The Parliament of the Commonwealth of Australia

# Report 40

## Extradition - a review of Australia's law and policy

### Joint Standing Committee on Treaties

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# Contents

## List of figures



## List of tables

# Foreword

Crime is increasingly becoming an international concern, as the barriers to trade and the mass movement of people have diminished and as communication technologies have become more sophisticated. Money laundering, drug trafficking and people smuggling have become issues of major concern both in Australia and abroad. In addition, allegations of war crimes have attracted considerable public attention in recent years.

International efforts to increase cooperation in investigating and prosecuting such crimes have correspondingly increased, and Australia has played an important part in those efforts. An essential part of an efficient response to criminal activity is enabling countries to pursue those who have offended against their laws, wherever they may be located. At the same time, however, it must be ensured that such people are protected against false allegations and unlawful prosecution and punishment.

In 1988 Australia's extradition laws underwent significant reform. One of the main changes was to introduce, as the default option for any new treaties that Australia entered, a "no evidence" model. Under this model, a country requesting extradition of a person to face trial need not produce any evidence to support the allegations of criminal conduct, but need only supply a statement of that alleged conduct.

This model represented a radical departure from the requirements that had previously applied, and that still apply under Australia's extradition arrangements with other Commonwealth countries. During our examination last year of Australia's proposed extradition treaty with Latvia, we became concerned that the "no evidence" model may not provide sufficient protection for Australians who are accused of crimes in other countries. Accordingly, we decided to conduct this review.

As a result of our inquiry, we do not favour the continuation of the "no evidence" approach to extradition. Other countries such as the United States of America (our main extradition partner) and Canada require a higher standard of proof before their courts will agree that one of their citizens should be surrendered. We consider that similar standards should be applied in relation to requests for extradition from Australia.

This report considers some of those alternative arrangements and, while not suggesting it is appropriate to hold a "mini-trial" in Australia before a person is surrendered to another country to face charges there, we are strongly of the view that justice demands that our courts should be able to scrutinise evidence more closely than is currently the case.

Because our inquiry has revealed a wide range of views on the best option, we believe there must be further consultation with legal professionals and other interested parties, so an appropriate balance is achieved in our extradition arrangements.

**ANDREW THOMSON MP**
**Chairman**

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**Secretary** Grant Harrison

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# Terms of reference

The Treaties 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.

# Abbreviations and glossary

| | |
|---|---|
| the Act | *Extradition Act 1988* (Cth) |
| DPP | Director of Public Prosecutions (Commonwealth) |
| "no evidence" model | In an extradition treaty, the model whereby a country requesting extradition must provide a statement that sets out the alleged conduct constituting the offence, but need not provide any evidence in support of the offence, such as statements of witnesses. |
| prima facie case requirement | Evidence which would, if uncontroverted, provide sufficient grounds to put the person on trial, or sufficient grounds for inquiry by a court, in relation to the offence. |
| Report No. 36 | Joint Standing Committee on Treaties *Report 36: An Extradition Agreement with Latvia and an Agreement with the United States of America on Space Vehicle Tracking and Communication*, October 2000, Canberra. |
| UK | United Kingdom |

# Recommendations

## Recommendation 1

While acknowledging the practical difficulties associated with changing the basis of Australia's extradition arrangements, we do not favour the continuation of the default 'no evidence' model in relation to requests for extradition from Australia.

We recommend that the Attorney-General refer for inquiry and report by the Australian Law Reform Commission matters relating to the appropriate evidentiary standard for extradition requests to Australia. The terms of reference for this inquiry should be sufficiently broad to allow the Commission to consider:

- the merits and consequences of adopting the 'record of the case' model used by Canada;
- the merits and consequences of adopting the 'probable cause' model used by the United States of America;
- other approaches to raising the evidentiary standard for extradition requests to Australia;
- international practice in relation to extradition arrangements, including the availability of appropriate safeguards for those persons subject to a request for extradition; and
- the impact of any changes on Australia's existing and future network of extradition arrangements. (paragraph 3.99)

## Recommendation 2

We recommend that the Australian Law Reform Commission inquiry recommended above also examine:

- the extent of the court's role in considering extradition requests, specifically:
    - in scrutinising the evidence presented in support of an extradition request;
    - in considering objections to extradition,
    - in considering evidence that may be led by persons whose extradition is sought, and
    - in determining whether a person is an extraditable person;
- whether the current presumption against bail unless there are special circumstances should be modified in light of the onerous consequences to persons who might be considered to be at low risk of absconding;
- whether the threshold for extraditable offences should be increased; and
- who should pay the costs of return to Australia of a person who has been surrendered to a foreign country to face trial. (paragraph 4.69)

# 1

# Introduction

## The purpose of this report

1.1 Over the past twenty years, high profile extradition cases, including those involving Robert Trimbole,[1] Christopher Skase and alleged World War II criminals such as Konrad Kalejs,[2] have attracted considerable public attention and debate in Australia.

1.2 It is clearly in the interests of the international community to have an effective network that prevents criminals from escaping justice. It is also in Australia's interests to ensure that our country does not become a haven for those who have committed serious offences elsewhere, and that those people accused of serious offences against Australian law may be brought back to face trial in our courts.

1.3 However, it is also important to ensure that Australian citizens are not subject without clear justification to criminal proceedings in other countries, particularly where there are concerns about due legal process and the protection of human rights. Balancing those competing concerns is

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1 In 1984 Australia sought to extradite Mr Trimbole from the Republic of Ireland in relation to charges of drug trafficking and other serious offences. The request, which was ultimately unsuccessful, attracted much public attention and political debate. In 1985 significant changes were made to Australia's extradition laws.

2 Latvia has sought extradition of Mr Kalejs, an Australian citizen who has previously been deported from the UK, Canada and the USA and who is accused of committing war crimes at a Nazi camp in Latvia during World War II.

at the heart of extradition policy, and it has been very much a concern of the Committee during the course of this review.

## The origins of this inquiry

1.4 When we considered Australia's proposed extradition agreement with Latvia last year,[3] we raised several concerns about the current extradition arrangements, in particular:

- the standard of evidence required to be shown before an extradition request would be granted;
- whether Australian citizens should be given more protection than non-citizens; and
- the mandatory and discretionary exceptions to extradition.

1.5 As a result we determined to conduct a more general review of Australia's extradition law, policy and practice.

1.6 A particular concern that triggered this inquiry was a suggestion that the changes made to Australia's extradition law and policy in the mid 1980s were a reaction to the fall-out from Australia's unsuccessful and highly publicised attempts to extradite alleged drug trafficker Robert Trimbole from Ireland. In particular, we had found the evidence of Professor Ivan Shearer, a leading Australian expert on extradition law, to be compelling:

> The requirement of the prima facie case[4] … was thought to be too onerous in the period following the Trimboli case, in about 1986. Clever lawyers, it was said, were getting fugitive criminals discharged because of the gaps in reliable evidence inherent in transmitting documents and sworn testimony from foreign countries to Australia. The rules of evidence, inherited by Australia from England, were said also to be too technical and difficult for foreign authorities to understand or comply with. Not that the Trimboli case had anything to do with evidence: in that case the fugitive escaped to Ireland with which Australia had no extradition treaty at the time. But in the ensuing hue and cry, when it was discovered that there were many gaps in Australia's coverage of extradition relations with foreign countries, the opportunity was seized by Australia of opening negotiations for a

3 Joint Standing Committee on Treaties, *An Extradition Agreement with Latvia and an Agreement with the United States of America on Space Vehicle Tracking and Communication*, Report No. 36, October 2000.

4 Discussed further in Chapter 2 at paragraphs 2.19-2.23, and Chapter 3.

> whole host of new extradition treaties in the period from 1987 onwards. It was then that it was proposed that a simplified "modern" model of the treaty should be adopted by Australia, dispensing with the prima facie case in the interests of efficiency and speed of handling requests, and so as to give reciprocity of treatment to those foreign countries that did not apply – or even understand – the prima facie evidence requirement.
>
> In my view the abandonment of the prima facie requirement in Australia's extradition treaty and legislative policy was over-hasty and unwise. It is unjust that a person (especially an Australian citizen) may be extradited to a foreign country on the mere demand (albeit subject to certain safeguards) of that country's authorities and without any opportunity for an Australian court to examine the evidence.[5]

1.7 As more than one witness to this inquiry cautioned, it is dangerous to develop general policy in response to the problems highlighted by notorious cases that involve very serious allegations.[6] It must also be ensured that extradition laws and policies operate to protect the interests of those people charged with less serious offences on the basis of very little evidence.

1.8 We therefore considered it appropriate to have a closer look at Australia's experience since the *Extradition Act 1988* was passed.

## The conduct of our inquiry

1.9 Over the last six months, we sought submissions from members of the public, academics, legal practitioners and government agencies involved in the extradition process about whether any changes were needed to Australia's current extradition laws and policies.

1.10 Appendix A lists the submissions and exhibits we received. Details of our public hearings, including lists of witnesses, are set out in Appendix B.

## The scope of this report

1.11 Our report is not a complete review of every aspect of Australia's extradition law and policy. During the course of our inquiry we noted that

5 Professor Ivan Shearer, *Submission 8*, in Report No. 36, pp. 50-51.

6 See Chapter 3, particularly at paragraphs 3.25 –3.27.

to a large extent the provisions of Australia's *Extradition Act 1988* reflect established international practice, for example, in reflecting universally recognised exceptions to extradition such as exemption for political offences, and the standard requirement that an extraditable offence should be an offence not only in the requesting country but also in the country where the person is located (the "double criminality" principle).

1.12 For that reason, and because of the limited time we had available for this inquiry, we did not examine every aspect of extradition law. Nor did we consider in any detail those areas of practice where we had received no suggestion of concern, for example, in relation to the special arrangement that exists between Australia and New Zealand.

1.13 Instead, we focussed on those issues that had become prominent during the Latvian treaty inquiry. Countries differ in the standard of proof they demand before they surrender people found within their borders. Some countries do not surrender their own citizens at all. This report focuses in particular on extradition from Australia, on what evidence needs to be presented and who makes the decisions in the extradition process, and whether Australian citizens should be treated any differently from non-citizens.

