

Extradition Treaty between Australia and the Republic of India, and Treaty between Australia and the Republic of India on Mutual Legal Assistance in Criminal Matters

Background

- 6.1 The *Extradition Treaty between Australia and the Republic of India* (the Extradition Treaty) and the *Treaty between Australia and the Republic of India on Mutual Legal Assistance in Criminal Matters* (Mutual Legal Assistance Treaty) are regarded as linked treaties by the Australian Government and as a consequence will be examined together in this chapter.

The Extradition Treaty

- 6.2 The Extradition Treaty is based on a model extradition treaty developed by Australia to conform to Australia's domestic legislative framework.¹ Australia's model extradition treaty has been used to develop a network of bilateral extradition treaties that currently number 35.²
- 6.3 Australia's current extradition relationship with India is based on the *Commonwealth Scheme for the Rendition of Fugitive Offenders 1966*. This was

1 Extradition NIA para 5.

2 Extradition NIA para 5.

an agreement of less than treaty status between members of the Commonwealth. Consequently, the agreement is non-binding in international law and imposes no obligations on participating states.³

6.4 The Australian Government has negotiated this treaty because of the requirement under the Commonwealth Scheme to provide a full brief of evidence sufficient to establish a prima facie case in support of an extradition request.⁴ The Attorney-General's Department (AGD) described the requirement to establish a prima facie case as:

...a very high evidentiary standard [that] can cause considerable delay, both in the requesting country, which has to prepare the brief of evidence, and for the requested country, which has to analyse whether a prima facie case has been made out.

6.5 According to the AGD, international developments in extradition matters since the late 1980s have indicated a trend towards simplifying the extradition process by establishing a 'no evidence' standard of information for extradition requests.⁵ The no evidence standard means that a country requesting an extradition is not required to make an evidentiary case as part of the extradition request.

6.6 The no evidence standard is argued to be a useful tool to aid extradition to and from countries that use a civil law system. The AGD asserted that the legal framework in a civil law system means that many of the system's practitioners do not understand what is meant by a prima facie case.⁶

6.7 In practice, the no evidence standard still involves some assessment by the requested Government as to the legitimacy of the request. The assessment is principally against the grounds for refusing an extradition request,⁷ which are set out below.

6.8 While Australia prefers a no evidence standard; that is, no evidence is required to be included as part of an extradition request, Indian domestic legal requirements necessitate that the requesting country must include an

3 Extradition Treaty National Interest Analysis (NIA) para 8.

4 Extradition Treaty NIA para 9.

5 Ms Maggie Jackson, *Transcript of Evidence*, 22 February 2010, p. 2. It should be noted that the no evidence standard is not used in all cases Australia's extradition treaties with the United States of America and South Korea, for example, contain similar provisions to those in the India treaty.

6 Ms Maggie Jackson, *Transcript of Evidence*, 22 February 2010, p. 6.

7 Ms Maggie Jackson, *Transcript of Evidence*, 22 February 2010, p. 5.

evidentiary case that is a less than prima facie case as part of the extradition request.⁸

6.9 According to the AGD:

The standard required in this treaty is such information as would reasonably establish that the person sought has committed the offence for which extradition is requested and to establish that the person requested is the person to whom the warrant refers. This standard does not require that every element of an offence be supported by evidence. Instead, there needs to be evidence that links the individual to the crime without necessarily proving each element of the offence.⁹

Proposed extradition process

6.10 The Extradition Treaty will apply to Australian and Indian nationals who are wanted for prosecution, or for the imposition or enforcement of a sentence, in relation to sentences with a minimum punishment of at least one year in jail.¹⁰

6.11 Where a request for extradition is received, the Extradition Treaty will require that the receiving country represent the requesting country in the extradition matter, including representing the requesting country in any proceedings arising out of the request.¹¹

6.12 There are a number of grounds for refusing extradition:

- the offence concerned is a military offence and there is no similar offence under criminal law;
- the period of time available to commence a prosecution has lapsed;
- the offence concerned carries the death penalty, and the requesting nation has not guaranteed that the death penalty will not be imposed or carried out;
- the offence concerned is of a political character;
- the person concerned will be exposed to double jeopardy (that is, they will be at risk of standing trial twice for the same offence);

8 Extradition Treaty NIA para 9.

9 Ms Maggie Jackson, *Transcript of Evidence*, 22 February 2010, p. 2.

10 Extradition Treaty NIA para 10.

11 Extradition Treaty NIA para 25.

- there are grounds for suspecting that the extradition request was made on account of the person's race, sex, religion, nationality or political opinion;
 - the person is liable to be tried or sentenced in an extraordinary or ad hoc court; and
 - The request does not comply with international treaties such as the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.¹²
- 6.13 If a request for extradition is not granted, the requesting country can then ask that the person be tried where they are. The country in receipt of this request must submit the case to its competent authorities for prosecution.¹³
- 6.14 The Extradition Treaty also establishes agreed procedures for dealing with the following extradition related matters:
- the provisional arrest of the person concerned pending consideration of a request;
 - the receipt of extradition requests from two different countries for the same person;
 - the transfer of the person to the requesting country;
 - the transfer of the property of the extradited person to the requesting country; and
 - the postponement of an extradition where the person is already under prosecution or serving a sentence.¹⁴

