

File Ref.: SBCR 34/2857/97 Pt. 4

LEGISLATIVE COUNCIL BRIEF

Transfer of Sentenced Persons Ordinance (Chapter 513)

Transfer of Sentenced Persons (Amendment) (Macau) Bill

INTRODUCTION

At the meeting of the Executive Council on 14 December 2004, the Council ADVISED and the Chief Executive ORDERED that the Transfer of Sentenced Persons (Amendment) (Macau) Bill (the Bill), at **Annex A**, should be introduced into the Legislative Council.

JUSTIFICATIONS

Background

2. Transfer of sentenced persons (TSP) to their places of origin, by returning them to an environment free of language and cultural barriers and where their friends and relatives can visit them on a regular basis, is conducive to their rehabilitation. Our policy is to facilitate such transfers between the Hong Kong Special Administrative Region (HKSAR) and other places.

3. Consistent with this policy, we have been in discussion with the Macau Special Administrative Region (MSAR) Government on an arrangement for the transfer of sentenced persons between Hong Kong and Macau. Article 95 of the Basic Law provides that the HKSAR may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other.

4. The discussions with Macau have concluded and a text of the TSP arrangement has been agreed. The terms of the arrangement are in conformity with the main principles and provisions enshrined in the Transfer of Sentenced Persons Ordinance, Cap. 513 (the Ordinance) and the TSP agreements that we have signed with other jurisdictions, which include, for example, the conditions of transfer, procedures for transfer, retention of jurisdiction and continued enforcement of sentence.

5. However, the Ordinance only enables the transfer of sentenced persons between the HKSAR and places outside China, and not transfers between the MSAR and HKSAR. To implement the TSP arrangement between the two SARs, it is necessary to amend the Ordinance to extend its application to include MSAR. Accordingly, section 2 of the Ordinance will need to be amended to make the Ordinance applicable to the transfer of sentenced persons between the MSAR and HKSAR.

6. Other provisions in the Ordinance will need corresponding amendments. First, section 4 of the Ordinance provides that the Chief Executive (CE) shall not issue an outward warrant unless, among other things, the sentenced person is a national of the receiving jurisdiction, or in the opinion of the CE, otherwise has close ties with that place. Under the TSP arrangement between the MSAR and HKSAR, one of the conditions for transfer is that a sentenced person must be a permanent resident of the receiving jurisdiction or has close ties with it. It is therefore necessary to amend the Ordinance to provide that in case of a transfer to Macau, the sentenced person must be a permanent resident of the MSAR or, in the opinion of the CE, has close ties with it.

7. Secondly, section 9 of the Ordinance requires the CE to notify the Central People's Government (CPG) of every relevant request for transfer and to comply with instructions given by the CPG. These requirements are not applicable to transfers between the MSAR and HKSAR. Amendment to the Ordinance is necessary so that section 9 will not be applicable to transfers between the MSAR and HKSAR.

THE BILL

8. Clause 3 extends the application of the Ordinance to the arrangements for the transfer of sentenced persons between the two SARs.

9. Clause 4 empowers the CE to issue an outward warrant for the transfer to Macau of a sentenced person who is a permanent resident of the MSAR or, in CE's opinion, has close ties with it.

10. Clause 5 amends section 9 of the Ordinance so that the requirement for the CE to notify the CPG will not be applicable to transfers between the MSAR and HKSAR.

11. The existing provisions being amended are at **Annex B**.

LEGISLATIVE TIMETABLE

12. The legislative timetable is as follows -

Publication in the Gazette	24 December 2004
First Reading and commencement of Second Reading debate	5 January 2005
Resumption of Second Reading debate, committee stage and Third Reading	To be notified

13. Subject to the passage of the Bill by the Legislative Council, the MSAR/HKSAR TSP Arrangement will be signed and brought into force.

IMPLICATIONS OF THE PROPOSAL

14. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. It has no direct economic, productivity, environmental or sustainability implications. There may be manpower and other resource implications for the Security Bureau, Department of Justice, Hong Kong Police Force, Correctional Services Department and Immigration Department in processing future applications and effecting transfers, which will be absorbed by the relevant bureau/departments. No additional civil service post will be created for the purpose.

15. The Bill does not affect the current binding effect of the Ordinance.

PUBLIC CONSULTATION

16. The Legislative Council Panel on Security has been briefed on the legislative proposal contained in the Bill at its meeting on 2 November 2004.

