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JOINT STANDING COMMITTEE ON TREATIES

Reference: Extradition law, policy and practice

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JOINT COMMITTEE ON TREATIES

Tuesday, 13 February 2001

Members: Mr Andrew Thomson *(Chair)*, Senators Bartlett, Coonan, Cooney, Ludwig, Mason, Schacht and Tchen and Mr Adams, Mr Baird, Mr Bartlett, Mr Byrne, Mrs Elson, Mr Hardgrave, Mrs De-Anne Kelly and Mr Wilkie

Senators and members in attendance: Senators Cooney and Mason and Mr Andrew Thomson, Mr Wilkie and Mr Byrne

Terms of reference for the inquiry:

The Committee will conduct an inquiry into extradition law, policy and practice in Australia.

The Committee will consider whether the current arrangements strike the best balance between ensuring that alleged criminals are brought to justice and that Australian citizens are protected from false accusations.

WITNESSES

Committee met at 4.27 p.m.

BITEL, Mr David Lee, Secretary-General, Australian Section, International Commission of Jurists

DOWD, The Hon. Justice John, President, Australian Section, International Commission of Jurists, Member of the International Commission of Jurists

CHAIR—I declare open this new hearing of the Joint Standing Committee on Treaties into extradition arrangements. I welcome witnesses, members of the public and so forth. We are going to have a second hearing in Canberra on Monday, 26 February, and a third in Melbourne in March some time. I will not repeat the formal warning I made before regarding the legal nature of these proceedings. I am sure you will remember it. Please begin, and then we will go to questions.

Justice Dowd—I am sorry that we were not able to get a written submission to you. I will record our position and send it to you.

The first point we wanted to make in relation to extradition is that we believe there is a lot of misinformation about the mechanics of extradition and what is necessary. We are opposed to a procedure whereby the executive, whether produced by the Attorney-General or whatever, merely by asserting facts and getting a warrant issued, can oblige a citizen to be plucked out of Australia into another country in terms of our mutual extradition arrangements.

We believe that in the last 15 years in New South Wales we have sorted out what we call a paper committal procedure whereby simply by making the documents admissible, copies of statements, you can have an examination to see if there is a prima facie case. If that prima facie case occurs, as is set out in your statute, then for all citizens we believe that that ought to be a minimum requirement Australia has adopted for the executive convenience of requiring the issue of a warrant and all of that.

The paper committal procedure or prima facie case procedure is said to be difficult for civil law countries to understand. Civil law countries take statements just like we do—it happens all through Europe and Asia—from witnesses with varying degrees of similarity to our law, as a result of which they make prosecutorial decisions. This has been developed particularly in the last decade. I started some of this as Attorney-General and the Hon. Geoff Shaw completed the process of a paper committal whereby those documents, the statements, are presented; they are prima facie evidence of what is contained in them. There is a procedure for testing some of the documents. It is what we call a section 48E of the Justices Act 1902, which your staff can obtain for you. The basic procedure is section 41(1) and (6) of that same Justices Act 1902. It sets up a very similar procedure as in your section 11 of the Extradition Act that you, in effect, must establish a prima facie case.

There is all the talk of those against this basic requirement of ‘it costs millions and the civil law countries do not understand’. It is not actually terribly difficult for a civil law country like France through its consulate here to employ a lawyer, like every other citizen has to do, to examine a prima facie case or present one. The same thing happens if I have to do the same reciprocally to another country. We now require a magistrate to in effect certify a prima facie case. If I want to sue anybody, make an allegation or lay an information against anyone here in

New South Wales, why should it be any different internationally? So I think, with due respect to the Attorney-General's submissions, that this case is not made out and this allegation that it costs hundreds of thousands. The trial I am hearing today and yesterday has in fact got a wad of papers there and that is a simple procedure. Evidence acts are easily amended to make documents admissible by simply saying they are. So there is no problem with that, but you may have some questions.

