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# Treaty on Extradition Between Australia and the People's Republic of China

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## **Joint Standing Committee on Treaties**

**24 March 2016**

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## Acknowledgment

The Law Council acknowledges the assistance of its National Criminal Law Committee, the New South Wales Bar Association and New South Wales Law Society in the preparation of this submission.

## Executive Summary

1. The Law Council is grateful for the opportunity to provide this submission in response to the Joint Standing Committee on Treaties' (the **Committee**) inquiry into the *Treaty on Extradition Between Australia and The People's Republic of China* (the **Treaty**).
2. The proposed Treaty would extend the circumstances in which Australia and China will be able to consider requests for extradition from each other. Prior to the Treaty coming into force, it is proposed that regulations will be made under the *Extradition Act 1988* (Cth) (**EA**) to declare China as an 'extradition country', and will specify that the EA applies in relation to China subject to the Treaty.<sup>1</sup>
3. It is vital Australia has an effective extradition regime to ensure criminals are not able to evade justice simply by crossing borders. In cooperating with foreign countries, however, Australia must adhere to fundamental rule of law principles and remain compliant with its international human rights obligations. Australia should not be complicit in criminal investigations and trials which do not comply with accepted fair trial principles or which may result in the imposition of the death penalty, or other cruel or degrading treatment.
4. The Law Council opposes ratification by Australia of the Australia-China Extradition Treaty in the absence of sufficiently robust protections to the right to a fair trial of those likely to be extradited to China. It also has reservations regarding how the Treaty would operate in the context of being supplemented by requirements in the EA.<sup>2</sup> Given the very different legal, political and social contexts of Australia and China, the proposed Treaty would exacerbate concerns about potential adverse impacts created by the current and proposed extradition regime. These concerns relate to the:
  - limited protections for the right to a fair trial;
  - limited evidentiary thresholds for determining an extradition request;
  - presumption against bail;
  - absence of time limits for Executive decision-making;
  - definition of 'political offence';
  - consequences for breaching an undertaking that the death penalty will not be imposed;
  - insufficient protections for children; and
  - inadequate monitoring systems.<sup>3</sup>
5. For these reasons, the Law Council's submission makes a number of recommendations aimed at improving the safeguards in the proposed Treaty and the EA regime.

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<sup>1</sup> Attorney-General's Department (Cth) *National Interest Analysis* [2016] ATNIA 6 [9].

<sup>2</sup> As noted in the National Interest Analysis [2016] ATNIA 6 for the Treaty, the requirements in the *Extradition Act 1988* (Cth) are supplemented by requirements in bilateral treaties – see para [8].

<sup>3</sup> Some of these concerns have previously been expressed by the Law Council in its [submission](#) to the House Standing Committee on Social Policy and Legal Affairs' inquiry into the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011.

## National interest and the rule of law

6. Reports that China does not act in accordance with procedural fairness and rule of law standards in criminal proceedings raises questions about whether the proposed Treaty is indeed in Australia's national interest.
7. International extradition serves an important function in allowing States to cooperate, respect each other's sovereignty, and ensure that criminals are not able to evade justice.
8. However, there is also an important national interest in ensuring that the administration of justice accords with fundamental rule of law principles and human rights obligations. Adherence by States to these norms promotes peace, and domestic and international security. As the Department of Foreign Affairs and Trade (DFAT) states on its website:

*Australia's commitment to human rights reflects our national values and is an underlying principle of Australia's engagement with the international community.<sup>4</sup>*

9. Recognition of the connection between human rights and national interest is reflected in Australia's candidacy for the United Nations Human Rights Council 2018-2020. The candidacy embodies the Australian Government's commitments to the Universal Declaration of Human Rights. By occupying a seat on the Human Rights Council, Australia will be better placed to positively influence the promotion and protection of human rights internationally. Implicit in the bid itself is an acknowledgment that Australia recognises human rights as linked to Australia's national interest.
10. Extradition treaties between States, such as in the proposed Treaty, have the difficult task of reconciling interests in furthering international cooperation in law enforcement matters, with protection of a defendant's legal rights. They also represent an acknowledgement from both countries of respect for the other's laws and sovereignty.
11. The proposed Treaty must be examined against the current socio-political climate in China and the current weaknesses in Australia's extradition regime. The terms of the Treaty must also be carefully examined to ensure that Australia does not facilitate the conviction or treatment of a person in a manner inconsistent with its own democratic values.

## Extradition between Australia and China

12. Australia has limited extradition arrangements with China under multilateral conventions such as those concerning corruption and money laundering.<sup>5</sup> However, China is not an 'extradition country' under the EA, and no regulations have been made to achieve this result.
13. A perusal of extraditions granted by Australia from 2010 to 2015 reveals that Australia has not extradited any person to the People's Republic of China during that period.<sup>6</sup> According to the Attorney-General's Department, the majority of the 49 extraditions

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<sup>4</sup> Department of Foreign Affairs and Trade, *Australia's Commitment to Human Rights*, <<http://dfat.gov.au/international-relations/themes/human-rights/Pages/australia-s-commitment-to-human-rights.aspx>>.

<sup>5</sup> Attorney-General's Department (Cth) *National Interest Analysis* [2016] ATNIA 6.

<sup>6</sup> Attorney-General's Department (Cth) *Annual Report* (2011 – 2015).

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during that time were to the USA and UK and other countries in Western Europe. In Asia, there have been two extraditions to Indonesia and one each to India, South Korea and Hong Kong<sup>7</sup> in those years.

14. China has a limited number of bilateral extradition treaties. As at July 2015, China did not have an extradition treaty with the USA, the UK, Canada, the European Union or New Zealand. However, it did have such treaties with Spain, Russia and South Africa. There has been reluctance by many countries to sign bilateral extradition treaties with China. As noted Chinese law expert, Professor Jerome A. Cohen, New York University, stated:

*There is a reason why the United States and most democratic nations do not have extradition treaties with China. That reason is China's criminal justice system, which, twenty-six years after the Tiananmen tragedy, has still failed to meet the minimum standards of international due process of law. Indeed, since Xi Jinping's assumption of power, despite a plethora of hymns extolling the rule of law, in practice China's criminal justice system has been steadily marching in the wrong direction, and this is no state secret or development known only to Chinese and foreign legal specialists.<sup>8</sup>*

15. In recent years the Chinese Government has increased efforts to establish extradition treaties. This is part of China's anti-corruption drive called 'Operation Fox Hunt', the successor to 'Operation Skynet'. Or as President Xi Jinping has dubbed the process of 'catching tigers and flies'. Tens of thousands have been swept out of office and roughly 1,500 people have been specifically targeted by the Central Commission for Discipline Inspection, its official media partners, or related Chinese government organs.<sup>9</sup> This process has been led from the Politburo Standing Committee member Wang Qishan under direction from President Xi.
16. Concerns with the anti-corruption drive and its ulterior political motives have been expressed by foreign government officials<sup>10</sup> and academics.<sup>11</sup> As Professor Kerry Brown, King's College, London, also a former British diplomat in China, has stated 'If they are aware that there is a political agenda – and there probably is in most of these cases – then they have to be very, very careful.'<sup>12</sup> Australia is one of the many countries attracting China's attention as part of 'Operation Fox Hunt'. Ten persons are

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<sup>7</sup> While the Hong Kong Special Administrative Region is part of the People's Republic of China, under the principle of 'one country, two systems' enshrined in Hong Kong's Basic Law, it is a separate law jurisdiction for the purposes of extradition and criminal law. The ICCPR, first applied to Hong Kong by the United Kingdom, continues to apply as a matter of international law to the Hong Kong SAR. Following the 1997 resumption by the PRC of sovereignty over Hong Kong. Australia has a separate extradition agreement with the Hong Kong SAR: *Agreement for the Surrender of Accused and Convicted Persons between the Government of Australia and the Government of Hong Kong*, done at Hong Kong on 15 November 1992 [1997] ATS 11, as amended by the *Protocol between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China Amending the Agreement for the Surrender of Accused and Convicted Persons of 15 November 1993, Hong Kong, 19 March 2007*, [2008] ATS 6.

<sup>8</sup> Professor Jerome A. Cohen, *Foreign Policy, Should the United States Extradite Chinese Fugitives?*, 7 August 2015. <<http://foreignpolicy.com/2015/08/07/us-china-fugitive-economic-corruption-law-ling/>>.

<sup>9</sup> For further details on the individual cases, the Asia Society has a useful infographic that helps to visualise the scale and impact of the anti-corruption drive, see: <<http://www.chinafile.com/multimedia/infographics/visualizing-chinas-anti-corruption-campaign>>.

<sup>10</sup> Vasudevan Sridharan, 'Obama administration warns against China's 'Operation Fox Hunt' in US', *International Business Times* (online) 17 August 2015. <<http://www.ibtimes.co.uk/obama-administration-warns-against-chinas-operation-fox-hunt-us-1515728>>.

