



Law Council
OF AUSTRALIA

Treaties on Extradition and Mutual Assistance between Australia and Jordan

Joint Standing Committee on Treaties

30 November 2017

Table of Contents

About the Law Council of Australia	3
Acknowledgement	4
Executive Summary	5
Independent review of the Extradition Act and Mutual Assistance Act	7
Appropriate evidential standard	8
Grounds of refusal	9
Political offence	10
Ethnic origin and status	11
Torture and other cruel, inhuman or degrading treatment or punishment.....	13
Minimum guarantees in criminal proceedings.....	16
Death penalty.....	17
Extradition for extraterritorial offences	19
Other grounds for refusal.....	20
Other issues with the proposed Treaties	21
Time limits under the proposed Extradition Treaty	21
Where no Extradition request has been received.....	21
Surrender of an eligible person	21
Additional protections in the proposed Mutual Assistance Treaty.....	22
Safeguards for children	23
Monitoring of extradited persons	24
Jordan's ratification of the optional protocols to the ICCPR and CAT	26

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12-month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of its National Criminal Law Committee, National Human Rights Committee, and the Law Society of New South Wales 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' (**Committee**) inquiry into:
 - the Agreement between the Government of Australia and the Hashemite Kingdom of Jordan on Extradition (the **proposed Extradition Treaty**); and
 - the Agreement between the Government of Australia and the Hashemite Kingdom of Jordan on Mutual Legal Assistance in Criminal Matters (the **proposed Mutual Assistance Treaty**) (collectively, the **proposed Treaties**).
2. It is vital that 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 its international obligations.
3. Therefore, the terms of the proposed treaties must be examined against the current social, political and legal climate in Jordan to ensure that Australia does not facilitate the conviction or treatment of a person in a manner inconsistent with its own democratic values and international obligations. Noting that a central motivation of the proposed Treaties is to increase international cooperation in the fight against terrorism,¹ the Law Council is particularly concerned by the:
 - prosecution, conviction and detention of persons pursuant to the Jordan Anti-Terrorism Law No 55 of 2006 (**Anti-Terrorism Law**),² which is cast in broad terms and has been used to prosecute persons critical of the Jordanian Government and its allies;
 - widespread and systematic use of torture and other cruel, inhuman or degrading treatment or punishment against persons suspected of 'terrorism', the narrow definition of torture under Jordanian law and its characterisation as a misdemeanour, as well as the impunity of law enforcement for its commission;
 - abrogation of fair trial rights of persons accused of 'terrorism' and other offences that fall within the jurisdiction of the State Security Court; and
 - reactivation of the death penalty in 2015, following an eight-year moratorium, to execute persons convicted of terrorism offences.
4. The Law Council considers that Australia should not be complicit in criminal investigations and trials which do not comply with accepted fair trial standards and which may result in torture, cruel, inhuman or degrading treatment or punishment, or imposition of the death penalty. The proposed treaties as currently drafted do not

¹ See *Agreement Between the Government of Australia and the Hashemite Kingdom of Jordan on Extradition*, signed 24 April 2017 [2017] ATNIA 24 (not yet in force), preamble; see also Joint Standing Committee on Treaties, 'Australia considers extradition Treaty with Jordan' (Media Release, 16 October 2017) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Extradition-Jordan/Media_Releases>.

² *Anti-Terrorism Law* (Hashemite Kingdom of Jordan) Law No 55 (2006) (UNODC translation) <www.track.unodc.org/.../Jordan/Laws/Jordan%20Anti-terrorism%20law%202006.pdf>.

contain sufficiently robust protections regarding those likely to be extradited to Jordan or prosecuted subject to a request for legal assistance.

5. For these reasons, the Law Council opposes Australia's ratification of the proposed Treaties.
6. In addition, the Law Council considers that the proposed Treaties exacerbate, rather than allay, concerns about potential adverse impacts created by the current extradition and mutual assistance regimes.³
7. Therefore, The Law Council directs its recommendations towards improving safeguards in the proposed Treaties as well as the *Extradition Act 1988* (Cth) (**Extradition Act**) and *Mutual Assistance in Criminal Matters Act 1987* (Cth) (**Mutual Assistance Act**). These include that:
 - an independent review of the Extradition Act and Mutual Assistance Act should be conducted to ensure that Australia is complying with fundamental rule of law principles and its international obligations;
 - an independent review of the 'no evidence' evidentiary standard should be conducted, which includes consideration as to whether the Canadian 'record of the case' standard or US 'probable cause' standard may be more appropriate;
 - an independent review of the Extradition Act and Mutual Assistance Act should be conducted to determine if the existing definition of 'political offence' is appropriate. Consideration should be given to amending the definition of 'political offence' to exclude only *serious* offences that endanger life and liberty, and defining the types of offences that may be carved out from the definition of 'political offence' by regulation;
 - the proposed Treaties, where applicable, should be amended to make it a mandatory ground for refusal of a request where:
 - the request appears to be for the purposes of facilitating a prosecution or punishment on the basis of a person's ethnic origin or status;
 - there are substantial grounds for believing that the person may be in danger of being subjected to cruel, inhuman or degrading treatment or punishment, or will be denied the minimum guarantees in criminal proceedings;
 - legal assistance is requested regarding an offence that carries the death penalty;
 - safeguards should be incorporated into the proposed Treaties which reflect Australia's obligations under the *UN Convention on the Rights of the Child*;
 - the proposed Extradition Treaty should be amended to require Australia to monitor the treatment, detention and trial of any person extradited from Australia to Jordan; and

³ The Law Council previously raised concerns in its submission to the Committee on the Australia-China Extradition Treaty: see Law Council of Australia, *Treaty on Extradition Between Australia and the People's Republic of China* (24 March 2016) <<https://www.lawcouncil.asn.au/files/pdf/submission/160324-Submission-3131-treaty-extradition-between-australia-peoples-republic-china.pdf>>. The Law Council also notes a review by the Committee of Australia's extradition regime which made recommendations to strengthen Australia's extradition regime, many of which have not been implemented, see: Joint Standing Committee on Treaties, Parliament of Australia, *Report 40 – Extradition: A Review of Australia's Law and Policy* (2001).

- Australia should encourage Jordan to ratify the Optional Protocol to the International Covenant on Civil and Political Rights and the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**), and to accept the competence of the Committee Against Torture to receive individual communications under article 22 of the CAT.

Independent review of the Extradition Act and Mutual Assistance Act

8. 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. 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.
9. When entering into extradition and mutual legal assistance treaties, States that adhere to these values have the difficult task of reconciling interests in furthering international cooperation in law enforcement matters, with protection of a defendant's legal rights. Such treaties also represent an acknowledgement from both countries of respect for the other's laws and sovereignty.
10. The Law Council considers that the UN Model Treaty on Extradition (**UN Model Extradition Treaty**),⁴ and the UN Model Treaty on Mutual Legal Assistance (**UN Model Legal Assistance Treaty**), (collectively, **UN Model Treaties**) strike the right balance between respect for State sovereignty, upon respect for which the international legal order is based, and applicable international human rights and other standards. Therefore, the Law Council considers that the proposed Treaties should, at a minimum, meet the standards set out in the UN Model Treaties.
11. The Extradition Act and Mutual Assistance Act also contains certain safeguards.⁵ However, these do not necessarily reflect the standards set out in the UN Model Treaties. The Law Council notes that some of the safeguards in the Extradition Act and Mutual Legal Assistance Act were inserted following amendment in 2011. At that time, the House of Representatives Standing Committee on Social Policy and Legal Affairs 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.*⁶
12. 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 Mutual Assistance Act and the Extradition Act more broadly should be

⁴ *Model Treaty on Extradition*, 14 December 1990, GA Res 45/116, GAOR, 45th sess, 68th plen mtg, A/RES/45/116.

