

## **Treaty on Extradition between Australia and the State of the United Arab Emirates<sup>1</sup>**

### **Introduction**

- 2.1 The Treaty on Extradition between Australia and the State of the United Arab Emirates (UAE) was signed for Australia on 26 July 2007. It was tabled on 18 September 2007 but Parliament was dissolved before the Joint Standing Committee on Treaties (JSCOT) could report on the agreement. The purpose of the Treaty is to provide for more effective extradition arrangements between Australia and the UAE. The Treaty adds to Australia's existing network of extradition treaties with 35 other countries.<sup>2</sup>
- 2.2 The Treaty is based on Australia's model extradition treaty and the United Nations model extradition treaty which incorporate a 'no evidence' standard of information for extradition requests. Australia is following a general international trend towards a 'no evidence' standard.<sup>3</sup>

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1 Full title: Treaty on Extradition between Australia and the State of the United Arab Emirates (Hobart, 26 July 2007).

2 National Interest Analysis (NIA), para 1.

3 Mr Steven Marshall, *Transcript of Evidence*, 8 May 2008, p. 16.

- 2.3 Australia has over 30 bilateral extradition treaties that incorporate ‘no evidence’ standards of information for extradition requests.<sup>4</sup> In evidence to the Committee, the Attorney-General’s Department explained that this approach:

treats determination of guilt or innocence as fundamentally a matter for the courts of the requesting state; however, the treaty still requires the provision of sufficient information to determine that the person is sought in a legitimate pursuit of the enforcement of the criminal law and also to enable Australia to consider whether there is a basis for refusing the extradition request under the treaty.<sup>5</sup>

### Reasons for Australia to take treaty action

- 2.4 Australia needs to ensure that criminals cannot evade justice simply by crossing borders. This requires an extradition system that can deal effectively with domestic and transnational crime, including terrorism, while providing appropriate safeguards.<sup>6</sup>
- 2.5 As with Australia’s other extradition treaties, the Treaty with the UAE provides a mechanism for one State (the Requested State) to surrender an accused or convicted person to the other State (the Requesting State) to face criminal charges or to serve a sentence. The legislative basis for extradition matters in Australia is the *Extradition Act 1988* (Cth) (the Extradition Act). It sets out a number of mandatory requirements which must be met before Australia can make or accept an extradition request. Those requirements may be supplemented by requirements contained in a multilateral or bilateral treaty.<sup>7</sup>
- 2.6 Australia is able to make an extradition request to any country, but without an extradition agreement there is no assurance that the other country will consider Australia’s request. Australia will be able to receive an extradition request from any country that is an ‘extradition country’ under the Extradition Act. An ‘extradition country’ is any country that is declared by regulations made under the Act to be an extradition country. The UAE is not currently an ‘extradition country’.<sup>8</sup>

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4 The term ‘no evidence’ does not mean ‘no information’. Rather, it means that the information required for extradition does not need to include evidence of the alleged offence.

5 Mr Steven Marshall, *Transcript of Evidence*, 8 May 2008, p. 9.

6 NIA, para 3.

7 NIA (2007), para 6.

8 NIA, paras 12-13.

## Obligations

2.7 Key provisions of the Treaty with the UAE are:

- The Treaty will provide a modernised framework for Australia and the UAE to send and accept extradition requests (Article 1).
- An extraditable offence is an offence which, at the time of the request, is punishable under the laws of both countries by imprisonment for a minimum period of one year or by a more severe penalty (Article 3(1)).<sup>9</sup>
- The agreement in the Treaty to extradite is qualified by numerous internationally accepted mandatory and discretionary grounds for refusal which reflect grounds contained in the Extradition Act. The Requested State must refuse to extradite a person where, for example, it believes that a request for extradition has been made in relation to a political offence; for the purpose of prosecuting or punishing a person on account of that person's race, colour, sex, language, religion, nationality, ethnic origin, political opinion or that the person's position may be prejudiced for any of those reasons; or because the person whose extradition is requested would be exposed to double jeopardy. (See Article 4).
- Extradition shall not be granted if the offence for which the person sought is accused or convicted carries the death penalty, unless the Requesting State undertakes that the death penalty will not be imposed or, if imposed, will not be carried out (Article 4(1)(g)).<sup>10</sup>

2.8 Article 5 of the Treaty provides that if the extradition of a person is refused, the Requesting State may request that the Requested State prosecute that person in lieu of extradition. If such a request is made and the laws of the Requested State allow it, the Requested State is obliged to submit the case to its competent authorities.

