

**EXTRADITION LEGISLATION AMENDMENT (COMMONWEALTH
COUNTRIES) REGULATIONS 2024**

EXPLANATORY STATEMENT

Issued by the authority of the Attorney-General
under section 55 of the *Extradition Act 1988*

Extradition is the process by which one country apprehends and sends a person to another country for the purposes of criminal prosecution or the imposition or service of a criminal sentence. The *Extradition Act 1988* (the Act) provides the legislative basis for extradition in Australia.

Section 55 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Under the Act, Australia can only accept extradition requests from an ‘extradition country’. Section 5 of the Act defines an ‘extradition country’ to include a country that is declared by the regulations to be an extradition country. Paragraph 11(1)(b) of the Act provides that regulations may make provision for the application of the Act in relation to a specified extradition country subject to certain limitations, conditions, exceptions or qualifications.

The London Scheme for Extradition Within the Commonwealth (the London Scheme) is a less-than-treaty status arrangement that allows members of the Commonwealth to cooperate on extradition without the need for a treaty. The *Extradition (Commonwealth countries) Regulations 2010* (the existing Regulations) give effect to Australia’s participation in the London Scheme and apply the Act to listed Commonwealth countries.

The *Extradition Legislation Amendment (Commonwealth Countries) Regulations 2024* (the Regulations) amend the definition of an ‘extradition country’ in the existing Regulations so that it no longer refers to a list of Commonwealth countries. Instead, the definition refers to a country that is a member of the Commonwealth of Nations and is not specified in any other regulations declaring it to be an extradition country for the purposes of the Act.

The amended definition also includes any country, colony, territory or protectorate specified in subregulation 5(2), which includes all British Overseas Territories. Due to the potential for

membership of the Commonwealth to change over time, this amendment ensures that Australia is able to accept extradition requests from any Commonwealth country without the need to amend the Regulations if a country leaves or joins the Commonwealth in the future.

The London Scheme enables Commonwealth countries to extradite fugitives to each other upon the presentation of an extradition request supported by prima facie evidence of the alleged offending (the prima facie standard). This evidentiary standard requires the judicial authority in the requested country to consider all evidence admissible under the law of the requested country and for the requested country to be satisfied that the case against the fugitive warrants them standing trial for the offences alleged against them. At the 1990 Commonwealth Law Ministers meeting, the Ministers agreed to modify the London Scheme in light of the evidential difficulties in extradition cases arising out of the prima facie standard. Accordingly, the London Scheme was amended to provide that a 'record of the case' standard could be implemented as an alternative to the prima facie standard. The 'record of the case' standard requires a recital of the evidence held by the requesting country in relation to the extradition offence, however does not involve an assessment of the adequacy of the evidence.

The Regulations allow Commonwealth countries to present an extradition request on the basis of the 'record of the case' standard. This approach is taken by a number of other Commonwealth countries such as Canada and Singapore. Regulation 8 modifies the application of the Act to Commonwealth countries to require additional documents to be produced during the extradition process to meet the 'record of the case' standard.

Any request for extradition which Australia may receive from a Commonwealth country under the London Scheme would be considered on a case-by-case basis, with the safeguards in the Act applying in each case. These safeguards include multiple mandatory and discretionary grounds for refusing extradition requests on the basis of human rights and other humanitarian considerations, consistent with Australia's international human rights obligations. For example, a person cannot be extradited to a foreign country if:

- they are sought for a political offence in relation to a foreign country
- they are sought for an ulterior motive

- they may be prejudiced at their trial, or punished, detained or restricted in their personal liberty if surrendered by reason of their race, sex, sexual orientation, religion, nationality or political opinions
- they are sought for an offence that is in breach of military law only
- they are sought for an offence for which they have already been acquitted or pardoned
- they are in danger of being subjected to the death penalty or torture, or
- they are prosecuted for additional offences to those specified in the extradition request.

There is also a broad discretion to refuse surrender under paragraph 22(3)(f), which allows the Attorney-General to take any relevant matter into account when making a surrender determination, including the circumstances of the case. This may include whether the individual being extradited would receive a fair trial, and whether extradition would be unjust or oppressive in light of the person's age, health and personal circumstances.

Before the Regulations were made, the Attorney-General considered the general obligation to undertake appropriate consultation pursuant to section 17 of the *Legislation Act 2003*. In developing the Regulations, the department consulted with the Department of Foreign Affairs and Trade and the Australian Federal Police. The department did not undertake public consultation as the effect of the Regulations is relatively minor in nature, and because the amendments give effect to Australia's existing participation in a longstanding international arrangement.

The Office of Impact Analysis (OIA) advised that an Impact Analysis is not required (reference number OIA24-08534).

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on the day after the instrument is registered.

The Regulations are exempt from sunseting under the *Legislation (Exemptions and Other Matters) Regulation 2015*, regulation 12, item 26. The Regulations ensure that Australia is able to consider extradition requests made under London Scheme by Commonwealth countries and are therefore designed to be enduring and not subject to regular review. All existing regulations under the Act that declare a country as an 'extradition country' are subject to this exemption.

Details of the Regulations are set out in Attachment A.

A statement of compatibility with human rights prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is at Attachment B.

Authority: Section 55 of the *Extradition Act 1988*

NOTES ON SECTIONS

Details of the *Extradition Legislation Amendment (Commonwealth Countries)*

Regulations 2024

Part 1 - Preliminary

Section 1 – Name

This section provides that the title of the Regulations is the *Extradition Legislation Amendment (Commonwealth Countries) Regulations 2024*.

Section 2 – Commencement

This section provides that the Regulations will commence on the day after the instrument is registered.

Section 3 – Authority

This section provides that the Regulations are made under the *Extradition Act 1988*.

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Extradition (Commonwealth countries) Regulations 2010

Item 1

Item 1 repeals regulation 5 of the existing Regulations and substitutes it with an expanded definition of an extradition country. The new definition replaces the reference to Schedule 1 to the existing Regulations (which contains a closed list of Commonwealth countries) with a broad definition of ‘member of the Commonwealth of Nations’ which can be verified through the Commonwealth of Nations website. This change will mean that the Regulations will not have to be updated in the future when a country either leaves or joins the Commonwealth.