The Mutual Legal Assistance Treaty

- 6.15 Like the Extradition Treaty, the Mutual Legal Assistance Treaty is based on a model mutual legal assistance treaty developed by Australia. The model mutual legal assistance treaty has been used to develop a network of bilateral treaties that currently number 25.¹⁵
- 6.16 The Mutual Legal Assistance Treaty is intended to assist the signatory countries to investigate, prosecute and suppress crimes including
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12 Extradition Treaty NIA para 12.

13 Extradition Treaty NIA para 15.

14 Extradition Treaty NIA paras 18 – 22.

15 Mutual Legal Assistance NIA para 3.

terrorism, drug trafficking, fraud, money laundering and people trafficking.¹⁶

- 6.17 There are extensive similarities between the Extradition Treaty and the Mutual Legal Assistance Treaty, including the fact that the Mutual Legal Assistance Treaty will replace a Commonwealth based arrangement of less than treaty status, the *Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth*.¹⁷ However, in this case, there are no significant changes to the functional arrangements within the Treaty. The new Mutual Legal Assistance Treaty is limited to making the current arrangements subject to international law.¹⁸

Proposed legal assistance process

- 6.18 Under the Mutual Legal Assistance Treaty, Australia and India have agreed to grant each other assistance in:
- serving documents;
 - the taking of statements and evidence from a person;
 - locating and identifying a person;
 - executing requests to search premises and seize potential evidence; and
 - locating, restraining and forfeiting the proceeds of criminal activity.¹⁹
- 6.19 As with the Extradition Treaty, there are a number of grounds for refusing to comply with a request, including:
- the offence concerned is of a political character;
 - the request would expose the person concerned to double jeopardy (that is, they will be at risk of standing trial twice for the same offence);
 - there are grounds for suspecting that the request was made on account of the person's race, sex, religion, nationality or political opinion; and
 - complying with the request would impair the security or sovereignty of the country receiving the request.²⁰

16 Mutual Legal Assistance NIA para 3.

17 Mutual Legal Assistance NIA para 5.

18 Mutual Legal Assistance NIA para 8.

19 Mutual Legal Assistance NIA para 9.

20 Mutual Legal Assistance NIA para. 13.

Previous recommendations

- 6.20 The Committee last considered an extradition treaty and mutual legal assistance treaty (with the United Arab Emirates) in 2008, and reported its findings in Report 91.²¹ The Committee made a number of recommendations as part of that Report with the intention of establishing a process to monitor the trial status, health, and conditions of detention of people extradited from Australia. The Government's Response to that Report was tabled on 17 December 2009.
- 6.21 The relevant recommendations proposed the monitoring process take the following form:
- the country that has made the extradition request report on the trial status, and health of the person concerned, and the condition of the detention facilities in which they are held;
 - the Department of Foreign Affairs and Trade report on extradited Australian citizens;
 - where a foreign national is extradited to their country of origin, that country be required to report on their status to Australia; and
 - where a foreign national is extradited to a third country, that person's country of citizenship should be asked to report on their status to Australia.²²
- 6.22 The Government did not accept these recommendations on the following grounds:
- it is not aware of any precedents for such a requirement in existing bilateral and multilateral extradition agreements;²³
 - potential bilateral treaty partners would not accept a requirement to report on persons extradited from Australia, on the basis that it would provide an administrative burden that would hinder the operation of a treaty partner's judicial system;²⁴
 - extradited Australians are already provided normal consular support if they so request;²⁵ and

