the person whose extradition is requested has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, article 14. It is further noted that under the UK's Extradition Act 2003 (see e.g. sections 21 and 87), the judge at the extradition hearing must order the person's discharge if he decides that the person's extradition would not be compatible with the Convention rights within the meaning of the Human Rights Act 1998. Please clarify whether similar safeguards could be added in the Bill in respect of the proposed special surrender arrangements.

12. It is also noted that prescribed arrangements under Cap. 503 may provide for additional safeguards and grounds for refusal of surrender, in addition to those provided for in Cap. 503. For instance, in the Fugitive Offenders (New Zealand) Order (Cap. 503S) (see Article 7(1)(c) of the Agreement in the Schedule), it is provided that surrender may be refused if the requested party considers that the surrender of the person might place it in breach of its obligations under international treaties. In the Fugitive Offenders (Czech Republic) Order (Cap. 503AI) (see Article 7(3)(e) of the Agreement in the Schedule), it is provided that surrender may be refused if the requested party considers that in the circumstances of the case, the surrender would be incompatible with humanitarian considerations in view of the age, health or other personal circumstances of the person sought. Moreover, in the Fugitive Offenders (South Africa) Order (Cap. 503AH) (see Article 6(2)(d) of the Agreement in the Schedule), it is provided that surrender may be refused if the requested party considers that the person whose surrender is sought did not or would not receive at trial in the requesting party the minimum guarantees contained in Article 14 of the International Covenant on Civil and Political

Rights. In the Fugitive Offenders (Ireland) Order (Cap. 503AF) (see Article 5(4) of the Agreement in the Schedule), it is provided that surrender should not be granted where the offence for which surrender is sought is punishable according to the law of the requesting party by the death penalty. Please clarify whether similar additional grounds for refusal of surrender could be added in the Bill in respect of the proposed special surrender arrangements.

Proposed scope of relevant offences covered by the special surrender arrangements – new section 3A(5) and (6) under clause 4

13. Under clause 4 of the Bill, special surrender arrangements are proposed to have effect in respect of 37 of the 46 items of description of offences specified in Schedule 1 to Cap. 503 while nine items of offences (together with four other items of offences in Schedule 1 to the extent that they relate to those nine excluded items) would be excluded (new section 3A(5) and (6) of Cap. 503). What are the criteria in deciding on what items of description of offences specified in Schedule 1 to Cap. 503 are included in (or excluded from) the Bill?

14. Under the existing section 25 of Cap. 503, CE in Council may, by order, amend Schedule 1 to Cap. 503. Based on the proposed definition of "specified Schedule 1 offence" in clause 4(6) of the Bill as drafted, would any order made by CE in Council under section 25 to expand the items of description of offences in Schedule 1 to Cap. 503 in the future have the effect of automatically expanding the scope of relevant offences covered by the special surrender arrangements in the Bill?

15. Under the existing fugitive offenders orders made under section 3(1) of Cap. 503, not all description of offences specified in Schedule 1 to Cap. 503 are covered in the orders. Under the new section 3A(1) of Cap. 503, the proposed special surrender arrangements may provide for further limits on the circumstances in which the person may be surrendered. Please clarify whether it would be possible for the proposed special surrender arrangements to further limit the number or types of specified Schedule 1 offence for the surrender of fugitive offenders.

16. Please also clarify whether the proposed special surrender arrangements would be applicable to offences with extra-territorial effect.

Committal proceedings for fugitive offenders

17. Regarding evidence requirements in committal proceedings for fugitive

offenders under Cap. 503, the following principles were stated in a paper submitted to the LegCo Panel on Security by the Security Bureau in 1999 (Annex to LC Paper No. CB(2) 2631/98-99(01)):

- (a) evidence sufficient to warrant a person's committal for trial according to the law of Hong Kong means that there must be a *prima facie* case against the fugitive, i.e. there must be evidence upon which, if the evidence adduced were accepted, a reasonable jury, properly directed, could convict;
- (b) the evidence presented by the requesting jurisdiction must be admissible according to Hong Kong rules of evidence;
- (c) the court of committal (i.e. magistrate) does not generally assess the credibility of the witnesses;
- (d) there is no right to cross-examine witness[es] who have given evidence in support of the request who are outside Hong Kong;
- (e) the fugitive has no right to lead any evidence which contradicts any allegation contained in the evidence presented by the requesting place that the fugitive engaged in the conduct constituting the offence;
- (f) the fugitive may lead evidence to show that he is not the person identified in the request for surrender;
- (g) the evidence of the requesting place is normally presented in documentary form; and
- (h) such evidence is on its face admissible in the proceedings if it is duly authenticated in terms of section 23 of Cap. 503.

