The Parliament of the Commonwealth of Australia

Advisory report:

Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011

House of Representatives
Standing Committee Social Policy and Legal Affairs

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Terms of reference

On Thursday 7 July 2011, the Selection Committee asked the Committee to inquire into and report on the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011.

List of abbreviations

AHRC	Australian Human Rights Commission
ALA	Australian Lawyers Alliance
CDPP	Commonwealth Director of Public Prosecutions
Crimes Act	*Crimes Act 1914*
Extradition Act	*Extradition Act 1988*
HRLC	Human Rights Law Centre
JSCOT	Joint Standing Committee on Treaties
LCA	Law Council of Australia
Mutual Assistance Act	*Mutual Assistance in Criminal Matters Act 1987*
the Bill	Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011
TI product	Telecommunications interception product

List of recommendations

Recommendation 1

The Committee recommends that the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011 be passed by the House of Representatives.

Recommendation 2

The Committee recommends that the Australian Government give consideration to removing the presumption against bail which operates in the *Extradition Act 1988* by allowing individuals to be granted bail only in special circumstances.

Recommendation 3

The Committee recommends that the Attorney-General's Department be required to provide in its annual report a record of any substantive breach of an undertaking given by a foreign country in relation to extradition or mutual assistance processes.

The Committee also recommends that, should a serious breach of an undertaking occur, the Minister for Justice or the Attorney-General be required to immediately report this breach to the Parliament.

Recommendation 4

The Committee recommends that, within three years of its enactment, the Attorney-General's Department conduct a review of the operations of the amendments contained in the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011.

1

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.[1] On Thursday 7 July 2011, the Selection Committee referred the Bill to the House Standing Committee on Social Policy and Legal Affairs for inquiry.[2]

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.[3]

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.[4]

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,[5] 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

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.[6] 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.[7]

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*.

2

Proposed Amendments to the *Extradition Act 1988*

Current extradition law and practice

2.1 Extradition is the legal process by which one country surrenders a person to another country to face criminal charges or serve a sentence. The extradition process in Australia is governed by the *Extradition Act 1988* (Extradition Act), a number of bilateral and inherited treaties on extradition and a number of multilateral treaties which include extradition obligations to which Australia is a party; these include the *United Nations Convention against Corruption* and the *United Nations Convention against Transnational Organised Crime*. Australia also participates in various non-treaty arrangements based on reciprocity with a number of countries including Cambodia, Canada, Japan and the United Kingdom.

2.2 Under the Extradition Act, the Attorney-General is responsible for extradition. In practice, under the current administrative arrangements the majority of extradition decisions are made by the Minister for Home Affairs and Justice. Reference to the Attorney-General in the legislation should also be taken to mean the Minister for Home Affairs and Justice.

2.3 Australia's current extradition system contains two processes:

- for countries other than New Zealand, extradition requests are made on a Government-to-Government basis, and
- for New Zealand, extradition requests are effectively made on a police-to-police basis where Australian authorities 'back' and endorse an

arrest warrant issued by a New Zealand court. The Attorney-General is not formally involved in this process and the decision to surrender a person is made by a magistrate.

2.4 In the 2009-10 financial year Australia made 19 extradition requests to foreign countries, 13 people were extradited to Australia, and 30 requests were still being progressed. In the same year Australia received 30 requests, extradited 6 people, and refused one request.[1]

Extradition from Australia

2.5 There are several stages involved in extraditing a person from Australia:

- following the receipt of a formal extradition request, the Attorney-General issues a notice to proceed under section 16 of the Extradition Act
- a magistrate conducts a hearing to determine whether the person is eligible for surrender. At this stage, and at any point thereafter, a person may consent to their surrender to the requesting country
- if an urgent provisional arrest warrant has not been issued and the person has been found eligible for surrender, the magistrate will now issue an arrest warrant. The person must be remanded in custody until the Attorney-General makes a final surrender determination
- the magistrate's decision is, under the current legislation, subject to review by the Federal Court, or a Supreme Court of a State or Territory
- after a person has been found eligible for surrender by a magistrate, the Attorney-General is required to make a final determination on whether to surrender the person, taking into account a wide range of factors

2.6 In urgent cases, a foreign country may also make a request for a person's provisional arrest if it is believed there is a real risk a person will flee from Australia's jurisdiction before a formal extradition request can be submitted to Australian authorities. If the request is accepted, a provisional arrest warrant will be issued. Once arrested, the person must be remanded in custody, pending the submission of a formal extradition request to Australian authorities, unless there are 'special circumstances' in the case that require a person to be remanded on bail.

1 Attorney-General's Department, *Attorney-General's Department Annual Report 09-10*, appendix 12, p. 345-347.

Extradition from Australia to New Zealand

2.7 The process for extraditing a person to New Zealand is further streamlined in a 'backing of warrants' system. Essentially, under this arrangement, Australian authorities 'back' or endorse a validly issued New Zealand warrant. A person is then brought before a magistrate who determines whether or not to surrender the person to New Zealand. There is no involvement by the Executive Government in this process.

Extradition to Australia

2.8 Outgoing requests for the surrender of a person to Australia are governed by the Extradition Act, treaties and the domestic law of the requested foreign jurisdiction. When a person is wanted for extradition to Australia, Australian authorities will draft an extradition request. If the Attorney-General signs the request[2], it is sent to the foreign country through diplomatic channels for consideration and action.

2.9 The International Crime Cooperation Central Authority within the Attorney-General's Department works to facilitate the submission of extradition requests to and from Australia.

Proposed legislative amendments to the *Extradition Act 1988*

Statutory appeal of extradition decisions

2.10 The Bill proposes to remove the jurisdiction of State and Territory Supreme Courts to hear appeals made under the Extradition Act. Under the proposed measures, all future appeals must be directed to the Federal Court of Australia.

2.11 Under the current legislative arrangements other extradition proceedings, such as an application for judicial review of a decision made by the Attorney-General, are already generally brought in the Federal Court. The amendments will clarify the process for seeking judicial review of extradition decisions and allow the federal court to develop its expertise in extradition matters.

2 *Extradition Act 1988*, s. 40.

Waiver of extradition proceedings

2.12 The proposed amendments would provide for a new, more streamlined extradition process for individuals who choose to consent to their surrender to a foreign country. Under the current legislative arrangements, a person may only consent to his or her extradition after they have been brought before a magistrate following the Attorney-General's issuing of a notice accepting the extradition request under section 16 of the Extradition Act. Further, the person must remain in custody until the Attorney-General issues a final surrender determination under section 22 of the Act. This process can be quite lengthy, resulting in the person spending an extended time remanded in custody waiting for the resolution of various extradition processes.

2.13 The legislation proposes adding a new section 15A to the Extradition Act which would allow a person to inform a magistrate that they wish to waive extradition. If a person consents to their extradition, under the amendments they will be able to either waive the extradition process or consent to surrender using the current consent process. A person will be able to waive extradition at any time after a person is remanded under section 15 until the magistrate informs the Attorney-General that the person has been found eligible for surrender under section 19 or has consented to their surrender under section 18.

2.14 A person may elect to waive extradition in relation to one or all of the offences listed in the provisional arrest warrant or in the extradition request. However, it will not be possible for a person to waive extradition in relation to only one, or some, of the offences listed in the extradition warrant.[3]

2.15 In accepting a person's decision to waive extradition, the magistrate must be satisfied:

- the person's decision is informed and made voluntarily
- the person understands the consequences of choosing to waive extradition, and
- the person has legal representation or has been given an adequate opportunity to obtain legal advice.

