

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

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

Purpose

This paper sets out the Administration's response to the issues raised by the Bills Committee at its meeting on 18 April 2005.

Administration's Response

- (a) *Explain the details of adaptation of sentence, including the legal basis for adaptation and whether the provisions, if any, contravened the court's jurisdiction in sentencing, the mechanism for adaptation, and whether such adaptation had been made in the past.*

Meaning of adaptation of sentence

The article on adaptation of sentence [see Articles 7.3 and 7.4 of the Arrangement between Hong Kong Special Administrative Region Government and the Macau Special Administrative Region Government on Transfer of Sentenced Persons (the Arrangement)] is modeled on the Strasbourg Convention on the Transfer of Sentenced Persons¹. Similar provisions can be found in the Agreements on transfer of sentenced persons between Hong Kong and six other foreign jurisdictions.

If the two Parties have different penal systems with regard to the division

¹ The Strasbourg Convention on the Transfer of Sentenced Persons is multilateral treaty reflecting the internationally accepted principles for the transfer of sentenced persons between jurisdictions.

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. Such provision allows adaptation of sentence within certain limits. The receiving Party may adapt the sanction to the nearest equivalent available under its own law, provided that this does not result in more severe punishment or longer detention. The receiving Party does not substitute a sanction for that imposed in the transferring Party. The adaptation procedure enables the receiving Party merely to adapt the sanction to an equivalent sanction prescribed by its own law in order to make the sentence enforceable. The receiving Party thus continues to enforce the sentence imposed in the sentencing Party, but it does so in accordance with the requirements of its own penal system.

Adaptation of sentence in respect of a transferred sentenced person may result in reduction in the term of the sentence to be served by that person in the receiving Party. But this process of adaptation should not be viewed as usurping the Hong Kong courts' function; rather it is entirely consistent with the power of the Chief Executive(CE) to commute the penalties imposed by the courts under Article 48(12) of the Basic Law. The same process is applicable when Hong Kong is the receiving Party, if the relevant sentence is by its nature or duration incompatible with the law of Hong Kong. Indeed, adaptation is consistent with international practice as evidenced by the Conventions and Treaties in this area.

Mechanism for adaptation

Where a sentenced person in the transferring Party applies to return to, say, Hong Kong to serve the remainder of his sentence imposed by a

court in the transferring Party 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. In this way, Hong Kong will not be enforcing a harsher sentence on the sentenced person than if that person had committed a similar offence in Hong Kong and had been convicted and sentenced by a court in Hong Kong. The adapted sentence will be reflected in the inward warrant issued by the CE pursuant to the s.5 of the Transfer of Sentenced Persons Ordinance (Cap. 513), in which the last date of imprisonment is specified.

The receiving Party, shall inform the transferring Party of the adapted sentence beforehand so that the transferring Party as well as the sentenced person can decide if they would agree to the transfer.

Statistics

So far, the Administration has not processed any transfer involving adaptation of sentence.

- (b) *Provide information on the number of sentenced persons transferred from Thailand to Hong Kong and how their remaining terms of sentence were dealt with.*

Three cases of inward transfers from Thailand to Hong Kong under the TSP Ordinance have been completed since June 1997. All of the sentenced persons have to serve the remainder of their sentences imposed by the courts in Thailand. This is reflected in the inward warrants which specify the terms of sentence to be served by them in Hong Kong.

- (c) *Advise on the legal provisions for dealing with the remaining term of sentence of a sentenced person transferred to Hong Kong and the enforcement of the remaining sentence.*

As mentioned in (a), the inward warrant issued by the CE will specify the term to be served by the transferred sentenced person.

Under section 2 of the Prisons Ordinance (Cap. 234), the term of “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 him (or any part thereof) in that place.” Thus, once transferred back to Hong Kong, the provisions of the Prisons Ordinance and its subsidiary legislation become applicable to the prisoner in question.

- (d) *Explain the procedure for transfer of a sentenced person from Hong Kong to a receiving jurisdiction.*

Please refer to **Annex A** for the details of the procedures for transfer of a sentenced person from Hong Kong to a receiving jurisdiction.

