

立法會
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**Bills Committee on Fugitive Offenders and Mutual Legal Assistance in
Criminal Matters Legislation (Amendment) Bill 2019**

Background brief prepared by the Legislative Council Secretariat

Purpose

This paper provides background information and summarizes Members' discussions on the Administration's proposed legislative amendments relating to cooperation between Hong Kong and other places on juridical assistance in criminal matters.

Background

2. According to Article 95 of the Basic Law, "[t]he Hong Kong Special Administrative Region may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other". According to Article 96 of the Basic Law, "[w]ith the assistance or authorisation of the Central People's Government, the Government of the Hong Kong Special Administrative Region may make appropriate arrangements with foreign states for reciprocal juridical assistance".

3. The Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) ("MLAO") provides the statutory framework for implementing the mutual legal assistance in criminal matters ("MLA") arrangements and regulates the provision and obtaining of assistance in the investigation and prosecution of criminal offences, including the taking of evidence, search and seizure, production of material, transfer of persons to give evidence and confiscation of the proceeds of crime. The Fugitive Offenders Ordinance (Cap. 503) ("FOO") provides for the surrender to certain places outside Hong Kong of persons wanted for prosecution, or for the imposition or enforcement of a sentence. It also provides for the treatment of persons surrendered to Hong Kong. At

present, Hong Kong has signed MLA agreements with 32 jurisdictions¹ and surrender of fugitive offenders ("SFO") agreements with 20 jurisdictions.² Under FOO and MLAO, apart from long-term arrangements applicable to Hong Kong, Hong Kong can also handle requests pursuant to a case-based approach as an interim measure before long-term arrangements with a place comes into effect.

4. In early 2018, there was a case in which a Hong Kong resident who was suspected to have murdered in Taiwan another Hong Kong resident had returned to Hong Kong ("the Taiwan homicide case"). According to the Administration, the request for sending the suspect to Taiwan for trial could not be processed due to the limitations of MLAO and FOO as both Ordinances stipulate that they are not applicable to any other parts of the People's Republic of China³ ("PRC"). In view of the above, the Administration has reviewed MLAO and FOO and considered that the two Ordinances must be amended promptly to address the inadequacies in the existing "case-based" surrender arrangement.

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

5. The Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019 ("the Bill") was published in the Gazette on 29 March 2019 and received its First Reading at the Council meeting of 3 April 2019. The Bill seeks to enable the case-based surrender arrangement to be applicable to any places with which Hong Kong has not entered into any long-term arrangement for reciprocal juridical assistance. The proposed case-based surrender arrangement would cover 37 items of offences based on their existing description in Schedule 1 to FOO.

¹ These jurisdictions are Argentina, Australia, Belgium, Canada, Czech Republic, Denmark, France, Finland, Germany, India, Indonesia, Ireland, Israel, Italy, Japan, Malaysia, Mongolia, the Netherlands, New Zealand, the Philippines, Poland, Portugal, Republic of Korea, Singapore, Sri Lanka, South Africa, Spain, Sweden, Switzerland, the United Kingdom, the United States and Ukraine.

² These jurisdictions are Australia, Canada, Czech Republic, France, Finland, Germany, India, Indonesia, Ireland, Malaysia, the Netherlands, New Zealand, the Philippines, Portugal, Republic of Korea, Singapore, South Africa, Sri Lanka, the United Kingdom and the United States.

³ As defined in the Interpretation and General Clause Ordinance (Cap. 1), "People's Republic of China" includes Taiwan, the Hong Kong Special Administrative Region and Macau.

Members' deliberations

6. At its meeting on 15 February 2019, the Panel on Security ("the Panel") was briefed on the Administration's proposals to amend FOO and MLAO to enable the case-based arrangement to be applicable to any places with which Hong Kong had not entered into any applicable long-term arrangement. Members' views and concerns are summarized in the following paragraphs.

Scope of jurisdictions and offences covered in the Administration's proposal

7. Some members expressed concern that the Administration's proposals would broaden the applicability of FOO and MLAO to other parts of PRC. Pointing out that many people lacked confidence in the legal system of the Mainland, they considered that the legislative proposals should be narrowed to requests for MLA and SFO between Hong Kong and Taiwan in order to deal with the Taiwan homicide case. Some members queried how the human rights of an offender surrendered to the Mainland would be safeguarded and whether the offender would receive a fair trial on the Mainland. Some members pointed out that the proposals would affect every individual in Hong Kong and undermine the rule of law, as well as provide the Chief Executive ("CE") with too much power in making an order for surrender. They considered that the impact far exceeded that of legislation to implement Article 23 of the Basic Law.

8. The Administration explained that narrowing the applicability of the Administration's proposals to Taiwan would only partially address the inadequacies in existing legislation. Similar requests might be received later from another jurisdiction with which Hong Kong had not signed any SFO agreement. As such, the Administration proposed to remove the limitation in existing legislation to provide a legal basis for instituting "case-based" MLA and SFO cooperation between Hong Kong and other jurisdictions with which Hong Kong had not entered into MLA or SFO agreements. The Administration stressed that a "case-based" SFO regime was already in place in many common law jurisdictions such as Australia, Canada, Ireland, New Zealand, South Africa and the United Kingdom.

9. The Administration further advised that CE's power under FOO had to be exercised in compliance with the laws of Hong Kong. All human rights and procedural safeguards under FOO would remain unchanged. The person to be surrendered could raise to the court any possible threat to his human rights that might arise after the surrender. The Administration pointed that under the double criminality principle, SFO requests in which the act concerned constituted an offence on the Mainland but not an offence in Hong Kong would be refused.

