

**JOINT STANDING COMMITTEE ON TREATIES**

**INQUIRY INTO  
AUSTRALIA'S EXTRADITION LAW,  
POLICY AND PRACTICE**

**SUBMISSION BY  
THE ATTORNEY-GENERAL'S DEPARTMENT**



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## EXECUTIVE SUMMARY

The function of extradition is to ensure that persons accused of criminal offences are unable to use international borders to avoid being brought to justice. In seeking to achieve this outcome a number of sometimes conflicting concerns must be taken into account, including:

- mediating between the differing legal systems of the parties;
- preserving human rights;
- establishing a relationship of reciprocity;
- maintaining a wide range of working extradition relations; and
- respecting the right of each party to determine the guilt or innocence of fugitives over which it properly has jurisdiction.

2. The essential steps in the extradition process in Australia are:

- arrest and remand of the fugitive;
- receipt of the formal extradition request and issue by the Minister of an authority to proceed;
- a hearing before a magistrate to determine whether the fugitive is eligible for extradition (unless the fugitive gives informed consent to waive the hearing), subject to appeal as far as the High Court;
- surrender determination by the Minister, subject to review by way of prerogative writ; and
- surrender of the fugitive, including temporary surrender for trial where appropriate.

Extradition to New Zealand operates on a simple “backing of warrants” system in which all decisions are taken by the courts and there is little or no Ministerial role.

3. The law of extradition is essentially statute-based. From the late 19th century until 1966 extradition between Australia and other parts of the British Empire and Commonwealth and with the rest of the world was governed by British legislation and treaties implemented under that legislation. Some of these treaties are still in force for Australia. They all include a list of extraditable offences (as opposed to the flexible dual criminality approach now favoured) and require the other party to establish a *prima facie* case against a fugitive it seeks to have extradited from Australia. Within the Empire there were two levels of extradition procedure; the default system had some similarities to extradition with foreign States (but lacked provision for refusal of extradition on political grounds) while a simple “backing of warrants” system operated within designated groups of colonies.

4. In 1966 the Commonwealth adopted the London Scheme, a non-treaty arrangement under which members would enact legislation to enable them to extradite to each other in accordance with agreed principles. In line with the independent status of Commonwealth countries, grounds of refusal based on human rights and political considerations were agreed but the list of extraditable offences and the requirement for a *prima facie* case remained. Australia immediately enacted legislation to give effect to the London Scheme and to put in place a similar regime under which Australia could negotiate and implement its own extradition treaties with non-Commonwealth countries. A small number of treaties were negotiated during the 1970s.

5. In 1985, in response to concerns about Australia's capacity to deal with the growing problem of transnational organised crime and problems experienced in seeking to negotiate extradition treaties with European civil law countries, significant modifications were made to Australia's extradition legislation. An option was introduced to agree to a "no evidence" procedure in lieu of the traditional requirement for a *prima facie* case and the list of extraditable offences was replaced by the flexible double criminality requirement. The legislation was consolidated into a single Act in 1988. Under the 1988 Act "no evidence" procedure was the default extradition regime and it has been the preferred procedure under Australia's extradition policy ever since.

6. Australia seeks to negotiate extradition treaties on the basis of a model treaty adopted in the mid-1980s which incorporates the "no evidence" procedure and the flexible dual criminality approach. Australia's extradition relations take four forms:

- bilateral treaties, including modern treaties negotiated by Australia and treaties inherited from the United Kingdom;
- non-treaty relations with Commonwealth countries under the London Scheme;
- non-treaty relations with non-Commonwealth countries based on understandings of reciprocity;
- extradition provisions in multilateral treaties on specific classes of crime.

In each case (except inherited treaties, the operation of which the Act expressly preserves) the relationship must be implemented by regulations made under the 1988 Act. Treaties must be consistent with the 1988 Act. The bulk of Australia's bilateral treaties are with the countries of Western Europe and the Americas. Some significant countries are excluded for human rights reasons.

7. The adoption of the "no evidence" procedure as a preferred alternative to the "*prima facie* case" procedure in 1985 has been the single most significant development in Australia's extradition law and policy. It has facilitated entry into extradition treaties with civil law countries, which have always had difficulties with the *prima facie* case because it is alien to their criminal justice system. The "no evidence" procedure is now embodied in 30 signed treaties.

8. It has been suggested that perhaps Australia should have retained the requirement to establish a *prima facie* case. This procedure requires provision of evidence in first

person affidavit form which is both sufficient and admissible under Australian law. The requirement for preparation of evidence in an unfamiliar form not required for domestic purposes is a significant burden for civil law countries seeking extradition. In complex cases even common law countries can find the requirements onerous, e.g. because of differences in rules on admissibility of evidence. The result is a high rate of failure of requests on formal rather than substantive grounds. While it is often argued that the *prima facie* case protects against extradition on ill-founded or false charges and is a right under common law, successive Australian Governments have taken the view that modern extradition treaties incorporate a range of safeguards (going well beyond the traditional “political offence” exception) which give the fugitive better protection against a malicious prosecution than does the *prima facie* case. Moreover, it is clear that a return to the “*prima facie* case” requirement would result in the termination of many of Australia’s treaties with civil law countries.

9. The “no evidence” procedure requires provision, in lieu of *prima facie* evidence, of a detailed statement of alleged acts and omissions. The statement must clearly establish dual criminality and in practice will be carefully scrutinised by Australian courts. The justifications for use of this procedure are that:

- (as the United Kingdom has also concluded) it is the only way to establish an effective extradition relationship with many civil law countries; and
- Australia should, and does, only enter into extradition treaties with countries in whose criminal justice systems it has sufficient confidence to let them make the final determination of guilt or innocence.

10. It has been suggested that an alternative evidentiary requirement might be imposed in place of the *prima facie* case. Possibilities would include:

- the “probable cause” test favoured by the United States, i.e. reasonable grounds to believe the fugitive guilty, with few restrictions on admissibility of evidence in support of the charge;
- the “record of the case” procedure devised by the Commonwealth as an alternative to the full *prima facie* case requirement, i.e. a detailed summary of the available evidence accompanied by a certificate from the Attorney-General of the requesting country that the evidence constitutes a *prima facie* case in that country, which can be assessed by a court in the requested country to determine whether there would be sufficient evidence to constitute a *prima facie* case there, ignoring questions of admissibility; or
- a requirement to provide reasonable grounds to suspect the fugitive guilty, with authority for a magistrate to disregard the rules of evidence

11. All of these tests would be preferable to the *prima facie* case and might be welcomed by some common law countries. However, it is unlikely that any would prove widely acceptable to civil law countries. An attempt to substitute any of these tests for the “no evidence” procedure could be expected to result in the loss of many of our treaties with civil law countries, bearing in mind the fact that some find our requirements under the “no evidence” procedure unduly strict.

12. Internationally, there has been collective support for simplification of extradition processes and some movement towards the “no evidence” model but change has been slow. A return by Australia to an evidentiary requirement would be counterproductive in terms of international law enforcement co-operation.

13. Australia’s current extradition arrangements are a mixture of “*prima facie* case” and “no evidence” procedures. It is an anomaly that extradition to most of Australia’s fellow common law countries is subject to a stricter test than is extradition to civil law countries. However, this reflects the bilateral nature of extradition relations. Australia is not in a position to impose uniform requirements if it wants to maximise the cover of its network of extradition partnerships, unless it is prepared to abandon insistence on reciprocity and apply the “no evidence” procedure to all its extradition partners.

14. Until 1999 there was a special requirement that any country seeking extradition of a person for a war crime alleged to have been committed in Europe during World War II establish a *prima facie* case against the person. This requirement was abolished by amending legislation with broad parliamentary support. The Department considers such special tests undesirable because they create complications for Australia’s extradition treaties and they are not logically defensible.

15. The re-imposition of an evidentiary requirement for extradition from Australia would be likely to result some disruption to our network of extradition treaties. The scale of the disruption would depend on the extent of the evidentiary requirement. The introduction of any such change would require renegotiation of a significant provision in most of our treaties. Unilateral reinterpretation is not a realistic option.

16. S. 19 (5) of the Extradition Act prevents the fugitive from adducing evidence at the extradition hearing to rebut the requesting country’s allegations. This position is consistent with that in the United States and Canada. While there is no similar rule in the United Kingdom, such defence evidence is generally given little weight there either, as it is accepted throughout the common law world that the extradition hearing is not a trial of the guilt or innocence of the fugitive. In Australia the fugitive is entitled to adduce evidence at the extradition hearing on a wide range of safeguard issues. In addition, if the fugitive has evidence which casts serious doubt on the allegations made by the requesting country (as opposed to merely revealing a dispute as to the facts), the Minister can take this into account in making the surrender decision.

17. Civil law countries generally refuse to extradite their nationals. Common law countries are generally willing to extradite their nationals. This reflects a fundamental difference in approach to jurisdiction and to evidentiary issues. Civil law countries claim jurisdiction over their nationals wherever they are located and their inquisitorial system of criminal procedure makes it easier for them to conduct a trial in relation to conduct which occurred outside their territory. In common law countries jurisdiction is fundamentally territorial (despite increasing statutory provision for extra-territorial jurisdiction in relation to particular types of crime) and the confrontational system of trial with its detailed rules of evidence requiring the direct participation of witnesses is ill-adapted to prosecutions for extra-territorial conduct.

18. Despite international encouragement for a more relaxed attitude to extradition of nationals, there has been little change in recent years in the position of States on this issue. While the present situation lacks reciprocity and can be ineffective in some cases, it is the only practicable way of ensuring that fugitives are effectively brought to justice as the laws governing domestic criminal procedure currently stand. This situation would not be improved by a decision that Australia would not extradite its own nationals. As technological developments make it increasingly practicable for witnesses to participate in foreign legal proceedings by video link it is possible that this position will change, but the legal changes needed to complement these development will impact significantly on State sovereignty and so are likely to be slow in eventuating.

19. It has been suggested that special evidentiary requirements might be imposed for the extradition of Australian nationals. The Department is of the view that a non-discriminatory approach is preferable and that Australian nationals should not receive special protection of this sort. If there is reason to expect prejudice on grounds of the fugitive's nationality, extradition should be refused whether or not the fugitive is an Australian national.

20. The removal of the "*prima facie* case" requirement has shifted the balance in extradition proceedings away from the courts and towards the executive. However, the shift is in effect limited because the case must still be judged by a court in the requesting country and the Minister's decisions are reviewable in the Australian courts. Moreover, the change is not only justified, but also necessary in order to maintain effective extradition relations with a significant part of the civil law world.

## BACKGROUND TO EXTRADITION

### 1. Introductory Overview

#### 1.1 *General considerations*

1.1.1 Extradition is the surrender by one country to another of a person accused or convicted of a criminal offence falling within the jurisdiction of the courts of the requesting country. It is a function of the executive government, although there is a degree of court involvement in the process.

1.1.2 In Australia, under the provisions of the *Extradition Act 1988* (“the Extradition Act” or “the 1988 Act”), extradition is the responsibility of the Attorney-General. In practice, under the current arrangements for the shared administration of the Attorney-General’s portfolio, decisions in relation to extradition requests are normally made by the Minister for Justice and Customs. Accordingly, the person performing the functions assigned to the Attorney in the Extradition Act is referred to in this submission as “the Minister”.

1.1.3 Extradition is fundamentally about international law enforcement co-operation. It reflects the concern of the international community that international boundaries should not allow offenders to evade criminal justice. Professor Ivan Shearer in 1971 noted that “a majority of nations in the world community have come to look upon extradition as the major effective instrument in international co-operation in the suppression of crime”<sup>1</sup>. Since then international bodies and conferences concerned with terrorism, the drug trade and other transnational criminal activities have constantly reiterated the need for a network of effective bilateral extradition treaties and the elimination of unnecessary procedural obstacles to extradition. Effective extradition provisions have also come to be regarded as an essential element of the growing body of Conventions addressing terrorism and transnational crime.

1.1.4 To meet this objective, effective extradition arrangements must mediate in a workable way between the criminal justice procedures of different countries. This is particularly important in relations between common law and civil law countries, as these two major legal systems have traditionally adopted quite different approaches to criminal justice procedure. Characteristics of the civil law system such as formal judicial investigations, the absence of exclusionary rules of evidence and the inquisitorial character of the proceedings differ markedly from the common law arrangements familiar in Australia and are highly significant in relation to some current contentious issues in the field of extradition. Accordingly, a degree of flexibility is required in judicial approaches to extradition issues; for example, an unduly strict adherence to the principle of resolving ambiguities in favour of an accused person could seriously hamper Australia’s capacity to conduct useful extradition relations with countries of the civil law world.

1.1.5 Conversely, the point is invariably made in any informed discussion of extradition that the primary objective of facilitating law enforcement must be

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<sup>1</sup> Shearer, I A, *Extradition in International Law*, Manchester University Press, London, 1971.

balanced against considerations of human rights. The issue arises both in relation to extradition procedure itself and to any subsequent trial and imprisonment or other punishment.

1.1.6 The scheme of international extradition is underwritten by the expectation of reciprocity. Modern extradition treaty practice recognises that we cannot have useful extradition relationships without a significant measure of trust in the legal systems of other countries. If Australia is not prepared to exercise this trust to a reasonable extent and extradite people to other jurisdictions, then we can expect that extradition, perhaps in important cases, will also be refused to us, and ultimately Australia would become isolated in extradition terms.

1.1.7 Australia's policy has been to broaden our extradition relations to reduce the number of potential haven countries for persons seeking to evade Australian criminal justice. There are likely to remain always a small number of these, being countries with which, because of their human rights record or the state of their criminal justice system, Australia has determined not, for the time being, to enter into extradition relations. The possibility must therefore be accepted that fugitives from Australia might find haven in such countries.

1.1.8 It is not the function of extradition proceedings to determine the guilt or innocence of persons sought for extradition because the courts of the requested country have normally no jurisdiction over the offences concerned. They are administrative proceedings to determine under law whether a person is liable to be surrendered to another jurisdiction to face trial or punishment. The courts of the requested country exercise jurisdiction over a wanted person in recognition of that person's right not to be deprived of their freedom except in accordance with law. Thus the court in the requested country is not enforcing the criminal process of either country but rather is protecting the person against arbitrary or capricious surrender by the executive authority of the requested country. There has been a long-standing difference of view between common law and civil law countries as to whether these principles are consistent with a court in the requested country scrutinising the "evidence" against the person available to the requesting country.

## ***1.2 The extradition process***

1.2.1 The main stages in the extradition process in Australia are as follows:

- *Provisional arrest:* The requesting country conveys through police or diplomatic channels a request for the arrest of a person wanted for an offence against the laws of the requesting country who is believed to be in Australia. (In this submission this person, or anyone identified as this person, will be described for convenience as "the fugitive", without prejudice to questions such as the identity or guilt of the person or whether the person is in fact actively seeking to evade the criminal justice authorities of the requested country.) Provided the Attorney-General's Department is satisfied that the requesting country will forward an extradition request for an extraditable offence within 45 days or less, the Australian Federal Police will seek issue, and co-ordinate execution, of a warrant for the provisional arrest of the fugitive. This step is normally taken without any involvement by the

Minister. However, the Minister may, at any time before it is executed, direct a magistrate to cancel the warrant.<sup>2</sup>

- *Remand:* Once the fugitive has been arrested he or she is brought before a magistrate and remanded in custody or on bail. In Australia there is a presumption against bail because the fugitive will commonly have a strong motive to escape the jurisdiction before the completion of extradition proceedings.<sup>3</sup> At any time before the extradition hearing the Minister may direct a magistrate to order the release of the fugitive or the discharge of the recognizances on which bail was granted. If no authority to proceed has been issued by 45 days (or such lesser time as may apply under an extradition treaty) after the provisional arrest, the fugitive must be released unless a magistrate is satisfied that a notice is likely to be issued within a reasonable period of time thereafter.<sup>4</sup>
- *Extradition request and authority to proceed:* The extradition process cannot proceed beyond this point without receipt of a formal extradition request from the requesting country and the express authority of the Minister. On receipt of an extradition request the Minister may issue a notice that the request has been received. This provides authority for a magistrate to proceed to conduct an extradition hearing. The Minister may only issue such a notice if, in effect, satisfied that the request has a reasonable prospect of success.<sup>5</sup>
- *Extradition hearing or consent to surrender:* A magistrate conducts a hearing to determine whether the fugitive is eligible for surrender. In all cases this hearing involves consideration of 3 issues, viz. sufficiency of the supporting documentation (arrest warrant, information on the alleged offence, etc.), dual criminality, and whether the fugitive can satisfy the magistrate that there is an “extradition objection” in relation to the offence. In the case of some countries the supporting documentation must also include admissible evidence sufficient to justify committal of the fugitive for trial if the alleged offence had occurred in Australia (“the *prima facie* case” requirement). At the conclusion of hearing the magistrate must either find the fugitive eligible for surrender or else order the fugitive’s release.<sup>6</sup> Alternatively, the fugitive may notify the magistrate that he or she consents to extradition. The magistrate must confirm that the consent is given voluntarily and with full knowledge of the consequences, but if so satisfied must commit the fugitive to await surrender.<sup>7</sup>
- *Appeals against magistrate’s finding:* Either party (the fugitive or the requesting country) may appeal within 15 days against a magistrate’s decision on eligibility for surrender. Appeals lie in the first instance to the Federal Court or to a State or Territory Supreme Court, thence to the Full Court of the Federal Court, and ultimately by special leave to the High Court. There is no right of appeal where a person has consented to surrender.<sup>8</sup>

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<sup>2</sup> S. 12, Extradition Act.

<sup>3</sup> S. 15, Extradition Act.

<sup>4</sup> S. 17, Extradition Act.

<sup>5</sup> S. 16, Extradition Act.

<sup>6</sup> S. 19, Extradition Act.

<sup>7</sup> S. 18, Extradition Act.

<sup>8</sup> S. 21, Extradition Act.

