

Treaty between Australia and Malaysia on Extradition and an Exchange of Notes between Australia and Malaysia on the Treaty of Extradition

- 2.1 The *Treaty between the Government of Australia and the Government of Malaysia on Extradition (Putrajaya, 15 November 2005) and an Exchange of Notes between the Government of Australia and the Government of Malaysia on the Treaty on Extradition (Kuala Lumpur, 7 December 2005)* (the Extradition Treaty with Malaysia) provides for the surrender of an accused or convicted person to the other Party to face criminal charges or serve a sentence.¹

Background

- 2.2 Australia has concluded 34 bilateral treaties² on extradition.³ The Extradition Treaty with Malaysia is based on Australia's model extradition treaty.⁴

1 National Interest Analysis (NIA), para. 6.

2 Attorney-General's Department, *Submission 13*, Treaties Tabled 10 May 2006. Australia has extradition treaties with Argentina, Austria, Belgium, Brazil, Chile, Ecuador, Finland, France, Germany, Greece, Hong Kong, Hungary, Indonesia, Ireland, Israel, Italy, Republic of Korea, Latvia, Luxembourg, Mexico, Monaco, Netherlands, Norway, Paraguay, Philippines, Poland, Portugal, South Africa, Spain, Sweden, Switzerland, Turkey, United States of America and Venezuela.

3 NIA, para. 5; Ms Joanne Blackburn, *Transcript of Evidence*, 19 June 2006, p. 24; Attorney-General's Department, *Submission 13*.

- 2.3 The extradition relationship between Australia and Malaysia is currently governed by the *London Scheme for Extradition within the Commonwealth 1966* (the London Scheme).⁵ The London Scheme is an arrangement of less than treaty status which applies between most Commonwealth countries.⁶ The current requirements for extradition to and from Malaysia require the Requesting Party to provide a brief of evidence sufficient to establish a *prima facie* case.⁷
- 2.4 The current arrangements are no longer consistent with the Australian Government's adoption of the 'no evidence' policy for extradition which Australia has now incorporated into most of its bilateral extradition treaties.⁸
- 2.5 Under the no evidence approach, the Requesting Party must provide certain documents to support an extradition request.⁹ The Committee was informed that:
- [A no evidence approach] still requires, as do all bilateral no evidence treaties, the provision of sufficient information to determine that the person is sought in the legitimate pursuit of the enforcement of the criminal law of the country making the request.¹⁰
- 2.6 The move away from the *prima facie* approach towards the no evidence approach is seen as a trend towards greater simplification of extradition matters and a no evidence standard for extradition requests.¹¹

Obligations

- 2.7 The key obligation of the Extradition Treaty with Malaysia is for both Parties to extradite to each other, pursuant to the terms of the Treaty, any persons who are wanted for prosecution, or the imposition or

4 NIA, para. 5.

5 NIA, para. 4; Ms Joanne Blackburn, *Transcript of Evidence*, 19 June 2006, p. 24.

6 NIA, para. 4; Ms Joanne Blackburn, *Transcript of Evidence*, 19 June 2006, p. 24.

7 NIA, para. 4.

8 Ms Joanne Blackburn, *Transcript of Evidence*, 19 June 2006, p. 24.

9 NIA, para. 10.

10 Ms Joanne Blackburn, *Transcript of Evidence*, 19 June 2006, p. 25.

11 NIA, para. 10; Ms Joanne Blackburn, *Transcript of Evidence*, 19 June 2006, pp 24- 25.

enforcement of a sentence, in the Requesting Party for an extraditable offence.¹²