⁵ See, for example, *Extradition Act 1988* (Cth) s 15B(3)(1)-(2), ss 16(2)(b) and 7; *Assistance in Criminal Matters Act 1987* (Cth) s 8.

⁶ 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.

conducted to ensure that Australia is acting consistently with the rule of law and international human rights obligations.

13. The Law Council notes that in relation to the proposed *Treaty on Extradition Between Australia and The People's Republic of China*,⁷ the Committee's dissenting report supported this position, recommending that ratification be delayed until after an independent review of the Extradition Act.⁸ Such a review would be especially timely given Australia's election to the UN Human Rights Council, as the international community will look to Australia to show leadership internationally on promoting adherence to human rights standards and the rule of law.

Recommendation:

- **An independent review of the Extradition Act and the Mutual Assistance Act should occur to ensure Australia is acting consistently with the rule of law and international human rights obligations.**

Appropriate evidential standard

14. Currently Australia has a 'no evidence' model for extradition. The proposed Extradition Treaty adopts this standard as article 7 allows the 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 Extradition Act does not require the requesting state to provide any evidence in support of the offence for which extradition is sought.
15. The Committee has previously analysed in detail the appropriate evidentiary standard that should apply to Australia's extradition regime and did not favour continuation of the default 'no evidence' model.⁹ Instead, the Committee considered that the Canadian 'record of the case' approach and the US 'probable cause' approach were preferable. This was because both the Canadian and US standards provide the courts with greater opportunity to assess whether any substantial evidence had been gathered against the accused and therefore determine whether it is in the interests of justice that the person should be surrendered to face justice.¹⁰ The Law Council notes that the US does not appear to have difficulty satisfying its 'probable cause' test.¹¹
16. The Law Council agrees with the Committee. The Law Council notes that the Committee previously recommended that the Attorney-General refer for inquiry and report by the Australian Law Reform Commission (**ALRC**) matters relating to the

⁷ *Treaty on Extradition Between Australia and the People's Republic of China*, signed 6 September 2007 [2007] ATNIF 26 (not yet in force).

⁸ The justification for this position included that 'Australia's network of extradition treaties has grown since the passage of the *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Act 2011*. We now have extradition arrangements with a large range of countries whose legal systems differ in material ways from ours. In the last five years, Australia has had extradition treaties with India, Vietnam, Uruguay and the United Arab Emirates enter into force: Joint Standing Committee on Treaties, *Report 167: Dissenting Report by Labor Members* (2016) [1.25]

<https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Extradition-China/Report_167/section?id=committees%2freportjnt%2f024024%2f24319#footnote7target>.

⁹ Joint Standing Committee on Treaties, Parliament of Australia, *Report 40 - Extradition A Review of Australia's Law and Policy* (2001) 43.

¹⁰ *Ibid.*

¹¹ See eg *Hermanowski v United States* (2006) 149 FCR 93.

appropriate evidentiary standard for extradition requests to Australia. The Government response did not accept this recommendation, noting that the evidentiary standard under which Australia conducts its extradition relations is a matter of policy that includes a wide range of considerations outside the legal sphere.¹² Nonetheless, the Law Council considers that a review of the evidentiary standard, by the ALRC or other independent body, such as the Parliamentary Joint Committee on Human Rights, is needed.

17. There is, of course, a reasonable argument that the 'no evidence' approach is appropriate for democracies where the rule of law is guaranteed. 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.
18. The Law Council notes that there is no provision in the proposed Extradition Treaty requiring Jordan to provide evidence in support of the offence and no means to challenge the strength of the evidence provided.¹³ The Law Council considers that a more rigorous evidential standard should be codified in the terms of the proposed Extradition Treaty, due to concerns about human rights and the rule of law being respected in Jordan (discussed below).
19. Further, the Law Council considers that the current prohibition on leading evidence to contradict an allegation that the person has engaged in conduct constituting an extradition offence should not be applied in circumstances where a person seeks to lead the evidence to establish an extradition objection.¹⁴

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 Committee in its *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 should not be applied in circumstances where a person seeks to lead the evidence to establish an extradition objection.**

Grounds of refusal

20. The Law Council is concerned that the proposed Treaties, and aspects of the Extradition Act, do not meet the minimum standards of the UN Model Treaties. The Law Council considers that, coupled with certain Jordanian laws, policies and practices, there is a risk that Australia's acquiescence to requests may undermine our own international human rights obligations and rule of law principles.

¹² Commonwealth Government, 'Government Response to the Joint Standing Committee on Treaties Inquiry into Australia's Extradition Law and Policy' (17 May 2004) 2.

¹³ Joint Standing Committee on Treaties, *Report 167: China Extradition Treaty* (2016) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Extradition-China/Report_167/section?id=committees%2freportjnt%2f024024%2f24292> [3.33].

¹⁴ *Extradition Act 1988* (Cth) s 9(5).

21. For convenience, the Law Council's concerns have been set out below against the grounds of refusal of requests set out in the UN Model Extradition Treaty and the UN Model Legal Assistance Treaty, respectively.

Political offence

22. Article 3(a) of the UN Model Extradition Treaty provides that extradition shall not be granted 'if the offence for which extradition is requested is regarded by the requested State as an offence of a political nature'. This is mirrored in article 4(1)(b) of the UN Model Legal Assistance Treaty, but as a discretionary ground of refusal.
23. 'Political offence' is not defined in either of the UN Model Treaties, but the Model Extradition Treaty acknowledges that states 'may wish to exclude certain conduct, for example, 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'.¹⁵
24. The refusal of assistance on the ground that an offence is of a political nature is encapsulated in article 4(1)(e) of the proposed Extradition Treaty and article 4(1)(a) of the proposed Mutual Assistance Treaty. Neither of the proposed Treaties define 'political offence', but the proposed Extradition Treaty excludes certain acts from being political offences.¹⁶
25. However, the proposed Treaties must also be interpreted in light of section 5 of the Extradition Act, which defines a 'political offence' as 'an offence against the law of the country 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)'. Further definition is provided in the regulations to the Extradition Act, which make clear that a 'political offence' excludes an act of violence against a person's life or liberty.¹⁷ The Law Council is of the view that 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. This would ensure that it better corresponds with the UN Model Extradition Treaty.¹⁸
26. As it stands, 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 minor offence against a person's life or liberty. 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 as it would be understood in Australia. In Jordan, the politically-motivated prosecutions of persons who have committed minor offences against a person's life or liberty can be facilitated by the wide definition of terrorism, and the existence of the offence of *lèse-majesté* ('insult to the King'),¹⁹ under Jordanian law.

¹⁵ *Model Treaty on Extradition*, 14 December 1990, GA Res 45/116, GAOR, 45th sess, 68th plen mtg, A/RES/45/116, article 3(a) (emphasis added).

¹⁶ *Agreement Between the Government of Australia and the Hashemite Kingdom of Jordan on Extradition*, signed 24 April 2017 [2017] ATNIA 24 (not yet in force) article 4(1)(e).

