

LEGISLATIVE COUNCIL BRIEF

Fugitive Offenders Ordinance (Cap. 503)

FUGITIVE OFFENDERS (NEW ZEALAND) ORDER

INTRODUCTION

At the meeting of the Executive Council on 16 June 1998, the Council ADVISED and the Chief Executive ORDERED that the Fugitive Offenders (New Zealand) Order at Annex should be introduced into the Legislative Council.

BACKGROUND AND ARGUMENT

The Fugitive Offenders Ordinance

2. Section 3 of the Fugitive Offenders Ordinance (the Ordinance) provides that the Chief Executive in Council may, in relation to any surrender of fugitive offenders (SFO) arrangements, by order direct that the procedures in the Ordinance shall apply as between Hong Kong and the place outside Hong Kong to which the arrangements relate, subject to the limitations, restrictions, exceptions and qualifications contained in the order.

3. Ten orders in relation to SFO bilateral arrangements (with the Netherlands, Canada, Australia, Malaysia, the Philippines, the US, Indonesia, India, the UK and Singapore) have been made under section 3(1) of the Ordinance.

The Fugitive Offenders (New Zealand) Order

4. The Hong Kong Special Administrative Region (“HKSAR”) signed the SFO agreement with New Zealand on 3 April 1998. The Fugitive Offenders (New Zealand) Order will enable the agreement to be brought into force. The Order, which includes the agreement as a schedule, provides that the procedures in the Ordinance shall apply as between the HKSAR and New Zealand, subject to the terms of the agreement.

5. Section 3(9) of the Ordinance provides that the Chief Executive in Council shall not make an order, unless the arrangements for the surrender to which the order relates are substantially in conformity with the provisions of the Ordinance. The agreement so conforms.

6. The Order will come into operation on a day to be appointed by the Secretary for Security, by notice in the Gazette, to coincide with the day the agreement enters into force. The commencement date will be settled after consultation with New Zealand and will depend on when necessary procedures in New Zealand will be completed.

7. Before the handover, Hong Kong's SFO arrangements with New Zealand depended on reciprocal legislation based on a Commonwealth Scheme. The British applied legislation lapsed on 1 July 1997 and since that date extradition between the HKSAR and New Zealand has not been possible. We need to make the Order as soon as possible to resume the extradition relationship with New Zealand.

LEGISLATIVE TIMETABLE

8. The legislative timetable will be -

Publication in the Gazette	3 July 1998
Tabling in the Legislative Council	8 July 1998
Commencement date	to be specified by the Secretary for Security

HUMAN RIGHTS IMPLICATIONS

9. The Department of Justice has advised that the Order is consistent with the human rights provisions of the Basic Law.

FINANCIAL AND STAFFING IMPLICATIONS

10. The proposed subsidiary legislation has no additional financial or staffing implications.

PUBLIC CONSULTATION

11. The Order will permit the agreement to be brought into force in accordance with the existing legal framework. Public consultation was not, therefore, considered necessary.

ENQUIRIES

12. Enquiries on the contents of this paper should be directed to -

	<u>Telephone No.</u>
Mrs Carrie WILLIS Principal Assistant Secretary for Security	2810 2329
Mrs Juliet LAM Senior Executive Officer, Security Bureau	2810 2325

Security Bureau

July 1998

(SBCR 9/1/2716/80(98) Pt.4)

FUGITIVE OFFENDERS (NEW ZEALAND) ORDER

(Made by the Chief Executive in Council under section 3 of
the Fugitive Offenders Ordinance (23 of 1997))

1. Commencement

This Order shall come into operation on a day to be appointed by the Secretary for Security by notice in the Gazette.

**2. Procedures in Ordinance to apply between
Hong Kong and New Zealand**

In relation to the arrangements for the surrender of fugitive offenders which are -

- (a) applicable to the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of New Zealand; and
- (b) recited in the Schedule,

it is hereby directed that the procedures in the Ordinance shall apply as between Hong Kong and New Zealand subject to the limitations, restrictions, exceptions and qualifications contained in those arrangements.

