

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

**Administration's response to issues raised
at the first Bills Committee meeting**

Purpose

This paper sets out the Administration's response to the issues raised by the Bills Committee at its meeting on 25 January 2005.

Administration's Response

- (a) *To provide the text of the Transfer of Sentenced Persons (TSP) Agreement with the Macau Special Administrative Region (MSAR).*

The text of the TSP Arrangement agreed between the Hong Kong Special Administrative Region (HKSAR) and the MSAR, in Chinese only, is at **Annex A** for reference.

- (b) *To provide a detailed comparison between the TSP Agreement with MSAR and the TSP agreements signed with other jurisdictions, including the procedures concerned, together with a copy of such agreement signed with other jurisdiction.*

Hong Kong has signed TSP agreements with seven jurisdictions, namely the United Kingdom, Philippines, Portugal, the United States, Thailand, Italy and Sri Lanka. The terms of the TSP Arrangement between the MSAR and HKSAR (including the conditions of transfer, procedures for transfer, retention of jurisdiction and continued enforcement of sentence)

are essentially the same as those with other jurisdictions. The only major difference is that under all signed agreements, a sentenced person who wishes to apply for transfer must have a remaining sentence of at least one year. Under the TSP Arrangement with MSAR, the remaining sentence requirement is set at six months.

Apart from sentenced persons who are permanent residents of the HKSAR or citizens of the partner jurisdictions, sentenced persons who have “close ties” with the HKSAR or the partner jurisdictions may also apply for transfer under two existing agreements (namely the agreements with the United Kingdom and Portugal). In the agreement with the Philippines, the condition of “close ties” is only applicable to transfer to HKSAR but not to transfer to the Philippines. The other four agreements (namely the agreements with the United States, Thailand, Italy and Sri Lanka) do not include “close ties” as one of the conditions of transfer. Under the TSP Arrangement between the MSAR and HKSAR, “close ties” is agreed to be a condition of transfer.

A copy of the TSP Agreement with Portugal (which came into force on 7 November 2004), as a comparison with the one with MSAR, is at **Annex B** for reference. All signed TSP agreements can be downloaded from the website of the Department of Justice at <http://www.legislation.gov.hk/table5ti.htm>.

- (c) *To explain why the TSP Agreement with MSAR was not signed before the Bill was introduced into the Legislative Council.*

Agreements on surrender of fugitive offenders and mutual legal assistance in criminal matters require Orders to be made pursuant to

Fugitive Offenders Ordinance (Cap. 503) and Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) respectively to permit their implementation.

Under s.3(2) of Cap. 503, an order is to be made by the Chief Executive in Council in relation to an arrangement for surrender 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” 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 requirement for the making of subsidiary legislation to implement TSP agreements between the HKSAR and partners under the Transfer of Sentenced Persons Ordinance (Cap. 513). The text of the TSP Arrangement with the MSAR has been agreed by the two sides. The Macau side has noted the need for the HKSAR to enact legislative amendment before the TSP Arrangement can be brought into operation. In the paper submitted for the Panel on Security’s discussion on 2 November 2004, we have mentioned the arrangement for signing the TSP Arrangement after the necessary legislative amendment.

- (d) *To provide information on the respective numbers of Hong Kong Special Administrative Region (HKSAR) residents serving sentences in MSAR and MSAR residents serving sentences in HKSAR, and the lengths of such sentences.*

As at 21 January 2005, there were a total of 78 HKSAR residents imprisoned in the MSAR and eight MSAR residents imprisoned in the HKSAR. Their length of sentences is set out below:

Length of Sentence	Number of HKSAR residents imprisoned in MSAR	Number of MSAR residents imprisoned in HKSAR
Less than 1 year	-	4
1 to 5 years	15	-
6 to 10 years	44	-
11 to 15 years	14	1
16 to 20 years	4	1
More than 20 years	1	2
Total	78*	8

* In addition, there were 13 HKSAR residents on remand in the MSAR.

