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Agreement between the Government of Australia and the Government of the Republic of India concerning Transfer of Sentenced Persons

Introduction

2.1 This chapter examines the *Agreement between the Government of Australia and the Government of the Republic of India concerning Transfer of Sentenced Persons*, which was signed by Australia on 18 November 2014 and tabled in the Parliament on 13 October 2015.

Background

2.2 Australia's international transfer of prisoners (ITP) scheme has been in place since 2002 following the enactment of the *International Transfer of Prisoners Act 1997* (ITP Act). The scheme is comprised of domestic legislation, international agreements and arrangements entered into by Australia to facilitate the transfer of prisoners between Australia and foreign countries.[1]

2.3 According to the NIA, Australia's ITP scheme reflects the humanitarian, rehabilitative and community safety objectives of prisoner transfers while

1 National Interest Analysis [2015] ATNIA 17 with attachment on consultation, *Agreement between the Government of Australia and the Government of the Republic of India concerning Transfer of Sentenced Persons* done at Canberra on 18 November 2014 [2014] ATNIF 30 (hereafter referred to as the NIA), para 11.

ensuring, as far as possible, that the original sentence of a transferred prisoner is preserved.[2] The Attorney-General's Department (AGD) enlarged on the rehabilitation and reintegration role that the ITP scheme plays and its contribution to community safety:

> Closer proximity to family, friends and community ties and the removal of language and cultural barriers enhances prisoners' rehabilitation and reintegration prospects. The scheme [enhances] community protection through the effective management and monitoring of prisoners once they are transferred back to their home country. It also enables prisoners' convictions to be recorded by the relevant authorities in their home country.[3]

2.4 The NIA points out the increasingly significant role that the transfer of sentenced persons plays in international cooperation in the administration of criminal justice. It notes that most developed countries participate in such schemes including the United Kingdom (UK), the United States of America (USA), Canada and most European countries.[4]

2.5 Australia has similar bilateral ITP treaties with China, Cambodia, Vietnam, Thailand and Hong Kong, and is a party to the Council of Europe Convention, which facilitates the transfer of prisoners between Australia and 63 other countries. These agreements have been implemented by regulations under the ITP Act.[5]

2.6 The AGD has not identified any issues with the scheme and considers that it is working effectively and meeting the objective to rehabilitate and reintegrate prisoners into the community:

> If a prisoner is in their home country, they have better access to culturally appropriate services. If we have an Australian who comes back here to serve time in an Australian prison, they will have the opportunity for a parole service to be looking after and helping monitor them after they leave prison. They might be able to receive relevant counselling for drug, alcohol or gambling issues. There are a range of services that a prisoner is able to access if they are transferred back here to Australia. We think that the kind of supervision that happens, linked to parole, does assist offenders to reintegrate into the community. Obviously offenders back home have the opportunity to be close to their family and

2 NIA, para 12.

3 Ms Catherine Hawkins, First Assistant Secretary, International Crime Cooperation Division, Attorney-General's Department (AGD), *Committee Hansard*, Canberra 9 November 2015, p. 1.

4 NIA, para 14.

5 NIA, para 15.

> friends, and those kinds of community ties are of course very helpful in terms of helping someone to reintegrate after they have served their prison sentence.[6]

2.7 Since the inception of the ITP scheme in Australia in September 2002 until November 2015, there have been 80 prisoners transferred from Australia to countries including Canada, the Netherlands, the USA, Spain, Germany and the UK. There have also been 22 prisoners transferred from foreign prisons to Australia from countries including Thailand, Hong Kong, Japan and the USA.[7]

2.8 While broadly consistent with the model used with other countries, the AGD explained that this Agreement has been adapted slightly to suit the circumstances and identified the following differences:

- the conviction has not occurred under military law, unless the states agree otherwise **(Article 4(k))**;
- the prisoner must not be subject to the death penalty **(Article 4(i))**; and
- the transfer is not prejudicial to the sovereignty, security or other interests of the transferring state.[8]

2.9 As at November 2015, Australia was processing 56 applications for transfer of prisoners out of Australia and 52 applications for transfer of prisoners to Australia. These applications have been made under both the Council of Europe Convention and Australia's bilateral ITP agreements.[9]

Reasons for Australia to take the proposed treaty action

2.10 According to the NIA there are currently no other multilateral or bilateral agreements to which India is a party that may enable Australia to undertake prisoner transfers with India.[10]

2.11 The NIA states that the Agreement is expected to provide a comprehensive framework to govern transfers of sentenced persons between Australia and India, ensuring that prisoners can be transferred between the two countries in accordance with clearly defined and

