

**National Interest Analysis [2017] ATNIA 28**

**with attachment on consultation**

**Agreement between Australia and the Hashemite Kingdom of Jordan on  
Extradition**

(Amman, 24 April 2017)

**[2017] ATNIF 35**

# NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

## SUMMARY PAGE

### **Agreement between Australia and the Hashemite Kingdom of Jordan on Extradition**

(Amman, 24 April 2017)

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#### **Nature and timing of proposed treaty action**

1. It is proposed to bring into force the *Agreement between Australia and the Hashemite Kingdom of Jordan on Extradition* (the proposed Agreement), done at Amman on 24 April 2017.
2. **Article 21(1)** of the proposed Agreement provides that it shall enter into force thirty days from the date on which the Parties have notified each other in writing that all necessary steps have been taken for the entry into force of the proposed Agreement. Before notification can be provided by Australia, Australia's domestic treaty requirements must be completed. These requirements include consideration by the Joint Standing Committee on Treaties (JSCOT) and the making of implementing regulations under the *Extradition Act 1988* (Cth) (the Extradition Act).

#### **Overview and national interest summary**

3. The purpose of the proposed Agreement is to provide for effective extradition arrangements to strengthen the bilateral crime cooperation and law enforcement relationship between Australia and Jordan. Australia does not currently have a bilateral arrangement with Jordan to facilitate extradition. While Australia can currently consider a request for extradition from Jordan on the basis that Jordan has been declared an extradition country for the purposes of the Extradition Act, the Jordanian Constitution prevents Jordan from actioning an extradition request from Australia in the absence of a bilateral extradition treaty. The proposed Agreement will establish a bilateral extradition relationship that allows extradition for offences punishable under the laws of both countries by imprisonment for a period of at least one year or by a more severe penalty.
4. Australia needs to ensure that criminals, including those involved in transnational crimes including terrorism, cannot evade justice simply by crossing borders. This requires a responsive, streamlined extradition system that effectively combats domestic and transnational crime, including terrorism, while providing appropriate safeguards. Jordan is an important partner for Australia in the Middle East. The proposed Agreement will strengthen this partnership and support future cooperation between Australia and Jordan to combat organised crime and terrorism.
5. The proposed Agreement is consistent with other Australian bilateral extradition treaties and can be implemented under Australia's existing domestic legislative framework for extradition.
6. The proposed Agreement adds to Australia's existing network of modern bilateral extradition treaties with 39 other countries, and our extradition obligations under a number of multilateral agreements.

7. The safeguards and protections in the proposed Agreement are consistent with those in the Extradition Act.

### **Reasons for Australia to take the proposed treaty action**

8. Jordan is an important partner in the Middle East for the Australian Government's efforts to combat serious crime including organised crime and terrorism. The proposed Agreement will facilitate closer cooperation between Australia and Jordan on organised crime and terrorism matters and will assist to ensure neither country becomes a safe haven for persons accused of serious crimes in the other country. This Agreement will strengthen Australia's ability to prosecute foreign terrorist fighters and those who engage in terrorism more broadly.

9. The proposed Agreement is consistent with Australia's domestic legislative arrangements for extradition under the Extradition Act. The Extradition Act sets out a number of mandatory requirements which must be met before Australia can make or receive an extradition request. Those requirements are supplemented by requirements contained in multilateral or bilateral treaties. Australia will consider each individual extradition request on a case-by-case basis in light of its domestic legislative framework for extradition, as well as its international obligations.

10. The proposed Agreement will provide a framework under which both Parties will be able to consider requests for extradition from the other. The proposed Agreement will oblige Jordan to consider Australian requests for extradition. While Australia can request extradition from any country, there are no assurances that the other country will consider Australia's request in the absence of a treaty.

11. This is particularly important in the context of prosecuting individuals for terrorism-related offences. Jordan is a transit country for foreign terrorist fighters and a strong international crime cooperation relationship with Jordan is critical in ensuring that those who engage in acts of terrorism cannot evade justice by seeking safe haven there.

