



**HUMAN RIGHTS AND EQUAL OPPORTUNITY
COMMISSION**

**SUBMISSION TO THE JOINT STANDING
COMMITTEE ON TREATIES INQUIRY INTO THE
EXTRADITION AND MUTUAL ASSISTANCE
TREATIES WITH MALAYSIA**

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INTRODUCTION

Extradition and mutual assistance treaties between Australia and Malaysia need stronger human rights safeguards

1. The Human Rights and Equal Opportunity Commission (“the Commission”) thanks the Joint Standing Committee on Treaties for its invitation to make a submission to the Inquiry into the *Treaty between the Government of Australia and the Government of Malaysia on Extradition* (The Extradition Treaty) and the *Treaty between the Government of Australia and the Government of Malaysia on Mutual Assistance in Criminal Matters* (the Mutual Assistance Treaty).
2. The Commission welcomes the inclusion of important human rights protections in the Extradition Treaty and Mutual Assistance Treaty. However, the Commission believes stronger safeguards are necessary to make sure that:
 - no person faces the death penalty in Malaysia as a result of Australia granting a request for extradition or mutual assistance;
 - no person suffers a breach of human rights in Malaysia as a result of Australia granting a request for extradition or mutual assistance; and
 - detention pending extradition is considered in sentencing.
3. Australia may be in breach of its international obligations if it makes a decision relating to a person within its jurisdiction, and there is a real risk that the decision may result in the violation of the person’s rights in another jurisdiction.¹ This is the case even though the act causing the breach of human rights may occur outside Australia – in this case in Malaysia.
4. There are significant concerns about Malaysia’s human rights record. Malaysia has not signed or ratified the *International Covenant on Civil and Political Rights* (ICCPR), the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) or the *Convention Relating to the Status of Refugees* (“The Refugee Convention”). Malaysia retains the death penalty for a wide range of offences and caning is imposed as a punishment for some offences.²
5. Concerns about Malaysia’s human rights record do not, in and of themselves, provide a basis to refuse requests for extradition or mutual assistance.³ However, the fact that Malaysia has not signed or ratified fundamental human rights is a compelling reason to make sure that both the Extradition Treaty and the Mutual Assistance Treaty provide strong human rights safeguards.

¹ See *Judge v Canada*, Human Rights Committee, Communication No. 829/1998 U.N. Doc. CCPR/C/78/D/829/1998 (2003). at [10.6]; *Kindler v Canada*, Human Rights Committee, Communication no. 470/1991 at [6.2, 132]; see also Art2(1) of the ICCPR and Art 3 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

² See *Amnesty International Report 2006* available at <http://web.amnesty.org/report2006/mys-summary-eng>

³ See *Chipana v Venezuela* Committee Against Torture, Communication No. 110/1998, U.N. Doc. CAT/C/21/D/110/1998 (1998)

THE EXTRADITION TREATY

6. The Commission recognises that there is a balancing act between maintaining effective international cooperation in the suppression of crime and safeguarding human rights in the extradition process.⁴
7. Article 2(1) of the ICCPR provides that each state must respect and protect the ICCPR rights of persons within their jurisdiction and territory. Australia must not extradite a person within its jurisdiction to a country where there is a real risk of ‘irreparable harm’ to the person’s ICCPR rights.⁵ If Australia extradites a person where there is a real risk that his or her ICCPR rights will be violated in another jurisdiction, Australia may be in violation of the ICCPR.⁶
8. Article 3 of CAT states ‘no party shall extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture’.⁷

Australia needs to check if there is a real risk of human rights violations

9. The main human rights protections in the Extradition Treaty are in Article 3 ‘Exceptions to Extradition’ which sets out the mandatory and discretionary grounds for refusing a request for extradition. Article 3(f) states ‘extradition shall not be granted if it may place the Requested Party in breach of its obligations under international treaties’. It is unclear from Article 3(f) what level of inquiry the Requested Party is required to undertake to satisfy itself that a decision to extradite will not result in a breach of a person’s rights in another jurisdiction.
10. The Commission believes that the Requested Party should make reasonable inquiries to determine whether or not there is a real risk that extradition may result in a breach of its international obligations. In other words, there should be a clear obligation for Australia to check if extraditing a person to Malaysia may result in Malaysia breaching the person’s rights under the ICCPR, CAT, CRC or the Refugee Convention.
11. The type of matters that might be relevant to the Requesting Party’s inquiries could include: whether there is a pattern of human rights violations in the requesting state; and whether there are any specific, well-founded reasons for believing the person concerned faces a real risk of his or her rights being violated.⁸

⁴ The Commission’s view that the *Extradition Act 1988 (Cth)* should contain stronger human rights safeguards is discussed in detail in the Commission’s submission to the Attorney-General’s Department (AGD’s) Review of Extradition Law and Practice. This submission is available on the Commission’s website at <http://www.hreoc.gov.au/legal/submissions/extradition200604.html>

⁵ Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) at [12].

