

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*

(Canberra, 18 November 2014)

[2014] ATNIF 30

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

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

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Nature and timing of proposed treaty action

1. The treaty action relates to the proposed ratification of the *Agreement between the Government of Australia and the Government of the Republic of India concerning Transfer of Sentenced Persons* (the Agreement), which was signed for Australia on 18 November 2014 by the Minister for Justice, the Hon Michael Keenan MP.

2. **Article 18(1)** (Entry into force and termination) of the Agreement provides that it shall enter into force on the thirtieth day after the date on which both countries have notified each other in writing that they have complied with their respective domestic requirements for the entry into force of the Agreement. Before notification can be given by Australia, Australia's domestic treaty-making requirements must be completed. These requirements include tabling the Agreement in Parliament, consideration by the Joint Standing Committee on Treaties ('JSCOT') and the making of implementing regulations under the *International Transfer of Prisoners Act 1997* (Cth) ('ITP Act').

Overview and national interest summary

3. 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.

4. The transfer of Australians serving a sentence of imprisonment in India has a number of benefits for Australia. It will:

- (a) enhance prisoners' prospects for rehabilitation and reintegration by removing language and cultural barriers, allowing access to training and educational programs, and facilitating contact with family and support networks;
- (b) contribute 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;
- (c) relieve the hardship and financial burden on the relatives of prisoners incarcerated in India; and

(d) reduce the costs of providing consular services to Australian prisoners in India.

5. The transfer of Indian nationals serving a sentence of imprisonment in Australia to their home country facilitates the rehabilitation and reintegration of Indian prisoners, by providing them with a more supportive family and cultural environment, as well as access to culturally and linguistically appropriate rehabilitation programs. Similarly, it relieves Australia of the ongoing costs associated with the incarceration of foreign nationals.

6. There are a number of requirements that must be met before a prisoner transfer under the Agreement can take place. Importantly, under **Article 4** (Conditions for Transfer) of the Agreement, the prisoner, the Government of India and the Australian Government must all consent to the transfer on the agreed terms of transfer, including the terms of sentence enforcement. Under the ITP Act, the consent of the relevant Australian state or territory government may also be required.

7. Under **Article 9** (Jurisdiction) of the Agreement, following transfer, the transferring country retains exclusive jurisdiction for the review, modification or cancellation of the prisoner's conviction imposed by its courts. Under **Article 14** (Expenses), the receiving country bears the costs of the transfer of the prisoner, except those costs incurred exclusively in the territory of the transferring country. It is also open to the receiving country to seek to recover all or part of the transfer costs from the prisoner.

8. Australia does not currently have a bilateral agreement in force with India to facilitate the transfer of sentenced persons. Accordingly, the negotiation of a bilateral treaty with India was required in order to provide a basis on which Australia can engage in prisoner transfers with India. An Agreement with India will provide a comprehensive framework to govern transfers of sentenced persons between Australia and India and ensure that Australia can accept applications from prisoners for transfer to or from India in accordance with clearly defined and mutually agreed terms. The Agreement will also further strengthen Australia and India's international crime cooperation relationship.

9. The Agreement adds to Australia's existing bilateral transfer of sentenced persons treaties with other countries¹, and our international transfer of prisoners obligations under the multilateral *Council of Europe Convention on the Transfer of Sentenced Persons* [2003] ATS 6 ('Council of Europe Convention') to which India is not a signatory.

10. The safeguards and protections in the Agreement are consistent with those contained in the ITP Act. The Agreement will be implemented through new regulations to be made under the existing provisions of the ITP Act.

Reasons for Australia to take the proposed treaty action

11. Australia has an international transfer of prisoners ('ITP') scheme in place to facilitate the transfer of prisoners between Australia and foreign countries. Australia's ITP scheme comprises domestic legislation (described below in paragraphs 30-34), and international agreements and arrangements entered into by Australia.

¹ Australia currently has bilateral transfer of sentenced persons agreements with Cambodia, China, Thailand, Hong Kong and Vietnam.

