

Government Response to Report 91 of the Joint Standing Committee on Treaties regarding Treaties between Australia and the United Arab Emirates on Extradition and Mutual Assistance in Criminal Matters

The Extradition Treaty

General comments

The Government thanks the Committee for its consideration of the *Treaty on Extradition between Australia and the State of the United Arab Emirates*. In expressing its conclusions on the Extradition Treaty, the Committee stated ‘it has concerns in relation to the general operation of Australia’s current treaty model for extradition’. It said that ‘Australia’s responsibility for persons extradited from Australia should not end at the conclusion of the extradition process, but should extend to monitoring the detention of extradited persons, the judicial proceedings they are subject to, their sentencing and their imprisonment.’

The Government appreciates the Committee’s views on this issue. However, the imposition of a general monitoring scheme for Australia’s extradition arrangements as proposed by the Committee would represent a significant and substantial change to such arrangements, and would significantly alter the basis on which extraditions are conducted in terms of both Australian and international practice.

Australia is currently a party to 34 modern bilateral extradition treaties and more than 20 multilateral treaty instruments which include extradition obligations, and also participates in various non-treaty arrangements based on understandings of reciprocity. None of the existing arrangements provide for monitoring of persons following extradition, and the Government is not aware of any international extradition agreements which contemplate such measures.

Australia could seek to have such measures included in extradition treaties. However, given the novelty of the proposed measures in the context of established practice, attempts to impose such measures, whether by treaty provision or otherwise, are likely to be strongly resisted by our existing and potential extradition partners, including on the grounds the measures would infringe the criminal justice processes and sovereignty of the requesting State. Insistence on such measures as a general condition of extradition is likely to preclude effective extradition relationships with a significant number of existing and future extradition partners. This would risk Australia becoming a safe haven for fugitives from many countries.

In general terms – and as a matter of international practice – the Vienna Convention on Consular Relations, which to a large extent codifies customary international law, provides for a State’s right to directly monitor proceedings against its nationals who are subject to detention or prosecution in another State. Accordingly, while Australia may implement monitoring measures in relation to Australian nationals extradited overseas (and has done so), the Vienna Convention does not provide any right to access citizens of other countries. There are also practical obstacles to extending this type of arrangement to all persons extradited from Australia, including the resources and expertise that would need to be deployed.

To the extent the Committee’s concerns relate to the potential abuse of the human rights of persons who are extradited from Australia, the Government considers such concerns are more

appropriately addressed in the context of the extradition process, rather than through the establishment of a detailed monitoring mechanism. Such a mechanism could only come into effect after the event, would be dependent on the preparedness of the government of the relevant country and the relevant local legislation to allow such monitoring and could not provide any legal basis for Australia to act on concerns in relation to the person surrendered. Thus, for example, if there is a real risk that the person may be subject to the death penalty or torture upon surrender, then extradition must be refused as a matter of law, according to subsection 22(3) of the *Extradition Act 1988*. This approach is consistent with Australia's settled approach to the removal of persons through other processes, such as under the *Migration Act 1958*, and with Australia's obligations under international human rights treaties. Under those treaties, any assessment of whether a person may be subject to the death penalty or torture must be carried out before their removal from Australia, not after.

Recommendation 1

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

The Government accepts this recommendation, and will arrange the making of regulations under the *Extradition Act 1988* in order to implement the treaty.

Recommendation 2

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

The Government does not accept this recommendation. It is not aware of any precedents for such a requirement in existing bilateral and multilateral extradition agreements. Many current and potential extradition partners would not be prepared to accept explicit obligations of this nature in extradition agreements. A requirement to provide such information in relation to all persons who have been subject to extradition to or from Australia would also impose significant and unwarranted administrative burdens on the justice and correctional authorities of the relevant jurisdictions.

