# Supplementary information

The Attorney-General's Department presents the following supplementary information to the Committee in relation to the proposed Agreement between Australia and the Hashemite Kingdom of Jordan on Extradition (the proposed Extradition Agreement), and the proposed Agreement between Australia and the Hashemite Kingdom of Jordan on Mutual Legal Assistance in Criminal Matters (the proposed Mutual Assistance Agreement).

This information is provided in response to specific questions raised by the Committee at the hearing on 4 December 2016, and is in addition to the material already presented by the Government witnesses.

**Extradition for extraterritorial offences**

Mr Robert asked if there is an issue in domestic law that would make it difficult to prosecute someone in Australia who was extradited from Jordan for an extraterritorial offence in a third country.[1]

In short, if the relevant person and any relevant evidence can be brought to Australia, there is no issue in Australia's domestic law that would make it difficult for such a person to be prosecuted. As a matter of best practice, the Attorney-General's Department will not make an extradition request for an accused person unless an undertaking has been received by a Commonwealth, State or Territory prosecuting agency that the accused person will be prosecuted upon surrender to Australia. The Attorney-General's Department understands that in providing such an undertaking, Australian prosecuting agencies assess the case against the accused person, including the sufficiency of evidence available and whether jurisdiction over the offence(s) is established under Australian laws.

Difficulties may however arise in securing the fugitive's return to Australia if the requirement for dual criminality is not met, that is if the alleged conduct does not constitute an offence in the requested country. As a matter of best practice, the Attorney-General's Department assesses whether dual criminality is likely to be met, and makes enquiries with the foreign country as necessary, prior to making an extradition request.

In relation to an Australian request for extradition, Article 3 of the Extradition Agreement provides that when determining dual criminality Jordanian authorities would need to consider whether the alleged acts or omissions would, if they had taken place at the time the request for extradition was received, have constituted an offence in Jordan.

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**Effect of Extradition agreement on current arrangements**

Mr Wilson asked how the Extradition agreement practically varies the process by which Australia would consider a request from Jordan.[2]

The main change to the current extradition relationship between Australia and Jordan is that the proposed Extradition Agreement would allow Jordan to consider an extradition request from Australia, which Jordan is currently unable to do due to their domestic law requirement for a treaty relationship.

Currently, as Jordan has been declared as an extradition country in regulations, Australia can already consider an extradition request from Jordan in accordance with the provisions of the *Extradition Act 1988* (Cth) (Extradition Act). If the proposed Extradition Agreement is ratified, Australia will be obliged to consider any future requests in accordance with that Agreement and the provisions in the Extradition Act. While the process for considering and executing any request will not vary in a practical sense (that is the documentary requirements for an extradition request, application of the 'no evidence' evidentiary standard and the process undertaken to progress a request will remain the same), any grounds for refusal contained in the proposed Extradition Agreement will need to be considered in addition to the safeguards contained in the Extradition Act. In practice this means that, when considering whether to surrender a person to Jordan the Minister will need to consider all mandatory and discretionary grounds for refusal in the proposed Extradition Agreement, as well as those contained in the Extradition Act. The Extradition Agreement would not operate to eliminate the Minister's general discretion to grant surrender under section 22(3) of the Extradition Act or the other statutory grounds for refusal.

The grounds for refusal contained in the proposed Extradition Agreement and the Extradition Act are broadly similar. The mandatory grounds for refusal in Article 4(1) of the proposed Extradition Agreement reflect those contained in sections 7 and 22 of the Extradition Act. For example, they provide that extradition must be refused where there are substantial grounds for believing that the person whose extradition is requested would be in danger of being subjected to torture if extradited (Article 4(1)(d)) or where the offence for which extradition is requested is regarded as a political offence (Article 4(1)(e)). Article 4(1)(c) also provides that extradition must be refused if the offence for which extradition is requested, or any other offence that may be established from the acts or omissions giving rise to the extradition offence, carries the death penalty, unless the requesting party has provided a death penalty undertaking. Article 4(1)(a) also states that extradition must be refused if there are substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's race, sex, religion, nationality or political opinion. If there were concerns that a request was made for the purpose of prosecuting or punishing a person on account of their ethnic origin, this ground could be used to refuse extradition.