- (e) *To advise on the time taken for the Central People's Government to reply to a notification from HKSAR of the request for transfer of a sentenced person between HKSAR and other jurisdictions.*

In respect of previous transfer cases, the Central People's Government, on average, replied to a notification of transfer request in 12 days.

- (f) *To explain the meaning of the term “close ties” in the Bill, whether the term was found in other local legislation and the procedures relating to establishment of “close ties”.*

The expression “close ties” is only found in the Transfer of Sentenced Persons (Cap. 513). This 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 Ordinance (Overseas Territories) Order 1986 (S.I. 1986 / 2226) as amended by the 1987 Amendment Order (S.I. 1987 / 1828) until the Reunification.

The expression is not defined in the statute and will therefore be given its ordinary meaning. Whether an applicant has close ties with the HKSAR or MSAR is a question of fact. In general when a sentenced person applies for transfer to the MSAR or return to the HKSAR to serve the remainder of his sentence, he will be asked to supply evidence regarding his status as a permanent resident of that place or close ties with that place. This includes, 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 HKSAR or MSAR as the case may be. A decision will be made in the light of all evidence produced by the applicant after verification where necessary.

《澳門特別行政區與香港特別行政區政府關於移交被判刑人的安排》

根據《中華人民共和國香港特別行政區基本法》第九十五條及《中華人民共和國澳門特別行政區基本法》第九十三條的規定，經澳門特別行政區與香港特別行政區(下稱“雙方”)代表協商，就移交被判刑人方面的合作安排，以協助被判刑人重投社會，達成以下共識：

第一條 定義

就本安排而言：

(一)“移交方”指可能或已經從其司法管轄區移交被判刑人的一方；

(二)“接收方”指可能或已經向其司法管轄區移交被判刑人的一方；

(三)“刑”、“刑罰”指法院在行使其刑事司法管轄權的過程中判處的任何有限期、沒有限期或不固定限期的剝奪自由的處罰或措施；

(四)“被判刑人”指須被扣押在移交方司法管轄區內的監獄、醫院或其他機構服刑的人。

第二條 一般原則

根據本安排的規定，可將在一方司法管轄區的被判刑人移交至另一方的司法管轄區，以執行對被判刑人的刑罰。

第三條 聯絡機關

一、雙方的聯絡機關須按照本安排的規定，處理移交請求。

二、澳門特別行政區的聯絡機關是行政法務司。香港特別行政區的聯絡機關是律政司。安排任何一方均可更改其聯絡機關。在這種情況下，安排一方須將有關更改通知安排另一方。

三、雙方的聯絡機關可為執行本安排的規定相互直接聯絡。

第四條 移交條件

被判刑人只可在下列條件下被移交：

(一) 引致判處刑罰的行為如發生在接收方司法管轄區內，依據接收方的法律亦構成刑事罪行；

(二) 被判刑人是接收方的永久性居民或與其有密切聯繫的人；

(三) 判決屬確定或最後判決，並且在移交方司法管轄區內就該罪行或任何其他罪行並無進一步刑事法律程序正在待決；

(四) 對被判刑人所判處的刑罰的刑期是：

(1) 有限期的，且請求移交時尚須服刑最少六個月，但在例外情況下，雙方仍可協商移交；

(2) 沒有限期的；

(3) 不固定限期的。

(五) 移交方、接收方及被判刑人均同意移交，但如鑒於被判刑人年齡、身體或精神狀況而安排任何一方認為有需要時，則被判刑人可由其合法代理人代表其表示同意移交。

第五條 移交程序

一、雙方均須盡力告知被判刑人可根據本安排申請移交。被判刑人可向任何一方表明欲被移交的意願。

二、移交請求可由移交方或接收方向另一方以書面方式提出。在

決定是否提出移交請求前，移交方或接收方須根據本安排第四條所列的條件考慮被判刑人的意願。

三、提出或接獲移交請求後，移交方須向接收方提供以下資料：

- (一) 被判刑人的身份資料，包括姓名、性別、父母姓名、出生日期及地點；如被判刑人在接收方內有居所，亦應包括其居所地址；
- (二) 經認證的判決書副本或定罪及刑罰證明書的文本；
- (三) 刑滿日期(如適用的話)、被判刑人已服刑的時間，以及被判刑人因勞動、行為良好、審訊前囚禁或其他原因而獲得的減刑；
- (四) 據以定罪及判刑的事實陳述，以及訂定有關罪行的法律的陳述；
- (五) 被判刑人或其合法代理人所作的同意移交的聲明書；
- (六) 指明被判刑人是接收方永久性居民的證明文件或聲明，或說明被判刑人與接收方有密切聯繫的資料。