2.16 If a magistrate is satisfied as to these matters, he or she must then notify the Attorney-General of the person's decision to waive extradition.

3 Explanatory Memorandum to the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011, p. 18.

2.17 Once the Attorney-General is notified of a person's decision to waive extradition, he or she is required to determine if the person should be surrendered. The Attorney-General could only determine that the person be surrendered if he or she is satisfied:

- there are no substantial grounds for believing that, if a person were surrendered, the person would be in danger of being subjected to torture, and
- if the person were to be surrendered, there is no risk the death penalty would be carried out upon the person in relation to any offence.

2.18 The Law Council of Australia notes that in operation, a magistrate should ensure that a person is not only informed of the consequences of waiving extradition, but also fully understands the implications arising from the decision.[4]

2.19 While acknowledging that the new waiver provisions may reduce the amount of time a person spends in custody, pending the conclusion of the formal extradition process, the Law Council of Australia remains concerned that a person may make a decision to waive extradition when:

> … if they do not waive their rights:
>
> - they will be detained throughout the extradition process unless they can overcome the presumption against bail; and
> - the potential period of their detention will be unknown and may extend over several years, in part because the Extradition Act imposes few timeframes on Executive conduct/decision making.
>
> These factors may be regarded as adding an element of duress to the decision making process and may impact on the voluntariness of a person's decision to waive their rights.[5]

2.20 The Law Council of Australia suggests that further reforms are needed to ensure the integrity of a person's decision to waive extradition, including removing the current presumption against bail and imposing statutory time limits on decisions made by the Executive under the Act.[6]

Amendments relating to political offences

2.21 Under the current legislation, a person cannot be extradited from Australia for a political offence. A political offence is currently defined in

4 Law Council of Australia (LCA), *Submission 2*, p. 8.

5 LCA, *Submission 2*, p. 9.

6 LCA, *Submission 2*, p. 9.

the Extradition Act as an offence against the law of a foreign country that is of a political character. The legislation then goes on to state that certain offences are not to be considered 'political offences' for the purposes of extradition.

2.22 The Bill will amend section 5 of the Extradition Act to expressly exclude the following offences from the political offence definition:

- an offence that involves an act of violence against a person's life or liberty
- an offence prescribed by regulations to be an extraditable offence in relation to a country, or countries, and
- an offence prescribed by regulations not to be a political offence in relation to a country or countries.

2.23 The amendments to the political offence definition are designed to streamline the political offence definition by moving all exceptions and exclusions of the definition into regulations made under the Extradition Act. Australia is party to a large number of bilateral and multilateral treaties that relate to international crime and international crime cooperation. Many of these treaties impose an obligation on Australia to ensure that certain offences are not considered political offences for the purposes of extradition. Australia currently meets these international obligations by listing relevant offences which are excluded from the definition within section 5 of the Extradition Act itself. The amendments will move the bulk of this list to regulations and make it possible to add further exceptions to the political offence definition through the amendment of regulations.

2.24 The Committee notes that the current definition of political offence in the Extradition Act already allows certain offences which are prescribed by a multilateral treaty not to be a political offence for the purposes of extradition, to be excluded from the definition through regulations.[7]

Extradition objection on the grounds of sex and sexual orientation

2.25 Under the current legislation, a person cannot be extradited from Australia if there is an 'extradition objection' in relation to the case. An 'extradition objection' is defined in section 7 of the Extradition Act and includes situations where a person's surrender is sought for the purposes of punishing the person on account of his or her race, religion, nationality,

7 *Extradition Act 1988*, section 5 paragraph (b) of the definition of political offence.

political opinions, or for a political offence. It also covers situations where if the person were to be surrendered, they may suffer prejudice on the basis of his or her race, religion, nationality or political opinions.

2.26 The Bill proposes to expand the definition of 'extradition objection' to include situations where a person is (or would be) discriminated against on the basis of their 'sex' or 'sexual orientation'. This proposed amendment will ensure that an extradition request must be refused if surrender is sought for the purposes of punishing a person on account of his or her sex or sexual orientation, or where the person may face discrimination on the basis of his or her sex or sexual orientation if they were to be surrendered.

2.27 A similar amendment is also proposed for the Mutual Assistance Act.

Notice of receipt of extradition request

2.28 Under the current legislation, there are a number of factors the Attorney-General must consider and be satisfied of before he or she issues a notice under section 16 of the Extradition Act, conferring jurisdiction on a magistrate to conduct extradition proceedings.

2.29 The Bill proposes to streamline the initial stages of the extradition process by limiting the number of factors the Attorney-General is required to consider before issuing a notice under section 16. Currently, the Attorney-General cannot issue a notice under section 16 unless he or she is of the opinion that:

- the person is an extraditable person in relation to an extradition country,[8] and
- the alleged criminal conduct for which the person is being sought for extradition would also constitute a criminal offence if the conduct occurred in Australia (dual criminality)[9]

2.30 The Attorney-General is also prohibited from issuing a notice under section 16 if he or she is of the opinion that an extradition objection exists in relation to the extradition offence.[10]

2.31 The Bill would make amendments to section 16 of the Extradition Act to remove the statutory requirement for the Attorney-General to consider extradition objections or dual criminality, before issuing a notice. Under

8 *Extradition Act 1988*, 16(2)(a)(i).

9 *Extradition Act 1988*, 16(2)(a)(ii).

10 *Extradition Act 1988*, 16(2)(b).

the measures, the Attorney-General would exercise his or her general discretion to issue a notice conferring jurisdiction on a magistrate to consider an extradition request. To issue the notice, the Attorney-General would only need to be satisfied that the person is an extraditable person in relation to the extradition country. The Attorney-General would no longer need to consider dual criminality and extradition objections before issuing a notice under section 16.

2.32 It is suggested that these measures will expedite the early stages of the extradition process and allow a matter to go before a magistrate in a more timely fashion. It will also reduce double handling in considering dual criminality and extradition objections through the extradition process. Currently, dual criminality is considered both by the Attorney-General at the section 16 stage and by a magistrate at the section 19 stage. Extradition objections are also twice considered by the Attorney-General; once in issuing a section 16 notice, and again in making a final surrender determination under section 22. The magistrate also considers extradition objections in making his or her ruling on the eligibility of a person for surrender.

2.33 In consultation, there were concerns raised about the removal of the dual criminality consideration from the section 16 stage of extradition proceedings.[11] There is concern that this amendment risks weakening section 16 as a 'gatekeeper' stage that prevents a person from being detained for an extended period of time and subjected to lengthy legal proceedings on the basis of an extradition request that is unlikely to ultimately result in the person's surrender.[12]

2.34 The Committee notes that the Bill does not remove safeguards, but rather reorders their consideration and removes duplication in the extradition process. The proposed amendments will not affect a person's substantive rights or protections. Dual criminality and extradition objections would still be considered either by the Attorney-General at the section 22 stage or by a magistrate at the section 19 stage of the extradition process.

2.35 However, the importance of the 'gatekeeper' function of section 16 should not be minimised. The Attorney-General's decision to exercise his or her discretion in issuing a section 16 notice is a serious one – and is reliant on the comprehensive gathering of information and consideration of relevant facts. The Committee notes the importance of ensuring that thorough investigations are always conducted and due consideration is given to

11 LCA, *Submission 2*, pp. 9-12.

12 LCA, *Submission 2*, p. 10.

every request to ensure that individuals are not unnecessarily detained as the result of a frivolous or unfounded extradition request, or where there is obviously an extradition objection in relation to the particular request.