SCHEDULE

[s. 2]

**AGREEMENT FOR
THE SURRENDER OF ACCUSED AND CONVICTED PERSONS BETWEEN
THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION OF THE PEOPLE'S REPUBLIC OF CHINA AND
THE GOVERNMENT OF NEW ZEALAND**

The Government of the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong Special Administrative Region"), having been duly authorised to conclude this agreement by the Central People's Government of the People's Republic of China, and the Government of New Zealand

Desiring to make provision for the reciprocal surrender of persons accused or convicted of a criminal offence

Have agreed as follows:

ARTICLE 1

OBLIGATION TO SURRENDER

The Parties agree to surrender to each other, subject to the provisions laid down in this Agreement, any person who is found in the jurisdiction of the Requested Party and who is wanted by the Requesting Party for prosecution, or for the imposition or enforcement of a sentence, in respect of an offence coming within the provisions of Article 2.

ARTICLE 2

OFFENCES

(1) Surrender shall be granted for an offence coming within any of the following categories of offences insofar as it is according to the law of both Parties punishable by imprisonment or other form of detention for two years or more, or by a more severe penalty and insofar as such offence is one for which surrender may be granted under the law of the Requested Party:

- (a) Murder or manslaughter;
- (b) Aiding, abetting, counselling or procuring suicide;
- (c) Offences involving wounding, injuring, causing grievous bodily harm; endangering the life or safety of any person; threatening to kill or cause grievous bodily harm;
- (d) Offences of a sexual nature including sexual violation; rape; sexual assault; indecent assault; sexual offences against children;
- (e) Kidnapping; abduction; false imprisonment; taking a hostage; dealing or trafficking in slaves or other persons;
- (f) Offences against the laws relating to drugs including narcotics and psychotropic substances;
- (g) Offences against the laws relating to theft; robbery; burglary; blackmail and extortion; handling or receiving property;
- (h) Offences against the laws relating to fraud or other forms of dishonesty; obtaining property, money, valuable securities or pecuniary advantage by false pretences; conspiracy to defraud;
- (i) Offences relating to counterfeiting, forgery or uttering;
- (j) Offences relating to companies including offences committed by officers, directors, and promoters;
- (k) Offences against the laws relating to bribery and corruption;
- (l) Perjury and offences relating to obstructing or defeating the course of justice;
- (m) Arson; criminal damage to property;

- (n) Piracy;
- (o) Killing an unborn child; offences relating to the unlawful termination of pregnancy;
- (p) Stealing or abandoning a child;
- (q) Procuring sexual intercourse;
- (r) Bigamy;
- (s) Offences relating to the possession or laundering of the proceeds of crime;
- (t) Offences for which surrender may be granted under international conventions binding on the Parties; offences created as a result of decisions of international organisations which are binding on the Parties;
- (u) Aiding, abetting, counselling or procuring the commission of, inciting, being an accessory before or after the fact to, or attempting or conspiring to commit any offence for which surrender may be granted under this Agreement;
- (v) Any other offence for which surrender may be granted in accordance with the law of both Parties.

(2) Where surrender is requested for the purpose of carrying out a sentence, a further requirement shall be that in the case of a period of imprisonment or detention at least six months remain to be served.

(3) For the purposes of this Article, in determining whether an offence is an offence punishable under the law of Requested Party it shall be sufficient if the conduct of the person, examined by reference to the totality of the acts or omissions alleged against the person, would constitute an offence against that law, notwithstanding that the elements of the offence prescribed by the

law of the Requesting Party are not identical with the elements prescribed by the law of the Requested Party.

(4) For the purposes of Article 2(1), an offence shall be an offence according to the laws of both Parties if the conduct constituting the offence was an offence against the law of the Requesting Party at the time it was committed and an offence against the law of the Requested Party at the time the request for surrender is received.

ARTICLE 3

SURRENDER OF NATIONALS

(1) The Government of New Zealand reserves the right to refuse the surrender of its nationals. The Government of the Hong Kong Special Administrative Region reserves the right to refuse the surrender of nationals of the People's Republic of China.

(2) Where the Requested Party exercises this right the Requesting Party may request that the case be submitted to the competent authorities of the Requested Party in order that proceedings for prosecution of the person may be considered.

ARTICLE 4

DEATH PENALTY

If the offence for which surrender is requested under this Agreement is punishable according to the law of the Requesting Party with the death penalty, and if in respect of such an offence the death penalty is not provided for by the law of the Requested Party or is not normally carried out, surrender may be refused unless the Requesting Party gives such assurances as the Requested

Party considers sufficient that this penalty will not be imposed or, if imposed, will not be carried out.

ARTICLE 5

BASIS FOR SURRENDER

A person sought by the Requesting Party shall be surrendered only if:

- (a) in the case of a person accused of a criminal offence the evidence is sufficient according to the law of the Requested Party to justify the committal for trial of that person; or
- (b) in the case of a convicted person there is sufficient evidence to establish that that person is the person convicted by the court of the Requesting Party.

