

INTERNATIONAL TRANSFER OF PRISONERS (UNITED ARAB EMIRATES)
REGULATIONS 2019

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

under section 58 of the *International Transfer of Prisoners Act 1997*

PURPOSE AND OPERATION OF THE INSTRUMENT

The *International Transfer of Prisoners Act 1997* (the Act) forms the Commonwealth legislative framework for the International Transfer of Prisoners scheme (the scheme) in Australia. The scheme allows Australians imprisoned overseas to apply to return to Australia to serve the remainder of their sentence in an Australian prison. The scheme also allows foreign nationals who are imprisoned in Australia to apply to serve the balance of their sentence in their home country.

Section 58 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by this Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Subsection 8(1) of the Act provides that the regulations may apply the Act to a foreign country and may declare that country to be a transfer country for the purposes of the Act. Subsection 8(2) of the Act provides that the regulations may declare that the Act applies in relation to such a foreign country subject to limitations, conditions, exceptions or qualifications referred to in the regulations. Paragraph 8(3)(a) of the Act provides that the limitations, conditions, exceptions or qualifications can include those necessary to give effect to a bilateral treaty.

The purpose of the *International Transfer of Prisoners (United Arab Emirates) Regulations 2019* (the Regulations) is to give effect in Australian domestic law to the *Treaty between the Government of Australia and the Government of the United Arab Emirates concerning Transfer of Sentenced Persons* (the Treaty). The Treaty was the subject of a public hearing by the Joint Standing Committee on Treaties (JSCOT). In Report 185, tabled 22 March 2019, JSCOT recommended that binding treaty action be taken to implement the Treaty.

Australia does not have a bilateral treaty in force with the United Arab Emirates (UAE) to facilitate the transfer of sentenced persons. The Treaty with the UAE provides a basis on which Australia can engage in prisoner transfers with the UAE. The Treaty establishes a comprehensive framework to govern transfers of sentenced persons between Australia and the UAE and ensures that Australia can accept applications from prisoners for transfer to or from the UAE in accordance with clearly defined and mutually agreed terms. The Treaty will further strengthen Australia's international crime cooperation relationship with the UAE.

The Regulations declare the UAE a transfer country, and allow the Act to apply to the UAE subject to the Treaty. The terms of the Treaty are set out in Schedule 1 of the Regulations. The Regulations are consistent with the Act. This means that every prisoner transfer between Australia and the UAE would require the consent of the prisoner, the Australian and UAE governments, and in some circumstances, the relevant Australian state or territory government.

The Regulations commence on the day on which the Treaty enters into force. Article 16 of the Treaty provides that the Treaty shall enter into force 30 days after the date on which parties have notified each other that their domestic processes for the implementation of the Treaty have been completed.

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

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

CONSULTATION

Consultation was not undertaken outside of the Australian Government for the Regulations as it relates to international cooperation on criminal justice and law enforcement matters between Australia and foreign countries. The Regulations do not have a direct, or substantial indirect, effect on business, nor do they restrict competition.

The Office of Best Practice Regulations (OBPR) has advised that a Regulation Impact Statement is not required for the Regulations (OBPR Reference number 24583).

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

International Transfer of Prisoners (United Arab Emirates) Regulations 2019

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 disallowable legislative instrument

The *International Transfer of Prisoners Act 1997* (the Act) forms the Commonwealth legislative framework for the International Transfer of Prisoners scheme (the scheme) in Australia. 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. The scheme is consent based and requires the formal consent of the prisoner, the Attorney-General, the relevant foreign country and (where appropriate) the relevant Australian state or territory, to or from which the prisoner wishes to transfer.

Subsection 8(1) of the Act provides that the regulations may apply the Act to a foreign country and may declare that country to be a transfer country for the purposes of the Act. Subsection 8(2) of the Act provides that the regulations may declare that the Act applies in relation to such a foreign country subject to limitations, conditions, exceptions or qualifications referred to in the regulations. Paragraph 8(3)(a) of the Act provides that the limitations, conditions, exceptions or qualifications can include those necessary to give effect to a bilateral treaty.