Consent to accessory extradition

2.36 Under section 20 of the Extradition Act, a person who has been found eligible for surrender by a magistrate or who has consented to their extradition may also consent to being surrendered for offences that are not 'extradition offences'. For instance, a foreign country may not yet have issued a warrant in respect of certain offences but the individual may wish to still consent to their surrender for these offences to allow any sentence resulting from the charges to be served concurrently. This is known as consent to accessory extradition and allows a person to have all outstanding charges against them dealt with upon their surrender to the foreign country.

2.37 At present, section 18 of the Extradition Act allows a person to consent to surrender for 'extradition offences' in respect of which the Attorney-General has given notice under subsection 16(1). Section 5 of the Extradition Act defines an 'extradition offence' as an offence that is punishable by at least 12 months imprisonment.

2.38 The proposed amendments in the Bill will clarify the circumstances in which a person can consent to accessory extradition. The amendments would make it clear that a person can consent to accessory extradition for offences that are punishable by more than 12 months imprisonment that are listed in the extradition request but are not listed in the section 16 notice accepting the extradition request.

2.39 The proposed measures will require a magistrate to be satisfied that there is no extradition objection in relation to any of the additional extradition offences and be satisfied that the person is, or has had an opportunity to legal representation. The magistrate must also inform the person of certain consequences that would arise from their consent to additional extradition offences before asking the person whether he or she consents to being surrendered in respect of those offences.

2.40 Where a person consents to additional extradition offences, the offences would be deemed to be 'qualifying extradition offences' for the purposes of section 22 of the Extradition Act. The Attorney-General would consider the additional extradition offences in determining whether the person is eligible for surrender under section 22. The Attorney-General would therefore retain a general discretion to refuse extradition and would also

be required to be satisfied that there is no 'extradition objection' in relation to the additional extradition offence(s).

Amendments relating to extradition to Australia from other countries

2.41 Some countries are prohibited by their domestic law from surrendering a person (to Australia or any other country) in the absence of an undertaking as to the maximum sentence that may be imposed on the person. For instance, a country's constitution may prohibit extradition when a person may be subject to life imprisonment if surrendered. This can be problematic in cases where a person may be technically liable to be sentenced to a life sentence, but it is unlikely that such a sentence would be imposed given the circumstances surrounding the offence.

2.42 The proposed amendments contained in the Bill will allow the Attorney-General to give a legally enforceable undertaking to a foreign country as to the maximum sentence that could be imposed upon a person, before the person is extradited to Australia. This undertaking could either state that life imprisonment will not be imposed on the person or specify the maximum period of imprisonment that can be imposed upon a person.

2.43 In practice, such undertakings would only be given with the agreement of the relevant State or Territory if the person is to be prosecuted for the offence or offences in a State or Territory. The new provisions would also provide that the Attorney-General must consult with the relevant State or Territory Attorney-General before giving such an undertaking.

Prosecution in lieu of extradition

2.44 Under the current legislation, a person may only be prosecuted in lieu of extradition where extradition has been refused because the person is an Australian citizen. The proposed amendments to section 45 of the Extradition Act will allow a person to be prosecuted in lieu of extradition in any case where Australia has refused an extradition request, regardless of their nationality. The amendments will allow Australia to prosecute persons in situations where the criminal justice system of the requesting country would give rise to an extradition objection or where a country is not an extradition country for the purposes of the Extradition Act.

2.45 Any person for whom extradition has been refused could be prosecuted in Australia for conduct that occurred outside of Australia if the conduct would have constituted an offence against Australian law had it occurred in Australia. The prosecution of the person in such circumstances would

not be dependent on Australia exercising extraterritorial jurisdiction over the offence.

2.46 Prosecution in lieu could only be undertaken with the consent of the Attorney-General. Under the proposed legislation, the Attorney-General would have discretion to refer a case to the relevant law enforcement agency and the Commonwealth Director of Public Prosecution (CDPP) for investigation and prosecution. The CDPP would need to independently assess whether the person should be prosecuted in accordance with the CDPP's Prosecution Policy. Current policy requires the CDPP to be satisfied that there is sufficient evidence to prosecute the case and considering all the circumstances surrounding the case, the prosecution would be in the public interest.[13]

2.47 These proposed measures will ensure that there is recourse for Australian authorities to prosecute a person who cannot be surrendered to a foreign country. This will have a deterrent effect and ensure that Australia is not seen as a safe haven for criminals evading justice in foreign countries due to the lack of an extradition relationship between Australia and the foreign country.

2.48 In earlier Government public consultation on the Bill, submissions to the Attorney-General's Department were critical of the proposed amendments that would make any offence prosecuted under the new measures an offence of absolute liability.[14] If the CDPP were to commence proceedings against a person under the amended section 45, the prosecution would not be required to prove intention or recklessness in committing the offence. The submissions suggest that ordinary standards and burdens of proof should apply to any prosecution under section 45.

Technical amendments relating to notices

2.49 Under the current provisions in the Extradition Act, the Attorney-General can give notices at various stages of the extradition process including, for example, the Attorney-General can issue notices that state an extradition request has been received under section 16 of the Act and notices under section 17 directing a magistrate to release a person from remand.

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13 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process*, <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf>, accessed 7 September 2011.

14 See for example, Human Rights Law Resource Centre, 7 March 2011, *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011*, submission to the Attorney-General's Department.

2.50 In some cases, it is necessary for the Attorney-General to amend a section 16 notice after the notice has been given, for instance, to rectify a minor deficiency or to add additional extradition offences to the notice. While the current legislation implies that a notice can be amended, there is no express power in the Extradition Act to allow the Attorney-General to amend the notice. There is also no process specified in the legislation for making such an amendment.

2.51 The Bill proposes to make various minor and technical amendments to the Extradition Act provisions that provide for the giving of notices by the Attorney-General. Under the measures, the Attorney-General will be able to make amendments to a section 16 notice up until the time at which a magistrate determines a person is eligible for surrender or a person consents to their extradition.

2.52 If an amended notice is issued to list new offences, while proceedings are in progress before a magistrate under section 18 or 19 of the Extradition Act, the magistrate could adjourn proceedings to give the person and the foreign country requesting extradition, additional time to prepare for proceedings in relation to the new offences.

2.53 Amendments to the Extradition Act are also proposed to give clear guidance on when a notice is taken to be 'given'. This can be particularly important in determining if the Attorney-General has given a section 16 notice within 45 days of a person's arrest under a provisional arrest warrant. The proposed amendments will specify that a notice is taken to be given at the time at which the notice, or a copy of the notice, is handed to the magistrate, or delivered in the ordinary course of post, or at the time at which the fax, email or other electronic communication is sent to the magistrate. Under these amendments, if an email is sent to a magistrate on 1 July 2011, the notice will be taken to be given on this day, regardless of when the magistrate views the email.

Amendments relating to remand and bail

2.54 Proposed amendments to the Extradition Act will extend the availability of bail to the later stages of the extradition process. Currently, once a person is found eligible for surrender by a magistrate, they must be remanded in custody to wait for a final surrender determination by the Attorney-General. The amendments will allow a person to be remanded on bail in 'special circumstances'.

2.55 It can take a significant amount of time to complete the various stages of the extradition process, particularly if a person challenges the decision of

the Attorney-General or the magistrate. It is appropriate therefore for the legislation to allow for persons to be remanded on bail in special circumstances pending the conclusion of the extradition process.