ARTICLE 6

MANDATORY REFUSAL OF SURRENDER

(1) A person shall not be surrendered if the Requested Party has substantial grounds for believing:

- (a) that the offence of which that person is accused or was convicted is an offence of a political character or that the request for surrender has in fact been made with a view to trying or punishing him or her for an offence of a political character;
- (b) that the request for surrender (though purporting to be made on account of an offence for which surrender may be granted) is in fact made for the purpose of prosecution

or punishment on account of race, colour, ethnic origin, sex, religion, nationality, or political opinions; or

- (c) that the person might, if returned -
 - (i) be prejudiced at that person's trial; or
 - (ii) be punished, detained or restricted in his or her personal liberty by reason of race, colour, ethnic origin, sex, religion, nationality or political opinions.

(2) A person who has been finally acquitted, convicted or pardoned under the law of the Requesting or Requested Party for any offence set out in the request shall not be surrendered for that offence.

(3) Surrender shall not be granted if the offence for which surrender is sought is an offence under military law which is not also an offence under ordinary criminal law.

ARTICLE 7

DISCRETIONARY REFUSAL OF SURRENDER

- (1) Surrender may be refused if the Requested Party considers that:
 - (a) the offence is, having regard to all the circumstances, not sufficiently serious to warrant the surrender of the person sought;
 - (b) there has been excessive delay, for reasons which cannot be imputed to the person sought, in bringing charges, in bringing the case to trial or in making the person serve his or her sentence or the remainder thereof;
 - (c) the surrender of the person might place that Party in breach of its obligations under international treaties;

- (d) in the circumstances of the case, the surrender would be incompatible with humanitarian considerations in view of the age, health or other personal circumstances of the person sought; or
- (e) the person whose surrender is requested has been sentenced or would be liable to be tried or sentenced in the Requesting Party by an extraordinary or ad hoc court or tribunal.

(2) The Requested Party may refuse to surrender a person for an offence which is regarded by its law as having been committed within the jurisdiction of its courts. If the Requested Party so refuses, the Requesting Party may request that the case be submitted to its competent authorities in order that proceedings for prosecution be considered.

(3) The Requested Party may refuse surrender where the person sought has been finally acquitted, convicted or pardoned in a third jurisdiction for the same offence for which surrender is requested and, if convicted, the sentence imposed has been fully enforced or is no longer enforceable.

(4) Where the surrender of a person is requested for the purpose of carrying out a sentence the Requested Party may refuse surrender if it appears that the conviction was obtained in the person's absence, unless the person has the opportunity to have the case retried in his or her presence, in which case the person shall be considered as an accused person under this Agreement.

(5) The Requested Party may refuse surrender if the request relates to the prosecution or punishment of a person for an offence which, had it been committed within the jurisdiction of the Requested Party, could no longer be prosecuted by reason only of lapse of time.

ARTICLE 8

POSTPONEMENT OF SURRENDER

(1) If the person sought is being proceeded against or is under punishment or is detained in the jurisdiction of the Requested Party in connection with any offence other than that for which surrender is requested, surrender may be deferred until the conclusion of the proceedings, the execution of any punishment imposed or the release from detention, as the case may be.

(2) When the person whose surrender is requested was previously surrendered by a third jurisdiction for prosecution or execution of sentence, no action shall be taken pursuant to such request until such time has elapsed as is required by any agreement with that third jurisdiction or until the person has had an opportunity of leaving the jurisdiction of the Requested Party.

ARTICLE 9

THE REQUEST AND SUPPORTING DOCUMENTS

(1) Requests for surrender and related documents shall be conveyed through the appropriate authority as may be notified from time to time by one Party to the other.

(2) The request shall be accompanied by:

- (a) as accurate a description as possible of the person sought, together with any other information which would help to establish that person's identity, nationality and location;

- (b) a statement of each offence for which surrender is sought and a statement of the relevant acts and omissions in respect of each offence; and
 - (c) a statement of the provisions of the law describing the offence for which surrender is requested and a statement of the punishment which can be imposed therefor and any time limit on the institution of proceedings or on the execution of any punishment for that offence.
- (3) If the request relates to an accused person it shall also be accompanied by a copy of the warrant of arrest issued by a judge, magistrate or other competent authority of the Requesting Party and by such evidence as, according to the law of the Requested Party, would justify committal for trial if the offence had been committed within the jurisdiction of the Requested Party.
- (4) If the request relates to a person already convicted or sentenced, it shall also be accompanied by a copy of the certificate of the conviction or sentence, and
- (a) if the person was convicted but not sentenced, a statement to that effect by the appropriate court and a copy of the warrant of arrest; or
 - (b) if the person was sentenced, a statement indicating that the sentence is enforceable and how much of the sentence has still to be served.

