



International Transfer of Prisoners (China) Regulations 2011¹

Select Legislative Instrument 2011 No. 114

I, QUENTIN BRYCE, 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 30 June 2011

QUENTIN BRYCE
Governor-General

By Her Excellency's Command

BRENDAN O'CONNOR
Minister for Justice

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1 Name of Regulations

These Regulations are the *International Transfer of Prisoners (China) Regulations 2011*.

2 Commencement

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

3 Repeal

The *International Transfer of Prisoners (China) Regulations 2008* are repealed.

4 Definitions

In these Regulations:

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

treaty means the treaty between the Government of Australia and the Government of the People's Republic of China concerning Transfer of Sentenced Persons, done at Sydney on 6 September 2007, a copy of the English text of which is set out in Schedule 1.

5 Declaration of China as a transfer country

For subsection 8 (1) of the Act, China is declared to be a transfer country for the purposes of the Act.

6 Application of the Act

For subsection 8 (2) of the Act, the Act applies to China subject to the treaty.

**Schedule 1 Treaty between the
Government of Australia and
the Government of the
People's Republic of China
concerning Transfer of
Sentenced Persons**

(regulation 4, definition of *treaty*)

Australia and the People's Republic of China (hereinafter referred to as "the Parties");

On the basis of mutual respect for sovereignty and equality and mutual benefit;

Desiring to cooperate in the enforcement of penal sentences; and

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

Have decided to conclude this Treaty and agreed as follows:

**ARTICLE 1
DEFINITIONS**

For the purposes of this Treaty:

- (a) "Transferring Party" means the party in which the sentence was imposed on the person who may be, or has been, transferred;
- (b) "Receiving Party" means the party to which the sentenced person may be, or has been, transferred;
- (c) "sentenced person" refers to a person who has been sentenced by a court or tribunal to imprisonment in the Transferring Party.

ARTICLE 2
GENERAL PROVISIONS

- (1) The Parties undertake to afford each other the widest measure of cooperation in respect of the transfer of sentenced persons in accordance with the provisions of this Treaty.
- (2) The Parties may, in accordance with the provisions of this Treaty, transfer a sentenced person to each other to enforce the sentence imposed against the person in the territory of the Receiving Party.

ARTICLE 3
CENTRAL AUTHORITIES

- (1) The Central Authorities of the Parties shall process requests for transfer in accordance with the provisions of this Treaty.
- (2) The Central Authorities referred to in paragraph (1) of this Article shall be the Australian Government Attorney-General's Department for Australia and the Ministry of Justice for the People's Republic of China. Should either Party change its designated Central Authority, it shall notify the other Party of such change in writing through diplomatic channels.
- (3) The Central Authorities shall communicate directly with each other for the purpose of this Treaty.

ARTICLE 4
CONDITIONS FOR TRANSFER

A sentenced person may be transferred only if:

- (a) the conduct on account of which the sentence was imposed against the sentenced person also constitutes an offence under the laws of the Receiving Party;
- (b) the sentenced person is a national of the Receiving Party. In exceptional circumstances both Parties can agree to waive this condition;

(c) the sentenced person has at least one year remaining to be served at the time of the request for transfer. In exceptional cases, the Parties may agree to a transfer even if the remaining period of time to be served by the sentenced person is less than one year;

(d) the judgment is final and no further legal proceedings relating to the offence, or any other offence, are pending in the Transferring Party; and

(e) the Transferring and Receiving Parties and the sentenced person all agree to the transfer. 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 the person's legal representative. The transfer, including terms relating to the recovery of any costs which may be incurred, must be consented to in writing by the sentenced person or their legal representative.

ARTICLE 5 DECISION TO TRANSFER

Each party may determine at its discretion whether or not to agree to the transfer requested by the other Party.

ARTICLE 6 NOTIFICATION

(1) The Parties shall endeavour to inform sentenced persons of the substance of this Treaty.

(2) The sentenced person shall be kept informed in writing of the progress of their application for transfer.

ARTICLE 7 REQUEST AND REPLY

(1) A sentenced person may apply to either Party for a transfer according to this Treaty. The Party to which the sentenced person has made an application for transfer must notify the other Party in writing of the application.

(2) A request for transfer may be made by either Party. The requested Party shall promptly inform the requesting Party of its decision whether or not to agree to the requested transfer.

(3) Requests for, and replies to, transfer shall be made in writing and transmitted through the channel as provided in Article 3.

ARTICLE 8

REQUIRED DOCUMENTS AND INFORMATION

(1) A request for transfer shall include the following:

- (a) the name, date and place of birth of the sentenced person;
- (b) a statement of the nationality of the sentenced person; and
- (c) the location where the sentenced person is being detained.

(2) Where a request for transfer has been made, unless it has been refused by either Party, the Transferring Party shall provide the Receiving Party with the following information and documents:

- (a) a certified copy of the judgment, statement of the facts upon which the conviction and sentence were based, and 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 including any pretrial confinement;
- (c) details of any request, if any, 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;
- (d) any corrections and medical reports on the sentenced person, including information about their treatment in the Transferring Party, and any recommendation for their further treatment in the Receiving Party; and
- (e) a copy of the written application for transfer by the sentenced person.

(3) The Receiving Party shall provide the Transferring Party with the following information and documents:

(a) a statement that the sentenced person is a national of the Receiving Party;

(b) a statement that the conditions included in Article 4(a) have been met; and

(c) a statement or information describing how the sentenced person's sentence would be enforced by the Receiving Party.