- *Minister's surrender determination:* If a fugitive is ultimately found to be eligible for surrender, the Minister must determine whether the fugitive will in fact be surrendered. The Minister must take account of the Act and any applicable extradition treaty and be satisfied that there is no mandatory reason to refuse extradition and that no specified discretionary ground for refusal should be relied on. In addition the Minister has a general discretion to consider whether the fugitive should be surrendered in relation to the offence. After considering all these matters the Minister must either issue a surrender warrant or else order the fugitive's release.<sup>9</sup>
- *Review of surrender determination:* The Minister's decision to issue a surrender warrant may be challenged by way of prerogative writ, e.g. on the ground that, in making the decision, the Minister failed to have regard to one of the matters specified in the Extradition Act.
- *Temporary surrender warrant:* If a fugitive is serving a sentence of imprisonment in Australia and appropriate undertakings are given by the requesting country, the Minister may issue a temporary surrender warrant, under which the fugitive will be released into the custody of the authorities of the requesting country for the purpose of trial but, on completion of the trial and sentencing, must be returned to complete the sentence the fugitive was already serving in Australia. Once the Australian sentence has been completed, the fugitive will be surrendered to serve the sentence imposed in the requesting country.
- *Surrender of the fugitive:* Under the surrender warrant the fugitive may be taken in police custody to an appropriate place, there transferred into the custody of escort officers from the requesting country, and removed from Australia in the custody of those officers. If, after 2 months from the warrant becoming liable to be executed, the fugitive has not been removed from Australia and there is no reasonable cause for the delay, the Federal Court or the Supreme Court of the State or Territory where the fugitive is being held, must, on application by the fugitive, order the fugitive's release from custody.<sup>10</sup>

1.2.2 Procedure in other common law countries follows similar lines. Procedure in civil law countries is broadly similar but normally does not require production of any evidence in support of the allegations against the fugitive.

### ***1.3 Simplified extradition to New Zealand***

1.3.1 Under Part III of the Extradition Act, extradition to New Zealand is governed by special rules similar to those applicable to extradition among the Australian States and Territories under the *Service and Execution of Process Act 1992*. The reasons for the lesser requirements are:

- the ease and frequency of travel between Australia and New Zealand;
- the close economic and political relationship between Australia and New Zealand;
- and

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<sup>9</sup> S. 22 and s. 23, Extradition Act.

<sup>10</sup> S. 26, Extradition Act.

- the shared legal and political traditions of the two countries.

1.3.2 The main differences from the procedures for extradition to other countries are:

- *Process independent of the Minister:* No formal extradition request is required. New Zealand warrants are simply indorsed by an Australian magistrate on application by an Australia police officer, provided the warrant appears to be genuine and the deponent submits by affidavit that he or she suspects that the fugitive is in, or on the way to, Australia. On the strength of the indorsed warrant the fugitive may be arrested. At the ensuing extradition hearing a magistrate must order the fugitive's surrender to New Zealand authorities unless satisfied that surrender would be unjust, oppressive or too severe a punishment for any reason. The Minister only becomes involved if it is necessary to consider issue of a temporary surrender warrant.
- *Normal restrictions on extradition do not apply:* In principle, extradition is available in respect of any offence under New Zealand law. There is no requirement for dual criminality or a speciality undertaking, nor is any evidence required to be presented in support of the charge.

1.3.3 Simplified extradition arrangements, in various forms, operate between neighbouring countries in many parts of the world, e.g. the United Kingdom and Ireland; Malaysia, Singapore and Brunei Darussalaam.

## 2. History of Extradition Legislation Applicable to Australia

### 2.1 Sources of extradition law

2.1.1 Australian law on extradition is entirely dependent on statute. Until 1966 the relevant law, apart from some minor administrative details, was set out in Imperial statutes. Since then, extradition to and from Australia has been governed by Australian statutes, although the Imperial legislation has some residual significance.

### 2.2 Imperial extradition legislation and treaties

#### 2.2.1 Extradition to countries outside the Empire

2.2.1.1 The Imperial extradition legislation fell into two groups. The Extradition Acts, 1870–1935 dealt with extradition between a part of the British Empire and a foreign country. The Fugitive Offenders Act, 1881 (and its more restricted forerunner, the Apprehension of Offenders Act, 1843) dealt with extradition between parts of the Empire.

2.2.1.2 Fuller details of the operation of the Imperial legislation are set out in **Attachment A**. In summary, the Extradition Act, 1870 set the ground rules for, and provided the vehicle for implementation of, bilateral extradition treaties between the United Kingdom and foreign States. There was no provision for non-treaty extradition arrangements. During the late 19th and early 20th Centuries the United Kingdom negotiated treaties consistent with this legislation with most of the then

independent countries of the world which had western-style legal systems. The application of these treaties extended to Australia as a part of the British Empire and Australia regarded itself as succeeding to them in international law when it emerged as an independent country (although whether the treaty could be invoked in practice would depend on the other party taking the same view).

2.2.1.3 While the broad scheme of these treaties was largely the same as under Australia's modern bilateral extradition treaties, there were a substantial number of differences. Setting aside minor refinements to the process, the main differences were:

- *List of offences*: The treaties contained a specific list of extraditable offences, consistent with the list in the Extradition Act, 1870. Extradition could be granted for these offences provided they were punishable under the laws of both parties. There was commonly also a discretion for extradition to be granted for other offences if they were extraditable under the laws of both parties. The list system remained in general use until the mid-20th century but tended to create difficulties where conduct was differently categorised in the legal systems of different countries or where extradition was sought for an offence not included in the list.
- *"Prima facie case" requirement*: All of the treaties specified that a fugitive was not to be surrendered unless the requesting party furnished evidence sufficient under the requested party's laws "to justify the committal of the prisoner for trial, in case the crime had been committed in the territory of" the requested party. This test was conceived as a familiar mechanism (the standard of proof required in a common law committal hearing) to ensure that alleged fugitives were not put to the gross inconvenience of extradition in the absence of a substantial case against them. However, many of the United Kingdom's treaty partners found the complexities of establishing a *prima facie* case a serious obstacle to extradition.

2.2.1.4 The only Australian legislation on extradition to foreign States during this period was the *Extradition Act 1903*, a short Act which vested powers exercisable under the Imperial Extradition Acts in appropriate persons in Australia.

## 2.2.2 *Extradition within the British Empire and Commonwealth*

2.2.2.1 Under the Fugitive Offenders Act, 1881 there were two approaches to extradition. Part I established a default regime covering the entire Empire. Part II established a simplified procedure which could be applied by Order in Council to a group of colonies in the same region.

2.2.2.2 The Part I procedure had a good deal in common with the procedure under the Extradition Acts, 1870. However, it differed in the following main respects:

- *Reduced formality*: A formal request was not required. The arrest warrant could simply be endorsed for execution in the requested part of the Empire. However, the Home Secretary or colonial governor had to endorse the warrant as well as a judge, *prima facie* evidence in support of the charge had to be provided and it was the Home Secretary or Governor who had to order the fugitive's surrender if he thought just.

- *No dual criminality requirement:* The offence merely had to be punishable in the requesting part of the Empire by 12 months' imprisonment with hard labour or a more severe penalty.
- *No refusal for political offences:* Because the Empire had a common sovereign and was subject to central political control, it was not considered appropriate to treat any offence as political. At this point there were no other human rights oriented grounds of refusal available but, as noted above, surrender could be refused at the political level (Home Secretary or governor) on broad considerations of justice.

2.2.2.3 The Part II procedure was essentially the same as the regime which currently governs extradition between Australia and New Zealand, being entirely operated by the courts. This procedure applied to a group including Australia, New Zealand and various Pacific island colonies until 1966.

### 2.3 *The London Scheme and the Australian Extradition Acts of 1966*

#### 2.3.1 *The London Scheme*

2.3.1.1 With the emergence of the modern Commonwealth of Nations in place of the British Empire in the period following World War II the Imperial extradition legislation became increasingly outmoded. As some of the newer members of the Commonwealth, beginning with India, adopted republican forms of government, they ceased to be covered by the Fugitive Offenders Act, leaving significant gaps in the extradition links within the Commonwealth. More fundamentally, the Empire had, despite local variations, constituted a single system of law and justice; the Commonwealth comprised a group of separate national systems of law and justice, albeit with many shared features. In this new environment the lack of safeguards in the Fugitive Offenders Act, particularly in relation to political offences, was of increasing concern. Equally, the independent status of members of the Commonwealth made it increasingly inappropriate that the United Kingdom should negotiate extradition treaties on their behalf as the Extradition Acts required.

2.3.1.2 In response to this situation Commonwealth Law Ministers, meeting in London in April 1966 developed the Scheme for the Rendition of Fugitive Offenders within the Commonwealth (the "London Scheme"—see copy of current version at **Attachment B**), a non-treaty arrangement which set out a procedure for extradition between Commonwealth countries. It was understood that members of the Commonwealth would enact extradition legislation consistent with the Scheme, in expectation of reciprocity.

2.3.1.3 In late 1966 the Commonwealth Parliament enacted the *Extradition (Commonwealth Countries) Act 1966* to implement the London Scheme and replace the Imperial Fugitive Offenders Act. At the same time Parliament enacted the *Extradition (Foreign States) Act 1966* to replace the Imperial Extradition Acts and provide Australia with a basis for direct negotiation of extradition treaties with non-Commonwealth countries. Formal responsibility for extradition decisions was transferred from the Governor-General to the Attorney-General.

### 2.3.2 *The Extradition (Commonwealth Countries) Act 1966*

2.3.2.1 The procedures under this Act were largely the same as the Part II procedures under the Imperial Fugitive Offenders Act, but in certain respects had been aligned more closely with procedures in relation to non-Commonwealth countries.

2.3.2.2 Formal extradition requests were now required from Commonwealth countries.

2.3.2.3 The principal changes related to qualifications on surrender, as follows:

- *Grounds for refusal:* In place of the previous broad executive discretion to decide for or against surrender on general considerations of justice, the following specific grounds were introduced:
  - the offence concerned is, or is by reason of the circumstances in which it is alleged to have been committed, an offence of a political character;
  - the offence is one for which the fugitive has already been acquitted, pardoned or punished in Australia or the requesting country;
  - the accused had been charged with the offence, or would be prejudiced at trial, on account of race, religion, nationality or political opinion;
  - by reason of the trivial nature of the case, the extradition request not having been made in good faith in the interests of justice or otherwise, it would, having regard to all the circumstances of the case, be unjust, oppressive or too severe a punishment to surrender the fugitive.
- *Postponement:* Surrender of a fugitive could be postponed if the fugitive was in custody or on bail in Australia for an offence alleged to have been committed here or was serving a sentence for a conviction in Australia.
- *Speciality:* The requesting country must undertake that the fugitive would not, following surrender to that country, be tried there for an offence other than the offence for which extradition was granted or a lesser offence founded on the same facts unless the requested country agreed to the fugitive's trial for another extraditable offence.
- *Dual criminality and list of extraditable offences:* As previously in the case of treaties with foreign States, extradition was only available for offences listed in a schedule to the Act and provided that the conduct of the fugitive was a criminal offence carrying a maximum penalty of at least 12 months' imprisonment in both the relevant part of Australia and the requesting country.

2.3.2.4 Part III of the Act effectively preserved the simplified "backing of warrants" procedure for extraditions to New Zealand and other territories which had been part of the South Pacific group to which Part II of the Imperial Fugitive Offenders Act had applied since 1925. Early in the life of the Act, the operation of Part III was restricted to New Zealand.

### 2.3.3 *The Extradition (Foreign States) Act 1966*

2.3.3.1 This Act (“the Foreign States Act”), like the Imperial Extradition Acts, was initially conceived of as a vehicle to implement existing (“inherited”) extradition treaties and new treaties negotiated by Australia as a sovereign nation. Treaties would be implemented by making regulations under the Act. These would declare that the Act applied to the country subject to such limitations, conditions, exceptions and qualifications as were necessary and desirable to give effect to the treaty.

2.3.3.2 Subsequently, during the mid 1970s, treaties were negotiated with Austria, Israel, Italy, Sweden and the United States and implemented by regulations in this form. In addition, from the outset the Foreign States Act applied to some 40 countries with which the United Kingdom had bilateral extradition treaties which had been implemented in their application to Australia by Imperial Orders in Council made under the Extradition Acts.

2.3.3.3 The regime the Foreign States Act established was similar to that under the Commonwealth Countries Act, but differed in several respects. First, the Foreign States Act reserved a statutory discretion to refuse extradition, whereas the Commonwealth Countries Act created a statutory obligation to extradite provided all the conditions were fulfilled. Second, in the Foreign States Act the speciality rule applied strictly so that an extradited fugitive could be tried only for the precise offence for which he or she had been extradited. The list of extraditable offences varied in some details from the list in the Commonwealth Countries Act and the precise details of the double criminality test were left to individual treaties.

2.3.3.4 Amendments to the Foreign States Act passed in 1974 allowed for the Act to be applied by regulations to a foreign State with which Australia did not have an extradition treaty but which had indicated that it was prepared to extradite to Australia on the basis of reciprocity. The immediate reason for this development was the Barton case, in which Australia was seeking to establish an extradition relationship with Brazil without the delay normally involved in negotiating a treaty. The Act was subsequently applied to Brazil on a non-treaty basis but no other such applications occurred until the mid 1980s.

## 2.4 *The 1985 amendments*

2.4.1 In response to growing concern during the late 1970s and early 1980s about the capacity of Australia’s law enforcement and criminal justice system to cope with organised and transnational crime, and in particular to the recommendation of the Stewart Royal Commission that “procedures for extradition may be simplified”, the then Government in 1985 introduced a package of measures to combat major crime. These measures included a group of amendments which updated the two Extradition Acts and brought the procedures provided by them into closer alignment.

2.4.2 Many of the changes reflected changes to the London Scheme which had been agreed by Commonwealth Law Ministers in 1983. The principal changes to the Commonwealth Countries Act were as follows:

- *Consent extradition:* This procedure allows a fugitive to waive the full extradition process and be returned voluntarily to the requesting country.

- *Appeal by requesting country:* Until the 1985 amendments only a fugitive might appeal against a magistrate's decision on an extradition application. One of the amendments provided for an appeal to be lodged on behalf of the requesting country if a magistrate rejected an extradition request.
- *Executive discretion to refuse extradition:* The Attorney-General's discretion to refuse extradition in a case where it would be unjust, oppressive or too severe a punishment to surrender the fugitive was extended to cover all situations, whereas previously it had been limited to those where the difficulty arose from triviality, bad faith or lapse of time.
- *Extradition for fiscal offences:* Offences against laws relating to taxation, customs duties, foreign exchange control and other revenue matters were made extraditable.
- *Redefinition of speciality:* The speciality rule was amended to provide that the restriction on trial of an extradited person in the requesting country terminates when the person has been given an opportunity of leaving that country. Previously the requesting country had first to give the person an opportunity of returning to the requested country.
- *Evidence of innocence of a fugitive:* Consistent with the view that the extradition hearing is not intended to determine the guilt or innocence of the fugitive but merely whether a case exists which would justify the fugitive's trial, the possibility of the fugitive's adducing evidence to contradict the evidence adduced on behalf of the requesting country was expressly precluded. This did not deprive the fugitive of the right to argue that the evidence so adduced did not establish a prima facie case.
- *Convictions in absentia:* It was made clear that, where an extradition request was founded on a conviction in absentia, the requesting country must produce evidence of guilt as well as of the conviction.

2.4.3 The amendments made to the Foreign States Act included most of the above and, in addition, two significant changes found to be desirable as a result of the work of a task force set up by the Government in early 1985 to negotiate new extradition treaties with appropriate countries as a matter of urgency, viz.:

- *No evidence procedure:* This was intended to enable Australia to conclude extradition arrangements with civil law countries whose systems had difficulty in adapting to the provision of pre-trial evidence. At the time this radical departure from Australia's previous extradition practice had bipartisan support.
- *Abolition of the list of extraditable offences:* Consistent with the trend towards "no list" extradition treaties in modern international practice (e.g. the European Convention on Extradition), provision was made for the conclusion of treaties which would permit extradition to be granted for any offence which carried a maximum penalty of 12 months' imprisonment or more in both countries. This avoided difficulties which might arise where an offence was not listed or was differently categorised under the laws of the two parties.

## 2.5 *The Extradition Act 1988*

2.5.1 Following the 1985 amendments an exhaustive review of the extradition laws was undertaken to eliminate inconsistencies and any problems encountered in implementation of the new provisions introduced in 1985. As a result, a new Bill consolidating the two existing Acts and making some further changes was introduced in late 1987.

2.5.2 The basic plan of the new legislation was to establish a single “default” extradition regime based on the “no evidence” procedure, to which additional requirements (e.g. to provide evidence establishing a *prima facie* case) could be added by regulations giving effect to particular treaties or non-treaty arrangements. Extradition to New Zealand continued to be governed by separate provisions (Part III) which placed it on substantially the same basis as extradition among the States and Territories of Australia.

2.5.3 The principal new features of the legislation were as follows:

- *Military offences:* A new statutory prohibition on extradition for purely military offences (e.g. desertion, insubordination) was introduced. This was a necessary consequence of abolishing the list of extraditable offences, which had only ever included offences known to the general criminal law.
- *Death penalty:* Extradition was to be refused in respect of any offence punishable by death in the requesting country, unless that country provided an undertaking that the death penalty either would not be imposed or, if imposed, would not be carried out in the case in question.
- *Torture:* The Attorney-General would also be required to refuse extradition unless satisfied that the fugitive would not be subject to torture in the requesting country. This reflected the obligations Australia was about to undertake on becoming a party to the Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment.
- *Prosecution in lieu of extradition:* Provision was made for the first time to allow Australia to prosecute an Australian citizen for criminal conduct committed overseas in a case where Australia had refused extradition solely on the basis of citizenship and the extraditing country would not extradite its nationals. This provision was intended to allow Australia to exercise the right, provided in many of its extradition treaties with civil law countries, to refuse extradition of its own nationals, without thereby preventing accused persons from being brought to trial.
- *Limitations on the definition of political offence:* “Political offence” was not inclusively defined, but certain classes of offence were expressly excluded from the definition. These were crimes (generally of a terrorist character) recognised by the international community in multilateral treaties as being extremely serious and not meriting the protection afforded traditionally by the “political offence” ground for refusal of extradition. Initially the offences concerned related to hijacking, safety of aircraft, genocide, torture, hostage taking and protection of internationally protected persons. Subsequently offences against the safety of maritime navigation and fixed platforms on the continental shelf have been added

to this list. It is expected that additional offences will be added as Australia accedes to other multilateral treaties for the suppression of particular types of terrorist activity. The same provision allowed for regulations to provide, in relation to particular countries, that certain crimes against heads of state or heads of government and crimes of violence committed in circumstances which create a collective danger to innocent life should not be regarded as political offences.