- 2.8 An 'extraditable offence' is detailed in Article 2 of the Extradition Treaty with Malaysia. Among other things, it provides that an extraditable offence must be punishable under the laws of both Australia and Malaysia for a period of not less than one year.¹³ Where a request for extradition is made relating to a person convicted of an offence, at least six months of the sentence of imprisonment must remain to be served.¹⁴
- 2.9 In the case of an offence relating to taxation, customs duties, foreign exchange control or other revenue matters, extradition may not be refused on the ground that the laws of the Requested Party do not impose the same kind of tax or duty or do not contain a tax, duty, customs or exchange regulation of the same kind as the laws of the Requesting Party.¹⁵
- 2.10 If the offence has been committed outside the territory of the Requested Party, the extradition will be granted where the laws of the Requested Party provide for the punishment of an offence committed outside its territory in similar circumstances and if the requirements of extradition under the Treaty are otherwise met.¹⁶
- 2.11 To support a request for extradition, the no evidence approach requires the Requesting Party to provide:
- the details necessary to establish the identity and nationality of the person sought including, when possible, photographs and fingerprints and a statement of the current location of the person, if known;
 - a statement of each offence for which extradition is sought;
 - a statement of the acts and omissions which are alleged against the person in respect of each offence for which extradition is sought;
 - the text of the laws creating each offence;

12 Article 1 Extradition Treaty with Malaysia.

13 Article 2(1) Extradition Treaty with Malaysia; NIA, para. 13.

14 Article 2(3) Extradition Treaty with Malaysia; NIA, para. 13.

15 Article 2(5) Extradition Treaty with Malaysia.

16 Article 2(6) Extradition Treaty with Malaysia.

- the text of the laws describing the penalty which may be imposed; and
 - a statement as to whether there is any limitation period in respect of proceedings or punishment.¹⁷
- 2.12 The Extradition Treaty with Malaysia provides for the provisional arrest of the person whose extradition is sought pending presentation of the request for extradition in situations of urgency.¹⁸
- 2.13 Where a person is the subject of an extradition request from more than one State, it is the decision of the Requested Party as to which State the person is to be extradited.¹⁹ In making its decision, the Requested Party should, among other things, consider whether the request was made pursuant to a treaty, the time and place of each offence, the respective interests of the requesting States, the gravity of the offences and the nationality of the person sought.²⁰
- 2.14 The Extradition Treaty with Malaysia contains the 'rule of speciality', the idea that a person can only be tried for the offence that they are extradited for.²¹
- Both the Extradition Act and the treaty have what is known as the speciality requirement. It is longstanding in extradition treaty law and practice...It sets out the requirement that, simplistically, you extradite a person back to face a particular charge. They cannot then be charged with completely unrelated offences without the consent of the party that agreed to the extradition.²²
- 2.15 However, the rule of speciality can be waived with the consent of the Requested Party, where the person fails to leave the Requesting Party within 45 days of being free to do so, or having left, returns, and, where the offence is another extraditable offence of which the person could be convicted upon proof of the facts upon which the extradition was based, provided the offence does not carry a more severe penalty than that offence for which the extradition was sought.²³
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17 Article 4 Extradition Treaty with Malaysia.

18 Article 8 Extradition Treaty with Malaysia; NIA, para. 18.

19 Article 9 Extradition Treaty with Malaysia; NIA, para. 19.

20 Article 9(2) Extradition Treaty with Malaysia.

21 Article 13 Extradition Treaty with Malaysia.

22 Ms Joanne Blackburn, *Transcript of Evidence*, 4 September 2006, p. 17.

23 Article 13(1)-(3)

- 2.16 Following an extradition, the Requesting Party is unable to re-extradite the person to a third State for trial or punishment for any offence that was committed before extradition to the Requesting Party without the consent of the Requested Party.²⁴

Human rights concerns

- 2.17 The Committee received a number of submissions concerned that human rights were not given sufficient consideration in the Extradition Treaty with Malaysia. The New South Wales Council for Civil Liberties (NSW CCL) was critical of the National Interest Analysis provided to the Committee by the Attorney-General's Department because of its failure to assess Malaysia's human rights record:

There is no assessment of the use of capital punishment, the fairness of criminal trials, the use of torture and compliance with other international human rights standards.²⁵

- 2.18 The Human Rights and Equal Opportunity Commission (HREOC) reiterated these concerns but also recognised that 'concerns about Malaysia's human rights records do not, in and of themselves, provide a basis to refuse requests for extradition or mutual assistance.'²⁶ HREOC recommends that an extradition request should not be granted until the Australian Government is satisfied that there is no real risk that extradition may result in a breach of Australia's international obligations.²⁷
- 2.19 Representatives from the Attorney-General's Department informed the Committee that although no specific assessment of Malaysia's human rights activities was undertaken prior to the negotiation of the Extradition Treaty with Malaysia, the treaty contains adequate human rights safeguards.

