



Australian Government

Australian Government response to the
Joint Standing Committee on Treaties Report 167:

Treaty on Extradition between Australia and the People's
Republic of China (Sydney, 6 September 2007)

March 2017

Australian Government response to the recommendations of the Joint Standing Committee on Treaties inquiry into the Treaty on Extradition between Australia and the People's Republic of China

The Government thanks the Committee for its consideration of the *Treaty on Extradition between Australia and the People's Republic of China* (the Treaty).

The evolving nature of, and increased threats posed by, transnational crime requires Australia to have a robust and responsive extradition system that assists in effectively combating domestic and transnational crime, while providing appropriate safeguards. It is important to ensure that criminals cannot evade justice simply by crossing borders.

Bilateral treaties on extradition provide the framework for extradition processes and procedures to facilitate consideration of requests that are targeted to specific bilateral circumstances. Australia is currently a party to 39 bilateral extradition treaties and more than 20 multilateral treaty instruments which include extradition obligations.

Australia and China have an established law enforcement and international crime cooperation relationship supplemented by treaties on mutual assistance and the international transfer of prisoners and cooperation arrangements between relevant agencies. This extradition treaty will complement these existing international crime cooperation mechanisms.

Australia considers all extradition requests on a case by case basis, in line with the range of safeguards contained in the *Extradition Act 1988* (the Extradition Act) and applicable treaties, including mandatory and discretionary grounds of refusal.

Recommendation 2

The Committee recommends that the extradition decision maker take into account reports from government and non-government sources regarding the degree to which China's criminal justice system currently complies with human rights and the rule of law, when making the decision to extradite an individual.

The Government accepts this recommendation.

In addition to the mandatory and discretionary grounds for refusing extradition in Articles 3 and 4 of the Treaty, and in section 22(3) of the Extradition Act, the decision-maker (the Attorney-General or the Minister for Justice) retains a broad discretion under section 22(3)(f) of the Extradition Act to refuse to surrender a person to an extradition country. The proposed Treaty does not displace the operation of any of the considerations that the decision-maker must have regard to under Australian law, including the residual discretion in the Extradition Act.

For the purposes of considering whether to refuse surrender under section 22(3), the decision-maker may consider all material reasonably available to assist them in determining whether the person should be surrendered. Assessment of these claims may include any

submissions put by the individual and representations or undertakings from the requesting country, including the extent to which the requesting country's criminal justice system complies with human rights obligations. The assessment may also consider country information, reports prepared by government or non-government sources, and information provided through the diplomatic network.

Recommendation 3

The Committee recommends that undertakings to provide a fair and open trial are routinely included in agreements to surrender an individual to China.

The Government notes this recommendation.

Decisions to surrender individuals are made by the Attorney-General or the Minister for Justice in accordance with the safeguards in the relevant extradition treaty and the Extradition Act, and are based on the particular circumstances of each case.

Article 4(c) of the proposed Treaty contains a discretionary ground for refusal of an extradition request where extradition would be 'incompatible with humanitarian considerations in view of that person's age, health or other personal circumstances'. This provision would cover issues that include injustice or oppression, particularly where they are intricately linked to the person's personal circumstances. Additionally, paragraph 22(3)(f) of the Extradition Act contains a general discretion to refuse surrender in circumstances where there are legitimate human rights concerns such as whether an extradited individual would have access to a fair trial. Relevant considerations may include the extent to which an individual would receive appropriate procedural guarantees in a criminal trial in the country to which he or she is being extradited.

It is open to the relevant decision-maker (the Attorney-General or the Minister for Justice) to request assurances from the requesting country about the treatment and conditions applying to a person upon extradition where concerns exist about whether that person would receive a fair and open trial. Assurances could include that the trial be held in open court, that the person has access to legal representation, that the person has an opportunity to test the evidence against them or that the person will be imprisoned in particular jails. The decision-maker would consider any individual's claims and any representations or assurances provided by the requesting country. The decision-maker may also consider country information, reports prepared by government or non-government sources and information provided through the diplomatic network.

It is appropriate that each extradition request be considered on a case by case basis.

Recommendation 4

The Committee recommends that the Attorney-General's Department supplement its current annual reporting framework for extradition cases with the following information for each case of an Australian national or an Australian permanent resident held in a foreign country:

- **if a trial has taken place;**
- **if so, the verdict handed down;**
- **if a sentence was imposed, what that sentence was; and**
- **whether an Australian embassy official was able to attend.**

The Government does not accept this recommendation.

The Department of Foreign Affairs and Trade (DFAT) already monitors trials, verdicts and sentences for Australians detained overseas through its portfolio responsibility to provide consular assistance to Australians in difficulty overseas, in accordance with the [Consular Services Charter](#). This includes Australians who have been extradited. In FY2015-16, DFAT provided consular assistance in 1198 cases of Australians arrested overseas ('Arrest' cases involve Australians arrested and charged – whether detained or not – and whose trial processes are not yet finalised); and to an additional 391 Australian prisoners ('Prisoner' cases involve Australians who have been convicted and sentenced overseas, including those who have appealed their sentences). This information is already contained in DFAT's [Annual Report](#) and annual consular [State of Play](#).

