

立法會
Legislative Council

LC Paper No. CB(3) 216/18-19

Ref. : CB(3)/M/OR

Tel : 3919 3300

Date : 29 November 2018

From : Clerk to the Legislative Council

To : All Members of the Legislative Council

Council meeting of 9 January 2019

**Proposed resolution under the Mutual Legal Assistance in
Criminal Matters Ordinance**

The Secretary for Security will move the proposed resolution in **Appendix 1** under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) at the above meeting. The President has directed that the proposed resolution be printed in the terms in which it was handed in on the Agenda of the Council.

2. The speech which the Secretary will deliver when moving the proposed resolution is in **Appendix 2**.

(Dora WAI)
for Clerk to the Legislative Council

Encl.

**Mutual Legal Assistance in Criminal Matters
Ordinance**

Resolution

(Under section 4 of the Mutual Legal Assistance in Criminal Matters
Ordinance (Cap. 525))

Resolved that the Mutual Legal Assistance in Criminal Matters (Mongolia)
Order, made by the Chief Executive in Council on 20 November 2018,
be approved.

Mutual Legal Assistance in Criminal Matters (Mongolia) Order

(Made by the Chief Executive in Council under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) with the approval of the Legislative Council)

1. Commencement

This Order comes into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

2. Ordinance applies between Hong Kong and Mongolia

- (1) In relation to the arrangements for mutual legal assistance a copy of which is annexed at Schedule 1, it is directed that the Ordinance, subject to the modifications specified in Schedule 2, applies as between Hong Kong and Mongolia.
 - (2) The modifications referred to in subsection (1) are summarized in Schedule 3.
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Schedule 1

[s. 2]

Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of Mongolia on Mutual Legal Assistance in Criminal Matters[#]

The Government of the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong Special Administrative Region") having been duly authorized to conclude this Agreement by the Central People's Government of the People's Republic of China and the Government of Mongolia (hereinafter referred to as "the Parties"),

Desiring to improve the effectiveness of law enforcement of both Parties in the prevention, investigation, prosecution of crime and the confiscation of criminal proceeds through cooperation and mutual legal assistance in criminal matters,

Have agreed as follows:

Article 1

Note:[#] The Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of Mongolia on Mutual Legal Assistance in Criminal Matters was done in the Chinese, Mongolian and English languages, each text being equally authentic. The Mongolian text of the Agreement is available for inspection at the Security Bureau of the Government of the HKSAR.

Scope of Assistance

1. The Parties shall, in accordance with the provisions of this Agreement, grant each other the widest measure of assistance in criminal matters.
2. For the purpose of this Agreement, criminal matters mean investigations, prosecutions or proceedings relating to any offence which at the time of the request for assistance falls within jurisdiction of the competent authorities of the Requesting Party.
3. Assistance shall include;
 - (a) taking evidence or statements from persons;
 - (b) providing information, documents, records and articles of evidence;
 - (c) locating or identifying persons or items;
 - (d) serving documents;
 - (e) executing requests for search and seizure;
 - (f) making detained persons and others available to give testimony or assist investigations;
 - (g) tracing, restraining and confiscating the proceeds and instrumentalities of criminal activities;
 - (h) delivery of property, including the restitution of property and lending of exhibits; and

- (i) other forms of assistance consistent with the objects of this Agreement which is not prohibited by the law of the Requested Party.
4. Assistance under this Agreement may be granted in connection with criminal offences against a law related to taxation, customs duties or other revenue matters provided that in the case of investigation of such offences the primary purpose of the investigation is not the assessment or collection of tax.
5. This Agreement is intended solely for mutual assistance between the Parties. The provisions of this Agreement shall not give rise to any right on the part of any private person to obtain, suppress or exclude any evidence or to impede the execution of a request.
6. This Agreement does not apply to;
 - (a) the surrender of offenders;
 - (b) the execution in the Requested Party of criminal judgments imposed in the Requesting Party except to the extent permitted by the laws of Requested Party and this Agreement;
 - (c) the transfer of prisoners to serve sentences; and
 - (d) the transfer of proceedings in criminal cases.

