Stephen Tully
Barrister-at-Law

6
St James' Hall
169 Phillip Street
Sydney NSW 2000, DX 328
t: (02) 9236 8610
f: (02) 9221 8686
e: stully@stjames.net.au

Mr Christof Heyns
Special Rapporteur on extrajudicial,
summary or arbitrary executions
By email: eje@ohchr.org

Mr Juan Ernesto Mendez
Special Rapporteur on torture and other cruel
inhuman or degrading treatment or punishment
By email: sr-torture@ohchr.org

National Institutions and Regional Mechanisms Section
Office of the United Nations High Commissioner for Human Rights
By email: nationalinstitutions@ohchr.org

14 March 2016

Dear all,

Re: Current inquiry into Australia-China Extradition Treaty and Australia's human rights obligations

I wish to draw your attention to an inquiry currently being conducted by the Australian Parliament, and, as it falls within your respective mandates, to encourage you to make a submission or provide information to that inquiry.

The Joint Standing Committee on Treaties (**the Committee**) inquires into and reports on matters arising from treaties including proposed treaty actions presented to the Australian Parliament. On 1 March 2016 the *Treaty on Extradition between Australia and The People's Republic of China* (Sydney, 6 September 2007) (**the extradition treaty**) was referred to that Committee for consideration. The Committee has invited interested persons and organisations to make submissions to it by 25 March 2016.

The Committee's terms of reference for this inquiry and additional information are available at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/2_March_2016. The submission requirements (which are not onerous) are specified at http://www.aph.gov.au/Parliamentary_Business/Committees/House/Making_a_submission.

This inquiry is of particular interest to your respective mandates and methods of work. A submission from you or the provision of information to the Committee would enable you to:

- enter into and further a constructive dialogue with governments
- monitor the implementation of existing international human rights law standards in Australia
- comprehensively study trends, developments and challenges about capital punishment and torture
- enhance your formulation of observations and recommendations to the Human Rights Council, governments and other actors on appropriate measures to prevent and eradicate such practices
- fulfil your objective to seek, receive, examine and act on information from governments, individuals and others on issues raised by your mandate, and
- cooperate with United Nations (**UN**) bodies, national human rights institutions, civil society and others.

Background Information

Australia is a State party to the *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty* [1991] ATS 19 (New York, 15 December 1989) (entry into force for Australia and generally on 11 July 1991).

The extradition treaty is **attached.** It has been signed but not ratified by Australia, and so is not yet in force. This treaty includes the following provisions:

> Article 3
> Mandatory Grounds for Refusal
> Extradition shall be refused if:
> ...
> (f) in accordance with the law of the Requesting Party, the person sought may be sentenced to death for the offence for which the extradition is requested, unless the Requesting Party undertakes that the death penalty will not be imposed or, if imposed, will not be carried out;
> (g) the Requested Party has substantial grounds for believing the person sought has been or will be subjected to torture or other cruel, inhuman or humiliating treatment or punishment in the Requesting Party;
> ...

Relevant extracts from the *Extradition Act 1988* (Cth) are found below. The complete version is available at http://www.austlii.edu.au/au/legis/cth/consol_act/ea1988149/.

With respect to the *Extradition Act 1988* (Cth), the UN Human Rights Committee commented in 2009 as follows:

> 20. The Committee notes with concern the residual power of the Attorney-General, in ill-defined circumstances, to allow the extradition of a person to a state where he or she may face the death penalty, as well as the lack of a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state, in violation of the State party's obligation under the Second Optional Protocol.
> The State party should take the necessary legislative and other steps to ensure that no person is extradited to a state where he or she may face the death penalty, as well as

whereby it does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another state, and revoke the residual power of the Attorney-General in this regard.
(Human Rights Committee, Consideration of Reports submitted by States Parties under Article 40 of the Covenant, Concluding observations on Australia, 95th sess, Geneva, 16 March - 3 April 2009, UN Doc CCPR/C/AUS/CO/5 (2009))

In 2011 Australia accepted this recommendation:

