



JUDGMENT UPDATE

basis of a view that it would be preferable for the offence to admit of a defence of belief. Having regard to the vital importance of protecting young girls, and in all the circumstances, the CFA felt

unable to say that imposing absolute liability for unlawful sexual intercourse with a girl under the age of 16 is arbitrary. It held that it is a choice constitutionally open to the legislature.



SIDELIGHTS

Mutual Legal Assistance between Hong Kong and Macau - the Arrangement for the Transfer of Sentenced Persons between Hong Kong and Macau



BL 93 of the Macau SAR provides the constitutional basis of judicial assistance between Macau and other parts of China, including Hong Kong. It is substantially identical to BL 95 of the HKSAR: Macau may, through consultations and in accordance with law, maintain judicial relations with the judicial organs of other parts of the country, and they may render assistance to each other.

Pursuant to the authorization under BL 93 of the Macau SAR and BL 95 of the HKSAR, Hong Kong and Macau have made efforts to develop mutual legal assistance between them. This resulted in, among other things, the signing of the Arrangement for the Transfer of Sentenced Persons between the two SARs on 20 May 2005.

Under the Arrangement, a sentenced person of either jurisdiction who is a permanent resident of the other jurisdiction or has close ties with it may return to the other jurisdiction to serve out his sentence. By returning sentenced persons to an environment where their friends and relatives can visit them on a regular basis, it is believed that the Arrangement would be conducive to their rehabilitation.

The terms of the Arrangement (including the conditions of transfer, procedures for transfer, retention of jurisdiction and continued enforcement of sentence) are in conformity with the main

principles and provisions enshrined in the Transfer of Sentenced Persons Ordinance (Cap 513) (“the Ordinance”), and the agreements on transfer of sentenced persons which Hong Kong has signed with other jurisdictions. For instance, one of the conditions of transfer is the agreement of the transferring and receiving jurisdictions as well as the sentenced person. The Arrangement, though, departs from the previous signed agreements in one major respect. Whereas the latter agreements provide that a sentenced person who wishes to apply for transfer must have a remaining sentence of at least one year, the remaining sentence requirement in the Arrangement is set at six months. This was based on the consideration that due to the close proximity between Hong Kong and Macau, it is likely that the procedures for processing requests for transfer will be completed within a short period of time.

For the purpose of giving effect to the Arrangement, the Transfer of Sentenced Persons (Amendment) (Macau) Ordinance 2005 was enacted to amend the Ordinance which then only provided for transfer of sentenced persons between Hong Kong and places outside China. Macau also gazetted the Arrangement in June 2005 with a view to implementing the Arrangement.

The Arrangement came into effect on 1 December 2005.



Application of Conventions Relating to Mutual Legal Assistance in Hong Kong

Effective mutual legal assistance (“MLA”) is an important tool to combat transnational crime. Whatever the applicable legal system, criminal investigations and proceedings are based on evidence and increasingly that evidence is located outside of national borders. As a result there is now an increased emphasis on a global level on mutual co-operation in the seeking and rendering of assistance for the purpose of cross border evidence gathering.

The Mutual Legal Assistance in Criminal Matters Ordinance (Cap 525) was enacted to enable assistance to be given by law enforcement agencies in Hong Kong to authorities abroad who are investigating or prosecuting criminal offences. The Ordinance permits assistance to be granted if there is a bilateral MLA agreement in place, an applicable multilateral agreement which contains MLA obligations, or if the requesting party can give an undertaking that it will comply with a future request from Hong Kong (a reciprocity undertaking).

Under BL 96 of the HKSAR, with the assistance or authorization of the CPG, the HKSARG may make appropriate arrangements with foreign states for reciprocal juridical assistance.¹

In addition to bilateral agreements, a number of multilateral agreements which contain MLA obligations are applicable to the HKSAR. They include:

- (a) Convention for the Suppression of Unlawful Seizure of Aircraft;
- (b) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;
- (c) Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents;

- (d) International Convention Against the Taking of Hostages;
- (e) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- (f) Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and its Protocol;
- (g) The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances;
- (h) International Convention for the Suppression of Terrorist Bombings;
- (i) International Convention for the Suppression of the Financing of Terrorism; and
- (j) The United Nations Convention Against Corruption.

A contracting party to a convention may seek assistance from the HKSAR pursuant to the provisions in the convention for investigation or prosecution of relevant offences. Hong Kong may provide assistance to contracting parties in accordance with requirements of the MLA Ordinance. Conversely the HKSAR may make requests to these parties to seek assistance for the purposes of a criminal investigation or proceeding in Hong Kong.

A convention requires a party, when executing requests for assistance, to provide the widest measure of assistance compatible with its domestic law or practice. Under the MLA Ordinance, the Secretary for Justice, who is the Central Authority for matters relating to mutual legal assistance in Hong Kong, may make arrangements for the provision of the following types of assistance: taking of oral evidence and production of things

¹ As at 24 November 2006, Hong Kong has concluded 21 bilateral MLA agreements with foreign states.



before a magistrate, search and seizure of material under search warrants, obtaining of documents and other material under production orders, arranging for travel of persons in custody and other persons to another place to assist in criminal investigation or proceedings, enforcement of external confiscation orders and restraining of dealing in proceeds of crime and service of process.

The MLA Ordinance has recently been amended to enable a court in Hong Kong to conduct examination of persons by means of live television link ie evidence by video conferencing for the purpose of civil or criminal proceedings in a foreign country.²

These conventions help the contracting parties to cope effectively with criminal cases having transnational implications.

² See Evidence (Miscellaneous Amendments) Ordinance 2003.

ABBREVIATIONS

BL	Basic Law / Basic Law Article
BoR	Hong Kong Bill of Rights
CA	Court of Appeal
CE	Chief Executive
CE in C	Chief Executive in Council
CFA	Court of Final Appeal
CFI	Court of First Instance
CPG	Central People's Government
ExCo	Executive Council
HKSAR	Hong Kong Special Administrative Region
HKSARG	Government of the HKSAR
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LegCo	Legislative Council
NPC	National People's Congress
NPCSC	Standing Committee of the NPC
PRC	People's Republic of China

Legal Policy Division

Department of Justice

4/F, High Block, Queensway Government Offices
66 Queensway, Hong Kong
Enquiries: 2867 2167
Fax: 2869 0720
E-mail: lpd@doj.gov.hk
Internet Home Page Address: www.doj.gov.hk

National Studies And Training Services Unit

Civil Service Training And Development Institute

Civil Service Bureau

4/F, North Point Government Offices
333 Java Road, North Point, Hong Kong
Enquiries: 2231 3976
Fax: 2541 4038
Internet Home Page Address: www.csb.gov.hk

Constitutional Affairs Bureau

3/F, Main and East Wings
Central Government Offices
Lower Albert Road, Hong Kong
Enquiries: 2810 2059
Fax: 2179 5284
E-mail: cabengq@cab.gov.hk
Internet Home Page Address: www.info.gov.hk/cab

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