ARTICLE 10

AUTHENTICATION

- (1) Any document that, in accordance with Article 9, accompanies a request for surrender shall, if duly authenticated, be admitted

in evidence in proceedings relating to the examination of the request.

- (2) A document is authenticated for the purposes of this Agreement if it purports to be:
 - (a) signed or certified by a judge, magistrate or an official of the Requesting Party;
and
 - (b) sealed with the official seal of a competent authority of the Requesting Party.

ARTICLE 11

LANGUAGE OF DOCUMENTATION

All documents submitted in accordance with this Agreement shall be in, or translated into, an official language of the Requested Party, to be specified by the Requested Party.

ARTICLE 12

PROVISIONAL ARREST

- (1) In urgent cases the person sought may, in accordance with the law of the Requested Party, be provisionally arrested on the application of the Requesting Party.
- (2) The application for provisional arrest shall contain:
 - (a) a statement of intention to request the surrender of the person sought;
 - (b) a statement of the existence of a warrant of arrest or a judgment of conviction against that person;
 - (c) information concerning the person's identity, nationality and probable location;
 - (d) a description of the person;

- (e) a brief description of the offence and the facts of the case;
 - (f) a statement of the sentence that can be or has been imposed for the offence; and
 - (g) where applicable, how much of that sentence remains to be served.
- (3) An application for provisional arrest may be transmitted by any means affording a record in writing through the channel notified under Article 9(1) or through the International Criminal Police Organisation (Interpol).
- (4) The provisional arrest of the person sought shall be terminated upon the expiration of sixty days from the date of arrest if the request for surrender and supporting documents have not been received. The release of a person pursuant to this paragraph shall not prevent the institution or continuation of surrender proceedings if the request and the supporting documents are received subsequently.

ARTICLE 13

ADDITIONAL INFORMATION

- (1) If the information communicated by the Requesting Party is found to be insufficient to allow the Requested Party to make a decision under this Agreement, that Party shall request the necessary supplementary information and may fix a time-limit for its receipt.
- (2) If the person whose surrender is sought is under arrest and the additional information furnished is not sufficient in accordance with this Agreement or is not received within the time specified, the person may be discharged. Such discharge shall not

preclude the Requesting Party from making a fresh request for the surrender of the person in respect of the same offence.

ARTICLE 14

CONCURRENT REQUESTS

If the surrender of a person is requested concurrently by one of the Parties and a State with whom New Zealand or the Hong Kong Special Administrative Region, whichever is being requested, has agreements or arrangements for the surrender of accused and convicted persons, the Requested Party shall make its decision having regard to all the circumstances including:

- (a) the provisions in this regard in any agreements in force between the Requested Party and the Requesting Parties;
- (b) the relative seriousness and place of commission of the offences;
- (c) the respective dates of the requests;
- (d) the nationality and ordinary place of residence of the person sought;
- (e) the possibility of subsequent surrender to another jurisdiction

and shall notify the other Party of its decision in the event of surrender of the person to another jurisdiction.

ARTICLE 15

REPRESENTATION AND COSTS

(1) The Requested Party shall make all necessary arrangements for legal representation and assistance in any proceedings in its jurisdiction arising out of a request for surrender.

(2) Subject to Article 15(3), the Requested Party shall meet the costs of any proceedings arising from the request in its jurisdiction and shall bear any expenses associated with the arrest and detention of the person whose surrender is sought until that person is surrendered. The Requesting Party shall bear all subsequent expenses including the costs of transporting the person from the jurisdiction of the Requested Party.

(3) If it becomes apparent that exceptional expenses may be incurred as a result of a request for surrender the Parties shall consult with a view to deciding how these expenses will be met.

ARTICLE 16

ARRANGEMENTS FOR SURRENDER

(1) The Requested Party shall, as soon as a decision on the request for surrender has been made, communicate that decision to the Requesting Party. Reasons shall be given for any complete or partial refusal of the request.

(2) When a person is to be surrendered, that person shall be sent by the authorities of the Requested Party to such convenient place of departure within that Party's jurisdiction as the Requesting Party shall indicate.

