

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Justice

*International Transfer of Prisoners Act 1997*

*International Transfer of Prisoners (India) Regulation 2016*

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 necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Subsection 8(1) of the Act provides that the regulations may apply the Act to a foreign country and may declare that country to be a transfer country for the purposes of the Act. Subsection 8(2) of the Act provides that the regulations may declare that the Act applies in relation to such a foreign country subject to limitations, conditions, exceptions or qualifications referred to in the regulations. Paragraph 8(3)(a) of the Act provides that the limitations, conditions, exceptions or qualifications can include those necessary to give effect to a treaty.

The purpose of the *International Transfer of Prisoners (India) Regulation 2016* (the Regulation) is to give effect in Australian domestic law to the *Agreement between the Government of Australia and the Government of the Republic of India Concerning Transfer of Sentenced Persons* (the Agreement), signed on 18 November 2014. The Agreement was the subject of a public hearing by the Joint Standing Committee on Treaties (JSCOT). In Report 157, tabled 2 December 2015, JSCOT recommended that binding treaty action be taken to implement the Agreement.

Australia's bilateral treaty with India provides a basis on which Australia can engage in prisoner transfers with India. The Agreement establishes a comprehensive framework to govern transfers of sentenced persons between Australia and India and ensures that Australia can accept applications from prisoners for transfer to or from India in accordance with clearly defined and mutually agreed terms. The Agreement further strengthens Australia and India's international crime cooperation relationship. The Regulation declares India as a transfer country, and applies the Act to India subject to the Agreement. A copy of the Agreement is set out in Schedule 1 to the Regulation.

The Regulation is consistent with the Act. The Agreement contains a number of important safeguards and human rights protections. This includes a condition of transfer that the death penalty has not been imposed, or where the death penalty has been imposed, the sentence has been commuted to a term of imprisonment or to life imprisonment. The Agreement also provides that sentences incompatible with the law of the receiving state can be adapted, provided that the adapted sentence is no more severe than that imposed by the transferring state in terms of nature or duration. In every case, both the transferring and receiving state and the prisoner must consent to the transfer.

Consultation was not undertaken outside of the Australian Government for this legislative instrument, as it relates to criminal justice and law enforcement matters. The instrument does not have direct, or substantial indirect, effects on business, nor does it restrict competition.

The Regulation commences on the day on which the Agreement enters in to force. Article 18 of the Agreement provides that it shall enter into force 30 days after the date on which parties have notified each other that their domestic processes for the implementation of the agreement have been completed.

The Office of Best Practice Regulation advised that a Regulation Impact Statement was not necessary for this Regulation.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

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

**Details of the *International Transfer of Prisoners (India) Regulation 2016***

**Section 1 – Name of Regulation**

This section provides that the title of the Regulation is the *International Transfer of Prisoners (India) Regulation 2016*.

**Section 2 – Commencement**

This section provides for the Regulation to commence on the day on which the *Agreement between the Government of Australia and the Government of the Republic of India Concerning Transfer of Sentenced Persons*, done on 18 November 2014, enters into force.

**Section 3 – Authority**

This section provides that the Regulation is made under the *International Transfer of Prisoners Act 1997*.

**Section 4 – Definitions**

This section defines terms used in the Regulation. In this regulation:

1. references to the word *Act* are interpreted as being references to the *International Transfer of Prisoners Act 1997*.

**Section 5 – Declaration of India as a transfer country**

This section declares India as a transfer country for the purposes of the Act, under subsection 8(1) of the Act.

**Section 6 – Application of the Act**

The *International Transfer of Prisoners Act 1997* sets out the legislative framework for Australian participation in international prisoner transfer schemes. Section 8 of the Act provides that the Act applies to a foreign country declared by the Regulations to be a transfer country for the purpose of the Act. Section 8 also states that the regulations may declare that the Act applies in relation to such a foreign country subject to limitations, conditions, exceptions or qualifications referred to in the regulations.

This section provides that the Act applies to India subject to the *Agreement between the Government of Australia and the Government of the Republic of India Concerning Transfer of Sentenced Persons*, done on 18 November 2014. The effect of this section is that India is declared to be a transfer country and provides that the Act applies to India subject to the Agreement. Therefore, the Act applies subject to the limitations, conditions, exceptions or qualifications necessary to give effect to the Agreement.

**Schedule 1 – Agreement between the Government of Australia and the Government of the Republic of India Concerning Transfer of Sentenced Persons, done at Canberra in Australia on 18 November 2014**

This schedule contains the text of the Treaty.

## Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### International Transfer of Prisoners (India) Regulation 2016

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### Overview of the Legislative Instrument

Australia's international transfer of prisoners (ITP) scheme is governed by the *International Transfer of Prisoners Act 1997* (the Act). The scheme aims to promote the successful rehabilitation and reintegration into society of a prisoner, while preserving the sentence imposed by the sentencing country as far as possible, in the prisoner's home country. This is an opt-in scheme, which requires the formal consent of the prisoner, Australia's Minister for Justice, the relevant foreign country and, where appropriate, the relevant Australian state or territory to or from which the prisoner wishes to transfer.

