

## SUBMISSIONS ON COOPERATION BETWEEN HONG KONG AND OTHER PLACES ON JURIDICAL ASSISTANCE IN CRIMINAL MATTERS

March 2019

### Introduction

Justice Centre Hong Kong is grateful for the opportunity to provide comments to the Security Bureau on the proposals by the Security Bureau with respect to the cooperation between Hong Kong and other places on juridical assistance in criminal matters ('the proposals').

Justice Centre believes it is vital that the Hong Kong Special Administrative Region (HKSAR) has an effective regime to ensure that criminals are not able to avoid justice by travelling across borders. In doing so, the HKSAR must ensure that in cooperating with other jurisdictions or foreign governments that fundamental rule of law principles are upheld and such cooperation is consistent with Hong Kong's international human rights law obligations. The HKSAR should not be complicit with other jurisdictions in criminal investigations and trials that do not comply with fair trial principles and where treatment contravenes the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT'), International Covenant on Civil and Political Rights ('ICCPR') and could result in the imposition of the death penalty. Such complicity could substantially damage the HKSAR's international reputation and its image as a jurisdiction that respects fundamental human rights and abides by commitments under international human rights law.

Justice Centre opposes the proposals from the Security Bureau in the absence of a comprehensive review of the Fugitive Offenders Ordinance (Cap. 503) ('FOO') and Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) ('MLAO'). Justice Centre also uses this opportunity to highlight specific concerns with the Security Bureau's approach towards presenting the proposals, issues with the existing legislation and recommendations to improve safeguards. Given the limited time provided by the Security Bureau, Justice Centre has limited its responses accordingly and would welcome an opportunity to meet with officials to expand upon our views.

### Lack of Consultation on the Proposals

Justice Centre is deeply disappointed with the Administration's approach towards the introduction of these proposals. Prior to their introduction in the Legislative Council there was no contact with civil society organisations and other relevant stakeholders to obtain our perspectives, despite the experience and expertise we could provide on certain aspects of the proposals.

Civil society has consistently raised concerns with the repeated failure of the Administration to adequately consult in the development of law and policy. Security Bureau's approach to these proposals highlight again this problem. For two years, Justice Centre has facilitated the work of the Hong Kong UPR Coalition ('the Coalition'), an alliance of

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45 civil society organisations working towards advancing human rights in Hong Kong through the United Nations Universal Periodic Review (UPR). The Coalition stated in their submission to the United Nations Human Rights Council:

*"Civil society are often not consulted for major legal and policy developments. Consultation mechanisms lack accountability and transparency. Meetings with government are difficult to obtain. Direct questions are often ignored...HKSAR should adopt a policy of timely and fulsome public consultation for any policy and legislative development, with special regard to persons with disabilities, indigent and non-Chinese speaking communities, within six months."*<sup>1</sup>

Additionally, Justice Centre has discussed the Security Bureau's proposals with representatives of foreign governments and has received confirmation that they were not contacted in advance. That no consultation was conducted with foreign governments is deeply concerning. Such an approach may give the impression that the Security Bureau was aware that foreign governments would object to the proposals but progressed regardless.

The Security Bureau's approach towards consultation demonstrates limited interest in obtaining alternative perspectives and calls into question the view of their value of stakeholder contributions to the Administration.

#### Failure to Comprehensively Review Fugitive Offenders Ordinance (Cap. 503) and Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) prior to Introduction of the Proposals

Before proposing any substantial amendment to any ordinance, it is important that a comprehensive review of its existing operation, including compliance with rule of law and international human rights principles is undertaken. This is especially relevant in the case of the FOO and MLA0 which can lead to the deprivation of liberty. The proposals will be a substantial departure from the existing mechanisms, particularly in the application of transfers under the FOO to the PRC, increasing the likelihood of individuals being transferred to jurisdictions with fair trial and human rights protections that are substantially less robust than those which exist in Hong Kong.