2.9 The procedures and supporting documentation that are required in making a request for extradition are set out in Article 6. A request for extradition must be supported by:

- a statement of each offence, for which extradition is sought;
- a statement of the acts and omissions which are alleged against the person in respect of each offence;

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<sup>9</sup> However, extradition shall be granted only if at least six months of imprisonment remain to be served.

<sup>10</sup> NIA, para 14.

- details necessary to establish the identity of the person and the current location of the person if known;
- the text of laws creating each offence and describing the penalty which may be opposed;
- where the person is accused of an offence, a warrant for the arrest of that person;
- where the person has been convicted and a sentence has been imposed, the request must include documentary evidence of the conviction, the sentence imposed and the extent to which the sentence has not been carried out; and
- where no sentence has been imposed, the request for extradition must be accompanied by documents that provide evidence of the conviction and a statement confirming that a sentence is to be imposed.<sup>11</sup>

2.10 The Requested State may postpone the surrender of a person in order to prosecute that person, or so that the person may serve a sentence in relation to an offence other than the offence for which extradition is sought. If serving a sentence in the Requested State, the person may be temporarily surrendered to the Requesting State to be prosecuted where the offence for which extradition is sought is other than that for which the sentence is being served (Article 13).

2.11 Article 14 prevents the Requesting State from prosecuting or punishing an extradited person for offences other than those for which extradition was granted, unless the Requested State consents.

2.12 Article 15 provides that a person who has been extradited under the Treaty must not be re-extradited by the Requesting State to a third State for trial or punishment for any offence that was committed before extradition to the Requesting State unless the Requested State consents to that surrender or the person has voluntarily remained in the Requesting State for 30 days or returns to the Requesting State of their own volition. The consent of the Requested State must be sought prior to the surrender of the extradited person to an international tribunal established in accordance with a multilateral international convention which applies to the Requesting State.<sup>12</sup> Article 17(1) provides that the Requested State shall make all necessary

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11 NIA, para 17.

12 However, where an extradited person leaves the Requesting State and returns voluntarily, or where the person does not leave the Requesting State within 30 days, that person may be re-extradited to a third State or relevant international tribunal.

arrangements for the representation of the Requesting State in any proceedings arising out of a request for extradition.

- 2.13 Article 19 provides that the Treaty shall enter into force 30 days after the exchange of instruments of ratification. Before this can be done for Australia, regulations will need to be made under the Extradition Act to implement the Treaty.

## **Human rights concerns**

- 2.14 In its submission and in evidence to the Committee, Civil Liberties Australia (CLA) expressed concern in relation to human rights issues and the current extradition treaty system model.
- 2.15 CLA's submission points out that the UAE retains the death penalty and corporal punishment for crimes including murder, rape, arson causing death and treason and argues that this is inconsistent with penalty schemes in Australia and with Australia's formal stance on the death penalty.<sup>13</sup>
- 2.16 In addition, the UAE has a dual courts system where sharia courts and civil courts operate in parallel, covering different areas of the law. Sharia law generally applies to all criminal and family law matters. Under the UAE Penal Code defendants may be detained for extended periods of time without formal recourse to seek bail. Defendants have the right to legal counsel only after the completion of the investigation and trials are conducted before judges, but not judges and juries. National security and public morality issue trials are not heard publicly.<sup>14</sup>
- 2.17 CLA's submission states that although the language of the mutual obligation treaty requests jurisdictions to provide full and frank information regarding alleged offences and penalty schemes, the disparity between the legal systems in Australia and the UAE may present practical problems in identifying dual criminality and reconcilable sentencing schemes between the two jurisdictions.<sup>15</sup>
- 2.18 In addition CLA recommended that if the relevant Minister decides to extradite an individual, the Minister must provide to the person to be extradited written evidence that the Minister has considered the particular prison and detention environment in which the extradited

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13 CLA, Submission No. 4, p. 1.