2.56 The Committee received a number of submissions commenting on the proposed amendments relating to bail and remand. All submissions that commented on the issue were supportive of the proposed measures. However, there were also some submissions that recommended further steps be taken to amend the current presumption against bail in extradition proceedings. Under the current provisions in the Extradition Act, a person may only be remanded on bail if they can prove that 'special circumstances' exist to justify such a course of action.

2.57 The Human Rights Law Resource Centre (HRLC) writes that the current position in relation to bail 'is manifestly incompatible with the prohibition against arbitrary detention [in article 9 of the *International Convention on Civil and Political Rights*], which requires that any detention be reasonable, necessary, proportionate and subject to judicial review'.[15]

2.58 The Law Council of Australia observes in its submission that:

> … many people who are subject to extradition requests are Australian citizens and permanent residents. They are in Australia, not to avoid justice, but because Australia is their usual place of abode. They may have strong ties to the community and limited means or desire to leave Australia. Nonetheless, such people are likely to be remanded in custody throughout the extradition process because of the operation of an inflexible rule based on a generalisation about the type of people who are ordinarily subject to extradition proceedings.
>
> The Court should not be constrained in its ability to reach a decision on bail which is appropriate in the circumstances of each individual case.[16]

2.59 In justifying the persistence with the presumption against bail, the Attorney-General's Department states that:

> The current presumption against bail for persons sought for extradition is appropriate given the serious flight risk posed by the person in extradition matters, and Australia's international obligations to secure the return of alleged offenders to face justice in the requesting country. The High Court in *United Mexican States*

15 Human Rights Law Resource Centre (HLRC), *Submission 6*, p. 11.

16 LCA, *Submission 2*, p. 7.

> *v Cabal*[17] has previously observed that to grant bail where a risk of flight exists would jeopardise Australia's relationship with the country seeking extradition and jeopardise our standing in the international community.
>
> The removal or substantial qualification of the existing presumption (which has been a feature of Australia's extradition regime since the mid-1980s) may impede Australia's ability to meet our extradition treaty obligation to return the person to the requesting country to face criminal charges or serve a sentence.[18]

2.60 As previously noted by the Joint Standing Committee on Treaties (JSCOT), in the common law there is a general presumption in favour of bail in ordinary criminal proceedings (with exceptions for certain serious offences). [19] Evidence given to JSCOT indicates that the presumption against bail was included in the legislation on the basis that 'there was a very high risk of a person escaping, particularly since in many cases the person had fled the jurisdiction for Australia to evade justice'.[20]

2.61 There is however, no such general presumption against bail in the extradition legislation of Canada, New Zealand or the United Kingdom.[21] It is also not a feature of the *Service and Execution of Process Act 1992*, which legislates for the extradition of persons between States, Territories and Federal jurisdiction within Australia.

2.62 The Committee expresses its concern regarding the presumption against bail, and notes that the Explanatory Memorandum to the Bill and the evidence provided by the Attorney-General's Department fail to provide adequate justification on this point. The Committee does not doubt that bail is likely and rightly to be refused in the majority of extradition cases, and considers that this amendment will have little effect on the outcome of bail application in such cases.

2.63 However, as a matter of principle, the Committee notes that it has not been convinced of the need for the Bill to prescribe a presumption either against or in favour of bail.

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17 *United Mexican States v Cabal* (2001) 209 CLR 169; 183 ALR 645.

18 Attorney-General's Department, *Submission 7*, p. 2.

19 See for example, Part 2 of the *Bail Act 1978* (NSW); *R v Light* [1954] VLR 152 at 157; JSCOT, *Report 40: Extradition – a review of Australia's law and policy*, p. 62.

20 Explanatory Memorandum to the Extradition Bill 1987; JSCOT, *Report 40: Extradition – a review of Australia's law and policy*, p. 62.

21 See for example, *Extradition Act 2003* (United Kingdom) s. 198; *Extradition Act 1999* (Canada), s. 18; *Extradition Act 1999* (New Zealand), ss. 23, 26.

Other minor and technical amendments

2.64 Division 9 of Part 3, Schedule 2 of the Bill will make a number of minor and technical amendments to the Extradition Act. The proposed amendments will simplify the language used in various sections of the Act and rectify a number of technical drafting issues.

Other issues raised in consultation

The 'no-evidence' model for extradition

2.65 Several of the submissions received by the Committee raised concerns related to the 1988 legislative move to a 'no-evidence' model for extradition. The principal Act was drafted in 1988 to move Australia to a modern system for extradition in which a country requesting extradition no longer needed to provide any evidence of a person's guilt with the request. This reflects a policy position that extradition proceedings are administrative in nature and should not determine or consider a person's guilt or innocence. This question is most appropriately dealt with in criminal proceedings in the requesting country.

2.66 In practice, this strict adherence to an extradition model that largely precludes the introduction of evidence of a person's guilt or innocence is contentious. For instance, in relation to the proposed amendments to the definition of 'political offence' Emeritus Professor Ivan Shearer points out that in the context of Australia's 'no-evidence' model, it could potentially be difficult for a magistrate to determine whether an offence is a political offence or not. Professor Shearer writes that he:

> … can foresee a problem for magistrates and courts on appeal in applying this provision when the Act prohibits their testing the evidence on which a foreign request is based. Whether the acts alleged are terrorist in nature or not cannot be decided merely by applying the dual criminality test; it requires a detailed examination of the facts and circumstances of the case.[22]

2.67 Both the Law Council of Australia and the Human Rights Law Resource Centre also suggest that the section 19(5) be amended to allow a person to adduce evidence to support their arguments. The HLRC proposes that a person should be allowed to present evidence to respond to and challenge

22 Emeritus Professor Ivan Shearer, *Submission 1*, pp. 1-2.

the statements put forward by the requesting state.[23] Similarly, the Law Council of Australia contends that a person should be allowed to adduce evidence that would support their argument that an extradition objection exists in their particular case.[24]

2.68 Legislation and policy in relation to extradition are characterised by a need to balance criminal justice outcomes with adequate human rights protections. The move to a no-evidence model for extradition has operated to streamline Australia's extradition system and arguably makes it a more effective legal tool for tackling transnational crime issues.

2.69 The Bill will make amendments to further streamline Australia's extradition system and attempts to balance these measures with further safeguards such as adding additional mandatory grounds for refusing surrender to the legislation and extending the availability of bail to the latter stages of the extradition process. It is largely a question of judgement in considering whether these measures, and the Extradition Act as a whole, strikes the right balance between the interests of justice and protecting the rights of the individual.

2.70 It is a complex and precarious task to achieve the appropriate balance between the interests of domestic and international justice, and protecting the rights of the individual. The Committee considers that the amendments proposed to the Extradition Act are well balanced and considered.

2.71 However, given the gravity of issues at stake, the Committee recommends that the Government monitor and review the operation of the new amendments to ensure that they are operating as intended and that adequate safeguards are in place to protect the rights of the individual. The Committee recommends that the Australian Government undertake a review of the operation of the amendments within 3 years of the Bill passing.

