

For discussion on
31 May 2019

Legislative Council Panel on Security

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

Purpose

The Hong Kong Special Administrative Region (“HKSAR”) Government consulted the Panel on Security of the Legislative Council (“LegCo”) on 15 February 2019, and initiated public discussion, on its proposal to amend the existing Fugitive Offenders Ordinance (“FOO”) (Cap. 503, Laws of Hong Kong) and Mutual Legal Assistance in Criminal Matters Ordinance (“MLAO”) (Cap. 525, Laws of Hong Kong) so as to deal with a case of a Hong Kong resident allegedly murdering another Hong Kong resident in Taiwan (the Taiwan homicide case) and to plug the loopholes in the current regime. Subsequently, the Security Bureau (“SB”) submitted the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019 (“the Bill”) to LegCo on 3 April 2019, which aroused extensive discussions and different opinions in the community. This paper aims to give an account of the development in respect of the Bill, and provide the Government’s consolidated response after listening to the views on the Bill from all sectors of society.

The Bill

2. The purpose of the Bill is to amend FOO and MLAO. FOO stipulates the procedures for Hong Kong to surrender fugitive offenders who committed serious criminal offences, the relevant human rights and procedural safeguards, the gatekeeping roles of the court and executive authority, appeal channels for fugitive offenders, etc. Surrender of fugitive offenders serve the purpose of transferring him to another jurisdiction for trial or service of sentence while protecting his rights. It is worth noting that FOO was enacted in March 1997 as part of the efforts in localising the laws upon Hong Kong’s return to China; and the human

rights and procedural safeguards for those to be surrendered provided in the Ordinance are in line with common international practice and regarded as a blueprint with reference value. In fact, except for the shortcomings highlighted in the ensuing paragraphs, no dispute has ever arisen regarding surrender of fugitive offenders (“SFO”) under the Ordinance over the past 20 years or so.

3. Different from SFO, MLAO does not involve the transfer of offenders. It concerns the assistance in and requirements for taking evidence, collecting evidence, freezing and confiscation of proceeds of crimes in Hong Kong, etc. Its main purpose is to provide assistance in the investigation and prosecution stages. Similarly, the approaches and safeguards adopted in MLAO have also drawn reference from the guidelines on mutual legal assistance in criminal matters (“MLA”) provided by the United Nations. Except for the geographical restrictions mentioned below, MLAO allows law enforcement agencies in Hong Kong to fulfill their international obligations to jointly combat crimes.

4. In early 2018, there was a case which took place in Taiwan involving a Hong Kong resident allegedly having murdered another Hong Kong resident and then returned to Hong Kong. The case caused deep sorrow to the victim’s family and the community has shown great sympathy and concern. At the same time, the Taiwan homicide case has highlighted the loopholes in the existing SFO and MLA regimes under the two Ordinances, i.e. geographical restrictions and impractical operational procedures for case-based SFO¹. We must stress that the

¹ While there is already a mechanism for case-based surrender under the existing FOO, it has not been activated over the past 22 years due to practical operational difficulties. Procedures for activating case-based arrangements under FOO are the same as that with long-term surrender arrangements, i.e. gazettal of the agreement signed between Hong Kong and the requesting party in the form of subsidiary legislation according to section 3 of FOO and submission to LegCo for scrutiny and endorsement before implementation. On actual operation, law enforcement requires a surrender case to be handled in a timely and confidential manner before the suspect is arrested and brought to the court. If prior gazettal of the agreement reached with the requesting party on a particular case and pre-legislature scrutiny are necessary, particulars of the fugitive offender and details of the case will be inevitably disclosed upon publication in the gazette, alerting the fugitive offender to flee. Moreover, as the authorities concerned cannot arrest the suspect before completion of the scrutiny of subsidiary legislation (generally ranging from 28 days at least to 49 days at most), law enforcement actions for apprehending the fugitive offender will be seriously hindered. The Bill proposes to improve case-based surrender arrangements (“special surrender arrangements”), which will apply to all jurisdictions, including any other part of the People’s Republic of China, which have not entered into a long-term surrender agreement with HKSAR.

proposals in the Bill are not tailor-made for any particular jurisdiction. Instead, they seek to enable Hong Kong to effectively handle serious criminal cases in the future where necessary, which is considered necessary by both parties, by case-based surrender cooperation with a jurisdiction that does not have any long-term surrender agreements with Hong Kong, while using the same set of standards and under the principle of mutual respect.