¹⁷ See s 2B of the *Extradition Act Regulations* 1988. Also excluded is conduct of a kind that is prohibited by the enumerated international Covenants in the regulations.

¹⁸ See *Model Treaty on Extradition*, 14 December 1990, GA Res 45/116, GAOR, 45th sess, 68th plen mtg, A/RES/45/116, preamble and footnote 8 to Article 3(a).

¹⁹ See Alkarama Foundation, *Jordan Shadow Report: Report submitted to the Human Rights Committee in the context of the review of the fifth periodic report of Jordan* (18 September 2017) 15-16

<<https://www.alkarama.org/en/documents/jordan-human-rights-committee-5th-review-alkaramas-report-sep-2017>>; Human Rights Watch, *Jordan: Drop Charges for 'Undermining Royal Dignity' – State Security Court*

27. The Law Council's concerns that the definition of 'political offence' under the proposed Extradition Treaty may not be a sufficient safeguard is exacerbated by the fact that the Minister has a broad power to exclude certain conduct from the definition of 'political offence' by way of regulation.²⁰ The justification for the delegation of this power 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'.²¹ However, the Law Council agrees with the observations of the Senate Standing Committee on the Scrutiny of Bills that important matters should be included in primary legislation, which is subject to more thorough parliamentary scrutiny than legislative instruments.²²
28. In addition, there is insufficient guidance in the Extradition Act on what type of offences the Minister may carve out of the definition of 'political offence'. The Extradition Act currently gives a broad mandate to the Minister to exclude any offence the Minister sees fit to exclude from the definition of political offence. In the Law Council's view, this does not provide a sufficient guarantee that, for example, such a determination could not be influenced by political pressure from a Requesting State to exclude the type of offence of which a person sought to be extradited is accused. The Law Council considers that the only offences that should be capable of exclusion from the definition of a political offence are those required to be excluded by a bilateral or multilateral treaty to which Australia is a party.²³

Recommendations:

- **An 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.**

Ethnic origin and status

29. In the UN Model Extradition Treaty, extradition may be refused if 'the Requested State has substantial grounds for believing that the request has been made for prosecuting a person on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status'.²⁴ This provision has been replicated in the proposed Extradition Treaty, except that 'ethnic origin' and 'status' have been omitted. It is not

Charges Youth Who Burned Poster of King (12 January 2012) <<https://www.hrw.org/news/2012/01/19/jordan-drop-charges-undermining-royal-dignity>>.

²⁰ *Extradition Act 1988* (Cth) section 5, definition of 'political offence', (c).

²¹ Explanatory Statement, Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Act 2012, 2.

²² Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Twelfth Report of 2011* (12 October 2011) 502.

²³ See *ibid.*

²⁴ *Model Treaty on Extradition*, 14 December 1990, GA Res 45/116, GAOR, 45th sess, 68th plen mtg, A/RES/45/116 (14 December 1990) article 3(a).

clear to the Law Council why this is the case. In practice, the effect of this omission would be that, even if Australia was satisfied that Jordan was seeking extradition to prosecute or punish a person on the grounds of their ethnic origin or status, Australia could not decline a request for extradition on that basis.

30. In the context of Jordan, Palestinians, for example, are a group that could be exposed to prosecution or punishment on the basis of ethnic origin or status. For example, a recent case in which UN Working Group on Arbitrary Detention (**WGAD**) found that Jordan had engaged in arbitrary detention concerned the pro-Palestinian activist Amer Jamil Jubran.²⁵ Mr Jubran had been arrested after 20 agents dressed in military uniform entered his home in the middle of the night, restrained him by force, threatened to kill him and called him derogatory names related to his Palestinian heritage.²⁶
31. After his arrest, Mr Jubran was taken to an undisclosed location where he was held for two months without charge, incommunicado. His family later learned that he was being held at the headquarters of the General Intelligence Directorate (**GID**).²⁷ It was said that Mr Jubran was tortured and subjected to ill-treatment by agents of the GID for the purposes of confessing to crimes imputed to him. Despite Mr Jubran's complaints before the SSC that he was tortured for the purposes of extracting a confession, he was found guilty and sentenced to ten years punitive labour.²⁸ The WGAD believed that Mr Jubran's deprivation of liberty was associated with his pro-Palestine advocacy work and that his conviction and harsh punishment were possibly an act of reprisal related to his refusal to cooperate with the GID as a possible infiltrator and informant among the Palestinian population.²⁹
32. Palestinians are not the only group of persons in Jordan who may experience prosecution or punishment in Jordan on the basis of their ethnicity or status. Jordan is also home to hundreds of thousands of Syrian refugees,³⁰ as well as many non-citizen residents, as under Jordanian law, Jordanian mothers (as opposed to Jordanian fathers) are unable to transmit Jordanian citizenship to their children.³¹ This has created an entire underclass of persons that may experience discrimination on the basis of their status as resident non-citizens.³²
33. Therefore, the Law Council considers that substantial grounds for believing that a person may be subject to prosecution or punishment on the basis of ethnic origin or status should be a mandatory ground for refusing extradition under the proposed Extradition Treaty, in line with the terms of the UN Model Extradition Treaty.

²⁵ UN Working Group on Arbitrary Detention, *Opinion No.9/2016 concerning Amer Jamil Jubran (Jordan)*, A/HRC/WGAD/2016/9 (10 October 2016).

²⁶ *Ibid* [7].

²⁷ The GID is roughly equivalent in function to ASIO or the CIA: see Human Rights Watch, *Suspicious Sweeps: The General Intelligence Department and Jordan's Rule of Law Problem* (18 September 2006) 8 <<https://www.hrw.org/report/2006/09/18/suspicious-sweeps/general-intelligence-department-and-jordans-rule-law-problem>>.

²⁸ UN Working Group on Arbitrary Detention, *Opinion No.9/2016 concerning Amer Jamil Jubran (Jordan)*, A/HRC/WGAD/2016/9 (10 October 2016) [12].

²⁹ *Ibid* [28].

³⁰ The UN lists the amount of Syrian refugees in Jordan as 655,056: see UN High Commissioner for Refugees, *Syria Regional Refugee Response: Jordan* (2017) <<http://data.unhcr.org/syrianrefugees/country.php?id=107>>.

³¹ See for example, Taylor Luck, 'Why Jordanian mothers still can't give citizenship to their children' (16 November 2017) *The Christian Science Monitor* <<https://www.csmonitor.com/World/Middle-East/2017/1116/Why-Jordanian-mothers-still-can-t-give-citizenship-to-their-children>>.

³² See generally, Arab Renaissance for Democracy and Development, *Mapping the legal obstacles Palestinians face in Jordan* (2015) <https://ardd-jo.org/sites/default/files/resource-files/mapping_the_legal_obstacles_palestinians_face_in_jordan_en.pdf>.

