



Obtaining Assistance from the Hong Kong Special Administrative Region in Criminal Cases

**Guidelines for Making Applications
under the
Mutual Legal Assistance
in Criminal Matters Ordinance
(Chapter 525, Laws of Hong Kong)**

International Law Division
Department of Justice
Hong Kong Special Administrative Region

Preface

The main purpose of these *Guidelines* is to –

- (a) outline the range of legal assistance in criminal matters that may be provided by the Hong Kong Special Administrative Region of the People's Republic of China (“Hong Kong SAR”);
- (b) assist foreign authorities in preparing and making requests to Hong Kong SAR for legal assistance in criminal matters; and
- (c) provide some general information on how requests for legal assistance in criminal matters are executed in Hong Kong SAR.

There are some important areas of international legal co-operation in criminal matters which are not covered in these *Guidelines*. In particular, Hong Kong SAR surrenders fugitive offenders to (and seeks their surrender from) other jurisdictions on the basis of bilateral agreements which it has concluded with those jurisdictions, or multilateral agreements which apply to both parties. Hong Kong SAR is also able, under its own bilateral agreements with other jurisdictions, to transfer and receive sentenced prisoners, for the purpose of enabling them to serve out their sentences nearer home.

Information about legal co-operation in those areas, and about negotiating agreements with Hong Kong SAR, may be obtained from Law Officer (International Law), International Law Division, Department of Justice at 47th floor, High Block, Queensway Government Offices, 66 Queensway, Hong Kong (email address : ild@doj.gov.hk).

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1. INTRODUCTION

1.1 Hong Kong SAR is committed to co-operating with foreign jurisdictions in combating crime. It is able to provide the following types of international legal co-operation :

- mutual legal assistance in criminal matters
- surrender of fugitive offenders (extradition)
- transfer of sentenced persons

1.2 These *Guidelines* focus on mutual legal assistance in criminal investigations and proceedings. They have been prepared by the International Law Division of the Department of Justice. The functions of the International Law Division include :

- (a) negotiating bilateral agreements on mutual legal assistance in criminal matters, on behalf of Hong Kong SAR; and
- (b) processing requests for legal assistance in criminal matters under international agreements and in accordance with the Mutual Legal Assistance in Criminal Matters Ordinance (“MLA Ordinance”) through its Mutual Legal Assistance Unit.

1.3 The full text of the MLA Ordinance (Chapter 525 of the Laws of Hong Kong) is available on the legislation database on the internet (“Bilingual Laws Information System”) maintained by the Department of Justice at <http://www.legislation.gov.hk/index.htm>.

2. APPLICATION OF THE MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS ORDINANCE

2.1 The MLA Ordinance was enacted to enable assistance to be given by law enforcement authorities in Hong Kong SAR to authorities abroad who are investigating or prosecuting criminal offences overseas. The Ordinance does not allow assistance to be given to jurisdictions that are unable to undertake that they will reciprocate (by giving similar assistance to Hong Kong SAR in comparable circumstances). The necessary reciprocity can be established by the conclusion of an international agreement for mutual legal assistance in criminal matters.

2.2 Bilateral Agreements

2.2.1 Negotiations for international agreements on co-operation in criminal matters are usually conducted by the International Law Division.

2.2.2 Hong Kong SAR has signed bilateral agreements with 30 countries. The agreements are given legal effect in Hong Kong SAR by orders made under the MLA Ordinance, subject to the approval of the Hong Kong SAR legislature. The agreements will only come into force upon completion by the other contracting parties too of their legal requirements for bringing the agreements into force. A list of Agreements currently in force is at <http://www.doj.gov.hk/eng/laws/table3ti.html>.

2.3 Multilateral Agreements

2.3.1 In addition to bilateral agreements, a number of multilateral agreements which apply to Hong Kong SAR also include provision for mutual legal assistance between the Parties. They include :

- (a) the Convention for the Suppression of Unlawful Seizure of Aircraft 1970;
- (b) the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971;
- (c) the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents 1973;
- (d) the International Convention Against the Taking of Hostages 1979;
- (e) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984;
- (f) the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988;
- (g) the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988;
- (h) the Convention on the Safety of United Nations and Associated Personnel 1994;
- (i) the International Convention for the Suppression of Terrorist Bombings 1997;

- (j) the International Convention for the Suppression of the Financing of Terrorism 1999;
- (k) the United Nations Convention against Transnational Organized Crime 2000;
- (l) the United Nations Convention against Corruption 2003; and
- (m) the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia 2004.

2.3.2 Parties to these Conventions may seek assistance from Hong Kong SAR pursuant to the provisions in them for mutual co-operation. Hong Kong SAR may provide assistance to contracting parties in accordance with the requirements of the MLA Ordinance.

2.4 Other Forms of Reciprocity

2.4.1 Co-operation may be provided by Hong Kong SAR under the MLA Ordinance even in the absence of a multilateral treaty or formal bilateral agreement. But the Ordinance requires that in such circumstances the requesting place provides a reciprocity undertaking which satisfies the Secretary for Justice in Hong Kong SAR that the requesting place will entertain future requests from Hong Kong SAR for assistance in criminal matters.