This will allow Australia to cooperate with countries that join the Commonwealth in the future without the need to amend the Regulations.

The Regulations would have the effect of establishing extradition relationships with Cameroon, Gabon, Mozambique, Rwanda and Togo, as Commonwealth countries which are not currently listed in the existing Regulation.

New regulation 5(2) prescribes the British Overseas Territories as extradition countries. This preserves the status quo as these territories were listed in the existing Regulation before these amendments were made. It is necessary to specifically prescribe these territories as they are not included on the Commonwealth of Nations website.

Item 2

Item 2 repeals regulation 8 which requires Commonwealth countries seeking extradition to provide prima facie case evidence to Australia. The new regulation 8 instead requires documentation outlining a record of the case. In addition to the supporting documents set out in 19(3)(a) of the Act, Commonwealth countries will now need to provide a statement of the person's identity, nationality, physical description and whereabouts along with a recital of the evidence in support of extradition and a certificate issued by prescribed officials of a Commonwealth country.

Item 3

Item 3 inserts a transitional provision after regulation 10 which provides that the existing Regulations as in force immediately before the commencement of the *Extradition Legislation Amendment (Commonwealth Countries) Regulations 2024* continue to apply to any extradition request received by Australia from a Commonwealth country before that commencement .

Item 4

Item 4 repeals Schedule 1 of the existing Regulations which listed all of the countries to which those Regulations applied. The Schedule is no longer needed due to the expanded definition of an 'extradition country' introduced by these Regulations.

Extradition Regulations 1988

Item 5

Item 5 repeals paragraph 2B(4)(a) of the *Extradition Regulations 1988*. Paragraph 2B(4)(a) modifies the definition of ‘political offence’ under section 5 of the Act in relation to the countries listed in Schedule 1 of the existing Regulations (repealed under item 4). Paragraph 2B(4)(a) is substituted with the new definition of extradition country in regulation 5 so that the modification of ‘political offence’ will no longer apply to a prescribed list of Commonwealth countries but rather to a member of the Commonwealth of Nations.

ATTACHMENT B

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Extradition Legislation Amendment (Commonwealth Countries) Regulations 2024

2. This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

3. Extradition is the process by which one country apprehends and sends a person to another country for the purposes of criminal prosecution, or for the imposition or service of a prison sentence. The *Extradition Act 1988* (the Act) provides the legislative basis for extradition in Australia. Under the Act, Australia can make an extradition request to any country, but can only receive an extradition request from a country that is an ‘extradition country’.

4. The Act relevantly allows regulations to be made to declare a country to be an ‘extradition country’ for the purposes of the Act, and provides that the Act applies to an extradition country subject to the terms of a bilateral or multilateral treaty.

5. The *Extradition Legislation Amendment (Commonwealth Countries) Regulations 2024* (the Regulations) amend the existing Regulations to give full effect to Australia’s

participation in the London Scheme for Extradition Within the Commonwealth (the London Scheme). The Regulations do so by declaring all Commonwealth countries as extradition countries for the purposes of section 5 of the Act, and applying the Act to those countries. This ensures that Australia can accept extradition requests from all Commonwealth countries.

6. The Regulations will also allow Commonwealth countries to present an extradition request which complies with the ‘record of the case’ evidentiary standard.

Overview of the extradition process

7. Australia’s extradition process for incoming extradition requests from foreign countries (excluding New Zealand) generally comprises four stages under the Act:

1. The Attorney-General may, in his or her discretion, issue a notice in relation to an extraditable person following receipt of a request from an extradition country (section 16).
2. If a notice is issued, an application may be made for a warrant for the arrest of the extraditable person (section 12). Following arrest, the person will be brought before a magistrate or eligible Judge who will remand the person (section 15).
3. Following remand, the person can either waive (section 15A) or consent (section 18) to their extradition. If the person does not waive or consent, a magistrate or eligible Judge must determine whether the person is eligible for surrender (section 19).
4. The Attorney-General must determine whether an extraditable person should be surrendered under either section 15B (if they have waived extradition in relation to one or more of the ‘extradition offences’) or section 22 (if they have consented to extradition or been found eligible under section 19).

Stage 1: Issue of a notice (section 16)

8. Following receipt of a formal extradition request from an extradition country, the Attorney-General has discretion under section 16 of the Act to issue a notice stating that an extradition request has been received for a person for an extradition offence(s).

9. The Attorney-General must not issue a notice under section 16 unless the Attorney-General is of the opinion that the person sought is an ‘extraditable person’ in

relation to the extradition country. Pursuant to section 6 of the Act, a person is an ‘extraditable person’ where:

- either:
 - a warrant is in force for the arrest of the person in relation to an offence or offences, or
 - the person has been convicted of an offence or offences, and the requesting country intends to sentence that person, or if they have been sentenced, the whole or part of their sentence remains to be served, and
- the relevant offence, or any of the offences, is an ‘extradition offence’ in relation to the extradition country, and
- the person is believed to be outside of the country making the extradition request.

10. The decision to issue a notice under subsection 16(1) is subject to judicial review under section 39B of the *Judiciary Act 1903* and section 75(v) of the Constitution.

Stage 2: Arrest and remand (sections 12 and 15)

11. With the exception of urgent matters (e.g. where the person may have been arrested pursuant to a provisional arrest request), once a notice has been issued, the Attorney-General’s Department will apply for an extradition arrest warrant under subsection 12(1) of the Act.

12. Pursuant to subsection 12(1) of the Act, a magistrate or eligible Judge will issue a warrant if satisfied, on the basis of information given by affidavit, that the person is an extraditable person in relation to the extradition country. Section 15 requires that a person be taken before a magistrate or eligible Judge as soon as practicable following their arrest and be remanded in custody or on bail. This decision is subject to judicial review under section 39B of the *Judiciary Act 1903*.