6 Ms Hawkins, AGD, *Committee Hansard*, Canberra 9 November 2015, p. 2.

7 NIA, para 16; Ms Hawkins, AGD, *Committee Hansard*, Canberra 9 November 2015, p. 2.

8 Ms Hawkins, AGD, *Committee Hansard*, Canberra 9 November 2015, p. 7.

9 NIA, para 17; Ms Hawkins, AGD, *Committee Hansard*, Canberra 9 November 2015, p. 2.

10 NIA, para 18.

mutually agreed terms. The Agreement is also likely to further strengthen Australia and India's international crime cooperation relationship.[11]

2.12 The Agreement will allow Australians imprisoned in India and Indian citizens imprisoned in Australia to apply to serve the remainder of their sentences in their home country. The Agreement will enable both governments to exchange information about a prisoner's sentence and imprisonment for the purpose of processing their transfer application, determine a prisoner's eligibility for transfer and agree on the terms of sentence enforcement prior to a prisoner's transfer.[12]

2.13 In addition to the rehabilitation and regeneration benefits, the NIA identifies the following advantages for Australia from the Agreement:

- contributing to community safety, by ensuring the effective monitoring, supervision and management of prisoners upon release on parole, and the recording of their convictions in Australia;
- relieving the hardship and financial burden on the relatives of prisoners incarcerated in India; and
- reducing the costs of providing consular services to Australian prisoners in India.[13]

2.14 The NIA identifies similar benefits arising from the transfer of Indian nationals serving a prison sentence in Australia back to India. It also relieves Australia of the ongoing costs associated with the incarceration of foreign nationals.[14]

2.15 According to the NIA, as at 13 July 2015, there were no Australians serving a sentence in Indian prisons, although there are some facing charges.[15] As at 11 December 2014, there were 100 people in Australian prisons who identified India as their country of birth. Australia's International Transfer of Prisoners Unit, within the AGD, periodically receives enquiries from Indian nationals in Australian prisons requesting to transfer back to India. The Agreement will provide an opportunity for these people to apply to transfer to their home country, and for Australians who might be imprisoned in India in the future, to likewise apply for transfers back to Australia.[16]

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11 NIA, para 8.

12 NIA, para 2.

13 NIA, para 4.

14 NIA, para 5.

15 Ms Hawkins, AGD, *Committee Hansard*, Canberra 9 November 2015, p. 3. Attorney-General's Department, *Submission 4*.

16 NIA, para 19.

Terms of transfer

2.16 The Conditions for Transfer are set out in **Article 4** and the Procedure for Transfer in **Article 6**. Australia and India will negotiate the terms of transfer of any prisoner requesting a transfer. This allows both parties to adapt any given sentence and negotiate for inconsistencies between their legal frameworks, for example with regard to parole requirements:

> If India had a term of imprisonment that was quite inconsistent with what we might do in Australia, through this continued sentence enforcement mechanism Australia would keep that head sentence but we may well say, 'For that kind of an offence in Australia, a parole period would be X years,' and negotiate with the Indian government to have that as part of the terms of transfer.[17]

2.17 The Agreement specifically 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 (**Article 10(3)**).[18]

2.18 The AGD made it clear that, when prisoners are transferring from Australia to a foreign country, the Australian Government 'would look for at least 80 per cent of the Australian non-parole period to be enforced in that foreign country'.[19]

2.19 The Committee expressed concern about the consequences for a prisoner where disparity exists between the laws of the two countries, particularly where an act may be regarded as a criminal offence in one country but not the other. The AGD explained that this circumstance is covered by the requirement for dual criminality to apply and is set out in **Article 4 (a)**:

> It is a requirement of the treaty that there is dual criminality so that the offence is criminalised both in India and in Australia. However, this treaty also enables that that requirement may be waived by both contracting parties if they agree. So that is the answer in terms of the framework of the treaty. Obviously dual criminality is there as the starting point. If the Australian government was concerned that the particular conduct that was

17 Ms Hawkins, AGD, *Committee Hansard*, Canberra 9 November 2015, p. 4.

18 NIA, para 20.

19 Miss Lisa Wyman, Principal Legal Officer, International Transfer of Prisoners Unit, Transnational Crime and Corruption Branch, International Crime Cooperation Division, AGD, *Committee Hansard*, Canberra 9 November 2015, p. 6.

