

## Introduction

### Referral and conduct of the inquiry

- 1.1 On Wednesday 6 July 2011 the Hon Brendan O'Connor MP, Minister for Home Affairs and Justice, introduced the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011 (the Bill) into the House of Representatives.<sup>1</sup> On Thursday 7 July 2011, the Selection Committee referred the Bill to the House Standing Committee on Social Policy and Legal Affairs for inquiry.<sup>2</sup>
- 1.2 The Committee advertised the inquiry on the Committee's website and issued a media release on 8 July 2011 inviting submissions. The Committee also wrote to 25 individuals and organisations inviting submissions. Details of the inquiry, the Bill, the explanatory memorandum and associated documents were also placed on the Committee's website.
- 1.3 The Committee received six submissions on the Bill. A list of the submissions is at Appendix A. Copies of the submissions have been placed on the Committee's website.
- 1.4 A public hearing was held in Canberra on Monday, 15 August 2011. A list of witnesses who appeared before the Committee at the hearing is at Appendix B. Copies of the Hansard transcript for the hearing are available online at <http://www.aph.gov.au/hansard/index.htm>.

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1 *House of Representatives Hansard*, 6 July 2011, p. 7716.

2 *House of Representatives Hansard*, 7 July 2011, p. 8059.

## Consultation and development of the Bill

- 1.5 The Bill has evolved out of a comprehensive review of Australia's international crime cooperation laws. As part of the review, in 2006 the Government released discussion papers for public consultation that proposed fundamental reforms to Australia's extradition and mutual assistance law and procedures. The concept for the Bill emerged out of this process. Exposure drafts of the Bill were released for public consultation in 2009 and in January 2011.
- 1.6 Approximately 26 submissions were received during the 2009 public consultation process and a number of amendments were subsequently made to the Bill to address concerns raised. This included removing provisions relating to the consolidation and deferral of judicial review in extradition cases and inserting new safeguards such as extending grounds for denying extradition to include cases where a person may be discriminated against on the basis of their sex or sexual orientation.
- 1.7 In the January 2011 public consultation on the Bill, the Government received around 30 submissions and a number of minor amendments were made to address concerns raised in consultation. For instance, the Privacy Commissioner raised a number of concerns relating to the disclosure of 'personal information' for foreign law enforcement purposes. Amendments were made to the Bill to address these concerns by requiring the foreign country to provide certain undertakings in relation to the use, storage, and destruction of personal information obtained from a mutual assistance request.
- 1.8 The Committee is satisfied that the Bill has been through a rigorous process of public consultation. Interested parties have had successive opportunities to make submissions to the Government on the Bill. Where it is appropriate to do so, the Committee has taken account of submissions made to the Government on exposure drafts of the Bill.

## Outline of the Bill

- 1.9 The Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011 (the Bill) will make a number of amendments to legislation regulating Australia's extradition and mutual assistance processes. The Bill is comprised of four Schedules which make amendments to the *Extradition Act 1988* (Cth) (the Extradition Act), the *Mutual Assistance in Criminal Matters Act 1987* (Cth) (the Mutual Assistance

Act), and various associated Acts including the *Crimes Act 1914*, the *Migration Act 1958*, the *Proceeds of Crime Act 2002*, the *Surveillance Devices Act 2004* and the *Telecommunications (Interception and Access) Act 1979*.

- 1.10 Extradition is the legal process by which one country surrenders a person to another country for the purposes of investigation, prosecution or to serve a sentence.
- 1.11 Mutual assistance is the formal Government to Government process by which countries assist each other in the investigation and prosecution of criminal offences. This can also include assistance in locating and recovering the proceeds of crime. Mutual assistance is separate from police-to-police and agency-to-agency assistance and other forms of informal assistance. Extradition and mutual assistance, as formal Government to Government processes, are complemented by less formal relationships between Australian law enforcement agencies and their international counterparts. The reforms in this Bill are focused on Government to Government assistance and, with some minor exceptions; do not affect forms of agency to agency assistance.
- 1.12 The Bill aims to ‘streamline’ extradition and mutual assistance processes, strengthen some safeguards, and clarify or modify some items to reflect emergent concerns such as cybercrime.
- 1.13 The following briefly outlines the amendments proposed in the Bill. A more detailed examination of the amendments to extradition and mutual assistance is undertaken in chapters 2 and 3 of this report.

## Schedule 1

- 1.14 Schedule 1 of the Bill makes general amendments relating to both extradition and mutual assistance. The purpose of the amendments in Schedule 1 is to enable Federal Magistrates to perform functions under the Extradition Act and Mutual Assistance Act that are currently confined to State and Territory Magistrates.
- 1.15 Proposed legislative amendments will also clarify privacy and information disclosure provisions relating to extradition and mutual assistance processes. The measures will clarify the application of the *Privacy Act 1988* (Cth) to extradition and mutual assistance processes.