In any reporting to AGD specifically on extradited Australian citizens or permanent residents, DFAT would need to ensure that the privacy rights of individual consular clients are not breached. DFAT adheres to stringent obligations under the *Privacy Act 1988* to protect the personal information of consular clients. Normally, in providing statistical data on consular case work, DFAT does not include statistics when there are five or fewer cases, as any information DFAT were to release could reasonably be expected to lead to those individuals being identified, and their privacy rights breached. In this context, DFAT notes the low number of cases of Australians extradited to foreign jurisdictions, their usual high media profile, and the likelihood that the data provided would be incomplete because of privacy obligations.

Recommendation 5

The Committee recommends that, 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 details of the trial, whether a consular official was able to attend, the outcome of any prosecution and, on request, the location and general health of the person while in custody as a result of a conviction.

The Government does not accept this recommendation.

While Australia has implemented monitoring measures in relation to Australian nationals extradited overseas, Australia's ability to introduce monitoring regimes for non-Australians extradited overseas is limited.

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. The *Vienna Convention* and Australia's various bilateral agreements on consular relations – including with China – do not give the Australian Government access to foreign nationals extradited to another country. Access to any dual national in their other country of nationality requires the consent of the host government, with consent to access usually premised on the individual having used their Australian passport to enter that country. However, if concerns were held about the welfare of an individual, consular officials could make enquiries about their welfare of the host government, including requesting consular access to a dual national if appropriate.

As submissions and responses to this and previous Committees' inquiries have stated, the Government considers that concerns relating to the potential abuse of human rights of persons extradited from Australia are more appropriately addressed during the extradition process. For example, subsection 22(3) of the Extradition Act contains a mandatory ground for refusal of an extradition request where the decision-maker (the Attorney-General or the Minister for Justice) have substantial grounds for believing that, if the person were surrendered to the extradition country, the person would be in danger of being subjected to torture.

It is also open to the decision-maker (the Attorney-General or the Minister for Justice) in an extradition matter to consider, where appropriate, whether ongoing monitoring of an extradited individual's prosecution, sentence and welfare should be a condition of the extradition.

Specifically to the proposed Treaty between Australia and China, the Government notes that Article 19 of the proposed Treaty requires the requesting country to provide information about the proceedings or execution of a sentence against a person extradited under the Treaty. This would apply regardless of the person's nationality.

While China does not recognise dual nationality, the *Agreement on Consular Relations Between Australia and China (2000)* (the Consular Agreement) enables consular access to a Chinese-Australian dual national who enters China on their Australian passport (Article 10(3)). If a Chinese-Australian dual national were to be extradited from Australia to China, the decision-maker could seek China's agreement, as a condition of the extradition, that the individual enter China using their Australian travel document, or otherwise that the Consular Agreement would apply to the person whose surrender is sought.

Recommendation 6

The Committee supports the Treaty on Extradition Between Australia and the People's Republic of China and, noting the power of the Minister for Justice to refuse extradition under the Extradition Act, recommends that binding treaty action be taken.

The Government accepts this recommendation and is progressing the making of regulations under the Extradition Act to implement the Treaty.

Dissenting report

Recommendation 1

That binding treaty action for the Treaty on Extradition Between Australia and the People's Republic of China be delayed until after an independent review of the Extradition Act 1988 (Cth) to ensure that Australia's extradition system continues to be consistent with community expectations and international legal obligations regarding the rule of law and human rights.

The Government does not accept this recommendation.

The Extradition Act has been subject to a number of reviews in recent years. The Government is committed to ensuring that Australia's domestic extradition regime under the Extradition Act operates in a manner that is consistent with Australia's international law obligations, including international human rights law obligations.

Australia conducted a comprehensive review of its extradition arrangements from 2005-2012, which resulted in amendments that passed in 2012 to modernise the extradition process, while maintaining appropriate safeguards and protecting human rights. These amendments were developed following an extensive public consultation process, with public comment sought and considered in 2005, 2009 and 2011. The 2012 amendments were reviewed by the House of Representatives Standing Committee on Social Policy and Legal Affairs. The Committee considered the amendments to be well balanced and considered. The Attorney-General's Department is currently conducting an internal review of the 2012 amendments to examine the extent to which the amendments have achieved their intended goal of streamlining the law while maintaining appropriate human rights safeguards.

In addition, further to Recommendation 1 of the Joint Standing Committee on Foreign Affairs, Defence and Trade's Report from its Inquiry into Australia's Advocacy for the Abolition of the Death Penalty, released in May 2016, the Attorney-General's Department recently conducted a review of the current legislative arrangements for extradition for consistency with Australia's obligations as a Party to the Second Optional Protocol to the International Covenant on Civil and Political Rights. The government response to the 13 recommendations from this Inquiry is expected to be tabled shortly.

The Extradition Act provides for ongoing judicial review of decisions relating to extraditions in Australia. It is open to the person the subject of an extradition request to challenge each stage of the extradition process in Australia. This includes reviews of magistrates' decisions under the Extradition Act, and reviews of executive determinations made pursuant to sections 16 and 22 of the Extradition Act, which are subject to judicial review under the *Judiciary Act 1903* and the Constitution.