Extending the grounds for refusing extradition

2.72 Submissions to the Committee suggest that the current grounds for refusing extradition should be further extended to include:

23 HLRC, *Submission 6,* pp. 9-10.

24 LCA, *Submission 2*, p. 14.

- situations where it is foreseeable, or there are substantial grounds for believing, that a person may be subject to cruel, inhuman or degrading treatment or punishment[25]
- refusal of extradition where a person subject to an extradition request has had their right to a fair trial violated or it is reasonably foreseeable that the person will suffer a violation of their right to a fair trial if they were to be surrendered[26]
- mandatory grounds for refusing extradition where the person is a child[27], and
- situations where a person faces discriminate, on the basis of their gender identity, ethnic origin, colour or language.[28]

2.73 Evidence from the Attorney-General's Department indicates that, while not stipulated as grounds for refusal, any of these factors could be taken into account by the Attorney-General in exercising his or her general discretion to refuse surrender.[29]

2.74 The general concern for submitters is that if these grounds for refusing extradition are not legislated for, there is no statutory obligation on the Attorney-General to turn his or her mind to these matters. In other words, while the Attorney-General's discretion to refuse extradition is unfettered, there would be no guarantee that factors not legislated for would receive active consideration in an extradition case.

2.75 The Attorney-General's discretion is an important power under which various factors, which would not arise in every extradition case, could be considered. However, in the absence of a statutory obligation to consider factors such as whether a person would receive a fair trial or if the person is a child, it is important to ensure that the Attorney-General is thoroughly briefed on all issues that may be taken into account in the exercise of his or her general discretion, whether or not the issue is directly raised by the person wanted for extradition in submissions to the Attorney-General.

2.76 The Committee supports the amendments as proposed, but adds a cautionary note that the discretionary power of the Attorney-General is the final safeguard in this streamlined extradition process. It is therefore

25 LCA *Submission No. 2*, pp. 16-17; Australian Human Rights Commission (AHRC), *Submission 4*, pp. 4-5; Australian Lawyers Alliance (ALA), *Submission 5*, p. 6; HLRC, *Submission 6*, pp. 5-6.

26 LCA, *Submission*, pp. 16-17; HRLC, *Submission* 6, p. 7.

27 LCA, *Submission 2,* pp. 16-17.

28 LCA, *Submission 2*, p. 14

29 Attorney-General's Department, *Submission 7*, pp. 3-5.

incumbent on the Attorney-General to ensure that all factors, including those not directly raised by the person being sought for extradition, are considered in exercising the discretion to grant or refuse an extradition request.

Undertakings in cases involving the death penalty

2.77 Submissions to the Committee from the Australian Human Rights Commission, the Human Rights Law Resource Centre and the Australian Lawyers Alliance all call for removal of the Attorney-General's residual discretion to extradite persons when the death penalty may be imposed.[30]

2.78 Failing this, the Law Council of Australia suggests that the legislation be amended to only allow extradition if a formal undertaking is provided by an official with the authority to guarantee that the death penalty will not be imposed in any circumstance. Further, if a requesting country breaches a death penalty undertaking, the Law Council of Australia suggests that no further extradition requests should be accepted from that country. Additionally it is suggested that there be a legislative requirement for the Attorney-General to monitor and report on compliance with death penalty undertakings following the surrender of a person in such circumstances.[31]

2.79 Currently, a person can be surrendered for an offence that carries the death penalty if the requesting country provides an undertaking that the death penalty will not be imposed, or if it is imposed, will not be carried out.[32] However, undertakings are not legally enforceable and there is no formal mechanism available to monitor a foreign country's compliance with an undertaking given to the Australian Government.

2.80 Evidence from the Attorney-General's Department indicates that as far as the Department is aware, there have been no breaches of any undertakings given to Australia by a foreign country to date.[33]

2.81 The reliance on undertakings to facilitate extradition is discussed further in Chapter 3, in relation to the undertakings required under the Mutual Assistance Act.

30 AHRC, *Submission 4*, pp. 4-6; ALA, *Submission 5*, pp. 7-10; HRLC, *Submission 6*, pp. 4-5.

31 LCA, *Submission 2,* pp. 15-16.

32 *Extradition Act 1988*, 8(3)(c).

33 Attorney-General's Department, *Submission 7*, pp. 5-6.

3

Proposed amendments to the *Mutual Assistance Act 1987*

Current mutual assistance law and practice

3.1 Mutual assistance is the formal process by which the Australian Government provides assistance to and requests assistance from foreign Governments in criminal investigations and prosecutions. Mutual assistance is used in situations where evidence or witnesses pertaining to a criminal offence are located in a foreign country. For instance, in a fraud case, mutual assistance processes can be utilised to obtain bank records from a financial institution. In another example, if a witness to a crime resides in a foreign country, mutual assistance processes can assist in obtaining a witness statement or testimony to assist with the investigation or prosecution of that offence.

3.2 The Mutual Assistance Act also allows Australian authorities to assist foreign countries in proceeds of crime actions. Under the Mutual Assistance Act, Australia can:

- register and enforce foreign proceeds of crime orders, including foreign forfeiture orders
- locate, restrain and forfeit the proceeds of crime related to an offence committed overseas where the property and assets are located in Australia, and
- share the confiscated proceeds of crime with the foreign country.

3.3 The Mutual Assistance Act governs government-to-government level assistance and requires a government to make a formal request for

assistance to its foreign counterpart. A formal request for assistance is required in situations where, for instance, a country seeks assistance that requires the use of coercive powers such as a search warrant. Similarly, a formal request would also be required to allow arrangements to be made for a person incarcerated in Australia to give evidence, in Australia or in a foreign country, for the purposes of a foreign investigation or prosecution.

3.4 The Mutual Assistance Act does not cover agency-to-agency assistance or police-to-police assistance. Agency-to-agency assistance and police-to-police assistance refers to informal cooperation between Australia and foreign law enforcement agencies and includes the provision of general intelligence information, operational briefings and information obtained from voluntary interviews.

3.5 In the 2009-10 financial year Australia made 182 outgoing requests for assistance. In the same year, Australia received 380 formal requests for assistance from foreign countries.[1]

Proposed legislative amendments to the *Mutual Assistance Act 1987*

Grounds for refusing a request for assistance

3.6 Under the current provisions of the Mutual Assistance Act, the Attorney-General must refuse a request for assistance if:

- the request relates to a political offence
- the request has been made for the purpose of prosecuting of punishing a person for a political offence
- the request was made for the purpose of persecuting a person on account of the person's race, sex, religion, nationality or political opinions
- the request relates to an act or omission that constitutes an offence under Australia's military law but not under Australia's ordinary criminal law
- the granting of the request would prejudice the sovereignty, security or Australia's national interest

1 Attorney-General's Department, *Attorney-General's Department Annual Report 09-10*, appendix 12, pp. 348-350.

- the request relates to an offence for which the person has already been acquitted, punished or pardoned, or
- the request concerns the prosecution or punishment of a person charged with, or convicted of, an offence that carries the death penalty, unless the Attorney-General is of the opinion that assistance should be provided considering the 'special circumstances' in the case (double jeopardy).[2]

3.7 The Attorney-General also has the discretion to refuse a request for assistance if:

- in a case where a person has not yet been charged or convicted, the Attorney-General believes the provision of assistance may result in the death penalty being imposed on a person, and after considering the interests of international crime cooperation, assistance should be refused in the particular circumstances of the case[3]
- the request relates to the prosecution or punishment of a person in relation to conduct that would not have constituted an offence had it occurred in Australia, or the person could no longer be prosecuted in Australia due to lapse of time or for any other reason
- the Attorney-General is of the opinion that the provision of the assistance could prejudice an Australian investigation or proceeding
- the provision of assistance could prejudice the safety of any person (whether in Australia or outside Australia)
- the provision of assistance would be an excessive burden on the resources of the Commonwealth, State or Territory, or
- it is appropriate, in all the circumstances of the case, for the request for assistance to be refused.

3.8 The Bill proposes amendments to the legislation to make it clear that these grounds for refusing assistance extend to requests made at the investigation stage of a case.

