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Paper for the House Committee meeting on 10 June 2005

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

Purpose

This paper reports on the deliberations of the Bills Committee on Transfer of Sentenced Persons (Amendment) (Macau) Bill.

The Bill

2. The Transfer of Sentenced Persons Ordinance (Cap. 513) (TSP Ordinance) provides for the transfer of sentenced persons between the Hong Kong Special Administrative Region (HKSAR) and places outside the People's Republic of China (PRC). The Bill seeks to make the Ordinance applicable to the arrangements for the transfer of sentenced persons between the HKSAR and the Macau Special Administrative Region (MSAR).

The Bills Committee

3. At the House Committee meeting on 7 January 2005, Members formed a Bills Committee to study the Bill. The membership list of the Bills Committee is in **Appendix**.

4. Under the chairmanship of Hon James TO Kun-sun, the Bills Committee has held four meetings with the Administration.

Deliberations of the Bills Committee

Arrangement for signing the Transfer of Sentenced Persons Arrangement with Macau

5. The Administration has explained that to facilitate the repatriation of Hong Kong people imprisoned in the MSAR to serve the remainder of their sentences, and vice versa, the HKSAR Government and the MSAR Government has concluded an Arrangement on the Transfer of Sentenced Persons. To put in place the Arrangement between the two SARs, it is necessary to amend the Ordinance to extend its application to include the MSAR.

6. At the request of members, the Administration has provided the draft copy of the Transfer of Sentenced Persons Arrangement with the MSAR. Members have asked why the Arrangement had not been signed before the Bill was introduced into the Legislative Council (LegCo). Members have pointed out that in respect of surrender of fugitive offenders, mutual legal assistance in criminal matters and the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the HKSAR, the relevant bilateral agreements are signed before LegCo's approval is sought.

7. The Administration has responded that the main consideration in all cases is whether there is provision in the relevant existing legislation that requires the signing of the bilateral agreement before the enactment of legislation for implementation, or vice versa. 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) (FOO) and the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (MLAO) respectively to permit their implementation. Under section 3(1) of FOO, an order is to be made by the Chief Executive (CE) in Council in relation to an arrangement for the surrender of fugitive offenders to direct that the procedures in FOO shall apply as between Hong Kong and the jurisdiction to which the arrangement relates. The term "arrangements for the surrender of fugitive offender" is defined in section 2 of FOO as 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 has been signed. Similar requirement is also provided in MLAO to give effect to an arrangement on mutual legal assistance in criminal matters between the HKSAR and partner jurisdictions.

8. The Administration has pointed out that under the TSP Ordinance, there is no similar requirement for the making of subsidiary legislation to implement transfer of sentenced persons agreements between the HKSAR and overseas jurisdictions. The practice is to gazette such agreements when they are brought into force by the two governments. However, as the Ordinance currently only enables the transfer of sentenced persons between Hong Kong and places outside PRC, it is necessary to amend the Ordinance so as to extend its application to Macau. There is no legal

impediment to the passage of the Bill before the Transfer of Sentenced Persons Arrangement between the HKSAR and the MSAR is signed.

9. Regarding the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the HKSAR, the Administration has advised that it was necessary to amend the Arbitration Ordinance (Cap. 341) for implementation. However, there was no legal provision requiring the signing of the Arrangement before or after the legislative amendment. The Arrangement was signed before the Arbitration (Amendment) Bill was introduced into LegCo in June 1999.

10. Members are of the view that the Administration should adopt a consistent policy in respect of the signing of bilateral agreements before the relevant legislation for implementation is introduced into LegCo. The Administration has responded that there is no across-the-board policy on the signing of a bilateral agreement with another jurisdiction before or after the introduction of enabling legislation.

11. Having considered members' views, the Administration has arranged for the Transfer of Sentenced Persons Arrangement between the HKSAR Government and the MSAR Government to be signed. A copy of the Arrangement signed in Hong Kong on 20 May 2005 has been provided to the Bills Committee.

Remaining sentence requirement for transfer

12. Under the Arrangement on Transfer of Sentenced Persons between the HKSAR Government and the MSAR Government, a sentenced person who wishes to apply for transfer must have a sentence of at least six months remains to be served at the time of the request. According to the Administration, under the signed agreements with the seven jurisdictions, namely, the United Kingdom, Philippines, Portugal, the United States, Thailand, Italy and Sri Lanka, the remaining sentence requirement is one year.

13. Members have asked why a remaining sentence of six months is set in the arrangement with the MSAR. Members have also queried the legal basis for dealing with the remaining term of sentence of a sentenced person transferred to Hong Kong, and how the remaining sentence will be enforced.

14. The Administration has responded that in view of the close proximity between Hong Kong and Macau, the procedures for dealing with the request for transfer should be able to be completed within a short period of time. A remaining sentence of six months is considered to be appropriate.