Stage 3: Eligibility hearing before a magistrate or eligible Judge (section 19)

13. If a person does not elect to waive the extradition process under section 15A or consent to their surrender under section 18 of the Act, a magistrate or eligible Judge shall

determine whether the person is eligible for surrender under section 19 of the Act. Pursuant to that section, a person is only eligible for surrender if:

- the necessary supporting documents (as set out in subsection 19(3)) are produced,
- where the regulations state that the Act applies subject to a limitation, condition, exception or qualification that requires the production of additional documentation, that the additional documentation is produced,
- the magistrate or eligible Judge is satisfied that the conduct would constitute an ‘extradition offence’ in both countries (known as ‘dual criminality’), and
- the magistrate or eligible Judge is satisfied there are no substantial grounds for believing there is an ‘extradition objection’ in relation to the extradition offence.

14. An ‘extradition offence’ is defined in section 5 of the Act to mean:

- in relation to a country other than Australia, an offence against a law of the country for which the maximum penalty is death or imprisonment, or other deprivation of liberty, for a period of not less than 12 months (or, if the offence does not carry a penalty under the law of the country, the conduct is required to be treated as an offence for which the surrender of persons is permitted by the country and Australia under a relevant extradition treaty), or
- in relation to Australia or part of Australia, an offence against a law of Australia, or law in force in the part of Australia, for which the maximum penalty is death or imprisonment, or other deprivation of liberty, for a period of not less than 12 months.

15. An ‘extradition objection’ is defined in section 7 of the Act and arises where:

- the extradition offence is a political offence in relation to the extradition country,
- the person is actually sought for the purpose of prosecuting or punishing the person on account of his or her race, sex, sexual orientation, religion, nationality or political opinions or for a political offence in relation to the extradition country,
- the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, sex, sexual orientation, religion, nationality or political opinions,

- the conduct constituting the offence for which the person is sought constitutes a military offence in Australia, but not an ordinary criminal offence, or
- the person has been acquitted or pardoned by a competent tribunal or authority in the extradition country or Australia, or has undergone the punishment provided by the law of that country or Australia, in respect of the extradition offence or another offence constituted by the same conduct as constitutes the extradition offence (i.e. protection from double jeopardy).

16. Pursuant to section 21 of the Act, either the person who is the subject of the extradition request or the extradition country may apply to the Federal Court of Australia for a review of the magistrate or eligible Judge's finding on eligibility. The Federal Court's decision may be further appealed to the Full Court of the Federal Court of Australia and the High Court of Australia.

17. The person who is the subject of the extradition request may also seek judicial review of an eligibility decision under section 39B of the *Judiciary Act 1903*.

Stage 4: Attorney-General's surrender determination (section 15B or section 22)

18. The fourth stage requires the Attorney-General to determine whether the person should be surrendered under either section 15B of the Act (if the person has waived the extradition process in relation to one or more extradition offences) or section 22 of the Act (if the person has consented to extradition or has been found eligible by a magistrate or eligible Judge under section 19).

19. In accordance with the principles of procedural fairness, the person who is the subject of the extradition request is given an opportunity to make representations to the Attorney-General regarding any matters, human rights or otherwise, prior to the Attorney-General making a surrender determination under sections 15B or 22 of the Act. A person can seek a review of the Attorney-General's surrender determination under section 39B of the *Judiciary Act 1903* and section 75(v) of the Constitution.

20. Subsection 22(3) of the Act provides that a person is only to be surrendered in relation to an extradition offence if:

- the Attorney-General is satisfied that there is no extradition objection (as set out above at paragraph 19) in relation to the relevant offence,

- the Attorney-General does not have substantial grounds for believing that, if the person were surrendered to the extradition country, the person would be in danger of being subjected to torture,
- where the offence is punishable by death, an undertaking is given by the extradition country to Australia that the person will not be tried for the offence, or if tried, the death penalty will not be imposed, or if imposed, will not be carried out,
- the extradition country has given a speciality assurance in relation to the person pursuant to subsection 22(4),
- where regulations made under section 11 of the Act give effect to a mandatory or discretionary limitation, condition, qualification or exception relating to surrender, the Attorney-General is satisfied that those circumstances do not exist (in the case of mandatory limitations, conditions, qualifications or exceptions), or if they exist (in the case of discretionary limitations, conditions, qualifications or exceptions), that the surrender of the person should nevertheless not be refused, and
- the Attorney-General, in his or her discretion, does not consider that the person should be surrendered.

21. In relation to paragraph 22(3)(f), the Federal Court of Australia has held that this general discretion ‘is unfettered, and the Minister may, in the exercise of the discretion, take into account any matters, or no matters, provided that the discretion is exercised in good faith and consistently with the objects, scope and purpose of the [Extradition] Act.’¹

22. Where a person elects to waive the extradition process, section 15B sets out that the Attorney-General may only surrender the person if:

- the Attorney-General does not have substantial grounds for believing that the person would be in danger of being subjected to torture if surrendered to the extradition country, and

¹ *Rivera v Minister for Justice and Customs* (2007) 160 FCR 115, 119 [14] (Emmett J, with whom Conti J agreed). This position has been subsequently affirmed by the Full Court of the Federal Court of Australia: *Snedden v Minister for Justice (Cth) & Anor* (2014) 145 ALD 273, 297 [150] (Middleton and Wigney JJ).

- the Attorney-General is satisfied that there is no real risk that the death penalty would be carried out on the person in relation to any offence should they be surrendered to the extradition country.

23. Paragraph 11(1)(b) of the Act allows regulations to be made that apply the Act to a specified extradition country subject to limitations, conditions, exceptions or qualifications. In this case, Regulation 8 of the existing Regulations provides that the Act applies in relation to a Commonwealth country. This means that the Act applies to all extradition requests received from a Commonwealth country, but may be modified where necessary for a limitation, condition, exception or qualification to apply to the terms of the Act as stipulated in the Regulations. This would only operate in circumstances where the Act would apply in a manner that is inconsistent with the Regulations.

