

Government's response to questions from American Chamber of Commerce (English only)

At the request of the American Chamber of Commerce (AmCham), the Chief Secretary for Administration, Mr Matthew Cheung Kin-chung, met the Chairman of AmCham, Mr Robert Grieves and its President, Ms Tara Joseph, on May 29 on the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019. To assist AmCham in understanding better the proposed legislative amendments, clarifying any misunderstanding and easing their concerns, the Office of the Chief Secretary for Administration agreed to provide a written response to the questions raised by AmCham which is as follows:

Rule of Law and Judicial Independence

Since the return to the Motherland, the Hong Kong Special Administrative Region (HKSAR) has implemented the basic policy of "Hong Kong people administering Hong Kong" and enjoyed a high degree of autonomy under the Basic Law. The "one country, two systems" principle has been fully and successfully implemented.

The rule of law and judicial independence are among the pillars of Hong Kong's free and competitive economy. The HKSAR Government is fully committed to safeguarding these two important pillars entrenched by the Basic Law and protecting the well-being of all people living, working or even visiting Hong Kong.

Article 85 of the Basic Law guarantees that the courts of the HKSAR exercise judicial power independently, free from any interference. They adjudicate cases in accordance with the law, including the human rights provisions of the Basic Law and the Hong Kong Bill of Rights. Members of the judiciary are immune from legal action in the performance of their judicial functions. As a matter of fact, in its reply to media enquiries on reports of comments allegedly made by a few anonymous judges in Hong Kong, the Judiciary made clear that "[t]he Judiciary will not comment on the proposed amendments to the Fugitive Offenders Ordinance, nor comment on any media reports in relation to them. Generally speaking, the Chief Justice would like to state that having regard to the independence and impartiality of the Judiciary, judges should refrain from expressing comments on political and other controversial issues. In particular, judges should avoid expressing views on legal issues which may come before the courts."

It is important to note that Hong Kong's judicial independence ranks 1st in Asia and 8th in the world. Hong Kong can recruit judges from other common law jurisdictions. Eminent judges from other common law jurisdictions have been appointed as non-permanent judges of the Court of Final Appeal, the highest appellate court in Hong Kong. At present, there are 14 non-permanent

judges (from the United Kingdom, Australia and Canada) who can be invited by the Chief Justice to sit on our Court of Final Appeal. The on-going and active participation of leading judges of the common law world at the Court of Final Appeal is the strongest testimony of Hong Kong's judicial independence and helps maintain a high degree of international confidence in our legal system. Apparently, Hong Kong is the only jurisdiction in the world with such an innovative arrangement.

Long-established trade relations between Hong Kong and US

Over the years, Hong Kong and the United States (US) have continued to maintain and expand bilateral trade and economic ties. Hong Kong always believes in free trade and we have become one of the world's largest trading economies because of free trade. In fact, the Washington-based Heritage Foundation has named Hong Kong the world's freest economy for the past 25 years in a row.

Counting on the basis of individual economies, the US was Hong Kong's 2nd largest merchandise trading partner in the world in 2018, while Hong Kong was the 10th largest export market of US. According to US statistics, the total merchandise and services trade between the US and Hong Kong in 2018 reached US\$69 billion. The US has been enjoying the highest trade surplus with Hong Kong among its global trading partners, valued at US\$34.3 billion in 2018, of which US\$31.1 billion was surplus in merchandise trade. For trade in services in 2018, according to US figures, the US' total trade of services with Hong Kong totalled US\$23.5 billion in 2018. Exports of services amounted to US\$13.1 billion, while imports of services were US\$10.4 billion. The US had a services trade surplus of US\$2.7 billion with Hong Kong in 2018.

In addition, Hong Kong and the US maintain close investment relations. In 2017, the US was the 7th major source of inward direct investment into Hong Kong while the US was the 9th major destination of outward direct investment from Hong Kong. There are some 1 350 US companies in Hong Kong. It is in the mutual interest of Hong Kong and the US to maintain and promote our bilateral relations.