1.14 In the course of our inquiry, we considered the extradition laws of several countries with similar legal systems to our own, namely Canada, the United States of America and the United Kingdom, to see if their experience might be of benefit to Australia. We also examined some other issues that were raised in submissions to us, including the presumption against bail; the prohibition against presenting alibi evidence; and the type of offence for which extradition is available.

1.15 To some extent the issues raised in this inquiry have overlapped those raised in another of our inquiries concerning the proposed International Criminal Court.[7] However, any additional recommendations concerning the extradition provisions in that treaty will be considered in that report.

7 The Committee's inquiry into whether Australia should ratify the 1998 Rome Statute of the International Criminal Court was established in October 2000 and is currently in progress. For more details, see the Committee's website at: http://www.aph.gov.au/house/committee/jsct/ICC/ICC.htm.

# 2

# Extradition: how it works

2.1 This chapter provides the background to the issues we explored in our review. It:

- explains how extradition law and practice has developed;
- sets out the main steps in Australia's extradition process;
- gives details of the different types of extradition arrangements affecting Australia; and
- outlines the number and types of Australian extradition cases over the past twenty years.

## What is extradition?

2.2 Extradition is the formal surrender by one state, on request of another state, of a person who has been accused or convicted of a crime committed within the requesting state's jurisdiction.

2.3 Extradition is recognised as a matter of international comity (that is, as a favour accorded by one nation to another) rather than an obligation under international law.[1] Consequently extradition is based largely on treaties or other reciprocal arrangements between states (although a request may also be granted as an act of grace by one country). As international treaties have no direct effect in Australia unless recognised by Australian law,[2]

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1 See discussion in E P Aughterson *Extradition: Australian Law and Procedure*, Law Book Company, Sydney, 1995, p. 2. There had been some earlier debate about whether extradition was an obligation: see *Barton v Commonwealth* (1974) 131 CLR 477 at 494 per Mason J; and I A Shearer *Extradition in International Law*, Manchester University Press, 1971, pp. 23-27.

2 This principle has been recognised in various High Court decisions, including *Simsek v McPhee* (1982) 148 CLR 636; *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168; and *Dietrich v The Queen* (1992) 177 CLR 292; but see *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273

extradition treaties to which Australia is a party are given effect by the *Extradition Act 1988*.[3]

2.4 Although extradition arrangements date from ancient times,[4] the practice developed substantially during the late 18th century, as improvements in transport arising from the Industrial Revolution facilitated the movement of people around the world. There was a growing need and a corresponding ability, through improved methods of communication, to pursue people fleeing from justice. Some of the basic concepts in today's extradition law, including the prohibition against extradition for political offences[5] and the "double criminality" requirement, [6] have their roots in the liberalism and emphasis on individual rights that emerged during that time.[7]

2.5 In more recent times extradition has been increasingly recognised as a major element of international cooperation in combating crime, particularly transnational crimes such as drug trafficking and terrorism. Australia has become a signatory to various international conventions that include obligations to facilitate extradition.[8] At the same time, other cooperative international law enforcement arrangements have developed, such as mutual assistance arrangements to facilitate the investigation of crime and recovery of proceeds of crime.[9]

2.6 The General Manager, International and Federal Operations for the Australian Federal Police, gave evidence to our inquiry about the increasing internationalisation of crime and its effect on Australia:

> The criminal environment in Australia is becoming increasingly transnational in character and form. For example, drugs – we are seeing criminals involved in importing drugs into Australia who are based in countries like Myanmar, Thailand, Hong Kong China

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where the court held that ratification of an international convention can create a legitimate expectation that administrative decision-makers will act in accordance with that convention.

3 Section 11(1) provides that the Act's application to a particular country may be modified by regulation as necessary to give effect to a bilateral treaty.

4 For example, evidence has been found of ancient Sumerian and Assyrian treaties that include extradition arrangements: see Aughterson 1995, pp. 2-3, Shearer 1971, pp. 5-6.

5 This exception has been extended in modern times to include where a person may be tried or prejudiced in his or her trial on the grounds of race, religion or nationality: see discussion in paragraph 2.29.

6 Further discussed at paragraph 2.41.

7 See Aughterson 1995, pp. 4-5.

8 These conventions are set out in Appendix D. They include conventions against terrorism, drug trafficking and torture.

9 *Mutual Assistance Act in Criminal Matters Act 1987* (Cth). More recently a permanent International Criminal Court has been proposed. This proposal is the subject of a separate inquiry by the Committee.

> and the People's Republic of China, and indeed Australian criminals here deeply involved in that type of activity…[10]

2.7 Money laundering and people smuggling were other examples he gave of transnational crimes affecting Australia:

> Globalisation, free trade, mass movement of people, porous borders in many countries – all are conducive to criminal activity and exploitation. Australians, regrettably, are active overseas, including in vulnerable countries in our own region … The key to the way the AFP is dealing with this is international law enforcement cooperation and, increasingly, collaboration … This must be underpinned by an efficient, effective and as far as possible seamless judicial process.[11]

## How Australia's extradition scheme works

2.8 Under the *Extradition Act 1988*, extradition is the responsibility of the Attorney-General. In practice, under current administrative arrangements decisions are made by the Minister for Justice and Customs.

### Extradition from Australia

2.9 The process of extradition from Australia involves several stages:[12]

- On application by the requesting country, a provisional arrest warrant is issued for the arrest of the person whose surrender is sought. Once arrested, the person must be remanded in custody unless there are "special circumstances".[13]
- Following receipt of a formal extradition request from the requesting country, the Minister issues an authority to proceed.[14]
- A magistrate conducts a hearing to determine whether the person is eligible for surrender. That decision is subject to review by the Federal or State or Territory Supreme Courts. (Alternatively the person may consent to being surrendered.)[15]

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10 Mr Andrew Hughes *Transcript of Evidence*, TR 38, 26 February 2001.

11 Mr Andrew Hughes *Transcript of Evidence*, TR 39, 26 February 2001. He stated that the AFP had 33 liaison officers in 22 cities in 21 countries.

12 *Extradition Act 1988*, Part II.

13 Section 15(6).

14 Section 16.

15 Sections 18-21.

- Once the person has been found eligible for surrender, the Minister decides whether the surrender will go ahead, taking into account a range of factors.[16]

2.10 The diagram on the next page sets out this process in more detail.

### Extradition to Australia

2.11 The Attorney-General's Department advises the Minister and prepares requests for extradition that conform with the requirements of the Act[17] as well as those of the country where the person is located.

2.12 Our review did not consider this aspect of Australia's extradition policy and practice any further, except insofar as we noted that extradition arrangements must be broadly reciprocal and that consequently any changes to Australia's requirements of other countries could have an effect on their requirements of us.

## Development of extradition law and policy

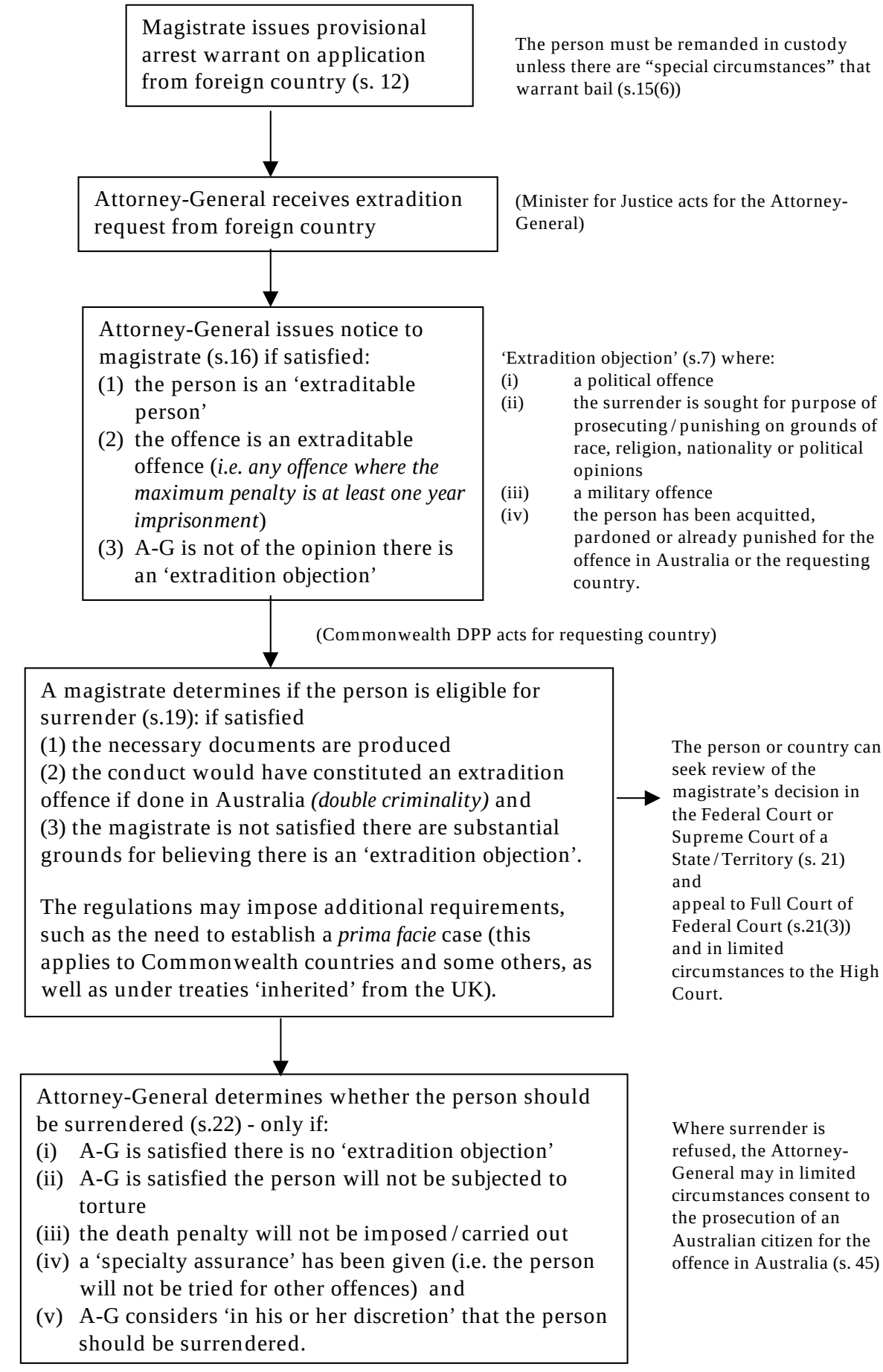
### General

2.13 One of the potential difficulties in extraditing people between countries is the existence of two distinct systems of law: the common law or 'adversarial' system that originated in England and applies in Commonwealth countries throughout the world, and the civil law or 'inquisitorial' system that developed from Roman law and applies in many European countries and their former colonies.