14 CLA, Submission No. 4, p. 1.

15 CLA, Submission No. 4, p. 1.

person will be placed and why the Minister has come to the decision to extradite the individual.<sup>16</sup>

- 2.19 Submissions from the governments of the Australian Capital Territory and Tasmania also expressed concerns in relation to the possibility of a person being extradited attracting penalties that are inconsistent with penalty schemes in Australia. The ACT Government further expressed concern that such applications 'have the real potential to violate and usurp the fundamental human rights protected under the ACT's *Human Rights Act 2004*'.<sup>17</sup>
- 2.20 Asked by the Committee to comment on issues raised in the CLA, ACT and Tasmanian Government submissions, the Attorney-General's Department responded that the source of the rights set out in the ACT legislation is the International Covenant on Civil and Political Rights, which Australia has ratified. As outlined in the NIA for the Treaty, the obligations regarding extradition are qualified by numerous internationally accepted grounds for refusal including the possible application of the death penalty and risk of torture.<sup>18</sup>
- 2.21 In addition, the Attorney-General's Department stated that it is not feasible to include a requirement that extradition assistance to another country may only be provided in circumstances where the penalty imposed by the requesting country directly corresponds with the relevant penalty under Australian law. As penalties for criminal offences often vary considerably between the various State and Territory jurisdictions, the Department suggested that it is difficult to see how such a requirement could operate in practice.<sup>19</sup>
- 2.22 In response to CLA's recommendation that the relevant Minister should be required to provide a person to be extradited with written reasons, the Attorney-General's Department argued that the rules of natural justice already apply and that a legislative requirement is unnecessary.<sup>20</sup> CLA also recommended regulations should be provided that specifically state 'the Minister must take into account the particular prison and detention environment (to which the person will be extradited)'. The Attorney-General's Department stated that the Treaty already includes specific grounds for refusal in respect of

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16 CLA, Submission No. 4, p. 6.

17 ACT Government, Submission No. 5. Further, the ACT is concerned that such applications for extradition have the potential to violate and usurp the fundamental human rights protected under the ACT's Human Rights Act 2004.

18 Attorney-General's Department, Submission No. 8, paras 16 and 18.

19 Attorney-General's Department, Submission No. 8, para 19.

20 Attorney-General's Department, Submission No. 8, paras 10 and 13.

the death penalty and torture and that prison conditions would be addressed under paragraph 4(2)(g) of the Treaty which allows for refusal of extradition:

if the Requested State considers the extradition of the person is unjust, oppressive, or incompatible with humanitarian circumstances in view of the age, health or other personal circumstance of the person.<sup>21</sup>

- 2.23 The Committee also asked for information concerning other bilateral extradition treaties with countries which may apply sharia law. The Attorney-General's Department advised that of the 35 extradition treaties currently in force, the legal systems in five extradition countries (Indonesia, Israel, Malaysia, the Philippines and Turkey) incorporate sharia law domestically to varying degrees. It was noted that in some regions sharia courts have limited jurisdiction over Islamic criminal offences such as alcohol consumption, gambling and conversion.<sup>22</sup> Although serious offences are not usually governed by sharia law, the Attorney-General's Department advised that some penal codes are influenced by sharia law and may codify a range of Islamic offences. However, given the customary nature of sharia law and its varied application between and within countries, it is difficult to state comprehensively the extent to which sharia law might apply to offences that may be subject to extradition under bilateral extradition treaties. However, all requests for extradition must meet the dual criminality requirement, whether the offence is governed by sharia law or a state penal code. Extradition offences must also be subject to a minimum one year term of imprisonment. These safeguards should prevent extradition where the foreign criminal offence does not correspond to an offence under Australian law.<sup>23</sup>

## **Australia's on-going responsibility towards extradited persons**

- 2.24 CLA raised concerns in relation to the lack of formal monitoring of extradited persons after they have been transferred to the requesting country:

There is no responsibility on anyone to do anything. Nowhere in the agreement does it say that there is any reporting back, it does not appear to be an [Attorney-General's Department]

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21 Attorney-General's Department, Submission No. 8, para 16.

22 Attorney-General's Department, Submission No. 8, para 38.

23 Attorney-General's Department, Submission No. 8, para 39.

responsibility to check that something has happened and we think that that is quite important.<sup>24</sup>

- 2.25 The Attorney-General's Department confirmed that there is currently no formal monitoring system for extradited persons:

When it comes to extradition of Australian nationals, Australia has consular responsibilities and has the ability-- and in practice it does this -- to follow up the situation of the person who is being returned. However, when you have a circumstance whereby someone might be travelling through Australia and is sought for extradition, say, from the country in which they are a citizen, we do not have a mechanism in which we actually continue to check the prison conditions in which the person is being kept or continue to check on the processes that have been undertaken. In effect, Australia accepts the undertaking of the relevant country and that is where it stands.<sup>25</sup>