Recommendation:

- **Where a request has been made for the purpose of prosecuting or punishing a person on account of that person's ethnic origin and status should constitute a mandatory ground for refusing extradition in the proposed Extradition Treaty.**

Torture and other cruel, inhuman or degrading treatment or punishment

34. The Law Council is concerned that the proposed Extradition Treaty and the Extradition Act do not provide adequate safeguards to avoid surrendering a person in circumstances where they would be subjected to cruel, inhuman or degrading treatment or punishment.
35. The proposed Extradition Treaty and the Extradition Act both set out as a mandatory ground for refusal of extradition the fact that there are 'substantial grounds for believing that if the assistance was provided, the person would be in danger of being subjected to torture'. This clause is not consistent with the UN Model Extradition Treaty, which extends the ground for refusal where there are substantial grounds to believe that a person is in danger of being subjected torture to include 'cruel, inhuman or degrading treatment or punishment'.
36. In the Law Council's view, the relevant section of the proposed Extradition Treaty and Extradition Act should be amended to reflect this wording and explicitly include cruel, inhuman or degrading treatment or punishment. This would promote consistency with Australia's international obligations, namely the *UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*,³³ which imposes a duty on States to take appropriate measures to prevent torture (article 2), and to prevent cruel, inhuman or degrading treatment or punishment (article 16). Relevantly, in interpreting the obligation in article 2 of the CAT, UN Committee Against Torture has stated that:

[t]he obligation to prevent torture in article 2 is wide-ranging. The obligations to prevent torture and other cruel, inhuman or degrading treatment or punishment (hereinafter "ill-treatment") under article 16, paragraph 1, are indivisible, interdependent and interrelated. The obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture... In practice, the definitional threshold between ill-treatment and torture is often not clear. Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment. Accordingly, the Committee has considered the prohibition of ill-treatment to be likewise non-derogable under the Convention and its prevention to be an effective and non-derogable measure.³⁴

³³ Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987). Australia ratified the Convention in 1989. See also

³⁴ Committee Against Torture, *General Comment No 2: Implementation of article 2 by States parties*, UN Doc CAT/C/GC/2 (28 January 2008) [2].

37. Further, article 7 of the *International Covenant on Civil and Political Rights (ICCPR)* also provides no one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment.³⁵ In *Ng v Canada*, the Human Rights Committee found that execution by gas asphyxiation would constitute cruel and inhuman treatment.³⁶ The HRC found that, as Canada could reasonably have foreseen that Mr Ng, if sentenced to death, would be executed in a way that amounted to a violation of the prohibition on cruel and inhuman treatment, Canada's decision to extradite Mr Ng without seeking and receiving assurances that he would not be executed violated article 7 of the ICCPR.³⁷
38. It follows that, in the Law Council's view, Australia would be in breach of its international obligations if it decided to extradite a person to Jordan in circumstances where the person may be subjected to torture or cruel, inhuman or degrading treatment or punishment. The lack of adequate explicit safeguards in the proposed Extradition Treaty and the Extradition Act to prevent this possibility of great concern given the prevalence of torture and cruel, inhuman or degrading treatment or punishment in Jordan.
39. Although Jordan is a party to the CAT, its obligations do not appear to have been fully implemented into Jordanian law nor observed in practice. For example, under Jordanian law, conduct qualifies as torture only if for the purposes of extracting a confession, a definition which falls far short of the international definition, which states that torture may be for a variety of other purposes.³⁸ In addition, although the CAT requires States to ensure the offence of torture carries a penalty under its national law that reflect the gravity of the conduct, under Jordanian law, torture carries a penalty consistent with that of a misdemeanour (one to three years imprisonment).³⁹
40. The Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment concluded during his visit to Jordan in 2006, that 'the practice of torture is widespread in Jordan, that a general awareness of the seriousness of torture is lacking, and that there is a total impunity for torture and ill-treatment in the country'.⁴⁰ Human Rights Watch have also documented widespread torture allegations in Jordan.⁴¹

³⁵ International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Australia ratified the Covenant in 1980.

³⁶ Human Rights Committee, *Views: Communication No. 469/1991*, 49th sess, UN Doc CCPR/C/49/D/469/1991 (1994) ('*Ng v Canada*').

³⁷ *Ibid.* While communications of the HRC are not binding, Australia as a party to the Optional Protocol of the ICCPR recognises the competence of the HRC as a specialist treaty body to interpret the provisions of the ICCPR and therefore its interpretation of this obligation is persuasive.

³⁸ Article 1 of the CAT defines torture as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for **such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind**, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions' (emphasis added): Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) article 1.

³⁹ Penal Code (Jordan) 1960 article 208(1), as cited in Alkarama Foundation, *Jordan Shadow Report: Report submitted to the Human Rights Committee in the context of the review of the fifth periodic report of Jordan* (18 September 2017) 5 (footnote 14) <<https://www.alkarama.org/en/documents/jordan-human-rights-committee-5th-review-alkaramas-report-sep-2017>>.

⁴⁰ Manfred Nowak, *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment – Mission to Jordan*, A/HRC/4/33/Add.3 (5 January 2007) 5 [3].

⁴¹ See Human Rights Watch, *Torture and Impunity in Jordan's Prisons: Reforms Fail to Tackle Widespread Abuse* (2008) <<https://www.hrw.org/sites/default/files/reports/jordan1008webwcover.pdf>>.

41. In 2016, there were 63 cases complaints of torture and mistreatment filed by alleged victims against security departments and personnel.⁴² As of September 2017, there have been no known successful convictions of police officers or intelligence officials for committing torture in Jordan.⁴³ Allegations of torture against officials in places of detention are prosecuted in the Police Court, staffed by police prosecutors and judges. The Police Court has been criticised by Human Rights Watch for its lack of independence and for its police prosecutors and judges doing too little to pursue cases against their fellow officers.⁴⁴
42. The Law Council considers that seeking and receiving assurances from Jordan that it will not engage in 'torture' as a pre-condition to approving an extradition request would be inadequate, given how torture is defined and understood under Jordanian law. Therefore, the Law Council considers it essential that safeguards are introduced into the proposed Extradition Treaty to mandate refusal of an extradition request where there are substantial grounds to believe that the person may also be in danger of being subjected to cruel, inhuman or degrading treatment or punishment.
43. In addition, section 15B(2) of the Extradition Act should be amended to make clear that the Attorney-General must have substantial grounds to believe that the person is not in danger of being subjected to cruel, inhuman or degrading treatment or punishment. Likewise, section 8(2)(ca) of the Mutual Assistance Act should be amended to require the Attorney-General to be satisfied that there are substantial grounds for believing that the person would not be subjected to cruel, inhuman or degrading treatment or punishment.
44. The Law Council notes the statement in the National Interest Analysis that the proposed Extradition Treaty:

*... expressly includes provisions that specify internationally accepted mandatory and discretionary grounds for refusing extradition (Article 4) and Article 18 of the proposed Agreement expressly preserves the rights enjoyed and obligations undertaken by the Parties under multilateral conventions.*⁴⁵
45. If it is intended that Australia's other international obligations will expand the mandatory and discretionary grounds for refusal, then this may support a ground of refusal on the basis of cruel, inhuman or degrading treatment or punishment. Clarification should be obtained from the Attorney-General's Department on this point. However, to avoid doubt, additional safeguards are required as noted above to ensure that the grounds for refusal fully reflect Australia's international obligations.

⁴² As reported in Laila Azzeh, 'Report sheds light on 'torture, excessive force' in detention' (11 April 2017) *The Jordan Times* <<http://www.jordantimes.com/news/local/report-sheds-light-torture-excessive-force%E2%80%99-detention>> (original report not available in English).

⁴³ Alkarama Foundation, *Jordan Shadow Report: Report submitted to the Human Rights Committee in the context of the review of the fifth periodic report of Jordan* (18 September 2017) 7 <<https://www.alkarama.org/en/documents/jordan-human-rights-committee-5th-review-alkaramas-report-sep-2017>>.

