PARLIAMENTARY INQUIRY INTO THE EXTRADITION AND MUTUAL ASSISTANCE IN CRIMINAL MATTERS LEGISLATION AMENDMENT BILL

SUBMISSION BY EMERITUS PROFESSOR IVAN SHEARER, AM

1. I appreciate the invitation extended to me by the Committee to make a submission on the above Bill, notwithstanding the expiry of the deadline for submissions, in view of my interest in the subject of extradition extending over several decades.
2. My comments will be brief. Since my expertise lies in the area of extradition more than in mutual assistance in criminal matters, I shall confine my comments to extradition. I shall make a general opening comment, then select only what appear to me to be the most significant provisions, and finally make a concluding general comment on the Bill.

General opening comment.

3. The subject of extradition was once a topic of only slight interest to the Australian Parliament. Until 1966 extradition to and from Australia was governed by British imperial laws. These were the Extradition Act, 1870 and the Fugitive Offenders Act, 1881 (the latter dealing with extradition within the parts of the British Empire). The Australian legislation of 1966 continued to observe this distinction between extradition to and from foreign countries and extradition within the Commonwealth of Nations. Both enactments were relatively short. The legislation was overhauled in 1988 with a new Act which combined both Commonwealth and foreign extradition. It was considerably more elaborate in design. Certain amendments followed in later years. The present Bill adds significant and numerous further elaborations and changes. Once passed, the resulting legislation will represent a Rolls Royce model compared with the humble Volkswagen of 1966. Since 1988, however, the legislation contains what I regard as a fundamental flaw, which remains unaltered by the present Bill. I shall address this in my concluding comments.
4. It is convenient in what follows in the next section to refer to the Explanatory Memorandum, rather than to the Bill itself.

Comments on particular provisions

5. Para. 1.1 deals with the proposed provision enabling Federal Magistrates to perform functions under both Acts. This is to be welcomed.
6. Para. 1.2 deals with privacy and information disclosure. This is also acceptable.
7. Paras. 1.5. and 2.1. The intention of the related provisions is to remove from State and Territory courts their present jurisdiction to hear appeals in extradition matters and to confine such jurisdiction to federal courts. This seems a sensible proposal designed to remove overlap and to avoid possible inconsistency in case law.
8. Para. 2.3 relates to a proposal to amend the definition of 'political offence' in the legislation (which is a mandatory ground for refusal to grant extradition) so as to exclude 'terrorism' from the ambit of 'political offence'. This is generally to be welcomed, and is in line with international developments to disregard political motives where the act charged consists of indiscriminate violence, or the threat thereof, such as to constitute terrorism. However, I

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. The Act is presently highly restrictive in this regard. I return to this point in my concluding comments below.

9. Para. 2.4 deals with elimination of duplication in the functions of the Attorney-General and magistrates. This is acceptable.
10. Para. 2.9 deals with extending the availability of bail in extradition proceedings. This is especially to be welcomed since the present legislation is unduly harsh in this respect, giving virtually no scope for the exercise of judicial discretion. The UK legislation, by contrast, allows normal bail procedures to apply, as illustrated by the current protracted proceedings against Julian Assange.
11. Para. 2.75 relates to a proposal to include in the category of extradition objections the grounds of sex and sexual orientation. This is to be welcomed and in line with current human rights norms.
12. Para. 2.109 relates to prosecution in Australia in lieu of extradition to a foreign country. Presently, this option is open only where the Attorney-General refuses extradition on the ground that the person demanded is an Australian national (which is a discretionary ground of refusal under extradition treaties with most foreign countries). It is proposed to extend this option to cases where extradition has been refused for any reason by the Attorney-General (but not where it has been refused by a court). On the face of it, these are welcome changes. But one cannot help but wonder how effective it will be in practice. The existing section 45 has been in force for 23 years. I have not heard of a single case where there has been a prosecution in Australia of a person whose extradition has been refused. The reason is not hard to find. Prosecutions require first-hand evidence. Moreover, that evidence must satisfy Australian standards of proof, and lead to an overall demonstration of proof of guilt beyond reasonable doubt. Where the relevant facts all lie in a foreign country, where the investigating authorities are unfamiliar with what is required by an Australian court, and where the chief witnesses would have to be flown to Australia, it is little wonder that a prosecution faces all but insuperable obstacles. It has always seemed to me that section 45, even as elaborated in the present Bill, was designed as window dressing or as a sop to foreign countries whose requests for extradition have been turned down. It is not a serious proposition. However, I would not object to its going forward in the present Bill, since it is harmless, and may serve that useful diplomatic purpose. I would respectfully suggest to the Committee that it asks the Attorney-General's Department for actual figures of prosecutions commenced/concluded under section 45 of the present Act, in case I am wrong.

