

**Bills Committee on
Transfer of Sentenced Persons (Amendment) (Macau) Bill**

**Administration's Response to the Issues Raised
at the Second Bills Committee Meeting**

Purpose

This paper sets out the Administration's response to the issues raised by the Bills Committee at its meeting on 28 February 2005.

Administration's Response

- (a) *To explain, making reference to the arrangements for bilateral agreements on arbitration, mutual legal assistance in criminal matters and surrender of fugitive offenders as well as the transfer of sentenced person (TSP) agreement with Macau, the principles adopted for a bilateral agreement to be signed with a jurisdiction before the relevant legislative proposal was introduced into the Legislative Council (LegCo) and the principles adopted for a bilateral agreement to be signed with a jurisdiction after the relevant legislative proposal was passed by LegCo, and the reasons for the different arrangements.*

The main consideration in all cases is whether there is provision in relevant existing legislation that requires the signing of the bilateral agreement before the enactment of implementing legislation, or vice versa.

As explained in the Administration's response of 21 February 2005, agreements on the surrender of fugitive offenders and mutual legal assistance in criminal matters with overseas jurisdictions require Orders

to be made pursuant to the Fugitive Offenders Ordinance (Cap. 503) and the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) respectively to permit their implementation. Under s.3(1) of Cap. 503, an order is to be made by the Chief Executive in Council in relation to an arrangement for the surrender of fugitive offenders to direct that the procedures in that Ordinance shall apply as between Hong Kong and the jurisdiction to which the arrangement relates. The term “arrangements for the surrender of fugitive offenders” is defined in s.2(1) of Cap. 503 to mean arrangements which are applicable to the HKSAR Government and the government of other Parties to the arrangements. An arrangement can only be said to be applicable to Hong Kong and the other party after it is signed. There is a similar requirement to give effect to an arrangement on mutual legal assistance in criminal matters between the HKSAR and partners under Cap. 525.

There is no similar requirement for legislative implementation of bilateral arrangements between Hong Kong and overseas jurisdictions under the Transfer of Sentenced Persons Ordinance (Cap. 513). The practice is to gazette such agreements when they are brought into force by the two governments. However, as the Transfer of Sentenced Persons Ordinance currently only enables the transfer of sentenced persons between Hong Kong and places outside China, it is necessary to amend the TSP Ordinance so as to extend its application to Macau. There is no legal impediment to the passing of the Transfer of Sentenced Persons (Amendment) (Macau) Bill before the TSP Arrangement is signed.

Hong Kong has not entered into bilateral agreements with overseas jurisdictions on the recognition and enforcement of arbitral awards. (The New York Convention on Recognition and Enforcement of Foreign

Arbitral Awards 1958 applies to Hong Kong and is given legal effect in Hong Kong by the Arbitration Ordinance (Cap. 341.)

Amendment to the Arbitration Ordinance was required to implement the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region. There was no legal provision requiring the signing of the Arrangement before or after the legislative amendment, and the Arrangement was signed before the Arbitration (Amendment) Bill was introduced into LegCo in June 1999.

- (b) To advise whether the arrangement of signing a bilateral agreement with a jurisdiction only after the relevant legislative proposal was passed by LegCo would also apply to future TSP and rendition agreements with the Mainland.***

The discussions with the Mainland authorities on TSP and rendition arrangements have yet to be completed. It is premature to determine at this stage whether those arrangements would be signed before or after the introduction of the relevant legislative proposal into LegCo. In any case, the practice need not follow that of the TSP Arrangement with Macau.

- (c) To review the drafting of the proposed new section 4(2)(b)(i) and (ii) of TSP Ordinance in relation to the word “otherwise”.***

The wording of the proposed new section 4(2)(b)(i) and (ii) follows the wording of the existing section 4(2)(b) which is being amended. Given that the wording of subparagraph (i) is similar to that of subparagraph (ii), we have focused on subparagraph (i) in the analysis below.

Subparagraph (i) reads as follows:

“(i) in the case of a transfer to a place outside the People’s Republic of China, the sentenced person is a national of that place or, in the opinion of the Chief Executive, otherwise has close ties with that place; or”.

According to the Oxford Advanced Learner’s English Dictionary, the phrase “or otherwise” is used to “refer to something that is different from or the opposite of what has just been mentioned”. The effect of subparagraph (i) is that if the sentenced person is not a national of a place outside the People’s Republic of China, he has to prove his close ties with that place in other respects. This is our policy intent. The use of “otherwise” in subparagraph (i) and (ii) is, therefore, appropriate.

Security Bureau
30 March 2005