⁴⁴ See Human Rights Watch, *Torture and Impunity in Jordan's Prisons: Reforms Fail to Tackle Widespread Abuse* (2008) 1, 45-49 <<https://www.hrw.org/sites/default/files/reports/jordan1008webwcover.pdf>>.

⁴⁵ Transnational Crime Branch, Criminal Justice – Policies and Programmes Division, Attorney-General's Department (Cth), *National Interest Analysis [2017] ATNIA 28 with attachment on consultation: Agreement between Australia and the Hashemite Kingdom of Jordan on Extradition* (2017) 4. *Extradition* (2017).

Recommendations:

- **There should be a mandatory ground of refusal in the proposed Extradition Treaty where there are substantial grounds to believe that a person is in danger of being subjected to ‘cruel, inhuman or degrading treatment or punishment’.**
- **Section 15B(2) of the Extradition Act and section 8(1)(ca) should be amended to require the Attorney-General to be satisfied that there are substantial grounds for believing that a person is not in danger of being subjected to ‘cruel, inhuman or degrading treatment or punishment’.**
- **The Government should clarify whether article 18 of the proposed Extradition Treaty is intended to afford the Government the ability to decline requests on the basis of other international obligations.**

Minimum guarantees in criminal proceedings

46. The Law Council has serious concerns that a person surrendered to Jordan may be subjected to abuse of their fundamental fair trial rights. The Law Council notes that the proposed Extradition Treaty is largely motivated by a desire to increase prosecution for terrorism offences.⁴⁶ In Jordan, violations of the Anti-Terrorism Law fall within the jurisdiction of the State Security Court (**SSC**),⁴⁷ and an accused person extradited to Jordan may appear before the SSC.

47. Although a civilian court, the SSC is comprised of three judges selected by the Prime Minister, two of whom are military personnel, and all of whom can be removed at any time by executive decision.⁴⁸ Since at least 1994, the UN Human Rights Committee (**HRC**) has repeatedly recommended that Jordan abolish the SSC, due to serious concerns about its organisational and functional independence and compliance with the requirement in article 14 of the ICCPR that criminal trials take place before a ‘competent, independent and impartial tribunal’.⁴⁹ These concerns consistently echoed by several, prominent human rights organisations.⁵⁰

⁴⁶ Joint Standing Committee on Treaties, ‘Australia considers extradition Treaty with Jordan’ (Media Release, 16 October 2017) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Extradition-Jordan/Media_Releases>.

⁴⁷ Anti-Terrorism Law No 55 (2006) [UN Office on Drugs and Crime trans, <www.track.unodc.org/.../Jordan/Laws/Jordan%20Anti-terrorism%20law%202006.pdf>].

⁴⁸ Alkarama Foundation, *Jordan Shadow Report: Report submitted to the Human Rights Committee in the context of the review of the fifth periodic report of Jordan* (18 September 2017) 11 <<https://www.alkarama.org/en/documents/jordan-human-rights-committee-5th-review-alkaramas-report-sep-2017>>.

⁴⁹ See Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant – Comments of the Human Rights Committee: Jordan*, 51st sess, CCPR/C/79/Add.35 (10 August 1994) [16]; Human Rights Committee, *Concluding observations of the Human Rights Committee Jordan*, 100th sess, UN Doc CCPR/C/JOR/CO/4 (18 November 2010) 11; see also Committee against Torture, *Concluding observations on the third periodic report of Jordan*, 56th sess, UN Doc CAT/C/JOR/CO/3 (29 January 2016) 38.

⁵⁰ See for example Human Rights Watch, *Suspicious Sweeps: The General Intelligence Department and Jordan’s Rule of Law Problem* (18 September 2006) 10 <<https://www.hrw.org/report/2006/09/18/suspicious-sweeps/general-intelligence-department-and-jordans-rule-law-problem>>; Amnesty International, *Jordan: 2016/2017 Annual Report* <<https://www.amnesty.org/en/countries/middle-east-and-north-africa/jordan/report-jordan/>>.

48. Relevantly, in 2016, the WGAD found that the SSC did not meet fundamental principles of independence and impartiality and thereby were in breach of article 14 of the ICCPR in the trial of an accused for any charge.⁵¹ That 2016 case involved Adam al-Natour and exemplifies the nature of the concerns regarding the SSC. Mr al-Natour was a Polish and Jordanian dual national, who had moved to Amman to study Arabic. He was arrested at his home by twenty GID personnel and taken to the premises of the GID, but not informed of the charges against him. His father was later told that his son was being held for having 'jihadi thoughts'.⁵²
49. During his detention by the GID, Mr al-Natour was allegedly subjected to beatings, electric shocks, and placed in an isolated cell and was permitted sunlight and to leave his cell for only half an hour per week. Mr al-Natour claimed he was forced to sign a confession, which was recorded in Arabic, a language of which he only had a limited grasp. He was eventually indicted under Jordan's Anti-Terrorism Law and put on trial before the SSC. He was permitted to meet his lawyer only one week before trial and was not given a court interpreter during trial. He was ultimately sentenced to ten years hard labour, for 'joining an armed group and terrorist organisation'.⁵³ The conviction was based on Mr al-Natour's 'confession' and the alleged fact he had travelled to the Syrian Arab Republic through Turkey, which was denied by Mr al-Natour. Neither his Polish nor Jordanian passports evidenced this alleged movement.⁵⁴
50. Under the current grounds for refusing extradition under proposed Extradition Treaty, an accused person is not protected from being extradited for trial before the SSC. This is because the SSC does not try offences under military law, a mandatory ground for refusal,⁵⁵ nor does it qualify as an 'extraordinary or *ad hoc* court or tribunal',⁵⁶ which would give rise to a discretionary ground for refusal. The UN Model Extradition Treaty provides a mandatory ground for refusal where there are substantial grounds to believe that a person will not be afforded the minimum guarantees of article 14 of the ICCPR. The Law Council considers that this mandatory ground should be incorporated into the proposed Extradition Treaty to address concerns relating to how the SSC may operate in particular cases.

Recommendation:

- **The proposed Extradition Treaty should be amended to include a mandatory ground for refusal where there are substantial grounds to believe the accused will not be afforded the minimum guarantees under article 14 of the ICCPR.**

Death penalty

51. Under the proposed Extradition Treaty, it is a mandatory ground of refusal where the offence the subject of the extradition request carries the death penalty. However, under the proposed Mutual Assistance Treaty, it is a discretionary ground of refusal

⁵¹ UN Working Group on Arbitrary Detention, *Opinion No.39/2016 concerning Adam al-Natour (Jordan)*, 76th sess, A/HRC/WGAD/2016/39 (9 November 2016) 5.

⁵² *Ibid* [6].

⁵³ *Ibid* [11]

⁵⁴ *Ibid*.

⁵⁵ *Model Treaty on Extradition*, 14 December 1990, GA Res 45/116, GAOR, 45th sess, 68th plen mtg, A/RES/45/116 (14 December 1990) article 3(c).