Objectives of Proposed Legislative Amendments

Surrender of fugitives is a long-standing international practice to combat serious crimes and prevent criminals from seeking havens to evade justice. The United Nations has long ago promulgated a model treaty for reference by different jurisdictions through a resolution. The existing Fugitive Offenders Ordinance (FOO) (Cap. 503) was drafted with reference to this model treaty regime on surrender of fugitives and has incorporated human rights principles. It has also balanced the needs of international cooperation in combating serious transnational crimes and protection of human rights.

The FOO has been in place for almost 22 years and has been operating well and smoothly. The courts have accumulated extensive experience in handling a considerable number of cases since the Ordinance came into force. We trust the professional competence and independence of our judges. So far,

the HKSAR has signed long-term agreements on surrender of fugitive offenders with 20 jurisdictions. They include the United States, Australia, Canada, the United Kingdom, France, Germany, New Zealand, Finland, the Netherlands, Ireland, Portugal, Czech Republic, South Africa, Singapore, Malaysia, India, Indonesia, Republic of Korea, the Philippines and Sri Lanka.

While the HKSAR is actively working on negotiations with numerous other jurisdictions with a view to reaching more long-term surrender arrangements and widening the network of co-operation, we are not able to handle requests for surrender of fugitives from the other 170 countries or request these countries to surrender criminals who committed serious crimes in Hong Kong in most circumstances. In addition, as the existing F00 does not apply to the Mainland, Macao and Taiwan, fugitives from these places may make use of this loophole to evade legal responsibility or seek refuge in Hong Kong. Hence, there is a need to remove the existing geographical restriction and make case-based cooperation between Hong Kong and other places possible under the laws for concerted efforts in combating crimes.

The HKSAR proposes to amend two local laws, namely the F00 and the Mutual Legal Assistance in Criminal Matters Ordinance (MLAO) (Cap. 525), which aim to deal with two practical problems, namely (i) a murder case which happened in Taiwan in early 2018 involving a Hong Kong resident allegedly killing another Hong Kong resident with the suspect subsequently returning to the HKSAR; and (ii) plugging the existing loopholes in the existing regime in criminal and juridical assistance matters, where the geographical restrictions and impractical operational requirements render the legislation inoperable in certain cases.

The proposed amendments do not pinpoint any particular jurisdictions, nor do they target common citizens. After the proposed legislative amendments are passed, the HKSAR can, where there are warranting cases and where it is absolutely necessary, using the same set of standards prescribed for long-term surrender arrangements and under the principle of mutual respect, effectively handle serious criminal cases with a jurisdiction that does not have any effective long-term agreement with the HKSAR. 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. The targets of case-based surrenders are fugitives who are suspected of committing grave criminal offences on the basis of prima facie evidence and are wanted for justice owing to the offences committed.

The proposed legislative amendments will not affect any of the 20 long-term agreements in force in the HKSAR. The clause on specialty and no re-surrender in all 20 agreements will continue to debar any re-surrender of fugitives from Hong Kong to another jurisdiction. The proposed case-based surrender arrangement is a special interim measure before a long-term agreement can be reached and comes into the force. The interim measure will not be adopted once a long-term agreement has been made and becomes effective.

Extensive Human Rights and Procedural Safeguards

In respect of case-based surrender requests, the HKSAR has full discretion as to whether the requests should be acceded to. All existing human rights and procedural safeguards provided for in the current legislation, which were drafted with reference to the model treaty on extradition promulgated by the United Nations and are in line with the common practices in juridical assistance overseas, will be maintained under case-based arrangements. These human rights safeguards under the F00 include:

(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 surrender of fugitive cases under long-term arrangements, the relevant offences must also be among the 46 items of offences described in Schedule 1 to the F00;

(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 surrender of fugitive 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 include:

(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 the Chief Executive (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.

The proposed legislative amendments are meant to protect law-abiding general public including the international business community in Hong Kong from the threat of fugitives who have committed serious criminal offences in other regions, enhancing HKSAR's capability in dealing with fugitives of serious criminal offences and making HKSAR a safer place and a better partner in the international fight against crime. Five key local chambers of commerce (including the Hong Kong General Chamber of Commerce, the Chinese General Chamber of Commerce, the Chinese Manufacturers' Association of Hong Kong, the Federation of Hong Kong Industries and the Hong Kong Chinese Importers' and Exporters' Association), have expressed support openly for the proposed legislative amendments. A number of political parties in the Legislative Council (LegCo) and independent members have also voiced their support.

