

**House of Representatives Standing Committee on Social Policy and Legal Affairs****Inquiry into the Extradition and Mutual Assistance in Criminal Matters Legislation  
Amendment Bill 2011***Public Hearing, Monday 15 August 2011***Attorney-General's Department**

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**QUESTIONS ON NOTICE (QoN)****QoN1: Can you make comment on the extradition request refused in 2009-10?**

On 28 September 2009 the Minister for Home Affairs made a final determination under section 22 of the *Extradition Act 1988* that a person not be surrendered to Poland. Poland sought the person's extradition for prosecution for an offence relating to obtaining goods and services by deception.

The Minister's determination was made following consideration of the extradition request in accordance with the requirements of the Act and Australia's extradition treaty with Poland, including consideration of matters raised on behalf of the person relating to humanitarian considerations.

**QoN2: Is legal aid available for persons subject to extradition proceedings?**

Under the National Partnership Agreement on Legal Assistance, through which Commonwealth legal aid funding is delivered to States and Territories, legal assistance under proceedings under section 19 or 21 of the *Extradition Act 1988* is a Commonwealth legal aid service priority. Individuals may apply for legal aid and would be assessed according to the eligibility requirements.

The Australian Government funds legal aid commissions to provide legal assistance services that come within Commonwealth legal aid priorities. In order for an application for legal aid to succeed, applicants must meet guidelines and satisfy means and merits tests as determined by legal aid commissions. Legal aid commissions are independent statutory authorities established under State and Territory legislation. Commissions have discretion to determine the extent of assistance they will provide in individual cases.

**QoN3: Is legal aid granted to persons subject to extradition proceedings in practice?**

The Department has statistics from legal aid commissions on applications for legal assistance under broad headings such as criminal, civil or family law but does not have statistics on applications for legal assistance specific to extradition matters. The Department is aware, however, of instances where persons the subject of extradition proceedings have been in receipt of legal aid.

**QoN3: Have we had the situation where persons subject to the extradition process have had no legal representation?**

The Department does not have statistics on the legal representation of persons for extradition matters. However, the Department is aware of instances where persons have elected to represent themselves in extradition proceedings.

## FURTHER QUESTIONS FROM THE COMMITTEE

### *Bail and remand*

#### **FQ1: Are Australian authorities able to confiscate the passports of foreign nationals wanted for extradition as a condition for granting bail?**

All applications for bail would be made to a court. A decision by a court to release a person on bail may be made on such terms and conditions as the court or magistrate thinks fit. This may include a condition that the foreign national surrender his or her passport.

#### **FQ2: Do we notify embassies that one of their nationals is wanted for extradition and ask them to not issue a new passport to ensure they remain in Australia if they are granted bail?**

Measures for preventing a person from absconding while on bail are primarily a matter for law enforcement agencies. The Australian Federal Police (AFP) advises that the passenger watch list system is the principal means that the AFP monitors and controls the movement of persons subject to bail conditions overseas. Bail conditions utilising the alerts system at international points of departure will still activate where a new passport is issued.

#### **FQ3: What alert systems are currently in place at passport checkpoints in airports etc that would flag if someone is trying to leave the country while subject to an extradition request?**

The Department is aware of a range of law enforcement mechanisms used by the Australian Federal Police (AFP) and other law enforcement agencies to monitor the movements of persons who are the subject of a foreign law enforcement interest. The AFP advises that the passenger watch list system is a tool that is available to the AFP to monitor the movements of persons of interests overseas. An alert is able to be placed upon a person who is the subject of an extradition request. When the subject of an alert presents his or her passport at an international airport or seaport, the alert is triggered. There triggering of the alert allows for appropriate intervention by AFP officers.

#### **FQ4: What is the policy justification for maintaining the presumption against bail in the Extradition Act?**

The current presumption against bail for persons sought for extradition is appropriate given the serious flight risk posed by the person in extradition matters, and Australia's international obligations to secure the return of alleged offenders to face justice in the requesting country. The High Court in *United Mexican States v Cabal*<sup>1</sup> has previously observed that to grant bail where a risk of flight exists would jeopardise Australia's relationship with the country seeking extradition and jeopardise our standing in the international community.

The removal or substantial qualification of the existing presumption (which has been a feature of Australia's extradition regime since the mid-1980s) may impede Australia's ability to meet our extradition treaty obligation to return the person to the requesting country to face criminal charges or serve a sentence.