⁵⁶ *Ibid* article 4(g).

where 'the request relates to the investigation, prosecution or punishment of a person for an offence in respect of which the death penalty may be imposed or executed'.⁵⁷

52. The Law Council considers that this should be amended to be a mandatory ground, in line with Mutual Assistance Act. The Mutual Assistance Act provides that the Attorney-General must refuse a request for assistance if, in the opinion of the Attorney-General, the offence is one in respect of which the death penalty may be imposed in the foreign country, unless special circumstances exist.⁵⁸
53. Further, the Law Council considers clarity around what is meant by 'special circumstance' in the Mutual Assistance Act would assist in providing the community with reassurance that mutual assistance will only be provided in appropriate cases. For example, special circumstances may include where the evidence would assist the defence, or where the foreign country undertakes not to impose or carry out the death penalty.⁵⁹
54. The Law Council therefore recommends that consideration be given to amending the Mutual Assistance Act to clearly define 'special circumstances' in the primary legislation. Otherwise, there is nothing in Mutual Assistance Act itself or regulations that would limit the Attorney-General's discretion to determine what would consist of a 'special circumstance'. The breadth of this discretion may create a risk, despite good intentions, that Australian assistance prior to arrest or detention may lead to the imposition of the death penalty.
55. Relevantly, in Jordan, several crimes still carry the death penalty, including certain terrorism offences which fall within the jurisdiction of the SSC. Jordan has not ratified the Second Protocol to the ICCPR to abolish the death penalty,⁶⁰ and public support for the death penalty is extremely high.⁶¹
56. Jordan ended an eight-year moratorium on the death penalty in December 2014, when it executed 11 men imprisoned for murder offences.⁶² Little explanation was provided for ending the moratorium, though there was a suggestion by Jordanian officials that the moratorium on executions had led to an increase in crime rates, a correlation denied by civil society groups.⁶³ In February 2015, Jordan responded to the immolation and murder of captured Jordanian pilot Muath Al-Kasasbeh by ISIS by executing two ISIS operatives in its custody who had been sentenced to death for terrorism offences in relation to the 2005 Amman bombings.⁶⁴ In March 2017, Jordan

⁵⁷ Ibid article 4(d).

⁵⁸ *Mutual Assistance in Criminal Matters Act 1987* (Cth) s 8(1).

⁵⁹ This view was previously expressed in Law Council of Australia and Australian Bar Association, *Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade on Australia's Advocacy for Abolition of the Death Penalty* (9 October 2015) [60]-[61].

⁶⁰ OHCHR, *Status of Ratification: Interactive Dashboard* (20/11/2017) <<http://indicators.ohchr.org/>>.

⁶¹ According to a poll carried out by the Center for Strategic Studies at the University of Jordan, 81% of Jordanians polled support the death penalty: see Khetam Malkawi, 'Majority of Jordanians support capital punishment – poll' (23 December 2014) *The Jordan Times* <<http://www.jordantimes.com/news/local/majority-jordanians-support-capital-punishment-%E2%80%94-poll>>; Areej Abuqudairi, 'Why did Jordan resume the death penalty?' (28 December 2014) *Al Jazeera* <<http://www.aljazeera.com/news/middleeast/2014/12/why-did-jordan-resume-death-penalty-201412271125989644.html>>.

⁶² See BBC News, *Jordan ends death penalty moratorium with 11 executions* (21 December 2014) <<http://www.bbc.com/news/world-africa-30567738>>.

⁶³ See Areej Abuqudairi, 'Why did Jordan resume the death penalty?' (28 December 2014) *Al Jazeera* <<http://www.aljazeera.com/news/middleeast/2014/12/why-did-jordan-resume-death-penalty-201412271125989644.html>> quoting Ziad al-Zoubi, spokesperson for the interior ministry.

⁶⁴ See BBC News, *Jordan executes convicted jihadists after pilot's death* (4 February 2015) <<http://www.bbc.com/news/world-middle-east-31124900>>.

hanged another 15 people who had been convicted a decade previous for terrorism offences.⁶⁵

57. While estimates vary, around 120 prisoners are on death row in Jordan.⁶⁶ The Law Council understands that prisoners sentenced to death are not informed of when they will be executed. This has been found by the HRC to constitute a form of cruel, inhuman or degrading treatment or punishment,⁶⁷ and inconsistent with Jordan's obligations under the CAT.

Recommendation:

- **Under the proposed Mutual Assistance Treaty, it should be a mandatory ground of refusal where the request relates to the investigation, prosecution or punishment of a person for an offence in respect of which the death penalty could be imposed.**
- **Consideration should be given to amending the Mutual Assistance Act to define, in the primary legislation, the 'special circumstances' in which the Attorney-General may accede to a request for assistance in relation to an offence that carries the death penalty.**

Extradition for extraterritorial offences

58. The National Interest Analysis states that the Extradition Treaty 'will strengthen Australia's ability to prosecute foreign terrorist fighters and those who engage in terrorism more broadly.'⁶⁸ A number of the offences relating to the prosecution of foreign fighters contained in Part 5.5 of the *Criminal Code 1995* (Cth) involve the exercise by Australia of extraterritorial legislative jurisdiction ('extended geographical jurisdiction category D'), that is they cover acts which take place wholly outside Australian territory.
59. Extraterritorial offences can give rise to particular difficulties when it comes to satisfying double criminality requirements under extradition treaties. For an extraterritorial offence of this sort to be extraditable, it must be shown not only to be an offence under the law of Australia, but also under the law of Jordan. Whether the latter requires a showing that under the law of Jordan that it is an offence for a Jordanian national or resident to engage in prohibited activities outside Jordan, or whether it would be sufficient to show that the acts would be an offence in Jordan, is not clear.
60. The Law Council notes that in a number of Australia's extradition treaties, specific provision is made in relation to extraterritorial offences in order to clarify such questions.

⁶⁵ Cornell Centre on the Death Penalty Worldwide, *Death Penalty Database: Jordan*, Cornell Law School, (28 June 2013) <<http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Jordan®ion=&method=>>>

⁶⁶ In March 2017, the Jordan Times claimed the amount of people on death row in Jordan is 120 – see '12 women on death row in Jordan – SIGI' (11 April 2017) *The Jordan Times* <<http://www.jordantimes.com/news/local/12-women-death-row-jordan-%E2%80%94-sigi>>. The Cornell Center on the Death Penalty Worldwide claimed there was 106 people on death row in February 2013: see Cornell Center on the Death Penalty Worldwide, *Death Penalty Database – Jordan* (2013) <<https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Jordan>>.

⁶⁷ See Human Rights Committee, *Views: Communication No. 469/1991*, 49th sess, UN Doc CCPR/C/49/D/469/1991 (1994) ('*Ng v Canada*').

⁶⁸ Transnational Crime Branch, Criminal Justice – Policies and Programmes Division, Attorney-General's Department (Cth), *National Interest Analysis [2017] ATNIA 28 with attachment on consultation: Agreement between Australia and the Hashemite Kingdom of Jordan on Extradition* (2017) [8].

For example, Article III of the Treaty on Extradition between Australia and the Republic of Chile 1993 provides in part:

2. Where the offence has been committed outside the territory of the Requesting State, extradition shall be granted where the law of the Requested State provides for the punishment of an offence committed outside its territory under similar circumstances. Where the law of the Requested State does not so provide, the Requested State may, in its discretion, grant extradition.

3. Where the offence for which extradition is sought has been committed outside the territory of the Requesting State, the Requested State may refuse to grant the extradition where it has jurisdiction, according to its own laws, to prosecute the person whose extradition is sought for the offence. If the Requested State does not grant extradition on this ground, it shall submit the case to its competent authorities and advise the Requesting State accordingly.

