FUGITIVE OFFENDERS AND MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS LEGISLATION (AMENDMENT) BILL 2019

SUBMISSION

1. The *Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019* (the "Bill") was gazetted on 29 March 2019. From *a legal perspective,* the Law Society provides the following submission.

2. The Law Society takes the view that as the proposed legislative amendments have far-reaching and important implications, there should be a comprehensive review of the extradition regime in Hong Kong and an extensive consultation with the stakeholders and the community. The process takes time. As such, the HKSAR Government should not rush the legislative exercise.

3. The HKSAR Government should carry out focused research on the following:

   (i) the surrender of fugitive offenders ("SFO") arrangements between the Mainland China and other countries, including any case-by-case arrangements, in particular any protections and exclusion provisions in these arrangements;

   (ii) how a person under an extradition request should be protected under current international legal standards; and

   (iii) any SFO arrangements from one jurisdiction to another one in the same country (e.g., in federal systems such as Australia, Germany, Malaysia and the United States, what is the extradition arrangement whereby a fugitive is transferred from

one jurisdiction to another one within that federal system?).

The above research should be made available for review as a part of proper consultation.

4. In the meantime, if the HKSAR Government considers it necessary to address expeditiously the surrender of the accused involved in the Taiwan alleged murder case, it should put forward proposals to address specifically that problem.

5. If notwithstanding what we have stated in the above, the HKSAR Government decides to proceed with the legislative amendment, we would suggest the following. The following serves only as a preliminary legal analysis of the current extradition regime for Hong Kong, and should not be taken as a compromise of our above position.

SHOULD THE FOO BE REVIEWED?

6. The primary legislation which currently governs the arrangements for surrender of fugitive offenders between Hong Kong and foreign countries is the Fugitive Offenders Ordinance (the "FOO") (Cap. 503).

7. The law of and procedure for mutual legal assistance in criminal matters is contained in the *Mutual Legal Assistance in Criminal Matters Ordinance* (Cap. 525).

8. In the past 22 years after its enactment in 1997, the FOO received only piecemeal and minor updates. In this period of time, there have been (a) rapid socio-economic developments in Hong Kong, and (b) substantial developments in the local jurisprudence in public law and human rights compliance, such as non-refoulement protection. In the same period of time, extradition laws in various countries have progressed. Examples are the enactments of the Extradition Act 2003 in the United Kingdom and the Extradition Act 1999 in Canada.

9. Subject to the international criminal law regime and the fundamental protection of human rights, we consider that extradition is an important tool in dealing with international crime. A comprehensive

review and update in the extradition[1] regime of Hong Kong in our view is required.

10. The above review should embrace, for example, a detailed study of criminal jurisdictions of different countries. There should also be an extensive consultation with the stakeholders and the community. The process takes time. Given the effect of participating in the international system of extraditing wanted persons, before the above proposed review is concluded, if the HKSAR Government is justifiably required to address and to deal with urgent requests to surrender fugitives to regions which have not entered into formal bilateral surrender agreements, then in principle we do not have strong objection to a case-by-case surrender arrangement. This however should only be a "*makeshift measure*" and is subject to

    (a) the provision of additional safeguards suggested below, for the purposes that

        (i) the accused Hong Kong person should have the right to dispute and resist the extradition request,

        (ii) the overall extradition arrangement under the Bill should be made more transparent to the general public, and

        (iii) the Hong Kong courts should have more power to oversee extradition requests;

    (b) the Government's commitment to step up its efforts to negotiate with those legal jurisdictions which have not yet entered into formal bilateral treaties or agreements for surrender of fugitives.

11. As the special surrender arrangements now proposed in the Bill is only a stop-gap initiative and not to replace formal fugitive agreements in the long-run, to avoid abuses the following additional safeguards should be included in the Bill.