Article 2

Other Arrangements

This Agreement shall not affect obligations subsisting between the Parties whether pursuant to other agreements, arrangements or otherwise, or

prevent the Parties from providing or continuing to provide assistance to each other pursuant to other agreements, arrangements or otherwise.

Article 3

Central Authority

1. Each Party shall designate a Central Authority to make or receive requests for the purpose of this Agreement. The Central Authority of the Hong Kong Special Administrative Region shall be the Secretary for Justice or his duly authorized officer. The Central Authority for Mongolia shall be the Ministry of Justice of Mongolia or an officer duly authorized by the Minister for Justice of Mongolia. Either Party may change its Central Authority in which case it shall notify the other of the change.

2. The Central Authorities shall communicate directly with one another for the purpose of this Agreement.

Article 4

Refusal or Postponement of Assistance

1. Assistance shall be refused if, in the opinion of the Requested Party:

- (a) the execution of the request would impair its essential interests;
- (b) the execution of the request would impair the sovereignty, security or public order of Mongolia or, in the case of the Hong Kong Special Administrative Region, of the People's Republic of China;

- (c) there are substantial grounds for believing that the request for assistance has been made for the purpose of prosecuting or punishing a person on account of that person's race, sex, religion, nationality or political opinions or that person's position may be prejudiced for any of those reasons;
- (d) the acts or omissions alleged to constitute the offence, if they had taken place in the Requested Party would not have constituted an offence under the laws of the Requested Party;
- (e) the request relates to an offence of a political character;
- (f) the request relates to the prosecution of a person for an offence where the person has been convicted, acquitted or pardoned by a competent court or other authority in either Party or has undergone the punishment provided by law in respect of that offence or another offence constituted by the same acts or omissions as that offence.

2. The Requested Party may, and if required by its law shall, refuse assistance if the request relates to an offence only under military law.

3. The Requested Party may refuse assistance if the request relates to an offence which carries the death penalty in the Requesting Party but in respect of which the death penalty is either not provided for in the Requested Party or not normally carried out unless the Requesting Party gives such assurances as the Requested Party considers sufficient that the death penalty will not be imposed or, if imposed, not carried out.

4. Assistance may be postponed by the Requested Party if execution of the request would interfere with an ongoing investigation or proceeding in the Requested Party.

5. Before refusing or postponing assistance pursuant to this Article, the Requested Party, through its Central Authority -
- (a) shall promptly inform the Requesting Party of the reason for considering refusal or postponement; and
 - (b) shall consult with the Requesting Party to determine whether assistance may be given subject to such terms and conditions as the Requested Party deems necessary.
6. If the Requesting Party accepts assistance subject to the terms and conditions referred to in paragraph 5(b), it shall comply with those terms and conditions.
7. The Requested Party shall promptly inform the Requesting Party of a decision not to comply in whole or in part with a request and the reason for that decision.

Article 5

Content of Requests

1. Requests for assistance shall include:
- (a) the name of the competent authority conducting the criminal matter to which the request relates, including the name of a responsible person and that person's contact details;
 - (b) the purpose of the request and the description of the assistance sought;
 - (c) the description of the subject matter and nature of the criminal matter, including a summary of relevant facts and laws and

- the maximum penalty for the offence to which the criminal matter relates;
 - (d) any time limit within which compliance with the request is desired;
 - (e) a description of any particular procedure or requirement to be followed in executing the request;
 - (f) the need for confidentiality and the reasons therefor;
 - (g) such other information as is necessary for the proper execution of the request.
2. Requests for assistance, to the extent necessary and possible, shall also include:
- (a) information on the identity, nationality and location of any person from whom evidence is sought;
 - (b) information on the identity and location of a person to be served, that person's relationship to the proceeding, and the manner in which service is to be made;
 - (c) information on the identity and whereabouts of a person to be located;
 - (d) a description of the place to be searched and of the items to be seized;
 - (e) information as to the allowances and expenses to which a person asked to appear in the Requesting Party will be entitled.