四、安排任何一方均須在提出移交請求前，或決定是否同意移交前，因應另一方的要求而盡可能向其提供任何有關的資料、文件或陳述。

五、如接收方在移交前希望透過其指派的官員，核實被判刑人根據本安排第四條(五)項所作出的同意移交是否自願地作出並完全知道移交的後果，則移交方須給予接收方這樣的機會。

六、移交方當局須在與接收方商定的日期以及位於移交方司法管轄區的地點，將被判刑人移交予接收方當局。

第六條 管轄權的保留

移交方保留對為判決的再審而提起的任何上訴作出裁判或是覆核其法院所定罪行及所判刑罰的司法管轄權。

第七條

執行刑罰的程序

一、對被判刑人移交後繼續執行刑罰，須適用接收方的法律及程序，包括規管有關監禁、囚禁或其他剝奪自由方式的服刑條件的法律及程序，以及包括訂定以假釋、有條件釋放、減刑或以其他方式將監禁、囚禁或其他剝奪自由方式的刑期縮短的法律及程序。

二、接收方執行刑罰時，除本條第三款另有規定外，須受移交方所定刑罰的刑期或刑滿日期所約束。

三、如刑罰在性質或刑期方面與接收方的法律有抵觸，則接收方可依據本身法律對相類罪行規定的刑罰作出相應的調整。為此，接收方的聯絡機關應在決定是否同意移交前，將擬調整有關刑罰告知移交方。

四、在調整刑罰時，接收方的有關當局須以移交方法院判決中指出的事實為依據。調整後的刑罰在性質或刑期上，均不得較移交方所判處的刑罰更為嚴厲，亦不得將剝奪自由刑轉換為財產刑或其他任何非剝奪自由刑的處罰。

五、如根據接收方的法律，被移交的被判刑人是未成年人，則不論被判刑人根據移交方的法律屬何種地位，接收方都可將該被判刑人當作未成年人看待。

六、一俟獲悉移交方按照本安排第六條作出赦免被判刑人的決定，或作出任何導致有關刑罰被撤銷或縮短的決定或措施後，接收方須立即修改或終止執行有關刑罰。

七、在下列任一情況下，接收方須通知移交方：

- (一) 被判刑人獲得釋放；
- (二) 被判刑人獲有條件釋放；

(三) 被判刑人在刑罰執行完畢之前逃離監禁。

八、如移交方提出要求，則接收方須提供其所要求的有關執行刑罰的其他資料。

第八條 被判刑人過境

如安排任何一方擬將被判刑人移交至第三方司法管轄區，或從第三方司法管轄區移交被判刑人，則安排另一方可予以合作，為該被判刑人的過境提供方便。擬進行該種移交的一方須事先將上述過境事宜通知另一方。