86. The following recommendations will be examined by Australia which will provide responses in due time, but no later than the seventeenth session of the Human Rights Council in June 2011:
...
86.34. Implement the observations of the Human Rights Committee by adopting the necessary legislation to ensure that no one is extradited to a State where they would be in danger of the death penalty (France);
...
(Human Rights Council, Report of the Working Group on the Universal Periodic Review for Australia, 17th sess, UN Doc A/HRC/17/10 (2011))

In 2015 Australia indicated the following during its Universal Periodic Review:

97. Australia's extradition regime is governed by the requirements in the Extradition Act 1988. When deciding whether to surrender a person who has been found eligible for extradition, the Attorney-General must refuse to extradite a person where the offence is punishable by the death penalty, unless an undertaking is provided that the death penalty will not be imposed, or if imposed, not carried out. In cases where a person elects to waive extradition, the Attorney-General must be satisfied that on return to the requesting country there is no real risk that the death penalty will be carried out upon the person in relation to any offence.
(Human Rights Council, National report of Australia submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, Working Group on the Universal Periodic Review, 23rd sess, 2–13 November 2015, UN Doc A/HRC/WG.6/23/AUS/1 (2015))

Potential application of the death penalty

Article 3 of the extradition treaty contemplates an undertaking from the Requesting Party. However, the value of diplomatic assurances or undertakings between States is questionable, particularly where individuals are being extradited to States where they are at risk of extrajudicial, summary or arbitrary execution, or torture and other cruel inhuman or degrading treatment or punishment. In the event of a violation of international human rights standards, the international legal responsibility of a Requested Party can be engaged.

Undertakings have been criticised by a number of prominent human rights bodies, as illustrated in the following extracts:

(a) the UN Human Rights Committee:

(i) *Kwok v Australia*, Communication No 1442/2005, UN Doc CCPR/C/97/D/1442/2005 (2009):

7.4 The State party submits that seeking assurances would be a permissible option in this case. There is no prohibition on an abolitionist state removing a person to a state that maintains the death penalty where there is no real risk of it being applied. The seeking of diplomatic assurances is common international practice and necessary in cases of extraction

or removal where the State assesses that there is a risk that the death penalty might be imposed. The State party refers to the principle that if there is a real risk that the death penalty may be applied in a given case, a State cannot remove the person "unless the Government, which has requested the extradition, provides a legally binding assurance not to execute the person". The State party is of the view that the same principle applies to removals and refers to the Committee's jurisprudence. The State party submits that a legally binding assurance is one given by the part of the government or the judiciary that would usually have the responsibility of carrying out the act or enforcing the assurance. The State party does not consider that there is a real risk that the author will face the death penalty if returned to China. However, if it should form the view that the death penalty would be imposed upon her, the government would seek assurances that she not face the death penalty were it to remove her to China.

9.6 The Committee observes that the State party does not contest the assertion that the author's husband has been convicted and sentenced to death for corruption, and that the warrant issued by the Chinese authorities for the author's arrest relates to her involvement in the same set of circumstances. The RRT itself, on 4 November 2004, while making no finding on the author's guilt or innocence, rejected the contention that the charges against her are contrived. The Committee reiterates that it is not necessary to prove, as suggested by the State party, that the author "will" be sentenced to death (para. 4.2) but that there is a "real risk" that the death penalty will be imposed on her. It does not accept the State party's apparent assumption that a person would have to be sentenced to death to prove a "real risk" of a violation of the right to life. It also notes that it is not made out from a review of the judgements available to the Committee, albeit incomplete, of the judicial and immigration instances seized of the case that arguments were heard as to whether the author's deportation to the People's Republic of China would expose her to a real risk of a violation of article 6 of the Covenant.