3. If the Requested Party considers that the information contained in the request is not sufficient to enable the request to be dealt with, it may request additional information.
4. Requests shall be made in writing.
5. Requests, supporting documents and other communications made pursuant to this Agreement shall be in the English language and, if requested, accompanied by a translation into an official language of the Requested Party.

Article 6

Execution of Requests

1. Requests for assistance shall be executed promptly in accordance with the law of the Requested Party and, insofar as it is not prohibited by that law, in the manner prescribed by the Requesting Party as far as practicable.
2. The Requested Party shall promptly inform the Requesting Party of any circumstances and reasons which are likely to cause a significant delay in responding to the request.

Article 7

Return of Material to the Requested Party

Where required by the Requested Party, the Requesting Party shall return the material provided under this Agreement as soon as possible when it is no longer needed for the criminal matter to which the request relates.

Article 8

Confidentiality

The Requested Party, if so requested, shall use its best efforts to keep confidential a request, its contents, supporting documents and any action taken pursuant to the request. If the request cannot be executed without breaching the requested confidentiality, the Requested Party shall so inform the Requesting Party, which shall then determine whether the request should nevertheless be executed.

Article 9

Limitation on Use

1. The Requesting Party shall not disclose or use any information or evidence obtained under this Agreement for purposes other than those described in the request without the prior consent of the Requested Party.
2. The Requesting Party, if so requested, shall keep confidential information and evidence provided by the Requested Party, except to the extent that the information and evidence is needed for the criminal matter described in the request and where otherwise authorized in writing by the Requested Party.
3. Information and evidence which has been made public in the Requesting Party in accordance with paragraph 1 or 2 may thereafter be used for any purpose.

Article 10

Obtaining of Evidence, Articles or Documents

1. The Requested Party shall, in conformity with its law and upon request, take testimony or otherwise obtain statements of persons or require them to produce items of evidence for transmission to the Requesting Party.
2. For the purposes of requests under this Article the Requesting Party shall specify the questions to be put to the witnesses or the subject matter about which they are to be examined.
3. The Requested Party shall, to the extent permitted by its law, allow the presence of such persons as specified in the request during the execution of the request, and may allow such persons to question the person whose testimony or evidence is being taken. In the event that such direct questioning is not permitted, such persons shall be allowed to submit questions to be posed to the persons whose testimony or evidence is being taken.
4. A person who is required to give evidence in the Requested Party under this Article may decline to give evidence where either:
 - (a) the law of the Requested Party would permit that person to decline to give evidence in similar circumstances in proceedings which originated in the Requested Party; or
 - (b) where the law of the Requesting Party would permit him to decline to give evidence in such proceedings in the Requesting Party.
5. Where a person who is required to give evidence in the Requested Party under this Article claims that there is a right to decline to give evidence under the law of the Requesting Party, the evidence shall nevertheless be taken and the claim made known to the Central Authority of the Requesting Party for subsequent determination by the authorities of that Party.

Article 11

Video Conference

Where possible and consistent with their laws, the Parties may agree on a case by case basis that the taking of the testimony takes place by means of video conference. In such case, both parties shall agree on the specific arrangements for the video conference.

Article 12

Availability of Persons in Custody to Give Evidence or Assist Investigations

1. A person in custody in the Requested Party whose presence is requested in the Requesting Party for the purposes of appearing as a witness or expert in proceedings or assisting in investigations pursuant to this Agreement shall, if the Requested Party consents, be transferred from the Requested Party to the Requesting Party for that purpose, provided the person consents and the Requesting Party has guaranteed the maintenance in custody of the person and his subsequent return to the Requested Party.
2. Where the sentence of imprisonment of a person transferred pursuant to this Article expires whilst the person is in the Requesting Party, the Requested Party shall so advise the Requesting Party which shall ensure the person's release from custody.