The *International Transfer of Prisoners (United Arab Emirates) Regulations 2019* (Regulations) give effect in Australian domestic law to the *Treaty between the Government of Australia and the Government of the United Arab Emirates concerning Transfer of Sentenced Persons* (the Treaty) by providing that the Act applies to transfers to and from the United Arab Emirates (UAE) subject to the text of the Treaty. The Treaty was the subject of a public hearing by the Joint Standing Committee on Treaties (JSCOT). In Report 185, tabled on 22 March 2019, JSCOT recommended that binding treaty action be taken to implement the Treaty.

The Treaty provides a comprehensive framework to govern transfers of sentenced persons between Australia and the UAE. It ensures that Australia can accept applications from prisoners for transfers to and from the UAE with clearly defined and mutually agreed terms. The Treaty further strengthens Australia's crime cooperation relationship with the UAE. The Regulations declare the UAE to be a transfer country and applies the Act to the UAE subject to the Treaty.

Human Rights Implication

The Regulations engage the right to privacy (Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR)) and the rights related to conditions in detention (i.e. Articles 7 and 10 of the ICCPR), and Article 3 of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT)). However, although the Regulations engage these rights, they do not limit these rights for the reasons explained below.

The Regulations do not engage the right to life (Article 6 of the ICCPR), for the reasons explained below.

The Right to Privacy

Article 17 of the ICCPR prohibits unlawful or arbitrary interference with a person's privacy. Collecting, using, disclosing or publishing personal information amounts to an interference with privacy. In order for the interference with privacy to not 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 the Treaty is to facilitate the voluntary transfer of prisoners between Australia and the UAE, with the aim of promoting their successful rehabilitation and reintegration into society. The right to privacy is engaged to the extent that information about the sentenced person is conveyed to the receiving State including the name, date and place of birth, statement of nationality, location of the sentenced person, their current address and details of the conviction and sentence (Article 5 of the Treaty). This information is clearly necessary to put in place arrangements for the transfer of a sentenced person and to fulfil the legitimate objective of the scheme.

To the extent the right to privacy is engaged and limited, this limitation is reasonable and proportionate. When the Australian Government seeks an applicant's consent to the collection, use and disclosure of their personal information to facilitate a transfer, applicants are provided with documents which set 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. Before a transfer can be progressed applicants are required to consent to this collection, use and disclosure of their personal information. In addition, the collection, use and disclosure of their personal information is limited to the information required to facilitate a transfer and achieve the legitimate objective of the scheme.

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) of the ICCPR also requires State parties to ensure that prison systems have as their essential aim the reformation and social rehabilitation of prisoners. The right to humane treatment in detention cannot be limited.

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 under the CAT or Article 7 of the ICCPR, a *non-refoulement* obligation would apply (discussed below).

The right to humane treatment in detention may be engaged if a prisoner provides informed consent to transfer back to a country with prison conditions that may not meet the standard articulated by Article 10 of the ICCPR. The engagement of this right is necessary to give effect to the desires of prisoners incarcerated in Australia or the UAE to transfer home to facilitate their successful rehabilitation and reintegration back into their home country. Consent based prison transfers ensure that individuals

transferred back to their home countries are able to enjoy and benefit from being closer to family, friends and culture (for example, a transfer can remove language, cultural or religious barriers).

Under the scheme, there are no forced removals. Each transfer requires the informed consent of the prisoner, the UAE, the Attorney-General, and in some circumstances, the consent of the relevant state or territory Minister. Prisoners are required to self-initiate applications and at the final stage of the scheme provide an informed consent to the transfer on the agreed terms. The informed consent includes consenting to the terms of enforcement of the sentence and acknowledging that they have informed themselves of the relevant prison conditions. A prisoner can elect to withdraw their consent from the transfer at any stage of the process up to and including the final transfer to the airport.

Each application (which is self-initiated by the prisoner) is considered on a case-by-case basis and the applicant, the Attorney-General and the UAE retain a broad and unfettered discretion to refuse consent to transfer for any reason. If a case were to arise under which the Attorney-General had concerns that an individual was at risk of harm by way of torture or cruel, inhuman or degrading treatment or punishment then a transfer would be refused.

Prohibition against torture or cruel, inhuman or degrading treatment or punishment

Article 7 of the ICCPR and Article 3 of the CAT contain a prohibition against torture or cruel, inhuman or degrading treatment or punishment. This includes a *non-refoulement* obligation not to return a person to a country where they would be at risk of harm by way of torture, or cruel, inhuman or degrading treatment or punishment.