The Extradition Act itself includes a range of mandatory conditions which must be met before an extradition request

24 Article 14 Extradition Treaty with Malaysia.

25 NSW CCL, *Submission 8*, p. 5.

26 HREOC, *Submission 12*, p. 2; reference to *Chipana v Venezuela* Committee Against Torture, Communication No. 110/1998, U.N. Doc. CAT/C/21/D/110/1998.

27 HREOC, *Submission 12*, p. 4.

will be granted. There is also a range of discretionary grounds upon which Australia can refuse to grant an extradition request. Underpinning all of that, the Minister or the Attorney making the decision has a remaining broad general discretion to refuse to grant an extradition request. Within the mandatory and discretionary grounds for refusal are covered all of Australia's international obligations in relation to the death penalty, torture and enforcement of the [International Covenant on Civil and Political Rights]. The Australian government has made a decision that it is appropriate to negotiate this treaty with Malaysia and that all of the grounds of refusal – both mandatory and discretionary and the general discretion – will provide sufficient and appropriate safeguards in that relationship.²⁸

2.20 The Extradition Treaty with Malaysia provides a number of mandatory and discretionary grounds on which the Requested Party is able to refuse extradition.²⁹

2.21 The Requested Party is obliged not to extradite a person:

- where the Requested Party determines that the request is politically motivated or regards the offence for which extradition is requested as being a political offence;
- if there are substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of that person's race, colour, sex, language, religion, nationality, ethnic origin, political opinion or other status, or that that person's position may be prejudiced for any of those reasons;
- if the offence for which extradition is requested is regarded by the Requested Party as an offence under military law, but not an offence under the ordinary criminal law of the Requested Party;
- if, in respect of the offence for which the extradition of the person is requested: the person has been acquitted or pardoned under the laws of the Requested Party or a third state; the person has undergone the punishment provided by the laws of the Requested Party or a third state; or the person has been convicted under the laws of the Requested Party or a third state;

28 Ms Joanne Blackburn, *Transcript of Evidence*, 19 June 2006, p. 27.

29 Article 3 Extradition Treaty with Malaysia.

- if the person, on being extradited to the Requesting Party, would be liable to be tried or sentenced in that Party by a court or tribunal that has been specially established for the purpose of trying the person's case; or
- if it may place the Requested Party in breach of its obligations under international treaties.³⁰

2.22 The Requested Party has discretion not to extradite a person:

- if the person whose extradition is requested is a national of the Requested Party. Where the Requested Party refuses to extradite a national of that Party it shall, if the other Party so requests and the laws of the Requested Party allow, submit the case to the competent authorities with a view to having the person prosecuted under the laws of the Requested Party in respect of all or any of the offences for which extradition has been requested;
- if the offence for which extradition is requested is regarded under the laws of the Requested Party as having been committed in whole or in part within its jurisdiction;
- if a prosecution in respect of the offence for which extradition is requested is pending in the Requested Party against the person whose extradition is requested;
- if the competent authorities of the Requested Party have decided not to prosecute the person for the offence in respect of which extradition is sought; or
- if the surrender is likely to have exceptionally serious consequences for the person whose extradition is sought, particularly because of her or his age or state of health.³¹

The death penalty

2.23 A number of submissions raised specific concerns regarding the death penalty in extradition requests, calling for a guarantee that the death

30 Article 3(1) Extradition Treaty with Malaysia.

31 Article 3(3) Extradition Treaty with Malaysia.

penalty will not be imposed on a person who is the subject of an extradition request.³²

2.24 The submission from Victoria Legal Aid drew attention to section 22(3)(c) of the *Extradition Act 1988* (Cth) (the Extradition Act). Section 22(3)(c) provides that an extradition request for an offence punishable by the death penalty will be refused unless the Requesting Country gives an undertaking that:

- the person will not be tried for the offence;
- if the person is tried for the offence, the death penalty will not be imposed on the person;
- if the death penalty is imposed on the person, it will not be carried out.