Human rights implications

24. The evolving nature of, and increased threats posed by, transnational crime require a robust and responsive extradition system that allows Australia to assist other countries to respond to offending, while ensuring appropriate safeguards apply. It is important to ensure that criminals cannot evade justice simply by crossing borders.

25. The Act and the Regulations which apply the Act to requests made under the London Scheme for Extradition Within the Commonwealth (the London Scheme) engage, or have the potential to engage, human rights and freedoms under the *International Covenant on Civil and Political Rights* [1980] ATS 23 (ICCPR) and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* [1989] ATS 21 (CAT), namely:

- the right to life (Article 6 of the ICCPR)
- the prohibition against torture and other cruel, inhuman or degrading treatment or punishment (Article 3 of the CAT and Article 7 of the ICCPR)
- rights to freedom from arbitrary detention (Article 9 of the ICCPR)
- rights regarding the expulsion of aliens (Article 13 of the ICCPR)
- fair trial and fair hearing rights, and minimum guarantees in criminal proceedings (Article 14 of the ICCPR)

- rights of equality and non-discrimination (Articles 2(1) and 26 of the ICCPR), and
- the right to privacy (Article 17 of the ICCPR).

26. The Act contains several human rights safeguards that the Attorney-General must take into account when determining whether to make a surrender determination (see above paragraphs 19, and that a magistrate or eligible Judge must take into account when determining a person's eligibility for surrender (see above paragraphs 13 and 15 on dual criminality and 'extradition objections'). Additionally, the Attorney-General's absolute discretion to refuse an extradition request under paragraph 22(3)(f) (see above paragraph 21) provides a further safeguard for the Attorney-General to take into account the specific circumstances of the extraditable person and other factors on a case-by-case basis. These safeguards will continue to apply to all extradition requests made by under the London Scheme by Commonwealth countries.

27. Each of the human rights and freedoms that may be engaged by the Act and the Regulations, and specific safeguards for these rights, are discussed below.

The right to life

28. Article 6 of the ICCPR provides that every human being has the inherent right to life and shall not be deprived of life arbitrarily. This Article requires State parties to protect this right by law.

29. The Act and the Regulations have the potential to engage the right to life in circumstances where an extradition request relates to an offence which carries the death penalty under the law of the requesting Commonwealth country.

30. The Act contains a number of safeguards that reflect, and are consistent with, the Australian Government's obligations under the ICCPR to protect the right to life as well as Australia's long-standing opposition to the death penalty.

31. Paragraph 22(3)(c) of the Act provides that the Attorney-General is only able to make a surrender determination in circumstances where the offence is punishable by a penalty of death if an undertaking has been provided that either the person will not be tried for that offence; or if tried, the death penalty will not be imposed; or, if the death penalty is imposed, it will not be carried out.

32. Paragraph 15B(3)(b) of the Act also provides a safeguard in circumstances where a person elects to waive the extradition process, by stipulating that the Attorney-General may only make a surrender determination where the Attorney-General is satisfied that there is no real risk that the death penalty will be carried out on the person in relation to any offence should they be surrendered to the extradition country.

33. The use of death penalty undertakings is a well-established tool in international extradition. It is the Australian Government's long-standing experience that undertakings in relation to the death penalty in extradition cases have always been honoured. Undertakings are written government assurances and a breach of an undertaking would have serious consequences for both Australia's extradition relationship and broader bilateral relationship with the relevant foreign country.

34. The Full Federal Court decision in *McCrea v Minister for Justice and Customs*² sets out the test for an acceptable death penalty undertaking for the purposes of paragraph 22(3)(c). The test requires that the Attorney-General 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'.³ Therefore, the Attorney-General must be satisfied in *both form and substance* that the undertaking provided means that the death penalty will not be carried out if the person were to be surrendered. Where an undertaking does not provide satisfaction in both form and substance, the requirements of paragraph 22(3)(c) of the Act would not be met and the Attorney-General must refuse the request.

35. Breach of an undertaking may also have reputational consequences and negatively impact the relevant foreign country's law enforcement relationship with other countries. The Attorney-General considers the reliability of any death penalty undertaking on a case by case basis.

36. Given the public nature of extradition, the Australian Government would most likely be made aware of a breach of a death penalty undertaking. The Attorney-General's Department has provided information on extradition matters in its annual reports to Parliament since the establishment of the Act, including whether there have been any

² (2005) 145 FCR 269.

³ Ibid, 275.

breaches of undertakings by a foreign country in relation to a person extradited from Australia. No significant breaches have been recorded to date.⁴

37. Australia also monitors Australian citizens who have been extradited through its consular network, in accordance with the Vienna Convention on Consular Relations. Following recommendations made in JSCOT's 2018 Report 177, since 2018-19, the Attorney-General's Department also includes de-identified statistical information in its annual report in relation to Australian nationals extradited by Australia, including, where available:

- whether a trial has taken place
- where a trial has taken place, information on the verdict handed down
- if a sentence was imposed, what the sentence was, and
- the total number of extradited Australian nationals who are currently receiving consular assistance.

38. The Act and the Regulations do not limit, and are therefore consistent with, the right to life under the ICCPR.

Prohibition against torture, and other cruel, inhuman or degrading treatment or punishment

39. Article 3 of the CAT establishes *non-refoulement* obligations prohibiting States from returning a person to a country where there are substantial grounds for believing that the person would be in danger of being subjected to torture. In addition, Article 7 of the ICCPR provides that no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment (CIDTP). It is widely accepted that Article 7 of the ICCPR includes implied *non-refoulement* obligations in relation to torture and CIDTP. Freedom from torture and CIDTP is an absolute right, which cannot be limited or qualified under any circumstance.