9.7 The Committee notes that the State party does not contest the author's claims that she is at risk of having an unfair trial if she were to be returned to the Peoples' Republic of China but merely argues that it's non-refoulement obligations do not extend to article 14 violations (paragraph 4.5). However, the Committee is obliged to give due weight to her argument of such a risk, as well as the fact that the author's spouse has apparently been sentenced to death for "accepting bribes" (paragraph 2.8) and that a warrant has been issued for her own arrest for similar offences (paragraphs 2.2 and 2.6). The Committee is also cognizant of the anxiety and distress that would be caused by her being exposed to such a risk. For all of the above reasons and while recognizing the State party's assertion (paragraph 7.1) that it currently has no plans to remove her from Australia, the Committee considers that an enforced return of the author to the Peoples' Republic of China, without adequate assurances, would constitute violations by Australia, as a State party which has abolished the death penalty, of the author's rights under article 6 and article 7 of the Covenant.

11. Pursuant to article 2, paragraph 3 (a) of the Covenant, the Committee concludes that the author is entitled to an appropriate remedy to include protection from removal to the People's Republic of China without adequate assurances as well as adequate compensation for the length of the detention to which the author was subjected.

(ii) *Mohammed Alzery v Sweden*, Communication No 1416/2005, UN Doc CCPR/C/88/D/1416/2005 (2006):

11.3 The first substantive issue before the Committee is whether the author's expulsion from Sweden to Egypt exposed him to a real risk of torture or other ill-treatment in the receiving State, in breach of the prohibition on refoulement contained in article 7 of the Covenant. In determining the risk of such treatment in the present case, the Committee must consider all relevant elements, including the general situation of human rights in a State. The existence of diplomatic assurances, their content and the existence and implementation of enforcement mechanisms are all factual elements relevant to the overall determination of whether, in fact, a real risk of proscribed ill-treatment exists.

11.4 The Committee notes that, in the present case, the State party itself has conceded that there was a risk of ill-treatment that – without more – would have prevented the expulsion of the author consistent with its international human rights obligations (see supra, at para 3.6). The State party in fact relied on the diplomatic assurances alone for its belief that the risk of

proscribed ill-treatment was sufficiently reduced to avoid breaching the prohibition on refoulement.
11.5 The Committee notes that the assurances procured contained no mechanism for monitoring of their enforcement. Nor were any arrangements made outside the text of the assurances themselves which would have provided for effective implementation. The visits by the State party's ambassador and staff commenced five weeks after the return, neglecting altogether a period of maximum exposure to risk of harm. The mechanics of the visits that did take place, moreover, failed to conform to key aspects of international good practice by not insisting on private access to the detainee and inclusion of appropriate medical and forensic expertise, even after substantial allegations of ill-treatment emerged. In light of these factors, the State party has not shown that the diplomatic assurances procured were in fact sufficient in the present case to eliminate the risk of ill-treatment to a level consistent with the requirements of article 7 of the Covenant. The author's expulsion thus amounted to a violation of article 7 of the Covenant.

(b) the UN Committee against Torture:

(i) *Agiza v Sweden*, Communication No 233/2003, UN Doc CAT/C/34/D/233/2003 (2005):

[13.4] It follows that the State party's expulsion of the complainant was in breach of article 3 of the Convention. The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.

(c) the European Court of Human Rights:

(i) *Chahal v United Kingdom* (Application No 22414/93) [1996] ECHR 54:

105. Although the Court does not doubt the good faith of the Indian Government in providing the assurances mentioned above (paragraph 92), it would appear that, despite the efforts of that Government, the NHRC and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem (see paragraph 104 above).
Against this background, the Court is not persuaded that the above assurances would provide Mr Chahal with an adequate guarantee of safety.