PUBLICITY

17. A press release will be issued on 17 December 2004. A spokesman will be available to answer media enquiries.

ENQUIRIES

18. Enquiries concerning the Bill may be directed to Mr Charles Wong, Principal Assistant Secretary for Security at 2810 3435.

Security Bureau
17 December 2004

A BILL

To

Amend the Transfer of Sentenced Persons Ordinance to make the Ordinance applicable to the arrangements for the transfer of sentenced persons between Hong Kong and Macau.

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Transfer of Sentenced Persons (Amendment) (Macau) Ordinance.

2. Commencement

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

3. Interpretation

Section 2 of the Transfer of Sentenced Persons Ordinance (Cap. 513) is amended, in the definition of “arrangements for the transfer of sentenced persons” –

- (a) in paragraph (a)(i), by repealing everything after “outside” and substituting “the People’s Republic of China; or”;
- (b) in paragraph (a)(ii), by repealing everything after “outside” and substituting “the People’s Republic of China; or”;
- (c) in paragraph (a) –
 - (i) by adding –

- “(iii) Government of the Macau Special Administrative Region and the Government; and”;
- (ii) by repealing “以下政府或地方的”;
- (d) in paragraph (b), by repealing everything after “purposes” and substituting –
 - “of –
 - (i) the transfer of a sentenced person or sentenced persons to Hong Kong from that place or from Macau; or
 - (ii) the transfer of a sentenced person or sentenced persons to that place or to Macau from Hong Kong;”.

4. Restrictions on issue of warrant

Section 4(2)(b) is repealed and the following substituted –

- “(b) (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
- (ii) in the case of a transfer to Macau, the sentenced person is a permanent resident of Macau or, in the opinion of the Chief Executive, otherwise has close ties with Macau; ”.

5. Chief Executive to give notice to Central People’s Government in relation to relevant requests

(1) Section 9(4)(b)(iii) is amended by repealing “outside Hong Kong” wherever it appears.

(2) Section 9(6) is amended, in the definition of “relevant request”, by repealing everything after “means” and substituting –

“_

- (a) a request to issue an inward warrant for the transfer of a sentenced person to Hong Kong from a place outside Hong Kong other than Macau;
- (b) a request to issue an outward warrant for the transfer of a sentenced person from Hong Kong to a place outside Hong Kong other than Macau; or
- (c) a request to transport in custody through Hong Kong a sentenced person from a place outside Hong Kong (other than Macau) to another place outside Hong Kong (other than Macau).”.

6. Inward and outward warrants

Schedule 1 is amended –

- (a) in Part 1, by repealing “19.....” and substituting “.....”;
- (b) in Part 2, by repealing “19.....” and substituting “.....”.

Explanatory Memorandum

The Transfer of Sentenced Persons Ordinance (Cap. 513) (“the Ordinance”) applies only to arrangements for the transfer of sentenced persons between Hong Kong and a place outside the People’s Republic of China. This Bill amends certain definitions in the Ordinance and the circumstances under which an outward warrant could be issued so as to put in place the necessary provisions for the implementation of the arrangement relating to the transfer of sentenced persons between the Government of the Hong Kong Special Administrative Region and the Government of the Macau Special Administrative Region when it enters into force.

Annex B

Chapter:	513	TRANSFER OF SENTENCED PERSONS ORDINANCE	Gazette Number	Version Date
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Section:	2	Interpretation	32 of 2000	09/06/2000
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In this Ordinance, unless the context otherwise requires-
 "arrangements for the transfer of sentenced persons" (移交被判刑人士的安排) means arrangements-

- (a) which are applicable to-
 - (i) the Government and the government of a place outside Hong Kong (other than the People's Republic of China or any part thereof); or
 - (ii) Hong Kong and a place outside Hong Kong (other than the People's Republic of China or any part thereof); and
- (b) for the purposes of the transfer of a sentenced person or sentenced persons to Hong Kong from that place or to that place from Hong Kong;

"court" (法院) includes a magistrate, tribunal and any other judicial authority of Hong Kong or a place outside Hong Kong;

"institution" (機構) includes a prison, hospital and reception centre;

"inward warrant" (移交入境手令) means a warrant issued under section 3(1)(a);

"outward warrant" (移交出境手令) means a warrant issued under section 3(1)(b);

"sentence" (刑、刑罰) means any punishment or measure involving the deprivation of liberty ordered by a court-

- (a) for a limited, unlimited or indeterminate period of time; and (Amended 32 of 2000 s. 24)
- (b) in the course of the exercise of its criminal jurisdiction;

"sentenced person" (被判刑人士) means a person who is required to be detained in an institution to serve a sentence.