⁶ See *Judge v Canada*, Human Rights Committee, Communication No. 829/1998 U.N. Doc. CCPR/C/78/D/829/1998 (2003) at [10.6]; *Kindler v Canada*, Human Rights Committee, Communication no. 470/1991 para at [6.2, 132].

⁷ Art 3(2) of CAT provides in determining whether there is a danger the person will be tortured ‘authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights’.

⁸ See *Chipana v Venezuela*, Committee Against Torture, Communication No. 110/1998, U.N. Doc. CAT/C/21/D/110/1998 (1998); see also Art 3(2) of CAT.

Recommendation 1: Extradition shall not be granted unless the Requested Country has made reasonable inquiries to satisfy itself that there is no real risk that extradition may result in a breach of its international obligations.

Extradition should be refused if a person may face the death penalty

12. The Commission believes Article 3(2) of the Extradition Treaty provides inadequate protection against the imposition of the death penalty. Article 3(2) states:

In cases in which a person could be subject to capital punishment in the Requesting Party but would not be subject to capital punishment in the Requested Party for the same offence under the laws of the Requested Party, no request for extradition shall be submitted without prior consultation and agreement to make such a request.
13. Article 3(2) adopts a different approach to the *United Nations Model Treaty on Extradition* and the *Australian Model Treaty on Extradition* which both provide extradition may be refused if the offence for which the person is sought or accused carries the death penalty under the law of the requesting State, unless that State undertakes the death penalty will not be imposed or, if imposed, will not be carried out.⁹
14. The Commission believes Article 3(2) should be amended to state an extradition request must be refused in respect of any offence punishable by death in the requesting country, unless that country provides an undertaking that the death penalty will not be imposed or, if it is imposed, will not be carried out.
15. This is consistent with the approach adopted by the *Extradition Act 1988(Cth)* which provides that where an offence is punishable by death Australia can only surrender a person if the requesting state provides an undertaking that:
 - (a) the person will not be tried for the offence;
 - (b) if the person is tried for the offence, the death penalty will not be imposed on the person; or
 - (c) if the death penalty is imposed on the person it will not be carried out.¹⁰
16. Refusing a request for extradition for an offence punishable by the death penalty, unless an undertaking is given that the death penalty will not be imposed, is also consistent with Australia's international obligations.
17. Australia has committed itself to opposing the reintroduction of the death penalty by ratifying the *Second Optional Protocol to the Covenant on Civil and Political Rights, aiming at the abolition of the Death Penalty*. The desirability of abolishing the death penalty has also been reaffirmed on many occasions by the United Nations Security Council, the Human Rights Committee and the General Assembly.
18. The ICCPR recognises the right to life as a fundamental and non-derogable right. The use of the death penalty is only permitted subject to strict safeguards in "countries which have not yet abolished [the death penalty]".¹¹ Countries which have not yet abolished the death penalty can only impose a death sentence following the final judgment of a

⁹ See Art 3(2)(c) *Australian Model Treaty on Extradition* Article 3(2)(c); see Art 4(d) *United Nations Model Treaty on Extradition*.

¹⁰ See s22(3)(c) *Extradition Act 1988(Cth)*

¹¹ See Article 6(2) of the ICCPR.

competent court and if a right to amnesty, pardon or commutation exist.¹² The imposition of a mandatory death penalty, which is retained by Malaysia for certain offences, is a breach of the ICCPR.

19. In *Judge v. Canada*,¹³ the United Nations Human Rights Committee (HRC) decided that Canada had breached its obligations under article 6(1) of the ICCPR by deporting Mr Judge “without ensuring that the death penalty would not be carried out”. The HRC stated:

For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence will not be carried out.¹⁴

20. In order for Australia to comply with its obligations under the ICCPR, an extradition request that relates to a capital offence must be refused unless Australia has ensured that the death penalty will not be carried out.

Recommendation 2: Extradition must be refused if the offence with which the person sought is accused or convicted, or any other offence for which that person may be detained or tried in accordance with this Treaty, carries the death penalty under the law of the Requesting State unless the Requesting Party undertakes that the death penalty will not be imposed or, if the death penalty is imposed, it will not be carried out.

Detention Pending Extradition should be considered in sentencing

21. The Commission is concerned about the absence of any time limits on the length of time a person can be held pending a decision to grant an extradition request.¹⁵
22. The Commission’s submission to the Attorney General’s Department’s Extradition Review recommended imposing strict statutory time limits to expedite court proceedings, executive actions and submissions by the extraditable person, as well as a maximum time limit on the period of time a person can be detained pending extradition.¹⁶
23. The Commission recognises that reforms of this nature are beyond the scope of this inquiry. However, the potential for unfair outcomes could be ameliorated by the inclusion of an article that provides the Requesting Country should undertake, that if the extradited person is convicted, the period of time the person has been detained pending extradition will be subtracted from the person’s sentence.
24. Providing credit for pre-sentence detention is consistent with the approach currently adopted by some state and territory legislation which provides that it is mandatory for the

¹² See Article 6(2) and Article 6(4) of the ICCPR.

