

National Interest Analysis [2018] ATNIA 16

with attachment on consultation

*Treaty between the Government of Australia and the Government of the
United Arab Emirates concerning Transfer of Sentenced Persons*

(Canberra, 9 May 2018)

[2018] ATNIF 35

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

Treaty between the Government of Australia and the Government of the United Arab Emirates concerning Transfer of Sentenced Persons

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Nature and timing of proposed treaty action

1. The proposed treaty action is entry into force of the *Treaty between the Government of Australia and the Government of the United Arab Emirates concerning Transfer of Sentenced Persons* (the Treaty), which was signed for Australia on 9 May 2018 by the Attorney-General, the Hon Christian Porter MP.
2. **Article 16(1)** of the Treaty provides that it shall enter into force thirty days after the date on which both countries have notified each other in writing that they have complied with their respective domestic requirements for the Treaty's entry into force.

Overview and national interest summary

3. The Treaty will allow Australian nationals imprisoned in the United Arab Emirates (UAE) and UAE nationals imprisoned in Australia to apply to serve the remainder of their sentences in their home country. The Treaty will enable both Governments to provide information to each other about a prisoner's conviction, sentence and imprisonment for the purpose of determining a prisoner's eligibility for transfer and appropriate terms of sentence enforcement prior to a prisoner's transfer.
4. Australia does not currently have a bilateral Treaty in force with the UAE to facilitate the transfer of sentenced persons. The Treaty will complete the suite of bilateral crime cooperation treaties by complementing the extradition and mutual assistance in legal matters treaties between Australia and the UAE which both entered into force in 2011. Building and strengthening a strategic international crime cooperation partnership with the UAE is important to the Australian Government due to Australia's expanding commercial and tourist presence in the UAE.
5. The Treaty will add to Australia's existing bilateral transfer of sentenced persons treaties with other countries¹, and our international transfer of prisoners (ITP) obligations under the multilateral *Council of Europe Convention on the Transfer of Sentenced Persons* (Council of Europe Convention) which facilitates the transfer of prisoners between Australia and 65 other countries. The UAE is not a member of the Council of Europe Convention.
6. The benefits of being able to transfer Australians incarcerated in the UAE to serve their sentences in Australia include: the removal of language and cultural barriers, access to family and social support, access to education programs, parole monitoring and supervision,

¹ Australia currently has bilateral transfer of sentenced prisoner treaties with India [2016], China [2011], Cambodia [2009], Vietnam [2009], Hong Kong [2006], and Thailand [2002].

and the recording of a prisoner's criminal conviction in Australia. Transfers of UAE nationals from Australia to the UAE will benefit those prisoners by enabling them to be considered for any applicable rehabilitation or conditional release programs in the UAE that may not be available to non-citizens in Australia, removing any language or cultural barriers, and enabling their conviction to be recorded in the UAE. Outgoing transfers will also relieve Australia of the ongoing costs associated with the incarceration of foreign nationals.

7. Transfers under the Treaty are not automatic. There are a number of requirements that must be met before a transfer can take place under the Treaty. Importantly, the prisoner (or where the prisoner is incapable of giving consent, a person entitled to act on his or her behalf (**Article 4(g)**), the UAE Government and the Australian Government must all consent to the transfer on the agreed terms of transfer before the transfer can occur (**Article 4**). The agreed terms of the transfer set out the manner in which the prisoner's sentence will be enforced in the receiving country. Under the *International Transfer of Prisoners Act 1997* (Cth) (the ITP Act), the consent of the relevant Australian State or Territory Government is also required for all incoming transfers and outgoing transfers where the prisoner has been convicted of a state or territory offence.

Reasons for Australia to take the proposed treaty action

8. Australia has an ITP scheme in place to facilitate the transfer of prisoners between Australia and foreign countries. The scheme comprises domestic legislation (the ITP Act and counterpart State and Territory legislation²) and international treaties – both bilateral and multilateral – entered into by Australia.

9. Australia's ITP scheme promotes 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. Transfers under the scheme are not intended to provide a more lenient or convenient sentence for prisoners.

