

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Justice

*International Transfer of Prisoners Act 1997*

*International Transfer of Prisoners (Peru) 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 states that the regulations may provide that the Act applies to a foreign country which is declared by the regulations to be a transfer country for the purposes of the Act.

The purpose of the *International Transfer of Prisoners (Peru) Regulation 2016* (the Regulation) is to declare that the Act applies to Peru, and that Peru is a transfer country for the purposes of the Act. This allows prisoners in Australia and Peru to apply for a transfer under the International Transfer of Prisoners scheme (the scheme).

Australia does not currently have a formal agreement in force with Peru to facilitate the transfer of prisoners. The Act does not require a formal agreement to be in place for a country to be declared a transfer country for the purposes of the Act.

The Regulation is consistent with the Act and does not oblige Australia to transfer any prisoners to or from Peru. Under the Act, transfers can only occur with the consent of the prisoner and the governments of Australia and the foreign country. Transfers of prisoners from Australia who have been convicted of a State or Territory offence, and all transfers of prisoners to Australia, also require the consent of the relevant State or Territory Government.

The Act contains a number of important safeguards and human rights protections. The Act contains wording to the effect that the sentence enforced in the receiving country must not be harsher, in legal nature or duration, than the sentence imposed in the sentencing country. The Act does not enable the transfer of persons to serve sentences which involve forms of punishment other than imprisonment, such as the imposition of the death penalty. However, if a prisoner who has been sentenced to death in a foreign country has their sentence commuted to a sentence of imprisonment, they are eligible under the Act to apply to transfer to Australia.

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

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

The Regulation commenced the day after it was registered on the Federal Register of Legislation.

The Office of Best Practise 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 *International Transfer of Prisoners (Peru) Regulation 2016***

**Section 1 – Name of Regulation**

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

**Section 2 – Commencement**

This section provides for the Regulation to commence the day after its registration.

**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 the Regulation:

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

**Section 5 – Peru is a transfer country to which the Act applies**

This section declares Peru as a country to which the *International Transfer of Prisoners Act 1997* applies and as a transfer country for the purposes of subsection 8(1) of that Act.

The *International Transfer of Prisoners Act 1997* sets out the legislative framework for Australian participation in international prisoner transfer schemes. Subsection 8(1) of the Act states that the regulations may provide that the Act applies to a foreign country which is declared by the regulations to be a transfer country for the purposes of the Act.

This section provides that the Act applies to Peru, and that Peru is a transfer country for the purposes of the Act.

## Statement of Compatibility with Human Rights

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

### **International Transfer of Prisoners (Peru) 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 this Legislative Instrument is to declare Peru to be a country to which the Act applies and a transfer country under the Act, so that Australians imprisoned in Peru and Peruvians imprisoned in Australia may make such applications.

#### **Human Rights Implications**

This 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 this 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 Act, which this Legislative Instrument declares to apply to Peru as a transfer country, contains a number of important safeguards. As noted above, the aim of the scheme is to promote the successful rehabilitation and reintegration of prisoners. 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 this Legislative Instrument is to facilitate the transfer of prisoners between Australia and Peru, with the aim of promoting the successful rehabilitation and reintegration of prisoners. The right to privacy is engaged to the extent that prisoners' personal information may be collected during the processing of their applications for a transfer to or from Australia. This personal information may include details such as the prisoner's name, date and place of birth, statement of citizenship, location, and details of the conviction and sentence, and relevant circumstances. That information may be conveyed to relevant Commonwealth, State or Territory Ministers, Directors of Public Prosecutions, public service agencies, correctional services, police services, other law enforcement agencies, intelligence agencies, court personnel, health authorities, community service authorities, and agencies or people responsible for administering the ITP scheme in the country which the prisoner wishes to be transferred to or from.

This information is necessary to facilitate the transfer of a prisoner, and the ITP scheme requires prisoners to formally consent to a transfer and have full knowledge of the legal consequences of a 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. This obligation is discussed further below in relation to the prohibition against torture and cruel, inhuman or degrading treatment or punishment.

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 to their home 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 prisoners. 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 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 prisoner, Australia's non-refoulement obligations under the CAT are not engaged by this Legislative Instrument. It is therefore not necessary to include a specific provision relating to torture in this Legislative Instrument. For the same reason, torture is not included in the *Council of Europe Convention on the Transfer of Sentenced Persons*, Australia's bilateral ITP treaties or the Act. Prisoners are required to consent to a transfer and have full knowledge of the legal consequences of a 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.