

**Additional Observations of the Hong Kong Bar Association
("HKBA")
on the HKSAR Government's proposed further changes to the
Fugitive Offenders and Mutual Legal Assistance in Criminal Matters
Legislation (Amendment) Bill 2019**

1. The HKBA has said previously in statements published on 4th March 2019 and 2nd April 2019 that:
 - i) it was not necessary to over-liberalize the FOO and MLAO regime to include Mainland China to enable the rendition of the suspect in the Taiwan case;
 - ii) it was highly doubtful if the proposed amendments would in practice achieve the rendition of that suspect to Taiwan;
 - iii) amendments might be made to other legislation to ensure that the Taiwan case will be dealt with;
 - iv) the HKSARG ought to explain why it considers that circumstances have changed since 1997 in terms of both the human rights record and the criminal justice system in the Mainland to justify major changes now;
 - v) the case-based arrangement would become the norm for surrender from Hong Kong to Mainland China. This is particularly so when the restriction against long-term surrender arrangements with the P.R.C. remains;
 - vi) if there is to be no scrutiny by LegCo of 'ad hoc' agreements, the Court ought to have an expanded role in vetting requests for human rights compliance in the requesting place; and
 - vii) there was no principled basis for the exclusion of offences that carry a maximum sentence of less than 3 years' imprisonment.

2. On 30th May 2019, the Secretary for Security announced further changes to the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019 which, for convenience sake, is here called ‘the Fugitives Bill’. These changes include:
 - i) Raising the imprisonment threshold for an offence in respect of which surrender can be sought to a maximum sentence of at least 7 years;
 - ii) Setting a time limit for offences in the requesting place so that there will not be retrospective requests;
 - iii) Allowing the CE to include in arrangements terms such as requiring the requesting jurisdiction to respect the presumption of innocence, open trial, visiting rights, banning forced confessions, and right to appeal; and
 - iv) As far as the rest of China is concerned, surrender and confiscation requests to be made by the Supreme People’s Procuratorate of the P.R.C. or the Supreme People’s Court in the P.R.C. only.

3. On 1st June 2019, the Secretary for Security confirmed in an answer to a question raised by the Hon. Fernando Cheung Chiu-hung in a Special Meeting of Panel on Security in the Legislative Council that only the raising of the penalty threshold to 7 years will be written into the Fugitives Bill. All the other proposals will be in the form of policy statements and practices and will not be written into the Fugitives Bill.

Raising penalty threshold to 7 years

4. As admitted by the Secretary for Security himself, the raising of penalty threshold to 7 years would exclude some serious and heinous offences such as criminal intimidation, giving possession of firearms to unlicensed person, possession of child pornography, procuring unlawful sexual act by false pretenses, unlawful sexual intercourse with young persons under 16, using/procuring/offer young persons under 18 for making pornography or for live pornographic performances, procuring a girl under 21 to have unlawful sexual intercourse with a third person.
5. This further limitation contradicts the HKSARG's stated "grave concerns about injustice caused by the system's loopholes in the community as well as doubts against the Government's commitment to combating serious cross-boundary crimes."
6. There is no principled policy reason behind choosing seven years imprisonment maximum penalty as the threshold. The threshold in cases where there are regular reciprocal agreements is much lower (the Canadian, Australian and United Kingdom long-term surrender agreements have one year's imprisonment as the threshold term.) The immunity given to persons accused of Mainland crimes that carry less than seven years imprisonment does not make sense in legal policy terms.
7. Of greater concern should be the fact that there are still many offences in respect of which there is a liability to surrender, for example, obtaining property by deception, theft, fraud, conspiracy to

defraud, money laundering, blackmail, possessing false instruments, bribery and corruption, and perjury.

8. The HKBA maintains the view that the protection offered to those who are engaged in business activities with, and in, the rest of the P.R.C. by raising the threshold is likely to be illusory as these offences are staple fare in extradition requests.

Other “safeguards”

9. As the Secretary for Security has stated clearly, the proposed additional safeguards will not be written into the amended ordinances. Instead efforts to secure compliance with these promised safeguards will be a matter for the executive.
10. The HKBA takes the view that this is a highly unsatisfactory arrangement.
11. Firstly, these safeguards depend entirely on the goodwill of the requesting state. They do not have the force of law. Neither the person surrendered nor the HKSAR can do anything to compel observance.
12. Secondly, the level of protection depends on the CE’s ability to negotiate with the requesting party and its relationship with the HKSAR. Where there is an asymmetrical relationship, as there is with the Mainland, it is doubtful that the CE could go so far as to say that requests from there will not be entertained unless there is 100%

compliance with promises about a fair trial procedure, humane conditions of detention, access to lawyers etc.