PROPOSED PROCEDURES FOR FOO

12. We ask that the Bill should include an amendment to section 23 of the FOO.

13. Section 23 now provides as follows:

> "Admissibility of evidence, etc.
>
> (1) Any supporting document or other document which is duly authenticated is admissible in evidence in any proceedings under this Ordinance *without further proof*." [emphasis supplied]
>
> …
>
> (4) Without prejudice to the generality of section 10(2)(b) or 12(4), in any proceedings under this Ordinance, any evidence which contradicts an allegation that a person sought to be surrendered under this Ordinance to a prescribed place has engaged in conduct which constitutes a relevant offence for which such surrender is sought is inadmissible and, accordingly-
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> (a) that person is not entitled to adduce such evidence; and
> (b) any court is not entitled to receive such evidence.
>
> (5) Without prejudice to the generality of subsection (4), in proceedings under this Ordinance evidence may be adduced for the purposes of showing that a person brought before the court of committal or any other court is not the person identified in the request for surrender to which the proceedings relate."

14. According to the above, the document in support for extradition could be admitted without further proof. Furthermore, any evidence to contradict the allegation raised by the requesting jurisdiction, save and except for identification, could not be adduced.

15. The above provisions do not accord with the public expectation that if there are concerns on extradition, the defence should be given the right to challenge any prima facie evidence. We therefore ask the above sections (i.e. section 23(1), (4) and/or (5)) be amended to the extent that, apart from identification, the defence should be given the full right to be heard, *including adducing evidence* to test the

credibility of the evidence presented against it. That would assist the magistrate in deciding whether a prima facie case has been made out, when it is to receive and consider evidence for the purpose of FOO. This proposal would be in accordance with the Government's repeated reassurances that the Judiciary should be able to supervise the process.

16. Subject to further research, we note the Extradition Act 2003 in the United Kingdom does not confer a "without further proof" privilege to the UK Government, insofar as admission of evidence is concerned (see section 202, Extradition Act 2003).

INCLUDING COMMITTAL PROCEEDINGS INTO THE BILL

17. In addition, we suggest that Part III of the Magistrates Ordinance Cap 227 (on committal proceedings and preliminary inquiry) should be adopted and be incorporated into the Bill, such that mandatory procedural requirements are laid down for both the Prosecution and the Defence to comply with - as in a routine criminal matter – and that, a defendant can *give* evidence and *call* evidence.

18. The above reinforces the rights of a person under an extradition request to defend against such request. This is fundamental.

CERTIFICATES BY THE CHIEF EXECUTIVE

19. We understand that under the Part II of the FOO on the arrangement for the return of fugitives[2], the Chief Executive (CE) is not required to decide whether or not there is a prima facie case. He or she only asks whether there is sufficient evidence to warrant asking the magistrate to see if there is a prima facie case.

20. The Bill now provides for a certificate to be issued by or under the authority of the CE to initiate a special surrender arrangement. *From a legal perspective but not otherwise*, we consider the Bill rightly does not disturb this procedural arrangement.

21. However, in order to deal with the concerns of Hong Kong people on surrendering fugitives, there should be additional safeguards, set out in the following.

22. We ask that when the CE is considering the issuance of the certificate, the CE should clearly list out in the certificate the criteria he or she has taken into account. Apart from the conditions such as those currently set out in some extradition treaties (e.g. with Germany or Singapore) where a party can refuse the surrender of a fugitive if it involves its own nationals, or if it would be incompatible with humanitarian considerations, there should be additional conditions, including (a) that the offence of which the surrender is sought is not political in nature, and (b) that the request should not be civil disputes disguised as criminal process. These additional requirements enhance the overall transparency of this makeshift process.

23. We have not seen from the Government's proposal the contents of the draft CE Certificate; we anticipate that its contents would be similar to Form 1 of the *Fugitive Offenders (Forms) Regulation,* Cap 503M. We reserve our comments on the contents of the Certificate, and the related matter generally.

SCHEDULED OFFENCES

24. Under the Bill, surrenders from Hong Kong pursuant to the special surrender arrangements cover only 37 items of offences, while 9 other items are excluded, based on their existing description in Schedule 1 of FOO, and the offences have to be ones punishable with imprisonment for more than three years or any greater punishment and triable on indictment in Hong Kong.