10. There are a number of significant benefits to be gained when transferring Australian nationals from the UAE. For example, transfers to Australia will:

- (a) enhance prisoners' prospects for rehabilitation and reintegration into society by removing language and cultural barriers, allowing access to training and educational programs whilst in custody, and facilitating contact with family and support networks;
- (b) contribute to community safety by ensuring prisoners can be effectively supported, monitored, and supervised upon release from prison (as prisoners will generally serve a period of supervised parole in Australia) and by the recording of their convictions in Australia. If an Australian national completes a term of imprisonment in a foreign country they would usually be removed from that country upon release and be free to return to Australia without the benefit of parole supervision or reintegration programs, and without having

²*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); Crimes (Sentence Administration) Act 2005 (ACT).*

their criminal conviction recorded in Australia;

(c) relieve the hardship and financial burden on the Australian-based relatives of prisoners that are incarcerated in the UAE; and

(d) reduce the costs of providing consular services to Australian nationals imprisoned in the UAE.

11. The transfer of UAE nationals serving a sentence of imprisonment in Australia to their home country will provide similar benefits to those listed above, and will also reduce the financial cost to Australia of the prisoner's ongoing incarceration (discussed in further detail at paragraph 27).

12. The transfer of sentenced persons is an important element of international cooperation in the administration of criminal justice. Most developed countries participate in transfer of sentenced persons schemes and the schemes are well established. These countries include the United Kingdom, the United States of America, Canada, most European countries and some Central and South American countries.

13. From the inception of the ITP scheme in Australia from September 2002 to 1 November 2018, there have been 87 prisoners transferred from Australia to foreign countries, and 32 prisoners transferred from foreign prisons to Australia.

14. As at 1 November 2018, Australia was processing 50 applications for transfer of prisoners out of Australia and 45 applications for transfer of prisoners to Australia. These applications have been made under both the Council of Europe Convention and Australia's bilateral ITP treaties.

15. The Australian Government is not aware of any multilateral or bilateral treaty to which the UAE is a party, other than the Treaty, that would facilitate prisoner transfers between Australia and the UAE.

16. The number of prisoners likely to benefit from the Treaty, if it enters into force, will depend on the number of Australians sentenced to a term of imprisonment in the UAE, and the number of UAE nationals imprisoned in Australia. As at 1 November 2018, there were five Australians sentenced to serve a prison term in the UAE. The Treaty will provide an opportunity for current prisoners to apply to transfer to their home state or territory, and for future Australians imprisoned in the UAE to likewise apply for transfers back to Australia. As at August 2018, there were at least six prisoners in Australian prisons who identify as UAE nationals or who were born in the UAE.

17. The Treaty contains a number of safeguards and protections including:

(a) a condition for transfer that if the prisoner has been sentenced to death, a transfer cannot be effected unless the death penalty has been commuted to a term of imprisonment or life imprisonment (**Article 1(d)**); and

(b) double jeopardy protections, as the Treaty does not allow for a prisoner to be tried for the same conduct in the receiving country as that for which the sentence was imposed in the transferring country (**Article 4(h)**).

18. 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 6**).

Obligations

19. The Treaty does not oblige Australia to agree to the transfer of a prisoner as transfers are not automatic. In every case, the prisoner as well as the transferring and receiving countries must consent to the transfer (**Article 4(f) and (g)**). The Treaty contains a considerable number of requirements that must be met before a prisoner can be eligible for transfer:

- (a) There are nationality requirements. Under **Article 4(c)**, prisoners are eligible to apply to transfer from the UAE to Australia if they are an Australian national. Similarly, a prisoner is eligible to apply to transfer from Australia to the UAE if they are a national of the UAE (**Article 4(b)**).
- (b) There is a requirement that the prisoner's conviction and sentence must be final and not subject to further legal appeal, and there must be no other legal proceedings relating to different offences pending against the person (**Article 4(e)**).
- (c) There must be at least 12 months of the prisoner's sentence remaining to be served on the day the transfer request is received unless otherwise agreed between the UAE and Australia (**Article 4(d)**). This is to allow sufficient time for the administrative processes involved in transfer applications including consultation with multiple stakeholders, and time for Ministerial consideration.
- (d) The Treaty requires dual criminality to be satisfied (**Article 4(a)**), meaning that the conduct giving rise to the offence for which the person has been sentenced must constitute a criminal offence in both countries, or would constitute such an offence if committed within the jurisdiction of the receiving Party at the time a transfer request is received. There is scope for this requirement to be waived if both countries agree to do so.