⁴ Only one potential breach of an undertaking has been reported over the last decade since reporting began. During the 2012-13 reporting period, Australia became aware that a person surrendered to the United Kingdom (UK) in April 2012 had been sentenced for an additional minor offence, when the UK had provided an undertaking that the person would not be detained or tried for an offence other than the offence for which the person was surrendered. The UK brought the matter back before the court and the conviction for the additional offence was set aside in July 2013, before the person had served any part of the sentence for that conviction.

40. The Act and the Regulations have the potential to engage the prohibition against torture and CIDTP in circumstances where a person would be in danger of being subjected to torture or CIDTP if surrendered to the requesting party.

Torture

41. Article 3 of the CAT prohibits the extradition of a person to a State where there are substantial grounds for believing that the person would be in danger of being subjected to torture, and requires that decision-makers take into account all relevant considerations when determining whether there are such grounds. Article 7 of the ICCPR relevantly provides that no one shall be subjected to torture.

42. Paragraphs 15B(3)(a) and 22(3)(b) of the Act provide that the Attorney-General may only surrender a person if (amongst other things) the Attorney-General does not have substantial grounds for believing that, if the person were surrendered, they would be in danger of being subjected to torture. This requirement in the Act is consistent with Article 3 of the CAT and Article 7 of the ICCPR.

43. Further, for the purposes of determining whether to surrender under section 15B or subsection 22(3) of the Act, the Attorney-General may consider all material reasonably available to assist in determining whether the person may be subjected to torture. This may include relevant international legal obligations, any representations or assurances from the requesting country, country-specific information, reports prepared by government or non-government sources, information provided through the diplomatic network and those matters raised by the person who is the subject of the extradition request. Therefore, the decision on whether to surrender a person is made by the Attorney-General on a case-by-case basis, in accordance with the safeguards in the Act which are in line with Australia's international obligations, including those in Article 3 of the CAT and Article 7 of the ICCPR.

CIDTP

44. Australia also has non-refoulement obligations under Article 7 of the ICCPR in relation to CIDTP. Safeguards in the Act, in particular the Attorney-General's general discretion under subsection 15B(2) and paragraph 22(3)(f) of the Act, provides a basis to refuse extradition where the Attorney-General has concerns based on CIDTP considerations.

The Attorney-General makes surrender determinations on a case-by-case basis in accordance with the safeguards in the Act, and in line with Australia's international legal obligations.

45. Further, the person who is the subject of an extradition request may seek judicial review under section 39B of the *Judiciary Act 1903* and section 75(v) of the Constitution of the Attorney-General's surrender determination made under sections 15B and 22 of the Act.

46. The Act and the Regulations do not limit the prohibition on torture and CIDTP, and are consistent with Australia's obligation not to return (*refouler*) a person to a country where there are substantial grounds for believing that the person would be in danger of being subjected to torture or CIDTP under Article 3 of the CAT and Article 7 of the ICCPR.

The right to freedom from arbitrary detention

47. Article 9(1) of the ICCPR protects the right to freedom from arbitrary detention and states that no one shall be deprived of their liberty except on such grounds and in accordance with such procedure as are established by law. Further, Article 9(4) of the ICCPR imposes an obligation on States to ensure that persons who are arrested and detained are entitled to take proceedings before a court to decide the lawfulness of their detention.

48. The only permissible limitations on the rights to liberty are those provided for in Article 9 itself, namely that deprivations are permitted, but only 'in accordance with procedures as are established by law', provided that the law itself and the enforcement of it are not arbitrary.

49. The presumption against bail for persons who are the subject of an incoming extradition request has the potential to engage the right to freedom from arbitrary detention.

50. The test for whether detention is arbitrary under Article 9(1) of the ICCPR is whether, in all the circumstances, detention is reasonable, necessary and proportionate to the end that is sought.⁵ Factors relevant to assessing whether detention is arbitrary include the existence of avenues of review on the appropriateness of detention, as well as whether less intrusive alternatives to detention have been considered.⁶

⁵ See, for example *A v Australia*, Communication No 560/1993, Views adopted 30 April 1997, UN Doc CCPR/C/59/D/560/1993, paragraph 9.2.

⁶ *Bakhtiyari v Australia*, Communication No. 1069/2002, Views adopted 29 October 2003, UN Doc CCPR/C/79/D/1069/2002, paragraphs 9.2-9.4.

51. Extradition detention is provided for under law in section 15 of the Act which requires the remand of a person, either in custody or on bail, following their arrest pursuant to an extradition request. Subsections 15(2) and 15(6) of the Act provide for a person to be remanded on bail where there are ‘special circumstances’ justifying such a remand. Bail is also available as a statutory right at various stages of the extradition process, and the same ‘special circumstances’ test applies to the granting of bail at the stage of a consent hearing (subsection 18(2)), a surrender eligibility hearing (subsection 19(9)), the review of a surrender eligibility decision (subsections 21(2) and (6)) or during the review of a surrender determination (section 49C).

52. Decisions on the granting of bail under the Act are decided on a case-by-case basis, in view of the individual’s particular circumstances. The ‘special circumstances’ test has been interpreted by the High Court of Australia as comprising two stages.⁷ First, the person seeking bail must establish that ‘special circumstances’ exist. In order to constitute ‘special circumstances’, the matters relied on need to be ‘different from the circumstances that persons facing extradition would ordinarily endure.’⁸ Second, the person must also establish that there is no real risk of flight. Where these two conditions are satisfied, there remains a general discretion for the magistrate or eligible Judge, or court to which a review application or appeal is made, to consider whether to grant bail based on the circumstances of the matter.⁹

53. To the extent that the test for bail, and by extension the Act and the Regulations, may limit the right to freedom from arbitrary detention, such limitation is aimed at a legitimate objective, being to:

- achieve the purposes of Australia’s extradition legislative and policy framework, namely to facilitate the apprehension and surrender of individuals for the purposes of criminal prosecution or to serve a prison sentence,
- give effect to Australia’s treaty obligations under international law and promote international comity between states, and

⁷ *United Mexican States v Cabal* (2001) 209 CLR 165 at 191 [61] (Gleeson CJ, McHugh and Gummow JJ) (*‘Cabal’*).

