



Extradition (Hong Kong) Regulations 2008¹

Select Legislative Instrument 2008 No. 12

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 *Extradition Act 1988*.

Dated 5 March 2008

P. M. JEFFERY
Governor-General

By His Excellency's Command

BOB DEBUS
Minister for Home Affairs

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1 Name of Regulations

These Regulations are the *Extradition (Hong Kong) Regulations 2008*.

2 Commencement

These Regulations commence on the day on which the Protocol between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China amending the Agreement for the Surrender of Accused and Convicted Persons of 15 November 1993, done at Hong Kong on 19 March 2007, enters into force.

3 Repeal

The Extradition (Hong Kong) Regulations are repealed.

4 Definition

In these Regulations:

Act means the *Extradition Act 1988*.

5 Declaration of the Hong Kong Special Administrative Region of the People's Republic of China as an extradition country

For the definition of *extradition country* in section 5 of the Act, the Hong Kong Special Administrative Region of the People's Republic of China is declared to be an extradition country.

6 Application of Act

For subsection 11 (1) of the Act, the Act applies to the Hong Kong Special Administrative Region of the People's Republic of China, subject to:

- (a) the Agreement for the Surrender of Accused and Convicted Persons between the Government of Australia and the Government of Hong Kong, done at Hong Kong on 15 November 1993, a copy of which is set out in Schedule 1; and
- (b) the Protocol, amending the Agreement in paragraph (a), between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China, done at Hong Kong on 19 March 2007, a copy of which is set out in Schedule 2.

**Schedule 1 Agreement for the Surrender
of Accused and Convicted
Persons between the
Government of Australia and
the Government of Hong
Kong, done at Hong Kong on
15 November 1993**

(paragraph 6 (a))

AGREEMENT FOR THE
SURRENDER OF ACCUSED AND CONVICTED PERSONS
BETWEEN THE GOVERNMENT OF AUSTRALIA
AND THE GOVERNMENT OF HONG KONG

The Government of Australia and the Government of Hong Kong, having
been duly authorised to conclude this Agreement by the sovereign
government which is responsible for its foreign affairs,

Desiring to make provision for the surrender of persons accused or
convicted of a criminal offence;

Have agreed as follows:

ARTICLE 1

OBLIGATION TO SURRENDER

The Parties agree to surrender to each other, subject to the provisions laid
down in this Agreement, any person who is found in the jurisdiction of
the requested Party and who is wanted by the requesting Party for
prosecution or for the imposition or enforcement of a sentence in respect
of an offence described in Article 2.

ARTICLE 2

OFFENCES

(1) Surrender shall be granted for an offence coming within any of the following descriptions of offences in so far as it is according to the laws of both Parties punishable by imprisonment or other form of detention for more than one year, or by a more severe penalty:

- (i) offences relating to the unlawful taking of human life;
- (ii) genocide;
- (iii) offences relating to unlawful wounding or injuring; assault including assault occasioning bodily harm and threats to kill; intentional or reckless endangering of life;
- (iv) aiding, abetting, counselling or procuring suicide;
- (v) offences relating to the unlawful termination of pregnancy;
- (vi) kidnapping; abduction; false imprisonment; unlawful confinement; dealing in slaves or other persons; taking a hostage;
- (vii) stealing, abandoning, exposing or unlawfully detaining a child; any other offences involving the exploitation of children;
- (viii) offences of a sexual nature including rape, sexual assault, indecent assault and unlawful sexual acts upon children; statutory sexual offences;
- (ix) offences against laws relating to prostitution and premises kept for the purposes of prostitution;
- (x) offences against laws relating to drugs, including narcotics and psychotropic substances;
- (xi) theft, robbery, burglary (including breaking and entering); blackmail and extortion; handling or receiving stolen property; any offence against the law relating to unlawful deprivation of property;
- (xii) criminal damage to property; arson;
- (xiii) offences involving the unlawful use of computers;