<sup>11</sup> Tom Phillips, 'China lashes out at US after claims Beijing is deploying 'covert agents'' *The Guardian* (online) 19 August 2015. <<http://www.theguardian.com/world/2015/aug/18/china-beijing-operation-fox-hunt-america>>.

<sup>12</sup> Ibid.

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said to be 'fugitive' in Australia, plus a further 30 in the USA, New Zealand and Canada.<sup>13</sup>

## Concerns about the human rights of those extradited to China

17. Concern has long been expressed in Australia about the ability of China to comply with the rule of law. Concern has been raised about major shortcomings in the quality of justice in China including denial and harassment of defence lawyers, corruption within the judiciary, political interference in trials, denial of procedural fairness (or 'due process'), prejudgment and bias. There have been frequent reports of the torture of prisoners to extract confessions or to punish, the holding of prisoners in detrimental conditions, and even organ harvesting from prisoners.
18. Those and related matters are detailed in the concluding observations adopted in 2015 by the UN Committee Against Torture which examined China's compliance with the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*.<sup>14</sup> The United States Department of State conducts annual reviews of the human rights situation in most countries of the world. In its Country Report for China in 2014 the Department of State also sets out detailed concerns about denial of the right to a fair trial, torture and prison conditions.<sup>15</sup>
19. The current concerns about human rights affecting those charged with a criminal offence or held in Chinese jails, based on the above material, include:
- a) in cases of 'endangering State security', 'terrorism' or serious 'bribery', the lawyer must obtain permission from public security investigators to meet with the suspect, and investigators may legally withhold permission for an indefinite period of time if they believe that the meeting could hinder the investigation or could result in the disclosure of State secrets;<sup>16</sup>
  - b) consistent reports indicating that public security officials constantly refuse lawyers' access to suspects and notification to their relatives on the grounds that the case concerns State secrets, even when the detained person is not charged with State security crimes;<sup>17</sup>
  - c) according to a 2012 report by the Beijing Municipal People's Procuratorate to the National People's Congress, of 20,000 criminal cases, defense counsel handled only an estimated 500 cases, or 2.5 percent of the total;<sup>18</sup>
  - d) detention and interrogation of more than 200 lawyers and activists since 9 July 201;<sup>19</sup> (see further discussion of this under the heading 'Treatment of the Legal Profession in China' below);

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<sup>13</sup> Philip Wen and Brendan Foster, 'China's most wanted fugitives in Australia', *The Sydney Morning Herald* (online), 9 May 2015 <<http://www.smh.com.au/business/china/chinas-most-wanted-fugitives-in-australia-20150507-ggwgku>>

<sup>14</sup> Committee Against Torture, *Fifth periodic report of China* UN Doc CAT/C/CHN/5 (17-18 November 2015).

<sup>15</sup> U.S. Department of State, *Country Reports on Human Rights Practices for 2014: China* (2014) <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dliid=236432>>

<sup>16</sup> Committee Against Torture, *Fifth periodic report of China* UN Doc CAT/C/CHN/5 (17-18 November 2015) [12].

<sup>17</sup> *Ibid.*

<sup>18</sup> U.S. Department of State, *Country Reports on Human Rights Practices for 2014: China* (2014) <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dliid=236432>>.

- e) the refusal of annual re-registration for lawyers, the revocation of lawyers' licences and evictions from courtrooms on questionable grounds;<sup>20</sup>
- f) abuses and restrictions which may deter lawyers from raising reports of torture in their clients' defence for fear of reprisals, weakening the safeguards of the rule of law that are necessary for the effective protection against torture;<sup>21</sup>
- g) judges regularly received political guidance on pending cases, including instructions on how to rule, from both the government and the Chinese Communist Party, particularly in politically sensitive cases;<sup>22</sup>
- h) corruption often influenced court decisions, since safeguards against judicial corruption were vague and poorly enforced;<sup>23</sup>
- i) authorities used the state-secrets provision to keep politically sensitive proceedings closed to the public, sometimes even to family members, and to withhold defendant's access to defense counsel;<sup>24</sup>
- j) mechanisms allowing defendants to confront their accusers were inadequate, such as only a small percentage of trials reportedly involved witnesses, and in most criminal trials, prosecutors read witness statements, which neither the defendants nor their lawyers had an opportunity to rebut through cross-examination;<sup>25</sup>
- k) in many politically sensitive trials, courts handed down guilty verdicts immediately following proceedings with little time for deliberation;<sup>26</sup>
- l) consistent reports indicating that the practice of torture and ill-treatment is still deeply entrenched in the criminal justice system, which overly relies on confessions as the basis for convictions;<sup>27</sup>
- m) the majority of allegations of torture and ill-treatment take place during pretrial and extralegal detention and involve public security officers, who wield excessive power during the criminal investigation without effective control by procuratorates and the judiciary;<sup>28</sup>
- n) numerous former prisoners and detainees reported they were beaten, subjected to electric shock, forced to sit on stools for hours on end, deprived of sleep, and otherwise subjected to physical and psychological abuse. Although

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<sup>19</sup> Committee Against Torture, *Fifth periodic report of China* UN Doc CAT/C/CHN/5 (17-18 November 2015) [18].

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> U.S. Department of State, *Country Reports on Human Rights Practices for 2014: China* (2014) <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dliid=236432>>.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Committee Against Torture, *Fifth periodic report of China* UN Doc CAT/C/CHN/5 (17-18 November 2015) [20].

<sup>28</sup> Ibid.

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ordinary prisoners were subjects of abuse, prison authorities singled out political and religious dissidents for particularly harsh treatment;<sup>29</sup>

- o) allegations of death in custody as a result of torture or resulting from lack of prompt medical care and treatment during detention;<sup>30</sup>
- p) the use of solitary confinement as a management method for prisoners and use of the 'interrogation chair' justified 'as a protective measure to prevent suspects from escaping, committing self-injury or attacking personnel', which the Committee found was highly improbable during an interrogation;<sup>31</sup>
- q) conditions in penal institutions for both political prisoners and criminal offenders were generally harsh and often degrading;<sup>32</sup>
- r) courts often shift the burden of proof back to defendants during the exclusionary procedures and dismiss lawyers' requests to exclude the admissibility of confessions;<sup>33</sup> and
- s) an international human rights NGO estimated that 4,000 persons were executed annually in recent years.<sup>34</sup>

20. Concerns about prison conditions<sup>35</sup> and the ability of individuals to receive a fair trial in China may increase reliance on extradition objections<sup>36</sup> by people remanded in custody at the section 19 of the EA stage (determination of eligibility to surrender) and at the final stage in the extradition process (Minister's determination whether the person should be surrendered).

21. The Law Council is also concerned that there is a real risk of lengthy detention prior to consideration by a magistrate as to whether a section 7 objection exists. It is open to the Attorney-General to consider extradition objections before issuing a section 16 notice, but not mandatory. Even at a contested hearing it is up to the person to raise these issues. The first requirement for the Attorney-General to consider these issues will be at the surrender determination stage.

## Treatment of the Legal Profession in China

22. In considering human rights issues in China as they relate to the Treaty it is important to be mindful of the treatment of the legal profession. Lawyers form a key role in the institutional framework of a legal system. The Law Council has been deeply concerned

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<sup>29</sup> U.S. Department of State, *Country Reports on Human Rights Practices for 2014: China* (2014) <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dliid=236432>>.

<sup>30</sup> Committee Against Torture, *Fifth periodic report of China* UN Doc CAT/C/CHN/5 (17-18 November 2015) [24].

<sup>31</sup> *Ibid*, 26.

<sup>32</sup> U.S. Department of State, *Country Reports on Human Rights Practices for 2014: China* (2014) <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dliid=236432>>.

<sup>33</sup> Committee Against Torture, *Fifth periodic report of China* UN Doc CAT/C/CHN/5 (17-18 November 2015) [32].

<sup>34</sup> U.S. Department of State, *Country Reports on Human Rights Practices for 2014: China* (2014) <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dliid=236432>>.

<sup>35</sup> Human Rights Watch, 'Tiger Chairs and Cell Bosses: Police Torture of Criminal Suspects in China', 13 May 2015. <<https://www.hrw.org/report/2015/05/13/tiger-chairs-and-cell-bosses/police-torture-criminal-suspects-china>>.