12. Australia's ITP scheme reflects the humanitarian, rehabilitative and community safety objectives of prisoner transfers while ensuring, as far as possible, that the original sentence of a transferred prisoner is preserved.

13. The benefits of transfer of Australian prisoners incarcerated in India to Australia include: the removal of language and cultural barriers; access to family and social support; access to education, training and employment programs; parole monitoring and supervision and the recording of a prisoner's criminal convictions in Australia. Transfers of Indian prisoners from Australia to India will benefit Indian prisoners, by enabling them to be considered for any rehabilitation or conditional release programs in India that may not be available to non-citizens in Australia, and remove any language or cultural barriers.

14. The transfer of sentenced persons is forming an increasingly important part of international cooperation in the administration of criminal justice. Most developed countries participate in transfer of sentenced persons schemes and have done so for some time. These countries include the United Kingdom, the United States of America, Canada and most European countries.

15. Australia has concluded similar bilateral ITP treaties with China [2011] ATS 41, Cambodia [2009] ATS 4, Vietnam [2009] ATS 27, Thailand [2002] ATS 22 and Hong Kong [2006] ATS 13, and is a party to the Council of Europe Convention, which facilitates the transfer of prisoners between Australia and more than 60 other countries. ITP agreements have been implemented in Australia by regulations made under the ITP Act. If JSCOT approves taking binding treaty action in relation to this Agreement, similar implementing regulations will be enacted under the ITP Act. Once an ITP agreement with another country has been implemented domestically by regulations, the ITP Act applies to Australia's prisoner transfer relationship with that country, subject to the provisions of the Agreement.

16. From the inception of the ITP scheme in Australia in September 2002 up until 31 May 2015 there have been 78 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.

17. As at 31 May 2015, Australia was processing 51 applications for transfer of prisoners out of Australia and 49 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.

18. The Australian Government is not aware of any multilateral or bilateral agreement to which India is a party, other than the proposed Agreement, that may enable Australia to facilitate prisoner transfers with India.

19. The number of prisoners likely to benefit from the Treaty, if it enters into force, will depend on the number of Australians sentenced in India, and the number of Indians sentenced in Australia. As at 13 July 2015, there were no Australians incarcerated in India, and 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 Attorney-General's Department, periodically receives enquiries from Indian nationals incarcerated in Australia requesting to transfer from Australia 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.

20. The Agreement contains a number of important safeguards and human rights protections, including a condition for 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 (**Article 4 (i)**). 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 (**Article 10 (3)**). In every case, both the transferring and receiving state and the prisoner must consent to the transfer (**Articles 7 and 8**).

Obligations

21. 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**).

22. 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.

23. 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.

24. 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 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)**).

25. 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.

26. 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**).

Costs

27. The cost of the continued enforcement of the sentence after transfer is to be borne by the receiving country (**Article 14**). Each prisoner transferred from Australia to India under the Agreement will represent a cost saving to Australia of approximately **A\$79,898** for each year the prisoner would otherwise have spent in an Australian state or territory prison (being the approximate annual cost of maintaining a person in prison in Australia according to the Productivity Commission's 2015 Report on Government Services).

28. In relation to incoming prisoners, it has been agreed between the Commonwealth and Australian states and territories² that:

- (a) the Commonwealth will meet the general administrative costs involved in processing transfers;
- (b) 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

² Administrative Arrangement between the Governor-General and the Administrator of the Northern Territory relating to the International Transfer of Prisoners (2002); Administrative Arrangement between the Governor-General and the Chief Minister of the Australian Capital Territory relating to the International Transfer of Prisoners (2003); Administrative Arrangement between the Governor-General and the Governor of the State of New South Wales relating to the International Transfer of Prisoners (2003); Administrative Arrangement between the Governor-General and the Governor of the State of Queensland relating to the International Transfer of Prisoners (2003); Administrative Arrangement between the Governor-General and the Governor of the State of South Australia relating to the International Transfer of Prisoners (2007); Administrative Arrangement between the Governor-General and the Governor of the State of Tasmania relating to the International Transfer of Prisoners (2003); Administrative Arrangement between the Governor-General and the Governor of the State of Victoria relating to the International Transfer of Prisoners (2003); Administrative Arrangement between the Governor-General and the Governor of the State of Western Australia relating to the International Transfer of Prisoners (2002).

country;

(c) 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

(d) the relevant state or territory will meet the costs of the ongoing incarceration of the prisoner.