The Administration's paper to the Legislative Council Panel on Security states the following:

*"The Government has reviewed the environment in which MLA0 and FOO operate. We are of the view that with rapid social development and globalization, today's people movement, commerce and business services, assets movement, and application of technologies, etc. are all totally different from those 21 years ago when the two ordinances were first introduced. Nowadays, the costs of cross-boundary crimes and absconding to another jurisdiction to avoid arrest are much lower, and the means to do so are much wider and easier."*<sup>2</sup>

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<sup>1</sup> Hong Kong UPR Coalition, Submission to the United Nations Human Rights Council, Joint Civil Society Submission from the Hong Kong UPR Coalition, March 2018, available at: [http://www.justicecentre.org.hk/framework/uploads/2018/UPR/HKUPRC\\_Submission\\_MARCH2018.pdf](http://www.justicecentre.org.hk/framework/uploads/2018/UPR/HKUPRC_Submission_MARCH2018.pdf).

<sup>2</sup> See p6, Security Bureau, Legislative Council Panel on Security, Cooperation between Hong Kong and other places on juridical assistance in criminal matters, LC Paper No. CB(2)767/18-19(03), February 2019.

Despite the government having “reviewed the environment”, there is no mention in the Administration’s Paper of whether the MLA and FOO have been reviewed themselves. For example, there is no mention of whether the legislation in its operation has been scrutinised to ensure compliance with rule of law principles and international human rights law.

#### Failure to Provide Adequate Justification for the Administration’s Proposals

Justice Centre is of the view that the Administration has failed to provide adequate justification for the proposals. Due to time limitations to provide feedback, only a few issues of concern will be raised in this section.

#### Comparison with Other Jurisdictions

The Administration’s Paper uses other jurisdictions as an attempt to justify the proposal for “case-based” arrangements:

*“According to our research, SFO arrangement on a “case-based” approach has already been in place in the United Kingdom, Canada, New Zealand, Ireland, Malaysia, South Africa, etc., with the aim to address the blank that cannot be filled by standing long term SFO arrangements only.”<sup>3</sup>*

However, the Administration’s Paper makes no attempt to explain how the “case-based” approach in those jurisdictions is similar or different to Hong Kong. No attempt is made to review the human rights safeguards that apply in those jurisdictions for “case-based” approaches. Neither is there any attempt to analyse whether those countries have surrender of fugitive arrangements with either the HKSAR or the People’s Republic of China (PRC) and how “case-based” approaches operate in such circumstances.

Additionally, such response does not refer or attempt to dissect the difference where such countries used as a comparison operate under a different constitutional arrangement compared to the HKSAR, as per the implementation of the Basic Law and “one country, two systems” guiding principles. Further explanation should be provided to acknowledge the HKSAR’s constitutional order and the impact of directions with respect to defence or foreign affairs in such cases, as outlined in Section 24 of the FOO.

#### Analysis of other Cases Identified in the Administration’s Paper

Justice Centre is concerned with the lack of evidence or data provided in the Administration’s Paper to justify the proposals. The Administration’s paper states:

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<sup>3</sup> Ibid n2, at p8.

*"The...two ordinances have been in force for 21 years, during which there have been a number of serious crime cases in which the culprits have absconded to other jurisdictions to elude justice."<sup>4</sup>*

No information is provided in the Administration's Paper as to how many "a number" is or circumstances in which culprits have absconded. Only one case is mentioned in detail in the Administration's Paper, that of the Taiwan homicide case.<sup>5</sup> Justice Centre concurs with the assessments of the Progressive Lawyers Group and Hong Kong Watch, that in the Taiwan homicide case that the HKSAR could have made arrangements either through seeking Legislative Council approval under the existing law or amended the law narrowly to allow extradition to Taiwan.<sup>6</sup> Further detail should be provided by the Administration to justify why the proposals are necessary and what actions the Administration took to handle requests with respect to the Taiwan homicide case.