<sup>36</sup> *Extradition Act 1988* (Cth) s7.



with the plight of lawyers in China for many years, but particularly in the wake of a recent crackdown on the legal profession which commenced in July 2015. The space for lawyers and legal advocates who take on clients and causes unpopular with the Chinese Government has been consistently diminishing.<sup>37</sup> This has coincided with a change in leadership in China as well as the introduction of a series of new laws and procedural rules affecting lawyers, for example the National Security Law which was introduced on 1 July 2015.<sup>38</sup>

23. An independent legal profession is fundamental to the promotion and protection of the rule of law. No lawyer should have to face intimidation, hindrance or improper interference in their work. All lawyers, regardless of the country in which they work, should be treated in a manner consistent with international human rights law, including the *International Covenant on Civil and Political Rights (ICCPR)*, and the United Nations *Basic Principles on the Role of Lawyers*.
24. In this context it is important to give some background to the scale and impact of the 9 July 2015 nationwide crackdown by the Chinese Ministry of Public Security (also known as the '709 crackdown) on lawyers, law firm staff and human right activists. According to the China Human Rights Lawyers Concern Group, as of 18 March 2016, 317 lawyers, law firm staff/human right activists have been detained, arrested, held incommunicado, summoned or had their freedom restricted temporarily.<sup>39</sup> The crackdown has occurred all over China, with lawyers and non-lawyers targeted in Beijing, Shanghai Guangdong, Hunan, Fujian and elsewhere. State-run media, the *Global Times*, characterised the targeted lawyers as 'a major criminal gang,' accusing 'radical human rights lawyers' of 'stirring up several serious public opinion issues' and 'disrupt[ing] the legal process'.<sup>40</sup> Many of the lawyers have been shown on the state-run media station, CCTV 'confessing' to having committed crimes.<sup>41</sup>
25. In early and mid-January 2016, Chinese authorities charged some of the detained lawyers with 'subversion of state power' (maximum life imprisonment) or 'incitement to subvert state power' (maximum 15 years imprisonment). The charges are particularly serious and suggest that the lawyers are attempting to overthrow the state. Many lawyers are still being held incommunicado or are yet to be charged. A total of 21 lawyers have now been officially arrested, 1 criminally detained, 2 subject to enforced disappearance, 4 held under unclear compulsory criminal measures, 1 under

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<sup>37</sup> Leitner Center for International Law and Justice and the Committee to Support Chinese Lawyers, *Plight and Prospects: The Landscape for Cause Lawyers in China*, September 2015. <[http://leitnercenter.org/files/Plight%20and%20Prospects\\_FULL%20FOR%20WEB.pdf](http://leitnercenter.org/files/Plight%20and%20Prospects_FULL%20FOR%20WEB.pdf)>; and Bochen Han, *The Diplomat*, *China's Human Rights Lawyers: Political Resistance and the Law* (interview with Dr Eva Pils), 11 February 2016. <<http://thediplomat.com/2016/02/chinas-human-rights-lawyers-political-resistance-and-the-law/>>.

<sup>38</sup> Note the concerns expressed by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights, regarding the National Security Law. United Nations Office of the High Commissioner for Human Rights, UN human rights chief says China's new security law is too broad, too vague', 7 July 2015. Available at: <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16210&LangID=E#sthash.KfoAf7XA.dpuf>>.

<sup>39</sup> China Human Rights Lawyers Concern Group, Latest data and development of cases as of 1800 18 March 2016. Available at: <<http://www.chrlawyers.hk/en/content/%E2%80%98709-crackdown%E2%80%99-latest-data-and-development-cases-1800-18-march-2016>>.

<sup>40</sup> Editorial: Radical Lawyers are Making a Mockery of the Profession, *Global Times* (online) 12 July 2015. <<http://www.globaltimes.cn/content/931580.shtml>>.

<sup>41</sup> 'Detained Chinese human rights lawyers 'confess': state media', *DW* (online) 19 July 2015. <<http://www.dw.com/en/detained-chinese-human-rights-lawyers-confess-state-media/a-18594110>>

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residential surveillance, 9 released on bail, 1 under house arrest and 36 forbidden from leaving the country.<sup>42</sup>

26. The Law Council has been vocal in speaking out on the treatment of lawyers in China following the '709 crackdown'. Since July 2015, the Law Council has issued two media releases, one on 17 July 2015<sup>43</sup> and the other on 21 December 2015,<sup>44</sup> published two opinion pieces,<sup>45</sup> met with senior DFAT officials, written to the Prime Minister and spoken to media, such as the *Australian Financial Review*, ABC News Radio and SBS World News Radio.<sup>46</sup>
27. The Law Council is of the view that the treatment of the legal profession in China, particularly the effects of the '709 crackdown', should be raised in future bilateral meetings by the Australian Prime Minister with China's Premier and President. The Law Council has formed this view on the following grounds:
- (a) Australia's commitment to international human rights law and the rule of law;
  - (b) Australia's interest in China's development of a robust and impartial legal system to assist in the resolution of disputes and encourage investor confidence;
  - (c) Australia's interest in strong institutional structures to aid economic development;
  - (d) the scale and unprecedented nature of the '709 crackdown'; and
  - (e) the capacity to make a real and substantial difference.
28. The Law Council has welcomed the efforts by the Australian Government to bring attention to the treatment of lawyers in China, notably in signing onto a joint statement to the Human Rights Council on 10 March 2016.<sup>47</sup> The Law Council strongly supports further public and private measures, and is willing to assist in developing measures aimed at contributing to the protection and promotion of the independence of the legal profession in China.

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<sup>42</sup> Ibid, 38.

<sup>43</sup> Law Council of Australia, Media Release, 'Law Council Deeply Concerned with 'Crackdown' against Lawyers in China', 17 July 2015. <[http://www.lawcouncil.asn.au/lawcouncil/images/1533 --  
\\_Law\\_Council\\_deeply\\_concerned\\_with\\_crackdown\\_against\\_lawyers\\_in\\_China.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/1533_-_Law_Council_deeply_concerned_with_crackdown_against_lawyers_in_China.pdf)>

<sup>44</sup> Law Council of Australia, Media Release, 'Law Council Joins UN and IBA in Concern for Chinese Lawyers', 21 December 2015. <[http://www.lawcouncil.asn.au/lawcouncil/images/1512 --  
\\_Law\\_Council\\_joins\\_UN\\_and\\_IBA\\_in\\_concern\\_for\\_Chinese\\_lawyers.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/1512_-_Law_Council_joins_UN_and_IBA_in_concern_for_Chinese_lawyers.pdf)>

<sup>45</sup> Stuart S Clark, 'China's Crackdown on Lawyers, A Disturbing Trend', *The Australian*, 1 February 2016; and Simon Henderson, 'Communist Party Declares War on China's Lawyers' *Lowy Institute Interpreter Blog* <<http://www.lowyinterpreter.org/post/2016/01/14/Communist-party-declares-war-on-Chinas-lawyers.aspx>>.

<sup>46</sup> For example, AFR, 'Lawyers Demand Malcolm Turnbull Take Tougher Line on China', 22 December 2015. <[http://www.afr.com/news/world/lawyers-demand-malcolm-turnbull-take-tougher-line-on-china-20151221-  
glt06m](http://www.afr.com/news/world/lawyers-demand-malcolm-turnbull-take-tougher-line-on-china-20151221-glt06m)>.

<sup>47</sup> Australia, Denmark, Finland, Germany, Iceland, Ireland, Japan, the Netherlands, Norway, Sweden, the UK, and the USA, Joint Statement – Human Rights Situation in China, 10 March 2016. <<https://geneva.usmission.gov/2016/03/10/item-2-joint-statement-human-rights-situation-in-china/>>.

**Recommendations:**

- **The Australian Prime Minister should raise concerns with the treatment of lawyers in China during the next bilateral meetings with China’s Premier and President.**
- **The Australian Government should continue to use opportunities through bilateral and multilateral forums to raise concerns with the treatment of lawyers in China, including seeking those lawyers detained in the July 2015 crackdown to be released and their rights to access a lawyer are protected.**

## Independent review

29. The Law Council notes that in 2011, the House of Representatives Standing Committee on Social Policy and Legal Affairs (the **Legal Affairs Committee**) recommended that:

*... within three years of its [Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011] enactment, the Attorney-General’s Department conduct a review of the operations of the amendments contained in the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011.<sup>48</sup>*

30. It is unclear whether this review has occurred internally. In any event, given the gravity of what is at stake, an independent review of the operation of the amendments contained in the *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Act 2012* (Cth) and the EA more broadly should be conducted to ensure that Australia is acting consistently with the rule of law and international human rights obligations.

**Recommendation:**

- **An independent review should be conducted of the *Extradition Act 1988* (Cth) in consultation with relevant stakeholders to ensure that Australia is acting consistently with the rule of law and international human rights obligations.**

## Right to a fair trial

31. The right to a fair trial is a ‘central pillar of our criminal justice system’,<sup>49</sup> and a ‘cardinal requirement of the rule of law’.<sup>50</sup> It is a fundamental common law right which has some limited protection in the Australian Constitution in the concept of judicial power.<sup>51</sup> The principle of legality also offers some protection to a person’s right to a

<sup>48</sup> House Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Report into the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011* (2011) 42, Recommendation 4.

<sup>49</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J).

<sup>50</sup> Tom Bingham, *The Rule of Law* (Penguin UK, 2011) ch 9.

<sup>51</sup> *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

fair trial.<sup>52</sup> Additionally, a person's right to a fair trial is guaranteed by article 14 of the ICCPR.

