Australian Government
Attorney-General's Department

International
Crime Cooperation Division

08/4747

26 May 2008

Mr James Rees
Secretary
Joint Standing Committee on Treaties
Department of the House of Representatives
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Mr Rees

Treaties tabled on 12 March 2008 – Questions on Notice

I refer to the Committee's inquiry into treaty actions tabled in the Parliament on 12 March 2008. During its public hearing on 8 May 2008 the Committee heard evidence in relation to the Treaty on Extradition between Australia and the United Arab Emirates and the Treaty between Australia and the United Arab Emirates on Mutual Legal Assistance in Criminal Matters. I am writing to respond to questions taken on notice during our evidence at the hearing.

Comments on other submissions made to the Committee

2. The Committee Chair referred (pages TR10-11 of the proof transcript) to submissions received by the Committee in relation to the treaties, and invited comment on the recommendations. There have been three relevant submissions authorised for publication – from Civil Liberties Australia (CLA), the ACT Government and the Tasmanian Government.

The CLA submission

3. The CLA states it does not formally oppose the ratification of the Extradition Treaty, but recommends the adoption of certain policies in drafting regulations to bring the Treaty into force under Australian law. CLA recommendation 1 indicates the regulations should provide that '[a]ssurances that are given regarding the extradition of individuals must have the "character of an undertaking by virtue of which the penalty of death would not be carried out"'.

4. It would be neither necessary nor appropriate to specify this requirement in regulations to implement the Treaty. The requirement for an undertaking in relation to the possible imposition of the death penalty is established as part of the primary legislation in paragraph 22(3)(c) of the *Extradition Act 1988*, which provides that where an offence for which extradition is sought is punishable by the death penalty the person may only be surrendered if, '*by virtue of an undertaking given by the extradition country to Australia*', one of the following is applicable:

(i) the person will not be tried for the offence;

(ii) if the person is tried for the offence, the death penalty will not be imposed; or

(iii) if the death penalty is imposed, it will not be carried out.

5. The effect of paragraph 22(3)(c) was the subject of an appeal to the Full Federal Court in the case of *McCrea* v *Minister for Justice and Customs* ((2005) 145 FCR 269), which concerned the adequacy of an undertaking provided to Australia by the Government of Singapore. The Court stated (paragraph 25):

> An evident object of s22(3)(c) is to provide a safeguard against the carrying out of the death penalty upon a person extradited to Australia under the Act. Whilst the object of the provision can be variously stated, the seriousness of the subject matter suggests that it is very unlikely that nothing more than compliance with a verbal formula was intended. Consistently with the object of the provision, there is much to be said for the view that the expression 'by virtue of an undertaking' requires that the decision maker consider whether the undertaking is one that, in the context of the system of law and government of the country seeking surrender, has the character of an undertaking by virtue of which the penalty of death would not be carried out.

6. As noted in the CLA submission, the principle in *McCrea* was followed by the Full Federal Court in the case of *Rivera* v *Minister for Justice and Customs* (2007) (160 FCR 115). It is possible the CLA's concerns regarding the existing legislation regime derives from assumptions regarding the factual background to the *Rivera* case. For example, the CLA states that (page 4):

> Although the FCA considered the relevant arguments submitted by Mr Rivera, there is still the question of why the Minister had not considered these issues in his original decision. If this is a reflection of how the Commonwealth Extradition Act 1988 and the various regulations are interpreted and implemented by the Minister, CLA has concerns that even though there are express protections found in the various legal instruments, there will still be circumstances where surrender warrants will be granted regarding individuals suspected of crimes that attract sentences that are not consistent with Australia's sentencing laws.

7. The suggestion the Minister failed to consider the relevant issues in relation to the undertaking is misplaced. The Federal Court's judgment details in some length the various documents put before the Minister (see paragraphs 42 to 49 (Emmett J) and paragraphs 125 to 127 and 154 (Buchanan J)). In the first instance judgment ([2006] FCA 1784) Justice Moore noted that the submissions made by Mr Rivera to the Minister totalled over 1000 pages (paragraph 8), and concluded (paragraph 69):

> In the result, there was material before the Minister which indicated that by reference to the applicable laws of the United States, the undertaking given by the United States had the character of an undertaking by virtue of which the penalty of death would not be carried out, if indeed an undertaking was required. In the absence of evidence to the contrary, it can be assumed that the Minister read this material and considered the issues raised by it.