The other secondary point I want to make is that we cannot have extradition treaties with other nations and listing genocide unless we in fact have offences. All of our treaties have—I have examined most of them—provisions that there has to be an offence carrying not more than in some cases two years and in some cases one year. Genocide is listed in more recent treaties. It is, however, totally fatuous because there is no crime of genocide under Australian law. We get fatuous letters from successive Australian governments saying that it is the view of the government that there are sufficient offences here. That is a load of old cobblers. The fact is that, unless you commit an offence which carries a penalty of one year or more, there is nothing enforceable for genocide.

Australia was one of the first countries to sign and one of the first countries to ratify the genocide convention. It is absolutely a waste of time to sign a convention unless you create offences here, and we have never done it. We have breached our international obligations under genocide by saying we would sign the treaty because the treaty says you must create offences (a) for genocide and (b) for extradition, and we have not done it. The stolen generation, so-called, is in fact one of the reasons, I suspect, that the genocide convention has not been implemented because people could bring charges under that international crime here within Australia. We consider that there should be an offence created and that genocide should go into extradition treaties.

The third point I wanted to make is that there should be proper provisions under the Bail Act for people here. Magistrates and judges all around Australia now make decisions on matters such as murder, rape and the most serious offences on bail, for some of which they are let out on bail, and there is no reason why an Australian citizen or a citizen of another country coming here should not be dealt with in the same way.

The fourth thing is that we believe that torture should be included as one of the matters covered in extradition treaties. Torture will in fact grow as an international concern as more and more people come to Australia who have been the subject of torture and who may want to bring proceedings. I am just saying that it is not that long since we have had the torture convention. It is an international crime and thus should be included in our extradition treaties. Those are the main points I wish to make.

Mr WILKIE—You believe that the issue of putting up a prima facie case would not be that difficult. We have heard a lot of evidence to suggest that it would be.

Justice Dowd—In the courts of this state it happens every day. No indictable case goes before the Supreme Court and the district court unless it has been through a magistrates court first. It is simply a matter of getting a photostater, copying the documents and tendering them, subject to this procedure that, for some witnesses who may on the face of the documents be wobbly, you can make an application and now, almost by consent with the DPP, you can

examine that witness on that particular issue quite briefly. What has happened here in New South Wales in the last three or four years—and I did a report on this for the last Attorney-General, the Hon. Geoff Shaw—is that a significant number of matters are being disposed of at the local court and the court system is operating more efficiently. There is just no mystery. The only difference are the laws of evidence. In some countries, you will have hearsay evidence brought in. We have moved a little way down this track and first-hand hearsay is sometimes now admissible. We have got a much wider Evidence Act under the Commonwealth than under New South Wales. It just is not difficult. You simply make the statements admissible and the magistrate here does the examination he or she does every day in our courts. It is just a myth that has grown up. Remember, it is the executive, and the executive is ultimately the worst infringer of human rights, that wants administrative convenience.

Senator COONEY—I am sure I should ask you some penetrating questions that you have to wrestle with, but I find myself in so much agreement with what you say generally that the questions are not coming. One little incident, in talking about the executive, is that one of the reasons why we should send people overseas to countries that would not return them to us is that those countries overseas try their own. Greece is the classic example that you mentioned. We were told that when this treaty was coming on board, but within about a month or so, perhaps less than that, we introduced legislation in a particular area to do the same thing—in other words, to try people here that have committed crimes overseas. So we put our citizens in double jeopardy—we try them here and then perhaps we extradite them. Have you got any comments? You were a considerable politician and now a considerable judge, so you might not want to answer.

Justice Dowd—I am a failed politician and now just a judge.

Senator COONEY—Have you got any thoughts on why we are taking this trend? It does seem to be a trend where we are willing to send out our citizens very readily. I can understand the sorts of objections that you get in this room today from people saying what is going on.

Justice Dowd—I think it is part of—and I am not going to use the word 'globalisation'—the fact that Australians are very much more mobile, and crime is very much more mobile than it was. As one eminent criminal James McCartney Anderson said to me once, 'Drugs have corrupted crime.' Drugs now constitute a major international activity involving people from overseas and people here. Increasingly, we are dealing with the importation—it is only the last generation, only since the Vietnam War, that serious drug consumption and drug importation has occurred.

