



# International Transfer of Prisoners (Hong Kong) Regulations 2006<sup>1</sup>

## Select Legislative Instrument 2006 No. 48

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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 17 March 2006

P. M. JEFFERY  
Governor-General

By His Excellency's Command

CHRISTOPHER MARTIN ELLISON  
Minister for Justice and Customs

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### 1 Name of Regulations

These Regulations are the *International Transfer of Prisoners (Hong Kong) Regulations 2006*.

### 2 Commencement

These Regulations commence on the day the Agreement comes into force for Australia.

### 3 Definitions

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

**Agreement** means the Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of Australia concerning the Transfer of Sentenced Persons, done at Hong Kong on 25 November 2005, a copy of the English text of which is set out in Schedule 1.

**Hong Kong** means the Hong Kong Special Administrative Region of the People's Republic of China.

**4 Declaration of Hong Kong as a transfer country**

Hong Kong is declared to be a transfer country.

**5 Application of the Act**

The Act applies to Hong Kong subject to the Agreement.

**Schedule 1      Agreement between the  
Government of the Hong Kong  
Special Administrative Region  
of the People's Republic of  
China and the Government of  
Australia concerning the  
Transfer of Sentenced  
Persons**

(regulation 3)

AGREEMENT BETWEEN THE GOVERNMENT OF THE HONG  
KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S  
REPUBLIC OF CHINA AND THE GOVERNMENT OF AUSTRALIA  
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 Australia (hereinafter referred to as "the Parties");

Taking into consideration the laws and regulations in force regarding law enforcement of the Parties and the desirability of enhancing their co-operative efforts in law enforcement and the administration of justice;

Desiring to co-operate in the enforcement of penal sentences; and

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

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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 place in the territory 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; and
- (e) “territory” means
  - (i) in respect of Hong Kong Special Administrative Region: the Hong Kong Special Administrative Region; and
  - (ii) in respect of Australia: the States and Territories of Australia, including external Territories of Australia.

## ARTICLE 2 GENERAL PRINCIPLES

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

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### 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 Hong Kong Special Administrative Region is the Secretary for Justice or an officer authorised by the Secretary for Justice. The Central Authority for Australia is the Australian Government Attorney-General's Department. 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 under this Agreement only on the following conditions:

- (a) the acts or omissions on account of which the sentence has been imposed constitute the essential elements of a criminal offence according to the law of the receiving Party, or would constitute such essential elements of a criminal offence if committed within the jurisdiction of the receiving Party. This requirement may be waived in a particular case if both Parties agree and to the extent permitted by the domestic law of the receiving Party;
- (b) where the Hong Kong Special Administrative Region is the receiving Party the sentenced person is a permanent resident of, or has close ties with, the Hong Kong Special Administrative Region;
- (c) where Australia is the receiving Party the sentenced person is:
  - (i) an Australian citizen; or

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- (ii) is permitted to travel to, enter and remain indefinitely in Australia in accordance with Australian law and has community ties with a State or Territory of Australia;
  - (d) the sentence imposed on the sentenced person is one of imprisonment, confinement or any other form of deprivation of liberty:
    - (i) for life;
    - (ii) for an indeterminate period; or
    - (iii) for a fixed period of which at least one year remains to be served at the time of the request for transfer. This requirement may be waived by the agreement of the Parties;
  - (e) the judgment is final and no other legal 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 of the sentenced person either Party considers it necessary, the sentenced person's consent may be given by a person entitled to act on their behalf;
  - (g) where Australia is the transferring Party, and where the sentenced person was sentenced under the laws of an Australian State or Territory, the State or Territory Government enforcing the sentence agrees to the transfer;
  - (h) where Australia is the receiving Party, the Government of the Australian State or Territory in which the sentence will be enforced agrees to the transfer; and
  - (i) the sentenced person has been fully informed by the receiving Party of any costs associated with the transfer that the receiving Party may seek to recover from the sentenced person in accordance with Article 12 (2).

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ARTICLE 5  
PROCEDURE FOR TRANSFER

- (1) The Parties shall endeavour to inform sentenced persons of the substance of this Agreement.
- (2)
  - (a) If the sentenced person wishes to be transferred, they may express such a wish to the transferring Party or the receiving Party, either of whom must inform the other Party in writing.
  - (b) A request for transfer may be made by the transferring Party or the receiving Party to the other Party.
  - (c) Requests for transfer shall be in writing and shall include the following information:
    - (i) the name, date and place of birth of the sentenced person;
    - (ii) a statement of the citizenship, nationality or residence status of the sentenced person; and
    - (iii) the location of the sentenced person and current address.
- (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 a statement of the relevant law 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 they are entitled on account of work done, good behaviour, pre-trial confinement or other reasons;
  - (c) a copy of the certificate or record of conviction and sentence and, if available, copies of any judgments and sentencing remarks;