5. As the current case-based surrender is operationally impracticable, the Bill provides for special surrender arrangements, i.e., on the basis of maintaining all human rights and procedural safeguards in the existing FOO (**Annex 1**), to provide that special surrender arrangements may be activated through a certificate issued by the Chief Executive (“CE”), which is conclusive evidence of there being such arrangements. In fact, there are already precedents of case-based surrender arrangements being activated and facilitated by certificates issued by executive authorities in foreign countries such as the United Kingdom and Canada.

6. The HKSAR Government adopts extremely stringent procedures in handling requests for the surrender of fugitive offenders, key features include:

- (a) Upon receiving a special surrender request, the HKSAR Government (generally the International Law Division of the Department of Justice (“DoJ”)) will comprehensively examine and consider such request in detail, and decide whether to handle it or not.
- (b) After considering the relevant documents of the case examined by DoJ, besides being satisfied that the arrangements of the case comply with the safeguards under the existing legislations (including all safeguards listed in Annex 1), the CE may, before deciding to activate the procedures, include additional safeguards in the arrangements according to the needs of the case. If the requesting party disagrees to the requirements of the HKSAR, the HKSAR Government will not follow up on such case.
- (c) The procedures leading up to the issue of a certificate by CE must be kept confidential to avoid alarming the fugitive offender.

However, the relevant documents will be disclosed when the law enforcement agency applies to the court for an arrest warrant. After an arrest warrant is granted by the court, the law enforcement agency will arrest the fugitive offender and the committal proceedings will proceed.

- (d) The court of the HKSAR will hold a hearing in open court and decide whether to make a committal order for CE to make decision on the person's surrender independently and impartially, based on the relevant provisions of FOO and evidence of the case. If the court considers that there is insufficient evidence or the restrictions to surrender under FOO are applicable to the request, the fugitive offender will be discharged immediately, and the executive authority and CE have no right to intervene. If the court makes a committal order, CE can still take into account grounds other than those under FOO, such as humanitarian grounds, before deciding to make an order for surrender or to make no order.
- (e) With sound rule of law in Hong Kong, in respect of every single order issued by CE including a decision on surrender procedures or a surrender order, the person involved has the right to apply for judicial review and may lodge appeals all the way to the Court of Final Appeal. Legal aid will be provided to eligible applicants (including non-Hong Kong residents) according to the policies under Hong Kong's legal aid system.

According to past experiences, the above legal procedures may last for a couple of years.

7. As the proposed special surrender arrangements do not change the human rights and procedural safeguards or other related provisions under the current law, the Bill basically involves relatively simple amendment, i.e. removing the geographical restrictions from the two Ordinances, and improving special surrender arrangements as a supplementary measure on the basis that long-term surrender arrangements are not affected, notwithstanding that reaching long-term surrender arrangements remains our policy objective. Given the public views on the legislative amendment this time, the Bill provides that offences covered by special surrender arrangements are the 37 (out of 46) items of offences described

in Schedule 1 to the existing FOO, with the threshold for punishment set higher than that of long-term surrender arrangements to cover offences punishable with imprisonment for more than 3 years and triable in Hong Kong on indictment only.

Public views on the Bill

8. Since putting forward the proposal on 15 February and introducing the Bill into LegCo on 3 April, the Government team has been explaining the proposal to various sectors of the community and listening to their views. Over the past few months, members of the Government team, including the Chief Secretary for Administration, Financial Secretary, Secretary for Justice, Secretary for Security, Secretary for Financial Services & the Treasury, Secretary for Commerce & Economic Development and Secretary for Constitutional & Mainland Affairs, met with local and overseas chambers of commerce, various organisations and sectors, foreign envoys and local communities, etc. on numerous occasions to have face-to-face dialogue and exchange. Given that a bills committee could not be formed to scrutinise the Bill and the dispute in our society persists, the Government team will continue to work hard on providing explanations for enhancing the understanding of the contents of the Bill among different stakeholders and members of the public.