> criminalised in India was not criminalised here in Australia, for very good public policy reasons, then that lack of dual criminality would be a ground for us to be able to refuse the transfer, and that would be a decision for the minister to make.[20]

2.20 The Agreement contains a number of safeguards and human rights protections, including that transfer is conditional on the death penalty not being imposed, or where the death penalty has been imposed, the sentence has been commuted to a term of imprisonment or to life imprisonment (**Article 4(i)**).

2.21 In its submission to the Committee, the Law Council of Australia welcomes the inclusion of the safeguard in **Article 4 (i)**. However, it urges the Australian Government to strengthen the requirements by specifying that a prisoner will not be transferred if they would be exposed to the risk of torture. The Law Council argues that this would be in line with Australia's obligations under Article 3 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).[21]

2.22 The AGD considers that, as the ITP is a voluntary consent-based scheme, there is no need for an explicit requirement in this regard:

> In the ITP Scheme, the Council of Europe convention, all our bilateral treaties and the ITP Act, transfer is fundamentally based on consent. It is a completely voluntary scheme. A prisoner would actually seek to make an application to transfer. The other government would have to consent and the Australian government would have to consent. It is a consent based scheme. It is all based on the voluntary decision of the prisoner to transfer, and I would say that that is why not in the Council of Europe convention, not in the Australian bilateral treaties and not in our act do we even countenance that.[22]

2.23 The Committee asked if there were any provisions for either party to provide information on an ongoing basis regarding transferred prisoners. Under **Article 11** the transferring state may request information from the receiving state concerning the enforcement of the sentence but there is no further obligation to monitor the transferred prisoners. The AGD reiterated that it is a voluntary consent based scheme. It is not a coercive scheme such as extradition arrangements.[23]

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20 Ms Hawkins, AGD, *Committee Hansard*, Canberra 9 November 2015, pp. 7–8.

21 Law Council of Australia, *Submission 1*.

22 Ms Hawkins, AGD, *Committee Hansard*, Canberra 9 November 2015, p. 3.

23 Ms Hawkins, AGD, *Committee Hansard*, Canberra 9 November 2015, p. 5.

Obligations

2.24 The Agreement would not oblige Australia to agree to the transfer of a prisoner, and provides considerable flexibility in determining eligibility for prisoner transfers. Under **Article 4(c)** (Conditions for Transfer) of the Agreement, prisoners are eligible to apply to transfer from India to Australia if they are an Australian citizen which is defined to include persons who are permitted to travel to, and enter and remain indefinitely in, Australia and have community ties with Australia, provided such persons are not Indian citizens. Similarly, a prisoner is eligible to apply to transfer from Australia to India provided they are a citizen of India (**Article 4(b)**). Applications for transfer can be made by the prisoner or someone on their behalf (**Article 6**).[24]

2.25 To be considered for transfer, the prisoner's conviction and sentence must be final and not subject to further legal appeal (**Article 4 (e)(f)**). Unless otherwise agreed between India and Australia in particular cases, there must be at least six months of the prisoner's sentence remaining to be served on the day the transfer request is received (**Article 4 (d)**). **Article 4(a)** stipulates a dual criminality requirement so that the conduct giving rise to the offence for which the person is imprisoned must constitute a criminal offence in both countries, determined at the time a transfer request is received, unless both countries agree to waive this requirement.[25]

2.26 A prisoner transfer can only take place with the agreement of the Australian Government, the Indian Government, and the prisoner (**Article 4**). The sentencing country is obliged to take reasonable steps to ensure that the prisoner's consent is given voluntarily and with full knowledge of the legal consequences (**Article 7(1)**), including any terms relating to the recovery of costs for the physical transfer of the prisoner (**Article 14 (1)**). Under **Article 7(2)** (Consent of the Sentenced Person), the sentencing country shall afford the receiving country an opportunity, prior to a transfer, to verify that the prisoner has provided voluntary and informed consent to the transfer.[26]

2.27 Under **Article 6** (Procedure for Transfer), Australia must take reasonable steps to inform prisoners of the substance of the Agreement, and to inform Indian authorities of requests for transfer. Unless Australia has decided

24 NIA, para 21.

25 NIA, para 22.

26 NIA, para 23.

not to agree to a particular transfer, Australia is also required to provide relevant information to India to enable India to properly consider transfer requests and to inform sentenced persons of the full consequences of transfer under Indian law (**Article 6 (5)**).[27]