- *Clarification of meaning of dual criminality:* It was expressly provided that the court is required to look at all the acts and omissions alleged against the person sought and, if any or all of those acts or omissions would have constituted an offence against the relevant law in force in Australia if committed here and if that offence carries the requisite level of maximum penalty, the court should find that there is dual criminality.
- *Standardisation of the “sufficient evidence/prima facie” test:* The test of whether a person should be committed for trial varies among State and Territory jurisdictions within Australia. To eliminate any unfairness that might arise and to prevent extradition hearings from usurping the role of the requesting country’s courts, the new 1988 legislation established a single test throughout the country for use in extradition hearings. This requires the magistrate to form the view that the evidence provided would, if uncontroverted, provide sufficient grounds to put the person on trial.
- *Consent to accessory extradition:* Following the successful introduction of the provisions for extradition by consent in the 1985 amendments, the 1988 legislation added provision for a fugitive accused of offences including both extradition offences and other (usually minor) offences for which extradition would not be independently available to consent to being tried on return for specified other offences. The speciality rule would still apply to any offences not specified in the request. The benefit of this arrangement is that it allows the fugitive to return and stand trial for all outstanding offences (provided they are listed in the extradition request) so that the person can be given concurrent sentences where appropriate and “wipe the slate clean” in a single process.
- *Review and Appeal Procedures:* Extradition decisions were exempted from review under the *Administrative Decisions (Judicial Review) Act 1977* (“the ADJR Act”) and were replaced with an enhanced system of review and appeal procedures all the way to the High Court of Australia while leaving in place the High Court’s original jurisdiction to grant relief. This measure was taken because some fugitives were pursuing (either simultaneously or successively) both their statutory rights to review under the Extradition Acts and their rights under the ADJR Act. This was considered to involve unjustifiable duplication and delay.
- *Temporary surrender:* Traditionally, if a fugitive was on trial or serving a prison sentence in the requested country, the person’s surrender would be postponed until he or she would have been released from prison in the normal course of events. This could result in trial of the fugitive in the requesting country being delayed for many years. The 1988 legislation introduced the concept of temporary surrender, so that a fugitive who had been tried and sentenced in Australia could be surrendered to stand trial in a requesting country, then be returned to Australia to

complete his or her Australian sentence before being finally surrendered to serve the sentence imposed in the requesting country.

- *Double jeopardy*: The longstanding ground of refusal in a case where the fugitive has been acquitted, pardoned or served a sentence in respect of the extradition offence was adjusted to apply only to decisions made in Australia or the requesting country. In the case of such a decision made in a third country the Attorney-General retains a discretion to refuse but is not required to do so. This reflected concerns that some major drug traffickers might be in a position to obtain sham acquittals or pardons for the purpose of evading extradition.

### **3. Treaties and Other Extradition Arrangements**

#### **3.1 *Australian Model Extradition Treaty***

3.1.1 In May 1985, as part of the drive, referred to above, to modernise and expand Australia's network of extradition treaties, the then Government had approved for use in negotiations a Model Extradition Treaty. With only minor modifications, this model has continued in use until the present time. It is regarded internationally as a practical and modern model and it significantly influenced the development of the United Nations Model Extradition Treaty. (The UN Model is intended to serve as a guide to countries wishing to adopt modern extradition treaty practices. It embodies the "no evidence" approach but has an option for those countries whose law requires a judicial assessment of evidence.) A copy of the Australian Model Extradition Treaty in its current form is at **Attachment C**.

3.1.2 The Model is consistent with the *Extradition Act 1988* but includes a number of provisions not expressly required by the Act. In particular, it includes the following additional grounds for refusal of extradition:

- The fugitive is a national of the requested party.
- The case has been or will be tried by an ad hoc or extraordinary tribunal or court.
- The offence cannot now be prosecuted in one of the countries, normally because of the expiry of a limitation period.
- Both parties have jurisdiction and the requested party decides to prosecute or, in the exercise of its jurisdiction, not to prosecute.
- The age or health of the fugitive would make surrender totally incompatible with humanitarian considerations.

#### **3.2 *Relationship between treaties and the Extradition Act***

3.2.1 Extradition treaties are implemented in Australian law by making regulations under the Extradition Act. These characteristically provide that the other party is an "extradition country" (i.e. a country to which the Act applies) and that the Act applies to that country "subject to" the treaty, which is scheduled to the regulations. The Act

provides that this formulation means that the Act applies in relation to the country “subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to” the treaty in relation to the country. There are similar provisions in relation to multilateral treaties which impose extradition obligations and in relation to giving effect to non-treaty extradition relationships.<sup>11</sup>

3.2.2 There is some debate as to the extent to which this provision authorises modification of the application of the Act. The Department has taken the view that it should not be read as allowing a modification which would reduce the rights of a fugitive unless the Act expressly authorises such a modification (which it does in relation to certain time limits which it imposes). Accordingly, treaties must be entirely consistent with the Act, although the Government is happy to consider additional safeguards for the fugitive proposed by a negotiating partner.

### 3.3 *Australia’s current extradition relations*

3.3.1 Australia’s extradition relations fall into four categories, as follows:

- *Bilateral treaties:* Australia has in force 31 modern extradition treaties, i.e. treaties negotiated or renegotiated since 1985. Of these treaties, 27 are based on the “no evidence” procedure, 2 on “probable cause” and 2 on “prima facie”. Only 2 include a list of extraditable offences. Another 5 modern treaties have been signed and await entry into force. Of these, 4 are based on the “no evidence” procedure and 1 on the “prima facie” procedure. Only 1 includes a list of extraditable offences. In addition Australia regards itself as bound by 15 inherited UK extradition treaties, whose status in the eyes of the other party is in some cases uncertain. There are also inherited treaties with the former Czechoslovakia and Yugoslavia. As a matter of international law there is not necessarily any obstacle to the continuation of these treaties with the successor states but Australia’s current extradition legislation does not implement these treaties in such a way as to give authority for extradition to any of the successor states under an inherited treaty.
- *London Scheme:* 65 other countries and dependent territories within the Commonwealth are covered on a non-treaty basis by the London Scheme. All of these operate on the “prima facie” procedure, although 2 are subject to the “record of the case” variant described below. (In addition, as already mentioned, a non-treaty “backing of warrants” procedure operates with New Zealand.)
- *Non-treaty arrangements based on understandings of reciprocity:* The Extradition Act has been applied to 7 non-Commonwealth countries on this basis. All these arrangements operate on the “no evidence” procedure.
- *Multilateral treaties including extradition provisions:* Australia is a party to 12 multilateral treaties or protocols thereto which create extradition obligations among their parties. The Extradition Act has been applied to the parties to these treaties for the purpose of giving effect to the extradition obligations they impose on Australia. Those obligations supplement any obligations which Australia may have to another party under a bilateral extradition treaty. Characteristically these

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<sup>11</sup> S. 11 (1) – (1C), Extradition Act.

treaties require parties to criminalise a particular type of conduct (in the majority of cases some form of terrorism), permit them to claim extended jurisdiction on a variety of bases and require them to either extradite or prosecute alleged offenders found within their territory.

A detailed table showing our extradition relations is at **Attachment D**.

3.3.2 From the point of view of Australian law enforcement, gaps remain in Australia's extradition network in the Central and Eastern European democracies which have emerged in the past decade, parts of Asia and some parts of South America. While negotiations for treaties or other explorations of the possibility of extradition relations are in progress with a number of these countries, human rights considerations have dissuaded the Government from pursuing, or have effectively prevented progress with, relations with some countries, including some which are of considerable significance from a law enforcement viewpoint.

## **SOME CURRENT ISSUES**

### **4. Introduction**

4.1 The extradition process is complex and raises many possible issues. The terms of reference for the Committee's review are also extremely broad. Against this background, the remainder of this submission does not seek to examine every issue which could be considered but focuses on those issues which the Department is aware, from the Committee's recent report on the Australia-Latvia Extradition Treaty and the foregoing discussions, are of particular concern to the Committee. The Department would, of course, be happy to provide oral evidence or further submissions on any additional issues which the Committee may wish to pursue in the course of the present review.

### **5. Evidentiary Requirements**

#### **5.1 Background**

5.1.1 Probably the most significant change made in Australian extradition law at any time was the introduction under the 1985 amendments of the "no evidence" extradition procedure. This was Australia's attempt to address a long-standing problem in extradition relations between common law and civil law States with a view to making a significant advance in international law enforcement co-operation. Since then Australian Government policy has been to move away from the prima facie case requirement. Australia has now signed 30 bilateral extradition treaties incorporating the "no evidence" procedure, 27 of which are in force. (One of these, the treaty with Norway, requires Australia to provide Norway with sufficient evidence to establish a presumption of guilt, but does not require provision of evidence to Australia.) By contrast, Australia had negotiated only 5 bilateral treaties under the Foreign States Act in the previous 19 years.

5.1.2 The common law countries have for the past two centuries required provision of prima facie evidence of the guilt of the fugitive under the law of the requested country. By contrast, the civil law countries have, with few exceptions, not required the production of evidence, being satisfied with a lawful arrest warrant, a statement of the alleged conduct and evidence going to the identity of the fugitive.

5.1.3 In deciding whether the "no evidence" approach is appropriate, one must consider the nature and objective of extradition. The object of extradition is to restore a fugitive to the State with a right to, or in the best position to, try the person. It is the court of that State which will ultimately be required to determine the innocence or otherwise of the person.

## 5.2 *The “prima facie case” approach*

### 5.2.1 *Nature of the test*

5.2.1.1 Under the so called prima facie case procedure, as it applies in Australia, a requesting State is required to provide evidence, in affidavit form, which would be sufficient, if the allegations had related to acts and omissions occurring in a part of Australia, to satisfy a magistrate in that part that the person whose extradition has been requested should be committed for trial for an offence under the laws in force in that part. While the test has been variously formulated in different jurisdictions and at different times, it essentially contemplates the provision of admissible evidence which would, if uncontroverted, be sufficient for a reasonable jury to convict the accused. The effect of this is that the documents supporting a request for extradition must be prepared as if for an Australian committal hearing and will be assessed in accordance with the laws of the Australian State or Territory in which the matter is heard.

5.2.1.2 The prima facie case requirement embodies a dual concept, namely sufficiency and admissibility of evidence under Australian law. While assessment of sufficiency is essentially a matter of comparing the admissible evidence with the requirements of the law with respect to elements of the offence and applying commonsense judgement, the admissibility in common law jurisdictions is governed by a complex body of rules concerning matters such as the form of sworn affidavit evidence, exclusion of hearsay and proof of business records.

5.2.1.3 Rules governing admissibility are relaxed to some extent to allow for the inherent differences between domestic committal proceedings and an extradition hearing. Most obviously, testimony is accepted in the form of affidavit evidence. Additionally, rules of practice (as opposed to rules of law) relating to admission of evidence are not enforced.

### 5.2.2 *Effect of the test*

5.2.2.1 Despite the limited concessions in respect of admissibility, the fact remains that under the prima facie case procedure a civil law country could only succeed in securing extradition from Australia by producing a case acceptable to a legal system, and subject to evidentiary laws, totally unknown to it. Even for other common law countries there can be significant problems. For example, they may be accustomed to a less rigorous application of the rules of evidence, or they may be dealing with a case such as a complex fraud where rules on admissibility of records vary depending on the statutory provisions adopted in different common law jurisdictions.

5.2.2.2 For reasons such as these the prima facie case procedure commonly has the effect of enabling fugitives to escape justice on technical, as opposed to meritorious, grounds. It has also resulted in extradition hearings being lengthier and more costly than necessary.

5.2.2.3 The United Kingdom experienced similar problems with the prima facie case requirement. These were productive of considerable ill-will from its Continental European neighbours, not only because they felt the requirement evidenced an attitude of superiority towards their criminal justice systems but also because of the great

difficulty they experienced in gaining the extradition of fugitives from the United Kingdom. The most notorious instance of these problems was Spain, which in 1978, having been unable to successfully extradite any person due to its inability to meet the “prima facie case” requirement, unilaterally abrogated its 1878 extradition treaty with the United Kingdom. (Negotiations between Australia and Spain for an extradition treaty were stalled for a decade before we introduced the option of extradition without the prima facie case requirement.)

### 5.2.3 *Arguments for and against the test*

5.2.3.1 Arguments in favour of the prima facie case requirement are as follows:

- A person should not be put to the great inconvenience inherent in extradition without some demonstration that the requesting country has a substantial case against the person. In a common law criminal justice system, the prima facie test is the natural test to apply. (In domestic committal proceedings it is the traditional method of sifting out those cases where the available evidence does not justify trial.) In this regard it is to be noted that substantially the same test was applied within the British Empire to extradition between colonies which were not designated as belonging to a geographically contiguous group.
- The consideration of the sufficiency of the evidence against the fugitive is a safeguard against extradition on false charges. If the evidence held by the requesting country is insufficient to prove the guilt of the alleged offender this will become readily apparent in the same way as a deficiency in evidence will be revealed by a domestic committal hearing.
- The Committee, in its report on the Latvia-Australia Extradition Treaty, posited as the first of its guiding considerations that:

“Australians enjoy the benefits of the common law, including the protections inherent in its rules of evidence, and these benefits ought not to be cast aside without compelling reason.”<sup>12</sup>

5.2.3.2 Arguments against the requirement are as follows:

- It reflects an unjustified attitude of superiority on the part of common law systems and is considered “alien and unacceptable” by civil law countries. It is true that the “prima facie case” requirement generally applies among common law countries as well as between common law and civil law countries and that in earlier times the same requirement applied to a considerable extent even within the British Empire. Nonetheless, it has proved an irritant not only in relations between the United Kingdom and its Continental European neighbours but also much further afield, as evidenced by the following remarks from a LAWASIA working group:

“It is [the court of the requesting country] which will ultimately be required to determine the innocence or otherwise of the extraditable person and it seems to us unnecessary, if not an assumption of some

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<sup>12</sup> Joint Standing Committee on Treaties, Report 36, at 13.

arrogance, for the courts of the requested country first to insist on assessing that evidence as a condition precedent to surrender.”<sup>13</sup>

- It is not necessarily appropriate for a person accused of a crime in a foreign country to be provided with the full range of procedural safeguards available to a person accused of a crime within Australia. The person will be entitled to all the procedural safeguards available under the law of the requesting country; extradition does not substitute for any part of that country’s normal criminal justice procedure apart from arrest. If Australia is prepared to trust the requesting country to determine the guilt or innocence of the person, it must logically be assumed to trust that country’s criminal justice procedure as a whole. Accordingly, the position of a person facing extradition proceedings in Australia is not precisely comparable with that of a person facing committal proceedings and different, even lesser, safeguards may therefore be justifiable. Moreover it is questionable to what extent the “*prima facie* case” requirement should be regarded as a “common law right” in any relevant sense. Extradition proceedings are entirely a creature of statute. Whether the model of a domestic committal hearing was well chosen is a legitimate subject for discussion in the light of over a century of experience.
- A civil law country requesting extradition under the *prima facie* procedure is required to present its evidence in a form substantially different from that in which it must be presented for the purposes of its own domestic criminal proceedings. This involves considerable additional costs. There are fundamental differences in criminal procedure between common law and civil law countries. Commonly, civil law countries have no precise equivalent to a committal hearing. For such countries the criminal trial is the continuation of a judicially controlled investigation and there is no point in the proceedings, short of the verdict, where the available evidence is to be measured against any particular standard. The inquisitorial system is not designed to receive evidence on oath at the pre-trial stage of proceedings, so affidavit evidence has to be collected especially for the purposes of the extradition request. In these circumstances civil law countries, and even some less sophisticated common law countries may find it impossible or prohibitively expensive to meet the requirements of the *prima facie* procedure, with the result that Australia could become a haven for criminals from such countries. The Committee, in its report on the Australia-Latvia Extradition Treaty expressed some scepticism about the difficulties experienced by civil law countries in this regard.<sup>14</sup> The Department can assure the Committee that problem is very significant and well known to those involved in extradition work. Considerable Australian Government resources are devoted to providing the necessary assistance to ensure that evidence is provided in an appropriate form. Restoration of the “*prima facie* case” requirement could be expected to result in a significant increase in the need for this type of assistance. The alternative of requiring requesting countries to take private legal advice would arguably be inconsistent with our current treaty obligations and would certainly be inconsistent with the requirements of comity between States which seek in good faith to facilitate law enforcement co-operation.

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<sup>13</sup> LAWASIA Standing Committee on the Law and Drugs, *Report of the Working Group on Extradition*, Seoul, 14 May 1984.

<sup>14</sup> Joint Standing Committee on Treaties, Report 36, at 14.

- The requirement to present evidence in the form of first-person affidavits can present major difficulties in cases of a transnational character, even where the request is being made by another common law country. In the *Reyat* case, a request from Canada to the United Kingdom concerning offences committed in Canada which had their main results in Japan, a large number of witnesses (variously reported as 31 or 78) had to be transported from Japan to Hong Kong for the purpose of securing affidavits from them because Japanese law did not permit the taking of evidence on oath by a foreign official, or for the purpose of a foreign hearing, in Japanese territory.
- The requirement to present a *prima facie* case is not a true test of the strength of the case against the fugitive as it will be presented in the requesting country. Rules on admissibility of evidence, particularly in relation to matters such as complex frauds, vary even among common law jurisdictions and hence are a cause of considerable difficulty in the extradition context, particularly for civil law countries. In civil law judicial investigations practically all relevant information, whatever its source, is admitted and taken into account by the examining magistrate, with its probative value assessed in accordance with the dictates of common sense in the particular circumstances. By way of example, the strict common law rule against hearsay (i.e. excluding evidence of what someone else was heard to say) is entirely foreign to civil law jurisdictions.
- In cases where a *prima facie* case is required under current Australian extradition law, valuable court time is consumed in assessing the merits of a case relating to events occurring in an unfamiliar jurisdiction and relating to offences against what is often an unfamiliar law.
- The “*prima facie* case” requirement tends to increase significantly the length and cost of extradition proceedings. A good example of this was the extradition of Bruce “Snapper” Cornwell from the United Kingdom. Australia initially provided certified transcripts of intercepted telephone conversations as part of the evidence against Cornwell. The British court required production of original evidence, so Australia had to provide the original tapes, at an additional cost in excess of \$100,000 and with considerable danger to the integrity of the primary evidence required at the eventual trial. Ironically, when Cornwell was eventually committed for extradition this material was not called for.
- Extradition proceedings have no function in assessing guilt or innocence. They are administrative proceedings to determine whether a person is liable under the applicable law to be surrendered to another jurisdiction to face trial or punishment. The function of the proceedings is not to enforce the criminal process in relation to the offence, but to prevent the arbitrary or capricious surrender of a person by the executive authority of the requested country. The sufficiency of the evidence against the accused is a matter for the courts of the requesting country. The courts of the requested country should not usurp this function.
- The requirement to establish a *prima facie* case cannot be relied on as a test of the good faith of the requesting State. If a foreign government is prepared to act in bad faith by providing a false warrant and statement of alleged conduct, it would

be naive to suppose that such a government would not also be prepared to produce false evidence in support of the request. The court's capacity to look into the good faith of the request arises not from the prima facie case requirement, which essentially goes to cogency of the evidence, but from the right of the fugitive to raise specified issues, such as allegations of bad faith generally (in relation to Commonwealth countries) or particular extradition objections which raise questions about the motivation for the request. Even so, an Australian court would not necessarily be in a good position to assess such allegations. There is a range of means by which good faith is guaranteed, including the requirement for a speciality assurance, the capacity of the Australian Government to protect the legal rights of its citizens overseas through consular representation and the Government's ability to take up a case at the government to government level.