Surrender of fugitives will not impinge on freedom of speech, of the press and of publication. If the proposed legislative amendments are passed, the case-based surrender arrangements will only cover 37 offences punishable with imprisonment for seven years or above, and none of them prohibits the exercise of the right to freedom of expression. Freedom of speech, of the press and of publication are the core values of Hong Kong and are fully protected by the Basic Law and the Hong Kong Bill of Rights. The proposed legislative amendments will not affect these freedoms. The HKSAR Government and the courts will strictly safeguard the principle of "double criminality" to ensure that the offence stated in a request for surrender must constitute an offence under the criminal law of Hong Kong, if they were to occur in Hong Kong.

Asset Recovery Requests

As with other requests for mutual legal assistance in criminal matters, asset recovery requests are processed in accordance with the provisions of the MLA0.

On being satisfied that the relevant requirements in the MLA0 are met, and that the restrictions to assistance laid down in the MLA0 are not applicable, the Secretary for Justice may act on a request for restraint or confiscation of property for the enforcement of external confiscation orders made by the courts of places outside Hong Kong for the purpose of recovering property or other assets received, derived from or used to commit external serious offences.

In deciding whether to make a restraint order or an order registering an external confiscation order pursuant to an application made by the Secretary for Justice for the requesting place, the Court of First Instance have to be satisfied that the conditions stipulated in the MLA0 are met. These conditions relate to the status of the proceedings in the requesting place in which the confiscation order has been made or will be made. These include: proceedings have been instituted in the requesting place, the proceedings have not been concluded and an external confiscation order has been made or

will be made in the proceedings. Because of the urgent nature of these cases, the Court may also make restraint order in cases where proceedings have not been instituted in the requesting place if it is satisfied that proceedings are to be instituted in the requesting place and it appears to the Court that such a confiscation order may be made in the proceedings. When a confiscation order is made in the requesting place, an application may be made to the Hong Kong Court for registration and enforcement of the order if the following conditions are met: the order is final and is not subject to appeal, where any person against whom, or in relation to whose property, the order made does not appear in the proceedings, that he received notice of the proceedings, in accordance with the law of the requesting place, in sufficient time to enable him to defend them; and the Hong Kong Court is of the opinion that enforcing the order in Hong Kong would not be contrary to the interests of justice.

With the proposed removal of the geographical restriction on the application of the MLA0 to arrangement between the HKSAR and other parts of China, HKSAR will be in a position to process asset recovery requests made by other parts of China, in the same manner as HKSAR is currently able to process such requests from foreign jurisdictions.

As explained above, the basis for HKSAR's processing of asset recovery requests is the MLA0, which is separate and independent from the F00 which relates to the surrender of persons. In exercising its powers under the MLA0 to make a restraint order, the Court is not concerned with the status of the owner of the property sought to be restrained.

Stringent Procedures for Case-based Surrender Arrangement

The HKSAR Government adopts extremely stringent procedures in handling requests for the surrender of fugitive offenders under the proposed case-based surrender arrangement, key features include:

(a) Upon receiving a surrender request under the proposed case-based arrangement, 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, 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 F00 and evidence of the case. If the court considers that there is insufficient evidence or the restrictions to surrender under F00 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 F00, 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.

Additional Safeguards under Case-based Surrender Arrangement

The HKSAR Government has assured that for the proposed case-based 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 F00. With the spirit of providing more instead of less safeguards in making the proposed case-based 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 the proposed case-based surrender arrangements under the Bill: (I) narrowing the application of the proposed case-based surrender arrangements to the most serious offences only; (II) adding more restrictions to the activation of the proposed case-based surrender arrangements; and (III) enhancing protection for the rights of the surrendered persons.

(I) narrowing the application of the proposed case-based surrender arrangements to the most serious offences punishable with imprisonment for seven years or above

According to the original proposal of the Bill, the proposed case-based 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 such 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 the proposed case-based surrender arrangements are only supplementary measures before long-term surrender arrangements are in place, the HKSAR 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 HKSAR Government

therefore decides that the offences to which proposed case-based surrender arrangements apply should be those punishable with imprisonment for seven years or more.