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- (xiv) offences against the laws relating to fraudulent activities; obtaining property, money, valuable securities or pecuniary advantage by false pretences or deception; embezzlement; conspiracy to defraud; false accounting;
 - (xv) offences relating to fiscal matters, taxes or duties, notwithstanding that the law of the requested Party does not impose the same kind of tax or duty or does not contain a tax, duty, or customs regulation of the same kind as the law of the requesting Party;
 - (xvi) offences against the law relating to counterfeiting; forgery; uttering a forged or false document;
 - (xvii) offences against the laws relating to bankruptcy or insolvency;
 - (xviii) offences against the laws relating to companies and securities;
 - (xix) offences against the laws relating to corruption, including bribery, secret commissions, and breach of trust;
 - (xx) offences against the laws relating to the administration of justice; perjury; subornation of perjury; attempting to pervert the course of justice;
 - (xxi) offences relating to unlawful escape from custody; mutiny in prison;
 - (xxii) offences against the laws relating to firearms, ammunition or explosives;
 - (xxiii) unlawful use, possession, control, seizure or hijacking of aircraft, vessels or other means of transportation;
 - (xxiv) piracy;
 - (xxv) offences against the laws relating to the protection of public health and the environment;
 - (xxvi) smuggling; offences against laws relating to the import and export of prohibited items, including historical and archaeological items;
 - (xxvii) facilitating for gain the illegal immigration of persons;
 - (xxviii) offences for which surrender may be granted under international conventions binding on the Parties; offences created as a result of decisions of international organisations which are binding on the Parties;

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- (xxix) offences relating to the possession or laundering of proceeds obtained from the commission of any offence for which surrender may be granted under this Agreement;
- (xxx) aiding, abetting, counselling or procuring the commission of, inciting, being an accessory before or after the fact to, or attempting or conspiring to commit any offence for which surrender may be granted under this Agreement;
- (xxxi) any other offences for which surrender may be granted in accordance with the laws of both Parties.
- (2) Where surrender is requested for the purpose of carrying out a sentence, a further requirement shall be that in the case of a period of imprisonment or detention at least six months remain to be served.
- (3) For the purposes of this Article, in determining whether an offence is an offence punishable under the laws of both Parties the totality of the acts or omissions alleged against the person whose surrender is sought shall be taken into account without reference to the elements of the offence prescribed by the law of the requesting Party.
- (4) For the purposes of paragraph (1) of this Article, an offence shall be an offence according to the laws of both Parties if the conduct constituting the offence was an offence against the law of the requesting Party at the time it was committed and an offence against the law of the requested Party at the time the request for surrender is received.

ARTICLE 3

SURRENDER OF NATIONALS

- (1) The Government of Australia reserves the right to refuse the surrender of its nationals. The Government of Hong Kong reserves the right to refuse the surrender of nationals of the state whose Government is responsible for its foreign affairs.
- (2) Where the requested Party exercises this right, the requesting Party may request that the case be submitted to the competent authorities of the requested Party in order that proceedings for prosecution of the person may be considered.

ARTICLE 4

DEATH PENALTY

If the offence for which surrender is requested under this Agreement is punishable according to the law of the requesting Party with the death penalty, and if in respect of such an offence the death penalty is not provided for by the law of the requested Party or is not normally carried out, surrender may be refused unless the requesting Party gives such assurances as the requested Party considers sufficient that this penalty will not be imposed or if imposed will not be carried out.

ARTICLE 5

BASIS FOR SURRENDER

A person shall be surrendered only if the evidence be found sufficient according to the law of the requested Party either to justify the committal for trial of the person sought if the offence of which that person is accused had been committed in the territory of the requested Party or to prove that the person sought is the person convicted by the courts of the requesting Party.

ARTICLE 6

REFUSAL OF SURRENDER

- (1) A person shall not be surrendered if the requested Party has substantial grounds for believing:
- (a) that the offence of which that person is accused or was convicted is an offence of a political character;
 - (b) that the request for surrender (though purporting to be made on account of an offence for which surrender may be granted) is in fact made for the purpose of prosecution or punishment on account of race, religion, nationality or political opinions; or

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- (c) that the person might, if returned, be prejudiced at trial or punished, detained or restricted in his or her personal liberty by reason of race, religion, nationality or political opinions.

(2) For the purposes of paragraph (1), an offence of a political character does not include any offence in respect of which both Parties have an obligation in accordance with a multilateral agreement either to surrender the person sought or to submit the case to their competent authorities for decision as to prosecution.