16 Section 22.

17 Part IV.

**Figure 2.1 Process of extradition from Australia under the *Extradition Act 1988***



2.14 In broad terms, in the common law or adversarial system the onus is on the prosecution to prove the case against an accused person beyond reasonable doubt. The role of the judge (and / or jury) is not to conduct an active inquiry but to weigh the evidence that has been presented. The defendant's legal representatives may cross-examine witnesses called by the prosecution as well as calling their own witnesses. There are strict rules on the admissibility of evidence, one of the main rules being the prohibition against hearsay evidence (that is, witnesses may not repeat statements made by another person as evidence of the truth of those statements).

2.15 By contrast, in the inquisitorial system, the judge takes a more proactive role in the conduct of the case. Normally the judge's decision is based largely on the formal documentary evidence developed during the investigation, although he or she has the discretion to require the evidence to be repeated orally in court. Where witnesses are called, only the judge may question them, although the defendant's counsel may suggest questions and make written submissions about the evidence and legal matters. Any logically relevant evidence is admissible, and the hearsay rule does not apply.[18]

2.16 In recent years, the two systems have become in some ways more similar, particularly in civil litigation,[19] and there has been increasing debate about the advantages to be offered by each.[20] However, essential differences remain, particularly in criminal trials where the rights of the accused are strongly defended and where suggested changes can be expected to meet with fierce opposition.

2.17 In an era of increasing international cooperation in law enforcement, it is important for countries to recognise the integrity of each other's legal systems, even where they are different in nature and procedure, if extradition is ever to occur. At the same time, it is important to ensure that the human rights of one's own citizens are safeguarded.

2.18 The United Nations Model Treaty on Extradition, adopted in 1990, attempts to establish a framework to accommodate those differences and

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18 As one writer noted in relation to German laws, 'To disregard hearsay evidence is generally considered as conflicting with the performance of one of the principal tasks of the criminal process, namely, to discover the truth of what happened.' See H Reiter 'Hearsay evidence and criminal process in Germany and Australia', *Monash University Law Review*, vol 10, June 1984, pp. 51 -72, at pp. 54-55.

19 See Australian Law Reform Commission *Managing Justice: A Review of the Federal Civil Justice System*, Report No. 89, ALRC, Sydney, 2000, pp. 94-96.

20 For discussion of the advantages and disadvantages of the adversarial system in criminal proceedings, see Law Reform Commission of Western Australia *Review of the Criminal and Civil Justice System in Western Australia*, Consultation Draft vol 1, LRCWA, Perth, 1999, pp. 69-102.

facilitate the making of extradition requests. The Model Treaty sets out mandatory and discretionary grounds for refusal and details the type of documentation that must accompany a request.

## Development of Australia's extradition scheme

2.19 Prior to Australia's enactment of extradition legislation in 1966, the law and treaties of the United Kingdom regulated our extradition arrangements. Some of those UK treaties, for example with Bolivia, Croatia and Cuba, are still in force here. All have a prima facie case test (that is, sufficient evidence to commit the person for trial for the offence).

2.20 In 1966 Commonwealth countries adopted the "London Scheme", whereby each country enacted legislation to allow for extradition between them, without the need to enter into treaties with each other.[21] The required standard of proof was the prima facie case. At the same time Australia also enacted legislation to put in place a similar scheme with non-Commonwealth countries, again with the prima facie case requirement.[22]

2.21 In the 1980s, following the recommendations of the Stewart Royal Commission into drug trafficking[23] and the failed attempt to extradite Robert Trimbole from Ireland, a government task force examined extradition law. Major changes to Australia's laws resulted in 1985, including the introduction of a "no evidence" alternative to the prima facie case requirement. Under this option, the requesting country must provide a statement of the conduct constituting the offence, but need not provide evidence in support. When the various Acts were consolidated into the *Extradition Act 1988*, the "no evidence" option became the default scheme. That option has been the preferred policy ever since, having been included in Australia's model treaty (at Appendix C), and is now embodied in 31 signed treaties.

2.22 In 1999 on the grounds of standardising extradition provisions, Australia's war crimes legislation was amended to replace the prima facie case requirement with the "no evidence" requirement.[24]

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21 Given effect in Australia by the *Extradition (Commonwealth Countries) Act 1966.*

22 *Extradition (Foreign States) Act 1966.*

23 The Report stated that it was desirable that the Government replace 'old and uncertain' extradition treaties as soon as possible with modern treaties that simplified and made extradition procedures certain: see Royal Commission of Inquiry into Drug Trafficking *Report*, (Commissioner the Hon Mr Justice D G Stewart), AGPS, 1983, p. 669.

24 *War Crimes Act 1945*, as amended by the *War Crimes Amendment Act 1999.*

## Australia's current extradition arrangements

2.23 The different types of extradition arrangements applying to Australia are listed below. Further details are in Appendix D:

- **Inherited treaties from the UK:** Australia regards itself as bound by at least 15 UK extradition treaties.[25] Those treaties dated from the late 19th or early 20th centuries. All require the prima facie case.
- **The "London Scheme" governing Commonwealth countries:** 65 countries and dependent territories are covered on a non-treaty basis, all requiring the prima facie case to be established.
- **Bilateral treaties:** There are 31 modern treaties in force in Australia. All but one of them have been have negotiated or re-negotiated since the "no evidence" option became available in 1985. Most of the treaties are with Western Europe and the Americas. Twenty-seven of the treaties follow the "no evidence" model, two (the USA and South Korea) adopt the "probable cause" test and two (Hong Kong and Israel) the prima facie case test. Another five treaties have been signed and await entry into force, four based on "no evidence" and one on the prima facie case.[26]
- **Non-treaty arrangements based on understandings of reciprocity**: These arrangements apply to seven non-Commonwealth countries,[27] all on the "no evidence" basis.
- **Multilateral treaties with extradition provisions:** Australia is a party to 12 treaties or protocols with extradition obligations (such as terrorism and drug trafficking). These supplement the obligations under bilateral treaties.
- **A special arrangement with New Zealand:** The arrangement between Australia and New Zealand is a special model involving the "backing of warrants", with no Ministerial involvement.[28] This arrangement reflects the close relationship between the two countries, and is similar to the arrangement existing between the United Kingdom and the

25 There is some uncertainty over the status of other UK treaties, such as those with the former states of Yugoslavia and Czechoslovakia.

26 Those treaties are with Latvia, Pakistan (the prima facie case), South Africa, Turkey and Uruguay.

27 Including Denmark, Iceland and Japan.

28 This means that a warrant for arrest issued by a New Zealand court must be endorsed by an Australian magistrate and, following the person's arrest and remand, the magistrate will then order that the person be surrendered to New Zealand, unless satisfied that it would be unjust or oppressive to do so: see Part III of the *Extradition Act 1988*. (The scheme is based on the scheme that formerly applied to the transfer of alleged offenders between Australia's States and Territories.)

Republic of Ireland. (As we did not receive any evidence to suggest that this arrangement was not working well, we have not examined this aspect of extradition practice in any more detail.)

2.24 In summary, there are two main tests in Australia's extradition arrangements: those requiring the establishment of a prima facie case, and those which have the 'no evidence' requirement.

2.25 Gaps remain in Australia's extradition network with countries in Central and Eastern Europe, parts of Asia and some parts of South America. The Attorney-General's Department advised the Committee that some negotiations were under way but that human rights considerations have hindered progress.

## Who decides on extradition

2.26 As Figure 2.1 above shows, while the courts determine that a person is eligible for extradition, it is the Minister who decides whether a person should be surrendered to a foreign country.

2.27 This arrangement reflects the history of extradition, which has traditionally been an act of the executive, and recognises that such matters are closely connected with foreign policy.[29]

2.28 There is also, however, an important role for the courts in ensuring that individual rights are protected. The extent of the courts' role varies from country to country and, in Australia, the courts' function depends on the nature of the arrangement with the particular country seeking extradition. Where a prima facie case must be established, the courts have a significant function in scrutinising the evidence, but they have a far less intensive role where the "no evidence" model applies. The appropriate balance between the courts and the executive is an issue we discuss in more detail in Chapters 3 and 4.

## Exceptions to extradition

2.29 The Act sets out a number of circumstances where a person will not be surrendered for extradition (see Figure 2.1).[30] Those circumstances include:

- where the requesting country has not given a 'specialty assurance' (that is, that the person will not be tried or punished for any offence other than those for which extradition has been sought);

29 The High Court in *Barton v Commonwealth* (1974) 131 CLR 477 stated that the executive's inherent powers include the power to seek extradition from another country. However, the power to surrender a person must be granted by legislation.

30 Section 22(3).

- where the person may be subjected to torture;
- where the death penalty may be imposed;
- where the offence is political or military; or
- where the surrender is sought for the purpose of prosecuting or punishing the person on the grounds of race, religion, nationality or political opinions.