29. In relation to outgoing prisoners from Australia to India, India will bear the cost of transfers under the Agreement, except those expenses incurred exclusively in Australian territory (**Article 14**). 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.³

30. A self-assessment of the regulatory impact of the Agreement has been conducted by the Attorney General's Department. The Office of Best Practice Regulation confirmed on 24 June 2015 that a Regulation Impact Statement is not required.

Implementation

31. It is proposed that the Agreement will be implemented through making regulations under **Section 8** (Application of Act to transfer countries) of the ITP Act.

32. The ITP Act provides the legislative framework for Australia's ITP scheme, and was developed through extensive consultation and cooperation with state and territory authorities. The provisions in the ITP Act can be enabled by either multilateral treaties, bilateral treaties, or an arrangement of less-than-treaty status.

33. All Australian states and the Northern Territory have passed complementary ITP legislation⁴, and all states and territories in which there are active ITP cases currently assist the Australian Government in processing applications.

34. The ITP Act allows the Commonwealth to conclude administrative arrangements with the states and territories setting out the administrative protocols for the outgoing transfer of foreign prisoners held as state or federal offenders, and the incoming transfer (as federal prisoners) of Australians imprisoned overseas (**Section 50**). Administrative arrangements have been concluded with all states and territories.

35. In Australia, the ITP Act requires that states and territories are involved in any transfers affecting them (**Section 27**). 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 an offence/offences against the law of an Australian state or territory applies to transfer to India, the consent of the relevant state or territory

³ *ibid* 2

⁴ *International Transfer of Prisoners Act 1997 (Tasmania); International Transfer of Prisoners Act 1997(NSW); Prisoners International Transfer Act 1997 (QLD); International Transfer of Prisoners Act 1998 (Vic); International Transfer of Prisoners Act 1998 (SA); Prisoners (International Transfer) Act 2000 (WA); International Transfer of Prisoners Act 2000 (NT).*

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.

36. 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, 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. The Australian Government works closely with states and territories to process all applications under the ITP scheme.

Future treaty action

37. **Article 17** (Amendments) of the Agreement allows for amendments or modifications to the Agreement to be made by mutual agreement between the Contracting States, and provides that such amendments or modifications come into force in the same manner as the Agreement itself. That is, any amendment or modification to the Agreement would constitute a treaty action, and would therefore be subject to Australia's domestic treaty making requirements.

Withdrawal or denunciation

38. Either country may terminate the Agreement by written notice at any time. Termination takes effect six months after the date of such notice (**Article 18**). Termination of the Agreement will not affect the enforcement of sentences of any prisoners who have already transferred under the Agreement. Termination of the Agreement by the Australian Government would need to be effected in accordance with Australia's domestic treaty action requirements.

Contact details

Transnational Crime Section
International Crime Cooperation Division
Attorney-General's Department

ATTACHMENT ON CONSULTATION

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39. Australian state and territory governments have been consulted on the proposed Agreement through the Commonwealth-State/Territory Standing Committee on Treaties ('SCOT'). Information on the negotiation of the Agreement was provided to state and territory representatives through biannual SCOT meetings throughout the course of the treaty negotiations. No requests for further information or comments on the Agreement have been received to date.

40. Negotiations with India about the Agreement were not in the public domain as Australia follows the international practice that a bilateral treaty remains confidential to the parties until it is signed. Consultation on the Agreement was conducted with relevant Australian Government departments and agencies.