⁸ *Ibid.*

⁹ *Ibid.*, 191-191 [62] (Gleeson CJ, McHugh and Gummow JJ).

- ensure that Australia is a reliable partner in international crime cooperation.

54. There is a rational connection between any limitation on the right to freedom from arbitrary detention and the legitimate objective, and any limitation is reasonable, necessary and proportionate, as outlined below.

55. The limitation is reasonable as the requirement to remand a person in custody unless there are ‘special circumstances’ is provided for under law. The ‘special circumstances’ test is clearly defined in case law and is applied by decision-makers on a case-by-case basis, where the decision-maker is required to carefully consider whether the circumstances relied upon by a person, either individually or in combination, meet the test. Notwithstanding the nature of the ‘special circumstances’ test, bail is available as a statutory right at various stages of the extradition process¹⁰ and applicants can and do successfully obtain bail in Australia during the extradition process.

56. Factors arising in individual cases that have been held to amount to ‘special circumstances’ under the Act include:

- extensive physical or mental health issues that could not properly be managed in custody,¹¹
- advanced age and health conditions,¹²
- the need for critical, whole-of-family treatment in order to treat a childhood illness,¹³

¹⁰ In addition to the statutory rights to bail under the Act, the Australian Government recognises that the Federal Court of Australia has the power to grant bail in the context of proceedings for judicial review of an extradition decision under section 39B of the *Judiciary Act 1903*. This power arises by virtue of section 23 of the *Federal Court Act 1976* (as confirmed in *Adamas v The Hon Brendan O'Connor (No 3)* [2012] FCA 365, [16]-[17] (Gilmour J)). Further, the High Court of Australia has the power to grant bail in extradition proceedings as an incident of its appellate jurisdiction granted by section 73 of the Constitution (as confirmed in *Cabal*, 182-183 [44] (Gleeson CJ, McHugh and Gummow JJ)).

¹¹ Unreported – *Smiglewski v Republic of Poland*; Unreported – *Lichtanska v The Republic of Poland*; Unreported – *Renshaw v United Kingdom*.

¹² *Zentai v Republic of Hungary* [2009] FCA 511; *Kalejs v Minister for Justice and Customs and Another* (2001) 111 FCR 442; Unreported – *Cassidy v The United Kingdom*; Unreported – *Renshaw v United Kingdom*.

¹³ Unreported – *Paul Thompson v United States of America*.

- specific skills requiring the person to be present at their workplace, family ties and guarantees of court attendance, and unlikelihood of receiving a custodial sentence for the alleged offences,¹⁴ and
- carer responsibility for a family member when no other person can fulfil the role in the circumstances and provide the required support.¹⁵

57. The limitation is necessary as the ‘special circumstances’ test for bail upholds Australia’s international obligations to secure the return of alleged offenders to face justice, given the serious flight risk posed in many extradition matters.

58. The High Court of Australia has recognised that Australia has a ‘very substantial’ interest in surrendering persons subject to an extradition request in accordance with its treaty obligations, and has clarified that granting bail where a risk of flight exists may jeopardise both Australia’s crime cooperation relationship with the requesting country and broader standing in the international community.¹⁶ This differentiates extradition proceedings from Australian criminal prosecutions. Australia’s extradition process is administrative in nature and the High Court has affirmed that extradition forms no part of the Australian criminal justice system.¹⁷

59. The limitation is also proportionate because the ‘special circumstances’ test for bail is applied by a magistrate or eligible Judge, or by the court to which a review application or appeal is made (as relevant), on a case-by-case basis according to merit. The case-by-case nature of these decisions, as well as the established review mechanisms, render any limitations on the rights reasonable, necessary and proportionate to the overall legitimate objective of facilitating the apprehension and surrender of individuals for the purposes of criminal prosecution or to serve a prison sentence in another country, upholding Australia’s international legal obligations and ultimately combatting serious transnational crime.

60. Article 9(4) of the ICCPR imposes an obligation on States to ensure that persons who are arrested and detained are entitled to take proceedings before a court to decide the

¹⁴ *United States of America v Green* (2009) 257 ALR 252.

¹⁵ Unreported – *Cassidy v The United Kingdom*.

¹⁶ *Cabal*, 189-190 [57]-[59] (Gleeson CJ, McHugh and Gummow JJ).

¹⁷ *Vasiljkovic v Commonwealth of Australia* (2006) 227 CLR 614 at [33]-[34] (Gleeson CJ), [58] (Gummow and Hayne JJ).

lawfulness of their detention. Any review of the lawfulness of detention must be real and not merely formal. Consistent with Article 9(4) of the ICCPR, a person may seek judicial review of a decision of a magistrate or eligible Judge to refuse bail under section 39B of the *Judiciary Act 1903*. There is also an ability to appeal any such judicial review decision. Further, persons held in extradition custody may also seek judicial review of the lawfulness of their detention at any time by applying for a writ of *habeas corpus*.

61. While the extradition process, and therefore extradition custody, is not limited by set time periods, the Attorney-General is required to make surrender decisions under the Act as soon as reasonably practicable.¹⁸ This enables the Attorney-General to appropriately consider all relevant information and properly afford procedural fairness throughout the process. The extradition process itself, or general remedies available in Australian law, presently allow for an individual to challenge the length of time taken at each stage of the extradition process. While proceedings are on foot to determine eligibility for surrender, or any review or appeal of such a finding, it is open to an individual, as a party to the proceedings, to raise an issue regarding the time taken for the matter to be resolved. In addition, it is also open to an individual awaiting a surrender determination to compel the making of that determination by seeking the issue of a writ of mandamus (where the person considers that it is ‘reasonably practicable’ for that decision to have been made). Finally, subject to any judicial review application that a person may initiate, the Act requires that an individual be surrendered to a foreign country within two months following the Attorney-General’s surrender decision. Accordingly, there are existing mechanisms as part of the extradition process, or available at general law, to ensure that the extradition process progresses in a timely manner.