Article 13

Availability of Other Persons to Provide Assistance

1. The Requesting Party may request the assistance of the Requested Party in inviting a person to appear in the Requesting Party for the purposes of providing assistance in a criminal matter pursuant to this Agreement. The Requesting Party shall indicate the extent to which the expenses and allowances will be paid.

2. Upon receipt of such a request the Requested Party shall invite the person to travel to the Requesting Party. The Requested Party shall promptly inform the Requesting Party of the person's response.

Article 14

Safe Conduct

1. A person present in the Requesting Party pursuant to a request made under Articles 12 and 13 shall not be obliged to give evidence in any proceeding or to assist any investigation other than the proceeding or investigation to which the request relates.

2. A person who does not consent to a request pursuant to Articles 12 or 13 shall not, by reason thereof, be liable to any penalty or be subjected to any coercive measure, notwithstanding any contrary statement in the request or summons.

3. A person who consents to provide assistance pursuant to Articles 12 or 13:

- (a) shall not be prosecuted, detained, or restricted in his personal liberty in the Requesting Party for any criminal offence which preceded his departure from the Requested Party, except as provided in Article 12;

- (b) shall not be subject to civil suit in respect of any act or omission of the person that is alleged to have occurred, or that occurred, before the person's departure from the Requested Party pursuant to the request, being a civil suit to which the person could not be subject if he were not in the Requesting Party.

4. Paragraphs 1 and 3 shall not apply if the person, not being a person in custody transferred under Article 12, and being free to leave, has not left the Requesting Party within a period of fifteen days after being notified that his presence is no longer required, or having left the Requesting Party, has returned.

5. A person who consents to give evidence under Articles 12 or 13 shall not be subject to prosecution based on his testimony, except for perjury or contempt of court.

Article 15

Provision of Publicly Available and Official Documents

1. The Requested Party shall provide copies of documents and records that are open to public access as part of a public register or otherwise, or that are available for purchase by the public.

2. The Requested Party may provide copies of any document, record or information in the possession of a government department or agency, but not publicly available, to the same extent and under the same conditions as such document, record or information would be available to its own law enforcement and judicial authorities.

Article 16

Service of Documents

1. The Requested Party shall serve documents that are transmitted to it for this purpose by the Requesting Party.
2. A request for the service of documents requiring the appearance of a person in the Requesting Party shall be received by the Requested Party not less than forty-five (45) days before the date on which the appearance is required. In urgent cases, the Requested Party may waive this requirement.
3. A request for the service of a document pertaining to an appearance in the Requesting Party shall include such notice as the Central Authority of the Requesting Party is reasonably able to provide of outstanding warrants or other judicial orders in criminal matters against the person to be served.
4. The Requested Party shall subject to its law, forward to the Requesting Party a proof of service in the manner required by the Requesting Party. Such proof of service may include a description of the date, place and manner of service, together with a receipt signed by the person on whom the document was served.
5. A person who fails to comply with any process served on him shall not by reason thereof be liable to any penalty or compulsory measure pursuant to the law of the Requesting Party or Requested Party.

Article 17

Search and Seizure

1. The Requested Party shall, insofar as its law permits, carry out a request for search and seizure and delivery of any material to the Requesting Party which is relevant to a criminal matter in the Requesting

Party, provided that the request includes information justifying such action under the law of the Requesting Party.

2. The Requested Party shall provide such information as may be required by the Requesting Party concerning the result of the search, the place of seizure, the circumstances of seizure, and the subsequent custody of the material seized.
3. The Requesting Party shall observe any conditions imposed by the Requested Party in relation to any seized material which is delivered to the Requesting Party, including any terms and conditions to protect third party interests in the material.

Article 18

Proceeds of Crime

1. The Requested Party shall, upon request, endeavor to ascertain whether any proceeds of crime against the law of the Requesting Party are located in the Requested Party and shall notify the Requesting Party of the results of its inquiries. In making the request, the Requesting Party shall notify the Requested Party of the basis of its belief that such proceeds may be located in the Requested Party.
2. Where, pursuant to paragraph 1, suspected proceeds of crime are found, the Requested Party shall take such measures as are permitted by its law to prevent any dealing in, transfer or disposal of such suspected proceeds pending a final determination in respect of those proceeds by a Court of the Requesting Party.
3. Where a request is made for assistance in securing the confiscation of proceeds of crime the Requested Party shall take measures as are permitted by its law to provide the assistance. This may include enforcing

an order made by a court in the Requesting Party and initiating or assisting in proceedings in relation to the proceeds to which the request relates.

