THE UNIVERSITY OF
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FACULTY OF LAW

The Hon Stuart Robert MP
Chair
Joint Standing Committee on Treaties
Parliament House
CANBERRA. ACT 2000

25 November 2016

Email: jscot@aph.gov.au

Dear Chair,

Australia-China Extradition Treaty – comments on JSCOT hearing of 24 November 2016

I write in relation to the Committee's consideration of the *Treaty on Extradition between Australia and The People's Republic of China* (the Treaty) and in particular with regard to a number of matters that were the subject of discussion at the Committee's most recent hearing on the Treaty, which was held yesterday, 24 November 2016 and which was webcast. My conclusions and recommendations appear at paragraphs 13, 18 and 19 below.

2. I am Professor of Law in the Faculty of Law at the University of New South Wales, specialising in international law, and human rights law and serve as Chair of the Steering Committee of the Australian Human Rights Centre at UNSW (further details of qualifications attached). I participated as a member of the delegation of the Law Council of Australia that appeared before the Committee and contributed to the Law Council's submissions to the Committee in relation to this treaty. However, due to the constraints of time, this submission is made in my personal capacity. It is nonetheless consistent with the position taken by the Law Council in its submissions.

3. There are two matters that arise from the submissions made by government officials to the Committee on 24 November 2016 and the ensuing discussion that deserve further comment.

A. Lack of basis in the Treaty for refusing extradition request on fundamental denial of fair trial ground

4. A major flaw in the Treaty put before the Committee is that it does not require or permit an extradition request from China to be refused on the ground that there are substantial grounds for believing that the person would not enjoy a fair trial as a result of *systemic*

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failures in the Chinese legal system to afford defendants in criminal trials fundamental fair trial rights.

5. This ground is distinct from the refusal of a request on the ground that factors specific to the circumstances of a particular individual (such as discrimination) might undermine a fair trial. Rather it is based on the likelihood that the ordinary operation of the criminal justice system will involve a fundamental failure to ensure a fair trial according to internationally accepted standards. That this is a real and continuing concern in relation to China is evident from the material placed before the Committee, and drawn from United Nations sources, reports of respected international non-governmental organisations, and assessment by academic and other experts.

6. While the Treaty includes a number of specific mandatory and discretionary grounds of refusal, the Australian government appears to have accepted that there is no general denial of fair trial exception in the Treaty in the evidence it has presented to the Committee. However important the specific exceptions in the Treaty are and whatever protection they may provide of certain fair trial rights in some cases, none of the provisions of the Treaty confers on Australia the right to refuse extradition on the more general ground of systemic denials of fundamental fair trial rights. Such a discretion would have existed under the Treaty if an 'unjust or oppressive' exception had been included, or if the Treaty had included the exception contained in Article 3 of the UN Model Treaty on Extradition, which provides for mandatory refusal of a request if the person 'would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, article 14'.

7. The government's response to this argument has been to sidestep it. The representative of the Attorney-General's Department, Ms Anna Harmer, stated at the Committee hearing on 24 November 2016 that, when one also takes into account the provisions of the *Extradition Act 1988,* in particular section 22, it would be possible, as a matter of domestic Australian law, for the Minister to refuse extradition on the ground that a fair trial would be unlikely because of systemic problems in the requesting country. It may be that this is a correct interpretation of section 22, though the fact that Australia has an international obligation to extradite a person under this Treaty would also be relevant to the interpretation of the scope of that discretion.

8. However, the scope of the discretionary power under section 22 of the Act is a quite separate issue to whether such a discretion is available under the Treaty as a matter of *international* law. As a matter of international legal obligation, the Treaty *requires* Australia to surrender a person who satisfies the criteria set out in the Treaty, if the correct procedure has been followed and the proper documentation provided, and if none of the mandatory or discretionary exceptions is applicable. There is no general right/discretion to refuse surrender conferred by the Treaty, and it is not open to Australia under the Treaty to refuse extradition on the ground that a person will not receive a fair trial because of systemic defects in the Chinse criminal justice system as opposed to the personal circumstances of the person requested that might lead to an unfair trial.

9. Nor can Article 12(1) of the Treaty, which provides that the 'Requested Party shall deal with the request for extradition in accordance with the procedures provided by its domestic law' reasonably be interpreted as related to anything other than procedural matters; it could therefore not be understood as expanding the bases on which extradition might be refused.

10. Nor does it appear that Article 21 of the Treaty would assist. That article provides that 'This Treaty shall not affect any right enjoyed and any obligation undertaken by the Parties under any multilateral conventions.' This provision preserves at least the full extent of rights and obligations under multilateral treaties with extradition provisions, and mutual assistance in criminal matters treaties. However, it is not clear whether the provision also includes obligations binding on Parties under human rights treaties and, if so, whether it would include obligations under a treaty by which only one Party has been bound (as in this case, the ICCPR).

11. I do not believe that the relevance of Article 21 has been the subject of detailed discussion in these hearings. If the government accepted that it was bound under the ICCPR not to return someone to a country where there are systematic fundamental violations of fair trial rights in criminal cases, Article 21 might be relevant, and might even provide a basis for the exercise of the section 22 discretion consistently with the Treaty. That would be a roundabout and contestable way of achieving what should be done by clear language in the Treaty. However, the government has stated that it does not consider Article 14 of the ICCPR prevents it from returning someone to face a fundamentally unfair criminal trial where that unfairness arises from systemic deficiencies in a criminal justice system and where those apply to all or most defendants without invidious personal distinctions.