- 2.26 The Committee is seriously concerned about the lack of a formal system for monitoring the trial status and health of extradited persons and the conditions of the detention facility in which they are held. Although an extradited Australian citizen may be monitored through the Australian consular system, there is no system in place to monitor the fate of foreign nationals (including permanent residents of Australia) who are extradited from Australia. At present there is no system to monitor whether such persons are dealt with in accordance with treaty obligations, whether they may be subjected to additional charges and criminal proceedings, or indeed whether they might be extradited or otherwise handed over to another country.<sup>26</sup>
- 2.27 CLA makes the point that it is somewhat naïve to accept assurances that a country to which a person has been extradited will not be extradited to a third country.<sup>27</sup>
- 2.28 Australia currently has 35 extradition treaties of which 31 are based on the 'no evidence' model. It would be prudent to monitor how these treaties operate in practice.<sup>28</sup>
- 2.29 Australia has a moral obligation to protect the human rights of extradited persons beyond simply accepting the undertakings of

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24 Mr Bill Rowlings, *Transcript of Evidence*, 8 May 2008, p. 5.

25 Mr Steven Marshall, *Transcript of Evidence*, 8 May 2008, p. 13.

26 Mr Bill Rowlings *Transcript of Evidence*, 8 May 2008, p. 6.

27 CLA, Submission No. 4.1, p. 2.

28 CLA, Submission No. 4.1, p. 1.



countries making extradition requests. A formal monitoring procedure should be established to ensure that Australia is not party, directly or indirectly, to any injustice or abuse of the human rights of persons it has extradited.

## **Costs**

- 2.30 Article 17 of the Treaty provides that the Requesting State must bear the expenses related to the translation of documents and the transportation of persons surrendered. The Requested State agrees to pay all other expenses incurred in the Requested State in connection with extradition proceedings concerning the person whose extradition is sought.
- 2.31 In accordance with the usual procedure for extradition cases, expenses incurred in extradition cases conducted under the Treaty will be met from existing budgets, principally of the Australian Attorney-General's Department, the Commonwealth Director of Public Prosecutions and the Australian Federal Police.

## **Consultation**

- 2.32 The State and Territory Governments have been consulted through the Commonwealth-State/Territory Standing Committee on Treaties (SCOT). Information on the negotiation of the Treaty was provided to State and Territory representatives for consideration at a meeting of the Standing Committee on Treaties on 18 May 2007. The Governments of the ACT and Tasmania made brief submissions to JSCOT.

## **Conclusions**

- 2.33 The Committee has concerns in relation to the general operation of Australia's current treaty model for extradition. Australia's responsibility for persons extradited from Australia should not end at the conclusion of the extradition process, but should extend to monitoring the detention of extradited persons, the judicial proceedings they are subject to, their sentencing and their imprisonment.

- 2.34 There should be a formal system established by the Department of Foreign Affairs and Trade and the Attorney-General's Department to monitor the status of persons extradited to other countries by Australia, regardless of whether these persons are:
- Australian citizens,
  - citizens of the requesting country; or,
  - citizens of a third country, other than Australia or the country requesting the extradition.
- 2.35 Although the Australian consular network may follow up the cases of Australian citizens who are extradited, a more formal system should be established whereby Australian consular officials monitor and report in detail on all extradited persons.

### **Country to country notification of extradited persons**

- 2.36 Australia should formally notify countries whose citizens have been extradited by Australia to a third country. This would ensure that an extradited person's country of citizenship is aware of the extradition and alerted to the need to provide appropriate consular assistance.
- 2.37 Information concerning the particular conditions attached to the extradition of a person should be passed on to the extradited persons country of citizenship along with the general obligations arising from the applicable extradition treaty with a request that any breaches (for example mistreatment of the person extradited) should be reported back to Australia.
- 2.38 If the extradited person's country of citizenship is unable or unwilling to provide consular support and monitor their trial status and health and the conditions of the detention facility in which they are held on behalf of Australia, Australia should be prepared to provide appropriate assistance to the person.

### **Annual reporting to Parliament**

- 2.39 An annual report to Parliament by the Attorney-General's Department and/or the Department of Foreign Affairs and Trade should be made that includes:
- the number of extradition requests made, granted and refused including the countries making the requests and the alleged offences involved;

- whether any waivers to provisions in an extradition treaty have been sought by any country and, if so, whether they were granted;
- the number of persons extradited (Australian citizens, permanent residents of Australia, foreign nationals); and
- whether any breaches of bilateral extradition agreements have been noted by Australian authorities and what action was taken.