12. Implementation of the proposed Agreement will also oblige Australia to consider extradition requests from Jordan. The Extradition Act allows Australia to receive extradition requests from countries that are declared to be an 'extradition country' under the Act (see section 5 of the Extradition Act). While Australia has previously declared Jordan to be an 'extradition country' notwithstanding the absence of a treaty, the proposed Agreement will provide greater clarity on the nature of that relationship and ensure reciprocity. Prior to bringing the proposed Agreement into force, regulations will be made under the Extradition Act to re-declare Jordan to be an 'extradition country', and specify that the Extradition Act applies in relation to Jordan subject to the proposed Agreement.

13. Extradition requests may only be granted where the requirements set out in the proposed Agreement and domestic legislation are met. The proposed Agreement contains a number of important safeguards and human rights protections, including mandatory grounds for refusal to extradite where a person will be subjected to torture or where extradition is sought for a political offence or a purely military offence, or for the purpose of prosecuting or punishing the person on account of their race, sex, nationality, religion or political opinion.

14. The proposed Agreement also provides that an extradition request must be refused if the offence for which extradition is sought carries the death penalty, unless the country seeking extradition has provided an undertaking that the death penalty will not be imposed or, if imposed,

will not be carried out. The human rights safeguards in the proposed Agreement are consistent with Australia's international human rights law obligations.

15. The proposed Agreement adopts the 'no evidence' standard for extradition requests. This accords with an international trend towards simplifying extradition requests. The 'no evidence' standard is included in the United Nations Model Extradition Treaty and is consistent with the scheme under the Extradition Act. Australia has over 30 modern bilateral extradition treaties that adopt the 'no evidence' standard. The term 'no evidence' does not mean 'no information'. Rather, it means that an extradition request needs to be supported by a statement of each offence for which extradition is sought and a statement of the conduct alleged against the person in respect of those offence(s) (**Article 5**), but does not require evidence sufficient to prove each element of each alleged offence under the laws of the requested country (such as 'prima facie' evidence including witness statements and affidavits). This is because extradition is not a criminal process. Rather, it is an administrative process to determine whether a person is to be surrendered to face justice in the Requesting Party.

16. Extradition is a preliminary step towards the trial of a person, or return of a person to serve a sentence of imprisonment. The purpose of extradition proceedings is not to determine guilt or innocence. The Extradition Act provides safeguards for decisions making under the Act, and there are also opportunities for review of extradition decisions.

## **Obligations**

17. The proposed Agreement will oblige Australia and Jordan to consider one another's requests for the extradition of persons who are wanted for prosecution or for the imposition or enforcement of a sentence for an 'extraditable offence', in accordance with the provisions of the proposed Agreement (**Article 1**).

18. The proposed Agreement provides that an extraditable offence is an offence which, at the time the extradition request is made, is punishable under the laws of both Parties by imprisonment for a maximum period of at least one year or by a more severe penalty (**Article 3(1)**). **Article 20** provides that the proposed Agreement applies to requests presented after its entry into force even if the acts or omissions occurred before the Agreement entered into force. Where extradition is sought to enforce a sentence of imprisonment for an offence of the nature described in **Article 3(1)**, extradition shall be granted only if a period of at least six months of the sentence remains to be served (**Article 3(2)**).

### *Grounds for refusing extradition*

19. The obligation to extradite in **Article 1** is qualified by other provisions of the proposed Agreement. The proposed Agreement expressly includes provisions that specify internationally accepted mandatory and discretionary grounds for refusing extradition (**Article 4**) and **Article 18** of the proposed Agreement expressly preserves the rights enjoyed and obligations undertaken by the Parties under multilateral conventions.

20. The grounds for refusing extradition under the proposed Agreement are consistent with Australia's domestic legal requirements and the grounds for refusal under the Extradition Act.