- In practice it has proved to be an obstacle to extradition to an extent that cannot be justified by considerations of substantive justice. A study by the United Nations Division on Narcotic Drugs in 1985 concluded that the requirement to establish a prima facie case “proved in practice to be an outstanding impediment to extradition and thus to the performance of justice at the level of international co-operation. A high percentage of requests by civil law States to States with a common law system fail for formal reasons”. In 1986 a United Kingdom White Paper on extradition noted that the static framework of United Kingdom extradition law meant that “the United Kingdom is widely regarded as one of the most difficult countries from which to secure extradition”. Effectively, the “prima facie case” requirement provides a formidable obstacle to the free flow of extradition between countries with acceptable criminal justice systems, thus denying the country where an offence was committed the right to exercise jurisdiction and thereby curbing efforts to combat crime. Successive Australian Governments have accepted that failure of extradition requests on technical rather than substantive grounds is an unacceptable impediment to international law enforcement co-operation.

#### *5.2.4 Protection of fugitives against abuse of the extradition process*

5.2.4.1 The Australian Government concluded in 1985 that the prima facie case requirement did not afford protection to a fugitive against abuse of the extradition process.

5.2.4.2 The British Government in 1986 reached the same conclusion and stated the issue in a White Paper as follows:

“[The prima facie case] requirement does not offer a necessary safeguard for the persons sought by the requesting State; it does, however, present a formidable impediment to entirely proper and legitimate extradition requests. There are other effective ways in which the rights of the fugitive are protected — for example by the double criminality law and by the proper application of the political safeguard. It is also the Government's intention to preserve the Secretary of State's overriding discretion to withhold extradition. This enables him to refuse his consent in cases where it seems to him that it may not be in the interests of justice for a person to be extradited.”

### 5.2.5 *Safeguards for the accused*

5.2.5.1 There is a significant body of safeguards, both procedural and substantive, built into the extradition process as it currently operates in Australia.

5.2.5.2 First, on receipt of a request the Minister is required to make a decision under s. 16 whether to authorise commencement of proceedings against the fugitive. The Minister is not to authorise such proceedings if he or she is of the opinion that there is an extradition objection in relation to the offence or offences for which extradition is sought. There is an extradition objection if:

- the offence named in the request is a political offence;
- the surrender of the person is in fact sought for the purpose of prosecuting or punishing the person for a political offence or on account of race, religion, nationality or political opinions;
- the person would be prejudiced at trial, or otherwise punished, detained or restricted in person liberty by reason of race, religion, nationality or political opinion;
- the offence would be a purely military offence if committed in Australia; or
- the person has been acquitted or pardoned, or has been convicted and punished, in either Australia or the requesting country, for the offence or for another offence constituted by the same conduct.

5.2.5.3 Even if there is not an extradition objection, the Minister has general discretion to refuse to authorise proceedings. This would allow the Minister to take into account the possible relevance of any other ground of refusal provided in the relevant treaty or specified later in the Act.

5.2.5.4 If proceedings are authorised by the Minister, the defendant (if extradition is contested) is required to appear at a hearing conducted before a magistrate under s. 19 to determine whether he or she is eligible to be extradited. At this hearing the defendant may seek to satisfy the magistrate that there are substantial grounds for believing that there is an extradition objection in relation to the offence. In addition, despite the limitation imposed by s. 19 (5) to ensure that the extradition hearing does not become a preliminary trial on the merits, the defendant is entitled to adduce evidence to clarify the allegations or to establish that he or she is not the person sought (e.g. by establishing that the defendant was in Australia at the time of the alleged offences).

5.2.5.5 If the defendant is found eligible for extradition, the Minister must then consider under s. 22 whether the eligible person should be surrendered. The Minister cannot agree to surrender unless a speciality undertaking is in place and, if necessary, a death penalty undertaking has been given by the requesting country. The Minister must also be satisfied that:

- there is no extradition objection in relation to the offence;

- the person will not be subjected to torture in the requesting country;
- no other circumstances constituting mandatory grounds for refusal under the relevant treaty exist (e.g. final judgment in the case has already been passed in Australia or a third State, the relevant limitation period has elapsed in Australia or the requesting State, the case would be heard in the requesting State by an extraordinary or ad hoc tribunal or court); and
- other circumstances constituting discretionary grounds for refusal under the relevant treaty either do not exist or else do not justify refusal in the particular case (e.g. the person is an Australian citizen, Australian prosecuting authorities have considered the case and are proceeding or have decided not to prosecute, Australia has jurisdiction in the case, extradition would be unjust, oppressive, incompatible with humanitarian considerations or too severe a punishment in the circumstances).

5.2.5.6 In addition, the Minister has a general discretion to refuse surrender in the interests of justice or for any other reason. If extradition was requested under a treaty and the Minister exercised this discretion without reference to any ground of refusal specified in the treaty, the decision would be permissible under domestic Australian law, but Australia would be in breach of an international legal obligation. Clearly, this would be an option of last resort in a difficult and exceptional situation.

5.2.5.7 The Minister's decisions under both s. 16 and s. 22 are subject to challenge by prerogative writ. The court may, for example, consider whether the Minister made a decision on improper grounds or failed to accord natural justice to a person affected by such a decision.

### 5.3 *The “no evidence” procedure*

5.3.1 Under the “no evidence” procedure the requesting country is not required to provide evidence establishing a *prima facie* case but otherwise must complete all the stages and processes required under the *prima facie* procedure. The request must be made through the diplomatic channel and must be accompanied by a valid arrest warrant, information as to the applicable laws of the requesting State pertaining to the offence, the penalty and any limitation period, as well as the identity of the person sought. In lieu of *prima facie* evidence it must provide a detailed statement of the acts and omissions alleged against the fugitive. This statement has to be detailed enough for a court to determine that the dual criminality requirement is satisfied. If the court is not satisfied of this, the fugitive will be discharged.

5.3.2 The justification for use of the “no evidence” procedure is partly practical and partly a matter of principle. First, it has made extradition arrangements possible with a wide range of civil law countries. The United Kingdom has found it necessary to adopt the “no evidence” approach in dealings with its Continental European neighbours and Australia faces a similar need in relation to some of its neighbours (although the position in Asia is complicated by a wide range of attitudes to human rights issues). Secondly, extradition is based on confidence that the requesting State's system of criminal justice provides at least minimum standards of fairness. If that is so, the determination of guilt or innocence may be left to that country without inquiry into the sufficiency of the evidence on which the conviction was based.

5.3.3 Since 1985, 30 treaties have been signed which contain this requirement. The treaty partners include mostly the countries of continental Europe and Latin America, but also countries in Africa and Asia. It is considered that, without the abolition of the *prima facie* case requirement in 1985, it is unlikely that the majority of those treaties could have been successfully negotiated. During negotiations with certain Western European countries in the mid-1980s it transpired that they were aware of the presence in Australia of fugitives of their nationality but had made no extradition requests simply because they did not believe there was any reasonable prospect of meeting the common law requirements.

5.3.4 It should be added that those 30 treaties include comprehensive safeguards setting out when extradition must, or may, be refused. The Act also gives the Minister a discretion not to surrender a person where the courts have found that person liable to be surrendered. The Minister cannot, however, overturn a court decision that a person is not liable to be surrendered.

5.3.5 Australian courts take very seriously the documentary requirements in “no evidence” treaties and insist on full and strict compliance with them. To this end they examine statements of alleged acts and omissions rigorously. They expect such a statement to be detailed, comprehensive, consistent and clear, with nothing left to assumption or inference. If a statement does not meet these standards, the request will either be found not to comply with the documentary requirements of the relevant treaty or the court will be unable to establish dual criminality to its satisfaction. Indeed, on at least one occasion this has caused a Western European treaty partner to express concern at the unusually high level of detail Australia expects in an extradition request.

5.3.6 In considering the adequacy of this procedure in the context of extradition, it needs to be borne in mind that there have been significant changes in the ease of travel and communications over the past century which are relevant both to the significance of extradition in the modern world and the degree of inconvenience to the alleged fugitive. On the one hand transnational criminal activity and escape from one country to another to evade law enforcement measures have become much more practicable, so that the need for extradition can be expected to arise fairly regularly. On the other hand, removal to a foreign country to face criminal charges has become distinctly less onerous than in earlier times. Differences in legal procedures and culture will, of course, still give rise to a significant degree of hardship in some cases where a person is extradited to a country which is not the person’s home country. However, it is probably fair to say that in some other instances extradition to another country will entail little more inconvenience than extradition to a distant part of Australia.

## **5.4 *Alternative Evidentiary Requirements***

### **5.4.1 *Probable cause***<sup>15</sup>

5.4.1.1 The United States applies a test which is commonly referred to as “probable cause”. This is to be distinguished to some extent from the same standard

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<sup>15</sup> The following material summarises the content of M Cherif Bassiouni, *International Extradition: United States Law and Practice* (2nd re ed, 1987) Oceana Publications, New York, at pp 552–577.

applied to arrests under United States law. “Probable cause” in relation to extradition has been defined by the Supreme Court as requiring that competent legal evidence be presented in order to warrant the reasonable conclusion under United States law that the relator (i.e. the alleged fugitive) committed the offence for which he is sought and not simply that he is suspected of having done so. Evidence sufficient to justify a conviction is not required.<sup>16</sup> Alternatively, the “probable cause” test has been summarised as requiring reasonable grounds to believe or suppose the fugitive guilty.<sup>17</sup>

5.4.1.2 The requirement to show “probable cause” is sometimes treated by commentators as being effectively the same as the “*prima facie* case” requirement under British common law. In practice, however, this test is rather less demanding than the British and Australian “*prima facie* case” requirement. The standard applied varies considerably. However, the United States courts have taken the view that extradition treaties should be liberally construed so as to give effect to the intention of the contracting parties<sup>18</sup>, so the “probable cause” requirement tends to be given a less exacting interpretation in the context of extradition than in that of arrest (except in relation to issues of dual criminality). Hearsay evidence is admissible.<sup>19</sup> Evidence improperly acquired (by American standards) by the requesting country outside the United States is also admissible.<sup>20</sup> A lenient standard is used to review a magistrate’s determination that the evidence submitted is sufficient to find probable cause. A determination of probable cause will be affirmed if there was “any evidence warranting the finding that there was reasonable ground to believe the accused guilty”<sup>21</sup>.

#### 5.4.2 *Record of the case*

5.4.2.1 Australia sought the agreement of other Commonwealth countries at the 1986 and Commonwealth Law Ministers’ Meeting to modification of the London Scheme by substitution of the “no evidence” procedure for the “*prima facie* case” procedure, either generally or on an optional basis. This proposal met with some support but considerable resistance. The majority of members took the view that judicial assessment of the sufficiency of the evidence was still a relevant component of modern extradition within the Commonwealth, but there was also a widespread acknowledgment that many of the common law rules affecting admission of evidence at extradition hearings were causing significant problems in some Commonwealth countries. Ultimately, at the 1990 Commonwealth Law Ministers Meeting in Christchurch, New Zealand, a compromise proposal initiated by Canada was adopted, recognising an alternative to the “*prima facie* case” requirement, subject to the possibility of members agreeing on a bilateral basis to other mutually acceptable alternatives.

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<sup>16</sup> *Collins v Loisel* (1922) 259 US 309, at 316.

<sup>17</sup> *Gluckman v Henckel*, 221 US 508 (1910) per Holmes J; *Application for the Extradition of D’Amico*, 185 F Supp 925, at 930 (SDNY 1960)

<sup>18</sup> *Factor v Laubenheimer* (1933) 290 US 276, 298.

<sup>19</sup> *Escobedo v US* (1980) 623 F 2d 1098, 1099 (5th Cir), *cert denied* (1980) 449 US 1036.

<sup>20</sup> *Castillo v Fortsht* (1980) 623 F 2d 1098 (5th Cir), *cert denied* (1980) 449 US 1036.

<sup>21</sup> *Fernandez v Phillips* 268 US at 312

5.4.2.2 The Canadian proposal, which now constitutes Annex 3 to the London Scheme, is referred to as the “record of the case” procedure, by reference to the principal document required to be provided under the procedure. The documents required are:

- *Record of the case:* This is a comprehensive statement of all the evidence gathered in support of the request and should include a full description of the statements that have been provided by the witnesses and of the documents and other items of real evidence located in support of the charge.
- *Affidavit from an officer of the investigating authority:* This should state that the record has been prepared under the officer’s direction and that the evidence has been preserved for use in court.
- *Certificate from the Attorney-General of the requesting country:* This should state that in his or her opinion the record discloses the existence of evidence sufficient under the law of the requesting country to justify prosecution.

5.4.2.3 The record of the case is to be accepted as evidence in the extradition hearing in the requested country without regard to that country’s normal rules on admissibility and the court is to determine whether the contents of the record, together with any other admissible evidence presented, would be sufficient under the requested country’s law to warrant trial of the fugitive.

5.4.2.4 The “record of the case” procedure thus resembles the United States “probable case” test in that it has abandoned restrictions on admissibility of evidence but it retains the sufficiency of evidence test which can be expected to continue to be interpreted more strictly in Commonwealth countries than in the United States. This type of compromise requirement is relatively workable in relations with other common law countries which have rules on admissibility of evidence which are broadly analogous to our own, although there is a degree of artificiality in seeking to apply the law of the requested country in part only.

5.4.2.5 However, this approach is inherently incapable of being applied to requests from civil law countries for the following reasons.

- *No prima facie case under civil law:* The requirement to establish a *prima facie* case in a committal hearing is not found in civil law criminal justice procedure. Accordingly, it would be impossible for a civil law country to provide the required certificate.
- *Impossible to assess evidence in accordance with Australian law:* Civil law countries rely almost exclusively on commonsense assessment of the probative value of all relevant material rather than on a distinction between admissible and inadmissible evidence. Accordingly, Australian magistrates would be required to embark, supposedly under Australian rules of evidence, on assessments of probative value in cases where the evidence would clearly be inadmissible in any common law country. There would be no common law precedent for the assessment of such evidence. In such circumstances the *prima facie* test would be rendered meaningless.

5.4.2.6 Canada, Malaysia, Samoa, Tonga and Zimbabwe are known to have enacted legislation to allow effect to be given to this option. South Africa has enacted legislation which provides for reception of a record of the case but treats the record as establishing conclusively the existence of a *prima facie* case, so that the procedure is, in effect, a “no evidence” procedure with a special documentary requirement. Australia has made regulations modifying the previous operation of the Extradition Act in relation to South Africa, Samoa and Tonga, effectively applying the Act on a “no evidence” basis in each case. (This has been done primarily because the Extradition Act does not permit application of an evidentiary requirement other than the full “*prima facie* case” requirement) The Attorney-General’s Department is still considering its position in relation to Canada in light of the recent Canadian legislation.

#### 5.4.3 *Other possible alternatives*

5.4.3.1 In the Committee’s Report in relation to the Australia-Latvia Extradition Treaty the Committee noted the possibility of imposing “a test of sufficient evidence to raise a reasonable cause to suspect the fugitive of having committed the offence”, coupled with authority for the magistrate to disregard the rules of evidence.<sup>22</sup>

5.4.3.2 Setting aside the possible reaction of Australia’s current treaty partners to any proposal to make the requirements for extradition from Australia more strict, this proposal could have some merit as against the “*prima facie* case” requirement. It is preferable to the “*prima facie* case” procedure in that it would eliminate exclusionary rules of evidence. It is also preferable to the “record of the case” procedure in that it does not saddle courts with the artificial function of seeking to apply only one part of the relevant Australian law in determining whether a *prima facie* case has been made out. It asks the court to apply a test which is familiar from the law pertaining to arrest warrants and which has never been subject to the strict evidentiary rules applicable in a committal hearing. Moreover, it is probable that the documentation accompanying many requests made under the “no evidence” regime would contain sufficient evidence already to meet this test.

5.4.3.3 The reintroduction of an evidentiary requirement could, of course, be expected to result in an increase in the duration, complexity and cost of extradition proceedings. The extent of that increase cannot be predicted with any certainty but past experience with extradition cases suggests that extensive use will be made of any possibility open to persons threatened with extradition.

### 5.5 *International Trends*

5.5.1 The conclusion of the European Convention on Extradition on a “no evidence” basis in 1957 was considered a significant advance for wider adoption of the “no evidence” procedure. The major impact of the Convention in this regard has been the ratification of the Convention by the United Kingdom in 1991 without reservation in this respect. The Republic of Ireland similarly ratified the Convention in 1966 without reservation of a right to require provision of *prima facie* evidence of guilt. It

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<sup>22</sup> Joint Standing Committee on Treaties, *Report 36: An Extradition Agreement with Latvia and an Agreement with the United States of America on Space Vehicle Tracking and Communication (2000) Commonwealth of Australia, Canberra*, at p.11.

should also be noted that Austria, which traditionally required provision of such evidence of guilt as could not immediately be shown by the accused to be false, now adheres to the Convention without reservation in this respect.

5.5.2 Conversely, of the 40 parties to the Convention, 2 (Malta and Israel) adhere subject to reservations requiring provision of evidence amounting to a prima facie case. Denmark reserves the right “where seemingly indicated by special circumstances” to require the requesting country to produce “evidence establishing a sufficient presumption of guilt”. Norway reserves the right to require the requesting Party to produce “prima facie evidence to the effect that the person claimed has committed the offence for which extradition is requested. (under Article 8 of the Norway-Australia Extradition Treaty of 1985 Norway requires production of evidence sufficient to establish a presumption of guilt.) Iceland similarly reserves the right to require the requesting country to produce evidence “establishing” the guilt of the fugitive. Sweden reserves the right to refuse extradition “if an examination of the case in question shows that the sentence or warrant [presented by the requesting Party] is manifestly ill-founded”. The Swedish reservation has also been adopted verbatim by the former Yugoslav Republic of Macedonia.