Recommendation 3

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

- **The Attorney-General's Department informs the Department of Foreign Affairs and Trade of each extradition, including the terms of the relevant extradition agreement and any special conditions applying to the case.**
- **The Department of Foreign Affairs and Trade would be expected to formally monitor all extradited Australians through the consular network.**

- **In the event that a foreign national is extradited to their country of citizenship, the extradition should be made on the understanding that the Australian Government will be informed through its diplomatic representatives of the outcome of the prosecution and the ongoing status of the person while in custody as a result of a conviction. The Australian consular networks would be expected to monitor and report on the condition of the extradited person until they have served their sentence and were released.**
- **In the event that a foreign national is extradited to a third country, the extradited person's country of citizenship should be informed and asked to monitor that person's trial status and health and the conditions of the detention facility in which they are held and report to the Australian Government if it has the capacity and is willing to do so. In the event that an extradited person's country of citizenship does not have the capacity to monitor the extradited person or is not willing to do so, then the Australian Government should monitor the person's trial status and health and the conditions of the detention facility in which they are held through Australia's consular network until that person is acquitted or, if convicted and imprisoned, their sentence is served, they are released and leave the country.**

The Government does not accept this recommendation. As outlined above, Australia is able to implement monitoring mechanisms in relation to Australian nationals detained overseas (including persons who have been extradited from Australia), and has done so. However, this does not apply in relation to foreign nationals. The Government recognises it has a specific role in relation to the welfare of Australian nationals, and this accords with the Vienna Convention on Consular Relations, which provides an exception to the general rule of non-interference in relation to monitoring the welfare of nationals.

Australia's ability to introduce monitoring regimes for non-Australians extradited overseas would depend, in the first instance, on the consent of the requesting country. As outlined above, we assess that many foreign countries would not be prepared to accept such arrangements. There is no provision for such regimes under our extradition treaties or other international instruments, so it would not be lawfully open to Australia to insist on such arrangements as a condition of extradition.

As a matter of practice, the provision of such assistance to foreigners who have been extradited overseas would place pressure on the limited resources of Australia's consular network, which has been established to assist Australians overseas.

In summary, the Government will maintain the following measures:

- (a) The Attorney-General's Department will continue to inform the Department of Foreign Affairs and Trade of each extradition of an Australian citizen and permanent resident, including the terms of the extradition and any special conditions applying to the case.
- (b) The Department of Foreign Affairs and Trade will continue to monitor all extradited Australian citizens and permanent residents through the consular network, to the extent that this is practically and legally possible (the Vienna Convention only specifically refers to consular rights in relation to

Australian citizens, and in any case, Australian citizens or residents may at any time refuse assistance or withdraw their consent to being monitored).

- (c) In relation to foreign nationals sought for extradition from Australia by a third country, the question of monitoring the person following extradition is fundamentally a matter for the person and his or her country of nationality. When foreign nationals are detained in Australia (e.g., in the context of extradition proceedings), law enforcement officers must inform them that they are entitled to request that their consular authorities be informed of their detention, and the consular authorities are entitled to visit and communicate with the relevant person, including in relation to the extradition. Once an extradition has taken place, it is the responsibility of the requesting country to enable consular access to the foreign national as appropriate.

Recommendation 4

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

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

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

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

The Government accepts this recommendation in part. The Attorney-General's Department has provided information on extradition matters in its annual reports to Parliament dating back to the late 1980s. This information currently includes the number of requests made, granted and refused, the countries which have made extradition requests (except in limited

circumstances where the existence of a request prior to arrest of the person may alert the person to pending law enforcement interest), the number and nationality of persons who have been extradited, and the categories of offences for which extradition has been granted.

In response to the Committee's recommendation, the Government will include the following additional information in annual reports of the Attorney-General's Department:

- (a) in relation to extradition requests granted by Australia, future reports will identify the categories of the relevant offences by reference to the countries which made the request
- (b) information on the number of Australian permanent residents extradited, and
- (c) information on any breaches of substantive obligations under bilateral extradition agreements noted by Australian authorities.

The Committee's recommendation for the inclusion of information on requests for 'waivers to provisions in an extradition treaty' appears to relate to requests for waiver of the speciality rule in accordance with the provisions of the relevant treaty (e.g., as provided for in Article 14 of the Extradition Treaty with the United Arab Emirates). The Government agrees to include such information in future annual reports for the Attorney-General's Department.