(ii) *Saadi v Italy* (Application No 37201/06) [2008] ECHR 179:

147. The Court further notes that on 29 May 2007, while the present application was pending before it, the Italian Government asked the Tunisian Government, through the Italian embassy in Tunis, for diplomatic assurances that the applicant would not be subjected to treatment contrary to Article 3 of the Convention (see paragraphs 51 and 52 above). However, the Tunisian authorities did not provide such assurances. At first they merely stated that they were prepared to accept the transfer to Tunisia of Tunisians detained abroad (see paragraph 54 above). It was only in a second note verbale, dated 10 July 2007 (that is, the day before the Grand Chamber hearing), that the Tunisian Ministry of Foreign Affairs observed that Tunisian laws guaranteed prisoners' rights and that Tunisia had acceded to "the relevant international treaties and conventions" (see paragraph 55 above). In that connection, the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.
148. Furthermore, it should be pointed out that even if, as they did not do in the present case, the Tunisian authorities had given the diplomatic assurances requested by Italy, that would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be

> protected against the risk of treatment prohibited by the Convention (see Chahal, cited above, § 105). The weight to be given to assurances from the receiving State depends, in each case, on the circumstances obtaining at the material time.
> 149. Consequently, the decision to deport the applicant to Tunisia would breach Article 3 of the Convention if it were enforced.

In sum, an undertaking does not relieve a Requested Party of its international human rights obligations. The Special Rapporteur on extrajudicial, summary or arbitrary execution has noted that, where the death penalty is imposed in violation of international standards, such collaboration or assistance may amount to complicity and should lead to indirect legal or other responsibility on the part of the assisting party (Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, submitted in accordance with General Assembly resolution 65/208.A/65/275 (2012), [68]).

Furthermore, under Australian law, an undertaking not to impose the death penalty does not have to be legally enforceable.

In *McCrea v Minister for Justice and Customs* [2005] FCAFC 180; (2005) 145 FCR 269, the Federal Court of Australia distinguished the question whether an undertaking was sufficient and effective for the purpose of s 22(3)(c) of the *Extradition Act 1988* (Cth) (extracted below) from the question whether it was legally enforceable in the ordinary sense. The Court reasoned that:

> 18 The appellant's contention that the assurance offered by the Government of Singapore was not an "undertaking" of the character required by s 22(3)(c) must be rejected.
> 19 As noted, it was no part of the appellant's case that the assurance was not in fact given by the Government of Singapore or that it would not in fact be honoured. The appellant's case ultimately comes down to the simple proposition that unless the undertaking is legally enforceable either domestically or internationally (the argument focused upon the legal effect of the undertaking under the law of Singapore) it cannot be an undertaking " by virtue of which" the penalty of death would not be carried out. Absent such a requirement the undertaking in question here can readily be seen as one "by virtue of which" the penalty would not be carried out; that is its evident purpose and the primary judge had no doubt that it would be effective for that purpose.
> 20 The difficulty with the appellant's argument is that the undertaking provided for by s 22(3)(c) is to be given by one country to another in the context of reciprocal international obligations. Undertakings of such a character are not ordinarily (if at all) enforceable in a domestic court or internationally. No mechanism for enforcement is provided or even suggested in the Act. Moreover, the very concept of an "undertaking" involves an obligation that is deliberate and serious but not necessarily legally enforceable.
> 21 The subject matter points to the same conclusion. When s 22(3)(c) speaks of an offence "punishable by a penalty of death" and of "the death penalty [being] imposed on the person" it must be taken to be referring to a penalty provided for and imposed by law. Whilst in common law countries following broadly either the Westminster or United States models of representative government, the exercise of the prerogative of mercy or executive clemency may lawfully result in a penalty imposed by law not being carried out, that is not (at least ordinarily) attributable to any legally enforceable obligation to exercise clemency. An "undertaking" by the executive government of such a country "by virtue of which" if the death penalty is imposed upon a person it will not be carried out, is a concept that can readily be understood as having practical content, notwithstanding that it involves no legally enforceable obligation. Specifically, an undertaking by Australia that a death penalty imposed under a Commonwealth law at a time when such a penalty was provided for, could readily be understood as being an undertaking "by virtue of which" the penalty would not be carried out, notwithstanding that such an undertaking to another country would not (conventionally) involve any legally enforceable obligation. Such an undertaking is no less understandable