2.30 These exceptions to extradition are generally accepted in international law and are reflected in the United Nations Model Treaty.[31]

2.31 Additional restrictions on extradition may be included as terms of particular treaties or by regulation. For example, regulations provide, in relation to Commonwealth countries, that a person shall not be surrendered if the Attorney-General is satisfied that it would be 'unjust or oppressive or too severe a punishment' to do so, taking into account such factors as the trivial nature of the offence.[32] Regulations concerning Australia's treaty with South Africa state that the Attorney-General must not authorise surrender if the person would be liable to be tried by a court or tribunal that has been specially established to try him or her.[33] Surrender may also be refused if the Attorney-General is of the opinion that it would be 'unjust, oppressive or incompatible with humanitarian considerations'.

2.32 The Act also gives the Attorney-General a general discretion to refuse an extradition request.[34] Instead of surrendering an Australian citizen for an offence committed in another country, the Attorney-General may consent to the prosecution of that person in Australia.[35]

## Extradition in practice

2.33 The number of people who have been subject to extradition to or from Australia and the countries that have been involved are discussed below.

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31 See Aughterson 1995, chapters 5 & 6.

32 Extradition (Commonwealth Countries) Regulations. This requirement is also included in Australia's model treaty (Article 3(2)(g)).

33 Extradition (Republic of South Africa) Regulations. Similar provisions are in regulations applying to Japan and Iceland. The principle is also included as an optional ground of refusal in the United Nations Model Treaty (Article 4).

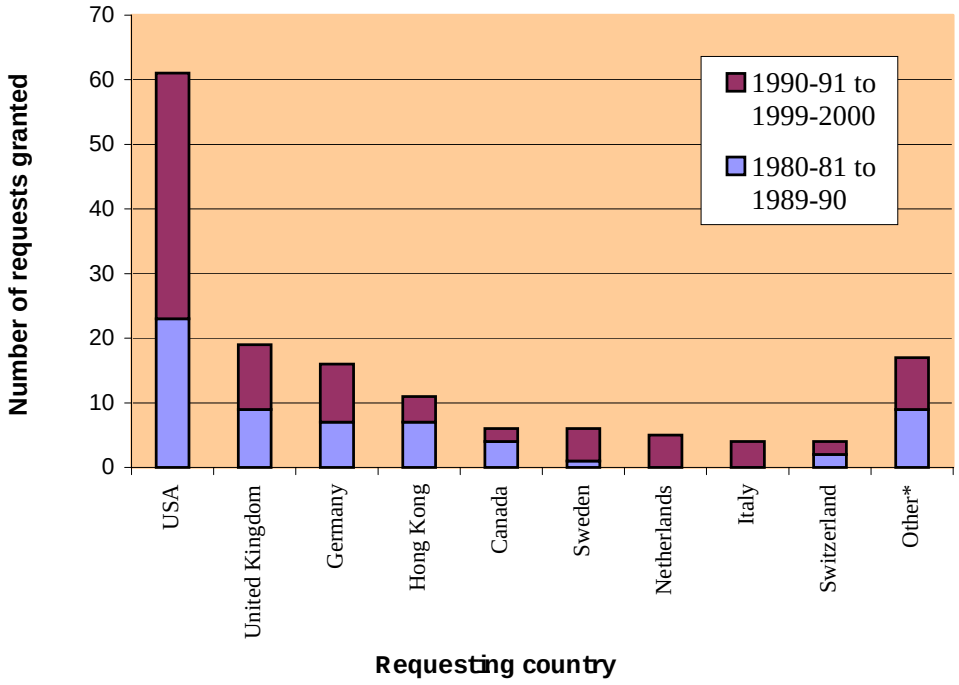
34 Section 22(3)(f).

35 Section 45.

## Australia's main extradition partners

2.34 Figures supplied by the Attorney-General's Department show Australia's main extradition partners over the last twenty years. Most extradition requests have been granted to the United States of America (which until 21 December 1992 was obliged to satisfy the prima facie case test and, since that date, the less rigorous "probable cause" requirement). Significant numbers of requests have also been granted to the United Kingdom (which must establish a prima facie case), Germany (the "no evidence" requirement) and Hong Kong (the prima facie case).

**Figure 2.2 Extradition from Australia by requesting country 1980-81 to 1999-2000**

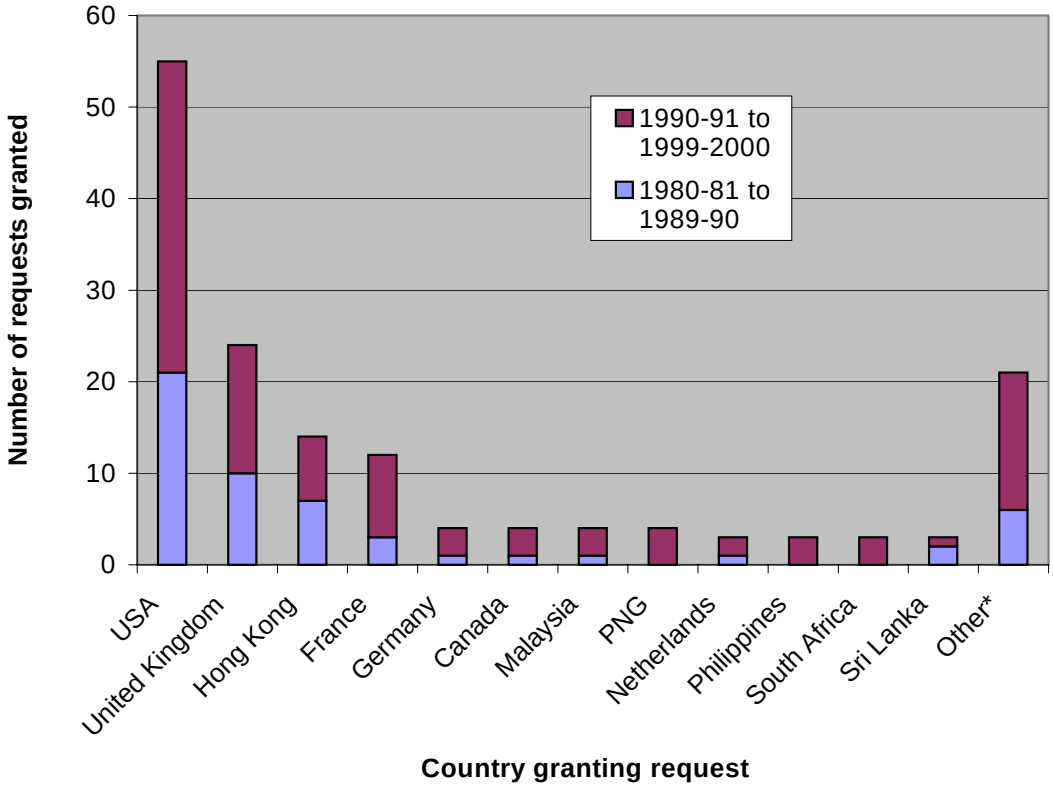



*Notes:* *'Other' comprises Austria (2), Denmark (1), Fiji (1), France (1), Greece (2), Israel (2), Indonesia (2), Japan (1), Republic of Korea (1), Papua New Guinea (1), Singapore (1) and South Africa (1).*

*Source:* *Attorney-General's Department*

2.35 Successful extradition requests made by Australia to other countries show a similar pattern, with most requests being granted by the USA, the United Kingdom and Hong Kong.

**Figure 2.3 Extradition to Australia 1980-81 to 1999-2000**

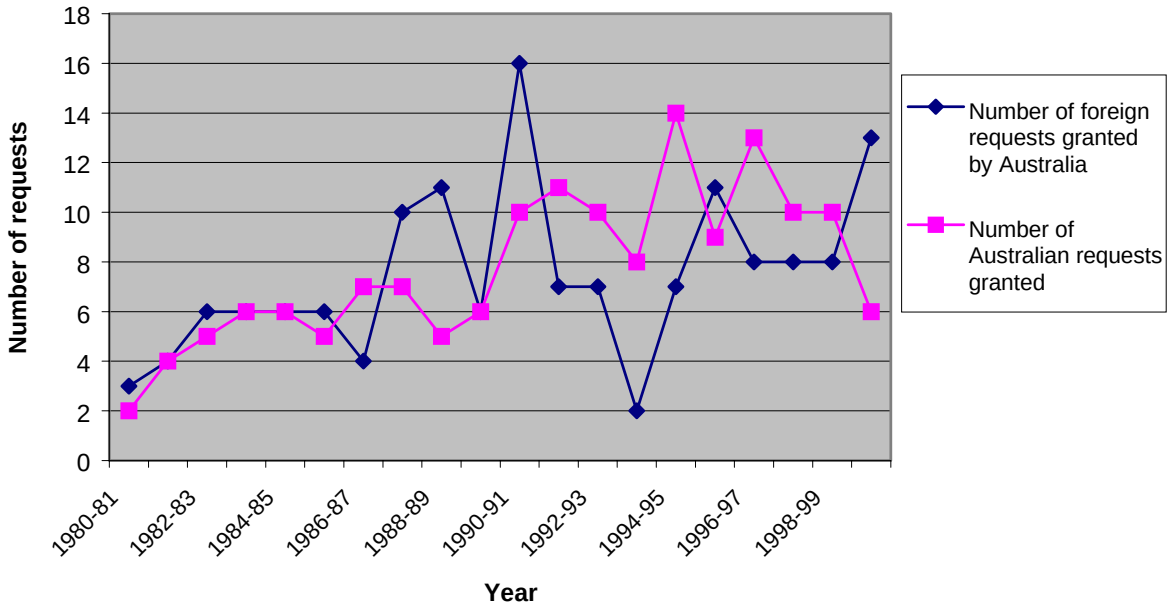



*Note:* *'Other' comprises Austria (1), Chile (1), Fiji (1), Italy (2), Japan (1), Republic of Korea (1), Luxembourg (1), Malta (1), Marshall Islands (1), Portugal (1), Singapore (2), Spain (2), Sweden (1), Switzerland (2), Thailand (2) and Tonga (1).*

*Source* *Attorney-General's Department*

2.36 In total, the Attorney-General's Department advised that 303 extraditions had taken place between Australia and foreign countries (other than New Zealand) in the past twenty years. While the figures are relatively small and fluctuate from year to year, the following graph shows a tendency to an overall increase.