Chapter:	513	TRANSFER OF SENTENCED PERSONS ORDINANCE	Gazette Number	Version Date
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Section:	4	Restrictions on issue of warrant	32 of 2000	09/06/2000
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- (1) The Chief Executive shall not issue an inward warrant unless-
 - (a) the acts or omissions constituting the conduct in respect of which the sentence was imposed amount to conduct which, if the conduct had occurred in Hong Kong, would constitute a criminal offence under the law of Hong Kong;
 - (b) the sentenced person-
 - (i) holds a permanent identity card within the meaning of the Registration of Persons Ordinance (Cap 177); or
 - (ii) in the opinion of the Chief Executive, otherwise has close ties with Hong Kong;
 - (c) the sentence imposed is for-
 - (i) life;
 - (ii) an indeterminate period; or (Amended 32 of 2000 s. 25)
 - (iii) a fixed period;

- (d) no further criminal proceedings relating to the sentenced person in respect of the conduct which gave rise to the sentence imposed are pending in the place outside Hong Kong; and
 - (e) an appropriate authority of the place outside Hong Kong and the sentenced person (or a person acting on his behalf) have consented to the transfer.
- (2) The Chief Executive shall not issue an outward warrant unless-
- (a) the acts or omissions constituting the conduct in respect of which the sentence was imposed amount to conduct which, if the conduct had occurred in the place outside Hong Kong, would constitute a criminal offence under the law of that place;
 - (b) the sentenced person-
 - (i) is a national of the place outside Hong Kong; or
 - (ii) in the opinion of the Chief Executive, otherwise has close ties with that place;
 - (c) the sentence imposed is for-
 - (i) life;
 - (ii) an indeterminate period; or (Amended 32 of 2000 s. 25)
 - (iii) a fixed period;
 - (d) no further criminal proceedings relating to the sentenced person in respect of the conduct which gave rise to the sentence imposed are pending in Hong Kong; and
 - (e) an appropriate authority of Hong Kong and the sentenced person (or a person acting on his behalf) have consented to the transfer.

(Amended 15 of 1999 s. 3)

Chapter:	513	TRANSFER OF SENTENCED PERSONS ORDINANCE	Gazette Number	Version Date
Section:	9	Chief Executive to give notice to Central People's Government in relation to relevant requests	15 of 1999	01/07/1997

Remarks:

Adaptation amendments retroactively made - see 15 of 1999 s. 3

(1) The Chief Executive shall cause the Central People's Government to be given notice of every relevant request.

(2) Where the Central People's Government issues an instruction to the Chief Executive to take, or not to take, an action-

- (a) in relation to a relevant request; and
- (b) on the ground that if the instruction were not complied with the interests of the People's Republic of China in matters of sovereignty, security or public order would be significantly affected,

then the Chief Executive shall comply with that instruction.

(3) Without prejudice to the operation of subsection (2), a relevant request shall not be complied with until-

- (a) the expiration of the relevant period; or
- (b) the Central People's Government advises the Chief Executive that the request may be complied with,

whichever first occurs.

(4) A notice under subsection (1) shall-

- (a) be accompanied by-
 - (i) a copy of the relevant request;
 - (ii) copies of the accompanying documents;
 - (iii) a summary of the material facts supporting the request;