#### Insufficient Human Rights Protections on Basis of Sex and Sexual Orientation

The Administration's Paper notes the human rights safeguards under the FOO and MLAO. Justice Centre is of the view that those safeguards are insufficient and are outdated.

For example, we refer to some of the provisions which are designed to provide protection, that of Sections 5(1)(c) and 5(1)(d) of the FOO, as well as Sections 5(1)(d) and 5(1)(e) of the MLAO. These mirroring provisions are designed to restrict the surrender of fugitives or refuse assistance in situations where the request is in fact related to the purpose of prosecuting or punishing someone on account of their race, religion, nationality or political opinion. For example, Section 5(1)(c) of the FOO states:

*"5. (1) A person shall not be surrendered to a prescribed place, or committed to or kept in custody for the purposes of such surrender, if it appears to an appropriate authority—*

*(c) that the request for surrender concerned (though purporting to be made on account of a relevant offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions"*

However, each of those provisions cited above under the FOO and MLAO have noticeable gaps in comparison to similar provisions in other jurisdictions. Justice Centre notes Sections 7(b) and 7(c) of the Extradition Act 1988 (Australia), as well as Sections 8(1)(c) of the Mutual Assistance in Criminal Matters Act 1987 (Australia). Each of these provisions includes protection on the basis where surrender is related to the purpose of prosecuting someone because of their sex or sexual orientation. The mirror provision to Section 5(1)(c) of the FOO in Australia is Section 7(b) of the Extradition Act 1988 (Australia), which states:

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<sup>4</sup> Ibid n2, p2.

<sup>5</sup> Ibid n2, p7.

<sup>6</sup> Hong Kong Watch, Hong Kong Watch urges Hong Kong government to rethink amendments to extradition arrangements, 21 February 2019, available at: <https://www.hongkongwatch.org/all-posts/2019/2/21/hong-kong-watch-urges-hong-kong-government-to-rethink-amendments-to-extradition-arrangements>. Progressive Lawyers Group, Statement of the Progressive Lawyers Group on the Government's Proposal to Amend Extradition Laws, 22 February 2019, available at: <https://hkplg.org/2019/02/22/法政匯思就政府建議修訂引渡相關法例之聲明-statement-of-the/>.

*"7. For the purposes of this Act, there is an extradition objection in relation to an extradition offence for which the surrender of a person is sought by an extradition country if:*

*(b) the surrender of the person, in so far as it purports to be sought for the extradition offence, is actually sought for the purpose of prosecuting or punishing the person on account of his or her race, sex, sexual orientation, religion, nationality or political opinions or for a political offence in relation to the extradition country"*[emphasis added]

Justice Centre recommends amendment to the critical human rights safeguards in the FOO and MLA0 to ensure that persons are not subsequently prosecuted or punished upon grounds arising out of/related to their sex or sexual orientation.

#### Impact of the Proposals on Non-Refoulement Claimants under the Unified Screening Mechanism

Justice Centre notes with concern the potential impact the proposals will have on non-refoulement claimants and the Unified Screening Mechanism (USM) in the HKSAR. The MLA0 and FOO have apparent safeguards designed to protect non-refoulement claimants. For example, we note that under Section 13(2A) an order for surrender must not be made for the surrender of a torture claimant to a prescribed place if the claimant's torture claim is made in respect of that prescribed place. Further, under Section 13(2B), if after an order for surrender has been made and the person makes a claim then the order for surrender is suspended until the torture claim is finally determined or withdrawn.