3.9 The Act would also be amended to include additional grounds for refusal by:

- expanding the discrimination ground of refusal to include cases of discrimination on the basis of a person's sexual orientation, and

2 *Mutual Assistance in Criminal Matters Act 1987*, ss. 8(1), 8(1A).

3 *Mutual Assistance in Criminal Matters Act 1987*, s. 8(1B).

- inserting an express mandatory ground for refusing a request for assistance when there are substantial grounds for believing the provision of assistance would result in a person being subjected to torture.

3.10 Other proposed amendments would also refine the current grounds of refusal to:

- make the double jeopardy ground of refusal a discretionary rather than mandatory ground for refusal, and
- repeal paragraph 8(2)(c) of the Act which currently gives the Attorney-General a discretionary ground for refusing a request for assistance if a person could no longer be prosecuted in Australia for the alleged conduct because the statute of limitations has expired.

3.11 The HLRC and Law Council of Australia both argue that the double jeopardy ground of refusal should be retained as a mandatory ground for refusal. The Law Council of Australia writes:

> The rule against double jeopardy is a long standing principle specifically designed to protect individuals from potential state oppression and harassment. The Law Council does not accept that a case has been established for why reform of the rule against double jeopardy is necessary.
>
> The Law Council submits that any dilution of the rule against double jeopardy:
>
> - may encourage, or fail to punish, poor investigative or prosecutorial work;
> - would introduce intolerable uncertainty for defendants and undermine the concept of the finality of proceedings; and
> - would place an unfair cost burden on accused persons forced to fund a second trial.[4]

3.12 The Committee notes that although it is proposed that double jeopardy and lapse of time be removed as explicit grounds of refusal, the Attorney-General may still consider these issues in exercising his or her general discretion to refuse assistance.

Amendments to the 'take evidence' provisions

3.13 In recent times, there has been an increase in the number of both incoming and outgoing mutual assistance requests asking for witnesses to give

4 LCA, *Submission 2*, p. 17.

evidence directly via live video link technology. Through this technology, a witness can give evidence in a courtroom in the requested country in real time to authorities in the requesting country.

3.14 Section 12 of the Mutual Assistance Act makes provision for Australian authorities to make requests to foreign countries for evidence to be taken for an Australian investigation or prosecution. Section 13 of the Mutual Assistance Act details the process for evidence to be taken in Australia at the request of a foreign country for the purposes of a foreign investigation or prosecution. However, the application of sections 12 and 13 of the Act to video link proceedings is not entirely clear.

3.15 The Bill would amend section 13 to clearly state that the Attorney-General can authorise evidence to be taken before an Australian magistrate for live transmission by video link back to a court in the foreign country.

3.16 The proposed amendments would also clarify the role of the Australian magistrate in conducting the proceedings in cooperation with the foreign court. Under the amendments, if a foreign court requests an Australian magistrate to take some form of action in relation to the proceedings, the Australian magistrate would have a discretion over whether or not to take that action.

3.17 Subsection 13(4A) of the Mutual Assistance Act enables a witness giving evidence in a take evidence proceeding in Australia to be examined or cross-examined via video link by a foreign legal representative in the requesting country. However, there is currently no equivalent provision that provides for the in person examination or cross-examination of a witness, by a foreign legal representative. Proposed amendments to the Act would make explicit provision in the legislation for the magistrate to allow foreign legal representatives to examine or cross-examine a witness either in person or by video link.

3.18 Further amendments to sections 12 and 13 would also make it clear that Australia can make and receive requests for take evidence proceedings to be recorded in audio or video, or recorded by other electronic means. In some circumstances, this type of recording will be more useful to the requesting country than the written transcript of proceedings that would ordinarily be provided

3.19 When there is a request by a foreign country for evidence to be given by a witness in Australia by video link that does not require the involvement of an Australian magistrate, this would continue to be progressed outside of the official mutual assistance framework on an agency-to-agency basis.

Expand the range of law enforcement tools available for foreign law enforcement purposes

Lawfully obtained telecommunications material

3.20 Under the current legislation, telecommunications interception (TI) product and covertly accessed stored communications information (such as email and phone records) that is obtained through lawful means can only be provided to a foreign country through take evidence or production order proceedings conducted before a magistrate under section 13 of the Mutual Assistance Act.

3.21 Proposed amendments to section 13A of the Act set out a more streamlined procedure for providing certain material to a foreign country. It allows Australia, with approval from the Attorney-General, to provide directly to a foreign country material that was lawfully obtained by, and is lawfully in the possession of, a domestic law enforcement agency. Under section 13A the material is not required to be produced before a magistrate before it can be provided to a foreign country as is currently required under the processes in sections 12 and 13. However, TI product and covertly accesses stored communications material cannot currently be provided to a foreign country under section 13A.

3.22 The Bill would make amendments to the Mutual Assistance Act and the *Telecommunications (Interception and Access) Act 1979* to allow the streamlined section 13A process to be used to share lawfully obtained TI product or covertly accessed stored communication material with foreign countries.

3.23 The proposals would also allow information in relation to the warrant used by Australian authorities used to obtain the information to be provided to foreign countries under the amended section 13A. This could include information contained in the application for the warrant, the person or telecommunications service to which the warrant relates and persons specified in the warrant as using the telecommunications service.

3.24 A range of safeguards will also be included in the legislation to ensure information is only provided to foreign countries in appropriate circumstances:

- all of the safeguards in the Mutual Assistance Act in relation to when a request must be refused would apply and the approval of the Attorney-General will be required before any TI product or covertly accessed stored communications material can be provided to a foreign country.

- TI product and covertly accessed stored communications material can only be provided if the penalty for the relevant foreign offence mirrors the penalties in an Australian law for an equivalent offence, and
- an annual report will be produced that details the instances of when this type of information has been provided to a foreign country.

Surveillance devices

3.25 The current legislation in relation to surveillance device warrants provides that these warrants can only be obtained for the investigation of a domestic offence that is punishable by at least three years imprisonment.[5] The Bill will make amendments to allow a surveillance device warrant to be obtained in Australia to assist in a foreign investigation or prosecution. It would also allow Australian authorities to make requests to foreign countries for assistance that includes the use of surveillance devices.

3.26 A range of safeguards would also apply to this expansion of police power. Under the amendments:

- the Attorney-General will need to consider the mandatory and discretionary grounds for refusing a request for assistance and give approval before a warrant can be sought
- a warrant can only be obtained if the relevant foreign offence meets the same criteria as required for the granting of a warrant for domestic offences, and
- Australian agencies will be required to report on the use of surveillance devices for foreign law enforcement purposes.

3.27 Further, under the new section 15F, the Attorney-General in authorising an eligible law enforcement officer to apply for a surveillance devices warrant, pursuant to a foreign request, must be satisfied that:

- a request has been received from a foreign country
- an investigation relating to a criminal matters has commenced in the requesting country
- the relevant offence is punishable by a maximum penalty for three or more years imprisonment, life in prison or death, and
- the requesting country has provided appropriate undertakings in relation to the use and destruction of information obtained as a result of

5 *Mutual Assistance in Criminal Matters Act 1987*, s. 13A(2).

the surveillance device and any other matters the Attorney-General considers relevant.

Forensic procedures

3.28 Currently, Australia cannot conduct a compulsory forensic procedure on a suspect, such as collecting fingerprints or DNA samples, in relation to a foreign serious offence pursuant to a request for assistance from a foreign country.