4. In the application of this Article, the rights of bona fide third party shall be respected under law of the Requested Party.

5. Proceeds confiscated pursuant to this Agreement shall be retained by the Requested Party unless otherwise agreed upon between the Parties.

Article 19

Certification and Authentication

1. A request for assistance and the documents in support thereof, as well as documents or other material supplied in response to such a request, shall not require any form of certification or authentication unless requested by either Party.

2. Insofar as not prohibited by the law of the Requested Party, documents, records or other materials shall be transmitted in such form or accompanied by such certification as may be requested by the Requesting Party in order to make them admissible according to the law of the Requesting Party.

3. Material shall be certified or authenticated by consular or diplomatic officers only if the law of the Party specifically so requires.

Article 20

Representation and Expenses

1. The Requested Party shall make all necessary arrangements for the representation of the Requesting Party in any proceeding arising out of a request and shall represent the interests of the Requesting Party in all other respects.

2. The Requested Party shall meet the ordinary cost of executing the request for assistance in the Requested Party, except that the Requesting Party shall bear:

- (a) the expenses associated with conveying any person to or from the Requested Party at the request of the Requesting Party, and any allowances or expenses payable to that person while in the Requesting Party pursuant to a request under Articles 12 or 13; and
- (b) the expenses and fees of experts and counsel retained at the request of the Requesting Party.

3. If during the execution of the request it becomes apparent that the execution of the request requires expenses of an extraordinary or substantial nature, the Parties shall consult to determine the terms and conditions under which the requested assistance can be provided.

Article 21

Consultation

The Parties shall consult promptly, at the request of either of them, concerning the interpretation, application or implementation of this Agreement.

Article 22

Settlement of Disputes

Any dispute arising out of the interpretation, application or implementation of this Agreement shall be resolved through diplomatic channels if the Central Authorities are themselves unable to reach agreement.

Article 23

Entry into Force, Amendment and Termination

1. Each Party shall notify the other Party in writing of the completion of its internal procedures required for entry into force of this Agreement. This Agreement shall enter into force thirty days after the date of the later of two notifications.
2. This Agreement may be amended upon the mutual written agreement of the Parties. Such amendment shall enter into force in accordance with the provisions set forth in paragraph 1.
3. This Agreement applies to any requests presented after its entry into force even if the relevant acts or omissions occurred prior to this Agreement entering into force.
4. Either Party may terminate this Agreement by notice in writing to the other at any time. Termination shall take effect six months after the day on which notice is given. Requests which have been received prior to termination of the Agreement shall nevertheless be processed in accordance with the terms of the Agreement as if the Agreement was still in force.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Agreement.

DONE in duplicate in Hong Kong on the twenty sixth day of March of Two thousand and eighteen, in the Chinese, Mongolian and English languages, each text being equally authentic. In case of any divergence of interpretation, the English text shall prevail.

Schedule 2

[s. 2 & Sch. 3]

Modifications to the Ordinance

1. Section 5(1)(d) of the Ordinance is modified to read as follows—

“(d) there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of the person’s race, sex* religion, nationality or political opinions;”.
2. Section 5(1)(e) of the Ordinance is modified to read as follows—

“(e) the request relates to the prosecution of a person for an external offence in a case where the person—*
 - (i)* has been convicted, acquitted or pardoned by a competent court or other authority in the place,** or Hong Kong in respect of that offence or of another external offence constituted by the same act or omission as that offence;* or
 - (ii)* has undergone the punishment provided by the law of that place or Hong Kong*,** in respect of that offence or of another external offence constituted by the same act or omission as that offence;”.
3. Section 17(3)(b) of the Ordinance is modified to read as follows—

“(b) the person, being free to leave Hong Kong, has not left Hong Kong within a period of 15 days after being notified that the person’s presence is no longer required for any of the following purposes* ~~has had an~~

~~opportunity of leaving Hong Kong and has remained in Hong Kong otherwise than for**—~~

- (i) ~~the purpose to which the request relates; or**~~
- (ii) the purpose of giving assistance in relation to a criminal matter in Hong Kong certified in writing by the Secretary for Justice to be a criminal matter in relation to which it is desirable that the person give assistance.”.

