



SUBMISSION ON THE EXTRADITION REVIEW

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Australia has maintained a commitment to human rights through the promotion and participation in the formulation of international human rights instruments including the ICCPR, the First and Second Optional Protocol to the ICCPR, the Torture Convention, and the Refugee Convention. As such, Australia remains obligated to act in conformity with these treaty principles. Commitment to human rights is essential, and this commitment extends to Australia's interaction with the international community through its extradition processes.

In reforming the extradition system, Australia should retain all of the human rights safeguards currently in place. The Castan Centre supports the recommendations discussed in the sections regarding human rights safeguards, the death penalty, torture and double jeopardy set forth in the discussion paper.¹ In situations where there is possibility for any of those abuses to occur, Australia should not extradite an individual until it gains assurances that the individual will not face any of the aforementioned injustices. In this regard, we strongly recommend that Australia take account of reports of the receiving country's record of fulfilling its assurances. Australia is not relieved of its human rights obligations in this regard by the mere receipt of assurances from the receiving country; it must ensure that processes, such as monitoring of

¹ This is consistent with Australia's obligations under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (see specifically Article 3, CAT-No party shall expel, return or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture), The Second Optional Protocol to the ICCPR on the Abolition of the Death Penalty, as well as Article 7 ICCPR (Freedom from Torture and Rights to Humane Treatment), Article 6 ICCPR (the right to life) (see *Judge v Canada* (829/98), and Article 14(7) ICCPR (freedom from double jeopardy).

the treatment of returnees by local consulates, are put in place to ensure compliance with those assurances.²

The Castan Centre also supports a recommendation to retain the current policy regarding discrimination (and this will be necessary should the political offence exception be abolished) as well as the expansion of grounds in the Extradition Act to include colour, sex, language and other status.

Since the Castan Centre supports the recommendations mentioned above, the major part of this submission specifically addresses those issues that could change in the current system and for which no concrete recommendation has been made by the Review Team. The final part of this submission concludes with a brief response to those recommendations which the Castan Centre does not support, namely, the proposals to abolish or minimise judicial involvement at various stages of the extradition process.

General Points Regarding Human Rights Law and Extradition

Article 2(1) of the ICCPR stipulates that each State is responsible to respect and protect the ICCPR rights of persons within their jurisdiction and territory. As such, individuals that Australia wishes to extradite fall under ICCPR protections. Specifically, if a State party extradites an individual in circumstances where there is a real risk that his or her ICCPR rights will be violated in another jurisdiction, the extraditing State may itself be in violation of the ICCPR.³

States parties must not extradite a person to a State where there is a real risk of ‘irreparable harm’ to their ICCPR rights.⁴ So far, cases under the First Optional Protocol have only confirmed that irreparable harm arises when a person faces a violation of their right to life (article 6) or freedom from torture, cruel, inhuman and degrading treatment (article 7). It is uncertain whether this non-extradition duty extends beyond articles 6 and 7. Mr Solari Yrigoyen, in a separate opinion in *Judge v Canada* (829/98) (the majority not commenting),

² Note that Sweden was found to violate the CAT in *Agiza v Sweden* (CAT 233/03) even though the receiving State Egypt had given relevant assurances as there was no adequate enforcement mechanism to ensure compliance by Egypt with its guarantees.

³ See *Kindler v Canada* (470/91), paragraph 13.2

⁴ General Comment 31, ‘Nature of the General Legal Obligation on States Parties to the Covenant’, paragraph 12.

applied the non-extradition duty to a potential breach of the right to appeal in criminal trials (article 14(5)). In the same case, Mme Chanet discussed the issue without resolving it. Certainly, Australia is at risk of breaching the ICCPR if it should extradite someone thus exposing them to a real risk of breach of an ICCPR right outside of articles 6 and 7.

In any case, Australia must be mindful of its obligations under the *Refugee Convention* not to expose people to persecution on Convention grounds: persecution covers situations that fall short of breaches of articles 6 and 7 ICCPR.

Issue 9: Political Offence Exception

The political offence exception should only be abolished provided safeguards are put in place to prevent possible extradition where the request is made for the purpose of prosecuting or punishing a person on account of his or her political opinions. Political expression is protected under Article 19 of the ICCPR⁵ as well as Articles 21 (regarding freedom of assembly) and 22 (regarding freedom of association). Under Article 25, all citizens of a country have a right to participate in that country's political processes. As such, Australia is possibly under an obligation to ensure that individuals will not be extradited for political offences. Such extradition would also likely breach the *Refugee Convention* given that 'political opinion' is a ground of persecution recognized in that Convention's definition of a 'refugee'.

To fulfill such an obligation, political offence protections should be maintained under "discrimination" protections and both should be considered by the Attorney General when he or she makes the decision on whether or not to extradite. Australia should ensure that any change in its law does not diminish the protection currently offered to people who might be persecuted in other countries on the basis of their political opinion.

Issue 11: Discrimination

Australia should continue its policy of not extraditing a person sought for the purpose of prosecuting or punishing the person on account of his or her race, religion or political

⁵ See, eg, *Mpandanjila et al v Zaire* (138/83), *Kalena v Zambia* (326/88), *Jaona v Madagascar* (132/82), *Kivenmaa v Finland* (412/90), and *Aduayom et al v Togo* (422-424/90).

opinion. Discrimination, however, occurs on other grounds and the review should extend the grounds and include categories such as colour, sex, language, sexual preference, and other status. Article 2 of the ICCPR explicitly includes broader protections than those currently encompassed in Australian Extradition law and the reformed law should extend the grounds of protection to include all those covered in Article 2 of the ICCPR. In addition to protection against discrimination based on race, religion, nationality or political question, Article 2(1) of the ICCPR protects against discrimination based on colour, sex, language, political or other opinion, national or social origin, property, birth, or other status. In Optional Protocol cases, ‘other status’ has been held to include statuses such as one’s sexuality, age, and marital status.

Extraditing a person to face charges based solely on account of an individual’s race, religion, nationality or other special status would probably run contrary to Australia’s obligations under the ICCPR and, in some circumstances, the *Refugee Convention*.⁶ At the least, extradition for the purposes of discrimination would manifest a hypocritical and mala fides attitude to our human rights commitments, seeing as such extradition exposes a person to human rights abuses by the receiving State.

Importance of Maintaining Judicial Involvement

The Castan Centre does not support any recommendations directed towards abolishing or diminishing the role of the Australian judiciary and judicial bodies in the Australian extradition system. Ensuring the long term integrity of the Australian extradition system is vital and continued involvement of the Australian judiciary and judicial bodies at various stages of the extradition process is important to meeting this fundamental objective.

While the Castan Centre does not support unnecessary delays and extended time in custody, an appropriate balance must be sought to ensure that any substantive rights of the person/s, the subject of an extradition request, are not unduly compromised. Questions of unnecessary delays and lengthy periods of time in custody could be better resolved by the introduction of appropriately streamlined administrative processes, specifically designed to reduce and/or eliminate such difficulties and ensure matters are resolved in a timely fashion.

⁶ The Refugee Convention of course has a limited number of Convention grounds, and does not for example incorporate persecution on the basis of an ‘other status’, though there is some breadth in the definition of a ‘social group’.