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.
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> 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.