2.4.2 It is the intention of the Government in Hong Kong SAR to continue to conclude more bilateral agreements to enhance and formalize international co-operation in criminal matters.

3. CENTRAL AUTHORITY FOR HONG KONG SAR

3.1 The Mutual Legal Assistance Unit of the International Law Division discharges the responsibilities of the Central Authority in Hong Kong SAR for the purposes of mutual legal co-operation in criminal matters, and handles matters relating to the provision and obtaining of assistance under the MLA Ordinance.

3.2 Foreign authorities may seek advice from the Unit on the preparation of requests to Hong Kong SAR, and draft requests may be forwarded to the Unit for comment, to ensure compliance with Hong Kong SAR's statutory requirements.

3.3 All requests to Hong Kong SAR for legal assistance under the MLA Ordinance should be addressed to the "**Secretary for Justice**", who is the head of the Department of Justice. It is not necessary for requests to be sent through diplomatic or consular channels. Instead, requests may be sent directly to :

The Mutual Legal Assistance Unit
Department of Justice
47/F, High Block
Queensway Government Offices
66 Queensway
Hong Kong

Fax number : (852) 2523 7959
Email : ild@doj.gov.hk

3.4 Requests sent to the Unit will be processed expeditiously. The Unit has pledged that it will respond within 10 working days to requests for mutual legal assistance and in more complex cases to provide an interim reply within 10 working days. For requests which cannot be processed under Hong Kong SAR law, the requesting authorities will be advised promptly with reasons and, in appropriate cases, with advice on how the request may be recast or supplemented to enable its execution in Hong Kong SAR.

4. ASSISTANCE UNDER THE MLA ORDINANCE

4.1 Scope of Assistance

4.1.1 The purposes for which assistance may be granted are referred to in these *Guidelines* as “criminal investigations and proceedings”. This expression covers :

- (a) criminal investigations, before proceedings are taken in court against an accused person;
- (b) prosecutions in court; and
- (c) ancillary criminal matters, relating to the proceeds of crime, such as action to enforce a confiscation order made outside Hong Kong SAR, or to restrain dealing with property in Hong Kong SAR that is derived from an offence abroad or to confiscate the property.

A place outside Hong Kong SAR may request the Secretary for Justice to provide assistance for any of these purposes.

4.2 Types of Assistance

4.2.1 Under the MLA Ordinance, the Secretary for Justice may make arrangements for the provision of the following assistance to another place :

- (a) taking of oral evidence and production of things before a magistrate (see paragraph 7.1 below);
- (b) search and seizure of material under search warrants (paragraph 7.2 below);
- (c) obtaining of material under production orders (paragraph 7.3 below);
- (d) arranging for travel of persons to another place to assist in criminal investigation or proceedings (paragraph 7.4 below);
- (e) enforcement of external confiscation orders and restraining of dealing in property which may be subject to external confiscation orders (paragraph 7.5 below); and
- (f) service of process (paragraph 7.6 below).

4.2.2 Legislation has been enacted in Hong Kong SAR to enable a court in Hong Kong SAR to conduct examination of persons by means of live television link (i.e. evidence by video conferencing) for the purposes of criminal proceedings in a foreign country or territory.

4.3 Assistance Sought by Hong Kong SAR

4.3.1 Conversely, the MLA Ordinance empowers the Secretary for Justice to make requests to places outside Hong Kong SAR to seek assistance of the types set out in sub-paragraph 4.2.1 above for the purposes of a criminal investigation or proceeding in Hong Kong SAR.

**5. REQUESTS TO BE MADE BY
APPROPRIATE AUTHORITY**

5.1 A request to Hong Kong SAR for assistance under the MLA Ordinance must, in addition to being addressed to the Secretary for Justice in Hong Kong SAR, be made by an appropriate authority in the requesting jurisdiction.

5.2 The “appropriate authority” is defined in the MLA Ordinance. The effect is that a request to Hong Kong SAR must be made by a person who the Secretary for Justice is satisfied has authority under the law of the requesting place to make a request to Hong Kong SAR for assistance in a criminal investigation or proceeding.