In addition, Article 4(2) contains a number of discretionary grounds of refusal that are not contained in the Extradition Act. For example, Article 4(2) provides that extradition may be

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refused if the person is a national of the Requested Party (Article 4(2)(a)), if the person would be liable to be tried or sentenced by an extraordinary or ad hoc court or tribunal (Article 4(2)(d)), and if the Requested Party while taking into account the nature of the offence and the interests of the Requesting Party, considers that, in the circumstances of the case, including the age, health or other personal circumstances of the person whose extradition is requested, the extradition of that person would be unjust, oppressive, incompatible with humanitarian considerations or too severe a punishment (Article 4(2)(f)).

While the Extradition Act does not explicitly reference the discretionary grounds for refusal in Article 4(2) of the proposed Extradition Agreement, those safeguards are matters that could be considered , where relevant, by the Minister in the exercise of his general discretion under section 22(3). Any concerns that the extradition request related to a person's ethnic origin could be considered by the Minister in the exercise of this general discretion.

Therefore, the proposed Extradition Agreement would not cause significant variations in the process by which Australia considers a request from Jordan, as the processes and requirements contained in the Extradition Agreement and the Extradition Act are broadly similar. However, the Extradition Agreement would clarify for Jordan Australia's domestic legal requirements and processes and provide the certainty of mutually-agreed obligations.

The proposed Extradition Agreement also clarifies the following issues that might arise in relation to a request:

- the proposed Extradition Agreement provides that, where a person has been arrested pursuant to a provisional arrest request, that person may be released after 60 days if the Requesting Party has not received the formal request (section 17(2) of the Extradition Act provides for a 45 day period); a 60 day period is provided for in several of Australia's extradition treaties, including our extradition treaties with the United Arab Emirates, Vietnam and India.
- Article 9 of the proposed Extradition Agreement sets out how the Requested Party is to deal with concurrent requests (i.e. competing extradition requests from different countries for the same person), and
- Article 14 provides that where a person has been extradited, the Requesting Party shall not extradite that person to a third State for any offence committed before that person's surrender without the Requested Party's consent, save in limited circumstances (a speciality assurance).

These clarifications would also enhance the efficiency of extradition processes for requests from Jordan by removing uncertainty about Australia's position on issues such as the timeframe for making an extradition request following a provisional arrest request and concurrent requests. Article 14 would also achieve efficiencies in removing the current need for Jordan to provide a speciality undertaking in respect of each individual extradition request and provide the certainty and authority of a treaty-based speciality assurance.

**Torture and other cruel, inhuman or degrading treatment or punishment**
Senator McAllister asked about issues raised by the Law Council in their submission in relation to the definition of torture as defined and understood in Jordanian law and how the proposed Extradition Agreement reflects the broader definition contained in the *United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).[3]

In international law there is a distinction between 'torture' and 'cruel, inhuman or degrading treatment'. Article 4(1)(d) of the proposed Extradition Agreement and section 22 (3)(b) of the Extradition Act provide that extradition shall be refused where there are substantial grounds for believing that the person whose extradition is requested would be subjected to torture if extradited. These provisions are designed to implement Australia's *non-refoulement* obligations under the CAT and accordingly, any request for extradition will be assessed in line with Australia's laws and the definition of torture under the CAT.

In addition, Australia has *non-refoulement* obligations under the *International Covenant on Civil and Political Rights* (ICCPR) in relation to cruel, inhuman or degrading treatment. There are safeguards referenced in the proposed Extradition Agreement and the Act that deal with humanitarian considerations including cruel, inhuman and degrading treatment. For example, Article 4(2)(f) of the proposed Extradition Agreement provides that extradition may be refused if it would be unjust, oppressive, incompatible with humanitarian considerations or too severe a punishment. In addition to such issues the Minister's general discretion under section 22(3)(f) of the Extradition Act would provide a basis to refuse extradition where there are humanitarian considerations. The decision whether to surrender a person will be made by the relevant Minister, on a case by case basis in accordance with the safeguards in the proposed Extradition Agreement and the Extradition Act, and in light of Australia's international law obligations.

The Government also notes that Jordan is party to the following conventions:

- the *International Covenant on Civil and Political Rights*
- the *United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*
- *the International Covenant on Economic, Social and Cultural Rights*
- the *Convention on the Rights of the Child*
- the *Convention on the Rights of Persons with Disabilities*
- the *Convention on the Elimination of All Forms of Discrimination against Women*; and
- the *Convention on the Elimination of All Forms of Racial Discrimination.*

**Military offence/fair trial issues**
Senator McAllister asked about the Law Council's submission that the proposed Extradition Agreement should be amended to include a mandatory ground for refusal where there are

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substantial grounds to believe that the accused will not be afforded minimum guarantees under Article 14 of the ICCPR.[4]

Article 4(1)(b) of the proposed Extradition Agreement and section 7(d) of the Extradition Act provide that extradition shall be refused if the offence for which extradition is sought is a military offence and not a criminal offence.

