

**The Switzerland Order made under section 4
of the Mutual Legal Assistance
in Criminal Matters Ordinance (Cap. 525)**

At its meeting held on 14 December 1999, Members of the Subcommittee deliberated at length the provisions of the Switzerland Order and requested clarification and further information on a number of points. The Administration's response is set out below :-

Article 15 – Notification of imprisonment

2. Some Members have expressed concern about the requirement in Article 15 that there be notification of the imprisonment of Hong Kong permanent residents in Switzerland irrespective of their consent. We have been asked to consider whether the rights to receive such notifications could be unilaterally forfeited by administrative means if there is no consent. We have since carefully considered the problem and its implications, and consulted departments concerned. We do not think it is appropriate to unilaterally forgo the right of notifications of imprisonment of HKSAR residents in Switzerland in these circumstances for a number of reasons.

3. The provision in this bilateral agreement negotiated between the Swiss Government and the HKSARG is to facilitate the provision of consular assistance under the arrangements for mutual legal assistance in criminal matters between the two places. Both sides are obliged to

comply with the terms of the Agreement. To forego unilaterally certain rights would be tantamount to amending the Agreement. This is undesirable from the external affairs perspective.

4. Legal advice is that Article 15 does not contravene the Personal Data (Privacy) Ordinance. Furthermore, sentences of imprisonment are imposed in open court; it would be usual for a sentence imposed on a “foreigner” to be reported both by the local press and the press in the person’s home jurisdiction. Accordingly the fact that a Hong Kong permanent resident was sentenced to imprisonment in Switzerland would, in the normal course, be expected to become public knowledge in Hong Kong.

5. To assess the implications of foregoing the right to automatic notification of detention of nationals under the Switzerland/HKSAR MLA Agreement, Members may wish to note that a number of consular agreements applicable to the HKSAR similarly require automatic notification e.g. the consular agreements with Canada and the United Kingdom. As we have explained at the meetings of the Subcommittee, there is no international unanimity that consent should be a prerequisite to informing a consular post of the detention of its nationals. Article 36 of the Vienna Convention on Consular Relations (VCCR) actually reflects the compromise reached between two different stances as to whether a consular post should be automatically informed of the custody of its nationals in the receiving state. On the one hand, some states considered that the wishes of the individuals (who might not want consular help or

might not want the fact of their imprisonment to be known to the authorities of their country) should be respected. On the other hand, some states considered that if consular officers were not automatically informed of the custody of their nationals, this might put their nationals at risk. These states argued that their nationals might be denied consular access under the pretext that they did not wish their own country to be informed. They pointed out that if notifications were made contingent upon request of the detained individual, disputes could arise as to whether the individual had in fact made the request or indeed been informed of his right to make the request. Many states were firmly of the view that unless there was unconditional notification the rule of international law which gives the right to every state to protect its nationals could be prejudiced. In the end a compromise was reached. Article 36 of the VCCR was drafted to make notification contingent upon request of the detained individual but with the rider that the person concerned be informed of his right to request notification. The fact remains that despite the final wordings of the VCCR, many countries, when concluding bilateral agreements with other states on the establishment of consular posts, do include clauses regarding unconditional notification to the consular posts concerned of the detention of their nationals.

6. While it has not been Hong Kong's position in the context of the negotiation of consular bilateral agreements between the CPG and other countries to press for unconditional notification of the custody of Hong Kong residents in the countries concerned as mentioned in paragraph 5 above, a number of these consular agreements provide for unconditional

notification on a reciprocal basis. We believe that we should not unilaterally forgo the rights as conferred by these bilateral agreements, as we are mindful of the wish of the public in general to receive protection from the Government of the HKSAR when they are detained or imprisoned elsewhere. This can be clearly seen from the public reaction to the detention of Hong Kong residents in South Africa in February this year. Had there been an unconditional notification agreement between Hong Kong and the government of South Africa, the SARG could have rendered assistance to the individuals concerned more promptly. Media commentaries and responses of families of detainees in the Mainland also suggest a rising public expectation for the Government to provide more avenues for residents in similar predicaments to seek assistance and to be aware of the availability of such assistance.

7. To summarise, it is our belief that provisions which provide for unconditional notification can more adequately protect the interests of Hong Kong people than provisions which require consent particularly if there is no requirement such as that contained in the Vienna Convention on Consular Relations for the person concerned to be informed of his right to request notification.

Article 25 – Provision of spontaneous information

8. Members asked that more information be provided on the need for the provision. The Hong Kong Police Force and their counterparts in overseas law enforcement agencies exchange intelligence and

information for the investigation of criminal matters on a police-to-police basis, if it is considered that the disclosure of such information might assist in the investigations of crimes and related proceedings. This includes spontaneous information on proceeds or instrumentalities of crime. The Hong Kong Police would only do so if it is not in breach the laws of the HKSAR. Article 25 of the Agreement reflects the fact that both Switzerland and the HKSAR follow this practice and co-operate fully in the prevention and detection of crimes, which would enhance the administration of justice and cooperation in law enforcement.

Article 34 – Police cooperation

9. Members enquired about the circumstances under which liaison with overseas law enforcement agencies would not be conducted through the Interpol. The Hong Kong Police conduct most of their liaison activities with overseas law enforcement agencies through Interpol, Hong Kong China. For the sake of operational efficiency, designated crime units in the Headquarters of the Hong Kong Police Force, such as the Narcotics Bureau and the Commercial Crime Bureau, also have direct contacts with their overseas counterparts for exchange of intelligence and information and for provision of operational assistance. Such direct liaison between operational units is considered very important in the combat against international drug trafficking activities and other serious transnational crimes.