6. CONTENTS OF REQUESTS

6.1 A request to Hong Kong SAR for assistance should be in writing and should include the following :

- (a) the particulars of the “appropriate authority” making the request, supported by the relevant documents or statutory provisions to enable the Secretary for Justice to satisfy himself as to the legal basis on which the request is made;
- (b) the name of the authority (if different from the above) concerned with the criminal investigation or proceedings to which the request relates (for example, the judicial or prosecuting authority conducting the investigation or proceeding relating to the request);
- (c) a description of the nature of the criminal matter (in particular, whether it relates to an investigation, a prosecution, or other matter, and details of the offence committed or alleged) and a statement setting out a summary of the laws contravened;
- (d) a statement setting out the maximum penalty for the offence to which the criminal matter relates;
- (e) a summary of the relevant facts including, in particular, the circumstances indicating their connection with any evidence sought in Hong Kong SAR;
- (f) the full particulars of persons under investigation and/or prosecution including their name, gender, date of birth, nationality/residence, passport or travel document number, etc;
- (g) a description of the purpose of the request and of the nature of the assistance being sought;
- (h) the relevance of the required evidence (that is, the manner in which the evidence is expected to assist in the investigation or to be used in the prosecution);
- (i) details of the procedure that the requesting place wishes Hong Kong SAR to follow in giving effect to the request, including details of the manner and form in which any information, document or thing is to be supplied under the request;
- (j) if confidentiality of the request is required, a statement expressing that requirement supported by reasons why confidentiality is needed;
- (k) if the original of a thing is requested, a statement specifying the reason for requiring the original;
- (l) details of the period within which the requesting place wishes the request be complied with; and
- (m) any other information that may assist in giving effect to the request.

6.2 In addition, other information may be required for specific types of assistance sought. There are more details about this in paragraph 7 below.

6.3 Standard form of Request

6.3.1 The Appendix to these *Guidelines* contains a suggested format for a request to Hong Kong SAR for assistance in a criminal matter. Requesting authorities may base their requests to Hong Kong SAR on this form. Requesting authorities may forward their requests in draft to the Mutual Legal Assistance Unit for comment and review prior to formal settlement and issue, if they wish.

7. INDIVIDUAL TYPES OF ASSISTANCE

7.1 Taking of oral evidence and production of things before a magistrate *[Section 10 of the MLA Ordinance]*

7.1.1 An appropriate authority of a place outside Hong Kong SAR may request that evidence be taken in Hong Kong SAR, or a thing in Hong Kong SAR be produced, for the purposes of assisting criminal investigations or proceedings in that place.

How requests are executed

7.1.2 With the authorization of the Secretary for Justice, specified witnesses are required to appear before a magistrate for the purposes of giving their evidence on oath or producing things. The oral evidence is reduced into writing. The magistrate certifies that the evidence was taken by him. The certified written evidence and the things produced, if any, are then sent to the Secretary for Justice for transmission to the requesting place.

7.1.3 The proceedings before the magistrate usually take place in open court, to which the general public has access. The magistrate may hold the proceedings *in camera* if :

- (a) it is necessary to do so in order to comply with any applicable international agreement;
- (b) the criminal matter to which the proceedings relate is still at the investigation stage, and the magistrate is satisfied that there are reasonable grounds for believing that :
 - (i) it is in the interest of the witness giving evidence to hold the proceedings *in camera*; or
 - (ii) the investigation would be substantially prejudiced if the proceedings were held in open court.

7.1.4 The following persons or their legal representatives may be present at the proceedings for taking evidence :

- (a) the person to whom the criminal investigation or proceedings in the requesting place relates;
- (b) any other person giving evidence or producing a thing at the proceedings before the magistrate; and
- (c) the appropriate authority of the requesting place.

7.1.5 The questioning of the witnesses before the magistrate is usually conducted by counsel from the Mutual Legal Assistance Unit, on behalf of the requesting place. With the consent of the magistrate, representatives of the appropriate authority may also question the witnesses.

7.1.6 Though a magistrate may compel witnesses to answer questions and produce things specified by a requesting place, there is a prohibition against 'discovery' against a non-party. Hence, a witness cannot be compelled to state what things relevant to the criminal investigation or proceedings are or have been in his possession or control, or to produce anything other than the particular things specified by the magistrate as in, or likely to be in, the witness's possession or control.

Additional Information Required in a Request

7.1.7 A request should :

- (a) describe clearly the matters on which the witness is to be examined and, if possible, provide a list of specific questions to be posed to the witness;
- (b) describe the particular things and, in the case of things in a documentary form, the particular documents or classes of documents relevant to the criminal investigation or proceedings, which the witness is required to produce;
- (c) state whether the written deposition of evidence has to be signed by the witness, or whether a certificate of the magistrate confirming that the evidence was taken by him would suffice;
- (d) state whether the requesting place wishes the examination of the witness to be conducted *in camera*, and if so, give reasons; and
- (e) state the names of the persons, if any, whom the requesting authority wishes to be present at the examination of the witness.

Live TV Link Evidence

7.1.8 Provision is also made for evidence to be taken by way of a live television link from a person in Hong Kong SAR. In such case, the magistrate is present in court during the taking of the evidence but the witness may be questioned directly through the live television link by counsel and court in the requesting jurisdiction as part of the criminal trial or process in that place.

7.2 Search and seizure of material under search warrants *[Section 12 of the MLA Ordinance]*

7.2.1 A place outside Hong Kong SAR may request from Hong Kong SAR things which are relevant to a criminal investigation or proceeding involving an offence in the requesting place. Such a request can be executed through a search warrant, provided the offence is punishable with imprisonment for not less than 24 months.