We now have a lot of restrictions on money movements which create international offences—some of them drug related, some of them not. With the very electronic nature of the speed with which we can deal with matters overseas, it is simply a widening of our parameters as an international nation—and we are still a major trading nation, despite our size—that we, in fact, are involved in crimes overseas very much more than we were. My children's generation treat going overseas as an as of course matter; my father's generation did it by ship once in their lifetime. That is what has happened in the two generations, and crime just follows the people.

Senator COONEY—It has changed in nature. Rumpole, John Mortimer and the Timsons: they used to have the idea of the honest criminal, the same sort of concept that you went around your crime with—

Justice Dowd—You had rules here in New South Wales—how much you paid politicians, how much you paid policemen, and Joe Borg ran the rackets. It was a very orderly thing. That is no longer the case; it is called disorganised crime.

Senator COONEY—Thank you.

Mr BYRNE—With respect to the retention of the prima facie case test, why would the Attorney-General's submission, which is what the Attorney-General has made, basically state that it would result in termination of many of our treaties?

Justice Dowd—The Attorney-General is correct in his submission in that it makes it more difficult with civil law countries. There is an unhealthy suspicion of common law countries within the civil law regime. You find this in East Timor, where we are trying to set up a legal system. The civil lawyers there from the United Nations stand back in horror at the common law because it looks and sounds so complicated. In Geneva recently, where I visited, I had civil lawyers say, 'Look, you have got to understand that we do not understand the system,' and therefore I think the Attorney-General is correct: it will make it harder for us to get treaties. It is a matter of how much you want them. If France had its own Christopher Skase here, the political will would suddenly jump up. I find it very sad that we run extradition treaties based on some high profile businessman, rather than on the low profile criminal—the low profile arch criminal who is bringing in millions of dollars of heroin, ecstasy and cocaine. So it is a matter of political will. Ultimately, it will become inconvenient to other states not to have an extradition treaty with Australia. But, frankly, I think it will make it more difficult, but it is mythology. It is a pain in the part of the anatomy to have to go through—to get all the photostats, send it on and so on—but some of the public servants forget that they are public servants and they are there to do the wish of the parliament and the people, and, if it is a little more inconvenient, tough. The end result is that criminals will not come to Australia.

Mr BYRNE—In that case, when we are considering future treaties, would it be your suggestion to the committee that we should insist on a commensurate prima facie test with the country that we are intending to have the extradition treaty with?

Justice Dowd—Yes, provided we do a simple explanatory note of how simple it can be, when it is a matter of looking at the committal proceedings. Here, 10 or 20 years ago, we had a major battle; there were two trials every time. We are not proposing a trial. We are proposing a simple section 41 of the act, section 11 of your act, and a window of opportunity to examine the odd witness on something the court determines is a proper matter for examination. Sometimes in a statement a witness says something which is very vague or we know that that witness is in fact a weak reed or a liar or whatever and, on a bit of an examination of the witness, the witness falls over, or the witness has been got to and says, 'I did not really see that,' and it goes away. Nevertheless, if it is a reasonable requirement to go through it for someone that knocks down your child in the street and takes a wallet or a purse, surely it is important enough to do it for the international crimes you are dealing with.

Mr BYRNE—Thank you very much.

Senator MASON—Particularly, Judge, as you say, when we are potentially surrendering our citizens, you are asking that the people seeking extradition also provide at least prima facie proof rather than simply a note.

Justice Dowd—Yes. This is what we consider a reasonable minimum safeguard for the citizens or residents of this country—that they be given the same legal courtesies they are for something that occurs down at the Downing Centre or local court.

Senator MASON—I think one point that the chairman and members of the committee have brought up is that it is more difficult to extradite someone to Great Britain than it is, say, to Uruguay, because of the nature of our arrangements.

Justice Dowd—Yes.

Senator MASON—That is a problem that is difficult politically as well as legally.

Justice Dowd—And, therefore, we have to arm our officers that do the negotiations with a little bit of education of how the system works—a sort of moron's guide to the committal proceeding—so that in fact they can say, 'Wait a minute. Stop this nonsense about how difficult it is. This is all you have to do.'