Article 13 of the Treaty provides that the Treaty shall not affect obligations of the Parties arising under multilateral conventions to which one or both Parties are party. Australia, as a party to both the CAT and the ICCPR, has *non-refoulement* obligations not to return a person to a country where they would be at risk of harm by way of torture, or cruel, inhuman or degrading treatment or punishment. Therefore, applications to transfer under the Treaty would be subject to Australia's obligations under the ICCPR and the CAT.

The Attorney-General has a broad and unfettered discretion to refuse transfers under the Treaty and the Act. If the Attorney-General had any concerns that an individual was at risk of harm by way of torture, or cruel, inhuman or degrading treatment or punishment then a transfer would be refused. As a practical matter, it is unlikely that a prisoner would provide free and informed consent in circumstances where conditions constituted torture or cruel, inhuman or degrading treatment or punishment. As such, the risk of Australia's *non-refoulement* obligations being engaged is low.

Right to life

Article 6 of the ICCPR provides that every human being has the inherent right to life. This right shall be protected by law and no one shall be arbitrarily or unlawfully deprived of his or her life. Australia has a *non-refoulement* obligation under Article 6 of the ICCPR not to remove a person to a country where there is a real risk that the person will be subject to the death penalty.

Both the Act and this Treaty reflect Australia's *non-refoulement* obligations and are consistent with the Australian Government's longstanding opposition to the death penalty. Under the Treaty, transfers can only be effected when the sentence is final and no longer the subject of any appeals. The Treaty also prohibits transfers of individuals who are subject to the death penalty, unless the sentence has

been commuted from death penalty to life imprisonment. Consequently, the Treaty does not limit the right to life.

Conclusion on this instrument and human rights implications

The Regulations are compatible with human rights, and to the extent that they may limit human rights, those limitations are to achieve a legitimate objective and are reasonable, necessary and proportionate.

Attachment A

NOTES ON SECTIONS

PART 1 – Preliminary

Section 1 – Name

This section provides that the title of the regulations is the *International Transfer of Prisoners (United Arab Emirates) Regulations 2019* (Regulations).

Section 2 – Commencement

This section provides that the Regulations commence on the later of (a) the day after the Regulations are registered, and (b) the day on which the *Treaty between the Government of Australia and the Government of the United Arab Emirates Concerning Transfer of Sentenced Persons*, done at Canberra on 9 May 2018 (Treaty) enters into force for Australia. However, the Regulations do not commence at all if the event in (b) does not occur.

Under the Treaty, entry into force will occur 30 days after the parties have notified each other in writing through diplomatic channels that their respective domestic requirements for entry into force have been fulfilled. The Minister must, by notifiable instrument, announce the day on which the Treaty enters into force for Australia.

Section 3 – Authority

This section provides that the Regulations are made under the *International Transfer of Prisoners Act 1997*.

Section 4 – Definitions

This section defines terms used in the Regulations. In the Regulations references to the word *Act* are interpreted as being references to the *International Transfer of Prisoners Act 1997* (the Act).

Section 5 – Declaration of the United Arab Emirates as a transfer country

This section declares the United Arab Emirates (UAE) as a transfer country for the purposes of subsection 8(1) of the Act. Subsection 8(4) of the Act provides that the Act may apply to a transfer country subject to the limitations, conditions, exceptions or qualifications necessary to give effect to a treaty. The effect of section 5 of Regulations is to allow prisoner transfers to take place between Australia and the UAE under the Act.

Section 6 – Application of the Act

The Act sets out the legislative framework for Australia's participation in international prisoner transfers. Subsection 8(2) of the Act states that the regulations may declare that the Act applies in relation to a foreign country subject to limitations, conditions, exceptions or qualifications referred to in the regulations.

Section 6 of the Regulations provide that the Act applies to the UAE subject to the Treaty. Therefore, the Act will apply subject to the limitations, conditions, exceptions or qualifications necessary to give effect to the Treaty.

SCHEDULE 1 – Treaty between the Government of Australia and the Government of the United Arab Emirates Concerning Transfer of Sentenced persons, done at Canberra in Australia on 9 May 2018

This schedule contains the text of the Treaty.