> when it is given now to Australia by a country that is an extradition country for the purposes of the Act.
> 22 The language and scheme of the other provisions of the Act also point to a distinction between an undertaking as something that is not of its nature necessarily legally enforceable and obligations that are. By reason of s 22(3)(d) the giving of a specialty assurance is a prerequisite for extradition but in defining the circumstances in which such an assurance shall be taken to have been given, s 22(4) refers separately and sequentially to circumstances existing by virtue of "a provision of the law of a country", "a provision of an extradition treaty in relation to the country" and "an undertaking given by the country to Australia." The expression "by virtue of" introduces all three paragraphs, notwithstanding their quite different content. When the provision refers to a state of affairs existing "by virtue of...a provision in an extradition treaty" it should not be taken to refer to domestically enforceable rights since this would greatly reduce its effectiveness for, in many extradition countries, provisions of treaties do not give rise to domestically enforceable rights. There is no reason to suppose that when the same introductory expression "by virtue of" is used in relation to an undertaking it bears a meaning that embraces domestically enforceable rights or that the use of "undertaking" in that context embraces such rights.
> 23 It was argued that s 22(4) should be put to one side, since it is in truth a definition provision. We disagree that its character deprives it of value for present purposes, but in any event precisely the same approach is adopted in the substantive provisions of s 25(2)(a) which concern the issue of a surrender warrant after temporary surrender under s 24 (and see also s 25(2)(b) in relation to the death penalty).
> 24 This is sufficient to dispose of the appeal since the only ground of challenge to the Minister's decision concerned the enforceability of the undertaking: see [6] above. Given the importance of the provision considered in this appeal, however, we should nevertheless indicate that we do not presently accept as necessarily correct one aspect of the learned primary judge's decision or the submissions of the Solicitor-General in supporting that aspect.
> 25 It does not follow from the conclusion that a legally enforceable undertaking is not needed that the requirements of s 22(3)(c) will be satisfied merely by the giving of an undertaking that follows the language of the provision and which has been made by a person with appropriate authority. An evident object of s 22(3)(c) is to provide a safeguard against the carrying out of the death penalty upon a person extradited from 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. It would seem unlikely that the object of the provision was intended to be achieved only by the favourable (to the person accused) exercise of the discretion conferred by s 22(3)(f).

McCrea has since been considered and applied (for example, in *Rivera v Minister for Justice and Customs* [2006] FCA 1784 and [2007] FCAFC 123; see also [2007] HCATrans 623).

The approach is generally consistent with that of Mason J in *Barton v Commonwealth* [1974] HCA 20; (1974) 131 CLR 477, where His Honour said at 503:

> 37 And in many instances the municipal law will leave to the decision of the executive the question whether the condition is satisfied or whether the diplomatic assurance given by the requesting state is adequate - see Shearer, pp. 31-33; *In re Zahabian* (1963) 32 Int LR 290.

I hope these details are helpful and encourage you to contribute to the Committee's deliberations.

The prohibition against torture

Section 22(3)(b) of the *Extradition Act 1988* (Cth) implements Australia's obligations under Article 3(1) of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment [1989] ATS 21 (**CAT**):

> No State Party shall expel, return ('refouler') 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.

Article 3 was considered by the Federal Court of Australia in *Santhirarajah v Attorney-General for the Commonwealth of Australia* [2012] FCA 940 as follows:

> 267 The legal advice to the Attorney-General explained that the standard of proof involved in the phrase "substantial grounds for believing" adopted by Australia in the construction of Art 3 was as follows:
>
> > Pursuant to the non-refoulement obligation under Article 3 of CAT, Australia is precluded from surrendering a person to a foreign country where there are substantial grounds for believing that the person the subject of extradition would face a 'real' or 'foreseeable' risk of being subjected to torture. The risk of torture must be one that is personally faced by the individual. It is not sufficient that the risk pertains to all persons due to the prevailing circumstances in a particular country at a particular time. Whilst the risk of torture must go 'beyond mere theory or suspicion', it does not need to be 'highly probable.'

It would be useful to assess Article 3 of the extradition treaty in light of Australia's approach to Article 3 of CAT and its obligations under international human rights law.