How requests are executed

7.2.2 Subject to compliance with the requirements of the MLA Ordinance, the Secretary for Justice nominates an authorized officer (normally a police officer) to apply to a magistrate for the issue of a warrant to search for and seize the required thing.

7.2.3 The application to the magistrate must specify the particular things or class of things sought and set out the reasons why they are believed to be in the possession of a particular person or in a particular place.

7.2.4 If a warrant is issued, an authorized officer executes it and seizes relevant items. Upon further direction from the Secretary for Justice, the items may be transmitted to the requesting place.

Additional Information Required in a Request

7.2.5 A request should :

- (a) identify with full details the particular person, premises or land to be searched;
- (b) describe the particular things or classes of things which are to be searched for and seized, and the grounds for believing that they are relevant to the criminal investigation or proceeding and are on (or under the control of) the person, in the premises, or upon the land identified; and
- (c) state the grounds for believing the particular things to be located as described.

7.3 Obtaining of material under production orders *[Section 15 of the MLA Ordinance]*

7.3.1 A “production order” is another means through which Hong Kong SAR may obtain material for a place outside Hong Kong SAR for the purposes of assisting a criminal investigation or proceeding in that place. The offence must be punishable with imprisonment for not less than 24 months.

How requests are executed

7.3.2 Under the MLA Ordinance the Secretary for Justice nominates an authorized officer (normally a police officer) to apply to the Court of First Instance of the High Court or the District Court in Hong Kong SAR for the production of the required material.

7.3.3 The application to the Court must contain sufficient information to satisfy it that, *inter alia*:

- (a) the material sought is likely to be of substantial value to a criminal investigation or proceeding in the requesting place and does not consist of or include items subject to legal privilege; and
- (b) it is in the public interest that an order ought to be made.

7.3.4 A production order will specify the name and address of the person to whom the order is directed and the particular material to be produced. It will also direct that the material be produced to an authorized officer, or that the officer be given access to it within a specified time. The MLA Ordinance prescribes a usual period of 7 days but allows this to be varied. Where large quantities of documents are involved, a longer period is often fixed. The material (or copies where appropriate) are then transmitted to the requesting place.

Additional Information Required in a Request

- 7.3.5 A request to secure material under a production order should :
- (a) describe the particular material which is relevant to the criminal investigation or proceeding and the person who is likely to be in, or to come into, possession or control of such material;
 - (b) confirm that the material sought is likely to be of substantial value, whether by itself or together with other material, to the criminal investigation or proceeding ; and
 - (c) confirm that the material does not consist of or include items subject to legal privilege.

7.4 Arranging for travel of persons to another place to assist in criminal investigation or proceedings *[Section 23 of the MLA Ordinance]*

7.4.1 The MLA Ordinance provides for the Secretary for Justice to make arrangements for the travel of a person (including anyone in custody) from Hong Kong SAR to another place to assist in a criminal investigation or proceeding.

How requests are executed

- 7.4.2 The Secretary for Justice may :
- (a) direct that a person who is being held in custody be released, and may make arrangements for the travel of that person to the requesting place in the custody of an officer appointed by the Secretary for Justice;
 - (b) arrange for a person who has been released from custody on parole (or any other order or licence to be at large) to be given approval to travel to the requesting place, and may make arrangements for that person to travel there; and
 - (c) make arrangements for the travel of any other person to the requesting place.

7.4.3 Before agreeing to provide assistance, the Secretary for Justice must be satisfied that, inter alia, the person sought has consented to travel to the requesting place for the purposes of the requested assistance.

7.4.4 In addition, the requesting place must provide undertakings to the Secretary for Justice that :

- (a) until the person who is to travel to the requesting place has had the opportunity to leave it again afterwards, he will not be subject to any criminal or civil liability incurred before his departure from Hong Kong SAR, or be required to give assistance in relation to a criminal matter other than the one to which the request relates;
- (b) any statement made by that person will not be used in any criminal prosecution of him except for perjury or contempt of court;

- (c) the person will be returned to Hong Kong SAR in accordance with any arrangements agreed with the Secretary for Justice; and
- (d) in a case where the person is being held in custody in Hong Kong SAR, the requesting place will keep him in custody in accordance with arrangements agreed with the Secretary for Justice; and upon receiving notification from the Secretary for Justice that the person is entitled to be released from custody under the law of Hong Kong SAR, will release him from custody and provide accommodation for his continuing presence in the place pursuant to the request.

Additional Information Required in a Request

7.4.5 A request should :

- (a) give the name, address, nationality/residence and other personal particulars of the person sought;
- (b) set out the reasons why the person is capable of giving assistance to the criminal investigation or proceedings;
- (c) describe the type of assistance that is required from the person;
- (d) give the undertakings required by the law of Hong Kong SAR;
- (e) provide sufficient information to enable the person to decide whether to consent to travel to the place; and
- (f) provide details of allowances to which the person will be entitled, and of the arrangements for accommodation for the person, while the person is in the place pursuant to the request.