Despite these protections in place, we remain concerned about the "case-based" arrangements could have upon non-refoulement claimants, especially countries which the HKSAR receives torture claims from, including those whereby there is no agreement government mutual legal assistance. This brings a potential risk of chain-refoulement, which forbids receiving jurisdictions from returning claimants to a country in which they would be in likely danger of persecution. The Administration's Paper does not address this concern. The potential risk of chain-refoulement is of even greater concern in the HKSAR due to the low substantiation rate, in contrast to many developed economies. Meanwhile, a relatively small number of legal aid certificates are granted for judicial review on immigration matters including non-refoulement claims. Data shows that out of 165 applications received in 2016, only 10 certificates were granted and of the 860 applications received in 2017, only 9 were granted.<sup>7</sup> Based upon these statistics, Justice Centre recommends that special dispensation is made to ensure that all torture claimants who are subject to an order for surrender are granted legal aid given the risks involved.

#### Evidentiary Standards under the FOO and MLA0

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<sup>7</sup> Legal aid applications for judicial review received and certificates granted by categories', p19. Legal Aid Department Annual Report, 2017. Available at: [https://www.lad.gov.hk/documents/annual\\_rpt\\_2017\\_en.pdf](https://www.lad.gov.hk/documents/annual_rpt_2017_en.pdf).

Justice Centre notes concerns with the evidentiary standards under the FOO with respect to consideration of the surrender of fugitive offenders, given that the Administration has heavily relied upon the HKSAR courts as a safeguard for the protection of fundamental rights.<sup>8</sup> As the Progressive Lawyers Group have mentioned in their statement:

*"It is true that all extradition requests must go through an extradition hearing. However, the court will grant such approval once it is satisfied that there is sufficient prima facie evidence to result in an indictment. This burden of proof is significantly lower than the standard required for a criminal conviction (proof beyond a reasonable doubt). That means an extradition request may easily get past this "last and the only line of defense" in Hong Kong, as long as the Chinese authorities can present factual evidence of a crime which is superficially plausible to the Hong Kong court, which lacks the resources and jurisdiction to sufficiently scrutinise such evidence."<sup>9</sup>*

### Death Penalty Concerns

Capital punishment effectively ceased in Hong Kong before its formal abolition, with the last execution taking place in 1966. However, formal abolishment did not occur until after the Legislative Council voted in favour of legislative measures to abolish it in 1991 and April 1993.<sup>10</sup> Before its abolition, capital punishment was mandatory in Hong Kong for murder, treason and piracy with violence.<sup>11</sup> However, Justice Centre is concerned that the MLAO and FOO do not operate in a manner to sufficiently guarantee protection for individuals who could face the death penalty.

Justice Centre notes that the provisions in the MLAO regarding the refusal of legal assistance in death penalty cases are discretionary. Section 5(3) states:

*"(3) A request by a place outside Hong Kong for assistance under this Ordinance may be refused by the Secretary for Justice—*

*(a) if that place is not a prescribed place;*

*(b) if that place is a prescribed place, pursuant to the terms of the prescribed arrangements concerned; or*

*(c) if the request relates to an external serious offence punishable with death and—*

*(i) the act or omission constituting that offence, if it had occurred in Hong Kong—*

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<sup>8</sup> Hong Kong Free Press, New rules would not enable extradition to mainland China over political cases, says Hong Kong security chief, 16 February 2019, available at: <https://www.hongkongfp.com/2019/02/16/new-rules-not-enable-extradition-mainland-china-political-cases-says-hong-kong-security-chief/>.

<sup>9</sup> Progressive Lawyers Group, Statement of the Progressive Lawyers Group on the Government's Proposal to Amend Extradition Laws, 22 February 2019, available at: <https://hkplg.org/2019/02/22/法政匯思就政府建議修訂引渡相關法例之聲明-statement-of-the/>.

<sup>10</sup> Amnesty International, History of the death penalty in Hong Kong and Macau, 2017, available at: [https://www.amnesty.org/hk/en/our-work/abolish-death-penalty/history\\_of\\_death\\_penalty\\_in\\_hong\\_kong\\_and\\_macau/](https://www.amnesty.org/hk/en/our-work/abolish-death-penalty/history_of_death_penalty_in_hong_kong_and_macau/).

