



International Transfer of Prisoners (Military Commission of the United States of America) Regulations 2007¹

Select Legislative Instrument 2007 No. 79

I, PHILIP MICHAEL JEFFERY, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following Regulations under the *International Transfer of Prisoners Act 1997*.

Dated 29 March 2007

P. M. JEFFERY
Governor-General

By His Excellency's Command

PHILIP RUDDOCK
Attorney-General

1 Name of Regulations

These Regulations are the *International Transfer of Prisoners (Military Commission of the United States of America) Regulations 2007*.

2 Commencement

These Regulations commence on the day after they are registered.

3 Definition

In these Regulations:

Act means the *International Transfer of Prisoners Act 1997*.

4 Application of the Act

For section 8 of the Act, the Act applies to the United States of America for the transfer to Australia of a prisoner:

- (a) serving a sentence of imprisonment ordered by a military commission established under chapter 47A of title 10 of the United States Code; and
- (b) subject to the arrangement set out in Schedule 1.

Note For the declaration of the United States of America as a transfer country, see the *International Transfer of Prisoners (Transfer of Sentenced Persons Convention) Regulations 2002*.

Schedule 1 Arrangement

(regulation 4)

Arrangement between the Government of Australia and the Government of the United States of America on the Transfer of Prisoners Sentenced by United States Military Commissions Established Pursuant to the Military Commissions Act of 2006 and the United States Code and on Co-operation in the Enforcement of Sentences Imposed by those Military Commissions.

The Government of Australia and the Government of the United States of America;

Referring to their mutual undertaking to work towards pursuing the option of repatriating any Australian national sentenced to a term of imprisonment by a United States military commission to Australia for service of sentence;

Have put into place the following Arrangement to facilitate such repatriations based on their mutual understandings.

Paragraph 1 – Definitions

For the purposes of this Arrangement:

- a. “applicable United States area” means the United States Naval Station at Guantanamo Bay, Cuba, an area over and within which the United States exercises complete jurisdiction and control pursuant to an Agreement between the United States and Cuba for the lease to the United States of lands in Cuba for Coaling and Naval Stations, signed at Habana, February 16, 1903 and entered into force February 23, 1903, and continued in effect pursuant to the Treaty of Relations between the United States and Cuba, signed at Washington, May 29, 1934 and entered into force June 9, 1934;

- b. “sentence” means any punishment or measure involving deprivation of liberty ordered by a United States military commission, on account of a criminal offense;
- c. “judgment” means a decision or order of a United States military commission imposing a sentence;
- d. “prisoner” means a person sentenced to a term of imprisonment by a United States military commission;
- e. “United States military commission” means a military commission established pursuant to the Military Commissions Act of 2006 and the United States Code.;
- f. “United States Code” refers to chapter 47A of title 10 of the United States Code, as amended by section 3(a) of the Military Commissions Act of 2006; and
- g. “national of Australia” means a person who is an Australian citizen; or is permitted to travel to, enter and remain in Australia indefinitely pursuant to the *Migration Act 1958* and has community ties with a State or a Territory.

Paragraph 2 – General principles

1. The undersigned Governments are to afford each other the widest measure of cooperation in respect of the transfer of prisoners in accordance with the provisions of this Arrangement.
2. A person sentenced by a United States military commission in the applicable United States area may be transferred to Australia in accordance with the provisions of this Arrangement, in order to serve the sentence imposed on him or her.
3. Transfer may be requested only by the Government of Australia or the Government of the United States of America, upon application to either by a prisoner desiring to be transferred under this Arrangement.

Paragraph 3 – Duty to furnish information

1. Any national of Australia charged with an offense or offenses before a United States military commission is to be informed of the substance of this Arrangement.

2. Any prisoner to whom this Arrangement may apply is to be afforded the opportunity to apply for transfer.

3. If the prisoner expresses an interest to the Government of the United States of America in being transferred under this Arrangement, the Government of the United States of America is to so inform the Government of Australia as soon as practicable, and after the judgment becomes final, is to promptly make available to the prisoner means whereby he or she may communicate with a representative of the Government of Australia.

4. The prisoner is to be informed, in writing, of any action taken by the Government of the United States of America or the Government of Australia under the preceding paragraphs, as well as of any decision taken by either Government on a request for transfer under Paragraph 4.

Paragraph 4 – Requests and replies

1. Requests for transfer and replies, including denials of and agreements to transfer, are to be made by the Government of Australia or the Government of the United States of America in writing.

2. Requests and replies are to be communicated through the Secretary of the Attorney-General's Department for the Government of Australia and the Legal Advisor to the Appointing Authority for Military Commissions for the Government of the United States of America.