21 JSCOT, *Report 91: Treaties Tabled on 12 March 2008*, 2008, pp 5-27.

22 JSCOT, *Report 91: Treaties Tabled on 12 March 2008*, 2008, Recommendations 2 and 3.

23 Minister for Foreign Affairs, *Government Response to Report 91*, 2009, p. 2.

24 Minister for Foreign Affairs, *Government Response to Report 91*, 2009, p. 2.

25 Minister for Foreign Affairs, *Government Response to Report 91*, 2009, p. 3.

- the conditions of extradited non citizens is a matter for their country of nationality.²⁶
- 6.23 During the current inquiry, the AGD reiterated the Government's response, and further added that:
- if a credible monitoring process was to be undertaken by Australia this would involve issues of resources and infringement of the sovereignty of the country requesting the extradition;²⁷ and
 - Australia can only offer consular assistance in relation to its own citizens where they have made a request for assistance.²⁸
- 6.24 The Committee notes that the Government's reasoning in rejecting these recommendations focuses on the procedural and administrative barriers to establishing a process to monitor the trial status, health, and conditions of detention of people extradited from Australia. The Government has not rejected the concept of monitoring per se.
- 6.25 The Committee believes the grounds for monitoring extradited persons are sound. The no evidence approach prevents the examination of the evidence for the offence that has prompted the extradition request. The evidence for the offence would in the past have been examined closely. In addition, the no evidence standard is designed to increase the speed at which extraditions can be processed. Both of these outcomes of the no evidence standard introduce risks for which, at the moment, there is no mitigation. The risks include that:
- an important aspect of the case that would normally have been examined in a prima facie case, and that may adversely affect the person facing deportation, is missed; and
 - as a result of faster processing and less thorough examination of a case, an important point, that should have come to light in a no evidence extradition process, is missed by accident.
- 6.26 The Committee believes that monitoring extradited persons would represent an effective means of mitigating the risks associated with a no evidence standard.
- 6.27 The Committee continues to believe, as pointed out in Report 91, that Australia has a moral obligation to protect the human rights of extradited persons beyond simply accepting the undertakings of countries making
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26 Minister for Foreign Affairs, *Government Response to Report 91*, 2009, p. 3.

27 Ms Maggie Jackson, *Transcript of Evidence*, 22 February 2010, p. 5.

28 Ms Maggie Jackson, *Transcript of Evidence*, 22 February 2010, p. 8.

extradition requests.²⁹ Australia must never be a party, directly or indirectly, to any injustice or abuse of the human rights of persons it has extradited, and regardless of whether the persons concerned are Australian citizens or not. While the Committee acknowledges that the risk of such an occurrence may be small, Australia currently has no formal process to ensure that, following extradition, a person's human rights are protected.

- 6.28 Monitoring the conditions of extradited persons could also enhance public confidence in Australia's extradition framework. Public confidence in Australia's approach to extradition could be severely damaged if abuses of an extradited person's human rights were to occur and Australia was found to have done nothing to try to prevent it.
- 6.29 For these reasons, the Committee wishes to make again the recommendation contained in Report 91.

Recommendation 4

The Committee recommends that new and revised extradition agreements should explicitly provide a requirement that the requesting country provide annual information concerning the trial status and health of extradited persons and the conditions of the detention facilities in which they are held.

Ensuring the wellbeing of Australian citizens

- 6.30 While Australian citizens who have been extradited have access to consular support where they request it, the Committee believes this is not sufficient to ensure the wellbeing of these Australians. There may be a number of reasons why a person does not request consular assistance. This may include the person not wanting assistance, but it may also include real or perceived intimidation, fear of reprisal, ignorance, poor mental or physical health, or difficulties communicating.
- 6.31 The Committee believes that, unless the person involved has made explicit their objection to consular assistance to the satisfaction of consular officers, all Australians who are subject to extradition should receive a face to face visit from a consular official at least annually.

29 JSCOT, *Report 91: Treaties Tabled on 12 March 2008*, 2008, pp 12–13.

Recommendation 5

The Committee recommends that all Australians who are subject to extradition should receive a face to face meeting with an Australian consular official, except where the person has made explicit their objection to consular assistance to the satisfaction of consular officers.

Advice of extradition

- 6.32 In relation to foreign nationals who are extradited from Australia to a third country, the first step should be to formally advise the government of their home country that one of its nationals has been extradited from Australia to a third country. The Committee understands this does not occur at present.³⁰

Recommendation 6

The Committee recommends that, when a foreign national is extradited from Australia to a third country, the Australian Government formally advise the government of that person's country of citizenship that one of its nationals has been extradited from Australia to a third country.

Conclusion

- 6.33 The Committee fully supports the Extradition Treaty and the Mutual Legal Assistance Treaty with India. It is clear that these treaties will streamline the extradition and legal assistance processes, improving the quality of law enforcement in Australia and India.
- 6.34 The bulk of the Committee's recommendations relate to future extradition treaties. It seems clear to the Committee that the concept of a process to monitor the trial status, health, and conditions of detention of people extradited from Australia has merit. The Committee believes that there is

30 Ms Maggie Jackson, *Transcript of Evidence*, 22 February 2010, p. 8.

a moral imperative that Australia never be a party to any injustice or abuse of the human rights of persons it has extradited.

Recommendation 7

The Committee supports the *Extradition Treaty between Australia and the Republic of India* and the *Treaty between Australia and the Republic of India on Mutual Legal Assistance in Criminal Matters* and recommends that binding treaty action be taken.