15. The Administration has explained that section 2 of the Prisons Ordinance (Cap. 234), the term "prisoner" is defined to "include a person who is sentenced in a place outside Hong Kong and is brought into Hong Kong in order to serve the sentence imposed upon (or any part thereof) in that place". Thus, once transferred to Hong Kong, the provisions of the Prisons Ordinance and its subsidiary legislation will be

applicable to the prisoner in question. The inward warrant issued by CE pursuant to section 3 of the TSP Ordinance will specify the term to be served by the transferred sentenced person.

Meaning of “close ties”

16. The Bill seeks to empower CE to issue an outward warrant for the transfer to Macau a sentenced person who is a permanent resident of the MSAR or, in CE’s opinion, has close ties with it. According to the Administration, under the agreements signed with the United Kingdom and Portugal, sentenced persons who have close ties with the HKSAR or the partner jurisdiction may also apply for transfer. In the agreement with the Philippines, the condition of “close ties” is only applicable to transfer to the HKSAR but not to transfer to the Philippines. The agreements with Italy, Sri Lanka, Thailand and the United States do not include “close ties” as one of the conditions for transfer.

17. Members have questioned the meaning of “close ties”, as the term is not defined in the Ordinance or in the Bill, and how an applicant having close ties with the HKSAR or the MSAR will be determined. Members have also asked whether guidelines or criteria are in place for such determination.

18. The Administration has advised that the term was taken from the United Kingdom Repatriation of Prisoners Act 1984, which applied to Hong Kong with modifications by virtue of the Repatriation of Prisoners (Overseas Territories) Order 1986 as amended by the 1987 Amendment Order before reunification. The term is not defined in the statute and will therefore be given its ordinary meaning. Whether an applicant has close ties with the HKSAR or the MSAR is a question to be determined according to the facts of an individual case. While it is a matter for the discretion of CE in each case, an example of “close ties” may be strong family connections, for instance, where the person does not have permanent residency in Macau but his immediate family members are all permanent residents of Macau.

19. The Administration has further explained that in general, when a sentenced person applies for transfer to Macau or return to Hong Kong to serve the remainder of his sentence, he will be asked to provide evidence regarding his status as a permanent resident of that place or his close ties with that place. In respect of close ties, this may include, for example, the length of the time he has lived in that place, where his family is, whether he has worked in that place or other relevant circumstances, etc. The Administration may seek clarification from the applicant or ask him to provide further information having regard to the claims made by him before deciding whether he has close ties with the MSAR or the HKSAR as the case may be. A decision will be made in the light of all evidence produced by the applicant after verification where necessary.

20. According to the Administration, as at 21 January 2005, there were 78 HKSAR residents imprisoned in Macau and eight MSAR residents imprisoned in Hong Kong.

In view of the close proximity between Hong Kong and Macau and the possible strong connections between residents of the two places, members have expressed concern about the pressure on penal places in Hong Kong, if a large number of sentenced persons serving sentence in Macau apply for transfer. Members are of the view that guidelines on how “close ties” would be determined should be put in place in order to guard against possible abuse.

21. At the request of members, the Administration has agreed to draw up internal guidelines for determining “close ties” with a place when more such cases have been established, and provide a copy of the guidelines to the Panel on Security.

Consent of sentenced persons for transfer

22. The Administration has informed members that one of the conditions for transfer is the agreement of the transferring and receiving Parties as well as the sentenced person. Where in view of age or physical or mental condition either Party considers it necessary, the sentenced person’s consent may be given by a person entitled to act on his behalf.

23. Members note that there is no mechanism for sentenced persons to appeal against the decision of the authority in relation to the request for transfer. Members have asked whether a sentenced person who has been transferred and is serving his remaining sentence in the receiving jurisdiction has the right to request for revocation of transfer.

24. The Administration has responded that Hong Kong has no legislative provision for revocation of consent for transfer. When a sentenced person gives his consent for transfer, he is fully informed of the remaining sentence to be served and the treatment he will receive in the receiving jurisdiction.

25. Hon James TO has suggested that the Administration should consider making a provision to specify that once a sentenced person has consented for transfer, he will be deemed to have been convicted and sentenced by a court in Hong Kong and revocation will not be allowed.

Adaptation of sentence

26. Under the Transfer of Sentenced Persons Arrangement between the HKSAR and the MSAR, if the sentence is by its nature or duration incompatible with the law of the receiving Party, that Party may adapt the sentence in accordance with the sentence prescribed by its own law for a similar offence. Members have expressed concern whether the provision for adaptation of sentence contravenes the court’s jurisdiction in sentencing. Members have questioned the legal basis and mechanism for adaptation.