7.5	Enforcement of external confiscation orders and restraining of dealing in property which may be subject to external confiscation orders <i>[Sections 27 & 28 of the MLA Ordinance]</i>
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7.5.1 A place outside Hong Kong SAR may request the Secretary for Justice to make arrangements to :

- (a) register and enforce a confiscation order that has been made in the requesting place; or
- (b) restrain any dealing in property located in Hong Kong SAR which may be subject to a confiscation order in proceedings which have been or are to be instituted in the requesting place.

How requests are executed

External Confiscation Order

7.5.2 An external confiscation order, that is, an order made outside Hong Kong SAR for the purpose of recovering (including forfeiting and confiscating) property which is or represents proceeds of crime may be registered and enforced in Hong Kong SAR through an application made by the Secretary for Justice, on behalf of the requesting place, to the Court of First Instance of the High Court in Hong Kong SAR.

7.5.3 The application to the Court must contain sufficient information to satisfy it that :

- (a) at the time of registration, the order is in force and is not subject to appeal;
- (b) the person in respect of whom, or in relation to whose property, the order was made received notice of the proceedings and had the opportunity of defending the proceedings; and
- (c) the enforcement of the order in Hong Kong SAR would not be contrary to the interests of justice.

7.5.4 Upon registration, an external confiscation order may be enforced in Hong Kong SAR. In appropriate cases, a receiver may be appointed to assist in the enforcement.

Order Restraining Dealing in Property

7.5.5 The Secretary for Justice may apply to the Court of First Instance of the High Court for an order prohibiting dealing in property. The Court will make an order if it is satisfied that :

- (a) proceedings have been instituted in a place outside Hong Kong SAR; and
- (b) there are reasonable grounds for believing that an external confiscation order may be made in those proceedings.

7.5.6 An order restraining dealing in property may also be obtained where the court is satisfied that proceedings are to be instituted in a place outside Hong Kong SAR and it appears that in those proceedings an external confiscation order may be made.

Additional Information Required in a Request

7.5.7 A request seeking to register an external confiscation order or to restrain dealing in property in Hong Kong SAR should :

- (a) contain information which satisfies the court of the matters set out in sub-paragraphs 7.5.3, 7.5.5 or 7.5.6 above, as the case may be; and
- (b) identify with sufficient particulars the property in respect of which the request is made.

7.6 Service of process

[Section 31 of the MLA Ordinance]

7.6.1 A place outside Hong Kong SAR may request the Secretary for Justice to arrange for service in Hong Kong SAR of any “process” relating to a criminal matter in that place.

How requests are executed

7.6.2 Service is carried out by the Chief Bailiff or his authorized agent.

Additional Information Required in a Request

7.6.3 A request for service should :

- (a) identify the person to be served;
- (b) describe the documents to be served; and
- (c) specify any required proof of service (which is usually by affidavit of the person serving the documents).

7.6.4 It should be noted that the failure of any person in Hong Kong SAR to comply with any foreign process does not constitute an offence under the law of Hong Kong SAR.

8. GROUNDS FOR REFUSAL OF ASSISTANCE

8.1 Mandatory Grounds

8.1.1 A request for assistance will be refused, as required by the law of Hong Kong SAR, if the Secretary for Justice is of the opinion that :

- (a) **Political offence** - the request relates to the prosecution or punishment of a person for an offence that is, or is by reason of the circumstances in which it is alleged to have been committed, an offence of a political character;
- (b) **Ulterior purpose** – there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of the person’s race, religion, nationality or political opinions;
- (c) **Double jeopardy** – the request relates to the prosecution of a person for an offence in respect of conduct pursuant to which the person has been convicted, acquitted, pardoned or punished in the requesting place;
- (d) **Impairment of sovereignty etc.** – acceding to the request would impair the sovereignty, security or public order of the People’s Republic of China;
- (e) **Military offence** – the request relates to the prosecution or punishment of a person in respect of an act or omission which, if it had occurred in Hong Kong SAR, would have constituted an offence only under military law and not also under the ordinary law of Hong Kong SAR;
- (f) **Essential interest of Hong Kong SAR** – acceding to the request would seriously impair the essential interests of Hong Kong SAR; or
- (g) **Double criminality** – the request relates to an act or omission that, if it had occurred in Hong Kong SAR, would not have constituted an offence there.

8.1.2 A request must contain a statement confirming that none of the grounds specified at (a), (b) or (c) of paragraph 8.1.1 above apply to the request. It is necessary for the Secretary for Justice to rely on a positive statement in the request to form the appropriate opinion.

8.2 Further Mandatory Grounds

Reciprocity Undertaking

8.2.1 A request from a place with which Hong Kong SAR does not have an operative bilateral agreement for mutual legal assistance will also be refused if the appropriate authority of the requesting place fails to give an undertaking which satisfies the Secretary for Justice that that place will, subject to its law, comply with a future request from Hong Kong SAR for assistance in a criminal matter.

