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The Committee Secretary
House of Representatives Standing Committee on Social Policy and Legal Affairs
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Dr Dacre,

Comments on the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011

Thank you very much for the opportunity to provide input into this significant piece of legislative change. As you might know, I have a special interest in extradition law, having written a doctorial thesis and now published a book in the field (*Extradition law in Australia – Time for a Rational Approach*) and I have appeared as counsel in extradition cases in superior courts in Australia. The provision of a submission to your body is a rare chance to provide certain views for which I thank you.

The proposed legislation addresses both extradition issues as well as mutual assistance issues. Of the two, my main focus is on extradition. In writing the following I have commented on things of high importance to me (given the timing in which this submission is required) so matters not the subject of specific comment may be taken as being agreed.

Federal Magistrates' Court jurisdiction

In broad terms, it seems to me to be an excellent idea to confer on a federal court (although not necessarily on the Federal Court of Australia) jurisdiction to hear and determine extradition matters. That will lend certainty to this area of jurisprudence and it will overcome the state-to-state variables that have previously bedevilled the uniform application of this federal enactment. The Federal Magistrates Court is mature enough now and sophisticated enough to address this area of law.

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At a practical level, extradition cases often need extremely fast red-tape-free resolution. A properly instructed Federal Magistrates Court can address those cases with the expected speed.

Empowering the Federal Magistrates Court will also obviate constitutional law issues that have called for High Court resolution such as whether an inferior state court is impermissibly exercising federal jurisdiction when embarking on the determination of some matter under the *Extradition Act*.

State court removal of power

In Part 1 the amendments propose to confer exclusive jurisdiction on Chapter Three courts, thereby removing the jurisdiction of state courts. That is a most sensible amendment for the reasons identified in paragraph 2.1 of the explanatory memorandum accompanying the bill.

Bail in "special circumstances"

Division 8 of Part 3 of Schedule 2 addresses reforms relating to the grant of bail. As a starting point the amendments are an improvement. However, the reforms persist in requiring an applicant to show "special circumstances". That seemingly innocuous phrase has produced a collection of decisions carrying no divining principle: *Schoenmakers v DPP* (1991) 30 FCR 70 (French J); *Schoenmakers v DPP (No 2)* (1991) 31 FCR 429; *Kainhoffer v DPP* (1993) 48 FCR 9 (Spender J); *Holt v Hogan* (1993) 44 FCR 572 (Cooper J); *Wu v A-G* (1997) 79 FCR 303 (BurchettJ); *McDade v United Kingdom* [1999] FCA 234 (Nicholson J); *McDade v United Kingdom* [1999] FCA1685 (Full Court); *Bertran v Vanstone* [1999] FCA 464 (Kenny J). This list is not exhaustive.

The High Court has also weighed into this debate with *Cabal* [2001] HCA 60 at [54], a matter recognized in the explanatory memorandum.

Other cases have spoken of the presumption against the grant of bail in extradition cases – *Rahardja v Republic of Indonesia* [1994] FCA 1413 and *Heslehurst v Government of New Zealand* [2000] FCA 937. Again, the explanatory memorandum refers to the High Court's decision in *Cabal* in this context.

It seems to me that persisting with the notion of "special circumstances" invites persisting with the current confusion surrounding that phrase. Either criteria be stipulated about what the notion means or the discretion about what comes within the notion in the way a magistrate presently deals with the issue when granting or refusing bail should inure.

Paragraph 2.174 of the explanatory memorandum sets out the *Cabal* presumption against the grant of bail. Yet the new s 49B, enabling a court to grant bail on appropriate terms, is a positive step towards the balancing of two opposite and mutually inconsistent concepts. The first is honouring Australia's treaty obligations by surrendering persons wanted by the requesting country and the risk of that person fleeing in the absence of jailing. The other side of the coin is the detention of a person who has not been tried let alone convicted of any offence. Section 49B seems to accommodate

both of those imperatives by mandating jail (in the absence of special circumstances) but permitting the grant of bail on appropriate terms.

Political offence exception

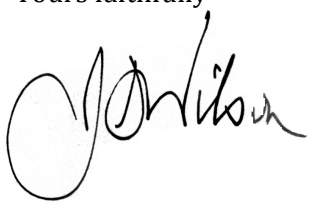
Paragraph 2.70 of the explanatory memorandum provides that the regulations will from time to time record the matters excluded from the definition "political offence". Recording in regulations (rather than in the body of the substantive legislation) the ever-changing concept of an offence of a political nature is a sensible way to make provision for the issue.

Other general observations

It is readily apparent that an enormous amount of research has gone into the formulation of the amendments recorded in the bill. Your committee is to be congratulated on its hard work and the outcome.

If you wish me to elaborate on any aspect of the foregoing please let me know.

Yours faithfully



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