10. Some members considered that the 46 items of offences specified in Schedule 1 to FOO were not merely serious criminal offences. There was a possibility that businessmen in Hong Kong might be surrendered because they were not familiar with the Mainland laws and might inadvertently commit a crime. These members considered that the Administration should remove economic crimes involving unintentional mistakes, or give priority to handling items of offences which were less controversial when implementing the case-based surrender arrangements.

11. Members may wish to note that the Administration subsequently advised that after taking into account that many existing long-term surrender arrangements did not cover all 46 items of offences in the list of extraditable offences, and that the public was not familiar with the actual operation of case-based surrender, it was decided to only handle 37 items of offences in the proposed case-based surrender arrangements. The Administration would also raise the threshold for case-based surrender arrangements such that only offences punishable with imprisonment for more than three years and triable on indictment in Hong Kong were covered.

Procedural and human rights safeguards

12. Noting from the Administration's proposals that SFO requests in relation to offences of a political character should be refused, some members sought clarification on how to determine whether an offence was of a political character.

13. The Administration advised that whether an offence was of a political character would depend on the circumstances of each case. There were many precedents in other common law jurisdictions which could assist the court in determining whether an offence was of a political character. The Administration added that requests involving persons being prejudiced or prosecuted/punished on account of his race, religion, nationality or political opinions would also be refused. The person to be surrendered could also apply for *habeas corpus* and lodge an appeal if his application was not successful.

Need for the proposed legislative amendments

14. Some members expressed support for the Administration's proposals. They considered that there was a pressing need to introduce the proposed legislative amendments to address inadequacies in existing legislation and enable the Administration to provide juridical assistance to Taiwan in the Taiwan homicide case. Some other members, however, took the view that the one-off case-based arrangement was already provided for under FOO, they did

not see the need for amending the two Ordinances for this purpose.

15. The Administration advised that details relating to an SFO request would inevitably be publicly disclosed when the relevant subsidiary legislation was published in the Gazette under the existing regime. If the legislative proposals were not implemented, it would be unable to provide juridical assistance in the Taiwan homicide cases. Besides the case, there were four other SFO requests which could not be dealt with under existing legislation. The Administration added that allowing offenders of serious crime to seek refuge in Hong Kong without the means to handle them would pose a serious threat to public order and public safety in Hong Kong.

16. A motion supporting the Administration to introduce the relevant legislative proposals into the Legislative Council ("LegCo") expeditiously for scrutiny was passed at the Panel meeting on 15 February 2019 (the wording of the motion is in **Appendix I**).

Receiving public views on the Administration's proposals

17. Some members expressed grave concern that the Administration had not consulted the public on its proposals. The Administration pointed out that the Security Bureau had invited public views on the Administration's proposals through its website from 12 February to 4 March 2019. These members, however, considered that the period for submission of views was too short. They took the view that the Panel should receive public views on the subject.

18. Some other members, however, considered that the Bills Committee to be formed to study the relevant Bill would invite public views, it was unnecessary for the Panel to hold a meeting to receive public views on the subject. Besides, members of the public could submit their views on the proposals in writing to the Panel and/or the Administration. After discussion, the Panel decided that it was unnecessary for the Panel to invite public views on the subject.

Relevant papers

19. A list of the relevant papers on the LegCo website is in **Appendix II**.

保安事務委員會

在 2019 年 2 月 15 日的會議上
就議程項目 IV "香港與其他地方
在刑事事宜相互司法協助方面的合作" 通過的議案

鑒於去年初發生一名香港女子在台灣遭其男友殺害的案件，而台灣當局雖多次提出刑事司法協助，但因香港與台灣兩地沒有簽訂移交逃犯等相關協定，以至未能將嫌疑犯送交台灣接受審訊，令死者家屬未能為死者沉冤得雪，討回公道，此外，事件亦凸顯現有刑事司法互助的法律漏洞，令香港可成為逃犯天堂；就此，本委員會支持保安局提出修訂《刑事事宜相互法律協助條例》和《逃犯條例》，以完善以個案形式合作的機制及涵蓋面，並鑒於涉及上述台灣殺人案的嫌疑犯有潛逃機會，本會促請當局盡快提交相關修訂建議，讓立法會進行審議。

(Translation)

Panel on Security

**Motion passed under agenda item IV
"Cooperation between Hong Kong and other places
on juridical assistance in criminal matters"
at the meeting on 15 February 2019**

In view of the homicide of a Hong Kong woman by her boyfriend in Taiwan early last year and the fact that Hong Kong is unable to transfer the suspect to Taiwan for trial despite repeated requests from the Taiwan authorities for juridical assistance in criminal matters due to absence of relevant agreements between Hong Kong and Taiwan concerning the surrender of fugitive offenders, thereby rendering the deceased's family unable to seek vindication and justice for the deceased; apart from that, the above incident has also highlighted the loopholes in the existing legislation on mutual juridical assistance in criminal matters making Hong Kong a paradise for fugitive offenders; in this connection, this Panel supports the amendments to the Mutual Legal Assistance in Criminal Matters Ordinance and the Fugitive Offenders Ordinance proposed by the Security Bureau to enhance the mechanism for 'case-based' cooperation and its scope of application, and given that there is a risk of the suspect in the above homicide case absconding, this Panel urges the Administration to introduce the relevant proposed amendments into the Legislative Council expeditiously for scrutiny.

Appendix II

Relevant papers on proposed legislative amendments relating to cooperation between Hong Kong and other places on juridical assistance in criminal matters.

Committee	Date of meeting	Paper
Panel on Security	15.2.2019 (Item IV)	Agenda Minutes
	5.3.2019 (Item II)	Agenda
Legislative Council	27.3.2019	Official Record of Proceedings (Question 3) (Members' Motions)

Council Business Division 2
Legislative Council Secretariat
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