8.2.2 An undertaking in the following form (by a person who has lawful authority to give that undertaking on behalf of the requesting place) is acceptable :

“[Requesting Place] undertakes that it will, subject to its laws, comply with a future request from the Hong Kong Special Administrative Region for similar assistance having a comparable effect to that requested from the Hong Kong Special Administrative Region in this case.”

Offences Relating to Taxation

8.2.3 A request for assistance that relates to an investigation (as opposed to a prosecution) of an offence relating to taxation will be refused if the requesting place does not have an agreement in effect with Hong Kong SAR for mutual legal assistance. If such an agreement is in effect, the Secretary for Justice will need to be supplied with information that satisfies him that the primary purpose of the request is not the assessment or collection of tax; otherwise he will again be obliged to refuse the request.

8.2.4 These restrictions in respect of offences relating to taxation do not apply if a prosecution has commenced.

8.3 Death Penalty

8.3.1 There is no death penalty in Hong Kong SAR. If a request from abroad for assistance relates to an offence punishable with death, the request may be refused if the requesting place fails to give an undertaking that satisfies the Secretary for Justice that the death penalty will not be imposed or, if imposed, will not be carried out.

9. CONFIDENTIALITY OF REQUESTS

9.1 A request to Hong Kong SAR may state that confidentiality of the request (both as to its contents and the fact that it has been made) is required. It would be helpful if the reasons for requiring confidentiality are given in the request. Requests for confidentiality can normally be entertained.

**10. COST OF CARRYING OUT REQUESTS
IN HONG KONG SAR**

10.1 The Department of Justice is responsible for the payment of expenses incurred in the execution of requests from overseas jurisdictions. For example, banks on which orders are served under section 15 of the MLA Ordinance, relating to production of bank documents, impose charges for photocopies of documents concerned and for reconstitution of accounts. Where a production order entails photocopying of voluminous documents, the charges payable can be substantial.

10.2 The Department may seek a contribution for expenses incurred in the execution of a request from a jurisdiction with which Hong Kong SAR has an agreement on mutual legal assistance, in accordance with the provisions in the agreement. In other cases, the Department reserves the right not to proceed with the execution of a request in the absence of an indemnity from the requesting jurisdiction to cover the expenses.

10.3 The Department of Justice will use its best endeavours to ascertain the likely expense of executing a request, and will advise the requesting jurisdiction as early as possible of any contribution that is required.

11. LETTERS OF REQUEST : ASSISTANCE BETWEEN JUDICIAL AUTHORITIES

11.1 Letters of request may be issued by an overseas court or tribunal for evidence to be obtained in Hong Kong SAR for the purpose of criminal proceedings in the overseas jurisdiction.

11.2 Under the Evidence Ordinance¹, Hong Kong SAR's Court of First Instance of the High Court is empowered to assist in obtaining evidence for criminal proceedings in an overseas court provided that the proceedings have been instituted or their institution is likely if the evidence is obtained. An order may be made by the Court in Hong Kong SAR for the examination of witnesses, either orally or in writing, or for the production of documents.

11.3 A letter of request should be issued by a competent court of an overseas jurisdiction and sent to the Chief Secretary for Administration, Central Government Offices, 2 Tim Mei Avenue, Tamar, Hong Kong. The necessary application to the Court in Hong Kong SAR in pursuance of a foreign letter of request is made by counsel in the Mutual Legal Assistance Unit of International Law Division.

¹ Chapter 8 of the Laws of Hong Kong.

12. ASSISTANCE AT LAW ENFORCEMENT LEVEL

12.1 As a matter of goodwill and international comity, law enforcement authorities around the world may assist each other in the investigation and prosecution of crimes. The law enforcement authorities of Hong Kong SAR, such as the Hong Kong Police Force, the Independent Commission Against Corruption and the Customs and Excise Department, may request their overseas counterparts to provide information or intelligence and conversely may, at their discretion, provide assistance to their respective foreign counterparts. But :

- (a) assistance can only be offered to the extent that does not conflict with any law of Hong Kong SAR; and
- (b) no compulsory (non-consensual) measures may be employed in offering assistance.

12.2 Foreign law enforcement authorities may make use of this avenue to make informal enquiries, such as to find out whether a person is in Hong Kong SAR; whether a company is registered in Hong Kong SAR, and if so, who are the directors controlling the company; whether the company is still in operation; or who is the registered owner of identified real property. With such information, foreign law enforcement authorities may be able to assist their appropriate authorities in deciding whether to make a formal request to Hong Kong SAR for the production of evidence.

12.3 Foreign law enforcement authorities who wish to conduct informal inquiries in Hong Kong SAR should approach Interpol, Hong Kong (China).