32. The Law Council, NSW Bar Association and Law Society of NSW are concerned that ratification of the Australia-China Extradition Treaty will be likely to expose a person extradited to denial of the right to a fair trial in China. The bases for that conclusion are that:
- a) Numerous expert bodies, including the UN Committee Against Torture and the US State Department, have recently expressed strong concerns about the ability of China to provide a right to a fair trial for those charged with criminal offences or prevent the torture of prisoners;
  - b) The Australia-China Extradition Treaty omits a common safeguard in Australia's extradition treaties to ensure protection of an extradited person's right to a fair trial, namely the ability to refuse a request where extradition would be 'unjust or oppressive';
  - c) Under the proposed Treaty, Australia could not refuse to extradite a person to China on the grounds that he or she was unlikely to receive a fair trial;
  - d) Extradition of a person to China is likely to result in a breach of the extradited person's right to a fair trial contrary to Article 14 of the ICCPR;
  - e) China is not party to the ICCPR,<sup>53</sup> and
  - f) The proposed Treaty does not require the provision of evidence to an Australian court or official in support of a request for extradition of the crime alleged to have been committed (the 'no evidence' ground).

## Safeguards in the Treaty

33. The terms of the Treaty are summarised in the National Interest Analysis [2016] ATNIA 6, prepared by the Commonwealth Attorney-General's Department.
34. The Treaty provides a number of safeguards for those being extradited, common to bilateral extradition treaties, such as the exclusion of extradition for political and military offence exceptions (Article 3), 'double criminality' (Article 1) and 'speciality' (Article 4). For example, Article 1 provides that extraditable offences are those which are 'punishable under the laws of both Parties existing at the time of the request for a period of one year or more' (double criminality). Where a person is liable to be extradited for an extraditable offence and there are other non-extraditable offences charged then, depending on Australian law, extradition may be granted with respect to those additional offences (speciality, Article 4).
35. Where the person is sought for an offence which carries the death penalty then, under the Treaty, extradition may be refused unless the Requesting Party undertakes that the death penalty will not be imposed or, if imposed, will not be carried out (Article 3(f)). Where there are 'substantial grounds for believing' the person 'will be subjected to torture or other cruel, inhuman or humiliating treatment or punishment', extradition may also be refused (Article 3(g)). Where there are substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting a person

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<sup>52</sup> *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 28 (McHugh J).

<sup>53</sup> China signed the ICCPR on 5 October 1998, but has yet to ratify the Covenant.

on the ground of race, sex, language, religion, political opinion or personal status, or the person's 'position of judicial proceedings' may be prejudiced, then extradition may also be refused (Article 3(b)).

36. Article 4 also provides each contracting party with the discretion to refuse extradition on certain grounds which include where the party has decided to prosecute the person for the offence with respect to which extradition is sought or contemplates so doing (Article 4 (a), (b)).

37. In addition, both contracting parties have a discretion to refuse extradition where:

*(c) the Requested Party, while taking into account seriousness of the offence and the interests of the Requesting Party, consider that the extradition would be incompatible with humanitarian considerations in view of that person's age, health or other personal circumstances.*

38. This is a departure from recent Australian extradition treaty practice because the words 'unjust or oppressive' have been omitted from the discretionary basis for refusal of an extradition request. Some examples will assist.

39. The equivalent provision in Article 9(2)(b) of the Australia and Indonesia Extradition Treaty 2004, for example, allows for a discretionary refusal:

*... where the Requested State, while also taking into account the nature of the offence and the interests of the Requesting State, 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 that person would be unjust, oppressive or incompatible with humanitarian considerations. (emphasis added)*

40. Similarly in the Australia and the State of the United Arab Emirates Extradition Treaty of 2007, Article 4(2)(g) allows for refusal of extradition,

*... if the Requested State considers the extradition of the person unjust, oppressive, or incompatible with humanitarian concerns in view of the age, health or other personal circumstances of the person. (emphasis added)*

41. By not including the words 'unjust and oppressive' in Article 4 of the Australia-China Extradition Treaty, Australia has denied itself the ability to refuse an extradition request on those grounds. This is particularly important in light of the widespread concerns about the ability of China to provide a fair trial to a person facing a criminal charge in China.

## **The right to a fair trial and the Extradition Act**

42. The EA provides for a multi-stage decision making process. Before surrender the person will have been the subject of: a provisional arrest warrant issued by a magistrate; remand following arrest; an extradition request from the requesting state; a determination by a magistrate as to whether the person is eligible for extradition including whether he or she has an 'extradition objection'; and, if eligible, a warrant from the magistrate ordering commitment to prison awaiting surrender or release as determined by the Attorney-General. The process culminates in the Attorney-General (or relevant Minister) determining whether the person is to be surrendered under section 22(2).

43. Subsection 22(3) sets out the circumstances in which a person may be surrendered under subsection 22(2). Paragraph 22(3)(e) requires the Attorney-General to exercise his or her power to surrender in accordance with any treaty where such treaty is specified in the regulations and is 'subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to a bilateral extradition treaty'.<sup>54</sup>
44. In the recent decision of *Commonwealth Minister for Justice v Adamas*<sup>55</sup> the High Court considered the Attorney-General's exercise of his surrender power under subsection 22(2) of the EA and the effect of Article 9(2)(b) of the Australia-Indonesia Extradition Treaty which allows for refusal of extradition on the grounds it would be 'unjust, oppressive or incompatible with humanitarian considerations'. The Court found that in exercising his power the Attorney-General 'must be satisfied that' extradition would not be 'unjust, oppressive or incompatible with humanitarian considerations'.<sup>56</sup> The Court went on to say that it was appropriate to *take into account* Australian standards of what is a fair trial in coming to such a decision.<sup>57</sup>
45. Accordingly, where the Treaty does not provide for a discretionary refusal on the ground that the extradition would be unjust or oppressive then subsection 22(2) would have no operation because the treaty does not provide a basis upon which the regulations could restrict the decision to surrender.
46. Paragraph 22(3)(f) of the EA allows the Attorney-General, in his or her discretion, to consider whether the person should be surrendered in relation to the extradition request. That broad discretion requires that the Attorney-General take into account such matters as Australia's compliance with its international law obligations. In the Full Court decision in *O'Connor v Adamas*<sup>58</sup> Barker J accepted that the Attorney had an obligation to take into account Australia's obligation to protect human rights under the ICCPR including Article 14 (the right to a fair trial).<sup>59</sup>
47. It was accepted by the Commonwealth in that case that Australia has a legal obligation of *non-refoulement* where there is a likely breach of Articles 6 (right to life) or 7 (freedom from torture) with respect to the implementation of the death penalty and torture.<sup>60</sup> However, Barker J accepted the Minister's submission that the case law did not unequivocally state that extradition, where there was likely to be a breach of the right to a fair trial in the requesting state, was itself a breach of the ICCPR by the requested state.<sup>61</sup> His Honour found it was sufficient that the Minister had taken into account Australia's international obligations.<sup>62</sup> The matter was not taken up on the appeal to the High Court.
48. The decisions in *Adamas* indicate the weakness of the safeguards in the EA to protect a person whose right to a fair trial is threatened by extradition. The position adopted by the Commonwealth in *Adamas* is that Article 14 of the ICCPR does not, as a matter of international law, stop Australia from extraditing a person to a state where it is likely his or her right to a fair trial will be denied.

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<sup>54</sup> *Extradition Act 1988* (Cth) s11.

<sup>55</sup> *Commonwealth Minister for Justice v Adamas*<sup>55</sup> [2013] HCA 59, (2013) 304 ALR, 305.

<sup>56</sup> *Commonwealth Minister for Justice v Adamas* [2013] HCA 59, (2013) 304 ALR 305, 30.

<sup>57</sup> *Ibid*, 37.

<sup>58</sup> *O'Connor v Adamas* [2013] FCAFC 14, (2013) 210 FCR 364.

<sup>59</sup> *Ibid*, 476 – 477.

<sup>60</sup> *Ibid*, 464.

<sup>61</sup> *Ibid*, 476. However, this conclusion is questionable – see discussion of the decision of *Kindler v Canada* below.

<sup>62</sup> *O'Connor v Adamas* [2013] FCAFC 14, (2013) 210 FCR 364, 478.

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## Australia's obligations under Article 14 of the ICCPR

49. In *Adamas Barker J* did not have to determine whether Australia had breached Article 14 of the ICCPR, he had to consider whether Australia's international obligations had been considered – a considerably weaker test. Two international human rights cases establish that the better view of Australia's international obligation under Article 14 of the ICCPR is that it would be a breach of the Covenant if a person was to extradited where there was a real risk that his or her rights under the Covenant would be violated: in the Human Rights Committee decision in *Kindler v Canada* (470/91) and in the European Court of Human Rights decision in *Soering v UK* (1989) 11 EHRR 439.

50. In *Kindler v Canada* the Human Rights Committee stated:

*If a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.*<sup>63</sup>

51. Earlier the European Court of Human Rights in *Soering v UK* had considered the likely violation of the extradited person's right to a fair trial in the light of a person facing the death penalty in the requesting state and held:

*The right to a fair trial in criminal proceedings, as embodied in Article 6 [of the European Convention Human Rights], holds a prominent place in a democratic society... The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country. However, the facts of the present case do not disclose such a risk.*<sup>64</sup>

52. Accordingly, in a given case where extradition is granted by Australia and there is a 'real risk' that the person's right to a fair trial under Article 14 of the ICCPR will be violated in China then Australia will be in violation of the Covenant.