13. The HKBA takes the view that the questions of i) whether there is a risk of human rights being abused in the event of surrender, and ii) whether there are sufficient human rights safeguards in place, are best answered by the courts rather than executive authorities. The independent courts will be the most suitable, persuasive, and effective authority as the protector of a fugitive's fundamental rights.
14. A ready-made example to follow would be the inclusion of a provision like sections 21¹ and 87² of the UK Extradition Act 2003 which requires a court to discharge a person in two types of extradition proceedings if extradition would not be compatible with

¹ **“Section 21 Human Rights**

- (1) If the judge is required to proceed under this section (by virtue of section 11 or 20) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 (c. 42).
- (2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.
- (3) If the judge decides that question in the affirmative he must order the person to be extradited to the category 1 territory in which the warrant was issued.
- (4) If the judge makes an order under subsection (3) he must remand the person in custody or on bail to wait for his extradition to the category 1 territory.
- (5) If the judge remands the person in custody he may later grant bail.”

² **“Section 87 Human Rights**

- (1) If the judge is required to proceed under this section (by virtue of section 84, 85 or 86) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 (c. 42).
- (2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.
- (3) If the judge decides that question in the affirmative he must send the case to the Secretary of State for his decision whether the person is to be extradited.”

that person's human rights under the European Convention on Human Rights as incorporated in the Human Rights Act 1998.

15. In Hong Kong the equivalent would be to require a magistrate to discharge a person whose surrender was sought if surrender would not be compatible with that person's human rights under the ICCPR as applied to Hong Kong as incorporated in Basic Law, Article 39 and the Hong Kong Bill of Rights Ordinance.
16. As it is, the current proposals, it is unclear how the HKSARG can ensure compliance if promises for these safeguards from the requesting party are not honoured. The fact that the subject has already been surrendered, and been subject to human rights abuses, would make protests or disapproval meaningless. It is also difficult for the HKSARG to refuse to entertain future extradition requests given the asymmetrical relationship between the HKSARG and the Mainland and in light of the duty to comply with any instructions from the Central Government regarding extradition requests under section 24 of the FOO.
17. This is an unsatisfactory way to discharge the HKSARG's duties under Article 4 of the Basic Law to "safeguard the rights and freedoms of the residents of the HKSAR and of other persons in the Region in accordance with law." The HKBA takes the view that the only effective way to ensure that a subject of return will not be subject to risks of human rights abuse is requiring the court to refuse a surrender if there is such a risk.

Retrospective Limitations

18. The HKSARG said no surrender would take place if the subject offence is time-barred in the requesting place.
19. The HKBA takes the view that this would only provide very limited protection. Under Article 87 of the P.R.C. Criminal Law, offences “shall not be prosecuted” if a period of time has elapsed commensurate with the prescribed sentences of up to 5, 10, or life imprisonment or death sentence.³
20. The limitation on prosecution is however subject to a number of exceptions. If the subject has “escaped” after the public security organ has placed a case on file and conducted an investigation, the limitation period does not apply. Similarly, it will not apply if the victim made the complaint to a public security organ within the limitation period and the public security organ failed to place a case on file. Even when the longest applicable limitation period of 20 years has expired, the Supreme People’s Procuratorate may still approve the instigation of a prosecution.⁴

³ “**Article 87** Crimes shall not be prosecuted if the following periods have elapsed:

(1) five years, when the maximum prescribed punishment is fixed-term imprisonment of less than five years;

(2) ten years, when the maximum prescribed punishment is fixed-term imprisonment of not less than five years but less than ten years;

(3) fifteen years, when the maximum prescribed punishment is fixed-term imprisonment of not less than ten years; and

(4) twenty years, when the maximum prescribed punishment is life imprisonment or death. If after twenty years it is considered that a crime must be prosecuted, the matter must be submitted to the Supreme People's Procuratorate for approval.”

⁴ “**Article 88** No limitation on the period for prosecution shall be imposed with respect to criminals who escape from investigation or trial after a people's procuratorate or public

21. It is noteworthy that Article 89 of the P.R.C. Criminal Law provides that: “if further crime is committed during a limitation period for prosecution, the limitation period for prosecution of the former crime shall be counted from the date the latter crime is committed.”⁵ In other words, the limitation period for an ‘old crime’ can be extended indefinitely so long as there is an allegation of a new offence within that period.
22. The HKBA takes the view that this “safeguard” is riddled with uncertainties and it offers scarcely any reliable assurances that a person is safe from being prosecuted for an apparently time-barred offence as one or more of these exceptions may apply.

Requests made by the highest authorities

23. Prescribing the originating authority for a request is more a question of formality than substance. How a request is processed up to the highest authority for making a request is a matter of procedural law and administrative practice. Even where the highest authority issues

security organ or state security organ places the case on file and conducts investigation, or a people's court handles the case.

No limitation on the period for prosecution shall be imposed if a victim puts forward accusation during a limitation period for prosecution, and a people's court or people's procuratorate or public security organ shall place the case on file but fails to do so.”