**Standard form of Request to Hong Kong SAR
for Assistance in a Criminal Matter**

TO : Secretary for Justice
Hong Kong Special Administrative Region (“Hong Kong SAR”)
of the People’s Republic of China

FROM : [name of appropriate authority/Central Authority of requesting place]²

**REQUEST FOR MUTUAL LEGAL ASSISTANCE
IN A CRIMINAL MATTER**

INTRODUCTION

EITHER : I/The office of (name of designated authority under an operative bilateral agreement with Hong Kong SAR for mutual legal assistance), being the Central Authority designated by Article (number of the relevant Article) of the Agreement for Mutual Legal Assistance between (name of requesting place) and Hong Kong SAR to make requests for mutual legal assistance in criminal matters on behalf of (name of requesting place), and being empowered by (state relevant provisions of empowering legislation of requesting place) to make requests for mutual legal assistance, present this request to the Central Authority of Hong Kong SAR.³

OR : I/The office of (describe appropriate authority, either person or office), being an appropriate authority by virtue of (state relevant provisions of empowering legislation of requesting place) to make requests for mutual legal assistance in criminal matters on behalf of (name of requesting place), present this request to the Secretary for Justice, Department of Justice, Hong Kong SAR.⁴

REQUEST

EITHER : This request is made under the Agreement between (name of requesting place) and Hong Kong SAR for Mutual Legal Assistance in Criminal Matters.⁵

OR : (Name of requesting place) makes this request for assistance to be extended under the Mutual Legal Assistance in Criminal Matters Ordinance, Chapter 525, Laws of Hong Kong.⁶

² Please insert the name of Central Authority if the request is made pursuant to an operative bilateral agreement with Hong Kong SAR, which requires requests to be made by a designated Central Authority. In other cases, please insert the name of appropriate authority.

³ This version may be used by a place having an operative bilateral agreement for mutual legal assistance with Hong Kong SAR.

⁴ This version may be used by a place without any operative bilateral agreement for mutual legal assistance with Hong Kong SAR.

⁵ This version may be used by a place having an operative bilateral agreement for mutual legal assistance with Hong Kong SAR.

⁶ This version may be used by a place without any operative bilateral agreement for mutual legal assistance with Hong Kong SAR.

NATURE OF REQUEST

This request relates to a [criminal matter]⁷ concerning (describe subject of criminal matter). The authority having the conduct of the criminal matter is (describe authority concerned with the criminal matter).

STATEMENT OF FACTS

(Describe the material facts of criminal matter including, in particular, those necessary to establish circumstances connected to evidence sought in Hong Kong SAR and the relevance of evidence sought in Hong Kong SAR to criminal matter in the requesting jurisdiction.)

CRIMINAL OFFENCES / APPLICABLE LEGISLATION / PENALTIES

EITHER : (Name of suspects/defendants) are (suspected of having /alleged to have) committed the following offences, namely :

- (describe offences and provisions of legislation contravened)

The maximum penalties for the above offences, which are the subject of this (investigation/prosecution) are :

- (specify maximum penalty for each offence and applicable law).⁸

OR : A confiscation order (has been/may be) made in proceedings in (name of requesting place). (State basis for any statement that a confiscation *may be* made.)

The order is connected with (state the relevant offences) in (name of requesting place) the maximum penalties for which are (specify maximum penalty for the offence and applicable law)]⁹.

IDENTITY OF SUSPECTS/DEFENDANTS

Provide full particulars of persons under investigation and/or prosecution including their name, gender, date of birth, nationality/residence, passport or travel document number, etc.¹⁰

PURPOSE OF THE REQUEST

By this request it is intended to (state purpose : e.g. secure admissible evidence for the purpose of the criminal proceedings against the defendants, enforce the abovementioned external confiscation order)

⁷ State whether it is an investigation, prosecution or an ancillary criminal matter relating to the restraining of dealing with property or the enforcement or satisfaction of an external confiscation order.

⁸ Applicable where request relates to an investigation or prosecution.

⁹ Applicable where request relates to restraint of property or enforcement of an external confiscation order.

¹⁰ Hong Kong SAR has a system of permanent residency. If persons are normally residents in Hong Kong SAR, they should be referred to in the request as Hong Kong residents or Hong Kong permanent residents (with a given Hong Kong Identity Card number, if available). Their nationality should also be stated in the request, if known.

MANDATORY ASSURANCES

It is confirmed that this request :

- (a) does not relate to the prosecution or punishment of a person for a criminal offence that is, or is by reason of the circumstances in which it is alleged to have been committed or was committed, an offence of a political character;
 - (b) is not made for the purposes of prosecuting, punishing or otherwise causing prejudice to a person on account of that person's race, religion, nationality or political opinions;
 - (c) does not relate to the prosecution of a person for an offence in a case where the person has been convicted, acquitted or pardoned by a competent court or other authority of (name of requesting place), in respect of that offence or of another offence constituted by the same act or omission as that offence; and
- [(d) does not have as its primary purpose the assessment or collection of tax.]¹¹

ASSISTANCE REQUESTED

The Department of Justice of Hong Kong SAR is requested to take such steps as are necessary to give effect to the following :

1. Examination on oath/affirmation of a witness before a magistrate in court.

(e.g.) Mr. X
ABC Co., Ltd.
(address)

to be orally examined on oath or affirmation on the following matters :

- (specify clearly relevant issues/areas relating to subject matter of criminal investigation/prosecution on which evidence of witness is sought and/or provide a list of relevant questions.)