8. In the appeal judgement, Justice Buchanan observed (paragraph 164):

> Mr Rivera has taken advantage at every level, of his opportunity to advance copious amounts of material and arguments, all of which appear to have been comprehensively considered.

9. Accordingly, we do not share the CLA's concerns regarding this issue. In particular, given the *primary* legislation governing extradition requires that assurances regarding the death penalty be of the character stipulated by the CLA (and this view has been confirmed in two appellate decisions by the Full Federal Court) we do not see any need to have this specified in *subordinate* legislation implementing the Treaty. No such specification has been included in any of the existing regulations implementing bilateral extradition treaties, and its inclusion in relation to the present Treaty may

cause unnecessary confusion regarding the settled interpretation of paragraph 22(3)(c) of the Extradition Act.

10. CLA recommendation 2 indicates the regulations should provide that '[i]f a person provides information attesting against the effectiveness of the [death penalty] assurance the Minister must consider the evidence.' Again, we consider the policy objective of this proposal is effectively met under the existing regime. The Minister's decision to issue a surrender warrant is subject to administrative law requirements regarding the rules of natural justice, which means the person would have the right to make submissions and provide information on matters relevant to the decision. The application of the rules of natural justice to extradition surrender decisions was considered in some detail by Justice French in *Hempel and Etheredge* v *Attorney-General* ((1987) 29 A Crim R 133), where he observed (pages 150-1):

> There is nothing in the Act to suggest a legislative intention whether by provision or specific alternative mechanisms or otherwise, to displace the presumptive rule that the fugitive whose surrender is contemplated by the Attorney-General, is entitled to be heard and to know the case against him.

11. The *Rivera* case provides a specific example of circumstances where the Federal Court examined whether the rules of natural justice were met in a surrender decision involving a death penalty assurance. Given the application of those rules is well settled in relation to extradition matters, we consider the inclusion of a specific requirement in the regulations implementing the present Treaty is neither necessary nor appropriate.

12. CLA recommendation 3 indicates the regulations should provide that '[i]f a person requests that the Minister hear evidence regarding the effectiveness of the [death penalty] assurance, then the Minister must consider the request with the view of allowing the request, unless it would be too onerous to do so.' As outlined above, it is recognised that the person has the right to put submissions before the Minister in relation to this issue, and this may include documentary materials which support the person's case. If the CLA is suggesting that a formal hearing of evidence should be required, we do not consider this to be appropriate. As noted by French J in *Hempel and Etheridge* (at pages 151-2):

> The rules [of natural justice] in this case required the Attorney-General to give to the applicants an opportunity to be heard on issues material to the exercise of his discretion. That requirement does not give rise to an obligation to conduct an oral hearing with a right of cross-examination and address. It was, given the administrative nature of the decision, sufficiently met by the receipt and consideration of written submissions by the applicants' solicitors.

13. CLA recommendation 4 indicates the regulations should provide that '[i]f the Minister refuses to consider evidence or refuses to hear evidence of the nature mentioned in recommendations 2 and 3, then the Minister must provide written explanation to the person to be extradited as to why the evidence will not be heard or considered'. As outlined above, the Minister is *required* under administrative law principles to consider all relevant materials submitted on behalf of the person subject to the surrender determination. We consider the introduction of legislation which expressly contemplates exceptions to this requirement would be undesirable.

14. The requirement is met in practice through the Attorney-General's Department inviting the person to make representations to the Minister, and all such materials are put before the Minister for the purpose of the decision. The Minister's decision to issue a surrender warrant may be challenged by way of prerogative writ, and is subject to review by the Federal Court under section 39B of the *Judiciary Act 1903*. In the event a person seeks judicial review, he or she is provided a copy of the

submission provided to the Minister (including all relevant materials) and the signed instrument of surrender.

15. CLA recommendation 5 indicates the regulations should provide that '[w]hen the Minister is considering whether to extradite an individual, the Minister must take into account the particular prison and detention environment (that the person will be extradited into) to assess whether the person will be put in an environment that would be tantamount to a death sentence, although not formally recognised as such, or whether the person will be subject to treatment tantamount to torture or inhumane treatment according to Australian and international standards.'