There are also safeguards in the proposed Extradition Agreement and the Extradition Act that will apply to the consideration of fair trial issues, including any concerns raised in relation to Jordan's State Security Court. The decision whether to surrender a person will be made by the Minister on a case by case basis in accordance with those safeguards.

The Minister will thoroughly assess any information suggesting that an individual may not receive a fair trial in light of their circumstances, as relevant considerations to the discretionary ground of refusal in section 22(3)(f). The relevant considerations may include the extent to which an individual would receive minimum procedural guarantees in a criminal trial in the country to which he or she is being returned (including whether he or she has access to legal representation).

Assessment of these claims may include analysis of the individual's claims and any assurances from the requesting country. The assessment may also consider country information, reports prepared by Non-Government Organisations and information provided through the diplomatic network.

**Monitoring**

Mr Wilson asked about the extent to which Australian authorities monitor persons that have been surrendered by Australia pursuant to extradition requests.[5]

Where an Australian national or permanent resident is to be surrendered to a foreign country, the Attorney-General's Department will inform the Department of Foreign Affairs and Trade (DFAT) of the extradition, including the terms of the extradition and any special conditions applying to the case. In applicable cases (i.e cases where the person has consented to receiving consular assistance), DFAT will monitor the trial, verdict and sentence for Australians surrendered to a foreign country and detained overseas through its portfolio responsibility to provide consular assistance to Australians in difficulty overseas, in accordance with the *Consular Services Charter.*

While the Vienna Convention on Consular Relations provides for a State's right to directly monitor proceedings against its nationals who are subject to detention or prosecution in another State, there is no basis under the Vienna Convention for Australia to monitor foreign nationals. Nevertheless, where a foreign national is detained in Australia for extradition purposes, local authorities will generally advise them of their entitlement to have their Embassy notified that they have been detained, in order to facilitate consular access. It is a

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matter for the foreign national whether he or she consents to have their Embassy notified of their detention. If the person consents and the Embassy is notified, it is a matter for the foreign Government how it wishes to continue monitoring that person's welfare after extradition. There may be cases where a foreign national does not consent to their Embassy being notified of their detention. In addition, there may be situations where notifying a person's country of citizenship of their location may jeopardise the person's safety or affect ongoing law enforcement matters. The Australian Government must act in accordance with the constraints on the disclosure of personal information in the *Privacy Act 1988* (Cth).

The Government considers that concerns about potential human rights abuses are more appropriately addressed during the extradition process, rather than after an individual has been extradited to another country.

**Review of the Extradition Act**

Mr Wilson made some comments regarding a review of the Extradition Act.[6]

Australia's extradition regime and procedures are frequently considered and assessed. The Australian Government conducted a comprehensive review of its extradition arrangements from 2005-2012, which resulted in amendments to the Extradition Act that passed in 2012. The 2012 amendments were reviewed by the House of Representatives Standing Committee Social Policy and Legal Affairs. The Committee considered the amendments to be well balanced and considered.

During the passage of the 2012 amendments to the Extradition Act, the Government undertook to commence an internal review of the operation of the amendments within 3 years. The Attorney-General's Department recently finalised its internal review of the amendments made to the Extradition Act in 2012. The review found that the reforms have achieved their intended goals of streamlining extradition processes while maintaining appropriate safeguards.

In 2016, the Attorney-General's Department conducted a review of the current extradition legislative arrangements in relation to the death penalty. This was in response to a recommendation of the Human Rights subcommittee of the Joint Standing Committee on Foreign Affairs, Defence and Trade's inquiry into Australia's advocacy for abolition of the death penalty. The Department is satisfied that Australia's extradition legislative arrangements are consistent with Australia's obligations as a Party to the Second Optional protocol to the International Covenant on Civil and Political Rights.

Australia also interacts with like-mindeds on extradition issues through its participation in the Quintet process (with the UK, US, NZ, Canada), bilateral meetings (e.g. casework meetings with the US) and multilateral fora (such as the United Nations Convention against Transnational Organised Crime and the United Nations Convention against Corruption). Australia's extradition regime was considered by the Financial Action Task Force (FATF) in

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2015 and was found to be compliant with the FATF recommendations and operationally effective.