第九條 語言

依本安排提出的移交請求以及所有應提供的其他有關文件及資料，應以接收方的任何正式語文寫成，或提供任何該正式語文的譯本。

第十條 費用

一、移交被判刑人或在移交被判刑人後繼續執行刑罰所涉及的費用，須由接收方負擔，但完全發生在移交方的費用除外。

二、接收方可向被移交的被判刑人追討移交所涉及的全部或部分費用。

第十一條 開始生效

本安排將於雙方以書面通知對方已遵從各自為使本安排生效的規

定之日起三十日後開始生效。

第十二條 適用

本安排亦適用於其開始生效前宣判的刑罰的執行。

第十三條 單方終止

一、安排任何一方可隨時以書面方式通知另一方終止本安排。在此情況下，本安排於另一方接獲通知之日起三個月後失效。

二、根據本條第一款規定失效的本安排，可繼續適用於其失效前被移交的被判刑人的刑罰的執行。

第十四條 解決爭議

因解釋、適用或執行本安排而發生的任何爭議，應通過雙方聯絡機關協商解決。

AGREEMENT BETWEEN

**THE GOVERNMENT OF THE HONG KONG
SPECIAL ADMINISTRATIVE REGION OF THE
PEOPLE’S REPUBLIC OF CHINA**

AND

THE GOVERNMENT OF THE PORTUGUESE REPUBLIC

CONCERNING

TRANSFER OF SENTENCED PERSONS

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 the Portuguese Republic,

Desiring to co-operate in the transfer of sentenced persons to facilitate their reintegration into society,

Have agreed as follows :

ARTICLE 1

DEFINITIONS

For the purposes of this Agreement

- (a) “transferring Party” means the Party from whose jurisdiction the sentenced person may be, or has been, transferred;
- (b) “receiving Party” means the Party to whose jurisdiction the sentenced person may be, or has been, transferred;

- (c) “sentenced person” means a person who is required to be detained in a prison, a hospital or any other institution in the jurisdiction of the transferring Party to serve a sentence;
- (d) “sentence” means any punishment or measure involving deprivation of liberty ordered by a court for a limited or unlimited period of time in the course of the exercise of its criminal jurisdiction.

ARTICLE 2

GENERAL PRINCIPLES

A sentenced person may be transferred from the jurisdiction of the transferring Party to the jurisdiction of the receiving Party in accordance with the provisions of this Agreement in order to serve the sentence imposed on him.

ARTICLE 3

CENTRAL AUTHORITIES

- (1) The Central Authorities of the Parties shall process requests for transfer in accordance with the provisions of this Agreement.
- (2) The Central Authority for the Portuguese Republic is the Procuradoria-Geral da República. The Central Authority for the Hong Kong Special Administrative Region is the Secretary for Justice or an officer authorized by the Secretary for Justice. Either Party may change its Central Authority in which case it shall notify the other of the change.
- (3) The Central Authorities may communicate directly with each other for the purposes of this Agreement.

ARTICLE 4

CONDITIONS FOR TRANSFER

A sentenced person may be transferred only on the following conditions :

- (a) the conduct on account of which the sentence has been imposed would constitute a criminal offence according to the law of the receiving Party if it had been committed within the jurisdiction of its courts;
- (b) where the Hong Kong Special Administrative Region is the receiving Party the sentenced person is a permanent resident of the Hong Kong Special Administrative Region or has close ties with the Hong Kong Special Administrative Region;
- (c) where the Portuguese Republic is the receiving Party the sentenced person is a Portuguese citizen or has permanent resident status in the Portuguese Republic or has close ties with the Portuguese Republic;
- (d) the sentence imposed on the sentenced person is one of imprisonment, confinement or any other form of deprivation of liberty in any institution:
 - (i) for life;
 - (ii) for an indeterminate period on account of mental incapacity;
or
 - (iii) for a fixed period of which at least one year remains to be served at the time of the request for transfer;
- (e) the judgement is final and no further proceedings relating to the offence or any other offence are pending in the transferring Party;
- (f) the transferring and receiving Parties and the sentenced person all agree to the transfer, provided that, 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.