* The text underlined is added. (The underlining is for ease of identifying the modification.)

** The text crossed out is deleted. (The crossing out is for ease of identifying the modification.)

Schedule 3

[s. 2]

Summary of Modifications to the Ordinance

1. Sections 1 and 2 of Schedule 2 specify modifications to section 5(1) of the Ordinance so that a request by a place outside Hong Kong for assistance under the Ordinance must also be refused if, in the opinion of the Secretary for Justice—
 - (a) there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of the person's sex; or
 - (b) 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.
2. Section 3 of Schedule 2 specifies modifications to section 17(3)(b) of the Ordinance to more precisely delineate the circumstances under which a person who is in Hong Kong to give assistance in relation to a criminal matter, pursuant to a request made by the Secretary for Justice, ceases to have immunities under section 17(1) of the Ordinance.



Clerk to the Executive Council

COUNCIL CHAMBER

20 November 2018

Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (*Ordinance*) applies as between Hong Kong and Mongolia. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Government of the Hong Kong Special Administrative Region and the Government of Mongolia and signed in Hong Kong on 26 March 2018. A copy of those arrangements is annexed at Schedule 1 to the Order. The Ordinance is to apply subject to the modifications specified in Schedule 2 to the Order. The modifications are summarized in Schedule 3 to the Order.

(Translation)

Mutual Legal Assistance in Criminal Matters (Mongolia) Order

**Draft Speech by the Secretary for Security on the Resolution
at the Legislative Council Meeting on 9 January 2019**

Mr President,

I move that the motion, as printed on the Agenda, on the resolution to approve the Mutual Legal Assistance in Criminal Matters (Mongolia) Order, be passed by this Council.

2. Hong Kong is committed to playing an active role in international cooperation in law enforcement. As many crimes are committed across borders, there is a need for different jurisdictions to strengthen law enforcement and judicial cooperation.

3. Hong Kong has been actively cooperating with other jurisdictions on criminal matters, and seeking to conclude bilateral agreements on mutual legal assistance in criminal matters (“MLA”) with other jurisdictions in accordance with Article 96 of the Basic Law to establish strong and comprehensive cooperation relationships. These bilateral agreements provide for reciprocal assistance between Hong Kong and the contracting parties, and demonstrate Hong Kong’s commitment to the international effort in fighting crimes.

4. The Mutual Legal Assistance in Criminal Matters Ordinance (“the MLA Ordinance”) provides a statutory framework for implementing MLA agreements signed between Hong Kong and other jurisdictions, enabling assistance to be provided to or obtained from foreign jurisdictions in the investigation and prosecution of criminal offences. Such assistance includes the taking of evidence, search and seizure, production of material, transfer of persons to give evidence and confiscation of crime proceeds.

5. Hong Kong has so far signed MLA agreements with 32 foreign jurisdictions, including the MLA agreement signed with Mongolia in March 2018. Pursuant to the MLA Ordinance, the Chief Executive in Council has made the Mutual Legal Assistance in Criminal Matters (Mongolia) Order to implement the bilateral agreement and enable the MLA Ordinance to be applied as between Hong Kong and Mongolia.

6. The Order will come into operation thirty days after the contracting parties have notified each other that their respective local requirements have been complied with. I will appoint by notice in the Gazette the commencement date of the Order in accordance with the requirements of the Order.
7. I now invite Members to approve the making of the Mutual Legal Assistance in Criminal Matters (Mongolia) Order.
8. Thank you, Mr President.