16. Both the legislation and the Treaty include specific grounds for refusal in respect of the death penalty and torture (see Articles 4(1)(g) and (h) of the Treaty and paragraphs 22(3)(b) and (c) of the Extradition Act). To the extent the CLA is concerned more generally about the particular prison conditions to which the person may be exposed, we consider this would be addressed under paragraph 4(2)(g) of the Treaty which allows for refusal of extradition if the Requested State considers 'the extradition of the person is unjust, oppressive, or incompatible with humanitarian circumstances in view of the age, health or other personal circumstances of the person.' In *Rivera*, Justice Buchanan indicated that the general discretion to refuse surrender under paragraph 22(3)(f) of the Extradition Act could also include consideration of whether the prison conditions would constitute cruel, inhuman or degrading treatment of punishment (160 FCR 115 at paragraphs 160-162).

The ACT Government submission

17. The ACT Government generally supports the ratification of the two treaties. However, it states 'there are concerns in regard to applications for legal assistance and the extradition of persons involved in investigation of offences that attract penalties that are inconsistent with penalty schemes in the ACT and Australia in general. Such applications have the real potential to violate and usurp the fundamental human rights protected under the ACT's *Human Rights Act* 2004.'

18. It is not clear to us how the operation of the treaties could violate the civil and political rights enumerated the ACT Human Rights Act. As noted in Part 3 of that Act, the primary source of the rights set out in that legislation is the International Covenant on Civil and Political Rights, which has been ratified by Australia. As outlined in the National Interest Analyses for the treaties currently under consideration, the obligations regarding the provision of assistance or extradition are qualified by numerous internationally accepted grounds for refusal.

19. We do not consider it would be feasible to include a requirement that assistance under the treaties may only be provided in circumstances where the penalty imposed under the UAE directly corresponds with the relevant penalty under the laws of Australia. Indeed, since penalties for criminal offences often vary considerably between the various State and Territory jurisdictions, it is difficult to see how such a requirement could operate in practice.

20. The ACT Government also suggested the Commonwealth consider appropriate regulations 'to ensure greater certainty that the assurances given are consistent with those expressed by the Federal Court in the matter of *McCrea* v *Minister for Justice and Customs*'. This is effectively identical to recommendation 1 in the CLA submission (dealt with in paragraphs 3-9, above).

21. Finally, the ACT Government suggests the UAE should be asked to provide assurances that a person will not be subjected to cruel or inhuman punishment if he or she is to be surrendered by Australia. The question of humanitarian considerations under the Treaty is addressed at paragraphs 15-16, above. If cruel or inhuman punishment was identified as a concern in relation to an extradition request from the UAE, the Australian Government would raise this with the UAE Government and any assurances provided by the UAE would be a relevant consideration for the

Minister to take into account in performing his or her statutory responsibility for making a surrender determination under section 22 of the Extradition Act.

Submission from the Government of Tasmania

22. The Tasmanian Government has made five recommendations, the first three of which concern the Extradition Treaty.

23. In relation to Article 5 (prosecution in lieu of extradition), the Tasmanian Government recommends 'the paragraph specify which competent authority the case is to be submitted to in order to enable the person to be prosecuted.' Article 5(1) refers more broadly to 'competent authorities' because the identification of the relevant prosecuting authority will be a matter to be determined in accordance with the relevant laws of the Requested State. This reflects the general practice under Australia's existing bilateral treaties arrangements, as well as under relevant multilateral instruments (see, for example, Article 16(10) of the *United Nations Convention Against Transnational Organized Crime*). The appropriate competent authority may vary depending on the legal system of the country, the type of offence and the place in which the offence was allegedly committed. For example, in Australia, the competent authority may be a state or federal office of public prosecutions or a different agency such as the Australian Securities and Investments Commission. It would not be practicable to seek to specify all relevant agencies in the text of the Treaty.

24. In relation to Article 6 (extradition procedure and required documents), the Tasmanian Government recommends 'paragraph 2(e)(iii) be amended to provide that, in addition to detail describing the penalty which may be imposed, details relating to the penalty which *has been* imposed should also be included as an alternative. It is also recommended that an appropriate confidentiality clause be included.'