(3) Subject to Article 16(4), the Requesting Party shall remove the person within the period specified by the Requested Party and if the person is not removed within that period the Requested Party may refuse to surrender that person for the same offence.

(4) If circumstances beyond its control prevent a Party from surrendering or taking over the person to be surrendered, it shall notify the other Party. In that case, the Parties shall agree a

new date for surrender and the provisions of Article 16(3) shall apply.

ARTICLE 17

SURRENDER OF PROPERTY

(1) To the extent permitted under the law of the Requested Party and subject to the rights of third parties which shall be duly respected, all articles acquired as a result of the offence to which the request relates or which may be required as evidence of the offence shall, if found, be surrendered if the request for surrender is granted.

(2) Where the law of the Requested Party or the protection of the rights of third parties so require and the Requested Party so requests, the articles shall be returned to the Requested Party without charge as soon as practicable after the end of the proceedings.

(3) If permitted by the law of the Requested Party and the Requesting Party so requests, the articles shall be surrendered to that Party even though the person cannot be surrendered owing to death, disappearance or escape.

ARTICLE 18

RULE OF SPECIALTY

(1) A person who has been surrendered shall not be proceeded against, sentenced, detained or subjected to any other restriction of personal liberty by the Requesting Party for any offence committed prior to the surrender other than:

- (a) the offence or offences in respect of which the surrender was ordered;
- (b) an equivalent or lesser offence, disclosed by the facts in respect of which the surrender was ordered, if the offence is one for which the person could have been surrendered under this Agreement; or
- (c) where permitted by the law of the Requested Party, any other offence being an offence for which surrender may be ordered under this Agreement in respect of which the Requested Party consents to the person being dealt with

unless the person has first had an opportunity to leave the jurisdiction of the Party to which he or she has been surrendered and has not done so within forty days of having been free to do so or has voluntarily returned after having left.

(2) A Party whose consent is requested under Article 18(1)(c) may require the submission of any document or statement referred to in Article 9.

ARTICLE 19

RESURRENDER

(1) Where a person has been surrendered to the Requesting Party by the Requested Party, that person is not liable to be surrendered or transferred beyond the jurisdiction of the Requesting Party for an offence committed before the person's surrender unless:

- (a) the person has first had an opportunity to leave the Hong Kong Special Administrative Region or New Zealand, as the case may be, and has not done so within forty

days of having been free to do so or has voluntarily returned after having left;
or

(b) the Requested Party consents to that surrender.

(2) A Party whose consent is requested under Article 19(1)(b) may require the submission of any document or statement referred to in Article 9.

ARTICLE 20

TRANSIT

(1) To the extent permitted by its law, transit through the jurisdiction of a Party may be granted on a request in writing.

(2) The Party through whose jurisdiction transit will occur may request the information referred to in Article 9(2)(b).

ARTICLE 21

ENTRY INTO FORCE SUSPENSION AND TERMINATION

(1) This Agreement shall enter into force on a date to be specified in an exchange of notes between the Parties confirming that their respective requirements for the entry into force of this Agreement have been complied with.

(2) This Agreement shall apply to offences committed before as well as after it enters into force.

(3) Each of the Parties may suspend or terminate this Agreement at any time by giving notice to the other through the channel notified under article 9(1). Suspension shall take effect on receipt of the relevant notice. In the case of termination the Agreement shall cease to have effect three months after the receipt of notice to terminate.

(4) This Agreement shall not apply to Tokelau unless the Parties have exchanged Notes through the diplomatic channel agreeing the terms on which this Agreement shall so apply.

IN WITNESS WHEREOF the undersigned, being duly authorised by their respective governments, have signed this Agreement.

Done at the Hong Kong Special Administrative Region this third day of April One thousand nine hundred and ninety eight in the Chinese and English languages, each text being equally authentic.

Clerk to the Executive Council

COUNCIL CHAMBER

16 June 1998

Explanatory Note

This Order applies the procedures for the surrender of fugitive offenders set out in the Fugitive Offenders Ordinance (23 of 1997) to Hong Kong and New Zealand. The Order is made in consequence of the arrangements for the surrender of fugitive offenders entered into by Hong Kong and New Zealand and signed in Hong Kong on 3 April 1998. Those arrangements are recited in the Schedule to the Order. It should be noted that those procedures are subject to the limitations, restrictions, exceptions and qualifications contained in those arrangements.