61. This issue is also recognised in the Model UN Treaty on Extradition, which provides that a Requested State may refuse extradition:

[i]f the offence for which extradition is requested has been committed outside the territory of either Party and the law of the requested State does not provide for jurisdiction over such an offence committed outside its territory in comparable circumstances.⁶⁹

62. In the Law Council's view, it would be helpful to clarify the reason why such a provision does not appear in the Extradition Treaty and whether its omission would prejudice the ability of Australia to successfully seek the extradition of persons charged with such offences. The Law Council considers that a provision to address this issue should be included.

Recommendation:

- **A provision should be included in the proposed Extradition Treaty which provides that if the offence for which extradition is requested has been committed outside the territory of either Party and the law of the requested State does not provide for jurisdiction over such an offence committed outside its territory in comparable circumstances, extradition should be able to be refused.**

Other grounds for refusal

63. The UN Model Mutual Assistance Treaty contains the following discretionary grounds for refusal of a request for legal assistance, which are not reflected in the proposed Mutual Assistance Treaty:

- assistance may be refused where the request relates to an offence the prosecution of which in the Requesting State would be incompatible with the Requested State's law on double jeopardy; and
- assistance may be refused where the request requires the Requested State to carry out compulsory measures that would be inconsistent with its law and practice

⁶⁹ *Model Treaty on Extradition*, 14 December 1990, GA Res 45/116, GAOR, 45th sess, 68th plen mtg, A/RES/45/116 (14 December 1990) Article 4(e).

had the offence been the subject of investigation or prosecution under its own jurisdiction.

64. The Law Council's view is that these discretionary grounds for refusal should be incorporated into the proposed Mutual Assistance Treaty as they reflect fundamental rule of law principles.⁷⁰

Recommendations:

- **Under the proposed Mutual Legal Assistance Treaty, it should be a discretionary ground of refusing assistance where the request:**
 - **relates to an offence the prosecution of which in the Requesting State would be incompatible with the Requested State's law on double jeopardy; and**
 - **requires the Requested State to carry out compulsory measures that would be inconsistent with its law and practice had the offence been the subject of investigation or prosecution under its own jurisdiction.**

Other issues with the proposed Treaties

Time limits under the proposed Extradition Treaty

Where no Extradition request has been received

65. Article 8(4) of the proposed Extradition Treaty provides that a person arrested may be released upon the expiration of 60 days from the date of that person's arrest if a request for extradition, supported by the documents specified in article 5, has not been received.
66. Under the UN Model Extradition Treaty, the time limit is 40 days. Similarly, the Law Council's position is that a person should be released after 40 days if a proper request for extradition together with supporting documents has not been received. Otherwise, concerns may arise regarding the lawfulness of the detention.

Surrender of an eligible person

67. Pursuant to article 10(3) of the proposed Extradition Treaty, surrender of a person is to occur within 45 days of a decision to extradite them, and if the person is not removed within that period, the Requested Party may refuse to extradite that person for the same offence.
68. The Law Council's position is that 45 days is too long. In the UN Model Treaty on Extradition, removal needs to occur 'within such reasonable period as the requested State specifies'.⁷¹

⁷⁰ See Law Council of Australia, *Rule of Law Principles* (March 2011) <<https://www.lawcouncil.asn.au/docs/f13561ed-cb39-e711-93fb-005056be13b5/1103-Policy-Statement-Rule-of-Law-Principles.pdf>>.

⁷¹ *Model Treaty on Extradition*, 14 December 1990, GA Res 45/116, GAOR, 45th sess, 68th plen mtg, A/RES/45/116 (14 December 1990) article 11(2).

69. In the Law Council's view, a period of 30 days would be a more appropriate timeframe. It would promote consistency with other recently concluded treaties, such as the United Arab Emirates (UAE) – Australia Extradition Treaty. Given the international nature of extradition, it seems arbitrary that a person should be detained for less time where an extradition request is not forthcoming simply because the request has not come from, for example, the UAE, as opposed to Jordan.
70. Further, different time periods of detention between different treaties may also give rise to concerns regarding Australia's domestic and international obligations of non-discrimination. Namely, that a person potentially subject to extradition under the UAE-Australia treaty enjoys preferential treatment to a person potentially subject to extradition under any Jordan-Australia treaty. This may render the additional period of detention, being 15 days, arbitrary, which would be inconsistent with Australia's international obligations to avoid arbitrary detention.

Recommendations:

- **Under the proposed Extradition Treaty, a person should be released after 40 days if a proper request for extradition together with supporting documents has not been received.**
- **Under the proposed Treaty on Extradition, if surrender of a person does not occur within 30 days of a decision to extradite them, the Requested Party may refused to extradite that person for the same offence.**

Additional protections in the proposed Mutual Assistance Treaty

71. The proposed Mutual Assistance Treaty does not include two further additional protections which are contained in the UN Model Legal Assistance Treaty:
- stated reasons provided to the Requesting State for any refusal or postponement of mutual assistance; and
 - protection of the rights of third parties when a request for search and seizure is being carried out.
72. The Law Council considers that these additional protections should be incorporated in the terms of the proposed Mutual Assistance Treaty in accordance with Australia's traditional criminal law principles and to foster Australia's bilateral relations.

Recommendations:

- **Under the proposed Mutual Legal Assistance Treaty:**
 - **there should be a provision requiring stated reasons for any refusal or postponement of mutual assistance; and**
 - **article 17(1) 'search and seizure' should be amended to further say 'and provided that the rights of *bona fide* third parties are protected.'**

Safeguards for children

73. The current Extradition Act does not include specific protection for children. The Law Council considers 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.⁷²
74. The Attorney-General may also exercise general discretion when determining whether to surrender a child for the purpose of an extradition request.⁷³ However, there is no mandatory requirement to do so, and no requirement to consider the child's age.
75. Under the *Criminal Code Act 1995* (Cth) (**Criminal Code**) a child:
- under 10 years of age is not criminally responsible for an offence;⁷⁴ 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.⁷⁵
76. In Jordan, the age of criminal responsibility was recently raised, in 2014, from 7 to 12, to meet international standards.⁷⁶
77. This means that there is the potential for Australia to surrender a child from the age of 12 years old to Jordan. In practice, the Law Council appreciates that extradition requests for children are rare. However, considering the nature of some of the extraditable offences, such as terrorism, it is not unforeseeable. The Law Council has been concerned by, for example, recent proposals by the Australian Government to allow children as young as 10 to be detained on suspicion of terrorism offences for up to two weeks without charge.⁷⁷
78. The current lack of specific protections for children may fail to adequately protect the rights of the child UN Convention on the Rights of the Child (**CRC**),⁷⁸ which both Australia and Jordan have ratified. This means Australia and Jordan have a duty to ensure children enjoy all the rights in the CRC. The Law Council notes that Australia's implementation of the CRC will shortly be reviewed by the UN, with Australia's country report due to the Committee on the CRC in January 2018.
79. The Law Council emphasises that 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. Therefore, the Law Council has recommended that the below safeguards be implemented to protect children.

⁷² In the Law Council's submissions to the Joint Standing Commission on Treaties in relation the Australia-China Extradition Treaty, the Law Council also expressed concern that Australia's current extradition regime did not include specific protection for children. See the Joint Standing Committee on Treaties, Parliament of Australia, *Report 167: China Extradition Treaty* (2016) [3.35].