20. Transfer applications are initiated by prisoners themselves (**Article 5(1)-(4)**). Australia and the UAE are obliged to take reasonable steps to inform prisoners of the substance of the Treaty (**Article 5(1)**), to ensure that prisoners are aware that they may be eligible to apply for transfer. When a new bilateral ITP treaty enters into force, the Attorney-General's Department writes to the relevant Minister responsible for prisons in each Australian state and territory and asks that the State or Territory Government notify prisoners in their jurisdiction about the new treaty, in addition to the information already provided to foreign prisoners about other ITP arrangements. The Department of Foreign Affairs and Trade is also informed, so that consular staff in the relevant foreign country can advise Australians imprisoned in that country that it is possible to apply to transfer to Australia to serve the remainder of their sentence.

21. Once a prisoner makes a transfer request, the transferring country is required to notify the receiving country (**Article 5(2)**) and, under **Article 5(5)**, provide a range of information

relevant to the potential transfer, including the nature of the offence, conviction and sentence, and any correctional, medical or social reports about the prisoner.

22. The receiving country is obliged to provide information relevant to the transfer including how the sentence will be enforced (**Article 5(6)**). This would normally include information on the earliest possible date that a prisoner could be released in the receiving country, parole or similar release programs, and the sentence expiry date. In some cases, such as where a prisoner may have particular health concerns, the receiving country could be asked to provide information on medical services that would be available to the prisoner.

23. The sentencing country is also required to take reasonable steps to inform sentenced persons of the full legal consequences of transfer (**Article 6**). In Australia, this is done at the point in the transfer process when the Attorney-General's Department writes to a prisoner to seek their consent to transfer. In that letter, the Department sets out the terms of transfer that have been proposed by the receiving country. For prisoners transferring to Australia, this letter will set out the expiry date of the prisoner's sentence, the earliest possible date that he/she could be released if granted parole, and any other relevant information (for example, if it is known at that stage whether any particular parole conditions may be imposed on the prisoner upon their release). For prisoners transferring to the UAE, this letter may encourage prisoners to seek further information on prison conditions, or advise whether the person is likely to spend more time in custody upon transfer than they would in Australia. Prisoners are generally not required to give their consent within a particular timeframe; rather they are given reasonable time to consider the proposed terms of transfer, and to seek legal advice or make any other enquiries prior to deciding whether to consent.

24. Once a transfer has occurred, the receiving country continues to enforce the sentence as if it had the same duration or termination date as imposed by the transferring country and as if the sentence has been imposed in the receiving country (**Article 8**).

25. In all cases, the transferring country retains exclusive jurisdiction for the review, revision, modification or cancellation of convictions that have been imposed by its courts and for the granting of pardons or amnesties (**Article 7**). If the transferring country makes a decision that affects the prisoner's conviction or sentence, for example by granting a six month reduction in the prisoner's sentence or pardon, the receiving country is obliged to modify or terminate enforcement of the sentence accordingly (**Article 8(4)**).

26. In the Government's experience, it is unusual for a transferring country to alter or cancel a conviction or the original sentence once a prisoner has transferred. However, some countries continue to grant sentence reductions, remissions or amnesties to a prisoner even after they have transferred back to Australia. In these cases, any such sentence reductions, remissions or amnesties will be recognised in Australia and apply to reduce the prisoner's head sentence in Australia.

Costs

27. A self-assessment of the regulatory impact of the Treaty has been conducted by the Attorney General's Department. The Office of Best Practice Regulation confirmed on 26 July 2016 that a Regulation Impact Statement is not required.