5.5.3 Australia has consistently promoted the “no evidence” procedure internationally since 1985. In 1990 a model extradition treaty based on the “no evidence” extradition regime which was formulated and promoted by Australia was adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana. The model treaty was subsequently endorsed by the United Nations General Assembly as a useful framework in negotiating and concluding bilateral extradition arrangements.

5.5.4 International conferences concerned with transnational criminal activity have repeatedly encouraged simplification of evidentiary requirements in extradition. Article 6, paragraph 7 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances expressly requires Parties to endeavour to simplify evidentiary requirements relating to extradition in respect of extraditable Convention offences. A similar provision, although expressed to be subject to the domestic law of the Party, appears at Article 16, paragraph 8 of the United Nations Convention against Transnational Organized Crime, which was adopted by the United Nations General Assembly on 15 November 2000.

5.5.5 Commonwealth Heads of Government, meeting in Kuala Lumpur in 1989, noted the difficulties associated with the “prima facie case” requirement and asked Law Ministers to take action to ensure that extradition arrangements within the Commonwealth were no more onerous than those with non-Commonwealth countries

5.5.6 The 1998 United Nations General Assembly Special Session on the World Drug Problem recommended, in its document on “Measures to promote judicial co-operation”, that States “review their domestic legislation to simplify procedures for extradition, consistent with their constitutional principles and the basic concepts of their legal systems”.

5.5.7 In the light of these international trends and the role Australia has played in them, any move by Australia to make extradition more difficult could be read as a backing away from our commitment to fighting the drug trade and other forms of

transnational organised crime. It would certainly not contribute to encouraging greater flexibility in extradition law and practice on the part of other countries in relation to, for example, the extradition of nationals. These practical considerations need to be balanced against concerns about the rights which should be enjoyed by alleged fugitives.

## **5.6 *The case for uniform arrangements***

5.6.1 The Committee in its report on the Australia-Latvia Extradition Treaty cited Professor Shearer's comments on the anomalous position that barriers to extradition from Australia to other Commonwealth common law countries (apart from New Zealand) are greater than those to civil law countries.<sup>23</sup> The Committee, later in the same report, posits as guiding considerations that:

- “(2) it is incongruous to maintain in Australian law, different standards of proof for extradition requests from Commonwealth countries (a prima facie case) and requests from countries with a civil law system (no evidence required); and
- (3) it seems absurd to entrench in law, a regime that makes it easier to extradite an Australian to a jurisdiction with whose legal system he or she is unfamiliar — that is, a civil law country — yet more difficult to extradite he or she to a more familiar common law jurisdiction.”.

5.6.2 The Department is aware of the anomalous aspects of the current situation. In fact, Australia has made representations both to individual Commonwealth countries and to the Commonwealth collectively, through the Commonwealth Law Ministers Meeting and its associated senior officials meetings, in support of wider adoption of the “no evidence” procedure. These representations, as noted above, have been generally rejected within the Commonwealth, although an effectively “no evidence” treaty was signed with South Africa in December 1998 and discussions with some other countries are continuing. Even the “record of the case” procedure is unacceptable to many Commonwealth countries.

5.6.3 The reality for Australia, in the Department's experience, is that uniformity in relation to the evidentiary issue could be attained only at the cost of significantly restricting the range of countries with which we retained workable extradition relations. There is no “lowest common denominator” which will satisfy all our extradition partners. Unlike major powers such as the United Kingdom a century ago or the United States today we are not in a position to insist on particular terms which may be distasteful to those with whom we negotiate. It is in Australia's interest from a law enforcement perspective to have extradition relations with a wide range of countries and it may be thought that the price of achieving that objective is that we have to tolerate anomalies which cannot be justified on other than pragmatic grounds.

## **5.7 *Special tests for special crimes—the war crimes issue***

5.7.1 Until 1999 the *War Crimes Act 1945* (as amended in 1989) imposed an overriding requirement for a prima facie case to be established in support of any

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<sup>23</sup> Joint Standing Committee on Treaties, Report 36, p. 10.

request for extradition for conduct covered by the Act. The conduct covered by the War Crimes Act is limited to serious war crimes committed in Europe between September 1939 and May 1945 (i.e. during World War II). The prima facie case requirement was imposed in 1989, when Parliament passed amendments to the Act to enable prosecution in Australia of persons accused of European World War II war crimes. The stated rationale for this requirement, which was inserted at the request of non-government senators, was that it would be unacceptable to surrender persons charged with such offences to Eastern European Communist countries. The underlying assumption appears to have been that those countries would have been unable to establish a prima facie case.

5.7.2 With the collapse of the Communist regimes in Eastern Europe and the emergence of most of the States concerned as democratic countries committed to international human rights standards, the rationale for the prima facie case requirement lost its validity. Accordingly, the Government moved to amend the War Crimes Act to remove the relevant provision. The amending legislation was ultimately passed in December 1999 with the full support of Parliament. This restored World War II war crimes to the same position as all other crimes for purposes of extradition.

5.7.3 It is submitted that the imposition of a special evidentiary requirement for one class of offences is undesirable in general. First, it is an abnormal arrangement and would be likely to complicate the negotiation of treaties considerably. The prima facie case requirement in the War Crimes Act was equally applicable to extradition to any country, not just those of the Communist Bloc, and was inconsistent with the terms of Australia's extradition treaties with the countries of Western Europe. Fortunately, this never became a practical issue.

5.7.4 Second, there is no obvious reason why people accused of one particular type of heinous crime should be specially protected against extradition in this way. The possibility of a malicious prosecution, or of prejudice at trial arising from considerations of race, religion, nationality or political opinion, is not limited to one class of offence nor, as previously noted, is the prima facie requirement an adequate protection against these things. The Extradition Act and Australia's bilateral treaties provide ample grounds for refusal of extradition and, where appropriate, prosecution in lieu of extradition in such cases.

## ***5.8 Effects of a change in Australian law and policy on evidentiary requirements***

### ***5.8.1 Return to prima facie case***

5.8.1.1 This would have two main effects. First, the cost and difficulty of preparing an extradition request to Australia would substantially increase for many countries and would be largely additional to the cost of preparing for the subsequent prosecution because of the different documentary requirements. There would also be a corresponding increase in the amount of staff time devoted by the Attorney-General's Department to consultations with countries preparing extradition requests. Lastly, the cost of running an extradition case in Australia on behalf of a civil law country would be substantially increased, as arguments about sufficiency and admissibility of evidence would be added to the existing range of points at issue.

5.8.1.2 Second, it is likely that a significant number of our modern extradition treaties with countries in Continental Europe and Latin America would be terminated at the instance of our treaty partners, or at the least those countries would tend to become markedly less co-operative in extradition matters, as they would expect on past experience to receive little if any future benefit from the treaties. We know from pre-1985 negotiations that a number of these States would not have agreed to a treaty with us incorporating the “*prima facie* case” procedure. There is no reason to think that their attitudes will have softened in the interim, especially in view of the United Kingdom’s acceptance of the no evidence procedure under the European Convention on Extradition.

5.8.1.3 In summary, the result of this change would be a substantial increase in the costs of extradition at the same time as its effectiveness would be significantly reduced. It is very doubtful that the benefits to fugitives, bearing in mind that they are still entitled to a fair trial in the requesting country, would be sufficient to justify this cost at a time when the need for international law enforcement co-operation has never been greater.

### 5.8.2 *Evidentiary requirement less than prima facie case*

5.8.2.1 A lesser evidentiary requirement than the *prima facie* case would probably be more acceptable to our civil law treaty partners, and might well be welcomed by some Commonwealth countries which would hesitate to abandon the evidentiary requirement entirely. Nonetheless, it could be expected that, on the whole, the Australian Government would have difficulty persuading civil law countries to accept a restored evidentiary requirement. Bearing in mind the fact that some of our partners already find our requirements excessively strict, it is even possible that a few would terminate their treaties with us if we were unable to continue on the present “no evidence” basis.

### 5.8.3 *Manner of implementation*

5.8.3.1 It is important that the Committee appreciate the true implications of making such a change in terms of implementation procedure. In its report on the Australia-Latvia Extradition Treaty the Committee suggested that the Government might advise Latvia formally in an interpretative declaration that Australia would interpret the requirement in that treaty for a statement of acts and omissions as requiring that the statement contain evidence sufficient to raise a reasonable suspicion that the accused person committed the offence specified in the extradition request.

5.8.3.2 The Department considers that this is not a workable option. While it may be open to a party to a bilateral treaty to make an interpretative declaration in relation to an ambiguous provision, it is not permissible to make a reservation to the effect that it will not be bound by a particular provision. Such reservations are only appropriate in the context of multilateral treaties, when they may be allowed as the price of gaining wide acceptance of a treaty. In the case of a bilateral treaty a substantive disagreement as to the terms should be resolved, if at all, by renegotiation. In the Department’s view the meaning of the requirement for a statement of acts and omissions is clear and is well understood by both parties. The effect of the suggested “interpretative declaration” would in fact be to provide that Australia would not be bound to accept an extradition request which complied with all the express

requirements of the treaty unless an additional requirement not set out in the treaty were also complied with. Accordingly, Latvia would be entitled to regard it as a reservation and accordingly to reject Australia's purported final agreement to be bound by the treaty.

5.8.3.3 These concerns apply *a fortiori* in the case of treaties already in force. The meaning of the relevant provisions have in each case been well understood by both parties from the outset. Accordingly, there is no basis on which Australia could now seek to raise a question of interpretation and unilaterally impose a meaning never envisaged by the parties and inconsistent with the meaning hitherto acted upon by both sides. Such a proceeding could be expected to cause considerable annoyance to our treaty partners (to say the least) and would not facilitate acceptance of the substantive change Australia was seeking.

5.8.3.4 Accordingly, it would be preferable, and indeed necessary, to seek to negotiate an amendment to each treaty. It is likely that this would be a lengthy and expensive process and, in many cases, unsuccessful. In addition it would have significance for the approach that would need to be taken to any associated amendments to the Extradition Act.

## **6. Limitation on evidence adduced by accused<sup>24</sup>**

### ***6.1 Background and Basic Principle***

6.1.1 Both the Foreign States and Commonwealth Countries Acts were amended in 1985 to provide that, at the extradition hearing, a fugitive is not entitled to adduce, and a magistrate is not entitled to receive, evidence to controvert an allegation that the fugitive has committed an act or omission in respect of which the surrender of the person is requested. This provision now appears as s. 19 (5) of the 1988 Act.

6.1.2 In his evidence to the Committee in relation to the Australia-Latvia Extradition Treaty, Professor Shearer was particularly critical of this aspect of the legislation, noting that "The alleged fugitive is not even permitted to present evidence of an alibi".<sup>25</sup>

6.1.3 However, this provision gives effect to the well established common law principle that extradition proceedings are not trials to determine guilt or innocence or to test evidence. The extradition hearing is an administrative process designed to establish if the person is liable under the law to be surrendered to another jurisdiction to face trial or punishment. V.E. Hartley Booth states the principle as follows:

"The fugitive criminal may be represented and may receive legal aid and give evidence on oath himself. He may call witnesses and produce exhibits so far as

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<sup>24</sup> The following discussion draws heavily on H Woltring, 'Extradition Law', in [1987] Law Inst J 919, at 921-922, in relation to the United States, on M Cherif Bassiouni, *International Extradition: United States Law and Practice* (1987) Oceana Publishing, New York, at 557-562 and, in relation to the United Kingdom, on VE Hartley Booth, *British Extradition Law and Procedure* (1980) Sijthoff and Noordhoff, Alphen aan den Rijn (Netherlands) at 58-59, 89-90 and 250-251 and A Jones, Jones on Extradition (1995) Sweet and Maxwell, London, at 182-185.

<sup>25</sup> *Ibid.*, at p. 10.

this is relevant, bearing in mind that the committal proceedings can never amount to a trial of fact.”<sup>26</sup>

## 6.2 *Position in United States and Canada*

6.2.1 The classic statement of the reasons for this rule was made in the American case of *In re Wadge* as long ago as 1883 in the following terms:

“If [a right to introduce evidence in defence] was recognised as the legal right of the accused in extradition proceedings, it would give him the option of insisting upon a full hearing and trial of his case here; and that might compel the demanding government to produce all its evidence here, both direct and rebutting in order to meet the defence thus gathered from every quarter. The result would be that the foreign government, though entitled by the terms of the treaty to the extradition of the accused for the purpose of a trial where the crime was committed, would be compelled to go into a full trial on the merits in a foreign country, under all the disadvantages of such a situation, and could not obtain extradition until after it had procured a conviction of the accused upon a full and substantial trial here. This would be in plain contravention of the intent and meaning of the extradition treaties”<sup>27</sup>

The United States Supreme Court has cited this statement with approval.<sup>28</sup>

6.2.2 The implications of this reasoning for admissibility of evidence from the fugitive before American courts were concisely summarised in the case of *In re Shapiro* as follows:

“The defenses available to the fugitive in an extradition proceeding are sharply limited. For example, alibi evidence and evidence contradicting the demanding country’s proof, and evidence in the nature of a defense, such as insanity, are inappropriate to such a hearing. The fugitive’s right is limited to adducing evidence which explains rather than contradicts the supporting proof.”<sup>29</sup>

It is, however, open to the fugitive to show that he or she is not the person sought by the requesting country.<sup>30</sup>

6.2.3 A number of Canadian decisions have held that since an extradition hearing is not a trial, but a proceeding in the nature of a preliminary hearing, the weight of any evidence adduced by the accused to contradict the evidence of the prosecution cannot be considered by a judge.<sup>31</sup> Further Canadian authorities have drawn the logical conclusion from this that a judge cannot receive evidence on behalf of the fugitive to contradict that tendered on behalf of the requesting state.<sup>32</sup>

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<sup>26</sup> *British Extradition Law and Procedure* (1980) Sijthoff and Noordhoff, Alphen aan den Rijn (Netherlands), at 58.

<sup>27</sup> 15 F, 864, per Brown J at 866 (SDNY 1883).

<sup>28</sup> *Charlton v Kelly* 229 US 447 (1930) and *Collins v Loisel* 259 US 309 (1922).

<sup>29</sup> 352 F Supp 641 (SDNY 1973).

<sup>30</sup> 6 M Wightman, *Digest of International Law* 998–99 (1968).

<sup>31</sup> *R v Gould* (1869) 20 CCC 154, *Re Caldwell* (1870) 5 PR 217, and *Re Stanbro* (1884) 1 ManLR 263.

<sup>32</sup> *Re Stanbro* (1884) 1 ManLR 263 and *Re Garbutt* (1891) 21 OR 179.

### 6.3 Position in the United Kingdom

#### 6.3.1 Admission of defence evidence

6.3.1.1 In the United Kingdom the position is somewhat equivocal, although it proceeds from the same fundamental principle. The traditional formulation of the “*prima facie* case” requirement has been “whether, if this evidence stood alone at trial, a reasonable jury, properly directed, could accept it and find a verdict of guilty”.<sup>33</sup> However, in contrast to the United States and Canadian position, the magistrate must receive any evidence tendered by the defence.<sup>34</sup> A striking example of this is the *Alves* case<sup>35</sup>, in which the requesting country (Sweden) relied on the evidence of an alleged accomplice of the fugitive. The alleged accomplice, having served his sentence, appeared as a witness for the fugitive and repudiated his earlier deposition on the ground that it had been procured by threats.

6.3.1.2 In *Alves* the magistrate’s decision to commit the fugitive to await his surrender was upheld by the House of Lords, but that is not to say that defence evidence is necessarily given no weight. In the unreported case of *Godber* Lord Widgery CJ said:

“Of course if the defence are able to discredit a prosecution witness to the point that no-one would really believe his evidence at all ... this will have an important effect on the outcome of the committal proceedings. But merely to show that there is defence evidence which is as good as the prosecution’s case ... is not good enough in these proceedings because it merely shows that there is an issue for the jury to try and it does not prevent the prosecution from claiming that they have made out a *prima facie* case.”<sup>36</sup>

However, there does not appear to be a reported case in which the requesting country was held to have failed to establish a *prima facie* case against the fugitive because of evidence presented in rebuttal.

#### 6.3.2 Alibi evidence

6.3.2.1 In relation to the issue of alibi, the United Kingdom authorities are mixed, as in the context of domestic criminal proceedings evidence of an alibi would not be given until the trial. Those cases where it has been taken into account directly appear to be confined to instances in which the evidence effectively went to identity (and could be assessed with some degree of certainty), because the alleged fugitive asserted that he or she was in the United Kingdom at the time of the alleged offence.<sup>37</sup> However, Hartley Booth considers that the decision of the House of Lords in *Kakis v. Republic of Cyprus*<sup>38</sup> is authority for the proposition that alibi evidence in general (i.e. including evidence to the effect that the fugitive was in the requesting country but not

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<sup>33</sup> *R v Brixton Prison Governor; ex parte Schtraks* [1964] AC 556, per Lord Reid at 580 (HL).

<sup>34</sup> *R v Zossenheim* (1903) 20 TLR 121.

<sup>35</sup> *R v Governor of Pentonville Prison; ex parte Alves* [1993] AC 284 (HL).

<sup>36</sup> See Hartley Booth, *op cit*, at pp 58–59.

<sup>37</sup> e.g. *R v Allen and Taylor* (1888), in E Clarke, *A Treatise on the Law of Extradition*, 4th ed (1903) Stevens and Haynes, London.

<sup>38</sup> (1978) 1 WLR 779.

at the scene of the crime at the relevant time) may be adduced, although it may carry little weight.

6.3.2.2 It is not clear that *Kakis* does support this view. In that case the fugitive was sought for a murder committed in Cyprus in April 1973. He was not arrested by the British authorities until February 1977. The basis of his appeal was that, under the Fugitive Offenders Act, 1967 (UK), it would be unjust or oppressive to return him to Cyprus, as the only two witnesses who could support his alibi had moved to the United Kingdom and were now unwilling to return to Cyprus for fear of political persecution. They could not, of course, be compelled to attend a trial in another country as witnesses. The appeal was allowed because, by reason of lapse of time for which he was not responsible, he would not now be in a position to adduce evidence in support of his alibi, thus detracting from the fairness of his trial. It does not appear from the report that the evidence was admitted in rebuttal of the requesting country's case. The House of Lords certainly only considered it on the limited issue of the unjustness or oppressiveness of the proposed trial in Cyprus. Lord Diplock, with whom the remaining members of the court agreed on this issue, made it clear that English courts were in no position to form a view as to the strength of alibi evidence. Lord Keith of Kinkel, in a dissenting judgment pointing out the often questionable probative value of alibi evidence, expressed the view that it would not have been appropriate for a British court to have commented on the reliability and credibility of the evidence in this case lest this should prejudice the actual trial.