25. We do not think the proposed amendments are warranted. Articles 6(2)(b) and (c) already require – where a person has been convicted of an offence – the Requesting State to provide a statement setting out the sentence which has been imposed. We do not consider the inclusion of a confidentiality requirement in relation to documents submitted in support of extradition would work in practice. While Australian officials are bound by relevant privacy and secrecy laws in relation to the handling of requests, the procedures for determining eligibility for extradition and considering whether the supporting documents have been produced are normally conducted in open proceedings before a magistrate under section 19 of the Extradition Act.

26. In relation to Article 9 (provisional arrest), the Tasmanian Government recommends 'the application for provisional arrest contains where possible, a copy of the warrant and/or conviction rather than just a statement of the existence of such documents. In respect to paragraph 4, it is recommended that the obligation on the Requested State to take the necessary steps to secure the arrest of the person be made subject to that action not being inconsistent with the laws of the Requested State.'

27. In Australia's experience, copies of arrest warrants are generally provided in support of urgent provisional arrest requests where they are immediately available. However, it is recognised under Australia's domestic legislative framework that provisional arrests may be sought on the basis of a statement from the Requesting State that an arrest warrant or record of conviction exists, and this also reflects internationally accepted practice (see, for example, Article 9(2) of the United Nations Model Treaty on Extradition). The urgent nature of requests for provisional arrests, as well as issues concerning potential translation of arrest documentation, necessitates flexibility in relation to the mandatory documentation requirements for provisional arrest. Similar provisions are included in most of Australia's existing bilateral treaties.

28. The obligation on the Requested State to take 'necessary steps' to secure provisional arrest would be conditioned by the Requested State's ability to do this in accordance with its domestic laws. In Australia, procedures for securing provisional arrest are set out in sections 12-15 of the Extradition Act, which provide for the issuing of an arrest warrant by a magistrate and its subsequent execution. Article 9(4) of the Treaty is in identical terms to the corresponding provision in Australia's model extradition treaty.

29. The other recommendations from the Tasmanian Government relate to the Mutual Assistance Treaty. In relation to Article 1 (scope of application), the Government recommends 'the definition of criminal matters be amended to make it clear that criminal matters include *but are not limited* to matters connected with offences against a law relating to customs duties, foreign exchange control and other revenue matters. In paragraph 3, it is recommended that the provision of assistance, as detailed, be subject to that assistance not being inconsistent with the laws of the Requested State.'

30. We do not consider either of these amendments are necessary. The word 'include' in Article 1(2) of the Treaty is sufficient to make clear that the list of offences mentioned is not exhaustive, and is therefore not limited to the matters specified. Article 5(2) of the Treaty, which deals with the execution of requests, expressly provides that '[r]equests for assistance shall be carried out in accordance with the law of the Requested State and, insofar as it is not incompatible with that law, in the manner requested by the Requesting State.'

31. The Tasmanian Government refers to Article 9(6), which relates to taking of evidence, and provides that 'if any person claims that there is a right to decline to give evidence under the law of the Requesting State, the Central Authority of that State shall, upon request, provide a certificate to the Central Authority of the Requested State as to the existence of that right. In the absence of evidence to the contrary, the certificate shall provide sufficient evidence as to the existence of that right.' The Tasmanian Government seeks clarification 'as to how this provision would operate if the laws of the Requested State do not confer on the person the same right to decline to give evidence.'

32. Article 9(6) effectively establishes an evidentiary presumption in cases where the Requesting State certifies how its laws operate in relation to the obligation to provide evidence. It has no bearing on the question of rights which may be available under the laws of the Requested State. Article 9(5) affords the individual the possibility of declining to give evidence under the laws of the Requested State or the Requesting State, where such laws provide for this.

Summary of relevant Federal Court decisions

33. Mr Andrews noted evidence to the effect that the Minister's surrender determination may be subject to judicial review and requested a summary of relevant Federal Court cases indicating the parameters provided by the Court in terms of guidance to the Minister (proof transcript, pages TR11-12). A summary of the major cases is at **Attachment** A to this letter.