9. From our first-hand experience, many people do not have enough understanding of the legal provisions concerned or have been affected by some sayings in the community, resulting in their misunderstanding and worries regarding the legislative amendment. Face-to-face explanations by government officials and their point-to-point responses could often help ease such worries and doubts. As to the alternative options suggested by some individuals during the discussion process, the Government has responded to them one by one.

Consolidated response from the Government

10. The Bill aims to handle the Taiwan homicide case and, at the same time, plug the loopholes in our juridical assistance system. The Government's proposal, which was formulated after careful studies, will ensure that offenders of serious crimes could not evade legal responsibilities by taking advantage of such loopholes, so as to protect the

safety of the public and our society. The Taiwan homicide case, though a single case, has highlighted that serious crimes of similar nature such as wounding, bombing, etc. could happen any time and any where. The only questions are when such crimes will happen, and who the unfortunate victims will be. We cannot allow offenders of serious crimes to seek refuge in Hong Kong and escape justice, which will likely threaten our public safety.

11. By international consensus, surrender of fugitive offenders is executed to fight organised and cross-boundary crimes and is a commonly accepted means to reduce crimes effectively. Since long ago, the United Nations has promulgated, through a resolution, a relevant model treaty as reference for different jurisdictions. Drawing reference from the model treaty, the existing FOO is in line with the common practice in respect of human rights and legal procedures, and has balanced the needs of both apprehending fugitive offenders and protecting human rights. Better still, for special surrender arrangements prescribed under the Bill, there can be more instead of less requirements for protection of the rights of the subject than general surrender arrangements under the existing FOO.

12. Given the above stated goals and policy considerations, the Government deems it necessary to proceed with the work related to the Bill. However, with the spirit of providing more instead of less safeguards in making special surrender arrangements, and having considered the specific views and concerns expressed by various sectors, it is considered that, to ease these concerns, we accept that additional safeguards could be provided in the following three aspects for special surrender arrangements under the Bill: (I) narrowing the application of special surrender arrangements to the most serious offences only; (II) adding more restrictions to the activation of special surrender arrangements; and (III) enhancing protection for the rights of the surrendered persons.

(I) narrowing the application of special surrender arrangements to the most serious offences only

(1) According to the original proposal of the Bill, special surrender arrangements apply to offences punishable with

imprisonment for more than three years and triable on indictment in Hong Kong. There are views that given that the Bill focuses on special surrender arrangements in the absence of a long-term agreement, it should only handle exceptionally serious offences and the threshold for applicable offences should be raised. This includes the proposal to raise the maximum imprisonment requirement to five, seven or even ten years for offences committed by fugitive offenders. As special surrender arrangements are only supplementary measures before long-term surrender arrangements are in place, the Government accepts that the Bill should only handle the most serious offences. Having considered that the most serious offences are tried at the Court of First Instance of the High Court in Hong Kong, and that the offences involved are punishable with imprisonment for seven years or more, the Government therefore decides that the offences to which special surrender arrangements apply should be those punishable with imprisonment for seven years or more.

(II) Adding more restrictions to the activation of special surrender arrangements

- (2) According to the Bill's proposals, in addition to the requirement that special surrender arrangements must comply with all provisions of FOO, provisions may be added in the arrangements in light of the needs of individual cases to further limit the circumstance for surrender (e.g. additional safeguards). To address the community's concerns about the rights of surrendered fugitive offenders during trials, we agree that the requesting party can be required to include safeguards that are in line with general human rights protection regarding special surrender arrangements, such as presumption of innocence, open trial, legal representation, right to cross-examine witnesses, no coerced confession, right to appeal, etc. Should the requesting party fail to meet the relevant requirements, CE has the full right to decide not to process the surrender request. The texts of special surrender arrangements will

be submitted to the court at the committal hearing conducted in open court. The public can therefore have knowledge of the arrangements via the court's open hearing. Also, after the court made a committal order, CE may refuse surrender on humanitarian or other grounds when making the final decision on surrender. Please see Annex 2 for details.