62. The Act and the Regulations are therefore consistent with the right to freedom from arbitrary detention in Article 9 of the ICCPR. To the extent that the Act and the Regulations may limit these rights, any limitation is reasonable, necessary and proportionate to achieve the legitimate objectives of the Act and Australia’s extradition regime.

Expulsion of aliens

63. Article 13 of the ICCPR provides that State Parties must observe certain procedural rights in the case of expulsion of non-citizens lawfully within the State’s territory. Article 13 is applicable to all procedures intended for the obligatory departure of an alien lawfully in the

¹⁸ See the Act, ss 15B(2), 22(2).

territory of the State, whether described in domestic law as expulsion or otherwise.¹⁹

Article 13 directly regulates the procedure of an expulsion, not the substantive grounds for expulsion.²⁰ Although extradition is an entirely distinct process from deportation, the term ‘expulsion’ in Article 13 is understood broadly, and may therefore apply to extradition procedures.

64. The Act and the Regulations have the potential to engage this right where the person subject to an extradition request is a non-citizen lawfully within Australian territory.

65. Article 13 provides that the decision to expel must be made in accordance in accordance with law, and that lawful non-citizens have the right to have their cases reviewed by competent authorities. All decisions on extradition in Australia are governed by the process provided for in the Act, and involve multiple stages at which judicial review may be sought of decisions made. The definition of an ‘extraditable person’ under section 6 of the Act does not make a distinction between Australian citizens and non-citizens. The process for decision-making, mechanisms for procedural fairness and process for review of decisions in Australia’s extradition regime apply regardless of citizenship status.

66. The Act and the Regulations do not limit, and are therefore consistent with, the provision on expulsion of aliens in the ICCPR.

Fair trial rights and minimum guarantees in criminal proceedings

67. Article 14(1) of the ICCPR provides that all persons shall be equal before the courts and tribunals and, in the determination of criminal charges or in a suit at law, shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Article 14 of the ICCPR also sets out a number of specific minimum guarantees in criminal proceedings including the prohibition against double jeopardy in Article 14(7).

68. The Act and the Regulations have the potential to engage fair trial rights and rights to minimum guarantees in criminal proceedings where a person is extradited in circumstances where there is a real risk of a denial of fair trial rights in the country to which the individual is to be extradited. However, it is the Australian Government’s view that Article 14 of the

¹⁹ Human Rights Committee, *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, UN HRC, 27th sess, UN Doc HRI/GEN/1/Rev.9 (11 April 1986), para 9.

²⁰ *Ibid*, para 9-10.

ICCPR does not extend to an obligation not to return a person to a country where they face a real risk of an unfair trial which could breach the obligations under Article 14. In other words, the Australian Government considers that Article 14 does not contain *non-refoulement* obligations and therefore is not engaged in the context of Australia potentially surrendering a person to another country under the Act.

69. Nevertheless, there are a range of protections under the Act which afford fair trial protections.

70. Subsection 15B(2) and paragraph 22(3)(f) of the Act give the Attorney-General a general discretion to refuse surrender, which enables the Attorney-General to consider fair trial or other human rights concerns. This includes whether an extradited individual would have access to a fair trial or whether to surrender a person convicted *in absentia* (and whether a person tried *in absentia* will have an opportunity to be retried). Relevant considerations may also include the extent to which an individual would receive (or has received) appropriate procedural guarantees in a criminal trial (or re-trial) in the country to which he or she is being extradited.

71. Further, it is open to the Attorney-General to request assurances from the requesting country relating to the treatment and conditions applying to a person upon extradition where the Attorney-General has concerns regarding a person's ability to receive a fair trial and be afforded minimum guarantees in criminal proceedings. Assurances could include that the trial be conducted in person and be held in open court, that the person has access to legal representation, that the person has an opportunity to test the evidence against them or that the person will be imprisoned in particular jails. As a matter of procedural fairness, the Attorney-General would also consider any information put to him by the individual subject to the extradition request, and any representations or assurances provided by the requesting country. The Attorney-General may also consider country-specific information, reports prepared by government or non-government sources and information provided through the diplomatic network.

72. Section 7(e) of the Act also includes double jeopardy in the definition of an 'extradition objection'. This has the practical effect of preventing:

- a finding by a magistrate or eligible Judge under section 19 that a person is eligible for surrender (pursuant to paragraph 19(2)(d)), or

- the Attorney-General making a surrender determination under section 22 (pursuant to paragraph 22(3)(a)),

in circumstances where a person has been acquitted or pardoned by a competent tribunal or authority in the extradition country or Australia, or has undergone the punishment provided by the law of that country or Australia, in respect of the extradition offence or another offence constituted by the same conduct as constitutes the extradition offence.

73. It is also open to the person who is the subject of an extradition request to seek review of a magistrate or eligible Judge's surrender eligibility decision under section 21 of the Act or seek judicial review under section 39B of the *Judiciary Act 1903* of administrative decisions at relevant stages of the extradition process, including a surrender determination by the Attorney-General.

74. The Act and the Regulations do not limit, and operate consistently with, the fair trial rights and minimum guarantees in criminal proceedings provided under Article 14 of the ICCPR.

Extradition hearings in Australia

75. The guarantee to a fair and public hearing by a competent, independent and impartial tribunal under Article 14(1) of the ICCPR is not engaged in relation to extradition proceedings in Australia. The United Nations Human Rights Committee has noted in its General Comment No. 32 that the right to a fair hearing by a court or tribunal does not apply to extradition proceedings (amongst other types of proceedings) as, in these circumstances, there is no determination of criminal charges nor presence of a suit at law.²¹ This reflects the fact that extradition is not a criminal process or trial. Rather, it is an administrative process to determine whether a person is to be surrendered to face justice in the Requesting Party.

76. Nonetheless, the United Nations Human Rights Committee has noted that other procedural guarantees may apply in these circumstances.²² These include judicial review by

²¹ Human Rights Committee, *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, UN HRC, 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007), para 17.