21. **Article 4(1)** of the proposed Agreement sets out the mandatory grounds for refusal. Under the proposed Agreement extradition must be refused in any of the following circumstances:

- where there are substantial grounds for believing that the extradition request has been made for the purpose of prosecuting or punishing a person on account of that person's race, sex, religion, nationality or political opinion, or that person's position may be prejudiced for any of those reasons (**Article 4(1)(a)**);
- if the offence for which extradition is requested is regarded as an offence under military law but not an offence under the ordinary criminal law of the Requested Party (**Article 4(1)(b)**);
- if the offence for which extradition is requested, or any other offence that may be established from acts or omissions giving rise to the extradition offence, carries the death penalty, and the Requesting Party has not provided an undertaking that the death penalty will not be imposed or, if imposed, will not be carried out (**Article 4(1)(c)**);
- where there are substantial grounds for believing that the person whose extradition is requested would be in danger of being subjected to torture if extradited (**Article 4(1)(d)**);
- if the offence for which extradition is requested is regarded as a political offence (**Article 4(1)(e)**); or
- where the person whose extradition is requested would be exposed to 'double jeopardy': that is, where that person has already been acquitted, pardoned, or punished under the laws of the Requested Party in respect of the conduct constituting the offence for which extradition is sought (**Article 4(1)(f)**).

22. The provision in **Article 4(1)(c)** relating to the death penalty reflects Australia's domestic legal requirements. Paragraph 22(3)(c) of the Extradition Act provides that the Attorney-General cannot surrender a person to another country for an offence punishable by a penalty of death unless the requesting country first gives an undertaking that the person will not be tried for the offence, or if the person is tried the death penalty will not be imposed, or if the death penalty is imposed, that it will not be carried out.

*Discretionary grounds for refusing extradition*

23. **Article 4(2)** of the proposed Agreement sets out discretionary grounds for refusal. Extradition may be refused where:

- the offence for which extradition is requested is considered by the Requested Party as having been committed wholly or partially within its jurisdiction (**Article 4(2)(b)**);
- a prosecution in respect of the conduct constituting the offence for which extradition is requested is pending in the Requested Party against the person whose extradition is sought (**Article 4(2)(c)**);
- the authorities of the Requested Party have decided not to prosecute the person for the conduct constituting the offence in respect of which extradition is requested (**Article 4(2)(d)**);
- the person whose extradition is requested would be liable to be tried or sentenced or has been sentenced by an extraordinary or ad hoc court or tribunal in the Requesting Party (**Article 4(2)(e)**); or
- the Requested Party considers that, in the circumstances of the case, including the age, health or other personal circumstances of the person whose extradition is requested, the extradition of the person would be unjust, oppressive, incompatible with humanitarian considerations or too severe a punishment (**Article 4(2)(f)**).

24. **Article 4(2)(a)** of the proposed Agreement provides a further discretionary ground for refusing extradition on the basis of nationality, unless the laws of the Requested Party prohibit the

extradition of its nationals (in which case, extradition shall be refused). If extradition is refused on the basis of nationality, the Requested Party shall, at the request of the Requesting Party, submit the case to its competent authorities for the purpose of instituting criminal proceedings in accordance with its domestic law. This will assist to ensure that nationality cannot be a basis for safe haven.

25. Where Australia is the Requested Party, section 22(3)(f) of the Extradition Act provides that a person can only be surrendered if the Attorney-General, in his or her discretion, considers that the person should be surrendered for the extradition offence(s). This requirement is additional to the mandatory and discretionary grounds for refusal (explained above) and the other requirements for extradition under the proposed Agreement and the Extradition Act. In making his or her determination, the Attorney-General may also have regard to international law considerations.