(II) Adding more restrictions to the activation of the proposed case-based surrender arrangements

According to the Bill's proposals, in addition to the requirement that the proposed case-based surrender arrangements must comply with all provisions of the 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 the proposed case-based 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 the proposed case-based 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, the CE may refuse surrender on humanitarian or other grounds when making the final decision on surrender. See Annex 1 for details.

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

In view of public concern over 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 mutual legal assistance, 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.

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.

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.

Strictly Adhere to Rules of Procedures of LegCo

The HKSAR Government would like to reiterate that the Bill has a time element. The suspect in the Taiwan murder case is serving sentence for other criminal offences in Hong Kong but is expected to be released this October. There is thus a pressing need to provide a legal basis for the assistance that we want to render to Taiwan, before the LegCo goes into summer recess from mid-July to October.

According to the Rules of Procedures of the LegCo, the HKSAR Government consulted LegCo's Panel on Security at the meeting held in February this year when a motion supporting the proposed legislative amendments was passed. The public was then invited to provide views on the proposed legislative amendments and among the some 4 500 written responses, about 3 000 in support and about 1 400 in opposition to the amendments. Having considered the views collected and all factors of consideration, the HKSAR Government decided that the proposed case-based surrender arrangements will only apply to 37 items of the 43 items of offences covered under the 20 surrender of fugitive agreements signed. We also agreed to 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 are covered.

In April 2019, the Bill was introduced into the LegCo and referred to its House Committee to scrutinise the Bill in detail through setting up of a Bills Committee according to the Rules of Procedures. However, after four meetings of the Bills Committee, no chairman could be elected owing to disruptions and chaos caused by some members of the Council. The repetition of confrontations and commotion has seriously tarnished the reputation of the Council and raised serious doubts on whether the Bills Committee is capable of properly conducting its business in the established manner. In view of the unprecedented circumstances and serious deadlock and the timing factor, the HKSAR Government had no choice but to consult the Chairman of the House Committee meeting and give notice to the Council for resumption of the Second Reading debate on the Bill on June 12. It must be stressed that the HKSAR Government attaches great importance to compliance with the due process of LegCo procedures. Indeed, we deeply deplore that the Government was deprived of the chance of going to the Bills Committee as it would provide a well-established tripartite forum for us to explain the complexity of the Bill, interact with LegCo Members, listen to their views and clarify any doubts in an open and transparent manner. There can thus be no question of the HKSAR

“bypassing” LegCo.

Conclusion

The HKSAR Government reiterates that, 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 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.

We understand the concerns of the international business community and the diplomatic sector. Let us stress in no uncertain terms that the proposed legislative amendments aim to tackle the Taiwan murder case and address the inadequacies of our existing legal regime on extradition to places other than the 20 jurisdictions with long-term agreement with the HKSAR. Given the full range of procedural, judicial and human rights safeguards clearly provided in the proposed case-based approach, any suggestion that it would risk undermining “One country, Two systems” and Hong Kong’s economic competitiveness are unfounded. If anything, the proposal would underline HKSAR’s commitment in enhancing Hong Kong’s status as a safe city and a responsible and active world partner in the fight against serious crimes. Finally, Article 41 of the Basic Law clearly states that “Persons in the Hong Kong Special Administrative Region other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents”.

The HKSAR Government would continue to step up its efforts to reach out to LegCo Members and all stakeholders, including the international business community, to explain the proposed amendments, listen to their views, clarify any misunderstanding and address any concerns. The Security Panel of LegCo is in the course of holding a 20-hour discussion on the Bill between May 31 and June 5. We will make the best of this open forum to fully engage LegCo Members. A copy of the paper for the Security Panel open meeting is attached at Annex 2. A set of easy-to-read infographics is also attached at Annex 3.

It must be stressed that the rule of law, independent judiciary, human rights protection, as well as freedom of speech, press, assembly, etc. are Hong Kong’s core values and cornerstones of our present-day success. The HKSAR Government will continue to fully safeguard these essential attributes which make Hong Kong tick.