25. We note a recent proposal of increasing the term to a seven-year imprisonment term. We consider that *only* those serious crimes should be subject to extradition.

26. As for the scheduled offences, we have not been provided with any *legal* justification as to why those 9 offences currently appearing in the FOO are not included in the Bill itself, for example the "offences involving the unlawful use of computers". These crimes could be

committed quite easily across borders (geographical or jurisdictional), and could be prevalent. Without any *legal reasoning*, at the moment we are not convinced as to why the proposed special surrender arrangement does not cover these 9 categories of crimes.

CONCERNS ON EXTRADITION TO MAINLAND CHINA

27. We understand that the Bill is not drafted for surrender arrangement of fugitives only to Mainland China. However, seemingly most arguments advanced on the Bill have been focused on the supposition that the surrender arrangement will be used to send Hong Kong people to Mainland China, because of the concerns expressed on the criminal justice system.

28. The singling out of a particular jurisdiction for comment is unfortunate and not helpful. Nevertheless, to assuage the concerns, we note with agreement a suggestion that it be made clear and explicit that the certificates of the CE are not issued other than pursuant to a formal request made through appropriate channels. In the case of Mainland China, the requests must be made by the Supreme People's Procuratorate (also known as the "Prosecutor General's Office" (最高人民檢察院). This is the highest national level agency responsible for both prosecution and investigation in the People's Republic of China.

29. Requests for surrenders should in any event not be made on spurious grounds. The above proposal would provide assurances that only properly formulated requests from the highest level of Prosecutorial Office in the Mainland China, are channelled to the HKSAR.

30. As a further layer of protection, we also note the proposal that, before a one-off special surrender arrangement is to be considered by the CE, in the request itself, the requesting state / party should give an open undertaking that, if and when the fugitive is to be surrendered to the requesting state / party, he or she should have proper (a) rights to proper legal representation and (b) rights to visitation.

THE ROLE AND THE JURISDICTION OF THE COURT

31. At the moment, the Court's role in reviewing and rejecting a request for surrender of a fugitive is fairly limited.

32. The jurisprudence of the Court in reviewing an extradition request is provided for under the FOO. That was explained in detail by the Court in the judgment of *Tiongco and the Government of the Republic of the Philippines & Another* HCAL 12/1998. In a subsequent judgment in *Cosby v Chief Executive of the HKSAR* HCAL 118/1999, the Court pointed out that (with emphasis supplied),

    (a) "it is the function of the magistrate in committal proceedings *to restrict himself to the question* of whether the evidence produced to him would, according to the law of the requested jurisdiction, amount to a (scheduled) offence in that jurisdiction *and to abjure considerations of the substantive law of the requesting state*".

    (b) "The Fugitive Offenders Ordinance … has to cater for co-operation with territories which embrace disparate legal concepts, and crimes framed quite differently from ours. Hong Kong's extradition legislation, as well as its extradition agreements … strive to *minimize the circumstances in which either the executive or the courts are required to examine the law of the requesting jurisdiction, and to maximize the emphasis upon conduct which in Hong Kong would constitute a scheduled crime.*"

    (c) In any event, "[the] decision as to committal was to be based on evidence adduced at the committal hearing, and the decision whether that evidence justified committal was one to which English law alone was relevant … This decision, *that the magistrate's task was to examine conduct, and not the constituent elements of the foreign offence*, was followed in Hong Kong in *Levy v. the Attorney General* [1987] HKLR 777, in which *the Court of Appeal added that it was also conduct, and not the foreign offence, "which the Governor considers when he decides whether to make an order requiring the magistrate to issue his warrant for the apprehension of the accused person."* (per Roberts CJ at page 780).