- (e) *Considering 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.*

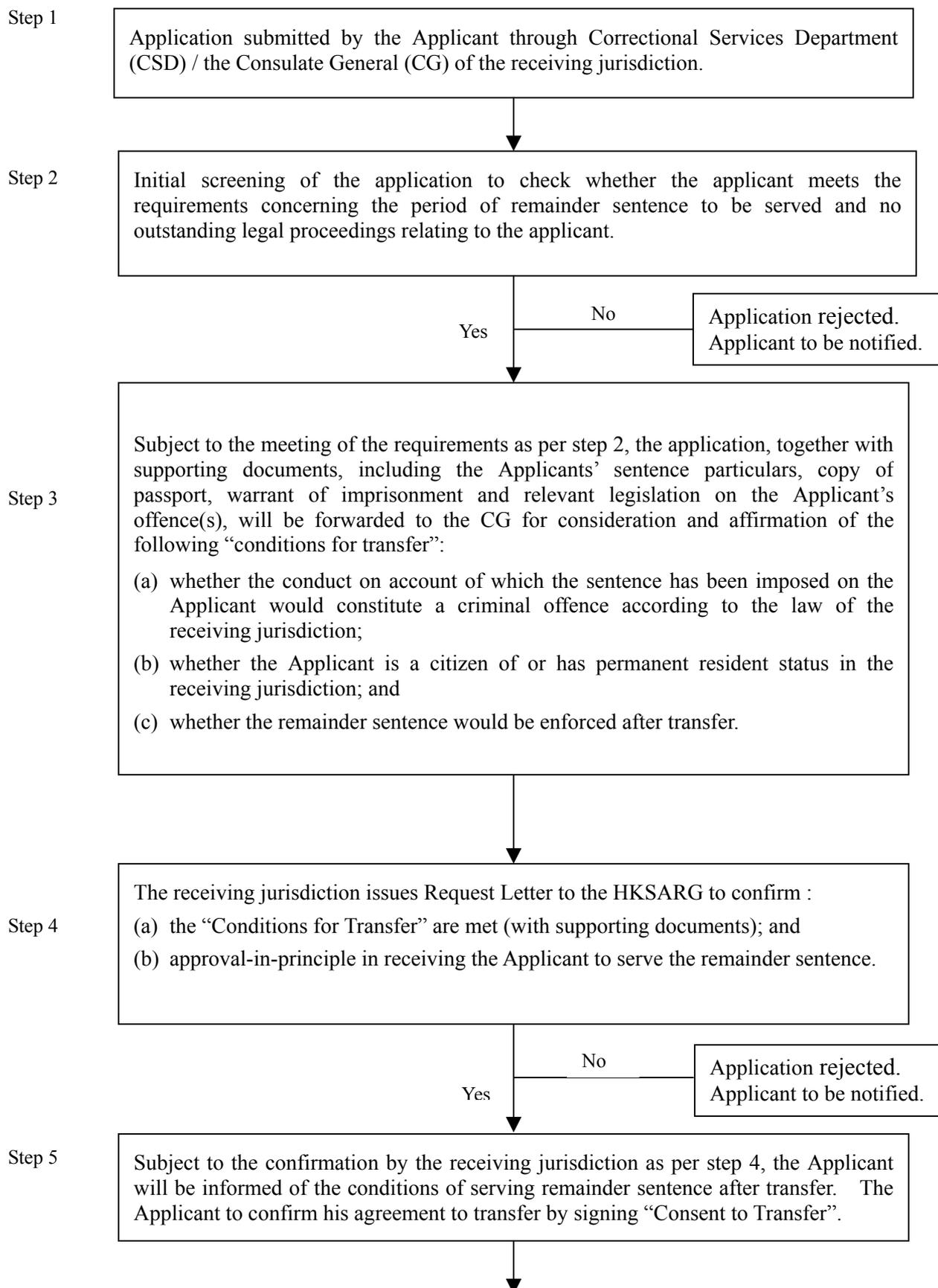
The article on retention of jurisdiction (see Article 6 of the Arrangement) is adopted from the Strasbourg Convention on the Transfer of Sentenced Persons. Similar provisions or provisions having the same effect can be