(3) Surrender for an offence shall be refused if the person whose surrender is sought cannot under the law of either Party be prosecuted or punished for that offence.

ARTICLE 7

DISCRETIONARY REFUSAL OF SURRENDER

Surrender may be refused if the requested Party considers that:

- (a) the offence is, having regard to all the circumstances, not sufficiently serious to warrant the surrender;
- (b) there has been excessive delay, for reasons which cannot be imputed to the person sought, in bringing charges, in bringing the case to trial or in making the person serve his or her sentence or the remainder thereof;
- (c) the offence for which surrender is sought was committed within the jurisdiction of its courts;
- (d) the surrender might place that Party in breach of its obligations under international treaties; or
- (e) in the circumstances of the case, the surrender would be incompatible with humanitarian considerations in view of the age, health or other personal circumstances of the person sought.

ARTICLE 8

POSTPONEMENT OF SURRENDER

If the person sought is being proceeded against or is under punishment in the jurisdiction of the requested Party for any other offence, surrender shall be deferred until the conclusion of the proceedings and the execution of any punishment awarded.

ARTICLE 9

THE REQUEST AND SUPPORTING DOCUMENTS

- (1) Requests for surrender and related documents shall be conveyed through the appropriate authority as may be notified from time to time by one Party to the other.
- (2) The request shall be accompanied by:
 - (a) as accurate a description as possible of the person sought, together with any other information which would help to establish that person's identity, nationality and location;
 - (b) a statement of each offence for which surrender is sought and a statement of the acts and omissions which are alleged against the person in respect of each offence; and
 - (c) the text of the legal provisions, if any, creating the offence, and a statement of the punishment which can be imposed therefor and any time limit on the institution of proceedings, or on the execution of any punishment for that offence.
- (3) If the request relates to an accused person it shall also be accompanied by a copy of the warrant of arrest issued by a judge, magistrate or other competent authority of the requesting Party and by such evidence as, according to the law of the requested Party, would justify committal for trial if the offence had been committed within the jurisdiction of the requested Party.

(4) If the request relates to a person already convicted or sentenced, it shall also be accompanied by:

- (a) a copy of the certificate of the conviction or sentence; and
- (b) if the person was convicted but not sentenced, a statement to that effect by the appropriate court and a copy of the warrant of arrest; or
- (c) if the person was sentenced, a statement indicating that the sentence is enforceable and how much of the sentence has still to be served.

ARTICLE 10

AUTHENTICATION

(1) Any document that, in accordance with Article 9, accompanies a request for surrender shall be admitted in evidence, if authenticated, in any proceedings in the jurisdiction of the requested Party.

(2) A document is authenticated for the purposes of this Agreement if:

- (a) it purports to be signed or certified by a Judge, Magistrate or other officer authorised by the requesting Party; and
- (b) it purports to be sealed with an official or public seal of the requesting Party or of an officer of the requesting Party.

ARTICLE 11

LANGUAGE OF DOCUMENTATION

All documents submitted in accordance with this Agreement shall be in, or translated into, an official language of the requested Party, to be specified by the requested Party in each case.

ARTICLE 12

PROVISIONAL ARREST

(1) In urgent cases the person sought may, in accordance with the law of the requested Party, be provisionally arrested on the application of the requesting Party. The application for provisional arrest shall contain an indication of intention to request the surrender of the person sought and the text of a warrant of arrest or a judgment of conviction against that person, a statement of the penalty for that offence, and such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offence been committed, or the person sought convicted, within the jurisdiction of the requested Party.

(2) An application for provisional arrest may be forwarded through the same channels as a request for surrender or through the International Criminal Police Organisation (Interpol).

(3) The provisional arrest of the person sought shall be terminated upon the expiration of forty-five days from the date of arrest if the request for surrender has not been received, unless the requesting Party can justify continued provisional arrest of the person sought in which case the period of provisional arrest shall be terminated upon the expiration of a reasonable time not being more than a further fifteen days. This provision shall not prevent the re-arrest or surrender of the person sought if the request for that person's surrender is received subsequently.

ARTICLE 13

ADDITIONAL INFORMATION

(1) If the information communicated by the requesting Party is found to be insufficient to allow the requested Party to make a decision in pursuance of this Agreement, the latter Party shall request the necessary supplementary information and may fix a time-limit for receipt thereof.