Additional Information

The Australian Parliament's Joint Standing Committee on Foreign Affairs, Defence and Trade has also been asked to inquire into and report on Australia's Advocacy for the Abolition of the Death Penalty. The terms of reference, submissions and other information are available at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/Death_Penalty. The Chair of that Committee invited the UN Office of the High Commissioner for Human Rights to provide insights on Australia's efforts: see Submission No 49, Geneva, October 2015. Although the deadline for submissions has now passed, public hearings are now underway.

Please do not hesitate to contact me if you need any further information.

Yours faithfully,

Copied: Committee Secretary
Joint Standing Committee on Treaties
Canberra ACT 2600 Australia
By email: jsct@aph.gov.au

Attached: Treaty on Extradition between Australia and The People's Republic of China (Sydney, 6 September 2007)

Selected provisions from the *Extradition Act 1988* (Cth) (emphasis added).

15B. Attorney-General must make surrender determination

(1) This section applies if a magistrate or eligible Federal Circuit Court Judge has advised the Attorney-General under paragraph 15A(4)(b) that a person wishes to waive extradition in relation to one or more extradition offences.

(2) The Attorney-General must, as soon as is reasonably practicable, having regard to all the circumstances, determine whether or not the person is to be surrendered to the extradition country concerned in relation to the extradition offences.

(3) The Attorney-General may only determine that the person be surrendered to the extradition country concerned if:

(a) 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 ; and

(b) the Attorney-General is satisfied that, on surrender to the extradition country, there is no real risk that the death penalty will be carried out upon the person in relation to any offence.

(4) If the Attorney-General determines that the person is not to be surrendered, the Attorney-General must, by notice in writing in the statutory form, direct a magistrate or eligible Federal Circuit Court Judge to order the release of the person from custody.

22. Surrender determination by Attorney-General

(1) In this section:

"eligible person" means a person who has been committed to prison or released on bail:

(a) by order of a magistrate or eligible Federal Circuit Court Judge made under section 18; or

(b) by order made under subsection 19(9) or 21(2A) (including because of an appeal referred to in section 21), where no proceedings under section 21 are being conducted or are available in relation to the determination under subsection 19(9) to which the order relates.

"qualifying extradition offence", in relation to an eligible person, means the following:

(a) if paragraph (a) of the definition of eligible person applies--any extradition offence in relation to which the person consented in accordance with section 18;

(b) if paragraph (b) of the definition of eligible person applies--any extradition offence in relation to which:

(i) the magistrate or Judge who made the order under subsection 19(9); or

(ii) the court that conducted the final proceedings under section 21; determined that the person was eligible for surrender within the meaning of subsection 19(2);

(c) in any case--any extradition offence in relation to which the person has consented in accordance with section 19A.

(2) The Attorney-General shall, as soon as is reasonably practicable, having regard to the circumstances, after a person becomes an eligible person, determine whether the person is to be surrendered in relation to a qualifying extradition offence or qualifying extradition offences.

(3) For the purposes of subsection (2), the eligible person is only to be surrendered in relation to a qualifying extradition offence if:

(a) the Attorney-General is satisfied that there is no extradition objection in relation to the offence; and

(b) 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 ; and

(c) where the offence is punishable by a penalty of death--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 on the person;

(iii) if the death penalty is imposed on the person, it will not be carried out; and

(d) the extradition country concerned has given a speciality assurance in relation to the person; and

(e) where, because of section 11, this Act applies in relation to the extradition country subject to a limitation, condition, qualification or exception that has the effect that:

(i) surrender of the person in relation to the offence shall be refused; or

(ii) surrender of the person in relation to the offence may be refused; in certain circumstances--the Attorney-General is satisfied:

(iii) where subparagraph (i) applies--that the circumstances do not exist; or

(iv) where subparagraph (ii) applies--either that the circumstances do not exist or that they do exist but that nevertheless surrender of the person in relation to the offence should not be refused; and

(f) the Attorney-General, in his or her discretion, considers that the person should be surrendered in relation to the offence.