- (3) The requesting party must provide assurance that the effective limitation period, if any, of the relevant offence has not expired, or the prosecution and punishment in respect of the offences is not precluded for any reasons, e.g. pardon.

(III) Enhancing protection for the interests of surrendered persons

- (4) In view of the public concern about the solemnity of the issue of requests by requesting parties and how to handle requests made by the Mainland, we have drawn reference from the general international practice and come to the view that the HKSAR Government should only process requests from the central authority (as opposed to the local authorities) of a place. Take the Mainland as an example, the HKSAR Government will not process any requests for surrender other than those made by the Supreme People's Procuratorate. Likewise, for MLA, the HKSAR Government will only process requests for assistance related to evidence/witnesses made by the Supreme People's Procuratorate; and as for assistance relating to restraining/confiscating the proceeds of crime, the HKSAR Government will only process those requests made by the Supreme People's Court.
- (5) There are views that Hong Kong people subject to surrender should be allowed to apply for serving their sentence in Hong Kong after conviction, hence allowing them to serve their sentence in an environment which they are familiar with in terms of language and habit and thereby facilitating their rehabilitation and visits by family members. We agree

to this line of thinking and will explore helping sentenced persons to serve their sentence in Hong Kong according to the arrangement under the current Transfer of Sentenced Persons Ordinance (Cap. 513). As the existing Ordinance is not applicable to the Mainland, we will follow up the work with the Mainland upon passage of the Bill.

- (6) To take better care of the interests of the surrendered persons, we will negotiate the issue of post-surrender visits on a case-by-case basis, so as to arrange visits via appropriate means, including visits by consuls (in the case of surrender to foreign countries) and officials, or other special cooperation arrangements.

Relations between the Mainland and HKSAR

13. As publicly reiterated by CE and the HKSAR Government, the legislative amendment is proposed by the HKSAR Government to handle the Taiwan homicide case and improve Hong Kong's judicial system, not to target the Mainland or any particular jurisdiction. However, the subject matter of the amendment involves the Mainland, with which many Hong Kong people have had frequent contacts for years, their views and concerns inevitably focus on the Mainland's practice. Nevertheless, the close relations between both places are exactly what makes the statutory "geographical restrictions" unjustified. At the international level, MLA and SFO are based on mutual respect, as well as confidence in local judicial system, and the protection by and strict enforcement of relevant ordinances.

14. Under the provisions of the Basic Law ("BL"), CE, being the head of HKSAR, is accountable to the Central People's Government and HKSAR. CE has reflected the concerns of the Hong Kong society on the legislative amendments to the Central People's Government. Regarding the need to take further measures to allay public concerns, the Central People's Government has expressed understanding and will respect and support the HKSAR Government's various measures for enhancing protection. It is hoped that the HKSAR Government's consolidated response can promote rational discussions in the Hong Kong society and ease worries.

15. Freedoms and rights in Hong Kong are well protected under BL. The proposals of the Bill are in line with BL and will by no means undermine any existing legal rights and freedoms or affect the mandatory duty of Hong Kong in respect of the 20 SFO agreements and 32 MLA agreements signed by it.

16. We reiterate that the Bill involves a time element. At present, Hong Kong lacks legislation for handling the Taiwan homicide case. Therefore, we must legislate to prepare for bringing the suspect of the Taiwan homicide case to face due legal proceedings. Various sectors of Hong Kong have agreed that the suspect of the Taiwan homicide case should be brought to justice. Hong Kong has always been willing to discuss on the provision of assistance regarding the case in accordance with the law and has prepared to do so. We will strive to take forward the relevant work to uphold justice.