(2) If the person whose surrender is sought is under arrest and the additional information furnished is not sufficient in accordance with this Agreement or is not received within the time specified, the person may be discharged. Such discharge shall not preclude the requesting Party from making a fresh request for the surrender of the person.

ARTICLE 14

CONCURRENT REQUESTS

If the surrender of a person is requested concurrently by one of the Parties and a state with whom Australia or Hong Kong, whichever is being requested, has agreements or arrangements for the surrender of accused and convicted persons, the requested Party shall make its decision having regard to all the circumstances including the provisions in this regard in any agreements in force between the requested Party and the requesting Parties, the relative seriousness and place of commission of the offences, the respective dates of the requests, the nationality and ordinary place of residence of the person sought and the possibility of subsequent surrender to another state, and furnish the other Party with information justifying its decision in the event of surrender of the person to another jurisdiction.

ARTICLE 15

REPRESENTATION AND COSTS

(1) The requested Party shall make all necessary arrangements for and meet the costs of any proceedings arising out of a request for surrender and shall otherwise represent the interests of the requesting Party.

(2) If it becomes apparent that exceptional expenses may be incurred as a result of a request for surrender the Parties shall consult with a view to deciding how these expenses will be met.

(3) The requested Party shall bear the expenses arising out of the arrest and detention of the person whose surrender is sought until that person is surrendered. The requesting Party shall bear all subsequent expenses.

ARTICLE 16

ARRANGEMENTS FOR SURRENDER

- (1) The requested Party shall, as soon as a decision on the request for surrender has been made, communicate that decision to the requesting Party.
- (2) When a person is to be surrendered, that person shall be sent by the authorities of the requested Party to such convenient place of departure within that Party's jurisdiction as the requesting Party shall indicate.
- (3) Subject to the provisions of paragraph (4) of this Article, the requesting Party shall remove the person within the period specified by the requested Party and if the person is not removed within that period the requested Party may refuse to surrender that person for the same offence.
- (4) If circumstances beyond its control prevent a Party from surrendering or taking over the person to be surrendered, it shall notify the other Party. In that case, the two Parties shall agree a new date for surrender and the provisions of paragraph (3) of this Article shall apply.

ARTICLE 17

SURRENDER OF PROPERTY

- (1) When a request for surrender is granted the requested Party shall, so far as its law allows hand over, upon request, to the requesting Party all articles, including sums of money:
- (a) which may serve as proof of the offence; or
 - (b) which have been acquired by the person sought as a result of the offence and are in that person's possession or discovered subsequently.

(2) The requested Party may temporarily retain any property mentioned in paragraph (1) if it is the subject of, or is required for, proceedings in that jurisdiction, or it may temporarily surrender it on condition that it be returned free of charge.

(3) These provisions shall not prejudice the rights of the requested Party or of any person other than the person sought. When such rights exist the articles shall on request be returned to the requested Party without charge as soon as possible after the end of the proceedings.

(4) The property mentioned in paragraph (1) shall, if the requesting Party so requests, be surrendered even though the person cannot be surrendered owing to death, disappearance or escape.

ARTICLE 18

RULE OF SPECIALTY

(1) A person who has been surrendered shall not be proceeded against, sentenced or detained with a view to the carrying out of any sentence for any offence committed prior to surrender other than:

- (a) the offence in respect of which return is ordered;
- (b) any lesser offence, however described, disclosed by the facts in respect of which return was ordered provided such an offence is an offence for which the person sought can be returned under this Agreement;
- (c) any other offence being an offence for which surrender may be granted under this Agreement in respect of which the requested Party consents to the person being dealt with;

unless that person has first had an opportunity to leave Australia or Hong Kong, as the case may be, and has not done so within forty days of having been free to leave or has returned after having left.

(2) A Party whose consent is requested under paragraph (1)(c) may require the submission of any document or statement mentioned in Article 9.

ARTICLE 19

RESURRENDER

(1) Where a person has been surrendered to the requesting Party by the requested Party, that person is not liable to surrender or rendition to any other state or jurisdiction for an offence committed before that person's surrender unless:

- (a) the requested Party consents to that surrender or rendition;
or
- (b) the person has first had an opportunity to leave Australia or Hong Kong, as the case may be, and has not done so within forty days of having been free to leave or has returned after having left.