2.40 Also, in respect of each extradited person the following details should be reported:

- their name<sup>29</sup>, nationality and the country to which they have been extradited;
- the person's trial status, ie whether they have been tried and sentenced, and the period of detention prior to trial;
- the means of monitoring the trial status and health of extradited persons and the conditions of the detention facilities in which they are held, i.e. through the Australian consular network or by some other means; and
- the outcome of the trial, if applicable, including convictions and sentencing.

2.41 Annual reporting would facilitate public monitoring and would also inform future consideration by JSCOT on new extradition treaties.<sup>30</sup> Despite the widespread adoption of the 'no evidence' approach by Australia, JSCOT is not in a position to determine whether the existing arrangements are being upheld in respect of all extradited persons.

2.42 In the event that a country has breached the provisions of an extradition treaty or that there has been an abuse of the human rights of an extradited person, the matter should be reported to Parliament and stand referred to the Joint Standing Committee on Foreign Affairs, Defence and Trade for inquiry and report.

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29 The Committee understands that there may be privacy issues involved in publishing an extradited persons identity. However, extradition proceedings are normally conducted in open court before a magistrate. Publishing the name of an extradited person allows for greater scrutiny of each case and further monitoring by non-government agencies that may otherwise not be aware of the case.

30 CLA, Submission No. 4.1.

## Recommendations

- 2.43 The Committee recognises the key role extradition plays in building strong cooperative relationships between countries to effectively combat transnational crime and the Committee supports this agreement. However the Committee has serious concerns in relation to the monitoring of outcomes for extradited persons under Australia's current extradition treaties and has made recommendations to the Government to act to address these concerns.

### Recommendation 1

**The Committee supports the *Treaty on Extradition between Australia and the State of the United Arab Emirates* and recommends that binding treaty action be taken.**

### Recommendation 2

**The Committee recommends that new and revised extradition agreements should explicitly provide a requirement that the requesting country provide annual information concerning the trial status and health of extradited persons and the conditions of the detention facilities in which they are held.**

### Recommendation 3

**That the Australian Government develop and implement formal monitoring arrangements for Australia's bilateral extradition treaties which include the following elements:**

- **the Attorney-General's Department informs the Department of Foreign Affairs and Trade of each extradition, including the terms of the relevant extradition agreement and any special conditions applying to the case.**
- **The Department of Foreign Affairs and Trade would be expected to formally monitor all extradited Australians through the consular network.**
- **In the event that a foreign national is extradited to their country of citizenship, the extradition should be made on the**

understanding that the Australian Government will be informed through its diplomatic representatives of the outcome of the prosecution and the ongoing status of the person while in custody as a result of a conviction. The Australian consular network would be expected to monitor and report on the condition of the extradited person until they had served their sentence and were released.

- In the event that a foreign national is extradited to a third country, the extradited person's country of citizenship should be informed and asked to monitor that person's trial status and health and the conditions of the detention facility in which they are held and report to the Australian Government if it has the capacity and is willing to do so. In the event that an extradited person's country of citizenship does not have the capacity to monitor the extradited person or is not willing to do so, then the Australian Government should monitor that person's trial status and health and the conditions of the detention facility in which they are held through Australia's consular network until that person is acquitted or, if convicted and imprisoned, their sentence is served, they are released and leave the country.

#### **Recommendation 4**

The Committee recommends that the Attorney-General's Department and/or the Department of Foreign Affairs and Trade include in their annual report to Parliament the following information concerning the operation of Australia's extradition agreements:

- the number of extradition requests made, granted and refused including the countries making the requests and the alleged offences involved;
- whether any waivers to provisions in an extradition treaty have been sought by any country and, if so, whether they were granted;
- the number of persons extradited (Australian citizens, permanent residents of Australia, foreign nationals); and

- whether any breaches of bilateral extradition agreements have been noted by Australian authorities and what action was taken.

Also, in respect of each extradited person the following details should be reported:

- their name, nationality and the country to which they have been extradited;
- the person's trial status, ie whether they have been tried and sentenced, and the period of detention prior to trial;
- the means of monitoring the trial status and health of extradited persons and the conditions of the detention facilities in which they are held, i.e. through the Australian consular network or by some other means; and
- the outcome of the trial, if applicable, including convictions and sentencing.