3.29 Currently, a forensic procedure can be carried out on a volunteer, following a request from a foreign country, if the person consents to the procedure. In the case of a child or incapable person, a forensic procedure can also be carried out if their parent of guardian provides informed consent to the procedure. However, the application of the *Crimes Act 1914* to forensic procedures carried out in these cases is unclear.

3.30 The Bill proposes to make a number of amendments that would enable the provisions relating to forensic procedures in the *Crimes Act 1914* to be used to assist a foreign country with a criminal investigation or prosecution. The proposals would allow a forensic procedure to be carried out on suspects and volunteers, including children and incapable persons, in certain circumstances. The procedures would be carried out under the same conditions and in the same circumstances and manner as for the investigation of a domestic offence. Importantly, the amendments would also allow Australian authorities to seek approval to conduct a compulsory forensic procedure if the person does not provide consent for the procedure to be carried out.

3.31 Under the proposed measures, a person would first be asked if they consent to the forensic procedure being carried out. If a person does not consent, authorities would need to seek both the approval of the Attorney-General and an order from a magistrate before the forensic procedure can be carried out.

3.32 Safeguards would apply to the process and a magistrate would only be able to authorise the carrying out of a forensic procedure after taking into account a wide range of circumstances, including whether the carrying out of the forensic procedure is justified in all the circumstances of the case.

3.33 Finally, despite any order by the magistrate relating to the the carrying out of a forensic procedure, the procedure would not be able to be carried out if a child or an incapable person objects to, or resists the carrying out of the procedure.

3.34 The retention of the evidence collected will be governed by the laws of the foreign country and any undertaking given by the foreign law enforcement agency in relation to the retention, use and destruction of forensic evidence.

Extending the proceeds of crime scheme

3.35 The Bill proposes to make a number of amendments to the proceeds of crime scheme in Part IV of the Mutual Assistance Act. The amendments would improve the operation of the proceeds of crime provisions in relation to non-conviction based proceeds of crime orders.

3.36 Obtaining a criminal conviction can be a lengthy and time consuming process. Non-conviction based proceeds of crime orders can be made regardless of whether a person has been convicted of an offence and are a tool designed to prevent the dispersal of assets before a conviction can be secured.

3.37 Under current legislation, Australian authorities can only register a non-conviction based proceeds of crime order issued by certain countries listed in regulations to the Act. The amendments in the Bill would allow Australia to register non-conviction based proceeds of crime orders from any country or seek a temporary non-conviction based restraining order on behalf of any country.

3.38 The Bill would also make a number of minor amendments to streamline the process by which the relevant minister can authorise the use of the proceeds of crime investigative tools in the Mutual Assistance Act.

Miscellaneous amendments

3.39 The Bill also proposes a number of other miscellaneous amendments to the Mutual Assistance Act to improve the operation of the legislation.

3.40 For instance, the definition of 'serious offence' in the Mutual Assistance Act would be changed to align with the definition of an 'indictable offence' contained in the *Crimes Act 1914* to allow the expanded range of assistance (like forensic procedures) that are currently only available for the investigation of domestic offences to be used for foreign law enforcement purposes..

3.41 Currently, a serious offence is defined as one that carries a maximum penalty of death, or imprisonment for not less than 12 months. This definition in subsection 3(1) of the Mutual Assistance Act would be

amended to provide that a 'serious offence' would now be defined as an offence that carries a maximum penalty 'exceeding 12 months'.

Other issues raised in consultation

Expanding the grounds for refusing assistance

3.42 A number of submissions received by the Committee suggested that grounds for refusing assistance should be expanded to include situations where:

- there is a risk a person could be subject to cruel, inhuman, or degrading treatment or punishment [6]
- a person may be subject to arbitrary detention, or denied the right to a fair trial[7]
- there are substantial grounds for believing that accepting the request may result in a breach of Australia's human rights obligations under the *International Covenant on Civil and Political Rights*, the *Convention against Torture, Cruel, Inhuman and Degrading Treatment* and the *Convention on the Rights of the Child*[8],
- there are grounds for believing a person is, or will be, discriminated against on the basis of their gender identity, language, ethnic origin, sexuality or other status (for example, membership of a particular social group)[9].

Assistance in death penalty cases

3.43 Subsection 8(1A) of the Mutual Assistance Act states that the Attorney-General must refuse a request for assistance if a person has been charged with, or convicted of, an offence that carries the death penalty unless there are 'special circumstances' that justify the granting of the request.

3.44 The Explanatory Memorandum that accompanied the original amendment provision in 1996, states that 'special circumstances' could include:

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6 LCA, *Submission 2*, p. 23; AHRC, *Submission 4*, p. 7; ALA, *Submission 5*, pp. 12-13; HRLC, *Submission 6*, p. 13.

7 LCA, *Submission 2*, p. 23; HRLC, *Submission 6*, p. 3.

8 LCA, *Submission 2*, p. 23.

9 LCA, *Submission 2*, p. 23; HRLC, *Submission 6*, p. 15.

> situations where the assistance being sought relates to exculpatory evidence or information; or, situations where the requesting country has provided an undertaking that the death penalty will not be imposed, or if it is imposed, will not be carried out.[10]

3.45 In the course of public consultation, the retention of the Attorney-General's discretion to provide assistance in cases where the death penalty could be imposed upon a person was questioned. Submissions from the Australian Human Rights Commission, HRLC, Australian Lawyers Alliance and the Law Council of Australia all suggested that the Attorney-General's discretion to grant assistance in 'special circumstances' should be revoked or limited to the provision of assistance in cases where the assistance is exculpatory in nature.

3.46 The Australian Lawyers Alliance comments that:

> Even if a country were to make an undertaking that the death penalty would not be imposed, or carried out, if the Australian government were to refuse to mutually assist in such matters, this would send a much stronger and clearer message about Australia's commitment to abolishing the death penalty.[11]

3.47 There were also calls for the Mutual Assistance Act to be expanded to regulate the provision of police-to-police assistance. Currently, assistance provided outside of the Mutual Assistance Act is not subject to the safeguards included in the Act. By including informal forms of assistance within the scope of the Mutual Assistance Act, it is hoped that the formal processes and human rights protections afforded by the Act will work to prevent a repeat of a situation where Australian police provide assistance that assists in the imposition of the death penalty on Australians by a foreign country.

3.48 The Australian Lawyers Alliance highlighted the case of the Bali 9 and voiced concerns that the current legislative arrangements would not prevent a repeat of the case.[12] They suggested that stringent legislative requirements be introduced to ensure that Australia's regulation of police-to-police assistance was consistent with Australia's obligations under international law and with safeguards in the Mutual Assistance Act through amendments to the *Australian Federal Police Act 1979*.

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10 Explanatory Memorandum to the Mutual Assistance in Criminal Matters Legislation Amendment Bill 1996, p. 15.

11 ALA, *Submission 5*, p. 15.

12 ALA, *Submission 5*, p. 16-18.

Undertakings

3.49 Just as modern extradition processes attempt to strike the appropriate balance between an effective and efficient extradition system and protecting the rights of the individual, the mutual assistance system attempts to strike a balance between ensuring law enforcement authorities have the appropriate tools at their disposal to bring criminals to justice while protecting human rights and individual rights to privacy and due process.

3.50 The measures in the Bill which propose to expand the range of law enforcement tools available to assist in foreign investigations and prosecutions are supported by safeguards. These safeguards include the provision that certain undertakings will be given by the foreign country in relation to the retention, use and destruction of personal information before such information is provided to the foreign country.

3.51 In death penalty cases, the undertakings predominantly provided by a foreign country for extradition and mutual assistance processes are that the death sentence will not be imposed, or if imposed, will not be carried out.