Security Bureau
May 2019

Human Rights and Procedural Safeguards under FOO

Human rights safeguards

- (a) **Compliance with the “double criminality” principle (section 2)** - the act or omission concerned must constitute an offence in both the requesting and requested jurisdictions. For SFO cases under long-term arrangements, the relevant offences must also be among the 46 items of offences described in Schedule 1 to FOO;
- (b) **Rule against double jeopardy (section 5)** - an offence being tried in one place cannot be tried again in another; the requested party shall refuse the request unless this rule is followed;
- (c) **No surrender for political offences (section 5)** - requests in relation to offences of political character shall be refused;
- (d) **Refusal of requests made for political or other motives (section 5)** – requests involving persons being prejudiced or prosecuted/punished on account of his race, religion, nationality or political opinions shall be refused;
- (e) **Safeguards against death penalty (section 13)** - for an offence punishable with death, the requesting party shall assure that such punishment will not be imposed or carried out. Otherwise the surrender request shall be refused; and
- (f) **Specialty protection and restriction against re-surrender (section 5)** - for SFO cases, the person shall not be dealt with for any offence other than the offence(s) for which he was surrendered, and shall not be re-surrendered to any other place;

Procedural safeguards

- (g) Where the requesting party requests that the fugitive offender be prosecuted for offences other than the specified offence or that he be re-surrendered to a third place, he may make representations to CE (section 5);
- (h) Applying for habeas corpus and appeal if his application fails (may appeal to the Court of Final Appeal) (section 12);
- (i) Applying for bail supported by special circumstances (section 12);
- (j) Applying for discharge in case of delay in his surrender (section 14);
- (k) Making a torture claim may appeal to the Court of Final Appeal) (section 13); and
- (l) Applying for a judicial review and, where necessary, legal aid at any time during the course of all proceedings.

**Special Surrender Arrangements:
Factors that the Government may take into account**

- I. When making special surrender arrangements with a requesting party, the Government will, apart from ensuring that such surrender arrangements comply with the provisions in FOO and the human rights safeguards therein, take into account whether the requesting party will conduct an open hearing.. The Government may, in light of the circumstances, consider adding factors including but not limited to the following in the text of the agreement and duly specify the undertakings to be provided by the requesting party:
 1. A person charged with a criminal offence (“the suspect”) has the right to be presumed innocent until proved guilty according to the law.
 2. The requesting party shall promptly inform the suspect of the nature and cause of the charge against him in detail and in a language the suspect understands.
 3. The suspect shall be given considerable amount of time and facilities to prepare for his defence and to communicate with a lawyer of his own choosing.
 4. The suspect shall be tried without undue delay.
 5. The suspect shall be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; if he does not have legal assistance, he shall be informed of this right; he shall be granted legal assistance where the interests of justice so require in the case, and without payment by him if he does not have sufficient means to pay for it.
 6. The suspect may examine, or have examined, the witnesses against him and to obtain the attendance and examination of

witnesses on his behalf under the same conditions as witnesses against him.

7. If the suspect cannot understand or speak the language used in court, he shall have the free assistance of an interpreter.
8. The suspect shall not be compelled to testify against himself or to admit guilt.
9. In case the suspect is a juvenile person, the procedure shall be such as will take account of his age and the desirability of promoting his rehabilitation.
10. Where the suspect is convicted of a crime, he shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
11. When a suspect has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
12. No suspect shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of a country.
13. If a surrender request involves a criminal offence which did not take place within the requesting country, and according to the laws of the requested country, the latter has no extra-territorial jurisdiction over such criminal offences, the surrender may be refused.

14. The surrender of a person sought may be refused for humanitarian reasons such as age, health and other personal circumstances.

II. In the course of the surrender procedures, CE reserves the final right of not surrendering. Even if the court makes a committal order, CE may still refuse to issue a surrender order in view of the relevant rights of the person to be surrendered under applicable laws and all circumstances of the case, including but not limited to the following:

1. the representation made by the person to be surrendered or his reasons for objecting to the surrender (including surrender restrictions under FOO and reasons for objecting to the surrender under other applicable laws);
2. the latest circumstances of the case or any changes to such circumstances; and
3. the person to be surrendered may be visited by his family, legal representatives and their relevant officers.