2. Production of things (documents, books etc.) before a magistrate, [and obtaining of oral evidence of the witness producing such material for the purpose of identifying and proving the material produced]¹².

(e.g.) Director
ABC Co., Ltd.
(address)

to be required to produce (describe form of evidence e.g. 'certified copies') of the following documents for the period (state relevant time frame) :

- (specify documents or classes thereof.)

¹¹ Necessary only if criminal matter is an investigation concerning offences relating to taxation and a bilateral agreement with Hong Kong SAR is in operation.

¹² Include this part if deemed necessary for purposes of admissibility of documents in evidence.

The above witness to be orally examined on oath or affirmation on the following matters for the purpose of identifying and proving the documents produced :

- (state relevant particulars.)

3. Search of person or premises for things.

(e.g.) The premises of ABC Co. Ltd.

(address)

to be searched under a search warrant for the seizure of the following from the company :

- (provide details of the things sought to be searched and seized.)
- (support any request for originals of items seized with reasons.)

4. Production of material (documents, books etc.) through production orders.

(e.g.) Manager

ABC Bank Ltd.

(address)

to be required to produce copies of the following documents under a production order :

- (describe particulars of material required to be produced and where located.)
- (state grounds for believing that material sought is likely to be of substantial value to criminal matter in requesting place.)
- (support any request for production of originals with reasons.)

5. Travel of prisoner/person from Hong Kong SAR to assist in a criminal matter.

(e.g.) Arrangements to be made for Mr. X

(address)

to travel to (name of requesting place) to give assistance in a [criminal matter]¹³ by rendering the following assistance :

- (specify the assistance sought.)
- (provide the undertakings required by the law of Hong Kong SAR.)
- (provide details of allowances to which the person will be entitled, and of the arrangements for accommodation for the person, while the person is in the place pursuant to the request.)

¹³ State whether it is an investigation or prosecution of an offence in the requesting place or an ancillary criminal matter.

6. Enforcement of Confiscation Order/ Restraint from dealing in property.

- (state particulars of external confiscation order to be registered and enforced, or property to be restrained and present state of proceedings.)
- (if an external confiscation order has already been obtained, provide details to show the order is in force and not subject to appeal, and that the persons in respect of whom or in relation to whose property the order was made received notice of the proceedings and had the opportunity of defending the proceedings.)
- (if a restraint order is sought, provide details to show that proceedings have been or are to be instituted in the place outside Hong Kong SAR, and an external confiscation order may be made in those proceedings. If proceedings have not yet been instituted, state the basis upon which they are to be instituted)

7. Service of Process.

(e.g.) Mr. X (address)
to be served with documents as follows :

- (describe documents to be served.)
- (specify manner of service and period within which to be served.)
- (specify required proof of service.)

EXECUTION OF REQUEST

Confidentiality

[It is requested that the fact that this request has been made/execution of the request be kept entirely confidential as (state reasons e.g. likelihood of interference with and/or destruction of evidence etc.)]¹⁴

[It is also requested that the evidence of the witness be taken *in camera* as there exist reasonable grounds for believing that it is in the interests of the witness to give evidence *in camera* because (state reasons) and the criminal matter would be substantially prejudiced if the examination was conducted in open court because (state reasons).]¹⁵

¹⁴ Necessary if confidentiality is requested.

¹⁵ Applicable if the request relates to the taking of evidence before a magistrate in court for the purposes of an investigation in the requesting place.

Procedure to be followed

It is requested that the following procedures be observed in the execution of the request :

- (state details of manner and form in which evidence is to be taken and transmitted to requesting place, if relevant.)
- (state any special requirements as to certification/ authentication of documents.)
- (state if attendance by representative of appropriate authority at examination of witnesses/execution of request is required and, if so, the title of the post held by the proposed representative.)

Period of Execution¹⁶

It is requested that the request be executed within (state period giving reasons i.e. specify likely trial or hearing dates or any other dates/reasons relevant to execution of request).

RECIPROCITY UNDERTAKING¹⁷

The Government of (name of requesting place) undertakes that it will, subject to its law, comply with a future request by Hong Kong SAR to it for similar assistance, by providing assistance having a comparable effect to that requested from Hong Kong SAR in this case.

Signed by

Name: _____

Office: _____

Date: _____

¹⁶ The MLA Ordinance prescribes a period of 7 days for production of documents and things under a court order. Where large quantities of documents are involved, a longer period may be required.

¹⁷ Applicable if the request is made by a place without any operative bilateral agreement with Hong Kong SAR. The undertaking should be given by the appropriate authority who is authorized to give such undertaking on behalf of the requesting place.