3. Either Government may deny a request for transfer.

Paragraph 5 – Supporting documents

1. Where a request for transfer has been made and not denied, the Government of the United States of America is to provide the Government of Australia with the following information:

- a. a statement advising of the identity and nationality of the prisoner, referencing the document relied upon to establish these facts;
- b. a statement of facts upon which the sentence was based;

- c. the termination date of the sentence, the length of time already served by the prisoner and any credits to which he or she is entitled as a result of circumstances, including on account of good behavior and other reasons;
- d. a certified copy of all judgments, sentences and determinations provided for in the Military Commissions Act of 2006 and the United States Code concerning the prisoner from the date of his detention in the custody of the United States of America, and the law of which such judgments, sentences and determinations are based;
- e. any medical or social reports on the prisoner, information about any such treatment he or she has received while in the custody of the United States of America, and any recommendation for his or her further such treatment in Australia; and
- f. any additional information requested by the Government of Australia, that is relevant to the transfer of the prisoner under this Arrangement.

Paragraph 6 – Conditions for transfer

- 1. Any transfer under this Arrangement is to be on the following conditions:
 - a. the prisoner is a national of Australia;
 - b. the sentence imposed on the prisoner by a United States military commission is one of imprisonment;
 - c. the judgment is final;
 - d. the Government of the United States of America and the Government of Australia and the prisoner all consent to the transfer provided that where in view of his age or physical or mental condition either Party considers it necessary, the prisoner's consent may be given by a person entitled to act on his behalf; and
 - e. the prisoner will be treated humanely and in accordance with the laws and international obligations of Australia.

Paragraph 7 – Consent and its verification

1. If both Governments agree to the transfer, the Government of the United States of America is to ask the prisoner to give consent to the transfer and is to ensure that, if the prisoner gives consent, it is given voluntarily and with full knowledge of the legal consequences thereof.
2. The Government of the United States of America is to afford an opportunity to the Government of Australia, if the Government of Australia so desires to verify, through a visit by an official of the Government of Australia to meet with the prisoner prior to the transfer, that the prisoner's consent to the transfer under the Arrangement is given voluntarily and with full knowledge of the consequences thereof.
3. The Government of the United States of America is to inform the prisoner, in writing, that should the prisoner not consent to the transfer he or she will not be detained by the Government of the United States of America beyond the term of imprisonment imposed by the United States military commission or otherwise penalized.
4. Once consent is obtained from the Government of the United States of America, the Government of Australia, and the prisoner, the prisoner is to be transferred as soon as practicable.

Paragraph 8 – Effect of transfer for the United States

1. The taking into charge of the prisoner by the appropriate authorities in Australia is to have the effect of suspending the enforcement of the sentence by the United States of America.
2. The Government of the United States of America is to no longer enforce the sentence if Australia considers enforcement of the sentence to have been completed.

Paragraph 9 – Effect of transfer for Australia

1. The competent authorities of Australia are to continue the enforcement of the sentence immediately upon the prisoner being taken into Australian custody.

2. The enforcement of the sentence in Australia is to be governed by the law of Australia and Australia alone is to be competent to take all appropriate decisions.

Paragraph 10 – Continued enforcement

1. Consistent with its law, the Government of Australia is to respect and maintain the legal nature and duration of the sentence as determined by the United States.

2. If, however, this sentence is by its nature or duration incompatible with the law of Australia, or its law so requires, Australia may, by a court or administrative order, adapt the sanction to the punishment or measure prescribed by its own law for a similar offense. As to its nature, the punishment or measure is to, as far as possible, correspond with that imposed by the sentence to be enforced. The punishment is not to aggravate, by its nature or duration, the sanction imposed by the United States.

Paragraph 11 – Amnesty, commutation

Either Government may grant amnesty or commutation of the sentence in accordance with its Constitution or other laws.

Paragraph 12 – Review of judgment, pardon

The Government of the United States of America alone is to have the right to decide on any application for review of the judgment or to pardon an offense.

Paragraph 13 – Termination of enforcement

The Government of Australia is to terminate enforcement of the sentence as soon as it is informed by the Government of the United States of America of any decision or measure as a result of which the sentence ceases to be enforceable.

Paragraph 14 – Information on enforcement

The Government of Australia is to provide information to the Government of the United States of America concerning the enforcement of the sentence:

- a. when the Government of Australia considers enforcement of the sentence to have been completed;
- b. if the prisoner has escaped from custody before enforcement of the sentence has been completed; or
- c. if the Government of the United States of America requests a special report.

Paragraph 15 – Signature and effective date

The effective date of the Arrangement will be the date of signature.

Paragraph 16 – Relationship to other Agreements and Arrangements

This Arrangement does not affect the rights and undertakings derived from extradition treaties and other treaties on international co-operation in criminal matters providing for the transfer of prisoners for purposes of confrontation or testimony.

Paragraph 17 – Withdrawal

Either Government may withdraw at any time from this Arrangement by written notice to the other Government.

Note

1. All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See www.frli.gov.au.