12. Finally, the investigation and possible prosecution in Australia of offences committed in China as an alternative to extradition is unlikely to provide a practical option to extradition in such cases. Even if the relevant acts would have been offences in Australia had they occurred here (necessary to satisfy the requirement of double criminality), this does not mean that those specific offences could be prosecuted in Australia, due to the territorial scope of Australian criminal laws relating to the type of offences for which extradition is commonly sought. For example, a murder committed in China is an extraditable offence, but it is highly unlikely that it could be prosecuted before an Australian court under Australian criminal laws relating to murder.

Preliminary conclusion

13. Accordingly, if Australia were to deny extradition on the ground of a systemic denial of fundamental fair trial rights, relying on the general discretion in section 22 of the *Extradition Act 1988*, such a refusal would appear to be inconsistent with the Treaty, and China would be entitled to complain of a failure by Australia to carry out its international obligations. The fact that such a refusal may be permissible under section 22 of the *Extradition Act 1988* as a matter of Australian law would provide no legal excuse or justification for Australia's failure to carry out its international obligations under the Treaty.

B. Is Australia out of step with other comparable countries?

14. The question also arose during the hearings whether liberal democratic countries comparable to Australia have modern bilateral extradition treaties with China, and whether Australia was out of step with comparator counties on this issue. It was pointed out in discussions and in submissions to the Committee that none of the United Kingdom, the United States of America, Canada or New Zealand has bilateral extradition arrangements with

China.[1] As noted in the Law Council's submission and at yesterday's hearing, it appears that only two Western countries other than Australia have entered into bilateral extradition treaties with China – these are Spain and France,.

15. An important distinction between those treaties and the Australia-China Treaty is that decisions made by the Spanish and French authorities under those treaties to extradite persons to China will be subject to the limitations of the European Convention on Human Rights as a matter of domestic and international law. Under the European Convention a State may not extradite a person to a country if to do so is likely to subject the person to proceedings that are 'manifestly contrary' to the right to a fair trial contained in Article 6 of the European Convention or to 'the principles embodied therein' (*Stoichkov v Bulgaria*, European Court of Human Rights [2007] 44 EHRR 14, [54]-[56]). This right can also be enforced by an individual before the European Court of Human Rights, which has the power to render legally binding judgments.

16. Australia, of course, is not party to the European Convention on Human Rights. However, the guarantee of a fair trial in that convention is substantially similar to that contained in Article 14 of the ICCPR, to which Australia *is* party. Thus, there is a strong argument that Article 14 imposes the same obligations in relation to extradition as Article 6 ECHR provides. However, correctly or not, the Australian government has expressly rejected this interpretation of Article 14, including during these hearings. In any event, while a person may bring a claim of a violation of the ICCPR to the UN Human Rights Committee, the Australian government has consistently maintained that the HRC's views in individual cases are not legally binding and it has refused to implement a significant number of Committee' recommendations in individual cases.

17. Thus, most Western countries have been unwilling to enter into bilateral extradition treaties with China; and the two countries that have are subject to an unequivocal international obligation not to return a person to face fundamentally unfair criminal proceedings. Furthermore, all 47 European countries which are members of the Council of Europe have accepted binding international legal obligations under the European Convention on Human Rights that prevent them from extraditing a person to *any* country where there is likely to be a flagrant denial of far trial rights. Against this background, in leaving this possibility open under its Treaty with China, Australia is certainly out of step with members of the liberal democratic family of States. Furthermore, Australia is also inconsistent in its own treaty practice on this matter, with many of its treaties and other extradition arrangements prohibiting extradition in such circumstances.

Conclusion and recommendation

18. For Australia to be party to a Treaty that on its terms appears to require the return of a person to a country where there are substantial grounds for believing that the person will suffer a flagrant denial of fair trial rights because of a fundamentally unfair criminal justice system, is unacceptable as a matter of criminal justice policy. Such a position is also in my view, and in the view of the Parliamentary Joint Committee on Human Rights, inconsistent with Australia's obligations under the ICCPR, though I acknowledge that the government has asserted a contrary interpretation of the ICCPR.

[1] New Zealand, however, has recently considered an ad hoc request from China for the extradition of a person accused of a serious criminal offence: *Kim v Minister for Justice* [2016] NZHC 1490 (July 2016) (the likelihood of torture and the acceptability of guarantees were in issue).

19. Accordingly, I urge the Committee to recommend against ratification of the Treaty by Australia until the instrument is amended or supplemented by a formal agreement of treaty status between Australia and China that a Party shall refuse the extradition of a person where there are substantial grounds for believing that the person would not enjoy the minimum guarantees in criminal proceedings provided for under international law, in particular as set out in the ICCPR.

If you need any further information, please contact me on Andrew.Byrnes@unsw.edu.au.

Yours sincerely

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cc Ms Anna Harmer, Commonwealth Attorney-General's Department
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Andrew Byrnes is Professor of Law at the University of New South Wales, Sydney, Australia, where he is also Chair of the Steering Committee of the Australian Human Rights Centre based in the UNSW Law School, and serves on the Board of the Diplomacy Training Program. He teaches and writes in the fields of public international law, human rights, and international criminal/humanitarian law. His work includes publications on gender and human rights, national human rights institutions, economic and social rights, peoples' tribunals, and the incorporation of human rights in domestic law. He served as President of the Australian and New Zealand Society of International Law from 2009 to 2013. From November 2012 until September 2014 he was external legal adviser to the Australian Parliamentary Joint Committee on Human Rights.