Consideration of Federal Court decisions

34. Mr Andrews asked whether, in advising the Minister on a surrender decision, the Department would note relevant Federal Court decisions as an indication of the way in which the Federal Court currently interprets the law (proof transcript, page TR12). As a matter of practice, the Department monitors and reviews all cases concerning the interpretation of the Extradition Act, and would bring relevant case law to the Minister's attention in advising on the exercise of the Minister's statutory responsibilities under the Act. The Department would ensure that authorities on the interpretation of specific provisions are taken into account for the purposes of the surrender determination. This would include consideration of applicable Federal Court judgments.

Waiver of speciality

35. Senator Birmingham requested general information on the terms under which waivers of speciality may be granted and the countries to which such waivers may have been granted (proof transcript, page TR15). In the time available, we have not been able to establish the specific details of cases in which Australia has previously granted a request for waiver of speciality – our records indicate no such requests have been dealt with by Australia for at least the past five years.

36. Available records indicate that in circumstances where consent to waive speciality has been considered in the past, the following criteria were applied by the responsible Minister:

- whether extradition would have been granted for the offences for which consent is sought
- whether the documentation in support of the request satisfied the requirements under the relevant treaty
- whether the requesting country could have requested extradition for the additional offences at the time of the extradition request
- how much time had lapsed since the extradition was granted
- whether the interests of justice require consent to be given, and
- whether the person has consented to being prosecuted in the requesting country for the additional offences.

37. The rule of speciality is implemented in Article 14 of the Extradition Treaty. If a waiver of speciality was requested, Article 14(2) would supplement the considerations outlined above in so far as it requires the request be accompanied by all of the documents which would be required in support of an extradition request as well as a legal record of any statement made by the extradited person with respect to the offence for which waiver is sought.

Extradition treaties and sharia law

38. Senator Birmingham sought examples of other bilateral extradition treaties with countries which may apply sharia law (proof transcript, page TR16). Of the 35 treaties currently in force, our understanding is that the legal systems in five extradition countries (Indonesia, Israel, Malaysia, the Philippines, and Turkey) incorporate sharia law domestically to varying degrees. In some regions sharia courts have limited jurisdiction over minor Islamic criminal offences, such as alcohol consumption, gambling, and conversion. Although serious offences are not usually governed by sharia law, we understand that some penal codes are influenced by sharia law and may codify a range of Islamic offences. However, given the customary nature of sharia law and its varied application between and within countries, it is difficult to state comprehensively the extent to which sharia law will be apply to offences which may be subject to extradition under those treaties.

39. In considering this issue, it is relevant to note that all requests for extradition must meet the dual criminality requirement, whether the offence is governed by sharia law or the state penal code. Extradition offences must also be subject to a minimum one year term of imprisonment. These safeguards prevent extradition where the essential elements of the foreign criminal offence do not correspond to offences under Australian law.

Australian Defence Personnel

40. Senator Birmingham asked about the application of the Extradition Treaty to Defence personnel who may be serving in the UAE and whether Australia has a status of forces agreement with the UAE (proof transcript, page TR17).

41. The treaty does not include any express provisions regarding the possible position of Australian defence personnel who may be serving in the UAE. Accordingly, in the event that an Australian Defence Force member who had been present in the UAE was subsequently sought for extradition under the treaty, the general terms and conditions of the treaty would apply.

42. As stated to the Committee, the treaty relevantly excludes extradition for purely military offences (Article 4(1)(b)). It also provides a ground for refusal in circumstances where a prosecution is pending against the person in Australia, or where the competent authorities of Australia have decided to refrain from prosecuting the person for the relevant offence. Significantly, Australian defence personnel serving overseas are subject to the general criminal laws of Australia by virtue of the *Defence Force Discipline Act 1982*.

43. The Department of Defence has advised there is no treaty in force between Australia and the UAE relating to the status of Australian defence personnel who may be in the UAE. Accordingly, any members of the ADF in UAE would be subject to the UAE's criminal jurisdiction.

44. I trust the above information is of some assistance to the Committee in its consideration of the treaties. Please do not hesitate to contact me if you require any further information.