⁵ “**Article 89** The limitation period for prosecution shall be counted from the date of the crime; if the criminal act is of a continual or continuous nature, it shall be counted from the date the criminal act is terminated.

If further crime is committed during a limitation period for prosecution, the limitation period for prosecution of the former crime shall be counted from the date the latter crime is committed.”

a request, the question of how a subject's prosecution is dealt with thereafter remains an unknown. It will be no comfort to a person surrendered if they are returned to the requesting place and then tried in local courts where due process is lacking, and fair trial rights are not secured.

24. Furthermore, despite the apparent raising of requirement under this head, there still remains the amendment to the authentication requirements under s.23 of the FOO that adds a provision which bypasses the requirement that any supporting document for surrender be authenticated by a judicial officer and a competent authority under s.23(2). The adoption of this approach under *ad hoc* arrangements is a step backward, weakening the usual safeguards built into long-term arrangements.

Mutual Legal Assistance

25. In addition to amendments being made to the FOO, the Fugitives Bill will also amend the MLAO to the effect that the same restriction affecting the rest of the P.R.C. will be removed. These changes have not attracted as much interest as the changes to FOO because they do not directly affect the liberty of an individual. It is worth explaining the effect of the amendments to MLAO in more detail here.
26. In gist, the MLAO empowers the HKSARG to enter into arrangements to provide legal assistance to a requesting place in criminal matters, which includes the investigation and prosecution of alleged criminal offences committed in the requesting place, as

well as ancillary criminal matters such as the enforcement of external confiscation orders.

27. Assistance that may be provided by the HKSARG include taking and producing evidence⁶, searching seizing⁷ and ordering the production of things⁸ that are relevant to the investigation or prosecution of an external offence, producing a Hong Kong prisoner to give evidence⁹ in an external criminal matter, applying for confiscation orders,¹⁰ restraint orders¹¹, and charging orders¹² for recovering proceeds of crime, except where the primary purpose of the request is the assessment or collect of tax¹³.
28. The HKBA notes that under the amended MLAO regime, the Secretary for Justice and Hong Kong law enforcement agencies may apply to the Hong Kong courts for any of these orders upon request by Mainland authorities where only a criminal investigation, rather than a prosecution, is said to be in place in the Mainland. The commencement threshold is much lower and there are no requirements of a *prima facie* case being present before such assistance is provided.
29. Moreover, the ‘double criminality’ requirement as seen in the FOO is much wider under the MLAO because there are no limits to the

⁶ Section 10 MLAO

⁷ Section 12 MLAO

⁸ Section 15 MLAO

⁹ Section 23 MLAO

¹⁰ Section 27 MLAO

¹¹ Section 7, Schedule 2 MLAO

¹² Section 8, Schedule 2 MLAO

¹³ Section 5(2) MLAO

types of offences that can be subject of an assistance request like the 46 types of offences set out in Schedule 1 of the FOO. Instead, the only “double criminality” requirement for mutual legal assistance is that the conduct subject of the request would also constitute an offence, or a serious offence carrying a maximum penalty of two years or more, in the requesting place and in Hong Kong¹⁴ unless it is an offence of a political character¹⁵, against military law¹⁶, where the request is made for the purposes of prosecuting or punishing a person on account of his race, religion, nationality or political opinions¹⁷, or falls foul of the rule against double jeopardy¹⁸.

30. To qualify for assistance by way of search, seizure, and confiscation, the MLA0 sets the maximum penalty threshold at 2 years imprisonment. In other words, the raising of penalty threshold to 7 years imprisonment under the amended FOO regime would not be applicable to mutual legal assistance. Orders can still be made against a Hong Kong resident if he is faced with criminal investigation or prosecution of offences less serious than those that will be covered by the amended FOO.
31. The HKBA notes that the amendments to the MLA0 would substantially strengthen the impact of the amended FOO in relation to criminal prosecutions in the Mainland. Where there is insufficient evidence to satisfy the *prima facie* evidence threshold to make a request for the surrender of fugitives under the FOO,

¹⁴ Section 5(1)(g) MLA0

¹⁵ Section 5(1)(b) MLA0

¹⁶ Section 5(1)(c) MLA0

¹⁷ Section 5(d) MLA0

¹⁸ Section 5(e) MLA0

Mainland law enforcement agencies may request legal assistance from Hong Kong courts in order to search and seize evidence that may assist in building a *prima facie* case for eventual surrender to the Mainland for prosecution.

32. Moreover, external confiscation orders that may be enforced in Hong Kong by way of mutual legal assistance may arise from criminal and civil proceedings in the requesting place.¹⁹
33. Therefore, the HKBA takes the view that the concerns relating to human rights and due process protection, or the lack thereof, arising from the proposed amendments to the FOO also apply to the amendments to the MLAO.

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¹⁹ Section 2(1) MLAO