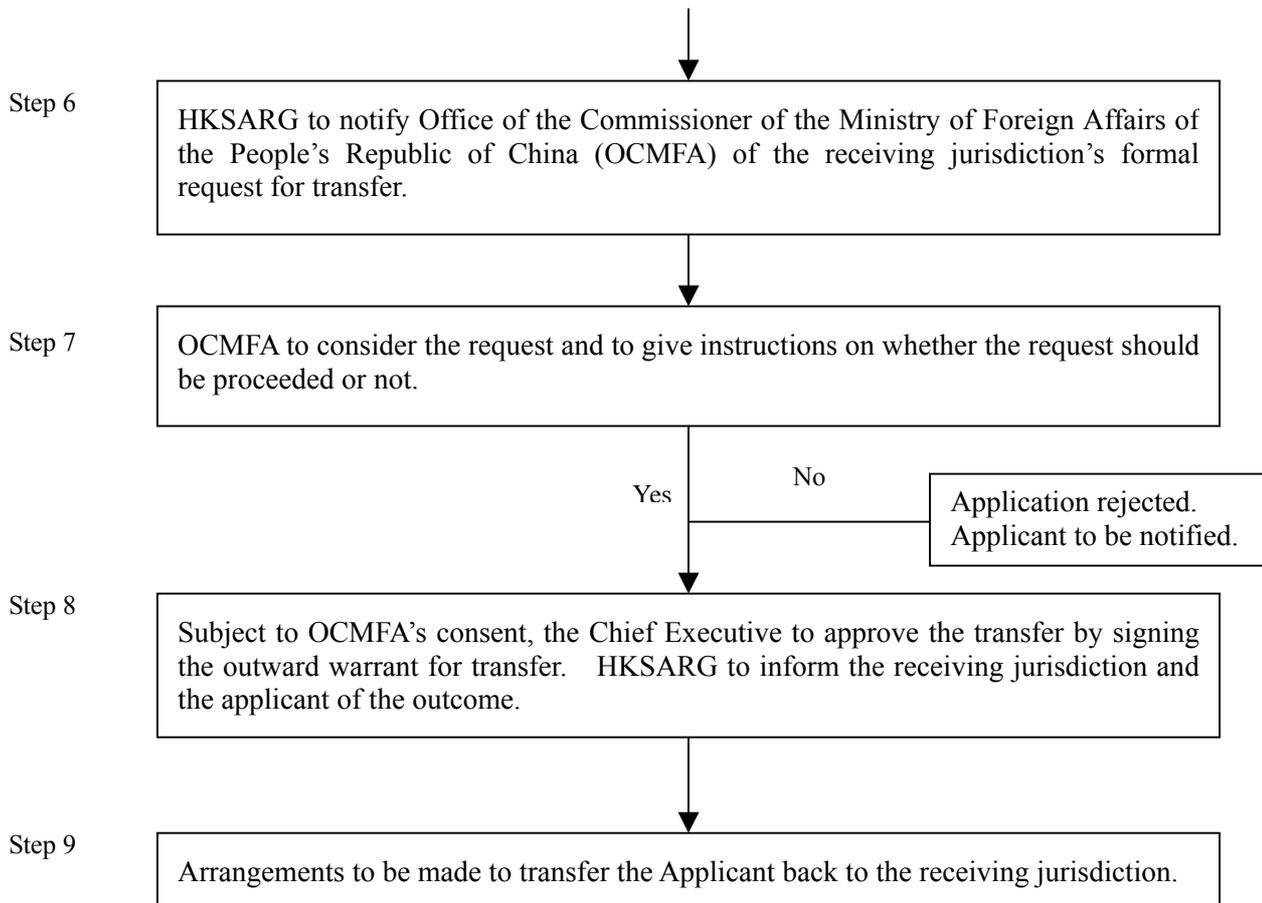
found in the existing TSP Agreements between Hong Kong and foreign jurisdictions. Pursuant to these provisions, the transferring Party retains exclusive jurisdiction regarding the judgments of its courts, the sentences imposed by them, and any procedures for revision, modification or cancellation of those judgments and sentences. On the other hand, the agreements specify that 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. The HKSAR Government, as the transferring Party, shall inform an applicant of the rights and benefits which would no longer be applicable to him in the receiving jurisdiction after transfer.

Signing of the Arrangement

The Arrangement between Hong Kong Special Administrative Region Government and the Macau Special Administrative Region Government on Transfer of Sentenced Persons was signed in Hong Kong on 20 May 2005. A copy of the signed Arrangement, in Chinese only, is at **Annex B** for reference.

Transfer of Sentence Persons
Flow Chart on Processing Outward Transfer Applications





香港特別行政區政府與澳門特別行政區政府

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，經香港特別行政區政府與澳門特別行政區政府(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、香港特別行政區的聯絡機關是律政司。澳門特別行政區的聯絡機關是行政法務司。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。

下列簽署人，經其各自政府正式授權，已在本安排上簽字為證。

本安排於二零零五年五月二十日在香港簽訂，一式兩份，每份均以中文寫成。

香港特別行政區政府
代表

澳門特別行政區政府
代表



李少光



張國華