Yours sincerely

Steven Marshall

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Attachment A

Key judicial decisions relating to surrender determinations under section 22 of the *Extradition Act 1988*

Foster v *Minister for Customs and Justice* (High Court (2000) 200 CLR 442)

This case concerned the application of a ground for refusal which would apply where the Minister was satisfied it would 'be unjust or oppressive or too severe a punishment' to surrender the person to the United Kingdom. The appellant contended the Minister did not sufficiently consider whether it was likely that he would be further imprisoned if convicted of the extradition offences. The appellant alleged that, as this was a relevant consideration, the Minister was required to obtain further information on the range of sentences that may be imposed or whether any part of the time the appellant had spent in custody would be taken into account in reducing that range.

The Court decided it was open to the Minister, on the material before her, to conclude she was not satisfied that it would be unjust or oppressive or too severe a punishment to surrender the appellant. The Court found that the Minister was entitled to consider and evaluate the appellant's arguments on the materials before her, and was not obliged to conduct her own sentencing investigation.

Farina v *Honourable Amanda Vanstone* (Federal Court [2000] FCA 583)

This case considered whether exercise of the Minister's discretion to surrender the applicant to Italy miscarried on the ground of *Wednesbury* unreasonableness. Justice Tamberlin found that where there were countervailing propositions and material before the Minister, the Minister is entitled to exercise discretion in forming an opinion as to the appropriate course of action. In light of the material before the Minister (including a report from the Attorney-General's Department and reports provided by the applicant), the decision was not on its face manifestly unreasonable and no error of law was made.

Timar v *Minister for Justice and Customs* (Federal Court (2001) 113 FCR 32)

The case concerned whether the Minister had properly applied a discretionary ground for refusal relating to humanitarian considerations in Australia's extradition treaty with Hungary. Justice Marshall found the Minister had sufficiently considered all relevant matters, including matters relating to the applicant's health. The Court also rejected claims that the decision was manifestly unreasonable. While the Minister may reasonably have reached a contrary conclusion, the decision was not so unreasonable as to be beyond the proper exercise of her discretion.

Chan v *Minister for Justice and Customs* (Federal Court [2001] FCA 718)

This case considered whether the Minister had properly applied a discretionary ground for refusal relating to humanitarian considerations in Australia's extradition agreement with Hong Kong. Justice Stone held that the Minister was bound to consider the applicant's life expectancy and the risk that a custodial term of imprisonment could in fact become a life sentence. He also found that the Minister was allowed, but not bound, to consider possible exculpatory evidence. The Minister's decision to surrender the applicant was upheld.

de Bruyn v *Minister for Justice and Customs* (Full Federal Court (2004) 143 FCR 162)

This case concerned the application of a ground for refusal which would apply if the Minister was satisfied it would 'be unjust, oppressive or incompatible with humanitarian considerations' to surrender the appellant to South Africa, in light of representations regarding the risk that the appellant would contract HIV/AIDS in prison. The Court set aside the Minister's decision to surrender the appellant, finding it was not sufficient for the Minister to rely on the conclusion there was no certainty that the appellant would contract HIV/AIDS. The Court noted there would be a point at which the risk or threat arising from prison conditions would be so high so as to come within the grounds for refusal. Following this decision, the Minister reconsidered the matter and determined that the appellant would not be surrendered.

McCrea v *Minister for Justice and Customs* (Full Federal Court (2005) 145 FCR 269)

As noted in paragraph 5 of the answers to questions on notice, this case concerned the adequacy of a death penalty undertaking provided to Australia by the Government of Singapore. The Court found that the undertaking provided by Singapore was of the character required by section 22(3)(c) of the Extradition Act. It held that the Minister must consider whether the undertaking is one that, in the context of the system of law and government of the country seeking surrender, has the character of an undertaking by virtue of which the death penalty would not be carried out.

Rivera v *Minister for Justice and Customs* (Full Federal Court (2007) 160 FCR 115)

This case involved a challenge to the Minister's decision to surrender the appellant to the United States. The appellant claimed that the Minister erred on numerous grounds, including in determining that:

- the appellant would not be prejudiced at trial by reason of his race and religion,
- the appellant would not be subjected to torture in the United States
- the death penalty assurance provided by the United States satisfied the requirements of section 22(3)(c) of the Extradition Act, and
- the surrender would not be unjust, oppressive or incompatible with humanitarian considerations.

In summary, the Court found there was no failure by the Minister to comply with the applicable provisions in the Extradition Act and there was no basis for any form of judicial restraint on the Minister's decision.