⁷³ *Extradition Act 1988* (Cth) s 22(3)(f).

⁷⁴ Criminal Code, s 7.1.

⁷⁵ *Ibid* s 7.2.

⁷⁶ International Labour Organisation, *Elimination of Child Labour, Protection of Children and Young Persons* (2014),

http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=100351&p_count=7&p_classification=04.

⁷⁷ See for example, Michael Koziol, 'Lawyers condemn 'draconian' move to hold 10-year-old terror suspects without charge' (7 October 2017) *Sydney Morning Herald* <http://www.smh.com.au/federal-politics/political-news/lawyers-condemn-draconian-move-to-hold-10-year-old-terror-suspects-without-charge-20171007-gywaul.html>.

⁷⁸ See in particular articles 2, 3, 9, 16, 20, 23, 27, 28, 37 and 40.

Recommendations:

- **The Extradition Act 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.**
- **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 the CRC will be protected, especially the minimum guarantees in article 40(2).**

Monitoring of extradited persons

80. The Law Council is aware that the Committee has previously expressed concerns over the lack of monitoring of extradited individuals and made recommendations accordingly to successive governments.⁷⁹ The Law Council shares these concerns.
81. The Law Council understands that the Department of Foreign Affairs and Trade (**DFAT**) monitors all extradited citizens and permanent residents through its consular network, to the extent that this is practically and legally possible. However, generally under the Extradition Act and the proposed Treaties there is currently no specific obligation for Australia to monitor non-citizens.
82. The Law Council recommends that the proposed Treaties be amended to include a 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 degrading treatment or punishment.
83. This monitoring is particularly important for a country like Jordan where independent inspection of its places of detention as understood pursuant to OPCAT is not permitted but allegations of torture or other cruel, inhuman or degrading treatment or punishment are widespread.⁸⁰ In addition, executions of persons sentenced to death seem to take place in a shroud of secrecy with little transparency.⁸¹
84. Such monitoring is essential for Australia to be in a position to determine whether the extradition arrangements with a country such as Jordan continue to be in Australia's national interest.
85. The monitoring arrangements could potentially be achieved by requiring Jordan to report back on the outcome of prosecutions, terms of imprisonment and details of correctional detention. A right of visitation for Australia could also be considered in cases other than those involving Australian citizens.

⁷⁹ Joint Standing Committee on Treaties, *Report 167: Dissenting Report by Labor Members* (2016) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Extradition-China/Report_167/section?id=committees%2freportjnt%2f024024%2f24319#footnote7target> [3.37]; see also Joint Standing Committee on Treaties, *Report 91: Treaties tabled on 12 March 2008*; *Report 110: Treaties tabled on 18, 25(2) and 26 November 2009 and 2(2) February 2010*; *Report 131: Treaties tabled on 21 August, 11 and 18 September 2012*.

⁸⁰ See generally, Human Rights Watch, *Torture and Impunity in Jordan's Prisons: Reforms Fail to Tackle Widespread Abuse* (2008) <<https://www.hrw.org/sites/default/files/reports/jordan1008webwcover.pdf>>.

⁸¹ See Amnesty International, *Jordan: Execution of 15 people 'horrific'* (4 March 2017) <<https://www.amnesty.org/en/press-releases/2017/03/jordan-execution-of-fifteen-people-horrific/>>.

86. The Law Council considers that the Extradition Act and Mutual Assistance Act should be reviewed to determine how an effective monitoring requirement could be included. The Law Council considers that a monitoring requirement within the legislation would promote faith in the integrity of the extradition and mutual legal assistance processes and improve accountability of the Requested State.
87. The Law Council endorses recommendations 4 and 5 of the Committee in its report on the Treaty on Extradition Between Australia and the People's Republic of China as a feasible model for monitoring.⁸² This entails the Attorney-General's Department supplementing 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.
88. In addition, 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.⁸³
89. The Law Council notes that the Government did not support the recommendation on supplementing its current annual reporting framework, on the basis that the DFAT already monitored trials, verdicts and sentences for Australians detained overseas through its portfolio responsibility to provide consular assistance to Australians in difficulty overseas, including Australians who have been extradited.⁸⁴
90. The Law Council is of the view that if these statistics are held by DFAT, then it should be easy, and indeed would be appropriate for them to also be transferred to the Attorney-General's Department to enable the Attorney-General's Department to supplement its annual reporting framework as recommended by the Committee.
91. The Law Council also notes that Government stated that Australia's ability to introduce monitoring regimes for non-Australians extradited overseas is limited, under the *Vienna Convention on Consular Relations*, which does not give the Australian Government access to foreign nationals extradited to another country.⁸⁵ However, the Government conceded that consular access to a dual national could be requested.

⁸² See Joint Standing Committee on Treaties, Parliament of Australia, *Report 167: Nuclear Cooperation-Ukraine; Extradition-China* (December 2016) *Report 167: Nuclear Cooperation-Ukraine; Extradition-China* (December 2016) [3.55], [3.58].

⁸³ Ibid.

⁸⁴ 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* (March 2017) 3.

⁸⁵ Ibid.

Recommendations:

- **There should be a requirement in the proposed 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 degrading treatment or punishment in the Requesting Party.**
- **The Extradition Act and Mutual Assistance Act should be reviewed to determine how an effective monitoring mechanism could be included.**
- **Recommendations 4 and 5 of the Committee's Report on the Australia-China Extradition Treaty should be implemented to strengthen monitoring of extradited persons.**

Jordan's ratification of the optional protocols to the ICCPR and CAT

92. In addition to amending the proposed Treaties to reflect the safeguards discussed above, the Law Council would welcome refocusing Australia's bilateral human rights public advocacy with Jordan towards the obligations contained in the ICCPR and CAT. Namely, the Law Council considers that Australia should encourage and advocate for Jordan to ratify the two Optional Protocols to the ICCPR and the Optional Protocol to the CAT, and accept the individual communications procedures under article 22 of the CAT. These ratifications and acceptance would require Jordan to outlaw the death penalty, allow communications to the HRC and Committee Against Torture alleging breaches of the ICCPR and CAT respectively and require independent inspection of Jordan's places of detention.
93. The Law Council considers that ratification and implementation of these international instruments by Jordan would provide some comfort that Australia acceding to requests for extradition or legal assistance would not inadvertently lead to human rights abuses.
94. As noted above, the death penalty is still legal in Jordan and Jordan has this year engaged in the mass execution of prisoners. Further, while Jordanian law empowers the National Centre for Human Rights to visit all places of inspection,⁸⁶ the Law Council understands that visits to the General Intelligence Directorate, commonly accused of abuses, are subject to pre-approval and cannot occur unannounced.⁸⁷
95. In addition, it is understood that there are no inspections that take place of temporary places of detention, which are used to detain persons held in administrative detention.

⁸⁶ *The National Centre for Human Rights Law* (No 51 of 2006) art 10.

⁸⁷ Alkarama Foundation, *Jordan Shadow Report: Report submitted to the Human Rights Committee in the context of the review of the fifth periodic report of Jordan* (18 September 2017) 4 <<https://www.alkarama.org/en/documents/jordan-human-rights-committee-5th-review-alkaramas-report-sep-2017>>.

Recommendation:

- **Australia should encourage Jordan to ratify the two Optional Protocols to the ICCPR, and the Optional Protocol to the CAT and to accept the competence of the Committee Against Torture under article 22 of the CAT to receive individual communications.**