3.52 The growing reliance on undertakings and other assurances from foreign countries to facilitate extradition and mutual assistance processes raises questions about the monitoring and enforcement schemes in place in relation to undertakings. The Attorney-General's Department has informed the Committee, that as far as the Department is aware, there have been no breaches of any undertakings given to Australia by a foreign country.[13] Generally though, undertakings are not legally enforceable and there is no formal mechanism available to monitor a foreign country's compliance with an undertaking it gives to the Australian Government.

3.53 In its response to JSCOT Report 91, the Government undertook to report on 'any breaches of substantive obligations under bilateral extradition agreements noted by Australian authorities' in the annual reports of the Attorney-General's Department. Given the expanded role of undertakings set out in the amendments proposed in this Bill, the Committee considers that the current reporting scheme should be expanded to include breaches of undertakings received under the Mutual Assistance Act.

3.54 Any breach of an undertaking by a foreign country is a matter of concern that was wide ranging implications for the bilateral relationship between Australia and the foreign country in question. Should a serious breach of

13 Attorney-General's Department, *Submission 7*, pp. 5-6.

an undertaking occur, the Committees does not consider it appropriate for the annual report of the Attorney-General's Department to be the only reporting mechanism of this breach.

3.55 Accordingly, the Committee recommends that if the Minister for Justice or the Attorney-General becomes aware of a serious breach of an undertaking, this breach should immediately be reported to the Parliament.

4

Committee Comment

4.1 The Committee considers this Bill to be an important contribution to improving Australia's international crime cooperation legislation. The Committee also recognises that safeguards in extradition and mutual assistance processes are vital to ensure the protection of individual rights.

4.2 It is the conclusion of the Committee that the Bill achieves an appropriate balance in streamlining processes and maintaining appropriate safeguards in terms of grounds for refusal and the discretionary powers of the Attorney-General.

4.3 The Committee also recognises the extensive consultation processes which has taken prior in the development of the principles underpinning the Bill and the circulation of the exposure draft of the Bill. In 2009 around 26 submissions were received by the Attorney-General's Department in public consultation on an initial exposure draft of the Bill. Extensive amendments were made following that consultation process. Earlier this year when a second exposure draft of the Bill was released, around 30 submissions were received. Once again, a number of amendments were made to address concerns raised.

4.4 Following the referral of the Bill to this Committee, a total of six submissions were received. While noting some remaining concerns with certain aspects of the Bill, the submissions also remarked on the many positives changes which had been implemented during the development of the Bill.

4.5 The Committee considers that the referral of this Bill to the Committee as part of the final stages of parliamentary scrutiny is appropriate and useful.

4.6 The process of the Committee inquiry has affirmed the rigour of previous consultations and has allowed further interrogation of the appropriate

balance achieved between streamlined cooperative processes and human rights protection.

Recommendation 1

The Committee recommends that the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011 be passed by the House of Representatives.

4.7 The Committee fully supports the Bill, although as a matter of principle it queries the necessity of the presumption against bail in relation to extradition processes. The Committee is concerned that this statutory presumption against bail unnecessarily restricts the judge in the exercise of his or her judicial discretion to determine whether a person should be remanded in custody or on bail, having regard to the individual circumstances of the case and the interests of justice.

4.8 The Committee considers that the Extradition Act could continue to operate effectively if there was no statutory presumption in favour of or against bail. It should rightly be the role of the judiciary to determine the merits and risks of bail in each and every case.

4.9 The Committee does not anticipate that a change in the proposed statutory presumption in relation to bail would lead to a significant change in the outcome of bail hearings in extradition cases. Indeed, in most extradition cases it would be expected that a person would be remanded in custody due to the inherent risks of a known fugitive further attempting to flee the country to evade justice.

4.10 However it is the conclusion of the Committee that an assessment of the risk of a person absconding should be a matter for a magistrate to consider having regard to all the circumstances in the case. Consequently, the Committee recommends that the Government gives consideration to removing the presumption against bail which operates in the Extradition Act by allowing individuals to be granted bail only in 'special circumstances'.

Recommendation 2

The Committee recommends that the Australian Government give consideration to removing the presumption against bail which operates in the *Extradition Act 1988* by allowing individuals to be granted bail only in special circumstances.

4.11 While fully supporting the amendments proposed in the Bill, the Committee notes the gravity of extradition and mutual assistance matters and the need for transparency and monitoring of processes in this area.

4.12 In the report the Committee has noted the increased importance of undertakings received from other countries for facilitating extradition and mutual assistance processes. It is the recommendation of the Committee that, similar to the requirement for the reporting of breaches of substantive obligations under bilateral extradition agreements, there should be a requirement for the Attorney-General's Department to provide an annual report of any breaches of undertakings by a foreign country in relation to both extradition and mutual assistance processes.

4.13 Further, should a serious breach of an undertaking occur, the Committee recommends that the Minister for Justice or the Attorney-General be required to immediately report this breach to the Parliament.

Recommendation 3

The Committee recommends that the Attorney-General's Department be required to provide in its annual report a record of any substantive breach of an undertaking given by a foreign country in relation to extradition or mutual assistance processes.

The Committee also recommends that, should a serious breach of an undertaking occur, the Minister for Justice or the Attorney-General be required to immediately report this breach to the Parliament.

4.14 In addition, the Committee notes the concerns of some submitters regarding the operation of the safeguards and the scope for the Attorney-General to exercise his or her discretion. The capacity of the Attorney-General to consider all factors in exercising his or her discretion is directly

related to the quality and integrity of the information provided. It is essential that all relevant issues are investigated and duly considered to enable the Attorney-General to appropriately exercise his or her general discretion to grant or refuse a request for extradition or mutual assistance.

4.15 Given the gravity of the issues at stake, the Committee recommends that a future review of the implemented changes should be undertaken. The Committee considers that such a review should be limited to the operation of the amendments contained in this Bill, with a focus on the appropriateness and scope of the safeguards introduced.

4.16 The Committee recommends that such a review is completed within three years from when the Bill is enacted.

Recommendation 4

The Committee recommends that, within three years of its enactment, the Attorney-General's Department conduct a review of the operations of the amendments contained in the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011.

Mr Graham Perrett MP
Chair
12 September 2011

A

Appendix A – List of submissions

1 Professor Ivan Shearer

2 Law Council of Australia

3 Dr Josh Wilson SC

4 Australian Human Rights Commission

5 Australian Lawyers Alliance

5a Australian Lawyers Alliance
SUPPLEMENTARY (to submission No. 5)

6 Human Rights Law Centre Ltd

7 Attorney-General's Department

B

Appendix B- List of witnesses

Monday, 15 August 2011 - Canberra

Attorney-General's Department

Ms Anna Harmer, Assistant Secretary, International Crime Cooperation Central Authority, International Crime Cooperation Division

Ms Maggie Jackson, First Assistant Secretary, International Crime Cooperation Division

Mr Andrew Kiley, Acting Director, Security Law Branch

Ms Kirsten Kobus, Director, Policy and Engagement Branch, International Crime Cooperation Division

Ms Alex Taylor, Assistant Secretary, Policy and Engagement Branch, International Crime Cooperation Division

Australian Federal Police

Mr Peter Whowell, Manager, Government Relations

Assistant Commissioner Kevin Zuccato, National Manager, Serious and Organised Crime

Australian Lawyers Alliance

Mr Angus Bucknell, President, ACT Branch

Ms Emily Price, Legal and Policy Officer