**Figure 2.4 Extradition requests granted 1980-81 to 1999-2000**




*Source: Attorney-General's Department*

2.37 The Department advised that in 242 cases (80%), the other party was a European country, Canada or the USA.

2.38 Almost three quarters of Australia's extraditions have been with common law countries (223). As might be expected given the conclusion of many extradition treaties between Australia and civil law countries in the last fifteen years, the proportion of extraditions between Australia and civil law countries has increased. In the first decade (1980-81 to 1989-90), 24 of the total 115 extraditions (21%) involved civil law countries. In the second decade (1990-91 to 1999-2000), the number involving civil law countries had risen to 56 of the total 188 extraditions (30%).

## Refusal of extradition requests

2.39 We were interested to ascertain in how many cases the Minister had refused extradition requests made to Australia. Figures provided by the Attorney-General's Department showed that between 1980-91 and 1989-90, 62 requests were granted by Australia and 9 (13% of the total) were rejected. In the following decade 1990-91 to 1999-2000, 87 requests were granted by Australia and 19 (18%) were refused. One more request had been refused in the financial year to May 2001.

2.40 The Department provided a breakdown of the reasons for refusal, while noting that individual cases could involve a mixture of reasons.[36]

**Table 2.1 Refusal of extradition by Australia July 1991 to April 2001**

| Ground for refusal | Number of refusals |
|---|---|
| Deficiency in arrest warrant (finding by court) | 3 |
| Inadequate statement of acts and omissions (finding by court) | 2 |
| Insufficient evidence (finding by court) | 2 |
| No general extradition relationship operative | 3 |
| Humanitarian considerations | 6 |
| Person was an Australian national | 4 |
| Person had already been prosecuted in Australia for the offence | 1 |

*Notes:* *In one case two reasons for refusal were given.*

*Source:* *Attorney-General's Department, on the basis of available records and from consultations with relevant officers.*

## Types of offences

2.41 Under the Act, an extraditable offence is defined essentially as any offence punishable in Australia by a maximum penalty of imprisonment for not less than twelve months.[37] However, some of the older treaties, including those inherited from the United Kingdom, list only specific serious offences as extraditable offences.[38]

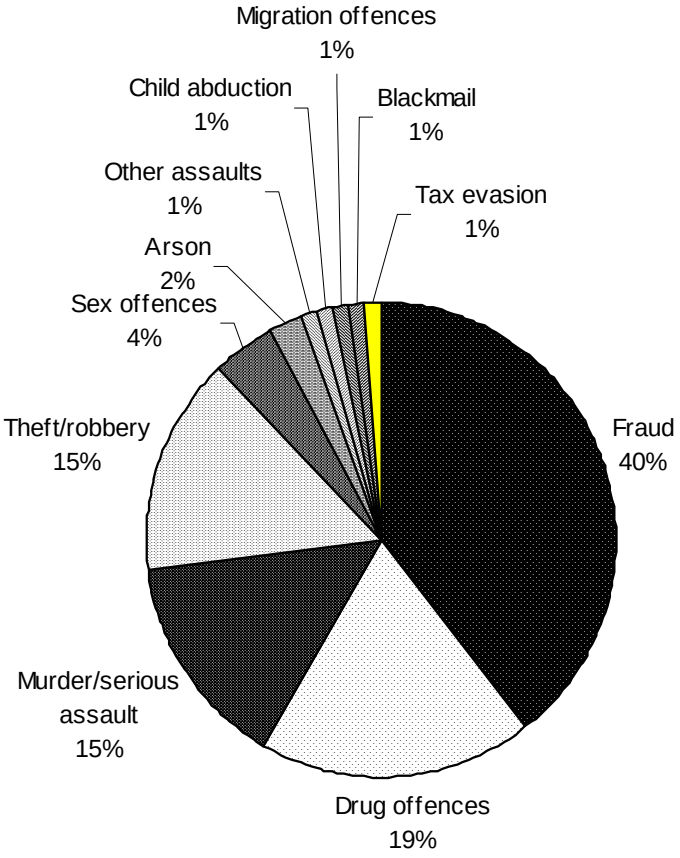
2.42 The types of offences for which Australia has granted extradition requests in the last ten years are shown in the following diagram. The largest proportion (40%) involve fraud cases. Almost a fifth of matters (19%) relate to murder, serious assault and sex offences, and a further fifth (19%) are drug offences. The remaining offences comprise theft and robbery offences (15%), and a small number of arson, other assaults, child abduction, blackmail and migration offences (totalling 7%).

36 Mr Steven Marshall, *Transcript of Evidence*, TR 22, 26 February 2001. See also Chapter 3 at paragraph 3.105.

37 Section 5. The "double criminality" principle requires the conduct to be an offence not only in the country requesting extradition but also in the country where the person is located.

38 A treaty may also specify that where extradition is requested in order to enforce a sentence on a person who has already been convicted, surrender may be refused if the period of imprisonment to be served is relatively short, for example, less than six months. This proviso is included in Australia's model treaty (Article 2(1)).

**Figure 2.5 Extraditions from Australia by type of offence 1990-91 to 1999-2000**




*Source Attorney-General''s Department*

2.43 We did not have details of individual matters and thus could not assess the seriousness of the allegations in each. However, it is clear that at least some of the categories, including murder and serious assault, are by their nature limited to the most serious offences.

## Conclusion

This chapter has shown that:

- Australia is subject to a range of different extradition obligations;
- The requirement to establish a prima facie case applies in most arrangements, while the "no evidence" requirement applies to many others, especially in the treaties Australia has entered with civil law countries over the last fifteen years;
- Extraditions to and from Australia have most frequently been with common law countries, particularly the USA and the UK. However, the proportion of extraditions to and from civil law countries has increased in the last decade.

# 3

# The appropriate standard of evidence

3.1 We noted in our previous report[1] that we found it incongruous that quite different standards of proof apply to extradition requests from Commonwealth countries and civil law countries, and that far more supporting evidence is required from countries whose systems of justice closely resemble Australia's. Conversely, less is required of countries where the implications of agreeing to surrender a person are potentially much more onerous, in that the legal system is quite different, proceedings may well be conducted in another language, and there may be reservations about due legal process and the protection of human rights.

3.2 Much of the evidence we received during this inquiry focussed on what standard of evidence should be provided in support of an extradition request. No-one suggested to us that the current arrangement, whereby Commonwealth countries must establish a prima facie case while most of Australia's other extradition partners need not present any supporting evidence, was ideal.

3.3 This chapter summarises and evaluates that debate. It discusses:

- arguments in support of Australia's move to the "no evidence" model;
- criticism of the "no evidence" model and possible alternatives to that model; and
- whether Australian nationals should be treated any differently from non-nationals in relation to requests for their extradition.

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1 Report No. 36, p. 13.

## Support for the move to "no evidence"

3.4 As discussed in Chapter 2, the "no evidence" model, which is now the default model for Australia's extradition treaties, requires only that a country requesting extradition provide a duly authenticated statement of the offence and the applicable penalty, the warrant for arrest and a statement setting out the alleged conduct constituting the offence.[2] No evidence in support of the offence, such as statements of witnesses, need be provided.

### Arguments in favour of the "no evidence" model

3.5 The Attorney-General's Department stated that the adoption of the "no evidence" procedure had facilitated entry into extradition treaties with civil law countries. Since the option had become available, 30 bilateral treaties had been negotiated or renegotiated, compared with only five in the previous 19 years.[3]

3.6 The Department pointed to international trends towards simplifying extradition matters, noting that 'international conferences concerned with transnational crime have repeatedly encouraged simplification of evidentiary requirements in extradition', and that certain United Nations Conventions imposed such requirements in relation to transnational crimes such as drug trafficking.[4]

3.7 The Department argued:

> In light of these international trends and the role Australia has played in them, any move by Australia to make extradition more difficult could be read as a backing away from our commitment to fighting the drug trade and other forms of transnational organised crime.[5]

3.8 Other criminal justice agencies supported the Department's view. The Office of the Commonwealth Director of Public Prosecutions (DPP) stated:

> Law enforcement has become a matter of international concern and effective law enforcement is only possible if it is supported by an effective extradition regime.

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2 Section 19(3) of the Act.

3 Attorney-General's Department *Submission 11,* p. 24.

4 Attorney-General's Department *Submission 11,* p. 28, referring to the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Article 6(7)), and the Convention Against Transnational Organised Crime (Article 16(8), although this provision is expressed to be subject to the domestic law of the party).

5 Attorney-General's Department *Submission 11,* pp. 28-29.

> The problem is that the extradition process still treats crime as if it was a national concern. The process remains slow and cumbersome with multiple levels of review and appeal. Delay in the criminal process almost always works in favour of the defendant and a well funded defendant has ample scope for achieving delay under the current extradition regime.[6]

3.9 A representative from the Australian Federal Police argued:

> Any tightening of Australia's extradition requirements would be counterproductive to enhancing cooperative law enforcement arrangements and would be inconsistent with international treaties to which Australia is a signatory, including most recently the Palermo convention against transnational organised crime which was signed in December 2000.[7]

3.10 A particular disadvantage of imposing additional requirements in the extradition process is the possibility of increasing delays in a process which may already take years. The Office of the DPP noted:

> … it can take up to six years to deal with a fully defended extradition case in which the fugitive exercises all of their appeal and administrative review rights. The cost of running such cases can be as high as two million dollars. As matters currently stand there are ten extradition cases before the Australian courts which are more than 12 months old. Five of those cases are more than two years old. There are six DPP cases where an extradition request has been before the courts of a foreign country for more than two years. The oldest of these cases has been before the UK courts since 1994.
>
> A delay of this magnitude at which is, after all, a preliminary stage of the prosecution process has the potential to frustrate the whole process and to prevent the effective enforcement of the criminal law.[8]

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6 DPP *Submission 9,* p. 1.