In relation to the proposed reporting of details in respect of each extradited person, the Government does not support the inclusion of any details expressly identifying the individuals (including the person's name). Although proceedings to determine eligibility for extradition are generally open to the public, this does not apply to subsequent stages of the extradition process. The ongoing and widespread publication of details regarding identifiable individuals through reports to Parliament would represent an unwarranted intrusion into their privacy.

As outlined in our response to recommendation 3, the Government will maintain monitoring measures in relation to extradited Australian citizens and permanent residents, to the extent this is practically and legally possible. The relevant details regarding such persons (without expressly identifying the persons) will be included in annual reports for the Attorney-General's Department.

The Mutual Assistance Treaty

The Government thanks the Committee for its consideration of the *Treaty between Australia and the State of the United Arab Emirates on Mutual Assistance in Criminal Matters*.

Recommendation 5

The Committee supports the *Treaty between Australia and the State of the United Arab Emirates on Mutual Legal Assistance in Criminal Matters* and recommends that binding treaty action be taken.

The Government accepts this recommendation, and will arrange the making of regulations under the *Mutual Assistance in Criminal Matters Act 1987* in order to implement the treaty.

Recommendation 6

The Committee recommends that the Parliamentary Joint Committee on Intelligence and Security be asked to undertake a general review of Australian policy and procedures concerning police-to-police cooperation and other information exchanges, including intelligence sharing arrangements, with a view to developing new instructions to regulate police-to-police and other assistance arrangements not governed by agreements at the treaty level. The instructions should prevent the exchange of information with another country if doing so would expose an Australia citizen to the death penalty.

The Government does not accept this recommendation. The functions of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) are defined by statute and limited to certain reviews in respect of Commonwealth intelligence and security agencies. The functions of the PJCIS do not extend to review of Commonwealth law enforcement agencies. The proposed inquiry would fall largely outside the statutory terms of reference for the PJCIS.

In May 2008, prior to the release of the Committee's report, the Attorney-General directed the Attorney-General's Department and the Australian Federal Police to review procedures for assistance in foreign investigations and prosecutions which may involve the possible application of the death penalty. The Government will announce the outcomes of the review once it has been completed.

Government Response to Report 91 of the Joint Standing Committee on Treaties regarding Film Co-production Agreements with China and Singapore.

Recommendation 8

The Committee recommends that where the subject matter of a treaty has bearing upon freedom of expression issues, the Australian Government broaden its consultation to include relevant human rights organisations.

The Department of the Environment, Water, Heritage and the Arts (DEWHA) will consult with relevant human rights organisations, particularly those with an interest in freedom of expression issues, as part of the process for assessing potential film co-production treaty partner countries.

The Attorney-General's Department has provided DEWHA with a list of relevant human rights organisations which could be consulted as part of this process. DEWHA will also consult with the Department of Foreign Affairs and Trade to identify any freedom of expression issues in a potential treaty partner country.

Recommendation 9

The Committee recommends that the Australian Government utilise any opportunities to make representations to the Chinese Government to lift its 20 foreign film quota significantly higher, with a view to eventually abolishing the quota.

The Government accepts Recommendation 9.

With China's accession to the World Trade Organisation (WTO) in 2001, the Chinese Government undertook to allow the importation of 20 foreign films per annum as one of its audiovisual commitments under the General Agreement on Trade in Services (GATS). The commitment provides for the theatrical release of these films on a revenue sharing basis, and reserves the right of the Chinese Government to regulate services associated with their distribution.

As noted by the Department of the Environment, Water, Heritage and the Arts at the Committee hearings, film projects approved as official co-productions under the Australia-China film co-production agreement will be treated as national films affording them preferential access to China's distribution and exhibition sectors, effectively bypassing the foreign film quota to which other countries remain subject.

The Government will endeavour to facilitate the further opening up of China's audiovisual sector.