- (iv) particulars of any places through which the sentenced person will be transported; and
- (v) such other documents relating to the request as may be required by the Central People's Government;
- (b) if not already provided by virtue of paragraph (a), clearly identify-
 - (i) the person making the request;
 - (ii) the sentenced person; and
 - (iii) in the case of a request referred to in-
 - (A) paragraph (a) of the definition of "relevant request", the place outside Hong Kong from which it is proposed to transfer the sentenced person into Hong Kong;
 - (B) paragraph (b) of that definition, the place outside Hong Kong to which it is proposed to transfer the sentenced person from Hong Kong;
 - (C) paragraph (c) of that definition, the places outside Hong Kong from and to which it is proposed to transport the sentenced person in custody through Hong Kong;
- (c) if not already provided by virtue of paragraph (a), state-
 - (i) the acts or omissions constituting the conduct in respect of which the sentence was imposed;
 - (ii) the sentence imposed;
 - (iii) the period of that sentence already served by the sentenced person; and
 - (iv) if that sentence is a fixed period, the date on which the sentenced person will cease to serve that sentence;
- (d) in the case of a request referred to in paragraph (a) or (b) of the definition of "relevant request", and if not already provided by virtue of paragraph (a), provide a copy of the sentenced person's (or a person acting on his behalf) consent to the transfer;
- (e) in the case of a request referred to in paragraph (c) of the definition of "relevant request", and if not already provided by virtue of paragraph (a) and if practicable, state particulars of the time the sentenced person is to be transported in custody through Hong Kong; and
- (f) in the case of a request referred to in paragraph (a) or (b) of the definition of "relevant request"-
 - (i) state the basis on which the request is being made; and
 - (ii) state advice with reasons whether the request may be complied with.

(5) Where a relevant request has been complied with, the Chief Executive shall, if the Central People's Government so requires, provide the Central People's Government with particulars of any evidence or documents provided pursuant to the request.

(6) In this section-
 "relevant period" (有關的期間), in relation to a relevant request, means the period commencing on the receipt of the request and expiring upon the elapse of such number of days as are agreed in writing from time to time by the Central People's Government and the Chief Executive for the purposes of this definition;

"relevant request" (有關的要求) means a request to-

- (a) issue an inward warrant;
- (b) issue an outward warrant; or
- (c) transport in custody through Hong Kong the sentenced person from a place outside Hong Kong to another place outside Hong Kong.

(Amended 15 of 1999 s. 3)

Chapter:	513	TRANSFER OF SENTENCED PERSONS ORDINANCE	Gazette Number	Version Date
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Schedule:	1	INWARD AND OUTWARD WARRANTS	15 of 1999	01/07/1997
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Remarks:
Amendments retroactively made - see 15 of 1999 s. 3

[section 3]

PART 1

INWARD WARRANT

To the Commissioner of Correctional Services and to each and all of the officers acting under his orders.

Whereas, pursuant to the Transfer of Sentenced Persons Ordinance (Cap 513), this warrant authorizes the bringing into Hong Kong of (name of sentenced person) from (name of the place outside Hong Kong) to (name of institution) to serve in Hong Kong the sentence imposed on him in the said place [until (date on which the said sentence terminates)]*:

YOU, THE SAID OFFICERS, ARE HEREBY COMMANDED to take the said sentenced person and to safely convey him to the said institution, and there deliver him to the Commissioner of Correctional Services, together with this warrant:

YOU, THE SAID COMMISSIONER OF CORRECTIONAL SERVICES, ARE HEREBY COMMANDED to receive the said sentenced person into your custody, and detain him to serve the said sentence [until the said date]*; and for your so doing this shall be sufficient warrant.

Dated this day of 19

.....
(Signature) Chief Executive

* Delete if the sentence imposed is for life.

PART 2

OUTWARD WARRANT

To the Commissioner of Correctional Services, to each and all of the officers acting under his orders and to the escorting officer representing the appropriate authority of the place outside Hong Kong.

Whereas, pursuant to the Transfer of Sentenced Persons Ordinance (Cap 513), this warrant authorizes the taking of (name of sentenced person) from (name of institution) and his delivery into the custody of the said escorting officer for the purposes of his removal to (name of the place outside Hong Kong) to serve in the said place the sentence imposed on him in Hong Kong:

YOU, THE SAID COMMISSIONER OF CORRECTIONAL SERVICES, ARE HEREBY COMMANDED to release the said sentenced person from the said institution into the custody of the said officers for the delivery of the said sentenced person to the said escorting officer, together with this warrant:

YOU, THE SAID OFFICERS, ARE HEREBY COMMANDED to take the said sentenced person and to safely convey him to the said escorting officer, and there deliver him into the custody of the said escorting officer, together with this warrant:

YOU, THE SAID ESCORTING OFFICER, ARE HEREBY COMMANDED to remove the said sentenced person to the said place; and for your so doing this shall be sufficient warrant.

Dated this day of 19

.....
(Signature) Chief Executive
(Amended 15 of 1999 s. 3)