

26 October 2015

Mr Angus Taylor MP
Committee Chair
Joint Standing Committee on Treaties
PO Box 6021
Parliament House
CANBERRA ACT 2600

By email: jsct@aph.gov.au

Dear Mr Taylor,

AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE REPUBLIC OF INDIA CONCERNING TRANSFER OF SENTENCED PERSONS

The Law Council is pleased to provide this brief submission to the Joint Standing Committee on Treaties regarding its inquiry into the *Agreement between the Government of Australia and the Government of the Republic of India Concerning Transfer of Sentenced Persons (the Agreement)*.

The Law Council's primary recommendation is that consideration be given to including an explicit requirement that each party shall treat all sentenced persons transferred under the Agreement in accordance with their international human rights obligations, particularly regarding the right to life and the prohibition against torture and cruel, inhuman or degrading treatment or punishment.

Subsequent to its bid for a seat on the United Nations Human Rights Council, such an explicit condition may enhance Australia's role as a leader in promoting global commitment to human rights.

International law obligations

Australia has committed itself against, as a matter of international law, transferring a sentenced person where there is a threat to their life, or if they are likely to be subject to torture or to inhuman or degrading treatment or punishment in the country to which they are being sent. Article 3 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)* prohibits removal of a person to another State where there are substantial grounds for believing that s/he would be in danger of being subjected to torture.

In paragraph 12 of its General Comment No. 31, the Human Rights Committee observed that article 2 of the *International Covenant on Civil and Political Rights* obliges States:

... not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant

[risk to life, or of being exposed to torture or cruel, inhuman or degrading treatment or punishment, respectively], either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations on such matters.¹

The Agreement

The Agreement contains explicit conditions that must be fulfilled before a sentenced person can be transferred. Article 4(i) of the Agreement includes the important safeguard of 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.² This is a welcome development in terms of unambiguously giving effect to Australia's obligations which are present as a matter of international law.

The explicit conditions, however, do not specify directly the obligation that Australia should not transfer a sentenced person where to do so would expose them to the risk of torture. This may be a valuable express condition – as is the death penalty requirement – particularly as India has not ratified the CAT.

The bilateral agreement on the transfer of sentenced persons between Uganda and the United Kingdom may provide a useful precedent in this regard. The Uganda and United Kingdom Agreement provides:

Each Party shall treat all sentenced persons transferred under the Agreement in accordance with their international human rights obligations, particularly regarding the right to life and the prohibition against torture and cruel, inhuman or degrading treatment or punishment.³

Thank you for the opportunity to provide these observations.

Please do not hesitate to contact Dr Natasha Molt, Senior Policy Lawyer (02 6246 3754 or natasha.molt@lawcouncil.asn.au) in the first instance should you require further information.

Yours sincerely,



Michael Brett Young
Chief Executive Officer

¹ Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 18th sess, UN Doc CCPR/C/21/Rev.1/Add. 13 (26 May 2004) [12].

² *Agreement between the Government of Australia and the Government of the Republic of India concerning Transfer of Sentenced Persons* (18 November 2014) 4, Article 4(i).

³ *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Uganda on the Transfer of Sentenced Persons* (2 June 2009) Article 9. While Uganda signed the Agreement with the UK transfer to serve a sentence in the UK is not yet expressly provided for under Uganda law.