<u>Concluding comments</u>

13. I conclude with identifying what I regard as the fundamental flaw in our present extradition legislation. I have had occasion to make representations on this matter before. And I published an article in the Australian Law Journal on the subject: "Extradition and Human Rights" Vol. 68 (1995) pp.451-455. It is this. Under the present legislation (since 1988) is not necessary for a foreign government to provide evidence of guilt when requesting extradition from Australia but merely to provide a description of the offence charged. Moreover, the Act

specifically prohibits magistrates and courts in Australia from inquiring into the facts and circumstances of the case except in so far as they deal with specific extradition objections. Under the previously applicable legislation of 1966 foreign requesting governments were required to make out a prima facie case of guilt, similar to what is required under our general criminal law when an Australian magistrate commits a person for trial before a higher court for an indictable offence. It is clear that in 1988 it was the intention of Parliament to streamline extradition by preventing those whose surrender was demanded from challenging the case against them. Support was adduced at that time by the Government from the practice of European States who do not demand a demonstration of probable guilt, or just cause for suspicion, in their extradition relations with one another. But this overlooks the fact that those same States do not extradite their own nationals. Moreover, their inquisitorial system of criminal justice is better able to cope with the alternative of prosecution in lieu of extradition.

14. The anomaly of the present situation is underlined by the fact that Australia is out of step with the practice of other Commonwealth countries. Thus, under the applicable Extradition (Commonwealth Countries) Regulations Australian courts must determine whether a prima facie case is presented on the evidence adduced where the requesting country is, e.g. Canada or the UK, but not where it is a foreign country, e.g Italy, the Philippines, Thailand. Also, under a few treaties even with foreign countries proof is required of "reasonable cause" (e.g. the United States). So the anomaly is that it is easier for countries with which Australia has little in common, politically or in a comparison of legal systems, to receive extradition from Australia than it is for countries closest to us, such as Canada, the UK and the USA.
15. I continue to be amazed that this situation has been allowed to continue, and that there has not been a public outcry at the injustice of sending a person (especially an Australian citizen) to a foreign country for trial on the mere say-so of that government without any opportunity to test the evidence against him, even to present an alibi. I can only assume that the Attorney-General, or responsible minister, has been active behind the scenes in exercising discretion to refuse in cases where there is doubt about the strength of the case. But even if so, this is wrong in principle. This should be a matter for the courts, not for the exercise of an executive discretion unreviewable by the courts. Moreover, it seems to me that the Parliament made a rod for the government's back in 1988 when in effect it removed a vital ground for refusal of extradition from the courts and vested it in the Attorney-General. Because under the previous law, the government of the day could always explain to a disappointed foreign requesting government that the courts of Australia are independent and the government is not responsible for decisions to refuse extradition for lack of evidence. By placing the matter in the sole hands of the executive branch of government, the government thereby potentially incurs the ire of foreign governments.
16. Again, respectfully, I suggest that the Committee ask the Attorney-General's Department for figures on extradition for, say, the past 10 years, including those cases where extradition has been refused by the government at the executive level, and for what reason.

Ivan Shearer, AM, RFD
Emeritus Professor of Law (University of Sydney, University of New South Wales);
Former Challis Professor of International Law, University of Sydney;
Adjunct Professor of Law, University of South Australia.
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