(2) A Party whose consent is requested under paragraph (1)(a) may require the submission of any document or statement mentioned in Article 9.

ARTICLE 20

TRANSIT

(1) To the extent permitted by its law, transit through the jurisdiction of a Party may be granted on a request in writing. The Party through whose jurisdiction transit will occur may request the information referred to in paragraph (2)(b) of Article 9.

(2) Permission, if given, for the transit of a person shall include permission for the person to be held in custody during transit.

ARTICLE 21

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 this Agreement have been complied with.

(2) The provisions of this Agreement shall apply to requests made after its entry into force regardless of the date of commission of the offence or offences set out in the request.

(3) Each of the Parties may terminate this Agreement at any time by giving notice in writing to the other through the same channels as a request for surrender. In that event the Agreement shall cease to have effect six months after the receipt of notice.

In witness whereof the undersigned, being duly authorised by their respective Governments, have signed this Agreement.

Done at Hong Kong, this fifteenth day of November one thousand nine hundred and ninety three, in the Chinese and English languages, each text being equally authentic.

For the Government of
Australia:

Frank Walker

For the Government of
Hong Kong:

A.P. Asprey

**Schedule 2 Protocol amending the
Agreement for the Surrender
of Accused and Convicted
Persons of 15 November 1993
between the Government of
Australia and the Government
of the Hong Kong Special
Administrative Region of the
People's Republic of China,
done at Hong Kong on
19 March 2007**

(paragraph 6 (b))

PROTOCOL BETWEEN THE GOVERNMENT OF AUSTRALIA
AND THE GOVERNMENT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF
CHINA AMENDING THE AGREEMENT FOR THE SURRENDER
OF ACCUSED AND CONVICTED PERSONS, DONE AT HONG
KONG ON 15 NOVEMBER 1993

The Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong Special Administrative Region") having been authorised by the Central People's Government of the People's Republic of China to conclude this Protocol with the Government of Australia (hereinafter referred to as "the Parties").

Recalling the Agreement between the Government of Australia and the Government of Hong Kong for the surrender of accused and convicted persons, done at Hong Kong on 15 November 1993 (hereinafter referred to as "the Agreement"),

Recognizing that the People's Republic of China resumed the exercise of sovereignty over Hong Kong with effect from 1 July 1997 and in accordance with its constitution has on that date established the Hong Kong Special Administrative Region of the People's Republic of China,

Noting that the Government of the People's Republic of China has confirmed the continued application of the Agreement to the Hong Kong Special Administrative Region and its recognition as an agreement entered into between the Government of Australia and the Government of the Hong Kong Special Administrative Region under the authorisation of the Government of the People's Republic of China,

Desiring to amend the Agreement,

Have agreed as follows :

Article 1

This Protocol amends the Agreement and the Agreement and this Protocol shall be read and interpreted together as one single instrument.

Article 2

Article 5 of the Agreement shall be removed.

Article 3

The text of Article 9(3) of the Agreement shall be replaced by the following:

“If the request relates to an accused person it shall also be accompanied by a copy of the warrant of arrest issued by a judge, magistrate or other competent authority of the requesting Party. In the case of requests to Hong Kong, the request shall also be accompanied by such evidence as, according to the law of Hong Kong, would justify committal for trial if the offence had been committed within the jurisdiction of Hong Kong.”

Article 4

The text of Article 16(1) of the Agreement shall be replaced by the following:

“The requested Party shall, as soon as a decision on the request for surrender has been made, communicate that decision to the requesting Party. Reasons shall be given for any complete or partial refusal of the request.”

Article 5

(1) This Protocol 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 Protocol have been complied with.

(2) This Protocol shall remain in force so long as the Agreement remains in force.

IN WITNESS WHEREOF the undersigned, being duly authorised by their respective Governments have signed this Protocol.

DONE in duplicate at Hong Kong this nineteenth day of March, two thousand and seven in the English and Chinese languages, each text being equally authentic.

For the Government of
Australia:

Murray A Cobban
Consul-General

For the Government of the
Hong Kong Special Administrative
Region of the People's Republic of
China:

Ambrose S K Lee
Secretary for Security

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>.