(4) For the purposes of paragraph (3)(d), the extradition country shall be taken to have given a speciality assurance in relation to the eligible person if, by virtue of:

(a) a provision of the law of the country; or

(b) a provision of an extradition treaty in relation to the country; or

(c) an undertaking given by the country to Australia;

the eligible person, after being surrendered to the country, will not, unless the eligible person has left or had the opportunity of leaving the country:

(d) be detained or tried in the country for any offence that is alleged to have been committed, or was committed, before the eligible person's surrender other than:

(i) any surrender offence; or

(ii) any offence (being an offence for which the penalty is the same or is a shorter maximum period of imprisonment or other deprivation of liberty) of which the eligible person could be convicted on proof of the conduct constituting any surrender offence; or

(iii) any extradition offence in relation to the country (not being an offence for which the country sought the surrender of the eligible person in proceedings under section 19) in respect of which the Attorney-General consents to the eligible person being so detained or tried; or

(e) be detained in the country for the purpose of being surrendered to another country for trial or punishment for any offence that is alleged to have been committed, or was committed, before the eligible person's surrender to the first-mentioned country, other than any offence in respect of which the Attorney-General consents to the eligible person being so detained and surrendered.

(5) Where the Attorney-General determines under subsection (2) that the eligible person is not to be surrendered to the extradition country in relation to any qualifying extradition offence, the Attorney-General must, by notice in writing:

(a) if the person has been committed to prison—direct a magistrate or eligible Federal Circuit Court Judge to order the release of the person; or

(b) if the person has been released on bail—direct a magistrate or eligible Federal Circuit Court Judge to order the discharge of the recognisances on which bail was granted.

(6) If a determination under subsection (2) is made in writing, the determination is not a legislative instrument.

(7) An order made under subsection (5) is not a legislative instrument.

25. Surrender warrants after temporary surrender

(1) Where:

(a) a person is surrendered to an extradition country under a temporary surrender warrant;

(b) the person is returned to Australia in pursuance of undertakings referred to in subparagraph 24(1)(d)(ii); and

(c) the extradition country still seeks the surrender of the person;

subject to subsection (2), the Attorney-General may, in his or her discretion, issue a warrant for the surrender of the person to the extradition country under this subsection.

(2) If the temporary surrender warrant referred to in paragraph (1)(a) was issued after the Attorney-General determined under subsection 22(2) that the person was to be surrendered, the Attorney-General shall not issue a surrender warrant under subsection (1) unless:

(a) by virtue of:

(i) a provision of the law of the extradition country; or

(ii) a provision of an extradition treaty in relation to the extradition country; or

(iii) an undertaking given by the extradition country to Australia;

the person, if surrendered to the extradition country, will not, unless the person has left or had the opportunity of leaving the country:

(iv) be detained or tried in that country for any offence that is alleged to have been committed, or was committed, before the person's surrender under the temporary surrender warrant referred to in paragraph (1)(a), other than any offence to which subparagraph 22(4)(d)(i), (ii) or (iii) applies; or

(v) be detained in the country for the purpose of being surrendered to another country for trial or punishment for any offence that is alleged to have been committed, or was committed, before the person's surrender to the first-mentioned country under the temporary surrender warrant, other than any offence in respect of which the Attorney-

General consents to the person being so detained and surrendered; and

(ba) 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 ; and

(b) where any surrender offence in relation to the person is punishable by a penalty of death--if the person is surrendered in respect of that offence, then, by virtue of an undertaking given by the extradition country to Australia, one of the following is applicable:

(i) except where there is only one such offence--the person will not be tried for that offence;

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

(iii) if the death penalty is imposed or was imposed while the person was surrendered under the temporary surrender warrant--it will not be carried out.

(3) If the temporary surrender warrant referred to in paragraph (1)(a) was issued after the Attorney-General determined under subsection 15B(2) that the person was to be surrendered, the Attorney-General may only issue a surrender warrant under subsection (1) if:

(a) 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; and

(b) the Attorney-General is satisfied that, on surrender to the extradition country, there is no real risk that the death penalty will be carried out upon the person in relation to any offence.