33. In a more recent judgment, the Court of Final Appeal re-affirmed that "the Magistrate *merely* had to determine whether a *prima facie* case existed to justify sending the defendant to face trial in the [requesting country] (Australia)" (with emphasis supplied) (see the judgment in *Ho Man Kong v Superintendent of Lai Chi Kok Reception Centre* FACV 13/2013, per Ribeiro PJ at page 184).

34. We have in the preceding paragraphs already proposed legal amendments to the FOO and the Magistrates Ordinance. In addition, we suggest there should be an expansion of the Court's criminal jurisdiction, by amending the Criminal Jurisdiction Ordinance Cap 461 to include murder and manslaughter into the scheduled offence of that Ordinance. Under this proposed amendment, the courts of Hong Kong could have extra-territorial jurisdictions to try a Hong Kong person who has committed a serious crime (murder or manslaughter) overseas in Hong Kong.

35. On the Taiwan murder case which the Government has repeatedly been referring to, we acknowledge the different views as to whether an amendment to the FOO and/or the above-quoted Ordinance in the manner proposed could have retrospective effect. We take the view that to avoid any doubt over the issue, the Government could include an express provision for applicability to the Taiwan murder case.

ADDITIONAL VIEWS

36. The Law Society wishes to set out in this Submission the further views that the Law Society received on the matter. These views are equally valuable.

37. According to these views, fundamentally, does Hong Kong need this piece of legislation?

38. For one thing, the HKSAR Government has not explained satisfactorily or at all why in the last 20 odd years without extradition arrangements to Mainland China (or Taiwan), Hong Kong does not have any major problems in extradition. The circumstances which have now purportedly given rise to this sudden need for legislation

are not persuasive, notwithstanding the repeated reliance by the Government on a murder case in Taiwan. As the matter now stands, the proposed case-by-case arrangement could easily and abusively be turned into a permanent mechanism to extradite Hong Kong people. In that case, the proposals, which are ill-conceived and hastily considered, would become entrenched. That will have profound and irreversible effects on the cherished status and the reputation of Hong Kong.

39. The above worries are particularly grave when members of the public focus their attention on the differences between the criminal justice systems of HKSAR and that of the Mainland China. The prospect of being extradited to the Mainland China underpins their concerns, which are exacerbated in the light of the fact that Mainland China has signed but has not ratified the International Covenant on Civil and Political Rights. The legal amendments could thus be conveniently be used for political persecution and suppress freedom of speech.

40. The proposed safeguards in the Bill do not address the above concerns. Among other things, the CE is politically appointed. Holder of the office is not subject to election by universal suffrage. Under this political arrangement, a Certificate from the CE cannot be any safeguard at all.

41. Even assuming that the need for this piece of legislation could be justified, there is no convincing reason why the legislative exercise has to be urgent. In any event, there are other alternatives that could help address the problems (if any) that the Government has enunciated. For example, there could be legal amendments to include murder and manslaughter in the schedule (of 24 offences) which can currently be prosecuted in Hong Kong under Section 153P of the Crimes Ordinance Cap 200, even though the crimes may have taken place wholly outside Hong Kong.

42. All in all, given the importance and the ramifications of this piece of legislation, the HKSAR Government ought to shelve the legislative exercise in order to give more time to examine closely the process and the arrangements proposed in the Bill. The need for the legislation must be satisfactorily addressed before the Law Society would consider in detail the legislative proposal itself, as a part of a

proper consultation process.

CONCLUSION

43. The Law Society received different views on the Bill, some of which are diametrically opposed (as we have illustrated). Divergence in the above speaks volumes on the controversy of the subject matter.

44. Notwithstanding the differences, we believe that the *legal analysis* set out in the above, one way or the other, should carefully and thoroughly be considered by the HKSAR Government.

The Law Society of Hong Kong
5 June 2019

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[1] The term "extradition" in this paper is used by reference to FOO.

[2] The arrangement for the surrender of fugitive offenders has been summarized in a research report prepared by the Legislative Council Secretariat [March 2001] viz. *"Research Study on the Agreement between Hong Kong and the Mainland concerning Surrender of Fugitive Offenders"*