28. The cost of the continued enforcement of the sentence after transfer is to be borne by the receiving country, except for any costs incurred exclusively in the territory of the

transferring country (**Article 12**). Each prisoner transferred from Australia to the UAE under the Treaty will represent a cost saving to Australia of approximately **AUD\$76,635** for each year the prisoner would otherwise have spent in an Australian state or territory prison.³

29. The ITP Act allows the Commonwealth to establish administrative arrangements with the states and territories setting out the administrative protocols for the outgoing transfer of foreign prisoners held as state, territory or federal offenders, and the incoming transfer (as federal prisoners) of Australians imprisoned overseas (**Section 50**). Administrative arrangements have been established with all states and territories. Under these arrangements, in relation to incoming prisoners, it has been agreed between the Commonwealth and Australian states and territories⁴ that:

- (a) the Commonwealth will meet the general administrative costs involved in processing transfers (in practice this is the employment costs for the team within the Attorney-General's Department that processes 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 an international departure point in the transfer country (in practice this will include the travel and accommodation costs of the Australian law enforcement escorts travelling with the prisoner, and the prisoner's airfare);
- (c) if the state or territory minister considers that an incoming prisoner, or their family, 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 from the prisoner, or their family, 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.

30. In relation to outgoing prisoners from Australia to the UAE, the UAE will bear the cost of transfers under the Treaty, except those expenses incurred exclusively in Australian territory (**Article 12**). Generally speaking, costs incurred exclusively in Australian territory would be those incurred when moving a prisoner from their current prison location to the nearest international departure point. The states and territories have agreed that these costs

³ This is the approximate annual cost of maintaining a person in prison in Australia according to the Productivity Commission's 2017 Report on Government Services. The Report lists the total net operating expenditure per prisoner per day in Australia as \$209.96.

⁴ 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).

will be borne by the state or territory in which the prisoner is held before transfer.⁵ For example, the costs of transferring a prisoner by plane from a prison located in remote Western Australia to Perth airport would be covered by the Western Australian Government.

Implementation

31. It is proposed that the Treaty will be implemented by making regulations under **Section 8** of the ITP Act, declaring the UAE to be a transfer country for the purposes of the Act.

32. Given that the ITP Act and counterpart state and territory legislation⁶ already provides the legislative framework for Australia's ITP scheme, including the requirements for engagement with the relevant State or Territory Governments, no provisions requiring consent of an Australian State or Territory Government were included in the Treaty.

33. 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 the UAE, the consent of the relevant State or Territory Government must be obtained in order for the transfer to proceed. 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 (**Section 5(1)(a)**). 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 and assisting the foreign government with arrangements for the prisoner's physical transfer. The Commonwealth Government works closely with states and territories to process all applications under the ITP scheme.

34. As there are no federal prisons in Australia, **section 2(a)** of the ITP Act requires the relevant State or Territory Government receiving sentenced persons from the UAE to also consent to such transfers, and such prisoners are deemed to be federal prisoners upon their transfer to Australia.

35. **Article 14** of the Treaty provides that the countries may consult with each other to promote the most effective use of the Treaty and to agree on such practical measures as may be necessary to facilitate its implementation.

Future treaty action

36. The Treaty is silent as to amendment. In the absence of an amendment provision, Article 39 of the *Vienna Convention on the Law of Treaties* ([1974] ATS 2) applies to allow amendment by agreement between the parties.

37. Any amendment to the Treaty would be a treaty action and would be subject to Australia's domestic treaty processes.

Withdrawal or denunciation

38. Either country may terminate the Treaty by written notice at any time, with termination taking effect three months after the date of such notice (**Article 16**). Termination of the Treaty will not affect the enforcement of sentences of any prisoners who have already

⁵ Above n. 4.

⁶ Above n. 2.

transferred under the Treaty. Termination of the Treaty by the Australian Government would need to be effected in accordance with Australia's domestic treaty action requirements.

Contact details

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ATTACHMENT ON CONSULTATION

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