²² Ibid, para 62.

an independent and impartial tribunal and, in these circumstances, guarantees of impartiality, fairness and equality as enshrined in the first sentence of Article 14(1) of the ICCPR.²³

77. The availability of judicial review under section 39B of the *Judiciary Act* 1903 and section 75(v) of the Constitution at various stages of the extradition process satisfies this requirement. Further, the subject of an extradition request may seek statutory merits review of a magistrate or eligible Judge's surrender eligibility decision under section 21 of the Act.

78. Extradition hearings in Australia are therefore compatible with the relevant procedural guarantees under Article 14(1) of the ICCPR.

The rights of equality and non-discrimination

79. Article 2(1) of the ICCPR provides that State parties undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the ICCPR, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 of the ICCPR further provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, a State party's law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

80. The Act and the Regulations have the potential to engage the rights of equality and non-discrimination in circumstances where an extradition request is made to Australia for the purposes of prosecuting or punishing a person on account of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, or where a person may be prejudiced in the requesting country as a result of these personal attributes.

81. The Act contains important safeguards to protect rights of equality and non-discrimination. Section 7 of the Act contains the definition of an 'extradition objection'.

²³ See Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary*, ed William A. Schabas (N.P. Engel, 2019), 362-363; *Griffiths v Australia*, Communication No. 1973/2010, Views adopted 21 October 2012, UN Doc CCPR/C/112/D/1973/2010, paragraph 6.5.

Relevantly, sections 7(b) and 7(c) set out that there is an extradition objection in relation to an extradition offence for which a person's surrender is sought if:

- the person is actually sought for the purpose of prosecuting or punishing the person on account of his or her race, sex, sexual orientation, religion, nationality or political opinions; or
- the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, sex, sexual orientation, religion, nationality or political opinions.

82. The presence of an extradition objection, including on the grounds listed above, has the practical effect of preventing both a finding by a magistrate or eligible Judge that a person is eligible for surrender pursuant to paragraph 19(2)(d), and a surrender determination by the Attorney-General pursuant to paragraph 22(3)(a) in those circumstances.

83. The attributes listed in the Act go beyond the personal attributes listed in the United Nations Model Extradition Treaty (which are limited to race, religion, ethnic origin, political opinions, sex or status).

84. The Attorney-General may also take into account other considerations relating to discrimination under the general discretion in paragraph 22(3)(f) of the Act when considering whether to make a surrender determination. This could include factors not expressly listed in section 7(b) and 7(c), including age, health or other personal circumstances. Further, any person subject to extradition has an opportunity to make representations to the Attorney-General regarding all of the protected attributes in Article 26 of the ICCPR before he or she makes a surrender determination, so that any such matters can be taken into consideration before reaching a decision.

85. The Act and the Regulations are therefore consistent with the rights of equality and non-discrimination in Articles 2(1) and 26 of the ICCPR.

The right to privacy

86. Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person's privacy. Collecting, using, storing, disclosing or publishing personal information amounts to an interference with privacy. In order for the interference with privacy not to be 'unlawful', it

must be provided by law. In order for the interference with privacy to not be ‘arbitrary’, it must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable, necessary and proportionate in the particular circumstances.²⁴

87. The Act and the Regulations have the potential to engage the right to privacy. Section 5 of the Act sets out that an extradition request must be in writing and subsection 19(2) details the supporting documents that must be provided by the extradition country in order for a person to be found eligible for surrender. Further, extradition requests are likely to contain a number of personal details relating to the person sought by the extradition country, including those necessary to establish the identity and nationality of the person sought. The collection, use or disclosure of this personal information may therefore interfere with the right to privacy.

88. However, the Regulations satisfy the requirement that any interference be lawful. They are also non-arbitrary, in that they are reasonable, necessary and proportionate to achieving the legitimate objective to facilitate the apprehension and surrender of individuals for the purposes of criminal prosecution or to serve a prison sentence in another country. The collection, use or disclosure of personal information in these circumstances supports efforts to combat domestic and transnational crime and prevent Australia from becoming a safe haven for persons accused or convicted of serious crimes in other countries. The collection, use or disclosure of personal information is therefore a reasonable and necessary part of Australia’s extradition regime.

89. The Act provides safeguards to protect the confidentiality of the information shared during the extradition process. Section 54A of the Act provides that the collection, use or disclosure of personal information about an individual is taken to be authorised by the Act for the purposes of the *Privacy Act 1988* if it is reasonably necessary for the purposes of the extradition of individuals to or from Australia, including making or considering whether to make, an extradition request.

90. This safeguard ensures that a person’s information will not be disseminated further than is necessary or for purposes beyond those intended to be achieved under the Act. Therefore, any limitations under the Act or the Regulations on the right to privacy in Article

²⁴ UN Human Rights Committee, *CCPR General Comment No. 16: Article 17*, Adopted at the Thirty-second Session of the Human Rights Committee, 8 April 1998, [3]-[4].

17 of the ICCPR are necessary to achieve the legitimate objective to facilitate the apprehension and surrender of individuals for the purposes of criminal prosecution or serving a sentence, and ultimately combat serious transnational crime. The safeguards in the Act to ensure confidentiality of personal information render any limitations on the right to privacy proportionate to this overall objective.

91. Therefore, the Act and the Regulations are consistent with the right to privacy in Article 17 of the ICCPR. To the extent that the Act and the Regulations may limit this right, any limitation is reasonable, necessary and proportionate to achieve the legitimate objectives of the Act and Australia's extradition regime.

Conclusion

92. The Act and the Regulations are compatible with the human rights and freedoms outlined above. Although the Act and the Regulations engage with, and may operate to limit, some human rights and freedoms, the protections and safeguards in the Act ensure that any such limitations are reasonable, necessary and proportionate to achieving the legitimate objective of facilitating the apprehension and surrender of individuals for the purposes of criminal prosecution or to serve a prison sentence in another country, and ultimately combatting serious crime.