<sup>11</sup> Ibid.

*(A) would not have constituted a Hong Kong serious offence punishable with death;  
or*

*(B) would have constituted a Hong Kong serious offence punishable with death in  
respect of which the punishment was not normally carried out; and*

*(ii) the place outside Hong Kong concerned fails to give an undertaking that satisfies the  
Secretary for Justice that the death penalty will not be imposed in respect of that external  
serious offence or, if imposed, will not be carried out.” [emphasis added]*

Justice Centre is concerned that the undertakings issued by foreign governments that the death penalty will not be imposed under Section 5(3) with respect to the MLAO are not legally enforceable and there is no provision otherwise provided in the legislation, for example in arrangements with the PRC, if there is non-compliance. This may mean that in practice an undertaking is difficult to enforce.

Justice Centre also notes the provisions in the FOO regarding the surrender of fugitives in death penalty. Section 13(5) states:

*(5) Where—*

*(a) a person is wanted in a prescribed place for prosecution, or for the imposition or enforcement  
of a sentence, in respect of a relevant offence against the law of that place; and*

*(b) that offence is punishable with death,*

*then an order for surrender may only be made in the case of that person if that place gives an  
assurance which satisfies the Chief Executive that that punishment will not be imposed on that  
person or, if so imposed, not carried out.*

Section 13(5) of the FOO is of concern to Justice Centre. There should be a mandatory refusal of extradition requests where the offence carries the death penalty. Failure to do so could potentially give rise to a breach of Article 2 of Hong Kong Bill of Rights Ordinance (Cap. 383). Justice Centre recommends amendment of the FOO to only allow extradition if a formal undertaking is provided by an official with the authority to guarantee that the death penalty will not be imposed in any circumstance. At present under Section 13(5), the place need only give an assurance which satisfies the Chief Executive. Further, Justice Centre recommends that if a requesting country breaches a death penalty undertaking, no further extradition requests should be accepted from that country.

## Recommendations

Justice Centre recommends that:

- the Security Bureau immediately withdraw the proposals to amend the Mutual Legal Assistance in Criminal Matters Ordinance and the Fugitive Offenders Ordinance;
- the Secretary for Justice refer the Mutual Legal Assistance in Criminal Matters Ordinance and the Fugitive Offenders Ordinance to the Hong Kong Law Reform Commission for review and report;

- the Administration should adopt a policy of timely and fulsome public consultation for any policy and legislative development, with special regard to persons with disabilities, indigent and non-Chinese speaking communities, within six months;
- the Security Bureau should provide data and details on “the number of serious crimes in which the culprits have absconded to other jurisdictions” in the 21 years of the operation of the MLAO and FOO;<sup>12</sup>
- the Administration should ensure legal aid funding is provided to all non-refoulement applicants who are subject to a request for their surrender if the claimant’s torture claim is made in respect of that prescribed place; and
- the Administration should issue a public direction indicating that in the event of a place breaching a death penalty undertaking, no further extradition requests will be accepted from that country.

Justice Centre recommends the following amendments are made to the MLAO and FOO:

- amendments to Section 5 of the FOO to provide for an additional restriction on surrender where the Secretary for Justice considers the surrender unjust or oppressive;
- amendments to Sections 5(1)(c) and 5(1)(d) of the FOO, as well as Sections 5(1)(d) and 5(1)(e) of the MLAO, to ensure that “sex” and “sexual orientation” are included as categories for refusal of request for surrender and request for assistance respectively; and
- amendments to Section 13 of the FOO to only allow extradition if a formal and public legal undertaking is provided by an official with the authority to guarantee that the death penalty will not be imposed in any circumstance.

Please contact Simon Henderson, Senior Policy Advisor ([simon@justicecentre.org.hk](mailto:simon@justicecentre.org.hk)) with any questions regarding this submission.

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<sup>12</sup> Ibid n2, p2.