7 Mr Andrew Hughes *Transcript of Evidence,* TR 39, 26 February 2001, referring to the United Nations Convention Against Transnational Organised Crime which details means of improving international cooperation on such matters as extradition, mutual legal assistance, transfer of proceedings and joint investigation of organised crime. Article 16(8) requires State parties, subject to their domestic law, to endeavour to expedite extradition procedures and to simplify evidentiary requirements.

8 DPP *Submission 9,* p. 2. The longest outstanding matter concerns alleged offences involving a shareholder loss of some $US 28 million, according to evidence given by DPP representative Mr Grahame Delaney (*Transcript of Evidence,* TR 29-30, 26 February 2001).

3.11 The DPP's submission called for streamlining of the extradition process 'to bring it up to date and to reduce the scope for technical challenge.'[9]

3.12 A submission from the Australia / Israel and Jewish Affairs Council argued that alleged war criminals used existing avenues to frustrate the extradition process:

> The procedure for obtaining extradition rightly allows many avenues of appeal. An unfortunate result of this, however, is that in many cases years elapse between the original application and the final decision. This has especially been the case where extradition is sought for war crimes, where it has been a common defence tactic in cases in jurisdictions such as the USA and Canada to prolong the case for as long as possible until finally the aged defendant can be considered too ill or inform to be extradited or to stand trial. Any alteration to the law making it more difficult to obtain extradition and increasing the avenues for defence attorneys to draw out the legal process indefinitely, especially for evidentiary reasons, would only aid this tactic and result in Australia not fulfilling its international obligations.[10]

3.13 (We note, however, that it is not only the prima facie case test that can create the potential for delay. Proceedings may also take a significant amount of time where the "no evidence" model applies, as the current proceedings involving Messrs Cabal and Pasini demonstrate.[11])

## Developments in the United Kingdom

3.14 The Attorney-General's Department also referred to trends in the United Kingdom (UK) as part of its justification for moving towards the "no evidence" model.[12] Like Australia, the UK has retained the prima facie case requirement for requests from Commonwealth countries under the London Scheme.[13] That requirement also applies in treaties dating from many years ago. However, the UK has applied the "no evidence" model to extradition arrangements with other parties to the European Convention on Extradition.[14]

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9 DPP *Submission 9,* p. 2.

10 Australia / Israel & Jewish Affairs Council *Submission 7,* p.8.

11 Mexico is seeking to extradite Messrs Cabal and Pasini from Australia pursuant to the "no evidence" model that applies under Australia's treaty with that country. The two men were arrested in November 1998 and have mounted a series of challenges to their extradition.

12 Attorney-General's Department *Submission 11,* p. 23, *Submission 11.2.*

13 Under the *Extradition Act 1989* (UK).

14 In 1991 the UK ratified the European Convention on Extradition (1957) which aims to facilitate extradition between parties. The "no evidence" model applies to extradition requests from 35 European countries.

3.15 The UK Home Office recently released a consultation paper that proposes a radical overhaul of the UK's laws to facilitate extradition with countries in whose legal systems the UK has confidence.[15] A four-tiered extradition system has been suggested, each tier having progressively more rigorous requirements. Requests from other European Union members would operate in the simplest way, with a 'backing of warrants' scheme which would involve limited scrutiny by the courts and no ministerial involvement (except in very limited circumstances[16]). The scrutiny would become progressively more rigorous for countries outside the European Union, with the Secretary of State retaining the final decision-making role in such cases.

3.16 The consultation paper suggests that the "no evidence" test should apply to the UK's main Commonwealth extradition partners (presumably including Australia), without requiring reciprocity from those countries. Only the strictest category in the proposed scheme, to apply to countries with which the UK has no general extradition arrangements, would retain the prima facie case as a protection for persons whose surrender is sought.

3.17 Such thinking ought not be disregarded, given the similarities between the UK and Australian legal systems. However, the proposals should be viewed with some caution, especially given that the Home Office paper is not final but has been released for consultation, and that it was developed by a working group comprising only those government agencies most involved in the extradition process. The proposals might well be expected to attract some opposition from defence lawyers and human rights advocates.

3.18 In addition, as Professor Aughterson's submission pointed out,[17] UK citizens have various protections that do not apply in Australia, particularly through recourse to the European Court of Human Rights.[18] Moreover, facilitating the transfer of people between the developed countries of Western Europe, where national borders have disappeared in many respects as a consequence of membership of the European Union, is quite different from applying that arrangement to other parts of the world without such close connections.

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15 UK Home Office *The Law On Extradition: A Review*, released 13 March 2001, accessed at http://www.homeoffice.gov.uk/oicd/jcu/extrad.htm on 24 April 2001.

16 Namely, where the person was sought by more than one country or was already facing proceedings or sentence in the UK.

17 Professor Aughterson *Submission 15*, p. 2.

18 The *Human Rights Act 1998* (UK) adopts many of the provisions of the European Convention on Human Rights into domestic law.

## Criticism of the prima facie test

3.19 The prima facie test is defined in the Act[19] as evidence which would, if uncontroverted, provide sufficient grounds to put the person on trial, or sufficient grounds for inquiry by a court, in relation to the offence. That is, the court need not find that a reasonable jury would be likely to convict the person, but must find that there is a case to answer.[20]

3.20 The Attorney-General's Department detailed various arguments against the prima facie case requirement:[21]

- The test 'reflects an unjustified attitude of superiority on the part of common law systems and is considered "alien and unacceptable" by civil law countries';[22]
- It is 'not necessarily appropriate' for a person accused of a crime in a foreign country to have all the procedural safeguards that would be available if the crime had been committed in Australia. The person will have access to all the safeguards available in the requesting country during the trial. Moreover, the Department argued that:

  > if Australia is prepared to trust the requesting country to determine the guilt or innocence of the person, it must logically be assumed to trust that country's criminal justice procedure as a whole.

- In the civil law system, there is no equivalent to a committal hearing, nor is evidence on oath received at the pre-trial stage. Thus:

  > civil law countries, and even some less sophisticated common law countries may find it impossible or prohibitively expensive to meet the requirements of the prima facie procedure, with the result that Australia could become a haven for criminals from such countries.

  In support of this point, the Department stated:

  > During negotiations with certain Western European countries in the mid-1980s it transpired that they were aware of the presence in Australia of fugitives of their nationality but had made no

19 Section 11(5)(b).

20 For discussion of section 11(5)(b), see Aughterson 1995, pp. 219-222. For discussion of the origins and justification of the prima facie case requirement, see Shearer 1971, pp. 150-165.

21 Attorney-General's Department *Submission 11*, pp. 17-21.

22 The Department's submission referred in particular (at pp. 18-19) to remarks from a 1984 LAWASIA Standing Committee Report that it seemed 'unnecessary, if not an assumption of some arrogance' for the court to 'insist on assessing [the] evidence as a condition precedent to surrender'.

> extradition requests simply because they did not believe there was any reasonable prospect of meeting the common law requirements.[23]

The Department noted that considerable Australian Government resources are already devoted to assisting foreign countries to provide evidence in the appropriate form, and that reinstituting the prima facie case requirement would be likely to significantly increase this demand.

- The prima facie case requirement 'is not a true test of the strength of the case' against the accused person, particularly because almost all relevant information, including evidence which would infringe Australia's strict rules against hearsay, would be admissible in a subsequent trial in a civil law country.
- The prima facie case requirement significantly increases the length and cost of extradition proceedings.
- Extradition proceedings are administrative proceedings to determine whether a person is liable to be surrendered to face trial in another jurisdiction. Their purpose is not to assess guilt or innocence, but 'to prevent the arbitrary or capricious surrender of a person by the executive authority of the requested country'. The sufficiency of the evidence against the person 'is a matter for the courts of the requested country.'
- The prima facie case requirement 'cannot be relied on as a test of the good faith' of the requesting country because:

> If a foreign government is prepared to act in bad faith by providing a false warrant and statement of alleged conduct, it would be naive to suppose that such a government would not also be prepared to produce false evidence.

- In practice, the prima facie requirement has proved to be a major impediment to extradition, as a 1985 study by the United Nations Division on Narcotic Drugs had commented. The requirement 'provides a formidable obstacle to the free flow of extradition between countries with acceptable criminal justice systems'.

3.21 A submission from the Victorian Bar also referred to the difficulties civil law countries faced in complying with common law evidentiary rules:

> To explain the requirements of [the hearsay] rule, and to have the material placed in a form where the rule is satisfied, and to do this through interpreters and dealing with witnesses who may already

23 Attorney-General's Department *Submission 11*, p. 24.

> be traumatised by the events concerned, is particularly difficult and creates a practical obstacle to extradition which generally has nothing to do with the merits. Similar things can be said for other rules of evidence. Whilst the alleged criminality should also be recognised as criminal in this jurisdiction, a requesting country should not be required to place its evidence (which may be voluminous) in a form which satisfies two regimes of evidentiary rules.[24]

3.22 The Attorney-General's Department argued that even other common law countries could have 'significant problems' in meeting the prima facie case requirement:

> For example, they may be accustomed to a less rigorous application of the rules of evidence, or they may be dealing with a case such as a complex fraud where rules on admissibility of records vary depending on the statutory provisions adopted in different common law jurisdictions.
>
> For reason such as these the prima facie case procedure commonly has the effect of enabling fugitives to escape justice on technical, as opposed to meritorious, grounds.[25]

## Criticism of the "no evidence" model

3.23 While some real concerns were raised about the prima facie case test, several key witnesses in our inquiry criticised the abandonment of that test in favour of the "no evidence" model. They were particularly concerned that this move had effectively taken the responsibility of safeguarding the rights of the individual from the courts and left it in the hands of the executive.[26]

3.24 Professor Aughterson argued:

> There has been a trend towards streamlining the extradition process so as to facilitate extradition. This has been at the expense of individual rights. That is exemplified by the general abolition of the requirement to establish a prima facie case and the allocation of responsibility for the protection of individual rights to the executive.[27]

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24 The Victorian Bar *Submission 16*, p. 3.