Under the Act, Australians imprisoned overseas are able to apply to return to Australia to serve the remainder of their sentence in an Australian prison. The Act also allows foreign nationals who are imprisoned in Australia to apply to serve the balance of their sentence in their home country. The purpose of the Regulation is to give effect in Australian domestic law to the *Agreement between the Government of Australia and the Government of the Republic of India Concerning Transfer of Sentenced Persons* (the Agreement), signed on 18 November 2014. The Agreement was the subject of a public hearing by the Joint Standing Committee on Treaties (JSCOT). In Report 157, tabled on 2 December 2015, JSCOT recommended that binding treaty action be taken to implement the Agreement.

The Agreement with India provides a comprehensive framework to govern transfers of sentenced persons between Australia and India. It ensures that Australia can accept applications from prisoners for transfer to or from India in accordance with clearly defined and mutually agreed terms. The Agreement further strengthens Australia and India's international crime cooperation relationship. The Regulation declares India to be a transfer country and applies the Act to India subject to the Agreement.

#### Human Rights Implications

The legislative instrument engages the right to privacy (Article 17 of the International Covenant on Civil and Political Rights, 'ICCPR').

The following rights are not engaged by the legislative instrument, for reasons explained below:

- the right to humane treatment in detention (Article 10, ICCPR), and

- the prohibition against torture and cruel, inhuman or degrading treatment or punishment (Article 7, ICCPR; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT')).

The Agreement, which this Regulation enforces, contains a number of important safeguards. As noted above, the aim of the scheme is to promote the successful rehabilitation and reintegration of sentenced persons. The formal consent of the prisoner is required in order to transfer a prisoner.

### The right to privacy

Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person's privacy. Collecting, using, storing, disclosing or publishing personal information amounts to an interference with privacy. In order for the interference with privacy not to be 'arbitrary', any interference with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances. Reasonableness, in this context, incorporates notions of proportionality, appropriateness and necessity.

As noted above, the legitimate objective of the Agreement is to facilitate the transfer of prisoners between Australia and India, with the aim of promoting the successful rehabilitation and reintegration of prisoners. The right to privacy is engaged to the extent that information about the sentenced person is conveyed to the receiving State, including the name, date and place of birth; statement of citizenship; location; and details of the conviction and sentence, and relevant circumstances (Article 6 of the Agreement). This information is clearly a necessity to put in place arrangements for the transfer of a sentenced person, and the scheme requires the formal consent of the person and full knowledge of the legal consequences in relation to any transfer. When a person applies for a transfer, the application documentation sets out how the Australian Government handles personal information under the *Privacy Act 1988* and details how a person's information is collected, used and disclosed. The applicant provides his or her consent to the collection and use of this information. The right to privacy is therefore not limited.

### The right to humane treatment in detention

Article 10(1) of the ICCPR requires that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Article 10(3) also requires State parties to ensure that prison systems have as their essential aim the reformation and social rehabilitation of prisoners.

There is no non-refoulement obligation arising from article 10 of the ICCPR. That is, there is no prohibition on removal from Australia of a person who is at risk of being treated inhumanely in detention in the country to which the person is to be removed. However, should there be a risk that the treatment would constitute torture, or cruel, inhuman or degrading treatment or punishment, a non-refoulement obligation would apply.

As a matter of domestic policy, the ITP scheme aims to enhance prisoners' prospects for rehabilitation and reintegration by allowing for the transfer of prisoners between countries. It does so by removing language and cultural barriers, and facilitating contact with family and support networks. The transfer of prisoners also allows access to training and educational programs beneficial for the reintegration and rehabilitation of sentenced persons. Transfer also relieves the hardship and financial burden on the relatives of a person serving a sentence in a foreign country. The formal consent of the prisoner is also required in order to transfer a prisoner.

#### Prohibition against torture and cruel, inhuman or degrading treatment or punishment

The prohibition on torture and cruel, inhuman or degrading treatment or punishment is contained in Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and the CAT. The ICCPR provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Non-refoulement obligations only arise in situations where there is an obligatory transfer of an individual. Taking into account the voluntary nature of the ITP scheme and that transfers do not take place without the consent of the sentenced person, Australia's non-refoulement obligations under the CAT are not engaged by the instrument. It is therefore not necessary to include a specific ground in the Agreement relating to torture. For the same reason, torture is not included in the Council of Europe Convention on the Transfer of Sentenced Persons, Australia's other bilateral ITP treaties or the Act. Sentenced persons are required to consent to the transfer and have full knowledge of the legal consequences of the transfer.

#### **Conclusion**

This legislative instrument is compatible with human rights as, to the extent it may limit human rights, those limitations are reasonable, necessary and proportionate.