53. The absence of provision in the Australia-China Extradition Treaty of a power to refuse extradition where the Attorney-General considers the extradition unjust or oppressive removes a vital (additional) protection for those likely to face trial in China.

54. Article 3(f) of *The United Nations Model Treaty on Extradition* also provides that if the person whose extradition is requested has not received or would not receive the minimum guarantees in criminal proceedings, as contained in article 14 of the ICCPR, then the extradition request must be refused.

### Recommendation:

- **The Treaty should be amended to provide for a discretionary ground of refusal of an extradition request where the Attorney-General considers the extradition unjust or oppressive.**

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<sup>63</sup> Human Rights Committee, Views: Communication No. 470/1991, 48<sup>th</sup> sess, UN Doc CCPR/C/48/D/470/1991 (1993) [13.2] ('*Kindler v Canada*') [13.2].

<sup>64</sup> *Soering v UK* (1989) 11 EHRR 439.

## Appropriate evidential standard

55. Currently Australia has a ‘no evidence’ model for extradition and the Treaty would adopt this standard. This reflects a policy position that extradition is an administrative rather than a criminal process, which determines whether a person is to be surrendered to face justice in the Requesting Party.<sup>65</sup>

56. This Committee has previously analysed in detail the appropriate evidentiary standard that should apply for Australia’s extradition regime. The Committee’s own Recommendation 1 of its August 2001 report entitled ‘Report 40: Extradition – a review of Australia’s law and policy’ was as follows:

*While acknowledging the practical difficulties associated with changing the basis of Australia’s extradition arrangements, we do not favour the continuation of the default ‘no evidence’ model in relation to requests for extradition from Australia.*

57. The Committee noted:

*We are inclined to the view that elements of the Canadian ‘record of the case’ approach and the US ‘probable cause’ approach are preferable to the ‘no evidence’ model, in that they provide the courts with a greater opportunity to assess whether any substantial evidence has been gathered against the accused person. That in turn must help in deciding whether it is in the interests of justice that the person should be surrendered to face trial.<sup>66</sup>*

58. While the Committee acknowledged that there may be some practical difficulty in terms of implementing the new standard, it did not believe that the problems are insurmountable, and that various means could be explored.<sup>67</sup>

59. The Committee also made recommendations that the Attorney-General refer for inquiry and report by the Australian Law Reform Commission (**ALRC**) matters relating to the appropriate evidentiary standard for extradition requests to Australia, including the merits and consequences of the Canadian ‘record of the case’ model<sup>68</sup> and the American ‘probable cause’ model.<sup>69</sup> No such referral has occurred to the ALRC or another independent body. The Government response to the Committee’s Inquiry into Australia’s Extradition Law and Policy did not accept the recommendation to refer this matter, noting:

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<sup>65</sup> Attorney-General’s Department (Cth) [National Interest Analysis](#) [2016] ATNIA 6 [12].

<sup>66</sup> Joint Standing Committee on Treaties, Parliament of Australia, *Report 40 - Extradition A Review of Australia’s Law and Policy* (2001) 43.

<sup>67</sup> *Ibid*, 46.

<sup>68</sup> Under this model the requesting country would provide a certified “record of the case”, in which a judicial or prosecuting authority of the requesting country attests to a summary of the available evidence and certifies that the evidence is available for trial and is either sufficient to justify prosecution, or at least was legally obtained according to the law of that country: Joint Standing Committee on Treaties, Parliament of Australia, *Report 40 - Extradition A Review of Australia’s Law and Policy* (2001) 37.

<sup>69</sup> This test has been summarised as one which requires reasonable grounds to believe the person is guilty: Joint Standing Committee on Treaties, Parliament of Australia, *Report 40 - Extradition A Review of Australia’s Law and Policy* (2001) 39.



*The evidentiary standard under which Australia conducts its extradition relations is a matter of policy, to be determined taking into account a wide range of considerations outside the legal sphere.*<sup>70</sup>

60. The Law Council agrees with the previous assessment of the Committee in relation to the appropriate evidentiary standard.
61. The Treaty follows a relatively recent treaty practice of not requiring extraditing states to provide evidence of the crimes alleged against the person to be extradited (and no process of evaluating such evidence). The policy change arose during the mid-1980s and culminated in the enactment of the EA. Article 7 of the Treaty allows a requesting state to rely solely on a statement of each offence for which extradition is sought and the conduct said to comprise the alleged offence, the text of relevant provisions of law, a copy of the warrant of arrest or (where the person has been tried and convicted) the effective court judgment. The EA does not require the requesting state to provide any evidence in support of the offence for which extradition is sought.
62. That practice broke with a longstanding approach to extradition which required the provision and consideration of such evidence, particularly with respect to States where the rule of law was in question and fair trial could not be guaranteed.
63. During the Committee's 2001 inquiry there was ample evidence before it that the introduction of the 'no evidence' rule was 'a step too far', especially with respect to extraditing States where there are substantial concerns about individual human rights and the right to a fair trial.
64. The Committee records the following testimony from a former senior official with the Attorney-General's Department at the time of the change in policy:

*3.27 Dr David Chaikin was Senior Assistant Secretary of the International Branch in the Attorney-General's Department when the key policy changes were made in the mid 1980s. He made the following comments:*

*There was an error. I myself did not appreciate it back in 1985 or 1986 but, in my view, there was an error. We went too far. We wanted to enter into all these treaties. There was the extradition public relations fiasco of Trimbole. There was a whole series of reasons at that time why we went that course but, in my view, it was a mistake. It is going to be increasingly a more important mistake ... We have put ourselves in a straitjacket with our model treaty, which we promulgate throughout the world as something that is good and beautiful.*

*3.28 Dr Chaikin's particular concern was that in the future it would be difficult for Australia to include more rigorous requirements in treaties with countries about which Australia may hold concern in regard to due process and other human rights protections.*<sup>71</sup>

65. In addition, well known international lawyer Professor Ivan Shearer is recorded as giving this evidence to Committee:

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<sup>70</sup> Commonwealth Government, 'Government Response to the Joint Standing Committee on Treaties Inquiry into Australia's Extradition Law and Policy' (17 May 2004) 2.

<sup>71</sup> Dr Chaikin: Joint Standing Committee on Treaties, Parliament of Australia, *Report 40 - Extradition A Review of Australia's Law and Policy* (2001) 29 [3.26].

3.30 Professor Shearer disagreed with the Department's justification that Australia only signs treaties with those countries in whose criminal justice systems it has sufficient confidence. He pointed out that conditions can suddenly deteriorate through a coup or emergency situation, or that there may be 'a steady erosion of the rule of law such as in Zimbabwe'.<sup>72</sup>

66. The Committee also quoted, at [3.31], from the Federal Court's decision in *Cabal v United Mexican States*<sup>73</sup>:

[279] Australia has extradition treaties with many countries. A number of these countries have legal systems very different from our own. Some of them would not be regarded as affording those charged with serious criminal offences anything approximating what we would consider a fair trial. They appear to have little regard for the importance of an independent judiciary and the rule of law. Some are reputed to be governed by regimes which are thoroughly corrupt.

67. It is also worth noting that the 'sufficient evidence test' or the 'prima facie evidence test' may still be applied in the operation of the EA where a treaty has specified such a test.<sup>74</sup> The relevant treaty has to incorporate such a test in its terms for those provisions to apply and such a test is not in the Australia-China Extradition Treaty.

68. There is, of course, a reasonable argument that the 'no evidence' approach is appropriate for democracies where the rule of law is guaranteed. One can see the administrative attraction in such an approach where a requesting state such as New Zealand is seeking extradition of a person from Australia. However, where there are very substantial concerns about the rule of law and the ability of a State to afford those charged with a criminal offence a right to a fair trial then the adoption of the 'no evidence rule' is very likely to compromise the human rights of an extradited person. The adoption of the Australia-China Extradition Treaty is one such case and the evidence, set out above, is very substantial indeed.

69. Further, the current prohibition on leading evidence to contradict an allegation that the person has engaged in conduct constituting an extradition offence<sup>75</sup> should not be applied in circumstances where a person seeks to lead the evidence to establish an extradition objection.

**Recommendations:**

- **An independent review should be conducted to determine the appropriate evidentiary standard for extradition requests to Australia in the terms previously recommended by the Joint Standing Committee on Treaties Report 40 Extradition: A Review of Australia's Law and Policy.**
- **The current prohibition on leading evidence to contradict an allegation that the person has engaged in conduct constituting an extradition offence<sup>1</sup> should not be applied in circumstances where a person seeks to lead the evidence to establish an extradition objection.**

<sup>72</sup> Professor Ivan Shearer: Joint Standing Committee on Treaties, Parliament of Australia, *Report 40 - Extradition A Review of Australia's Law and Policy* (2001) 30 [3.30].

<sup>73</sup> *Cabal v United Mexican States* [2001] FCA 427.