25 Attorney-General's Department *Submission 11*, p. 17.

26 We discuss this issue further in Chapter 4.

27 Professor Aughterson *Submission 15*, p. 1.

3.25 Professor Shearer stated:

> It was wrong in 1985 to have moved so precipitately towards abolition of the prima facie case. It was wrong too to take so much power away from the courts and to vest it in the Executive. The consequences were not thought through by Parliament. It was all done in great haste as a panic reaction to the Trimboli case. No other common law countries followed our lead.[28]

3.26 He also stated:

> Among the arguments against the requirement of the prima facie case, contained in the body of the [Attorney-General's Department's] submission … is the suggestion … that a prima facie case is not a common law right in any sense. This is perfectly true: extradition is a creature of statute. But there is such a thing as natural justice. I suggest that the sense of justice of most people would be offended by any law, statutory in basis or not, that can have people taken away from their own home to a distant country to face trial on matters alleged against them in relation to which the courts in their own country have no power to review for probable cause or reasonable suspicion. The civil law countries do not return our favour: they refuse altogether to surrender their own citizens, prima facie case or no prima facie case.[29]

3.27 Dr David Chaikin was Senior Assistant Secretary of the International Branch in the Attorney-General's Department when the key policy changes were made in the mid 1980s. He made the following comments:

> There was an error. I myself did not appreciate it back in 1985 or 1986 but, in my view, there was an error. We went too far. We wanted to enter into all these treaties. There was the extradition public relations fiasco of Trimbole. There was a whole series of reasons at that time why we went that course but, in my view, it was a mistake. It is going to be increasingly a more important mistake … We have put ourselves in a straitjacket with our model treaty, which we promulgate throughout the world as something that is good and beautiful.[30]

3.28 Dr Chaikin's particular concern was that in the future it would be difficult for Australia to include more rigorous requirements in treaties with countries about which Australia may hold concern in regard to due process and other human rights protections.

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28 Professor Shearer *Submission 20*, p. 2.

29 Professor Shearer *Submission 20*, p. 2.

30 Dr Chaikin, *Transcript of Evidence*, TR 99, 26 March 2001.

3.29 Witnesses also took issue with some of the other justifications offered by the Department for preferring the "no evidence" model. Professor Aughterson argued:

> … in my view; it is not a justification for expediency to say that extradition is merely a preliminary step towards a trial in another state. As noted by Gyles J in the Federal Court in *De Bruyn v Republic of South Africa:*
>
> > "The [Extradition] Act affects the liberty of the subject in a drastic fashion – the consequences are far more serious than being charged with a crime in Australia. Principles which are applicable in this case (where it might be thought that the appellant has few merits) are equally applicable to the case of a long-standing Australian citizen with an impeccable record. The questions which arise under this statute cannot be dealt with as though they are ordinary commercial or administrative law issues."[31]

3.30 Professor Shearer disagreed with the Department's justification that Australia only signs treaties with those countries in whose criminal justice systems it has sufficient confidence. He pointed out that conditions can suddenly deteriorate through a coup or emergency situation, or that there may be 'a steady erosion of the rule of law such as in Zimbabwe'.[32]

3.31 A recent judgement of the Full Court of the Federal Court lent support to this view:

> Australia has extradition treaties with many countries. A number of these countries have legal systems very different from our own. Some of them would not be regarded as affording those charged with serious criminal offences anything approximating what we would consider a fair trial. They appear to have little regard for the importance of an independent judiciary and the rule of law. Some are reputed to be governed by regimes which are thoroughly corrupt.[33]

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31 Professor Aughterson, *Submission 15*, p. 2, referring to *De Bruyn v South Africa* [1999] FCA 1344 (unreported, 29 September 1999), at paragraph 28. The Court went on to state: 'Whilst they have no doubt to be considered in a practical way without being overzealous in discerning deficiencies …, doubts or ambiguities of fact or law should not be resolved in favour of the country seeking extradition.'

32 Professor Shearer *Submission 20*, p.1.

33 *Cabal v United Mexican States* [2001] FCA 427 (unreported, 18 April 2001), at paragraph 279. The Court noted that the choice of whether to enter into a treaty with such countries was a matter for the Australian Government, and that the courts' role under the Act was to ensure that the statutory requirements were met, 'and not with the wisdom or otherwise of having entered into such treaty arrangements'.

3.32 Another witness, Dr Chaikin, disagreed with the Department's suggestion that the prima facie case requirement provided no real protection to individuals, in that it would be easy for a foreign country to fabricate supporting evidence if it so wished. He argued that this reasoning did not take account of the reality of the behaviour of police and prosecutors:

> … some police and prosecutors in a foreign country may be prepared to tell lies about what a witness or the fugitive has said – for example, they may be prepared to provide an untrue or misleading summary of a statement of a witness … But the same police investigator or prosecutor may be extremely reluctant to fabricate an actual signed statement of a witness and produce it to a foreign court …
>
> In some countries the police and prosecutors are unduly influenced by local military commanders or powerful individuals and pay little, if any, regard to the human rights of defendants. In other countries, including sophisticated democracies such as the United States of America, prosecutors have tremendous discretion or influence in the decision to lay charges. Prosecutorial overreach and the overloading of indictments as a means of getting the best result in plea bargain negotiations is not uncommon ...[34]

3.33 Dr Chaikin argued that by requiring witness statements to be submitted

> … there is a greater chance that the illicit purpose of the prosecution or the hopelessness of the prosecution case will be revealed. This is not a fool-proof method of discovery. However, in an adversarial system of law, a defence lawyer will have a greater chance of detecting an improper, inadequate or biased investigation where the foreign prosecution is required to produce prima facie evidence of a crime.[35]

3.34 Dr Chaikin gave as an example the 1993 case of *Stanton*.[36] In that case, the Philippines Government sought the extradition of an Australian national and his Filipino / Australian wife for murder. In support of the application the Philippines Government had provided material such as witness statements, although the "no evidence" treaty between Australia and the Philippines did not require that material.

3.35 Although the Federal Court found that the couple was eligible for extradition, the judge went beyond what the Act required of the court by

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34 Dr Chaikin *Submission 21,* p. 4.

35 Dr Chaikin *Submission 21,* p. 4.

36 *Stanton v DPP & Republic of the Philippines* (unreported) Federal Court, Spender J, 12 January 1993.

commenting on the supporting evidence that had been provided. Justice Spender referred to 'serious doubts' about the quality of the police investigation and the charges. In particular, His Honour commented that there were no first-hand witnesses, no confessional statements implicating the couple, 'a complete lack of supporting forensic evidence' and a 'serious possibility of fabrication of witnesses' statements', and recommended 'a most careful scrutiny' by the Attorney-General.[37] The extradition request was ultimately rejected.

3.36 Dr Chaikin commented:

> If the Philippine extradition request had not included such material then His Honour Mr Justice Spender could not have made his comments and the Australian Attorney-General would not have been in a position to reject the extradition request ... These evidentiary statements thus provided the means of detecting the grossly inadequate investigation and/or "malicious prosecution".[38]

## Possible alternatives to the "no evidence" model

3.37 During our inquiry witnesses who criticised the 'no evidence' model suggested various alternatives for consideration. They were:

- The re-institution of the prima facie case test for all countries, with or without modification. Suggested modifications were:
  - ⇒ a relaxation of the normal evidentiary rules to allow civil countries to present evidence which is admissible in their legal system;
  - ⇒ a "record of the case" procedure, under which the requesting country would provide a comprehensive statement of the evidence;
  - ⇒ an additional right to accused persons to cross-examine the requesting country's witnesses.
- The less onerous "probable cause" test adopted by the USA (that is, evidence to provide reasonable grounds to believe the person is guilty).

3.38 We discuss these alternatives below.

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37 At paragraphs 60-66.

38 Dr Chaikin *Submission 21,* pp. 5-6. Other submissions criticising the abandonment of the prima facie case requirement were received from Ms J Trimas *Submission 1,* Mr D Trimas *Submission 2,* Ms Styles et al *Submission 3,* Ms J Michie *Submission 4,* Ms J Howarth *Submission 6,* Ms J Townsend *Submission 8,* Mr M Vescio *Submission 12* and Mr C Nyst *Submission 13.*

## Reinstitution of the prima facie case

3.39 With the exception of the criminal justice agencies, most witnesses supported the prima facie case requirement as a necessary and not particularly onerous safeguard of the rights of those whose extradition from Australia is sought.

3.40 As one witness argued:

> … we allow other foreign countries to extradite people from Australia in circumstances where they really have nothing at that stage and they should not be extraditing them. We are really throwing them to the mercy of the situation in the foreign country, because once you go back to the foreign country you are at a grave disadvantage ....[39]

3.41 Another justification given for retaining the prima facie case test was that civil law countries that followed the "no evidence" model had other safeguards for their citizens:

> While the abolition of the requirement to establish a prima facie case complies with the requirements of civil law states, there are other protections in those countries that have not been adopted in Australia. These include:
>
> - non extradition of nationals
> - a more exacting test as to whether double criminality is established;
> - judicial assessment of human rights protections. In European civil law states not only are there constitutional or statutory protections, but also there is recourse to the European Court of Human Rights.[40]

3.42 Professor Shearer similarly argued that reciprocity was lacking in the "no evidence" model because foreign countries did not extradite their own nationals.[41]

3.43 However, witnesses varied in their opinions as to whether modifications should be made to the existing prima facie case test and what those modifications might be.