¹³ Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003).

¹⁴ Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003) at [10/4].

¹⁵ The *Extradition Act 1988* (Cth) states that if a person is not removed from Australia within two months of the issue of a surrender warrant, the person can apply to be released. However, there is no provision in domestic legislation or in this Extradition Treaty which limits the time a person can spend in detention pending the decision to surrender.

¹⁶ See <http://www.hreoc.gov.au/legal/submissions/extradition200604.html>

court to take into account in sentencing any time for which the offender has been held in custody in relation to the offence.¹⁷

Recommendation 3: The Requesting Country should undertake that, if the extradited person is convicted, the period of time the person has been detained pending extradition will be subtracted from the person's sentence.

THE MUTUAL ASSISTANCE TREATY

Assistance should be refused if it exposes a person to the risk of the death penalty

25. The Commission believes that, consistent with Australia's international obligations and bipartisan opposition to the death penalty a request for mutual assistance must be refused in relation to any prosecution, punishment, or investigation which may result in the imposition of the death penalty.
26. Article 4 of the Mutual Assistance Treaty sets out the mandatory and discretionary grounds for refusing a request for mutual assistance. The risk of a person being exposed to the death penalty is not listed as a mandatory or discretionary ground for refusing assistance. The Explanatory Notes record the Parties' agreement that the Mutual Assistance shall only be provided in conformity with the respective laws of the parties, including the limitations on assistance contained in section 8(1A) and 8(1B) of Australia's *Mutual Assistance in Criminal Matters Act 1987* (The Mutual Assistance Act).¹⁸
27. The Commission is concerned that ss 8(1A) and 8(1B) of the Mutual Assistance Act do not provide adequate protection against the risk of a person being exposed to the death penalty in Malaysia as a result of assistance provided by Australia. This is because the Mutual Assistance Act:
 - does not provide for the mandatory refusal of a request for mutual assistance in relation to an investigation which may expose a person to the risk of the death penalty;

¹⁷ See *Crimes (Sentencing Procedure) Act 1999*(NSW) ss24(a), 47(3); *Sentencing Act 1997* (Tas) s16 (1)(a); *Crimes (Sentencing Act) 2005* (ACT) s63(2). Under other State and Territory legislation the Court has discretion to take into account pre-sentence detention.

¹⁸ Section 8(1A) provides a request from a foreign country for assistance in the prosecution or punishment of a person charged with or convicted of a capital offence must be refused unless the Attorney General believes there are 'special circumstances' which mean that assistance should be granted; and s 8(1B) states that a request for assistance by a foreign country **may** be refused if the Attorney General believes providing assistance may result in the death penalty on a person and after taking into consideration the interests of international criminal co-operation, is of the opinion that in the circumstances of the case the request should not be granted.

- does not prevent the Australian Federal Police (AFP) from lawfully providing assistance to Malaysian police which may expose a person to the risk of the death penalty.¹⁹

28. In *Rush v Commissioner of Police* Finn J stated:

[T]here is need for the Minister administering the *Australian Federal Police Act 1979* (Cth) ('the AFP Act') and the Commissioner of Police to address the procedures and protocols followed by members of the Australian Federal Police ('AFP') when providing information to the police forces of another country in circumstances which predictably could result in the charging of a person with an offence that would expose that person to the risk of the death penalty in that country.²⁰

29. The Commission recognises that it is beyond the scope of the Committee to address the procedures followed by the AFP in relation to providing information to the police force of another country. However, the Commission believes that the Mutual Assistance Treaty with Malaysia should clearly state that requests made under the Treaty must be refused if providing assistance may expose a person to the risk of the death penalty.

Recommendation 4: Mutual assistance must be refused if it may expose a person to the risk of the death penalty unless the Requesting Country undertakes that the death penalty will not be imposed or, if the death penalty is imposed, it will not be carried out.

Assistance should be refused if a person's human rights may be breached

30. Article 4 of the Mutual Assistance Treaty does not impose any obligation on the Requested Country to consider whether granting a request of mutual assistance may result in a breach of a person's human rights in the Requesting Country.
31. The Commission believes that mutual assistance should be refused unless the Requested Country is satisfied that there is no real risk that providing assistance may result in the breach of a person's rights under the ICCPR, CAT, CRC or the Refugee Convention.

Recommendation 5: Mutual Assistance shall not be granted unless the Requested Country has made reasonable inquiries to satisfy itself that there is no real risk that providing assistance may result in a breach of a person's rights under the ICCPR, CAT, CRC or the Refugee Convention.

¹⁹ The decision in *Rush v Commissioner of Police* [2006] FCA 12 confirms that the Mutual Assistance Act does not prevent law enforcement agencies from providing assistance to law enforcement agencies in other countries in relation to investigations where the death penalty may be imposed.

²⁰ *Rush v Commissioner of Police* [2006] FCA 12 at [1].