<sup>74</sup> *Extradition Act 1988* (Cth) s11(5), (6).

<sup>75</sup> *Ibid*, s9(5).

## Bail in extradition proceedings

70. Currently under the EA, a person may be remanded on bail during the early stages of the extradition process if special circumstances exist. Once a person is found eligible for surrender, either following a determination of eligibility by a magistrate or where the person consents to extradition, s/he must be committed to prison.
71. The current requirement that special circumstances must be established before a person remanded under the EA can be granted bail under subsection 15(6) should be repealed. The usual presumption in favour of bail should be restored as its reversal may undermine the presumption of innocence, as a key component of a fair trial.
72. This is consistent with the position adopted in Canada, the United Kingdom and New Zealand.<sup>76</sup> The *Service and Execution of Process Act 1992* (Cth), which governs extradition between Australian jurisdictions also does not have a 'special circumstances' requirement.
73. The current provisions can have an unnecessarily harsh effect, particularly given the time (sometimes years) it can take to complete all extradition processes. This concern may be magnified in the case of extradition requests from China where it is more likely that extradition objections will exist, but that these matters are only looked at towards the end of the process. This means that people who would not be ultimately found eligible for extradition may be held in custody for long periods of time before this basic element of eligibility is actually tested.
74. The Explanatory Memorandum which accompanied the Extradition Bill 1987 sought to justify the 'special circumstances' requirement in subsection 15(6) as follows:
- Subclause (6) provides that a person shall not be granted bail unless there are special circumstances. Such a provision is considered necessary because experience has shown that there is a very high risk of persons sought for extraditable offences absconding. In many cases the person is in Australia to avoid arrest in the country where he is alleged to have committed the offence, i.e. the person left the jurisdiction to avoid justice.*<sup>77</sup>
75. The risk of flight is a matter that the court would already routinely consider when determining whether to grant bail. Evidence that a person had fled a jurisdiction and sought to hide in Australia would no doubt be persuasive in the determination of a bail application.
76. On that basis, there is no reason that the flight risk posed by a person subject to an extradition request requires a reversal of the presumption in favour of bail.
77. Moreover, many people who are subject to extradition requests are Australian citizens and permanent residents. They are in Australia, not to avoid justice, but because Australia is their usual place of abode. They may have strong ties to the community and limited means or desire to leave Australia. Nonetheless, such people are likely to be remanded in custody throughout the extradition process because of the operation of an inflexible rule based on a generalisation about the type of people who are ordinarily subject to extradition proceedings.

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<sup>76</sup> *Extradition Act 2003* (UK), s198; *Extradition Act 1999* (Canada), s18; *Extradition Act 1999* (NZ), ss23, 26.

<sup>77</sup> Explanatory Memorandum, Extradition Bill 1987, 18.

78. The Court should not be constrained in its ability to reach a decision on bail which is appropriate in the circumstances of each individual case.

79. In this regard, the Legal Affairs Committee 'expressed its concern regarding the presumption against bail' and noted that the evidence provided by the Attorney-General's Department failed 'to provide adequate justification on this point'.<sup>78</sup> The Legal Affairs Committee therefore recommended that:

*...the Australian Government give consideration to removing the presumption against bail which operates in the Extradition Act 1988 by allowing individuals to be granted bail only in special circumstances.*<sup>79</sup>

**Recommendation:**

- **The current requirement that special circumstances must be established before a person remanded under the *Extradition Act 1988* (Cth) can be granted bail under subsection 15(6) should be repealed. The presumption in favour of bail should be restored.**

## Waiver of extradition and consent

80. After being arrested, a person is able to elect between consent, waiver and contested hearing. The bail application occurs after this election.

81. The waiver of extradition or consent process under the EA<sup>80</sup> may reduce the amount of time a person spends in custody, pending the conclusion of the formal extradition process. However, the Law Council remains concerned that a person may make a decision to waive extradition or consent when, if they do not waive their rights or consent:

- they will be detained throughout the extradition process unless they can overcome the presumption against bail; and
- the potential period of their detention will be unknown and may extend over several years, in part because the EA imposes few timeframes on Executive conduct/decision making.

82. These factors may be regarded as adding an element of duress to the decision making process and may impact on the voluntariness of a person's decision to waive their rights or consent to the extradition.

83. Further reforms are needed to ensure the integrity of a person's decision to waive extradition or consent, including removing the current presumption against bail and imposing statutory time limits on decisions made by the Executive under the Act.

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<sup>78</sup> House Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Report into the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011* (2011) 20.

<sup>79</sup> *Ibid*, Recommendation 2.

<sup>80</sup> Under section 15A of the EA a person may elect to waive extradition at any time after the person is remanded under section 15, up until the magistrate advises the Attorney that the person has consented to extradition under section 18, or until the Magistrate makes a determination about eligibility for surrender under section 19 (subsection 15A(2)). If a person wishes to waive extradition, s/he must waive extradition with respect to all of the offences contained in the provisional arrest request or the extradition request – Explanatory Memorandum to the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011, 18.

84. Further, while there are obligations on a magistrate to inform the person of certain matters outlined in paragraph 15A(5)(b), there is value in ensuring that the person is not only informed, but fully understands the implications of his or her decision to waive extradition. While paragraphs 15A(5)(c) and (d) require a magistrate to inform a person of the consequences of their possible decision, there is no requirement that the magistrate is satisfied that the person understands the implications of the decision. This may be particularly important where language barriers or psychiatric or cognitive impairment are involved.

**Recommendations:**

- **Subject to the requirements of natural justice and procedural fairness, statutory time limits should be applied to actions undertaken by the Executive under the Act.**
- **There should be a requirement that the magistrate is satisfied that the person understands the implications of his or her decision to waive extradition.**

## Early consideration of dual criminality and extradition objections

85. The Law Council remains concerned about the removal of the requirement for the Attorney-General to consider dual criminality and extradition objections from the section 16 stage of extradition proceedings by the *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Act 2012* (Cth).

86. Article 2 of the proposed Treaty provides that an 'extraditable offence' is an offence which, at the time the extradition request is made, is punishable under the laws of both countries by a maximum penalty of imprisonment of at least one year, or by a more severe penalty.

87. If the Attorney-General is not *required* by the EA to consider dual criminality or the possibility of an extradition objection prior to issuing a notice under section 16, then s/he may not, as a matter of course, be provided with detailed briefing and advice on these matters before exercising his or her discretion under section 16. The decision to issue a notice under section 16 may be a formality. The opportunity to dispose expeditiously and early with all or part of a questionable extradition request may be lost.

88. The Legal Affairs Committee also recognised the importance of early investigations:

*... the importance of the 'gatekeeper' function of section 16 should not be minimised. The Attorney-General's decision to exercise his or her discretion in issuing a section 16 notice is a serious one – and is reliant on the comprehensive gathering of information and consideration of relevant facts. The Committee notes the importance of ensuring that thorough investigations are always conducted and due consideration is given to every request to ensure that individuals are not unnecessarily detained as the result of a frivolous or unfounded extradition*

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*request, or where there is obviously an extradition objection in relation to the particular request.*<sup>81</sup>

89. Further, reform of the EA needs to address a more substantive issue relating to dual criminality.
90. As presently applied, the principle of dual criminality only requires that the totality of the facts alleged against a person would constitute an offence in Australia. It is not necessary to establish that the facts *directly relied upon to establish the extradition offence* would on their own constitute an offence in Australia.
91. Under the approach adopted by the Federal Court in *Zoeller v Federal Republic of Germany*,<sup>82</sup> where a person is charged with an offence that is not a crime in Australia, but, incidentally, the statement of conduct makes reference to acts or omissions that would constitute a crime in Australia, double criminality is likely to be established. That will be so even though that additional conduct will have no relevance to the actual offence charged following extradition.<sup>83</sup> That is the very outcome that the principle of double criminality was intended to avoid.<sup>84</sup>
92. The Law Council acknowledges that it will often not be possible to get exact parity in the way different countries characterise and describe criminal conduct. Some foreign offences may not have a direct parallel in Australian law. One possible way around this may be to look for a less serious Australian offence that still carries at least a one-year term of imprisonment penalty. Therefore, it is not desirable to be too prescriptive in terms of how closely related the overseas and Australian offences must be. Nonetheless, the facts *directly relied upon to establish the extradition offence* (rather than the totality of the facts alleged against a person) should constitute an offence in Australia.

**Recommendations:**

- **There should be obligation on the Attorney-General to satisfy him or herself that dual criminality is established and that no extradition objection exists before issuing a section 16 notice to a magistrate, and thus commencing the extradition process.**
- **Under the dual criminality principle, it should be necessary to establish that the facts *directly relied upon to establish the extradition offence* (rather than the totality of the facts alleged against a person) would constitute an offence in Australia.**

## Political offences

93. The independent review should consider in more detail whether the definition of 'political offence' in section 5 of the EA is sufficient to exclude from extradition requests that are politically motivated.

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<sup>81</sup> House Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Report into the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011* (2011) [2.35].

<sup>82</sup> *Zoeller v Federal Republic of Germany* (1989) 23 FCR 282.