2.25 The Committee was informed by the Attorney-General's Department that the safeguards provided by the Extradition Act are also contained in the Extradition Treaty with Malaysia.

In this treaty, article 3 clause 2 has a specific requirement for consultation before any request is made for extradition of a person to face an offence which carries capital punishment. This clause enables Australia and Malaysia to come to an agreement as to the terms and conditions on which the person will be extradited, if at all. That enables us either to get an undertaking from Malaysia in accordance with the terms of section 22 of the Extradition Act or, alternatively, allows Malaysia to consider whether it wishes to change the charges for which it will seek the extradition to charges which do not carry the death penalty.³³

Implementation

2.26 The Extradition Treaty with Malaysia will be implemented through regulations under section 55 of the Extradition Act. The Extradition Act and regulations implement the terms of Australia's 34 other

32 Law Institute Victoria, *Submission 7*, p. 1; Victoria Legal Aid, *Submission 10*, p. 3; Human Rights and Equal Opportunity Commission, *Submission 12*, p. 4.

33 Ms Joanne Blackburn, *Transcript of Evidence*, 19 June 2006 p. 29.

bilateral treaties on extradition and the terms of the Extradition Treaty with Malaysia are consistent with its safeguards and protections.³⁴

Costs

- 2.27 The Requesting Party bears the expense of transportation and document translation.³⁵ The Requested Party bears the expense of all other costs incurred in the Requested Party during extradition proceedings, such as through arrest and detention.³⁶
- 2.28 The costs to be met by Australia will be met from the existing budgets of the Attorney-General's Department and the Commonwealth Director of Public Prosecutions.³⁷

Consultation

- 2.29 No public consultation occurred as negotiations with Malaysia on the Extradition Treaty were not in the public domain.³⁸ The Extradition Treaty with Malaysia was included on the schedule of the Commonwealth-State/Territory Standing Committee on Treaties (SCOT) in January 2006 and SCOT met in May 2006. No comments were received by the Attorney-General's Department as a result of that meeting.³⁹
- 2.30 In addition to writing to the Premiers and Chief Ministers of the States and Territories and the Presiding Officers of the State and Territory Parliaments, the Committee wrote to forty individuals and organisations inviting them to comment on both the Extradition Treaty with Malaysia and the Mutual Assistance Treaty with Malaysia. As a result of these invitations, the Committee received an additional seven submissions.⁴⁰

34 NIA, para. 26.

35 Article 16 Extradition Treaty with Malaysia; NIA, para. 27.

36 Article 16 Extradition Treaty with Malaysia; NIA, para. 27.

37 NIA, para. 27.

38 NIA, Consultation Annex, para. 2.

39 Ms Joanne Blackburn, *Transcript of Evidence*, 4 September 2006, p. 15.

40 The Committee received seven submissions as a result of its invitation from the: Office of the Privacy Commissioner, the Law Institute Victoria, the New South Wales Council for

Conclusion and recommendation

- 2.31 The Committee recognises the key role extradition plays in building strong cooperative relationships between countries in the region to effectively combat transnational crime.

Recommendation 1

The Committee supports the *Treaty between the Government of Australia and the Government of Malaysia on Extradition (Putrajaya, 15 November 2005)* and an *Exchange of Notes between the Government of Australia and the Government of Malaysia on the Treaty on Extradition (Kuala Lumpur, 7 December 2005)* and recommends that binding treaty action be taken.