## Schedule 2

- 1.16 Schedule 2 of the Bill contains amendments relating to extradition. The Bill will make legislative amendments to the Extradition Act to:

- 'streamline' the number of factors the Attorney-General must consider in issuing a notice to a magistrate that an extradition request has been received
- allow individuals subject to an extradition request to seek bail in the later stages of the extradition process, in special circumstances
- allow a person to waive required processes prior to surrender, subject to certain safeguards
- extend the circumstances in which a person may be prosecuted in Australia as an alternative to extradition
- allow a person to consent to extradition in relation to a wider range of offences, and
- modify the definition of 'political offence' to clarify that the political offence exception to extradition does not extend to specified crimes such as terrorism, and require that extradition must be refused if a person may be prejudiced by reason of his or her sex or sexual orientation following surrender.<sup>3</sup>

1.17 The stated purpose of the measures is to streamline the extradition process and potentially reduce the amount of time a person is required to spend in extradition custody, while maintaining appropriate safeguards.<sup>4</sup>

### Schedule 3

- 1.18 Schedule 3 to the Bill contains legislative amendments related to mutual assistance. The proposed amendments will:
- increase the range of law enforcement tools available to assist other countries with their investigations and prosecutions, subject to appropriate safeguards
  - streamline existing processes for providing certain forms of assistance to foreign countries

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3 Under the current legislation, a person cannot be extradited if: the offence is a political offence; extradition is sought for a political purpose; there is discrimination on the basis of a person's race, religion, nationality or political opinions; the offence is a military offence; the person has already been acquitted, pardoned, or punished for the offence; there is a risk the person will be subjected to torture; and, the offence carries the death penalty and the requesting country has not provided an acceptable undertaking. See *Extradition Act 1988*, ss. 16, 19, 22. The Attorney-General also retains a general discretion to refuse an extradition request.

4 Second Reading Speech, Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011 (The Hon Brendan O'Connor MP, Minister for Justice), *House of Representatives Hansard*, 6 July 2011, p. 7717.

- strengthen safeguards in relation to the provision of assistance where there are death penalty or torture concerns in a particular case
- amend the various grounds on which Australia can refuse a request for assistance from another country,<sup>5</sup> including in cases where a person may be prejudiced at their trial, or where the purpose of the investigation or prosecution is to persecute a person on the basis of his or her sexual orientation, and
- streamline the process used to authorise a proceeds of crime action, and allow Australian courts to register and enforce foreign non-conviction based proceeds of crime orders from any country.

## Schedule 4

1.19 The Bill contains a number of amendments which are contingent on the commencement of amendments of other bills currently before Parliament. Schedule 4 of the Bill contains technical contingent amendments to address these issues.

## Scope of the report

1.20 This report is not intended to be a complete review of Australia's extradition and mutual assistance laws and policies. The Committee's primary focus has been to consider the legislative amendments proposed in the Bill. Chapter 2 discusses the proposed amendments to the Extradition Act and Chapter 3 discusses the proposed amendments to the Mutual Assistance Act.

1.21 The Joint Standing Committee on Treaties (JSCOT) has previously conducted a detailed inquiry into Australia's extradition law and practice

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5 Current grounds for refusing a request for assistance are set out in s. 8 of the *Mutual Assistance in Criminal Matters Act 1987* and include situations where: the request relates to the prosecution or punishment of a person for a political offence; there is discrimination on the basis of a person's race, sex, religion, nationality or political opinions, the offence is a military offence; granting the request would prejudice Australia's national interest; the person has already been acquitted, pardoned or punished for the offence; a person may be subjected to the death penalty; the conduct constituting the offence would not have constituted an offence in Australia; the request relates to conduct for which the person could not be prosecuted in Australia because of lapse of time or any other reason; the assistance could prejudice the safety of any person in or outside Australia, the assistance would excessively burden the Commonwealth or a State or Territory.

in Report 40 of August 2001.<sup>6</sup> The inquiry looked at the operation of the Extradition Act in light of Australia's move to a 'no evidence' extradition model in 1988. In June 2008, JSCOT made further detailed recommendations in relation to Australia's extradition law and practice in JSCOT Report 91.<sup>7</sup>

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6 Joint Standing Committee on Treaties (JSCOT), August 2001, *Report 40: Extradition – a review of Australia's law and policy*.

7 JSCOT, June 2008, *Report 91: Treaties tabled on 12 March 2008*.