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<sup>1</sup> (2001) 209 CLR 165; 183 ALR 645

## *Grounds for refusing requests for extradition and mutual assistance*

**FQ5: Is the onus on the person the subject of an extradition or mutual assistance request to raise issues of concern in submissions to the Minister that may prompt the Minister to exercise his or her discretion to refuse the request?**

### *Extradition*

The person the subject of an extradition request has the opportunity to raise reasons against extradition, in line with the Extradition Act and relevant Treaty, at multiple points in the extradition process.

The procedure for dealing with an extradition request, as amended by the Bill, would require the Minister to accept the request and issue a notice to a magistrate if satisfied that the person is an ‘extraditable person’ in relation to the extradition country, meaning a person who has been convicted in a foreign country, or a person for which a foreign country has issued an arrest warrant.

A magistrate would then be required to determine if the person is eligible for surrender, if satisfied, among other things, that there are no substantial grounds for believing there is an extradition objection in relation to the offence. Extradition objections, as amended by the Bill, would include if extradition is sought for a political and military offence, if there is double jeopardy, if the person is to be prosecuted on the basis of race, religion, nationality political opinions, sex or sexual orientation or if the person would be prejudiced at trial or otherwise on the basis of his or her race, religion, nationality political opinions, sex or sexual orientation. At that point in time the person the subject of an extradition request can make submissions to the court regarding these matters.

Once a magistrate determines that a person is eligible for surrender, the Minister can only determine that a person should be surrendered if, there is no extradition objection, there are no substantial grounds to believe the person will be subject to torture, the death penalty will not be imposed or carried out, a speciality assurance has been given, and mandatory and discretionary grounds for refusal in any extradition treaty between Australia and the requesting country do not apply. As part of the consideration of these matters the person the subject of the extradition request can make submissions to the Minister which the Minister is required to consider.

In addition to these considerations, the Minister has a general discretion to refuse extradition if he or she considers the person should not be surrendered in relation to the offence. It is open to a person to make representations to the Minister for consideration in exercising his discretion to surrender a person. The Minister’s discretion is unfettered and he or she may take account of any matter, regardless of whether the person has raised that matter in his or her representations.

### *Mutual Assistance*

Mutual assistance requests are made in the context of ongoing criminal investigations and prosecutions. Generally, persons who are the subject of the foreign investigations and prosecutions will not be aware of the request. Section 43C of the *Mutual Assistance in Criminal Matters Act 1987* prohibits the disclosure of the existence, content and execution of a request made by a foreign country unless it is necessary to do so in the performance of a person’s duties, or the Attorney-General has given approval to do so.

The Department undertakes enquiries where appropriate and the Minister will consider all relevant information in determining whether to grant the assistance sought by the foreign country, including the mandatory and discretionary grounds for refusal under the *Mutual Assistance in Criminal Matters Act 1987*.

Before providing the mutual assistance requested, the Attorney-General or the Minister must consider the grounds for refusing requests that are set out in section 8 of the *Mutual Assistance in Criminal Matters Act 1987* and any grounds provided for in treaties to which Australia is a party. Under the Mutual Assistance Act, as amended by the Bill, a request for mutual assistance must be refused if, in the opinion of the Attorney-General or the Minister:

- the request relates to or there are substantial grounds for believing the request relates to the investigation, prosecution or punishment of a person for a political offence
- there are substantial grounds for believing the request was made for the purpose of investigating, prosecuting, punishing or otherwise prejudicing a person on account of his or her race, sex, religion, nationality, political opinions or sexual orientation.
- the request relates to the investigation prosecution or punishment of a person in relation to an act or omission that constitutes an offence under Australia's military law but not under Australia's ordinary criminal law
- the granting of the request would prejudice the sovereignty, security or national interest of Australia or the essential interests of an Australian State or Territory
- there are substantial grounds to believe the person will be subjected to torture, or
- the death penalty may be imposed in the foreign country, unless the Attorney-General or the Minister for Home Affairs is of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted.

A request for mutual assistance could be refused if, in the opinion of the Attorney-General or the Minister:

- the request relates to the investigation, prosecution or punishment of a person for an offence for which the person has been acquitted or pardoned by a competent foreign tribunal or authority, or has already undergone the relevant punishment ('double jeopardy').
- the request relates to the investigation, prosecution or punishment of a person for an act or omission that does not constitute an offence against Australian law ('dual criminality')
- the assistance could prejudice an Australian criminal investigation or proceeding
- the assistance would prejudice the safety of any person in or outside Australia
- the assistance would impose an excessive burden on the resources of the Commonwealth or of a State or Territory, or
- given all the circumstances of the case, the assistance requested should not be granted.