2.28 Unless either country has not consented to a transfer, and if requested by the transferring country prior to a transfer occurring, the receiving country must following transfer provide the transferring country with information relevant to how the sentence will be enforced (**Article 6 (6)**). Once a transfer has occurred, the receiving country continues to enforce the sentence as originally imposed (**Article 10 (1)**). If, however, a sentence is by its nature or duration incompatible with the law of the receiving country, the receiving country may, in proposing the terms of transfer, adapt the sentence in accordance with the country's law for a similar offence. An adapted sentence must not be any more severe in nature or duration, than that imposed by the transferring country (**Article 10(3)**). Under the ITP Act, the terms of transfer, including sentence enforcement must be consented to by both the transfer and receiving countries.[28]

2.29 In all cases, the transferring country retains exclusive jurisdiction for the review, revision, modification or cancellation of convictions imposed by its courts (**Article 9(1)**). Following transfer, however, either country may, in accordance with its Constitution or other laws, grant pardon, amnesty, commutation of, or reductions or remissions to the transferred person's conviction or sentence (**Article 9 (2)**). If the transferring country makes a decision that affects the prisoner's conviction or sentence, the receiving country shall modify or terminate enforcement of the sentence accordingly (**Article 10**).[29]

Implementation

2.30 The NIA proposes that the Agreement will be implemented through regulations under the ITP Act **Section 8** (Application of Acts to transfer countries). Administrative arrangements have been concluded with all states and territories setting out the administrative protocols for the outgoing transfer of foreign prisoners held as state or federal offenders,

27 NIA, para 24.

28 NIA, para 25.

29 NIA, para 26.

and the incoming transfer (as federal prisoners) of Australians imprisoned overseas.[30]

2.31 In Australia, the ITP Act requires that states and territories are involved in any transfers affecting them (**Section 27**). The NIA states that no provisions requiring consent of an Australian state or territory government were included in the Agreement on the basis that this is an internal consideration for Australia. Under the ITP Act, where a person serving a sentence in Australia in respect of a conviction for offences against the law of an Australian state or territory applies to transfer to India, the consent of the relevant state or territory government must be sought in order for the transfer to proceed. As there are no federal prisons in Australia, the relevant state or territory government receiving sentenced persons from India must also consent to such transfers, and such prisoners are deemed to be federal prisoners upon their transfer to Australia.[31]

2.32 Under the ITP Act, in the case of outgoing transfers of federal prisoners, the approval of the state or territory government where the prisoner is serving his or her sentence is not required (**Article 20**). However, the NIA explains that each state and territory assists in processing transfers of federal offenders by providing reports on the prisoner's behaviour and progress through the prison system. According to the NIA the Australian Government works closely with states and territories to process all applications under the ITP scheme.[32]

Costs

2.33 The cost of the continued enforcement of the sentence after transfer is to be borne by the receiving country (**Article 14**). The NIA claims that each prisoner transferred from Australia to India could represent a cost saving to Australia of approximately A$79 898 for each year the prisoner would otherwise have spent in an Australian prison.[33]

2.34 For prisoners transferred to Australia from India, the Commonwealth and Australian states and territories have agreed that:

30 NIA, para 31 and 34.

31 NIA, para 35.

32 NIA, para 36.

33 This figure is the approximate annual cost of maintaining a prisoner in Australia according to the Productivity Commission's 2015 *Report on Government Services*.

- the Commonwealth will meet the general administrative costs involved in processing transfers;
- the state or territory to which a prisoner wishes to return will be responsible for meeting the costs of transporting the prisoner to Australia from the transfer country;
- if the state or territory minister considers that an incoming prisoner is in a position to pay for the costs (or a proportion of the costs) associated with their transfer to Australia, they may seek reimbursement by the prisoner of such costs as a condition of the transfer; and
- the relevant state or territory will meet the costs of the ongoing incarceration of the prisoner.[34]

2.35 The AGD confirmed that previously, states and territories have successfully recovered the costs of transferring prisoners under similar agreements.[35]

2.36 In relation to prisoners transferring from Australia to India, India will bear the cost of transfers, except those expenses incurred exclusively in Australian territory (**Article 14**). According to the NIA Australian states and territories have agreed that the costs of moving a prisoner within Australia to the nearest point of international departure will be borne by the state or territory in which the prisoner is held before transfer.[36]

Conclusion

2.37 The Committee supports Australia's ratification of the *Agreement between the Government of Australia and the Government of the Republic of India concerning Transfer of Sentenced Persons* and recommends that binding treaty action be taken.

Recommendation 1

2.38 **The Committee supports the *Agreement between the Government of Australia and the Government of the Republic of India concerning Transfer of Sentenced Persons* and recommends that binding treaty action be taken.**

34 NIA, para 28.

35 Ms Hawkins, AGD, *Committee Hansard*, Canberra 9 November 2015, p. 3.

36 NIA, para 29.