Please clarify whether the above-stated principles are equally applicable to the committal proceedings relating to the proposed special surrender arrangements of fugitive offenders under the Bill.

Transitional provisions in respect of the proposed special surrender arrangements

18. It is noted that there are transitional provisions in the existing section 27 of Cap. 503. Please clarify whether similar transitional provisions are needed in respect of the

special surrender arrangements proposed in the Bill.

Authentication of supporting documents – clause 6

19. It is noted that clause 6 of the Bill seeks to add a new section 23(2A) to Cap. 503, which provides that any document is deemed to be duly authenticated if it purports to be signed, certified, sealed, or otherwise authenticated, in a way provided for by the prescribed arrangements concerned. Please clarify whether this new provision would be applicable to both the proposed special surrender arrangements in the Bill and the existing arrangements under Cap. 503. If so, please also clarify why this new provision on authentication of documents would affect the authentication of documents in respect of the existing arrangements under Cap. 503.

Case-based approach under the existing Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)

20. According to paragraph 6 of the LegCo Brief, apart from long-term bilateral arrangements or multilateral conventions applicable to Hong Kong, requests for provision of mutual legal assistance in criminal matters can currently be handled pursuant to a case-based approach under the existing Cap. 525. Please clarify the legal basis (by referring to specific existing provision(s) of Cap. 525 as appropriate) for handling such requests pursuant to a case-based approach. Please also clarify whether an order under section 4(1) of Cap. 525 would be made in respect of such requests for provision of mutual legal assistance in criminal matters handled pursuant to a case-based approach. If no such order would be made, would LegCo or the public be informed of such requests for the provision of mutual legal assistance?

Proposed amendments to the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)

21. Under the existing section 3(2) of Cap. 525, Cap. 525 shall not operate to prevent or prejudice the generality of the provision or obtaining of assistance in criminal matters between Hong Kong and a place outside Hong Kong otherwise than as provided for under Cap. 525, or pursuant to arrangements for mutual legal assistance. It thus appears that it may not be necessary to rely on Cap. 525 to provide or obtain assistance in criminal matters. If that is the case, why is it necessary to amend Cap. 525 under Part 3 of the Bill?

22. Please clarify whether arrangements for mutual legal assistance with any other part of PRC in the future would be given effect by way of an order made under section 4(1) of Cap. 525, and if not, why not. What would be the conditions that the Secretary for Justice may determine under section 6 of Cap. 525 in respect of such arrangements for mutual legal assistance?

23. The effect of clause 10 of the Bill appears to be that a request for assistance in criminal matters covered by bilateral arrangements for mutual legal assistance (which are the subject of an order under section 4(1) of Cap. 525) may only be made pursuant to such bilateral arrangements. What would be the implications of the proposed amendments to Cap. 525 on the existing arrangements for mutual legal assistance which are currently given effect by orders made under section 4(1) of Cap. 525 ("prescribed arrangements")? Would it be possible that such existing prescribed arrangements may be terminated after the Bill is passed so that the parties concerned could resort to the new arrangements under the Bill?

24. Please also clarify whether transitional provisions are needed in respect of the proposed amendments to Cap. 525.

25. It is noted that prescribed arrangements under Cap. 525 may provide for additional safeguards and grounds for refusal of requests for assistance in criminal matters, in addition to those provided for in Cap. 525. For instance, in the Mutual Legal Assistance in Criminal Matters (Canada) Order (Cap. 525J) (see Article 5(3)(b) of the Agreement in Schedule 1), it is provided that the requested party may refuse assistance if the requesting party cannot comply with any conditions in relation to confidentiality or limitation as to the use of material provided. Moreover, in the Mutual Legal Assistance in Criminal Matters (Singapore) Order (Cap. 525P) (see Article 3(4)(c) and (d) of the Agreement in Schedule 2), it is provided that the requested party may and shall, if required by its law, refuse assistance if it is of the opinion that the provision of the assistance would, or would be likely to, prejudice the safety of any person, or the provision of the assistance would impose an excessive burden on resources. Would similar additional grounds of refusal be provided for arrangements that are not prescribed arrangements? If so, how could this be done? Please also clarify whether, and if so how, the public could know about these additional grounds of refusal in the absence of an order made under section 4(1) of Cap. 525.