**FQ6: A number of submissions have suggested that the grounds for refusing extradition should be extended to include situations where a person may be prejudiced or persecuted because of their gender identity, ethnic origin, colour, or language. Why are these grounds not included in the legislation?**

The *Extradition Act 1988* currently includes grounds for refusing surrender if the person may be prejudiced by reason of his or her race, religion, nationality or political opinions. The Bill would insert prejudice by reason of sex or sexual orientation as additional grounds for refusing surrender.

Prejudice on the basis of gender identity, ethnic origin, colour, or language would be covered by these existing grounds for refusal or under the Minister's general discretion to refuse to extradite a person. For example, prejudice on the basis of ethnic origin, colour or language would be covered by the existing grounds for refusing surrender where a person may be prejudiced by reason of his or her race or nationality.

As the Minister stated in his second reading speech for the Bill, prejudice on the basis of other personal circumstances such as a person's gender identity, and related health and humanitarian considerations, would be taken into account under the Minister's general discretion to refuse to extradite a person.

**FQ7: Why are there no grounds in the legislation to preclude the extradition of a minor or a child under the age of 16?**

The extradition of a minor or a child under the age of 16 would be considered by the Minister under his general discretion to refuse surrender. In addition, any provisions in bilateral and multilateral treaties would be taken into consideration, including where extradition would have serious consequences because of the age of the person. The Department is not aware of any instance in which Australia has extradited a person under the age of 16.

**FQ8: Does the Department actively consider factors not required by legislation, such as whether a person will receive a fair trial, in advising the Minister in the exercise of his or her discretion?**

The Minister's discretion under s22 is unfettered and, in addition to the matters he is mandated under s22 to consider, he may also take into account any other matter in making his determination whether to surrender a person and determine the weight to be given to that matter. In considering matters under s22 the Minister will consider those matters raised by the person the subject of the extradition, in addition to other matters considered relevant such as international obligations. In providing advice to the Minister, the Department will raise any matters the Minister may wish to consider in exercising his general discretion.

*Undertakings*

**FQ9: The Australian Law Council submits that only 'formal undertakings' should be regarded as sufficient. Can you comment on this (paragraph 69 of the submission <http://www.aph.gov.au/house/committee/spla/Bill%20Extradition/subs.htm>)?**

The Federal Court in *McCrea v Minister for Justice and Customs* [2005] FCAFC 180 sets out the test for an acceptable death penalty undertaking. The test requires the Minister to be satisfied that '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.' This test is applied in considering undertakings from foreign countries.

**FQ10: Is there a process for monitoring whether undertakings given to Australia by a foreign country in relation to an extradition or mutual assistance request have been complied with?**

It is the Attorney-General's Department's longstanding experience that undertakings are respected. The Department is not aware of any case in which the terms of a diplomatic undertaking issued to Australia by a country pursuant to section 22(3)(c) of the *Extradition Act 1988* have been breached. Extradition and mutual assistance between countries is based

on reciprocity and comity. As such, any conditions imposed are likely to be honoured by the receiving country. This is due to the Government to Government nature of extradition and mutual assistance, and recognition by that country that undertakings must be respected to ensure future cooperation.

Section 9 of the MA Act provides that assistance under the Act may be provided to a foreign country subject to such conditions as the Attorney-General determines. Any information provided to foreign countries in response to mutual assistance requests is done so subject to the condition that the information will only be used for the purposes for which the foreign country requested.

Current Australian procedures ensure consular officials meet/visit imprisoned Australians annually and often more frequently. This allows Australia to monitor compliance to undertakings for these extradited persons.

The decision to monitor a non-Australian national is a matter for that person's country of citizenship. With the consent of the person, Australia can inform consular authorities of their country of citizenship of their extradition to a third country. Australia does not monitor the status of foreign nationals who have been extradited by Australia as Australia has no consular right of access to non-nationals. In addition, this would significantly alter the basis on which extraditions are conducted in terms of Australian and international practice. Attempts to monitor non-Australian nationals may be seen as infringing on the foreign country's sovereignty and criminal justice processes.

**FQ11: Is there a process for reporting to Parliament on whether undertakings in relation to extradition and mutual assistance have been breached?**

In response to Report 91 of the Joint Standing Committee on Treaties regarding Treaties between Australia and the United Arab Emirates on Extradition and Mutual Assistance in Criminal Matters, the Government will include additional information in annual reports of the Attorney-General's Department. This additional information includes information on any breaches of substantive obligations under bilateral extradition agreements noted by Australian authorities.