26. **Article 5** of the proposed Agreement prescribes the procedure and supporting documentation required to make an extradition request. The information and documentation that must be provided in support of an extradition request includes:

- a statement of each offence for which extradition is requested (**Article 5(2)(a)(i)**);
- a statement of the acts and omissions that are alleged against the person in respect of each offence (**Article 5(2)(a)(ii)**);
- the text of the laws establishing each offence and describing the penalty which may be imposed (**Article 5(2)(a)(iii)**);
- a statement regarding any applicable time limitations in respect of proceedings or punishment (**Article 5(2)(a)(iv)**);
- details necessary to establish the identity and nationality of the person whose extradition is sought (**Article 5(2)(a)(v)**);
- a statement of the current location of the person, if known (**Article 5(2)(a)(vi)**);
- if the person is accused of an offence, a warrant for the arrest of that person (**Article 5(2)(b)**);
- if the person has been convicted of an offence, documentary evidence of the conviction, any sentence imposed, the fact that the sentence is immediately enforceable and the extent to which any sentence imposed has not been carried out (**Articles 5(2)(d) and (e)**); and
- if the person has been convicted in absentia, a document authorising the person's arrest and any options available to the person to challenge the conviction or sentence (**Article 5(2)(c)**).

27. **Article 5(5)** of the proposed Agreement provides that extradition of a person may still be granted even if all of the requirements of **Article 5** have not been met, provided that the person consents to the extradition.

28. **Article 7** of the proposed Agreement enables additional information to be provided in support of an extradition request if necessary.

29. **Article 8** of the proposed Agreement provides that in urgent cases a Party may apply for the provisional arrest of a person whose extradition will later be requested. A provisional arrest application is an urgent request to arrest a person pending receipt of a request for extradition. A provisional arrest application may be appropriate in cases of urgency, for example, when it is believed that there is a risk that the subject of the application may abscond or flee the jurisdiction of the Requested Party. **Article 8** of the proposed Agreement requires that a provisional arrest application must be accompanied by the following:

- a statement about the reasons for urgency prompting the making of the application (**Article 8(2)(a)**);
- a description of the person (**Article 8(2)(b)**);
- details of the person's location, if known (**Article 8(2)(c)**);
- for each offence for which extradition will be sought, a statement of the offence and the conduct constituting the offence (**Articles 8(2)(d)** and **(e)**);
- a statement of the existence of a warrant for the arrest of the person or evidence of a court judgment of conviction (**Article 8(2)(f)**);
- a statement of the punishment that can be or has been imposed for the offence(s) (**Article 8(2)(g)**); and
- a statement that a formal request for the extradition of the person will follow (**Article 8(2)(h)**).

30. If the Requested Party does not receive a request for the extradition of a person taken into custody on the basis of a provisional arrest application within 60 days of the person having been taken into custody, the person may be released from custody (**Article 8(4)**).

31. **Article 9** deals with the situation where an extradition request is received for the same person from two or more different countries. It sets out six factors that must be considered by the Requested Party in determining to which country the person is to be extradited, including the relative seriousness of the offence(s) for which extradition is sought if the requests relate to different offences, the dates of the requests and the nationality of the person (**Article 9(2)**).

32. **Article 10** sets out the procedure for surrendering the person to the Requesting Party once a decision to extradite has been made. For instance, it provides that if the Requesting Party does not remove the person from the territory of the Requested Party within 45 days, the Requested Party may refuse the extradition (**Article 10(3)**).

33. **Article 11** makes provision for the surrender, upon request, of all property found in the Requested Party's territory that has been acquired as a result of the offence(s) for which extradition is requested, or may be required as evidence. Surrender of such property is subject to the law of the Requested Party and the rights of third parties.

34. **Article 12** allows extradition to be postponed to allow the Requested Party to prosecute or enforce a sentence against the person for an offence other than an offence constituted by conduct for which extradition is requested. If the person is serving a sentence in the Requested Party, the person may be temporarily surrendered to the Requesting Party for prosecution in relation to an offence for which extradition is sought and then returned to the Requested Party after proceedings have concluded, in accordance with mutually agreed conditions (**Article 12(3)**). Surrender may also be postponed on medical grounds (**Article 12(2)**).