6.3.2.3 In essence, the position in the United Kingdom appears to be that the fugitive may adduce evidence in rebuttal of the requesting country's case but this will only prevent the finding of a *prima facie* case in circumstances where it comprehensively and convincingly undermines the credibility of that case. The very small amount of case law on this matter and the brief mention it receives in texts suggest that fugitives have not generally thought it worthwhile to present evidence of this type at an extradition hearing, perhaps because of the slight chance of affecting the outcome.

## **6.4 The Australian position**

### *6.4.1 The magistrate's role*

6.4.1.1 The 1985 amendments to the Australian Acts (corresponding to s. 19 (5) of the 1988 Act) ensured that magistrates acted in accordance with the United States and Canadian common law position outlined above. They represent a move away from the United Kingdom position, but because both positions stem from the same underlying concept of the role of the extradition hearing the practical difference is not great.

6.4.1.2 The role of the magistrate is to determine whether the documents that are produced to him or her are sufficient to satisfy him or her that the fugitive is liable to be surrendered. This does not mean that the fugitive cannot produce any evidence to the magistrate. The magistrate *must* receive evidence from the fugitive going to the issues raised by certain of the provisions of the legislation which relate to liability to surrender. These include evidence that:

- (a) the person is not the person named in the foreign warrants and request (by this means evidence in the nature of an alibi, which would not be admissible for the purpose of contradicting the allegations by the requesting country, can be introduced in some circumstances);
- (b) the offence alleged, or the conviction recorded, was not in respect of an extraditable offence;
- (c) the documents tendered in support of the request are not in proper form or are incomplete;
- (d) the offence alleged, or the conviction recorded, is in respect of an offence of a political character or that the requisition for surrender was in fact made with a view to try to punish the person for an offence of a political character;
- (e) the speciality requirements are not satisfied;
- (f) the person has been acquitted or pardoned or has already undergone the punishment provided for the offence alleged in the request;
- (g) there are substantial grounds for believing that the request for extradition was in fact made for the purpose of prosecuting or punishing the person on account of his race, religion, nationality or political opinions or that, if surrendered, the person may be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.

6.4.1.3 Other matters may be the subject of evidence properly adduced by a fugitive. These matters fundamentally fall within the category of additional mandatory safeguards contained in Australia's modern extradition treaties and include for example:

- (a) that the intended prosecution is statute barred;
- (b) that the offence alleged, or conviction recorded, is in respect of a purely military offence not known to the ordinary criminal law; and
- (c) that, if surrendered, the person would be liable to be tried by, or liable to serve a sentence already imposed by, an extraordinary or ad hoc tribunal.

6.4.1.4 None of the above matters "controvert an allegation that the person has committed an act or omission in respect of which the surrender of the person is requested".

#### 6.4.2 *The Minister's role*

6.4.2.1 Despite the limitations applicable to the extradition hearing, the Minister is required under Australian law to take into account any representations made by or on behalf of the fugitive. If, for example, a person were able to demonstrate that the allegations were completely false or that the prosecution was not instituted in good faith (the sorts of situation where defence evidence would be given significant weight in the United Kingdom), the Minister would take this into account. Australian extradition treaties generally require the Minister to consider whether, in the

circumstances of the case, the extradition of the person would be unjust. The surrender determination is potentially subject to judicial review in an Australian court, which could overturn a capricious decision or one which failed to take account of relevant factors.

## **7. Nationals**

### **7.1 *International practice***

7.1.1 Internationally, practice in relation to extradition of nationals falls into two broad camps. As a rule common law countries have no objection to the extradition of their nationals. Conversely, since the middle of the 19th Century the civil law countries of Continental Europe have consistently opposed extradition of their nationals and other civil law countries have generally followed their lead, although the Latin American States have shown discernibly greater flexibility in their adherence to this rule.

7.1.2 This division of opinion is not accidental but corresponds to significant differences in the rules of the two legal systems. Common law States generally do not claim criminal jurisdiction over conduct occurring outside their territory. While there are some exceptions of long standing to this rule and the number of exceptions is growing in response to the growth of international travel and communications, the territorial principle of jurisdiction remains fundamental in the common law world. This principle may be seen as a necessary concomitant of the common law accusatorial system of criminal justice, with its complex rules of evidence which normally make prosecution for an offence alleged to have occurred outside the court's territorial jurisdiction extremely difficult. The effect of this position is that, in the absence of specific legislative provision, common law states have no legal basis to prosecute a person in lieu of extradition. Even where there is statutory provision to permit such prosecutions, they are likely to prove very difficult, if not totally impracticable, in many cases. Accordingly, the practical result of refusal to extradite is likely to be impunity for the person concerned.

7.1.3 Civil law States generally claim jurisdiction over the conduct of their nationals wherever occurring and so are always in a position, as a matter of law, to prosecute a fugitive in lieu of extradition. The inquisitorial criminal justice system, in which the judge is required to satisfy him or herself of the truth of the matter with very few formal restrictions on the evidence he or she may take into account, lends itself far more readily to a prosecution for an offence alleged to have occurred in the territory of another State, as it minimises the difficulties which arise from such factors as the non-compellability of witnesses located in foreign countries, witnesses' ignorance of the language of the court, and the like.

7.1.4 Although philosophically opposed to refusal of extradition of nationals, the United Kingdom and the United States have generally been obliged to agree to bilateral extradition treaties with civil law countries which provided at least a discretion for the parties to refuse to extradite their nationals. It is the Department's understanding that, where consistent with the terms of a treaty, these countries have remained willing in principle to extradite their nationals to civil law States. However,

in the case of the United Kingdom this has been counterbalanced by the inclusion in all its bilateral extradition treaties of the “*prima facie* case” requirement, which has presented a major obstacle to extradition to civil law States irrespective of the nationality of the fugitive. The extradition practice of the United Kingdom has been significantly altered during the last decade by its participation in the European Convention on Extradition, which combines the discretion to refuse extradition of nationals with the “no evidence” extradition procedure.

## 7.2 *Theoretical justifications*

7.2.1 The principal grounds advanced for refusal to extradite nationals are as follows:

- A person ought, wherever possible, to be tried by his or her “natural judges”, i.e. the courts of his or her home country.
- The State owes a special duty of protection to its subjects.
- A citizen has a right not to be compelled to leave his homeland.
- A foreigner cannot expect the same standard of justice to be applied to him in a foreign court as in a court in his own country, whether because of conscious or unconscious prejudice or simply because of the difficulties of mounting an effective defence away from one’s own resources and support networks.
- The criminal laws of States vary in substance and procedure and may be inferior to those of the home State.

7.2.2 The principal arguments advanced in support of the extradition of nationals are as follows:

- While a person is in a foreign country he or she enjoys the protection of that country’s laws and owes a corresponding duty to obey them. The enforcement of those laws is primarily a matter for that country, whether or not the accused person is apprehended within its territory.
- Even where the law permits exercise of personal jurisdiction over a country’s nationals for offences alleged to have been committed outside its territory, prosecution in the exercise of such jurisdiction will always involve significant practical difficulties, even under the more flexible arrangements of the civil law system e.g. the non-compellability of witnesses and/or need to rely on written testimony, greater need for reliance on translation, difficulty of obtaining physical evidence or viewing the scene of the alleged events, possible lack of diligence on the part of the prosecutor in the face of these other difficulties. In two recent cases where Australian extradition requests have been refused by our civil law treaty partners on grounds of nationality, we have sought prosecution in lieu of extradition. In both cases (one is still continuing), the process has proved extremely difficult.

### **7.3 *Recent international developments***

7.3.1 In recent years there have been increasing calls from international conferences on law enforcement co-operation for a more flexible attitude to extradition of nationals but there has been little progress in this area. The non-extradition of nationals is an entrenched principle of most civil law systems, often guaranteed by the country's constitution.

7.3.2 The one significant development in this regard which is frequently cited is the willingness of the Netherlands to agree to extradite its nationals on condition that they will be returned to the Netherlands to serve any sentence imposed in the requesting State. The 1998 United Nations General Assembly Special Session on the World Drug Problem, in its document on "Measures to promote judicial co-operation", recommended that Parties consider, among other matters, the possibility of extraditing their nationals on this basis. The recently concluded United Nations Convention against Transnational Organized Crime includes, at Article 16, paragraph 11, a provision that extradition of a national for trial only is to be considered sufficient compliance with the obligation to extradite or prosecute an alleged offender. Substantially identical provisions have been included in the Conventions against Terrorist Bombings and Financing of Terrorism, which were both concluded in recent years, and appear to have become a standard element of the extradition provisions to be included in new multilateral treaties on criminal matters.

### **7.4 *Australian treaty practice and policy***

7.4.1 All but one of Australia's extradition treaties (the exception being the treaty with Ireland), including both modern and inherited treaties, contain either a discretion not to surrender nationals or, in the case of some inherited treaties, a complete prohibition on the surrender of nationals. Not only is this generally required by our treaty partners but it provides an ultimate safeguard or protection for Australian citizens in cases where there are concerns about an extradition request which cannot be brought within any of the other grounds of refusal provided in a treaty. Accordingly, a discretion to refuse extradition on grounds of nationality appears in the Australian Model Extradition Treaty.

7.4.2 Until the 1988 Act commenced, refusal by Australia to extradite an Australian citizen would almost certainly have resulted in that fugitive totally escaping justice. With this in mind, provision was made in the 1988 Act (s. 45) to make it possible to prosecute an Australian citizen for an offence committed overseas if the person's extradition had been refused solely on grounds of nationality on the basis that the Minister is satisfied that the requesting State would not have extradited one of its nationals to Australia in a corresponding case. There was some speculation at that time that Australia had decided to adopt the practice of civil law States in this regard and would refuse extradition of its nationals generally. In reality there was never any such intention and in practice there have been very few refusals on grounds of nationality. No one has yet been tried under s. 45 of the 1988 Act. Moreover, experience with the reception of video-link evidence under the *Crimes (Child Sex Tourism) Amendment Act 1994* illustrates that, even with the aid of modern telecommunications, trials for offences alleged to have occurred outside the territorial jurisdiction are still likely to be extremely difficult in common law countries.

7.4.3 Unless countries in either group are prepared to change their policies and laws (including very significant changes to evidentiary laws in the case of common law countries), the pattern of co-operation necessary to ensure that nationals of one country wanted in another are not able to evade the criminal justice process must involve:

- a common law country (if unable itself to prosecute effectively) being prepared to extradite its nationals to the State where the alleged offence occurred; and
- a civil law country taking prosecution action against its nationals on the basis of material provided by the State where the alleged offence occurred.

7.4.4 Accordingly, the Government has taken the view that a blanket refusal to extradite Australian citizens would run counter to the interests of justice. Despite the possibility of a prosecution under s. 45 of the 1988 Act, the difficulties inherent in prosecuting persons for offences committed overseas (including difficulties which arise under our criminal trial processes) would mean that blanket refusal to extradite our nationals would result in many persons escaping justice entirely and, subject to Australians returning home undetected, would amount to a licence to commit offences abroad. Thus a strict insistence on reciprocity in this respect would ultimately be to the detriment of effective law enforcement.

7.4.5 Given that position, Australia would need to be very cautious about refusing extradition on grounds of nationality unless:

- (a) it were planning to exercise jurisdiction in the matter itself under s. 45; or
- (b) extradition would impose exceptional hardship on the fugitive.

Accordingly, it has been the Department's practice in bilateral extradition treaty negotiations to assure the other side, if the question is raised, that as a matter of practice Australia would be prepared to consider extraditing a national.

## **7.5 *Should Australia refuse to extradite its nationals?***

7.5.1 In his evidence to the Committee's inquiry into the Australia-Latvia Extradition Treaty, Professor Shearer is said to have expressed the view that "the true mismatch between Australia and civil law countries is not that they do not understand Australia's requirement of a *prima facie* case but that Australia (together with other countries of the common law inheritance) has no rule or policy against the extradition of its citizens and does not have general jurisdiction over crimes committed by Australian citizens abroad, whereas countries with a civil law heritage have such policies and powers that are at times included in their constitutions".<sup>39</sup>

7.5.2 With respect, the Department submits that the two issues are so interrelated that there is little point in seeking to assign primacy to one over the other. Moreover, the Department considers that the foregoing discussion demonstrates that a move at present to a policy of always or generally refusing extradition of Australian citizens would be a retrograde step in terms of effective law enforcement. Indeed, it is

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<sup>39</sup> Joint Standing Committee on Treaties, *Report 36*, p. 10.

submitted that non-extradition of nationals is a continuing problem for international law enforcement co-operation and that retaliation in kind by common law countries would greatly aggravate the problem.

7.5.3 Even if the considerations against giving nationals a privileged position in relation to extradition which are discussed in the following section are not accepted by the Committee, it is submitted that, rather than extending to common law countries at this stage the right (or perhaps privilege) enjoyed by nationals of civil law countries in this regard, it would be preferable to await developments in communications technology and in international legal co-operation which would make it possible to conduct effective trials in common law countries in lieu of extradition in such cases. While it is fair to say that the requisite technological advances have already progressed significantly, the development of a framework of international agreements, and even underpinning domestic legislation, to allow effective use to be made of the technology is still at a very early stage.

7.5.4 This is not the place to enter into a detailed discussion of the issues surrounding development of procedures for reception of video-link evidence. However, it is clear that development of the requisite co-operative arrangements will involve requested countries providing more direct assistance within their own territory for the conduct of foreign proceedings than they have generally been willing to do in the past, e.g. the compulsion of witnesses to participate personally in foreign criminal proceedings (not merely, as at present, to give evidence before a court in the requested country for use in such proceedings) and the exercise of control over contempt against the foreign court. Such inroads into national sovereignty are unlikely to be agreed without careful consideration and the process is likely to take many years.

## **7.6 *Should Australia impose special evidentiary requirements for extradition of Australian citizens?***

7.6.1 In its report on the Australia-Latvia Extradition Treaty the Committee raised this issue and commented as follows:

“Citizenship of Australia ought to confer on holders more than a public relations effect; it ought to carry some genuine protection at law, some real difference in rights along with some real difference in responsibilities. Extradition rules seem an appropriate area of law in which to provide some such protection against false accusations in a foreign country.”<sup>40</sup>

Conversely, Professor Shearer, in proposing a “middle ground” approach to the issue of evidentiary requirements, expressly indicated that it was and should be a non-discriminatory solution. In support of this view he cited Article 26 of the International Covenant on Civil and Political Rights, 1966.<sup>41</sup>

7.6.2 Given the widespread practice of civil law countries in refusing extradition of their nationals, it cannot be denied that many countries take the view that this type of protection is an appropriate right or privilege of their nationals. Conversely, it is

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<sup>40</sup> Ibid, p. 15.

<sup>41</sup> Ibid, p. 11.

difficult to reconcile with the traditional common law interpretation of equality before the law.

7.6.3 With respect, it is submitted that Professor Shearer's support for a non-discriminatory approach is more consistent with both principle and effectiveness. It is arguable that the special rights and duties associated with citizenship should essentially be those associated with the management and protection of the society to which the citizen's personal fate is tied, e.g. the rights to vote and to hold public office, military service obligations. By contrast, it is clearly true as a general proposition that obedience to the law is owed by all within the territorial jurisdiction to which it applies and all within that jurisdiction are equally entitled to the protection of the law. One corollary of this is that a foreigner should be liable for his or her conduct within a country on the same basis as nationals of that country. (It is well established in international law that a person's country of nationality is entitled to exercise diplomatic protection to ensure that its national receives equal treatment under the law of a foreign country, and possibly even treatment that conforms to an international minimum standard.) It might be considered that another corollary is that, in the absence of indications that the person will be disadvantaged in the requesting country because of his or her nationality (which can already be taken into account in an Australian extradition hearing, whatever the nationality of the fugitive) the country where the offence allegedly occurred should be allowed to exercise jurisdiction unless there is some special reason not to do so.

## **8. Respective Roles and Functions**

8.1 In its report on the Latvia-Australia Extradition Treaty, the Committee expressed some concern about the current distribution of roles between the magistrate conducting an extradition hearing and the Minister. It should be noted in this regard that we are not talking about an issue of separation of powers in the strict sense. Extradition is an administrative function, not a judicial one. However, it has traditionally been a function shared between a magistrate and a Minister in common law countries. (In some civil law countries the functions performed by the Minister in our system are largely performed by an independent prosecutor.)

8.2 There is good reason for the role of the Minister in the process. Extradition involves issues of international relations as well as justice. For reasons of diplomacy a government may wish to describe its grounds for refusing an extradition in less confrontational terms than a strict legal consideration of the position might suggest. Moreover a government may have access to confidential sources of information on the internal affairs of a requesting country; significant problems could result from any need to substantiate such information in court. There may be occasions when consideration needs to be given to the possibility of refusing extradition of an otherwise eligible person because of concerns about whether an extradition partner is fulfilling its obligations under the relevant arrangement or treaty, or indeed whether there are conditions or developments in the country which make it an unsuitable treaty partner. These are all matters which a Minister is better positioned to handle than are the courts and the Department does not understand the Committee to object to the Minister playing this type of role.

8.3 The nub of the issue appears to be the effect of the decision in 1985 to allow for the removal of the requirement for the requesting country to establish a *prima facie* case. Where the “no evidence” procedure has been introduced the importance of the extradition hearing has unquestionably been reduced and consideration of such evidentiary issues as arise has become a function of the Minister rather than the magistrate. Professor Shearer rightly notes that there have been a few cases where extradition was refused by the Minister because of perceived deficiencies in the case against the fugitive. No doubt it is arguable that the process is less transparent than consideration by a court of the evidence against the fugitive.

8.4 Whether the present legislation strikes the correct balance is, in the end, a matter of personal judgment. However, two points should be kept in mind. First, the Minister’s decisions are reviewable under the prerogative writ procedure and have often been reviewed in that way. Second, the “no evidence” procedure is the basis for the great bulk of Australia’s extradition treaties. Without these, Australia would have great difficulty recovering fugitives from Australian justice and would itself become something of a haven for overseas criminals. This is not a consequence to be dismissed lightly.



**IMPERIAL EXTRADITION LEGISLATION**

Under the Extradition Act, 1870 (Imp) the Crown was authorised to direct by Order in Council that the Act should apply in the case of a foreign State with which the United Kingdom had entered into an extradition treaty. In the course of the late 19th and early 20th centuries the United Kingdom negotiated extradition treaties with almost every country in Europe and the Americas and a few countries in Asia and Africa. The earlier treaties applied to the Australian colonies, and later the newly established Commonwealth of Australia, as a matter of course. In the case of treaties negotiated after World War I, application of the treaty was extended to Australia as a dominion with its consent. In either case the treaty applied by virtue of an Imperial Order in Council.