<sup>83</sup> Professor Ned Aughterson on 5 September 2008 at the combined NSW Bar/Law Council "Federal Criminal Law Conference".

<sup>84</sup> *Ibid.*

94. Article 3(a) of the proposed Treaty specifies that extradition must be refused if the offence for which extradition is requested is a 'political offence'. A 'political offence' is defined in section 5 of the EA as an offence that is of a political character, whether because of the circumstances in which it is committed or otherwise, and whether or not there are competing political parties in the country.
95. A political offence does not include an act of violence against a person's life or liberty or certain offences as prescribed in the Regulations including those established under the *United Nations Convention against Corruption* or conduct referred to in terrorism conventions including the *International Convention for the Suppression of Terrorist Bombings*. Regulation 2B(3) of the EA Regulations defines a 'political offence' as not an offence constituted by taking or endangering, attempting to take or endanger, or participating in the taking or endangering of, the life of a person and the offence is committed in circumstances in which the conduct creates a collective danger, whether direct or indirect, to the lives of other persons.
96. Article 3 of the *United Nations Model Treaty on Extradition* provides extradition should not be granted if the offence for which the extradition is requested is regarded by the Requested Party as an offence of a political nature. 'Political nature' is not defined, although the footnote to Article 3(a) states that:
- Countries may wish to exclude certain conduct, e.g. acts of violence such as **serious** offences involving an act of violence against the life, physical integrity or liberty of a person, from the concept of a political offence.*<sup>85</sup>
97. If section 5 of the EA is to include exclusion for acts of violence against life and liberty, it should refer to a 'serious offence' that involves an act of violence against a person's life or liberty. This would ensure that it better corresponds with the terms of the United Nations Model Treaty on Extradition. The 'serious offence' wording is not included in the Regulations. This may be because 'serous offence' is defined in other legislation such as the *Crimes Act 1914* (Cth). Nonetheless, it is possible for a 'serious offence' to be defined separately for the purposes of the EA.
98. However, serious consideration needs to be given as to whether acts of violence should automatically be excluded from the definition of 'political offence'. A potential difficulty with the current formulation of 'political offence' in section 5 and its exceptions is that a country may nonetheless be politically motivated to arrest and charge a person for a crime. This political motivation may be concerned with matters that affect the interests of a State but not necessarily the peace and public order of a country. The interests of a foreign State might not always match those of Australia's interests.
99. Statements from several High Court Justices have noted the potential for common crimes to be political if they are politically motivated.
100. The Federal Court case of *Santhirajah v Attorney-General for the Commonwealth of Australia* [2012] FCA 940 considered the meaning of the term 'political offence' in the context of an application for extradition. After reviewing the major UK and Australian authorities on the meaning of the expression, North J noted that:

*... the courts have not found a defining characteristic or set of characteristics which identify those offences which are political offences. Rather, the courts have*

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<sup>85</sup> UN General Assembly, *Model Treaty on Extradition : resolution / adopted by the General Assembly*, 14 December 1990, A/RES/45/116, Article 3(a) – emphasis added.

*more or less instinctively responded to the facts of each case and assessed them within the particular historical circumstances in which the offences were committed.*<sup>86</sup>

101. Judge North also discussed the reasons behind the difficulty in determining an acceptable approach to the meaning of the expression, noting:

*... the tension between the ordinary meaning of the term and the unwanted results which such a meaning produces. Where violent acts such as indiscriminate mass killings of civilians are carried out as part of a political campaign, offences arising from that conduct would, in the ordinary usage of language, be described as political offences. But to afford offenders protection from extradition in those circumstances was an outcome too shocking for most judges to accept.*<sup>87</sup>

102. Judge North also commented on the way legislation has expressly restricted the scope of the ordinary meaning of the term political offence, noting that:

*The fact that Parliament has expressed limitations on what amounts to a political offence recognises that the ordinary meaning of that term covers a range of conduct which today is viewed as inappropriate for exclusion from the process of extradition.*<sup>88</sup>

103. However, a question arises as to the adequacy of the current definition when common crimes can sometimes be pursued for substantially a political purpose.

104. The Law Council is also concerned that there is a possible inappropriate delegation of legislative power. The definition of 'political offence' in section 5 permits the Minister a broad power to exclude certain conduct from the definition of 'political offence' by way of regulation. The justification for this was so that the extradition regime could be 'kept up-to-date with Australia's international obligations without requiring frequent amendments to the Extradition Act'<sup>89</sup>.

105. However, the rule of law requires that important matters are included in primary legislation rather than in regulations wherever possible.<sup>90</sup> There is insufficient guidance on what type of offences may be carved out of the definition. Further, it allows offences to be excluded from the definition not only for the purposes of a bilateral or multilateral treaty to which Australia is a party, but more generally. The Law Council is therefore concerned that the power is framed in terms which are broader than necessary. It notes that the Senate Standing Committee on the Scrutiny of Bills has also raised such concerns.<sup>91</sup>

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<sup>86</sup> *Santhirarajah v Attorney-General for the Commonwealth of Australia* [2012] FCA 940 at [148].

<sup>87</sup> *Ibid.*, at [244].

<sup>88</sup> *Ibid.*, at [250].

<sup>89</sup> Explanatory Statement, Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Act 2012, 2.

<sup>90</sup> Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Twelfth Report of 2011*, 12 October 2011, 502.

<sup>91</sup> *Ibid.*



### Recommendations:

- **The independent review should examine the appropriateness of the current definition of ‘political offence’ to determine its adequacy.**
- **If section 5 of the Extradition Act is to exclude acts of violence against life and liberty, it should refer to a ‘serious offence’ that involves an act of violence against a person’s life or liberty.**
- **If exceptions to the definition of ‘political offence’ are to be relegated to the regulations, then the Extradition Act should provide more precise guidance on what type of offences may be carved out of the definition.**
- **Section 5 should provide that an offence may be excluded from the definition only to the extent that it is required to be so excluded by a bilateral or multilateral treaty to which Australia is a party.**

## Death Penalty

106. Article 3(g) includes an important ground of mandatory refusal of an extradition request where the offence for which extradition is requested 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. Similar protections exist in Article 3(g) for torture or other cruel, inhuman or humiliating treatment or punishment in the Requesting Party.

107. The Law Council and NSW Bar Association have not been able to locate identifiable data on the question of whether China has abided by undertakings with respect to imposition and implementation of the death penalty and torture as well as speciality obligations accepted willingly or under a treaty. It is respectfully suggested that such information be requested from the DFAT and from Australian diplomatic missions to fill this gap as it is absent from the National Interest Analysis provided.

108. The mandatory grounds of refusal seek to ensure that the Treaty will not facilitate convictions to the death penalty or executions being imposed. However, undertakings are not legally enforceable<sup>92</sup> and there is no provision in the Treaty for the consequence of a State’s non-compliance with an undertaking. Further, the dispute resolution provision of the Treaty in Article 22(2) is not one that provides for referral through legal mechanisms but through diplomatic channels. This may mean that in practice an undertaking is difficult to enforce.

109. In this context, the Law Council notes the case of Stern Hu where a dispute arose between China and Australia where Australian consular officials were denied access to parts of Stern Hu’s trial. At the time, a Chinese Ministry of Foreign Affairs spokesperson is reported to have stated that ‘We should not confound the consular agreement with sovereignty, especially judicial sovereignty... The decision of a closed-door trial was made based on Chinese law’.<sup>93</sup> Professor Donald Rothwell has stated of the case:

*This statement highlights China’s particular position on the interpretation of international law. China has in recent years been promoting a fierce sovereignty-*

<sup>92</sup> *McCrea v. Minister for Customs and Justice* (2005) 145 FCR 269.

<sup>93</sup> Donald Rothwell, ‘Chinese Law is Australia’s Business’, *The Drum* (online) 29 November 2010 <[http://www.abc.net.au/news/2010-11-29/another\\_australian\\_detained\\_in\\_china/41544](http://www.abc.net.au/news/2010-11-29/another_australian_detained_in_china/41544)>.

*orientated interpretation of international law, whether it be China's rights to exercise sovereignty over its peoples notwithstanding human rights violations, its assertion of significant maritime claims throughout parts of the South China Sea, or the capacity of the Chinese courts to trump bilateral Consular Agreements with countries such as Australia.*<sup>94</sup>

110. The legislation or Treaty should therefore be amended to only allow extradition if a formal undertaking is provided by an official with the authority to guarantee that the death penalty will not be imposed in any circumstance. Further, if a requesting country breaches a death penalty undertaking, no further extradition requests should be accepted from that country.

**Recommendations:**

- **The legislation or Treaty should be amended to only allow extradition if a formal undertaking is provided by an official with the authority to guarantee that the death penalty will not be imposed in any circumstance.**
- **If a requesting country breaches a death penalty undertaking, no further extradition requests should be accepted from that country.**
- **The Committee should inquire into identifiable data on the question of whether China has abided by undertakings with respect to imposition and implementation of the death penalty and torture as well as speciality obligations accepted willingly or under a treaty.**

## Safeguards for children

111. The current EA regime does not include specific protection for children and this must be addressed to provide certainty around the potential age of criminal responsibility for extradition purposes. The requirement of dual criminality may suggest that the age of criminal responsibility must be the same in both countries prior to a person being eligible for extradition.