ARTICLE 5

PROCEDURE FOR TRANSFER

- (1) The Parties shall endeavour to inform sentenced persons of their right to transfer under this Agreement.
- (2) A request for transfer may be made by the transferring Party or the receiving Party to the other Party. If the sentenced person wishes to be transferred, he may express such a wish to the transferring Party or the receiving Party, which shall consider such an expressed wish against the criteria set out in Article 4 before deciding whether to request a transfer.
- (3) Where a request for transfer has been made the transferring Party shall provide the receiving Party with the following information :
 - (a) a statement of the facts upon which the conviction and sentence were based and the text of the legal provisions creating the offence;
 - (b) the termination date of the sentence, if applicable, and the length of time already served by the sentenced person and any remissions to which he is entitled on account of work done, good behaviour, pre-trial confinement or other reasons;
 - (c) a copy of the certificate of conviction and sentence.
- (4) Either Party shall, as far as possible, provide the other Party, if it so requests, with any relevant information, documents or statements before making a request for transfer or taking a decision on whether or not to agree to the transfer.
- (5) The transferring Party shall afford an opportunity to the receiving Party, if the receiving Party so desires, to verify through an official designated by the receiving Party, prior to the transfer, that the sentenced person's consent to the transfer in accordance with Article 4(f) of this Agreement is given voluntarily and with full knowledge of the consequences thereof.
- (6) Delivery of the sentenced person by the authorities of the transferring Party to those of the receiving Party shall occur on a date and at a place within the jurisdiction of the transferring Party agreed upon by both Parties.

ARTICLE 6

ENFORCEMENT OF SENTENCE

- (1) The transferring Party shall retain jurisdiction for the review of convictions and sentences imposed by its courts.
- (2) Subject to paragraph (5), the receiving Party shall enforce the sentence as if the sentence had the same duration or termination date as advised by the transferring Party and had been imposed in the receiving Party.
- (3) The continued enforcement of the sentence after transfer shall be governed by the laws and procedures of the receiving Party, including those governing conditions for 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, remission or otherwise.
- (4) 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. The adapted sentence shall be no severer than that imposed by the transferring Party in terms of nature or duration.
- (5) The receiving Party shall modify or terminate enforcement of the sentence as soon as it is informed of any decision by the transferring Party in accordance with paragraph (1) to pardon the sentenced person, or of any other decision or measure of the transferring Party that results in cancellation or reduction of the sentence.
- (6) The receiving Party may, if a sentenced person would be a juvenile according to its law, treat the sentenced person as a juvenile regardless of his or her status under the law of the transferring Party.
- (7) The receiving Party shall inform the transferring Party:
 - (a) when the sentenced person is discharged;
 - (b) if the sentenced person is granted conditional release; or
 - (c) if the sentenced person has escaped from custody before enforcement of the sentence has been completed.

- (8) The receiving Party shall, if the transferring Party so requests, provide any information requested in relation to the enforcement of the sentence.

ARTICLE 7

TRANSIT OF SENTENCED PERSON

If either Party transfers a sentenced person to or from another jurisdiction, the other Party may co-operate in facilitating the transit through its territory of such a sentenced person. The Party intending to make such a transfer shall give advance notice to the other Party of such transit.

ARTICLE 8

LANGUAGE OF DOCUMENTATION

All requests for transfer submitted by one Party shall be in, or translated into, an official language of the other Party. All documents submitted by a Party in support of a request for transfer shall be accompanied, if so required by the other Party, by a translation into an official language of that other Party.

ARTICLE 9

EXPENSES

The expenses incurred in the transfer of the sentenced person or in the continued enforcement of the sentence after transfer shall be borne by the receiving Party. The receiving Party may, however, seek to recover all or part of the cost of transfer from the sentenced person.

ARTICLE 10

SETTLEMENT OF DISPUTES

Any dispute arising out of the interpretation, application or implementation of this Agreement shall be resolved through diplomatic channels if the Central Authorities are themselves unable to reach agreement.

ARTICLE 11

FINAL PROVISIONS

- (1) This Agreement shall enter into force thirty days after the date on which the Parties have notified each other in writing that their respective requirements for the entry into force of this Agreement have been completed with.
- (2) Either Party may terminate this Agreement at any time by giving notice to the other. In that event the Agreement shall cease to have effect three months after the date of receipt of the notice.

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 twenty-fourth day of May in the year of two thousand and one in duplicate in the Chinese, Portuguese and English languages, each text being equally authentic.

**FOR THE GOVERNMENT OF
THE HONG KONG SPECIAL
ADMINISTRATIVE REGION
OF THE PEOPLE'S
REPUBLIC OF CHINA:**

**FOR THE GOVERNMENT OF
THE PORTUGUESE
REPUBLIC:**

Regina Ip

Jaime Gama