

EXPLANATORY STATEMENT

Select Legislative Instrument 2008 No. 24

Issued by the authority of the Minister for Home Affairs

International Transfer of Prisoners Act 1997

International Transfer of Prisoners (Transfer of Sentenced Persons Convention) Amendment Regulations 2008 (No. 1)

Section 58 of the *International Transfer of Prisoners Act 1997* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or as necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Act forms the basis for the International Transfer of Prisoners Scheme (the Scheme) in Australia. The Scheme allows Australians imprisoned overseas in a ‘transfer country’ to apply to return to Australia to serve the remainder of their sentence in an Australian prison. The Scheme also allows foreign nationals who are imprisoned in Australia to apply to serve the balance of their sentence in their home country, so long as their home country is a ‘transfer country’.

A ‘transfer country’ is defined in subsection 4(1) of the Act as ‘a foreign country or region that is declared by the regulations under section 8 to be a transfer country’. Subsections 8(2) and (3) of the Act allow regulations to declare that the Act applies in relation to a foreign country subject to the limitations, conditions, exceptions or qualifications necessary to give effect to a treaty. Section 4 of the Act defines ‘treaty’ to include a convention, protocol, agreement or arrangement.

The *International Transfer of Prisoners (Transfer of Sentenced Persons Convention) Regulations 2002* (the Principal Regulations) declare countries that are bound by the Convention on the Transfer of Sentenced Persons (the Convention) to be ‘transfer countries’ under the Act, subject to that Convention. This ensures that people imprisoned in Australia who are foreign nationals of those countries, and Australian’s imprisoned in those countries, can participate in the International Transfer of Prisoners Scheme established by the Act. The purpose of these Regulations is to eliminate the need to amend the Principal Regulations each time a new country becomes party to the Convention.

The Convention was done at Strasbourg on 21 March 1983, and was proposed within the framework of the Council of Europe. The Convention is open for accession by non-member States of the Council of Europe. Australia acceded to the Convention on 5 September 2002 and it entered into force for Australia on 1 January 2003.

The Principal Regulations originally listed the countries that are bound by the Convention (in Schedule 2), and declared the countries in that list to be ‘transfer countries’. Schedule 2 had been amended four times since the Principal Regulations came into force in December 2002. Prior to these Regulations Schedule 2 was out of date as it did not cover Russia and Mexico, for whom the Convention had recently come into force.

The Regulations repeal the list of countries in Schedule 2 and declare that each foreign country for whom the Convention is in force is a 'transfer country'. The Regulations include a note referring the reader to the Council of Europe's treaty website which contains a current list of countries for which the Convention is in force.

The approach of referring in regulations to foreign countries who are party to a Convention without listing those countries is not without precedent (see for example sub-regulation 4(1) of the *Mutual Assistance (Transnational Organised Crime) Regulations 2004*). Subsection 13(3) of the *Legislative Instruments Act 2003* allows things to be declared in regulations by referring to a class of things.

The federal and State agencies responsible for liaising with prisoners about Australia's International Transfer of Prisoners Scheme were informed about these regulations prior to them being made. In accordance with the requirement in section 54 of the Act, States and Territories will be informed when new countries become 'transfer countries' under the Act by virtue of becoming bound by the Convention. A list of 'transfer countries' is also available on the website of the Attorney-General's Department.

The Regulations will not impose any compliance costs on businesses, and will not restrict competition.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commenced on the day after they were registered on the Federal Register of Legislative Instruments.

Details of the Regulations are set out in the [Attachment](#).

Details of *International Transfer of Prisoners (Transfer of Sentenced Persons Convention) Amendment Regulations 2008 (No. 1)*

Regulation 1 is a citation provision.

Regulation 2 provides for the Regulations to commence on the day after they are registered on the Federal Register of Legislative Instruments.

Regulation 3 provides that the *International Transfer of Prisoners (Transfer of Sentenced Persons Convention) Regulations 2002* are amended by Schedule 1.

Schedule 1, item 1 rewords the declaration of ‘transfer country’ so that a transfer country is a foreign country for which the Convention is in force rather than a country listed in Schedule 2.

This item also inserts two notes to assist the reader. The first notes that the rules on when the Convention comes into force for a State are set out in Articles 18 and 19 of the Convention. The rules vary slightly for member States of the Council of Europe and non-member States. In most cases the Convention enters into force for a State on the first day of the month following the expiration of a period of three months after the date that State has deposited an instrument of ratification, acceptance or approval (for signatory States), or an instrument of accession (for non-member States that are not signatories), with the Secretary General of the Council of Europe.

The second note informs the reader that the Council of Europe’s treaty website contains a current list of countries for which the Convention is in force.

Schedule 1, item 2 provides that the Act applies to a transfer country, subject to the Convention. This means that people imprisoned in Australia who are foreign nationals of countries for which the Convention is in force, and Australian’s imprisoned in those countries, can participate in the International Transfer of Prisoners scheme established by the Act. In the event of any inconsistency between the Act and the Convention, the Convention will apply.

Schedule 1, item 3 repeals Schedule 2, which contained the list of countries to whom the Convention applies. This list is made redundant by the rewording of the declaration of ‘transfer country’ in Schedule 1, item 1 which no longer refers to Schedule 2. This change means that the Principal Regulations no longer need to be amended every time a new country becomes a party to the Convention.