35. Under **Article 13** of the proposed Agreement, a person extradited under this Agreement shall not be detained, proceeded against or subject to the execution of sentence in the territory of the Requesting Party for any offence committed before her or his extradition other than for:

- an offence for which extradition was granted;
- another extraditable offence that is provable on the same facts, and punishable by the same or lesser penalty, as the offence for which extradition was granted; or
- any other extraditable offence to which the Requested Party consents.

36. This is commonly referred to as the ‘rule of speciality’. This protection will cease to apply if the person remains in the jurisdiction of the Requesting Party 45 days after being released in relation to the offence(s) for which they were extradited and is able to leave, or where the person has left the Requesting Party’s jurisdiction and subsequently voluntarily returned. The protection does not extend to offences that are committed after surrender.

37. **Article 14** provides that, where a person has been extradited under the proposed Agreement, the Requesting Party must not then extradite the person to a third country for any offence committed prior to the person’s surrender unless the Requested Party consents, or the person fails to leave the Requesting Party’s territory within 45 days of being free to do so or voluntarily returns to the Requesting Party’s territory after leaving it.

38. **Article 15** of the proposed Agreement provides procedures to enable permission to transit through the territory of one Party, for the purposes of enabling the surrender of a person from a third State to the other Party.

39. **Article 16** permits the extradition of a person without a formal extradition proceeding if the person sought elects to waive the extradition process.

40. **Article 18** specifies that the proposed Agreement will not affect the obligations of the Parties arising from any multilateral instrument to which one or both are parties. This would include situations where a Party is obliged to refuse extradition under specific international treaty obligations outside of the proposed Agreement.

41. **Article 19** of the proposed Agreement provides that the Parties shall consult on the interpretation and application of the Agreement.

## **Implementation**

42. Section 11 of the Extradition Act allows regulations to be made providing that the Extradition Act applies to a specified extradition country subject to any bilateral extradition treaty between that country and Australia. This is the mechanism through which extradition treaties are given effect in Australia’s domestic law. It is proposed that the proposed Agreement will be implemented by way of regulations made under the Extradition Act.

## **Costs**

43. The Requested Party agrees to pay all expenses incurred in its territory in connection with extradition proceedings arising out of an extradition request (**Articles 17(1) and 17(2)**). **Article 17(3)** of the proposed Agreement provides that the Requesting Party must bear the expenses incurred in conveying the person from the Requested Party’s territory.

44. In accordance with the usual procedure for international extradition, expenses incurred in relation to extradition requests received or made by Australia under the proposed Agreement will be met from existing budgets of relevant Commonwealth agencies in respect of Jordanian requests, and by Australian investigative and prosecutorial agencies seeking extradition in respect of Australian requests.



## **Regulation Impact Statement**

45. The Office of Best Practice Regulation has been consulted and confirms that a Regulation Impact Statement is not required.

## **Future treaty action**

46. The proposed Agreement 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.

47. Any amendment to the proposed Agreement would be a treaty action and would be subject to Australia's domestic treaty requirements.

## **Termination**

48. Pursuant to **Article 21(2)** of the proposed Agreement, either Party may terminate the proposed Agreement by written notice at any time. Termination shall take effect six months after the date on which such notice is given. Termination by Australia would be subject to Australia's domestic treaty requirements.

## **Contact details**

Transnational Crime Branch  
Criminal Justice – Policy and Programmes Division  
Attorney-General's Department

## **ATTACHMENT ON CONSULTATION**

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(Amman, 24 April 2017)

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#### **CONSULTATION**

49. The State and Territory Governments have been consulted through the Commonwealth-State/Territory Standing Committee on Treaties (SCOT). Information on the negotiation of the proposed Agreement was provided to State and Territory representatives through the biannual SCOT meetings during the course of negotiations. No requests for further information or comments on the proposed Agreement have been received to date.