27. The Administration has explained that the provision for adaptation of sentence is modelled on the Strasbourg Convention on the Transfer of Sentenced Persons (the Strasbourg Convention). Similar provisions are also made in the agreements on transfer of sentenced persons between Hong Kong and the other foreign jurisdictions referred to in paragraph 12 above, except Thailand. If two Parties have different systems with regard to the division of penalties or the minimum and maximum lengths of sentence, it might be necessary for the receiving Party to adapt the sanction to the punishment or measure prescribed by its own law for a similar offence. The receiving Party may adapt the sanction to the nearest equivalent available under its own law, i.e. the remaining sentence to be served to the maximum length of sentence under its own law. The Administration has stressed that adaptation is consistent with international practice as evidenced by the conventions and treaties in this area. There is no question of exercising the court's jurisdiction in sentencing.

28. Regarding the mechanism for adaptation, the Administration has explained that where a sentenced person in the transferring jurisdiction applies to return to, say, Hong Kong to serve the remainder of his sentence imposed by a court in the transferring jurisdiction and his sentence is by its nature or duration incompatible with the law of Hong Kong, Hong Kong may adapt the sentence in accordance with the sentence prescribed by its own law for a similar offence. For instance, a person was convicted of theft and sentenced to 20 years' imprisonment by a court in the transferring jurisdiction where a provision for adaptation of sentence is made in the bilateral agreement. After serving two years', he applies for transfer to serve the remainder of his sentence in Hong Kong. Under the Theft Ordinance (Cap. 210) in Hong Kong, a person who commits theft shall be liable on conviction to a maximum of imprisonment for 10 years. Pursuant to the adaptation of sentence provision, Hong Kong may adapt the remaining sentence to be served by the applicant to 10 years. With the consent of the transferring jurisdiction and the applicant, the transfer will be effected, and the date on which the prisoner's sentence will terminate will be specified in the inward warrant issued by CE.

29. Hon James TO has suggested that flexibility should be given to the sentenced person's wish for transfer even though there is no adaptation of sentence in his favour.

Rights and benefits of sentenced persons on transfer

30. To avoid unnecessary misunderstanding, members have asked the Administration to consider making clear to an applicant for transfer the rights and benefits in relation to serving his sentence in the transferring jurisdiction which would not be applicable in the receiving jurisdiction and vice versa.

31. The Administration has responded that the provisions on retention of jurisdiction in the Transfer of Sentenced Persons Arrangement between the HKSAR Government and the MSAR Government are adopted from the Strasbourg Convention. Similar provisions or provisions having the same effect are also in the existing bilateral agreements between the HKSAR and foreign jurisdictions. Pursuant to these

provisions, the transferring Party retains exclusive jurisdiction regarding the judgments of its courts, the sentences imposed by them, and any procedures for revision, modification or cancellation of those judgments and sentences. The agreements specify that the continued enforcement of the sentence after transfer will be governed by the laws and procedures of the receiving Party, including those governing the conditions of service of imprisonment, confinement or other deprivation of liberty, and those providing for the reduction of the term of imprisonment, confinement or other deprivation of liberty by parole, conditional release, or remission.

32. The Administration has agreed that the HKSAR Government, as the transferring Party, will inform an applicant of the rights and benefits which will no longer be applicable to him in the receiving jurisdiction after transfer.

Notification to the Central People's Government

33. Section 9 of the Ordinance requires CE to notify the Central People's Government (CPG) of every relevant request for transfer and to comply with instructions given by CPG. The Administration proposes to amend the section so that the requirement for CE to notify CPG will not be applicable to transfers between the HKSAR and the MSAR.

34. The Administration has explained that the notification requirement is not applicable because the transfer of sentenced persons between the HKSAR and the MSAR is a matter between the two SARs of PRC.

Implementation of the Arrangement on Transfer of Sentenced Persons between the HKSAR Government and the MSAR Government

35. At the request of members, the Administration has undertaken to inform the Panel on Security of the progress of implementation of the Arrangement on the Transfer of Sentenced Persons between the HKSAR Government and the MSAR Government one year after the Arrangement has come into operation.

Resumption of Second Reading debate

36. The Bills Committee supports the resumption of the Second Reading debate on the Bill at the Council meeting on 29 June 2005.

Follow-up actions by the Administration

37. The Administration has undertaken –

- (a) to draw up internal guidelines for determining “close ties” with a place when more such cases have been established, and provide a copy of the guidelines to the Panel on Security (paragraph 21 above refers); and
- (b) to inform the Panel on Security of the progress of implementation of the Arrangement on Transfer of Sentenced Persons between the HKSAR Government and the MSAR Government one year after the Arrangement has come into operation (paragraph 35 above refers).

Advice Sought

38. Members are invited to note the deliberations of the Bills Committee and the date for the resumption of Second Reading on the Bill.

Council Business Division 2
Legislative Council Secretariat
9 June 2005

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

Membership list

Chairman Hon James TO Kun-sun

Members Hon Margaret NG
Hon LAU Kong-wah, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Daniel LAM Wai-keung, BBS, JP

Total: 5 Members

Clerk Mrs Sharon TONG LEE Yin-ping

Legal Adviser Mr Stephen LAM

Date 25 January 2005