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- (d) details of any request for extradition of the sentenced person that has been made to the transferring Party or of any State that has expressed interest in extraditing the sentenced person or that is likely, in the opinion of the transferring Party, to request extradition;
  - (e) any reports including corrections, medical or social reports on the sentenced person, information about their treatment in the transferring Party, and any recommendation for their further treatment in the receiving Party; and
  - (f) any other additional information requested by the transferring Party.
- (4) The receiving Party shall provide the transferring Party with the following information before transfer, if requested by the transferring Party:
- (a) a document or statement indicating that the sentenced person complies with the conditions in Article 4 (b) or 4 (c) as the case may be;
  - (b) a statement that the acts or omissions on account of which the sentence has been imposed constitute the essential elements of a criminal offence according to the law of the receiving Party or would constitute such essential elements of a criminal offence if committed within the jurisdiction of the receiving Party, alternatively, a statement that the receiving Party waives this requirement to the extent permitted by its domestic law;
  - (c) a statement describing how the sentenced person's sentence would be enforced by the receiving Party; and
  - (d) any other additional information.
- (5) 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.
- (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 territory of the transferring Party as agreed upon by both Parties.

## ARTICLE 6 CONSENT OF THE SENTENCED PERSON

- (1) The transferring Party shall ensure that the sentenced person consents to the transfer voluntarily and with full knowledge of the legal consequences thereof. The procedure for giving such consent shall be governed by the law of the transferring Party.
- (2) 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) is given voluntarily and with full knowledge of the legal consequences thereof.

## ARTICLE 7 RETENTION OF JURISDICTION

The transferring Party shall retain jurisdiction for the review, revision, modification or cancellation of convictions and sentences imposed by its courts.

## ARTICLE 8 CONTINUED ENFORCEMENT OF SENTENCE

- (1) 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 as if the sentence had been imposed in the receiving Party.
- (2) 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.

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- (3) If the sentence is by its nature or duration incompatible with the law of the receiving Party, the receiving Party may adapt the sentence in accordance with the sentence prescribed by its own law for a similar offence. When adapting the sentence, the appropriate authorities of the receiving Party shall be bound by the findings of fact, insofar as they appear from any opinion, conviction, judgment, or sentence imposed by the transferring Party. The adapted sentence shall be no more severe than that imposed by the transferring Party in terms of nature or duration.
  - (4) 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 their status under the law of the transferring Party.
  - (5) Following the transfer of a sentenced person, each Party may grant pardon, amnesty or commutation of the sentence in accordance with its Constitution or other laws.
  - (6) 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 Article 7 or paragraph (5) of this Article to pardon the sentenced person, or of any other decision or measure of the transferring Party that results in cancellation, commutation, termination or reduction of the sentence.
  - (7) The Parties shall inform the sentenced person in writing of any action or decisions taken by the transferring Party or the receiving Party under paragraphs (2) to (6) of this Article.

#### ARTICLE 9 INFORMATION ON ENFORCEMENT OF SENTENCE

The receiving Party shall provide information to the transferring Party concerning enforcement of the sentence -

- (a) if the sentenced person is granted conditional release;
- (b) when it considers enforcement of the sentence to have been completed;

- (c) if the sentenced person has escaped from custody before enforcement of the sentence has been completed;
- (d) if the transferring Party requests a special report.

#### ARTICLE 10 TRANSIT OF SENTENCED PERSONS

If either Party transfers a sentenced person to or from a place outside of its territory the other Party shall, subject to its domestic law, 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 11 LANGUAGE

Requests for transfer and accompanying documents shall be submitted in, or accompanied by a translation into, an official language of the receiving Party.

#### ARTICLE 12 EXPENSES

- (1) The receiving Party shall bear the expenses of:
  - (a) the transfer of the sentenced person, except the expenses incurred exclusively in the territory of the transferring Party; and
  - (b) the continued enforcement of the sentence after transfer.
- (2) The receiving Party may, however, seek to recover all or part of the cost of transfer from the sentenced person.

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ARTICLE 13  
CONSULTATION

The Central Authorities of the Parties may consult with each other to promote the most effective use of this Agreement and to agree upon such practical measures as may be necessary to facilitate the implementation of this Agreement.

ARTICLE 14  
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 15  
TERRITORIAL APPLICATION

This Agreement shall apply to the territory of Australia and the territory of Hong Kong Special Administrative Region.

ARTICLE 16  
ENTRY INTO FORCE AND TERMINATION

- (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 the Agreement have been complied with.
- (2) This Agreement shall apply to any request for transfer presented after the entry into force of the Agreement even if the sentence was imposed before the date of entry into force of this Agreement.

- (3) Either Party may terminate this Agreement at any time by giving notice in writing 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 in duplicate at Hong Kong this twenty-fifth day of November, Two thousand and five in the Chinese 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

Ambrose S.K. Lee

[*Signature not reproduced*]

FOR THE GOVERNMENT OF  
AUSTRALIA

Murray Alexander Cobban

[*Signature not reproduced*]

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#### **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](http://www.frli.gov.au).