A2. The scheme and operation of these treaties was broadly similar to that of Australia's modern (i.e. post-1985) extradition treaties, but there were some significant differences. Characteristically, the Imperial treaties provided for extradition for any offence included in a specific list, with a discretion to extradite for any other offence regarded as extraditable under the laws of both parties at the time. The parties were entitled to refuse surrender of their own nationals. (In some of the older treaties there was no provision for extradition of a party's nationals.) Grounds for refusal were:

- if the fugitive had already been tried and discharged or punished, or was still under trial, in the requested State;
- if the fugitive had acquired exemption from prosecution or punishment by lapse of time under the laws of either requesting or requested State; and
- if the offence for which the fugitive's extradition was sought was of a political character.

A3. Extradition was subject to the condition of speciality, i.e. that the fugitive, if extradited, was not to be tried in the requesting State for any other offence (apart from an offence committed after his extradition) than that for which he had been extradited, until he had had an opportunity of returning to the requested State.

A4. Requests for extradition were to be made through the diplomatic channel. If the fugitive was an accused person the request for extradition was to be accompanied by an arrest warrant and evidence sufficient to justify the fugitive's arrest if the offence had occurred in the requested State. (In the case of a person already convicted, the request was to be accompanied by the sentence of condemnation.) There was also provision for provisional arrest of a fugitive, who could be held in custody for a specified period pending receipt of the request.

A5. Extradition could be granted only if properly authenticated documentary evidence (depositions and copies of documents) was produced which would be sufficient under the laws of the requested State to justify committal of the fugitive to trial if the offence had occurred in that country, or to prove the identity of the fugitive

as a person convicted in the requesting State and that the offence was extraditable in the requested State at the time of conviction. This additional evidence had to be produced within a specified time or such additional time as the requested State required, or the fugitive would be released.

A6. In the United Kingdom the evidence was assessed by a police magistrate at a hearing conducted as nearly as possible in the same way as a domestic committal hearing for an indictable offence. The magistrate might also take account of evidence that the alleged offence was of a political character or was not an extraditable offence. If satisfied that the fugitive might lawfully be extradited, the magistrate would commit him to prison, but otherwise would immediately order the fugitive to be discharged.

A7. The fugitive could not be surrendered less than 15 days after the decision to grant extradition was made, during which time he could appeal for a writ of habeas corpus. At the conclusion of the 15 days or of the hearing of the application (unless it succeeded) the Home Secretary could issue a surrender warrant and the fugitive could be removed to the requesting State. If the fugitive were not removed within 2 months he could apply to a judge for an order that he be discharged from custody. If the fugitive had already been accused of or sentenced for another offence in the requested State, the surrender was to be postponed until the completion of the trial and any sentence.

#### *Extradition within the British Empire and Commonwealth until 1966*

##### *(a) General extradition regime for the Empire*

A8. Part I of the Fugitive Offenders Act, 1881 provided for an arrest warrant issued in one part of the Empire to be endorsed for execution in another part by both a superior court judge and the governor of that part (in the case of the United Kingdom, a superior court judge, the Home Secretary and a police magistrate) if they were satisfied that the warrant had been issued with lawful authority and that the person named in the warrant was in or on his way to that other part. Before such a warrant had been received, a magistrate in a part of the Empire could issue a provisional arrest warrant for a fugitive suspected to be in or on his way to that part on such information, and in such circumstances as would justify issue of an arrest warrant for an offence committed within the magistrate's jurisdiction. There was no requirement for dual criminality: Part I applied to all offences which were punishable, in the part of the Empire where they were committed, by 12 months' imprisonment with hard labour or a more severe penalty.

A9. Once the fugitive was arrested, he was to be brought before a magistrate. If the magistrate found the arrest warrant authentic and that the evidence produced raised a "strong or probable presumption" that the fugitive committed the offence alleged (i.e. a *prima facie* case, *R v Governor of Brixton Prison; Ex parte Bidwell* [1937] 1 KB 305, per Swift J at 314) and that Part I applied to the offence, he was to commit the fugitive to prison to await his return to the requesting part of the Empire. The fugitive then had 15 days within which to make an application for a writ of habeas corpus. After the 15 days or the completion of the hearing of such application (assuming it was unsuccessful), the Home Secretary or the governor of the colony could, "if he thinks just", issue a warrant for the return of the fugitive to the part of the Empire

where the offence was alleged to have occurred. The fugitive was entitled to apply to a superior court to be discharged if not returned within one month. In addition, the fugitive could apply to a superior court for an order that he be discharged or that his return be postponed, on the grounds that, by reason of the trivial nature of the case, the application for his return not having been made in good faith in the interests of justice or otherwise, it would, having regard to all the circumstances of the case, be unjust, oppressive or too severe a punishment to return the fugitive at any time or for the time being. Lastly, if not prosecuted within 6 months of his return, or if acquitted, the fugitive was entitled to request the Home Secretary or the colonial governor to provide him with free passage back to the part of the Empire from which he had been extradited.

*(b) Simplified extradition within geographical regions*

A10. Under Part II of the Fugitive Offenders Act an arrest warrant issued in one of a group of colonies could be endorsed for execution in another of that group by a magistrate in the latter colony if the magistrate was satisfied the warrant was issued with lawful authority and the person named in the warrant was suspected to be in or on the way to the latter colony. Again there was no requirement for dual criminality. Before the warrant was received, a magistrate could issue a provisional arrest warrant, on the strength of which a fugitive could be held in custody for a reasonable time. Once the fugitive was arrested and the warrant received and endorsed, a magistrate had to be satisfied that the warrant was duly authenticated and had been issued by a person with lawful authority to do so and that the prisoner was in fact the person referred to in the warrant. If so satisfied the magistrate could order the return of the fugitive to the colony in which the arrest warrant had been issued. The fugitive was entitled to apply to a magistrate or a superior court to be discharged if not returned within one month. In addition, the fugitive could apply to a magistrate or a superior court for an order that he be discharged or that his return be postponed, on the grounds that, by reason of the trivial nature of the case, the application for his return not having been made in good faith in the interests of justice or otherwise, it would, having regard to all the circumstances of the case, be unjust, oppressive or too severe a punishment to return the fugitive at any time or for the time being. Lastly, if not prosecuted within 6 months of his return, or if acquitted, the fugitive was entitled to request the colonial governor to provide him with free passage back to the part of the Empire from which he had been extradited.

A11. For the purposes of Part II Australia was declared part of a South Pacific group of colonies and dominions in 1925. The other members of the group were Papua, Norfolk Island, New Guinea, Nauru, New Zealand, Western Samoa, Fiji, the Gilbert and Ellice Islands (now Kiribati and Tuvalu) and the British Solomon Islands.



## ATTACHMENT B

*Note: Attachment B is not available in this format.*



















## ATTACHMENT C

### AUSTRALIAN MODEL EXTRADITION TREATY

Revised version of 13 August 1986

#### TREATY ON EXTRADITION BETWEEN AUSTRALIA AND .....

Australia and .....

DESIRING to make more effective the co-operation of the two countries in the suppression of crime by concluding a treaty on extradition.

HAVE AGREED as follows:

#### **Article 1** **Obligation to extradite**

Each Contracting State agrees to extradite to the other, in accordance with the provisions of this Treaty, any persons who are wanted for prosecution or the imposition or enforcement of a sentence in the Requesting State for an extraditable offence.

#### **Article 2** **Extraditable offences**

1. For the purposes of this Treaty, extraditable offences are offences however described which are punishable under the laws of both Contracting States by imprisonment for a maximum period of at least one year or by a more severe penalty. Where the request for extradition relates to a person convicted of such an offence who is wanted for the enforcement of a sentence of imprisonment, extradition shall be granted only if a period of at least six months of such penalty remains to be served.
2. For the purpose of this Article in determining whether an offence is an offence against the law of both Contracting States -
  - (a) it shall not matter whether the laws of the Contracting States place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology;
  - (b) the totality of the acts or omissions alleged against the person whose extradition is sought shall be taken into account and it shall not matter whether, under the laws of the Contracting States, the constituent elements of the offence differ.
3. Where extradition of a person is sought for an offence against a law relating to taxation, customs duties, foreign exchange control or other revenue matter extradition

may not be refused on the ground that the law of the Requested State does not impose the same kind of tax or duty or does not contain a tax, duty, customs, or exchange regulation of the same kind as the law of the Requesting State.

4. Where the offence has been committed outside the territory of the Requesting State extradition shall be granted where the law of the Requested State provides for the punishment of an offence committed outside its territory in similar circumstances. Where the law of the Requested State does not so provide the Requested State may, in its discretion, grant extradition.

5. Extradition may be granted pursuant to the provisions of this Treaty irrespective of when the offence in relation to which extradition is sought was committed, provided that:

- (a) it was an offence in the Requesting State at the time of the acts or omissions constituting the offence; and
- (b) the acts or omissions alleged would, if they had taken place in the territory of the Requested State at the time of the making of the request for extradition, have constituted an offence against the law in force in that State.

### **Article 3** **Exceptions to extradition**

1. Extradition shall not be granted in any of the following circumstances:
  - (a) if the offence for which extradition is sought is a political offence. Reference to a political offence shall not include the taking or attempting taking of the life of a Head of State or a member of that person's family nor an offence against the law relating to genocide;
  - (b) if there are substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality or political opinion or that that person's position may be prejudiced for any of those reasons;
  - (c) if the offence for which extradition is sought is an offence under military law, which is not an offence under the ordinary criminal law of the Contracting States;
  - (d) if final judgement has been passed in the Requested State or in a third state in respect of the offence for which the person's extradition is sought;
  - (e) if the person whose extradition is sought has, according to the law of either Contracting State, become immune from prosecution or punishment by reason of lapse of time; or
  - (f) if the person, on being extradited to the Requesting State, would be liable to be tried or sentenced in that State by a court or tribunal;

- (i) that has been specially established for the purpose of trying the person's case; or
- (ii) that is only occasionally, or under exceptional circumstances, authorised to try persons accused of the offence for which extradition is sought.

2. Extradition may be refused in any of the following circumstances:

- (a) if the person whose extradition is sought is a national of the Requested State. Where the Requested State refuses to extradite a national of that State it shall, if the other State so requests and the laws of the Requested State allow, submit the case to the competent authorities in order that proceedings for the prosecution of the person in respect of all or any of the offences for which extradition has been sought may be taken;
- (b) if the competent authorities of the Requested State have decided to refrain from prosecuting the person for the offence in respect of which extradition is sought;
- (c) if the offence with which the person sought is accused or convicted, or any other offence for which that person may be detained or tried in accordance with this Treaty, carries the death penalty under the law of the Requesting State unless that State undertakes that the death penalty will not be imposed or, if imposed, will not be carried out;
- (d) if the offence for which extradition is sought is regarded under the law of the Requested State as having been committed in whole or in part within that State;
- (e) if a prosecution in respect of the offence for which extradition is sought is pending in the Requested State against the person whose extradition is sought;
- (f) if the offence for which extradition is sought is an offence which carries a punishment of the kind referred to in Article 7 of the International Covenant on Civil and Political Rights; or
- (g) if the Requested State, while also taking into account the nature of the offence and the interests of the Requesting State, considers that, in the circumstances of the case, including the age, health or other personal circumstances of the person whose extradition is sought, the extradition of that person would be unjust, oppressive, incompatible with humanitarian considerations or too severe a punishment.

3. This Article shall not affect any obligations which have been or shall in the future be assumed by the Contracting States under any multilateral Convention.

**Article 4**  
**Postponement of extradition**

The Requested State may postpone the extradition of a person in order to proceed against that person, or so that that person may serve a sentence, for an offence other than an offence constituted by an act or omission for which extradition is sought. In such case the Requested State shall advise the Requesting State accordingly.

**Article 5**  
**Extradition procedure and required documents**

1. A request for extradition shall be made in writing and shall be communicated through the diplomatic channel. All documents submitted in support of a request for extradition shall be authenticated in accordance with Article 6.
2. The request for extradition shall be accompanied:
  - (a) if the person is accused of an offence - by a warrant for the arrest or a copy of the warrant for arrest of the person, a statement of each offence for which extradition is sought and a statement of the acts or omissions which are alleged against the person in respect of each offence;
  - (b) if a person has been convicted in his absence of an offence - by a judicial or other document, or a copy thereof, authorising the apprehension of the person, a statement of each offence for which extradition is sought and a statement of the acts or omissions which are alleged against the person in respect of each offence;
  - (c) if the person has been convicted of an offence otherwise than in that person's absence - by such documents as provide evidence of the conviction and the sentence imposed, the fact that the sentence is immediately enforceable, and the extent to which the sentence has not been carried out;
  - (d) if the person has been convicted of an offence otherwise than in that person's absence but no sentence has been imposed - by such documents as provide evidence of the conviction and a statement affirming that it is intended to impose a sentence;
  - (e) in all cases by the text of the relevant provision of the law, if any, creating the offence or a statement of the relevant law as to the offence including any law relating to the limitation of proceedings, as the case may be, and in either case, a statement of the punishment that can be imposed for the offence; and
  - (f) in all cases by as accurate a description as possible of the person claimed together with any other information which may help to establish that person's identity and nationality.
3. To the extent permitted by the law of the Requested State, extradition may be granted of a person pursuant to the provisions of this Treaty notwithstanding that the

requirements of Paragraph 1 and Paragraph 2 of this Article have not been complied with provided that the person claimed consents to an order for extradition being made.

4. The documents submitted in support of a request for extradition shall be accompanied by a translation into the language of the Requested State.

### **Article 6** **Authentication of supporting documents**

1. A document that, in accordance with Article 5, accompanies a request for extradition shall be admitted in evidence, if authenticated, in any extradition proceedings in the territory of the Requested State.
2. A document is authenticated for the purposes of this Treaty if:
  - (a) it purports to be signed or certified by a Judge, Magistrate or other officer in or of the Requesting State; and
  - (b) it purports to be authenticated by the oath or affirmation of a witness or to be sealed with an official or public seal of the Requesting State or of a minister of state, or of a Department or officer of the Government, of the Requesting State.

### **Article 7** **Additional information**

1. If the Requested State considers that the information furnished in support of a request for extradition is not sufficient in accordance with this Treaty to enable extradition to be granted that State may request that additional information be furnished within such time as it specifies.
2. If the person whose extradition is sought is under arrest and the additional information furnished is not sufficient in accordance with this Treaty or is not received within the time specified, the person may be released from custody. Such release shall not preclude the Requesting State from making a fresh request for the extradition of the person.
3. Where the person is released from custody in accordance with paragraph 2, the Requested State shall notify the Requesting State as soon as practicable.

### **Article 8** **Provisional arrest**

1. In case of urgency a Contracting State may apply by means of the facilities of the International Criminal Police Organisation (INTERPOL) or otherwise for the provisional arrest of the person sought pending the presentation of the request for extradition through the diplomatic channel. The application may be transmitted by post or telegraph or by any other means affording a record in writing.

2. The application shall contain a description of the person sought, a statement that extradition is to be requested through the diplomatic channel, a statement of the existence of one of the documents mentioned in paragraph 2 of Article 5 authorising the apprehension of the person, a statement of the punishment that can be, or has been imposed for the offence and, if requested by the Requested State, a concise statement of the acts or omissions alleged to constitute the offence.
3. On receipt of such an application the Requested State shall take the necessary steps to secure the arrest of the person claimed and the Requesting State shall be promptly notified of the result of its request.
4. A person arrested upon such an application may be set at liberty upon the expiration of 45 days from the date of that person's arrest if a request for extradition, supported by the documents specified in Article 5, has not been received.
5. The release of a person pursuant to paragraph 4 of this Article shall not prevent the institution of proceedings with a view to extraditing the person sought if the request is subsequently received.

#### **Article 9 Conflicting requests**

1. Where requests are received from two or more States for the extradition of the same person, the Requested State shall determine to which of those States the person is to be extradited and shall notify the Requesting States of its decision.
2. In determining to which State a person is to be extradited, the Requested State shall have regard to all relevant circumstances and, in particular, to:
  - (a) if the requests relate to different offences - the relative seriousness of the offences;
  - (b) the time and place of commission of each offence;
  - (c) the respective dates of the requests;
  - (d) the nationality of the person; and
  - (e) the ordinary place of residence of the person.

#### **Article 10 Surrender**

1. The Requested State shall, as soon as a decision on the request for extradition has been made, communicate that decision to the Requesting State through the diplomatic channel.
2. Where extradition is granted, the Requested State shall surrender the person from a point of departure in its territory convenient to the Requesting State.
3. The Requesting State shall remove the person from the territory of the Requested State within such reasonable period as the Requested State specifies and, if

the person is not removed within that period, the Requested State may refuse to extradite that person for the same offence.

4. If circumstances beyond its control prevent a Contracting State from surrendering or removing the person to be extradited it shall notify the other Contracting State. The two Contracting States shall mutually decide upon a new date of surrender, and the provisions of paragraph 3 of this Article shall apply.

#### **Article 11** **Surrender of property**

1. To the extent permitted under the law of the Requested State and subject to the rights of third parties, which shall be duly respected, all property found in the Requested State that has been acquired as a result of the offence or may be required as evidence shall, if the Requesting State so requests, be surrendered if extradition is granted.

2. Subject to paragraph 1 of this Article, the abovementioned property shall, if the Requesting State so requests, be surrendered to the Requesting State even if the extradition cannot be carried out.

3. Where the law of the Requested State or the rights of third parties so require, any articles so surrendered shall be returned to the Requested State free of charge if that State so requests.

#### **Article 12** **Rule of speciality**

1. Subject to paragraph 3 of this Article, a person extradited under this Treaty shall not be detained or tried, or be subjected to any other restriction of his personal liberty, in the territory of the Requesting State for any offence committed before his extradition other than:

- (a) an offence for which extradition was granted or any other extraditable offence of which the person could be convicted upon proof of the facts upon which the request for extradition was based, provided that that offence does not carry a penalty which is more severe than that which could be imposed for the offence for which extradition was sought; or
- (b) any other extraditable offence in respect of which the Requested State consents.

2. A request for the consent of the Requested State under this Article shall be accompanied by the documents mentioned in Article 5.

3. Paragraph 1 of this Article does not apply if the person has had an opportunity to leave the Requesting State and has not done so within 45 days of final discharge in respect of the offence for which that person was extradited or if the person has returned to the territory of the Requesting State after leaving it.