Senator MASON—One last question: is there a precedent for this? You say that it can be easy and that the differences between the civil and common law are not so great as to inhibit this process. Do you have any precedents where this process has worked in other contexts?

Justice Dowd—Under your own act you have got proclaimed countries where this procedure is required. The regulations, under part of section 11, set out a procedure whereby the prima facie procedure is there. You must be doing it now.

Senator MASON—We are in some contexts.

Justice Dowd—In some countries—and you only need to look at the officers that are dealing with that. What we are proposing is the minimum standard of the prima facie case but the simplest procedure—in effect, a brief of statements. For instance, we get a crown case statement, a simple summary, with the brief there subject to a right to examine—for cause, not generally—particular witnesses. Under our section 48E procedure, there is an examination for cause. Then each person here brought before a court to be dragged off somewhere else in the world gets at least the same as the person who breaks and enters your house tonight.

Senator MASON—Thanks, Judge.

CHAIR—Would you have any difficulty commenting on that case under way now in Melbourne—the Latvian.

Justice Dowd—Kalejs.

CHAIR—Yes, or do you feel you had better stay away from that?

Justice Dowd—It is before a court now?

CHAIR—Yes, it has been heard—mentioned and adjourned, I think. So perhaps it is best to leave it.

Justice Dowd—It is probably better not, if that is all right, Chairman.

CHAIR—Fair enough. You were talking about the genocide convention. I did not quite understand you there. What is the urgency in extradition context of that?

Justice Dowd—We are a safe haven here in Australia for people guilty of genocide in other parts of the world. People that we want to extradite here—to bring them here—for such offences, we cannot. We do not have reciprocal laws because we have no law on genocide. We entered into a treaty which said that genocide is an offence and we will make it an offence in New South Wales, Australia. But we have never done that. We have never implemented our treaty obligation to create offences. So things such as the removal of children, which is the stolen generation case, and matters such as the killing of races—Jews and so on—are not offences here, because successive governments get the same advice from the same public servants: we have got offences. We have got offences relating to murder. But genocide, which is a very simple treaty, covers a whole range of offences—the sort of thing we saw in East Timor, where one quarter of one million people were just removed in the space of weeks by a massive government exercise, and taken to West Timor and other parts; those that were not thrown into the sea. That happened. That is an offence. We want to be able to try people for that.

CHAIR—I understand it. In a sense the common conception of genocide is of the Nazi holocaust, where people were killed—

Justice Dowd—But that is not what the definition is.

CHAIR—I know, but the difficulty that obviously a lot of people are going to have is the expanded nature of that, and in the ICC statute there is even this notion of persecution, which is kind of new, and we can see that being run back against us by any number of NGOs, and so people get terribly nervous about this sort of growing what you might call jurisdictional creep—

Justice Dowd—I do understand that, but Australia can either stand back like the United States and not sign treaties and wear the flak, or it can participate and then wear the consequences, and it is the maturity with which we do that. I mean, we take the view on matters such as genocide that in our region genocide occurs in a lot of places, such as in countries in South-East Asia and we believe that ultimately we must deter people by having a no-place-to-hide doctrine, and that means Australia has to be a place where people cannot come to hide. Other than the United States and Canada, we probably took more war criminals from World War II than any other nation, because we were a safe place to go. Most of those people are dead now. We do not want it to happen again.

CHAIR—I appreciate that: with treaties, if we talk the talk, we should walk the walk.

Justice Dowd—Yes.

CHAIR—Thank you for that. If members of the committee are happy, we might adjourn there. Thank you for the contribution.

Justice Dowd—Thank you, Mr Chairman, for the opportunity.

Resolved (on motion by **Mr Wilkie**):

That this committee authorises publication of the proof transcript of the evidence given before it at public hearing this day.

Resolved (on motion by **Mr Wilkie**):

That the submission by Professor E. P. Aughterson be received as evidence to this inquiry and authorised for publication.

Committee adjourned at 4.53 p.m.