(4) Either Party shall, if requested and as far as possible, provide the other Party with any relevant documents, statements or information before making a request for transfer or taking a decision on whether or not to agree to a transfer.

ARTICLE 9 CONSENT OF THE SENTENCED PERSON AND VERIFICATION

(1) The Transferring Party shall ensure that the sentenced person or his or her legal representative voluntarily consents to the transfer with full knowledge of the legal consequences of the transfer; and makes a written declaration confirming that the consent is voluntary and made with full knowledge of the legal consequences of the transfer. The procedure for giving such consent shall be governed by the law of the Transferring Party.

(2) Where the Receiving Party requests, the Transferring Party shall afford the Receiving Party the opportunity to verify, through an official designated by the Receiving Party, that the sentenced person has consented in accordance with the conditions set out in paragraph (1) of this Article.

ARTICLE 10
DELIVERY OF THE SENTENCED PERSON

Where an agreement is reached on a transfer, the Parties shall determine the time, place in the territory of the Transferring Party, and procedure for the transfer, through consultation through the channels as provided in Article 3.

ARTICLE 11
RETENTION OF JURISDICTION

(1) The Transferring Party shall retain jurisdiction for the modification or cancellation of convictions and sentences imposed by its courts.

(2) 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 this Article that results in modification or cancellation of a conviction or sentence imposed by its courts.

ARTICLE 12
CONTINUED ENFORCEMENT OF SENTENCE

(1) After receiving the sentenced person, the Receiving Party shall continue to enforce the sentence pursuant to the nature and the duration of the sentence determined by the Transferring Party, as if the sentence had been imposed in the Receiving Party.

(2) If the sentence as determined by the Transferring Party 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 domestic law for a similar offence. When adapting the sentence:

(a) the Receiving Party shall be bound by the findings of facts insofar as they appear from the judgment imposed by the Transferring Party;

(b) the Receiving Party shall not adapt a penalty of deprivation of liberty to a pecuniary penalty;

(c) the adapted sentence shall, as far as possible, correspond with that imposed by the sentence in the Transferring Party;

(d) the adapted sentence shall be no more severe than that imposed by the Transferring Party in terms of nature or duration;

(e) the adapted sentence is not bound by the minimum duration of penalty applicable to a similar offence prescribed by the laws of the Receiving Party; and

(f) the period of time served by the sentenced person under a sentence of imprisonment in the Transferring Party shall be deducted.

(3) When adapting a sentence in accordance with paragraph (2) of this Article, the Receiving Party shall transmit a copy of the legal document on the adaptation to the Transferring Party.

ARTICLE 13

APPLICABLE LAW FOR THE CONTINUED ENFORCEMENT OF SENTENCE

(1) The continued enforcement of the sentence after transfer shall be governed by the laws and procedures of the Receiving Party.

(2) 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 the sentenced person's status under the law of the Transferring Party.

(3) The law of the Receiving Party shall apply to the sentenced person for the reduction of sentence, parole or other relevant measures during enforcement of sentence.

(4) Either Party may, in accordance with its domestic law, grant a pardon to the sentenced person transferred and shall inform promptly the other Party of the decision through the channel as provided in Article 3.

(5) The Receiving Party shall terminate enforcement of the sentence as soon as it is informed of any decision by the Transferring Party in accordance with paragraph (4) of this Article to pardon the sentenced person.

(6) The Receiving Party or the Transferring Party, as appropriate, shall inform the sentenced person in writing of any action or decisions taken under paragraphs (2) to (4) of this Article.

ARTICLE 14

INFORMATION ON ENFORCEMENT OF SENTENCE

The Receiving Party shall provide information to the Transferring Party concerning the enforcement of the sentence if:

- (a) the sentenced person is granted parole;
- (b) the enforcement of the sentence has been completed;
- (c) the sentenced person has escaped from custody or died before the enforcement of the penalty has been completed; or
- (d) the Transferring Party requests a specific statement.

ARTICLE 15

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, cooperate 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 except where air transportation is used and no landing in the territory of the other party is scheduled.

**ARTICLE 16
LANGUAGE**

For the purpose of this Treaty, the Parties shall communicate in their official language and provide a translation in the official language of the addressed Party.

**ARTICLE 17
EXPENSES**

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.

**ARTICLE 18
CONSULTATION AND SETTLEMENT OF DISPUTES**

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

(2) Any dispute arising out of the interpretation, application or implementation of this Treaty shall be resolved through diplomatic channels.

**ARTICLE 19
CERTIFICATION AND AUTHENTICATION**

Any documents provided through the Central Authorities in accordance with this Treaty shall not require any form of authentication or certification.

ARTICLE 20
ENTRY INTO FORCE AND TERMINATION

(1) Each Party shall inform the other by diplomatic note when all necessary steps have been taken for entry into force of this Treaty. This Treaty shall enter into force on the thirtieth day from the date of the later diplomatic note.

(2) The Treaty shall also be applicable to the transfer of sentenced persons against whom the sentence was imposed before its entry into force.

(3) Either Party may terminate this Treaty at any time by notice in writing to the other Party through diplomatic channels. Termination shall take effect on the one hundred and eightieth day after the date on which the notice is given.

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto by their respective Governments, have signed this Treaty. Done in duplicate at Sydney on the sixth day of September two thousand and seven in English and Chinese languages, each text being equally authentic.

For Australia

For the People's Republic of China

.....
Hon Philip Ruddock
Attorney-General

.....
HE Yang Jiechi
Minister of Foreign Affairs

Note

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