#### **Article 13** **Surrender to a third State**

1. Where a person has been surrendered to the Requesting State by the Requested State, the first-mentioned State shall not surrender that person to any third state for an offence committed before that person's surrender unless:
  - (a) the Requested State consents to that surrender; or
  - (b) the person has had an opportunity to leave the Requesting State and has not done so within 45 days of final discharge in respect of the offence for which that person was surrendered by the Requested State or has returned to the territory of the Requesting State after leaving it.
2. Before acceding to a request pursuant to sub-paragraph (1)(a) of this Article, the Requested State may request the production of the documents mentioned in Article 5.

#### **Article 14** **Transit**

1. Where a person is to be extradited to a Contracting State from a third state through the territory of the other Contracting State, the Contracting State to which the person is to be extradited shall request the other Contracting State to permit the transit of that person through its territory.
2. Upon receipt of such a request the Requested Contracting State shall grant the request unless it is satisfied that there are reasonable grounds for refusing to do so.
3. Permission for the transit of a person shall, subject to the law of the Requested Contracting State, include permission for the person to be held in custody during transit.
4. Where a person is being held in custody pursuant to paragraph 3 of this Article, the Contracting State in whose territory the person is being held may direct that the person be released if transportation is not continued within a reasonable time.
5. The Contracting State to which the person is being extradited shall reimburse the other Contracting State for any expense incurred by that other Contracting State in connection with the transit.

#### **Article 15** **Expenses**

1. The Requested State shall make all necessary arrangements for and meet the cost of any proceedings arising out of a request for extradition and shall otherwise represent the interest of the Requesting State.
2. The Requested State shall bear the expenses incurred in its territory in the arrest and detention of the person whose extradition is sought until that person is surrendered to a person nominated by the Requesting State.
3. The Requesting State shall bear the expenses incurred in conveying the person from the territory of the Requested State.

**Article 16**  
**Entry into force and termination**

1. This Treaty shall enter into force thirty days after the date on which the Contracting States have notified each other in writing that their respective requirements for the entry into force of this Treaty have been complied with.
  
2. Either Contracting State may terminate this Treaty by notice in writing at any time and it shall cease to be in force on the one hundred and eightieth day after the day on which notice is given.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto by their respective Governments, have signed this Treaty.

DONE at

on the \_\_\_\_\_ day of \_\_\_\_\_ One Thousand,  
nine hundred and eighty- ..... in English and ....., each text being equally  
authentic.



## AUSTRALIA'S EXTRADITION RELATIONS

### SUMMARY

#### GENERAL NOTES

1. Australia has modern extradition treaties in place with 29 countries. Three signed extradition treaties have yet to enter into force. Modern extradition treaties generally require that the conduct in question constitutes a criminal offence for which the maximum penalty is at least 1 year's imprisonment in both countries. They generally require production by the requesting country of a written statement setting out the conduct constituting the offence but not evidence sufficient to establish a *prima facie* case against the fugitive.
2. In addition, Australia regards itself as having succeeded to UK extradition treaties with 25 countries. These treaties were negotiated in the late 19th and early 20th centuries and applied to Australia as a colony or were extended to it as a dominion prior to 1939. In many cases it is unclear whether these countries regard themselves as having an extradition treaty in place with Australia. Reliance on the inherited treaties can present problems because:
  - the parties undertake to extradite for a list of specified offences, which is now outdated, and extradition for any other conduct which is a criminal offence in both countries is purely discretionary; and
  - because they are required to provide evidence sufficient to establish a *prima facie* case, which is often extremely difficult for non-common law countries.
3. The *Extradition Act 1988* may also be applied to countries with which Australia has no extradition treaty. The principal use of non-treaty application of the Act is to provide for extradition between Australia and other Commonwealth countries. However, the Act has been applied to a small number of non-Commonwealth countries on a non-treaty basis.
4. A number of multilateral conventions to which Australia is a party require parties to either prosecute or extradite persons found in their territory for convention offences. Convention offences include terrorist acts against aircraft and airports, piracy, drug, torture and genocide offences. To this end Australia has applied the Extradition Act to other countries which are parties to these multilateral conventions to allow for extradition in relation to specified convention offences.
5. Extradition to New Zealand is governed by a separate regime set out in Part III of the Extradition Act. Similarly to extradition between Australian jurisdictions, the procedure involves endorsement by Australian courts of

warrants issued in New Zealand, without any requirement for approval by a Minister of the decision to extradite.

6. It should be noted that some countries will extradite persons without any requirement for an extradition arrangement to be in place.
7. Many countries are prohibited by their law from extraditing their own nationals to another country, or have a long-standing practice of refusing to extradite their nationals. Where this is known to be the case, it is indicated in the following lists. Most bilateral extradition treaties provide a discretion for the requested State to refuse to surrender its nationals. In theory, the country of nationality in such a case can try the fugitive for an offence he or she is alleged to have committed in another country, but in practice trial of a person in Europe or Latin America for an offence alleged to have been committed in Australia is extremely difficult, as witnesses located in Australia cannot be compelled to give evidence in a foreign country and, if they do agree to give evidence, the costs of their attendance will be considerable.

### **BILATERAL EXTRADITION TREATIES** **In force and under negotiation**

**Note:** This list includes:

- (a) countries with which Australia has a modern extradition treaty in force (name in **bold**);
- (b) countries with which Australia is negotiating, or has signed but not yet brought into force, a modern extradition treaty; and
- (c) countries with which Australia has an extradition treaty inherited from the UK.

Unless the contrary is indicated, treaties in this list provide for 'no evidence' extradition.

The status of inherited extradition treaties from the viewpoint of the other party is often uncertain, especially in the case of the successor states to the former Czechoslovakia and Yugoslavia. The UK also entered into treaties with Latvia, Lithuania and Estonia but it is unclear whether these should be regarded as having revived when these countries regained their independence from the former USSR.

Country	Entry into Force	Comments
Albania	11 July 1927	Inherited UK Treaty. Requires <i>prima facie</i> case.
<b>Argentina</b>	15 February 1990	
<b>Austria</b>	6 February 1975 and amended by Protocol of 1 February 1987	Extradition of Austrian nationals is prohibited.
<b>Belgium</b>	19 November 1986	Belgian nationals are almost never extradited.
Bolivia	4 November 1898	Inherited UK Treaty. Requires <i>prima facie</i> case.
Bosnia and Herzegovina	13 August 1901	Inherited UK Treaty. Requires <i>prima facie</i> case.
<b>Brazil</b>	1 September 1996	Extradition of Brazilian nationals is prohibited (unless citizenship acquired after offence)
<b>Chile</b>	13 January 1996	
Colombia	16 December 1889	Inherited UK Treaty. Requires <i>prima facie</i> case.
Croatia	13 August 1901	Inherited UK Treaty. Requires <i>prima facie</i> case.
Cuba	22 May 1905	Inherited UK Treaty. Requires <i>prima facie</i> case.
Czech Republic	15 December 1926.	Inherited UK-Czechoslovakia Treaty. Requires <i>prima facie</i> case. Text of a modern 'no evidence' treaty is under negotiation.
<b>Ecuador</b>	1 August 1990	
El Salvador	13 January 1883	Inherited UK Treaty. Requires <i>prima facie</i> case.
<b>Finland</b>	23 June 1985 and amended by Protocol of 14 February 1986	Extradition of Finnish nationals is prohibited.
<b>France</b>	23 November 1989	Extradition of French nationals is prohibited.
<b>Germany</b>	1 August 1990	Extradition of German nationals is prohibited.
<b>Greece</b>	5 July 1991	Extradition of Greek nationals is prohibited.
Guatemala	26 February 1912	Inherited UK Treaty. Requires <i>prima facie</i> case.
Haiti	21 February 1876	Inherited UK Treaty. Requires <i>prima facie</i> case.
<b>Hong Kong</b>	29 June 1997	Requires <i>prima facie</i> case. Extradition only for modernised list of offences.
<b>Hungary</b>	25 April 1997	Extradition of Hungarian nationals is prohibited.

<i>Country</i>	<i>Entry into Force</i>	<i>Comments</i>
<b>Indonesia</b>	21 January 1995	
Iraq	31 August 1934	Inherited UK Treaty. Requires <i>prima facie</i> case.
<b>Ireland</b>	29 March 1989	
<b>Israel</b>	3 January 1976	Requires <i>prima facie</i> case. Extradition of Israeli nationals is prohibited.
<b>Italy</b>	9 May 1976 and amended by Protocol of 1 August 1990	
<b>Korea, South</b>	16 January 1991	Requires a statement establishing reasonable grounds ('probable cause') to believe that the person sought committed the offence.
Latvia (see also under Non-Treaty Extradition Relations)	1 January 1926	Inherited UK Treaty. Requires <i>prima facie</i> case. A Modern "no evidence" treaty was signed on 14 July 2000 but is not yet in force.
Liberia	23 March 1894	Inherited UK Treaty. Requires <i>prima facie</i> case.
<b>Luxembourg</b>	12 August 1988	Luxembourg nationals are almost never extradited.
Macedonia, Former Yugoslav Republic of	13 August 1901	Inherited UK Treaty. Requires <i>prima facie</i> case.
<b>Mexico</b>	27 March 1991	Mexico does not extradite its nationals in practice.
<b>Monaco</b>	1 August 1990	
<b>Netherlands</b>	1 February 1988	Netherlands nationals may only be extradited if they will be returned to the Netherlands to serve any term of imprisonment imposed.
Nicaragua	19 July 1907	Inherited UK Treaty. Requires <i>prima facie</i> case.
<b>Norway</b>	2 March 1987	Extradition of Norwegian nationals is prohibited. Norway also reserves the right to refuse extradition of permanent residents of Norway who are nationals of Denmark, Finland, Iceland or Sweden.  Norway reserves the right to refuse extradition if the evidence provided is insufficient to establish a presumption that the fugitive is guilty of the alleged offence.
Pakistan (see also under Non-Treaty Extradition Relations)	—	Treaty signed 16 March 2000 but not yet in force.

<i>Country</i>	<i>Entry into Force</i>	<i>Comments</i>
Panama	26 August 1907	Inherited UK Treaty. Requires <i>prima facie</i> case.
<b>Paraguay</b>	30 May 1999	
Peru	20 May 1907.	Inherited UK Treaty. Requires <i>prima facie</i> case.
<b>Philippines</b>	18 January 1991	
<b>Poland</b>	2 December 1999	Extradition of Polish nationals is prohibited.
<b>Portugal</b>	29 August 1988	Extradition of Portuguese nationals is prohibited.
Romania	21 May 1894	Inherited UK Treaty. Requires <i>prima facie</i> case.
San Marino	19 March 1900	Inherited UK Treaty. Requires <i>prima facie</i> case. Extradition of San Marino nationals is prohibited by law.
Slovakia	15 December 1926.	Inherited UK-Czechoslovakia Treaty. Requires <i>prima facie</i> case.
Slovenia	13 August 1901	Inherited UK Treaty. Requires <i>prima facie</i> case.
South Africa (see also under Non-Treaty Extradition Relations)	Not yet in force.	As initially signed 13 December 1995 required <i>prima facie</i> case. Following a change in South African law, a revised treaty providing for 'no evidence' extradition was signed on 9 December 1998.
<b>Spain</b>	5 May 1988	Extradition of Spanish nationals is prohibited.
<b>Sweden</b>	10 March 1974 and amended by Protocols of 6 October 1985 and 10 June 1989	Sweden will not extradite its nationals to Australia.
<b>Switzerland</b>	1 January 1991	Extradition of Swiss nationals without their consent is prohibited.
Thailand (see also under Non-Treaty Extradition Relations)	24 November 1911.	Inherited UK Treaty. Requires <i>prima facie</i> case.
Turkey	Not yet in force	Signed 3 March 1994. Extradition of Turkish nationals is prohibited.
<b>United States</b>	8 May 1976 and amended by Protocol of 21 December 1992	Requires evidence establishing reasonable grounds ('probable cause') to believe that the person sought committed the offence.
Uruguay	20 March 1885	Inherited UK Treaty. Requires <i>prima facie</i> case. A modern 'no evidence' treaty was signed on 7 October 1988..

Country	Entry into Force	Comments
Venezuela	19 December 1993	
Yugoslavia	13 August 1901	Inherited UK Treaty. Requires <i>prima facie</i> case.

## NON-TREATY EXTRADITION RELATIONS

**Note:** This list includes:

- (a) Commonwealth countries; and
- (b) a small number of other countries to which the Extradition Act has been applied on a non-treaty basis

The requirement for *prima facie* evidence applies unless the contrary is indicated.

The Act is applied to Commonwealth countries, except South Africa, Fiji, Cameroon and Mozambique, by the Extradition (Commonwealth Countries) Regulations, which give effect to the Scheme for the Rendition of Fugitive Offenders within the Commonwealth (the London Scheme).

South Africa and Fiji are included below but are dealt with by separate regulations.

Country	Date on which Act applied	Comments
Anguilla	1 December 1988	
Antigua and Barbuda	3 May 1985	
Bahamas	3 May 1985	
Bangladesh	28 November 1975	
Barbados	1 May 1967	
Belize	3 May 1985	
Bermuda	1 December 1988	
Botswana	1 May 1967	
British Antarctic Territory	1 December 1988	
British Indian Ocean Territories	1 December 1988	
British Virgin Islands	1 December 1988	
Brunei Darussalam	3 May 1985	
Canada	1 May 1967	
Cayman Islands	1 December 1988	
Cook Islands	27 May 1992	
Cyprus	1 May 1967	Extradition of Cypriot nationals is prohibited.

<i>Country</i>	<i>Date on which Act applied</i>	<i>Comments</i>
Denmark	3 May 1985	Extradition is to be conducted on a 'no evidence' basis.  In practice Danish nationals are not extradited.
Dominica	3 May 1985	
Falkland Islands	1 December 1988	
Fiji	17 December 1970	Act applied by separate regulations from 23 May 1991 on 'prima facie' basis.
Gambia	1 May 1967	
Ghana	1 May 1967	
Gibraltar	1 December 1988	
Grenada	3 May 1985	
Guyana	1 May 1967	
Iceland	1 December 1988	Extradition is to be conducted on a 'no evidence' basis.  Extradition of Iceland nationals is prohibited.
India	1 May 1967	
Jamaica	1 May 1967	
Japan	3 May 1985	Extradition is to be conducted on a 'no evidence' basis.  Extradition of Japanese nationals, unless provided for by a treaty, is prohibited.
Kenya	1 May 1967	
Kiribati	17 December 1970	
Lesotho	1 May 1967	
Malawi	1 May 1967	
Malaysia	1 May 1967	
Maldives	3 May 1985	
Malta	1 May 1967	
Marshall Islands	30 June 1993	Extradition is to be conducted on a 'no evidence' basis.
Mauritius	1 May 1967	
Montserrat	1 December 1988	
Namibia	27 May 1992	
Nauru	17 December 1970	
New Zealand	1 May 1967	Part III of the Act provides for extradition to New Zealand by backing of warrants, similar to procedures for extradition between Australian jurisdictions.

<i>Country</i>	<i>Date on which Act applied</i>	<i>Comments</i>
Nigeria	1 May 1967	
Pakistan (see also Extradition Treaties)	27 May 1992	
Papua New Guinea	28 November 1975	
Pitcairn, Henderson, Ducie and Oeno Islands	1 December 1988	
St Kitts and Nevis	3 May 1985	
St Helena	1 December 1988	
St Helena Dependencies	1 December 1988	
St Lucia	3 May 1985	
St Vincent and the Grenadines	3 May 1985	
Samoa	17 December 1970	Extradition on 'record of the case'.
Seychelles	3 May 1985	
Sierra Leone	1 May 1967	
Singapore	1 May 1967	
Solomon Islands	17 December 1970	
South Africa (see also Extradition Treaties)	3 May 1985	Act initially applied on a 'prima facie' basis. From 21 May 1997 the Act has been applied to South Africa on a 'no evidence' basis. A 'no evidence' treaty has been signed.
South Georgia and South Sandwich Islands	1 December 1988	
Sri Lanka	1 May 1967	
Swaziland	17 December 1970	
Tanzania	1 May 1967	
The Sovereign Base areas of Akrotiri and Dhekelia	1 December 1988	
Thailand (see also under Extradition Treaties)	6 December 1995	Extradition is to be conducted on a 'no evidence' basis. However, the most recent extradition <i>from</i> Thailand was effected under the 1911 UK-Siam Treaty.
Tonga	17 December 1970	Extradition on 'record of the case'.
Trinidad and Tobago	1 May 1967	
Turks and Caicos Islands	1 December 1988	
Tuvalu	17 December 1970	
Uganda	1 May 1967	
United Kingdom	1 May 1967	
Vanuatu	3 May 1985	
Zambia	1 May 1967	
Zimbabwe	3 May 1985	

## EXTRADITION OBLIGATIONS UNDER MULTILATERAL CONVENTIONS

**Note:** Australia is a party to numerous multilateral conventions which impose extradition obligations on parties in relation to offences established in accordance with the requirements of each convention. Accordingly, the *Extradition Act 1988* has been applied to the other parties to these conventions in respect of convention offences, subject to conditions applying to the existing bilateral extradition relationship, if any. Where Australia has no existing bilateral extradition relationship (whether arising from a modern bilateral treaty, an inherited Imperial treaty or a non-treaty arrangement) with one of these countries, the Act applies to the country on a “no evidence” basis. The following list states how many countries in this residual group the Act applies to pursuant to each convention:

<i>Convention</i>	<i>No. of parties other than bilateral extradition treaty partners</i>
Convention for the Suppression of Unlawful Seizure of Aircraft, done at the Hague on 16 December 1970 (“the Hague Convention”)	52
Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971 (“the Montreal Convention”)	49
International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979 (“the Hostages Convention”)	18
Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973 (“the IPP Convention”)	22
United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna on 20 December 1988 (“the 1988 UN Drugs Convention”)	58
(IAEA) Convention on the Physical Protection of Nuclear Material, done at Vienna on 3 March 1980 (“the Physical Protection Convention”)	7
Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988 (“the Ships Convention”)	2
Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988 (“the Fixed Platforms Protocol”)	2
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the United Nations on 10 December 1984 (“the Torture Convention”)	16

<i>Convention</i>	<i>No. of parties other than bilateral extradition treaty partners</i>
International Convention and Protocol for the Suppression of Counterfeiting Currency, done at Geneva on 20 April 1929 (“the Currency Convention”)	18
Single Convention on Narcotic Drugs, 1961, as amended by the Protocol of 25 March 1972 amending the Single Convention on Narcotic Drugs, 1961 (“the amended Single Convention”)	23
Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, done at Paris on 17 December 1997 (“the Bribery Convention”)	1