112. The Minister may also exercise his/her general discretion when determining whether to surrender a child for the purpose of an extradition request.<sup>95</sup> However, there is no mandatory requirement to do so, and no requirement to consider the child's age.

113. Under the *Criminal Code Act 1995* (Cth) a child:

- under 10 years of age is not criminally responsible for an offence;<sup>96</sup> and
- a child from 10 to 14 years of age can only be criminally responsible for an offence if the child knows that his or her conduct is wrong.<sup>97</sup>

<sup>94</sup> Ibid. See also Joshua Neoh, Donald R. Rothwell and Kim Rubenstein 'The complicated case of Stern Hu: allegiance, identity and nationality in a globalized world' in Fiona Jenkins, Mark Nolan, and Kim Rubenstein (eds), *Allegiance and Identity in a Globalised World* (CUP: Cambridge, 2014) 453-477.

<sup>95</sup> *Extradition Act 1988* (Cth), s22(3)(f).

<sup>96</sup> *Criminal Code* (Cth), s7.1.

114. This means that, on the face of the law, there is the potential for Australia to surrender a 10 year old or a 14 year old to China, provided China has a similar age of criminal responsibility and provided the Requesting State can establish that this element of the offence under Australian law can be established. In practice, the Law Council appreciates that extradition requests for children are rare. Nonetheless, children are owed a duty over and above that of adult persons and appropriate safeguards must be in place to protect the rights of children.

115. The current lack of specific protections for children may fail to adequately protect the rights of the child under Articles 2, 3, 9, 16, 20, 23, 27, 28, 37 and 40 of the United Nations *Convention on the Rights of the Child* (CRC), which Australia and China have ratified. This means Australia and China have a duty to ensure children enjoy all the rights in the CRC.

116. The Law Council therefore recommends the following safeguards be implemented to protect children.

**Recommendations:**

- **The list of extradition objections should be expanded to include a prohibition on the extradition of a child under 16 years of age. Such a provision would ensure Australia's compliance with the CRC.**
- **The *Extradition Act 1988* (Cth) should be amended to include a general obligation to take into account the best interests of children as a primary consideration in all decisions which affect them (as required by article 3 of the CRC).**
- **The surrender of a child for extradition should only be made in exceptional circumstances and subject to the requesting country providing an undertaking that:**
  - **the child's rights under CRC will be protected, regardless of whether or not the requesting state is a signatory to CRC; and**
  - **the child's trial for the extradition offence will be consistent with standards in Australia's domestic criminal law as they relate to children.**

## Monitoring

117. The Law Council understands that DFAT monitors all extradited citizens and permanent residents through its consular network, to the extent that this is practically and legally possible.

118. However, generally under the EA regime and the proposed Treaty there is currently no specific obligation for Australia to monitor non-citizens. It is suggested that there be a legislative requirement for the Attorney-General to monitor and report on compliance with any death penalty undertakings following the surrender of a person and also the conditions of imprisonment of prisoners to ensure they are not being subjected to torture or other cruel, inhuman or humiliating treatment or punishment in the Requesting Party.

<sup>97</sup> Ibid, s7.2.

119. Such monitoring is essential for Australia to be in a position to determine whether the extradition arrangements with a country such as China continue to be in Australia's national interest.
120. The monitoring arrangements could potentially be achieved by requiring a Requesting State to report back on the outcome of prosecutions, terms of imprisonment and details of correctional detention. A right of visitation for the Requested State could also be considered in cases other than those involving the citizen of the Requested State.

**Recommendation:**

- **There should be a requirement in the Treaty for the Attorney-General to monitor and report on compliance with any death penalty undertakings following the surrender of a person and also the conditions of imprisonment of prisoners to ensure they are not being subjected to torture or other cruel, inhuman or humiliating treatment or punishment in the Requesting Party.**

## China's ratification of ICCPR

121. Australia should consider only ratifying the Treaty subject to China ratifying the ICCPR. While China signed the ICCPR on 5 October 1998, it has yet to formally ratify it. This is despite some measures taken aimed at ratification.<sup>98</sup> As one of the core international human rights treaties and a component of the International Bill of Rights, the ICCPR is one of the most significant sources of international rights law. China's failure to ratify the ICCPR is stark, particularly given that it is the only member of the permanent five on the United Nations Security Council who has yet to do so. One hundred and sixty-eight states are party to the ICCPR. Seven states, along with China, have signed, but are yet to ratify, and 22 have taken no action.<sup>99</sup>
122. While China is not a party to the ICCPR, it is nonetheless still required to refrain from acts which would defeat the object and purpose of the treaty. This is in accordance with Article 18 of the *Vienna Convention on the Law of Treaties*. In this sense the ICCPR is still a practical tool in improving the protection and promotion of human rights in China. However until ratification takes place the full realisation of rights under the ICCPR will not be achieved.
123. China's accession to the ICCPR was previously a policy priority in Australia's bilateral human rights dialogue with China. This was noted in a 13 March 1998 media release by the Former Minister for Foreign Affairs, Alexander Downer, following the public pronouncement by China's Former Vice Premier and Foreign Minister Qian Qichen that China intended to sign the ICCPR.<sup>100</sup> However, since that time the degree to which Australia has prioritised China's ratification of the ICCPR appears to have

<sup>98</sup> China amends laws for ratification of ICCPR, China Daily (online) 14 July 2011. <[http://www.chinadaily.com.cn/china/2011-07/14/content\\_12904570.htm](http://www.chinadaily.com.cn/china/2011-07/14/content_12904570.htm)> and Report of the Working Group on the Universal Periodic Review, China, 27 February 2014, A/HRC/25/5/Add.1. <<http://www.ohchr.org/EN/HRBodies/UPR/Pages/CNSession17.aspx>>.

<sup>99</sup> United Nations Office of the High Commissioner for Human Rights, Status of Ratification Dashboard. <<http://indicators.ohchr.org/>>.

<sup>100</sup> Media Release, Minister for Foreign Affairs, Alexander Downer, *Australia Welcomes China's Intention to Sign International Human Rights Covenant*, 13 March 1998. <[http://foreignminister.gov.au/releases/1998/fa027a\\_98.html](http://foreignminister.gov.au/releases/1998/fa027a_98.html)>.

diminished, at least publicly. For example, at China's second cycle Universal Periodic Review appearance in October 2013, Australia did not include ratification of the ICCPR in its recommendations. This was in contrast to the more than 30 countries which highlighted ratification as a priority, such as France, Japan, Republic of Korea and New Zealand.<sup>101</sup> Additionally, through the Australia-China Human Rights Dialogue no mention has been made in the media releases of discussions around China's ratification of the ICCPR.<sup>102</sup>

124. The Law Council would welcome refocusing Australia's bilateral human rights public advocacy with China back onto the ICCPR, and is of the view that ratification of the Treaty subject to China ratifying the ICCPR might be an appropriate mechanism to pursue this goal. With Australia being one of the early countries to have ratified the ICCPR, noting the ICCPR's consistency with Australia's national interests in the protection and promotion of human rights, as well as Australia's bid for a Human Rights Council seat in 2018-2020, it is important that Australia's commitment to international human rights law is explicitly interwoven in our bilateral agreements.
125. The Law Council acknowledges that this particular approach comes with an interrelated set of foreign policy objectives which apply more broadly to the Australia-China relationship, as with any other bilateral relationship. Additionally, from a practical perspective, there remain a number of laws and regulations which still require reform. However, considering the express intent by the Chinese Government and the ongoing domestic law reform efforts in China, it is not an unrealistic option.
126. In the event that adoption of the Treaty subject to China's ratification of the ICCPR is not supported by the Committee, Australia should develop a whole of government strategy to promote China's prompt and judicious ratification of the ICCPR. Such a strategy would require coordination across government, with input from DFAT, the Attorney-General's Department, the Australian Human Rights Commission (AHRC) and other relevant agencies. Civil society engagement would also be critical. This strategy should incorporate advocacy that is both public and private. Additionally, it should be complemented by additional financial resources for the China-Australia Human Rights Technical Cooperation Program run by the AHRC.

**Recommendations:**

- **Australia should only ratify the Treaty subject to China ratifying the ICCPR.**
- **In the alternative, Australia should develop a whole of government strategy to promote China's prompt and judicious ratification of the ICCPR.**

<sup>101</sup> Report of the Working Group on the Universal Periodic Review, China (including Hong Kong, China and Macao, China), 4 December 2014, A/HRC/25/5. <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/188/55/PDF/G1318855.pdf?OpenElement>>.

<sup>102</sup> For example, Media Release, 15th Australia-China Human Rights Dialogue, 20 February 2014. <<http://dfat.gov.au/news/media-releases/Pages/15th-australia-china-human-rights-dialogue.aspx>>