### Support for the existing test

3.44 Dr Spry QC submitted that the prima facie case test, or a standard of proof 'not less than' this test should be maintained, at least for Australian

39 Dr Chaikin *Transcript of Evidence*, TR 107, 26 March 2001.

40 Professor Aughterson *Submission 15*, p. 2.

41 Report No. 36, pp. 51-52.

nationals.[42] His submission was supported by legal practitioner Mr Tom Bostock.[43]

3.45 Mr Julian Burnside QC appearing on behalf of the Victorian Bar argued that the prima facie case test should apply to countries in whose systems Australia did not have 'real confidence':

> Australia should recognise a distinction between those nations in whose justice systems it has genuine confidence, and those whose justice systems are still aspiring to the standards we deem essential. The distinction should for the basis of a 2-tier system of extradition: a fast-track (warrant and statement of conduct) system for nations in whose justice system we have real confidence; a prima facie case test for the others … In my opinion, it is irrational to apply to all other nations the same assumptions about the integrity of their justice systems.[44]

3.46 He did not suggest, however, that the prima facie case test itself should be modified in any way.

## Adding a right to cross-examine witnesses

3.47 Two witnesses supported the retention of the prima facie case test but went even further. His Honour Justice Dowd proposed the inclusion of provisions equivalent to those governing normal committal proceedings in Australia, whereby the court, while generally proceeding on the basis of written statements, has the discretion to allow particular witnesses to be called to give oral evidence.[45]

3.48 This additional protection for those accused of offences in another country was supported by Mr Chris Nyst, on the basis that:

> Cross examination is an integral part of the assessment of any evidence and its value should not be ignored in the context [of] the extradition process.[46]

3.49 Mr Nyst argued that the development of procedures for giving evidence by video or audio link had introduced new considerations:

42 Dr Spry *Submission 17*, p. 6, *Submission 17.1*, p. 2.

43 Mr Bostock *Submission 18*.

44 The Victorian Bar *Submission 16.1*, pp. 3-4. We note, however, that the first submission from The Victorian Bar had supported the move to "no evidence" treaties without qualification (*Submission 16*, p. 4). As that submission pointed out, there was a diverse range of views amongst members.

45 Justice Dowd, *Transcript of Evidence*, TR 1, 4-5, 13 February 2001. His Honour referred to the *Justices Act 1902* (NSW) sections 48-48I, particularly section 48E. There are similar provisions in other Australian States and Territories.

46 Mr Nyst *Submission 13*, pp. 4-5.

> In the past determination of a prima facie case has been made without hearing any *viva voce* evidence. Statements of prosecution witnesses have been tendered and accepted without any right of cross-examination. Receipt of such untested evidence was sought to be justified on the grounds that it would be altogether too heavy a financial and administrative burden to require witnesses to be available for cross-examination on their statements.
>
> … The use of [audio and video] facilities in criminal courts is now commonplace and must raise the issue of whether the right of cross examination (of selected witnesses by leave of the court, as now occurs in the case of all committal proceedings in NSW) by audio/video linkup, should now be introduced into the extradition process. Unfortunately experience shows that those who are preparing statements of evidence for presentation to a foreign court in circumstances where they are aware that such statement[s] cannot be tested, are apt to sometimes at least overstate the evidence.[47]

3.50 The Attorney-General's Department referred to several problems in this proposal:

> A court does not have the power to compel the attendance of a witness located in a foreign country.
>
> Even under the mutual assistance in criminal matters treaties which are becoming increasingly common … states have not been prepared to concede such a power to foreign courts or, generally, even to agree to enforce foreign summonses for the appearance of witnesses.
>
> A video-link hearing of a witness in the requesting state might be a more acceptable alternative. However … quite apart from the limitations of current technology, there are a number of thorny legal issues affecting national judicial sovereignty which would have to be resolved on a bilateral basis before this became a practical option with any particular treaty partner.[48]

3.51 Professor Aughterson agreed that taking evidence by video was not without problems.[49]

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47 Mr Nyst *Submission 13,* p. 4.

48 Attorney-General's Department *Submission 11.2,* p. 12. Other issues that would need to be resolved include remedies in cases of contempt of court or perjury by witnesses located outside Australia.

49 Professor Aughterson *Transcript of Evidence,* TR 91, 26 March 2001.

## More relaxed rules of evidence

3.52 Professor Shearer noted in his submission to our previous inquiry that the existing form of the prima facie case test:

> … has rightly been criticized as too exacting and too open to the taking by defence lawyers of technical objections. What is required is a test of sufficient evidence to raise a reasonable cause to suspect the [person] of having committed the offence.[50]

3.53 Dr Chaikin, while supporting the prima facie test as a 'necessary filter', called for more flexible evidentiary rules in extradition hearings on the basis that:

> … if we changed the evidentiary requirements … and got rid of the evidentiary rules so that you allowed hearsay in and you would allow everything in but you examined the quality of the material, then the main problem that civil law countries face would be eliminated.[51]

## The Canadian model: 'record of the case'

3.54 Acknowledging the difficulties many civil law countries have in complying with complex common law evidentiary rules, several witnesses supported the Canadian model as an alternative that would allow for some examination by Australian courts of the available evidence.[52] Professor Shearer, for example, described the Canadian model:

> … as a reasonable compromise between natural justice and the demands of mutual co-operation in the suppression of crime.[53]

3.55 Canada completed a major review of its extradition laws in 1999.[54] The new Act retains the prima facie case test for all countries.[55] However, the evidentiary laws have been modified so that hearsay evidence and other evidence normally inadmissible in Canada may be presented to a court hearing an extradition application.[56]

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50 Report No. 36, p. 54.

51 Dr Chaikin, *Transcript of Evidence*, TR 107, 26 March 2001.

52 Professor Shearer *Submission 20*, p. 2; Australia/Israel & Jewish Affairs Council *Submission* 7, p. 10; Dr Chaikin *Transcript of Evidence*, TR 107, 26 March 2001.

53 Professor Shearer *Submission 20*, p. 2.

54 Canada's Extradition Act, S.C. 1999, c. 18 came into effect on 17 June 1999.

55 Section 29(1)(a) which requires evidence to 'justify committal for trial in Canada'.

56 The exception is evidence gathered in Canada, which must satisfy the normal rules of evidence (section 32(2)). The Act includes other significant changes: it has extended application to international courts and tribunals, including the proposed International Criminal Court. Extraditable offences have been defined as those attracting at least a two year maximum

3.56 In addition, the judge may receive as evidence a certified "record of the case", in which a judicial or prosecuting authority of the requesting country attests to a summary of the available evidence and certifies that the evidence is available for trial and is either sufficient to justify prosecution, or at least was legally obtained according to the law of that country.[57]

3.57 Because of its relative newness, there has been little analysis of the operation of the new Canadian legislation, although we note that various challenges to the constitutional validity of the evidentiary provisions have not succeeded.[58]

## A similar option under the London Scheme

3.58 The Attorney-General's Department advised that in 1990 the Commonwealth Law Ministers Meeting adopted a "record of the case" procedure as an alternative to the prima facie case requirement for Commonwealth countries.[59] The necessary documents are a comprehensive statement of all the evidence, including a full description of witnesses' statements; an affidavit from the investigating authority; and a certificate from the Attorney-General of the requesting country that the evidence is sufficient to justify prosecution. The court in the requested country must then determine whether the evidence is sufficient under its own laws to justify trial.

3.59 The Department noted that Canada, Malaysia, Samoa, Tonga and Zimbabwe have enacted legislation to give effect to this procedure. While South Africa's legislation also provides for reception of a record of the case, the record is treated as conclusive proof that a prima facie case exists, 'so that the procedure is, in effect, a "no evidence" procedure with a special documentary requirement'.[60]

3.60 The Department criticised the approach as being 'inherently incapable of being applied to requests from civil law countries' because:

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sentence of imprisonment (an issue we discuss in Chapter 4). The Act also includes standard grounds for refusal of surrender of a person.

57 Section 33. The rules of evidence have also been modified in other ways, such as providing for documents to be admissible without any solemn affirmation or oath and without proof of the signature of an official (sections 34 & 35).

58 We are grateful to the Canadian High Commission for their provision of material on the Canadian experience, including transcripts of relevant cases such as *Attorney-General of Canada v Zhipin Yang* (unreported), Superior Court of Justice, Ontario, 25 September 2000.

59 Australia had proposed the 'no evidence' procedure, but this was not adopted. The option is Annex 3 to the London Scheme. Members may also agree on a bilateral basis to other mutually acceptable alternatives.

60 Attorney-General's Department *Submission 11*, p. 27.

- it would be impossible for a civil law country to provide the required certificate, since they do not have a prima facie case requirement in their legal system; and
- it would be 'impossible' for magistrates to assess the probative value of evidence which would normally not be admissible in Australia, in order to determine that there was a case to answer.[61]

3.61 However, we are not persuaded that a modified 'record of the case' model would present insurmountable difficulties, particularly since a similar scheme is working in Canada. To overcome the first difficulty referred to by the Department, the Canadian legislation allows a certificate that the evidence is either sufficient to justify prosecution or was legally obtained according to the law of the requesting country (see paragraph 3.56 above). The Canadian courts have apparently not had any difficulty in assessing evidence that is normally inadmissible under their domestic law.

3.62 We note also that the Office of the DPP was not so opposed to this model, stating in evidence:

> There may be scope for a test that would require civil law countries to provide more information than they do at present, but which would not require them to put together a prima facie case. It may be, for example, that some countries would be able to provide a copy of a report of an investigating magistrate or a certificate to the effect that the evidence has been considered and the conclusion has been drawn that there is a case to answer.[62]

## The US model: probable cause

3.63 Another alternative that we considered in the course of our inquiry was the USA model.

3.64 The applicable test in the USA is the "probable cause" test, which has been summarised as one which requires reasonable grounds to believe the person is guilty.[63] That test applies in Australia's extradition treaty with the USA, as well as in our treaty with South Korea.[64]

3.65 The Attorney-General's Department noted:

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61 Attorney-General's Department *Submission 11,* p. 26.

62 Mr Grahame Delaney, *Transcript of Evidence,* TR 28, 26 February 2001.

63 Attorney-General's Department *Submission* 11, p. 25, referring to *Glucksman v Henckel* 221 US 508 (1910) per Holmes J.

64 Australia's extradition treaty with Norway also provides that Norway may refuse extradition if it considers the evidence 'insufficient to establish a presumption that the person concerned is guilty'. However, Australia does not require the same standard of evidence from Norway. We did not receive any evidence about the operation of this provision.

> In practice … this test is rather less demanding test than the British and Australian "prima facie case" requirement. The standard applied varies considerably. However, the United States courts have taken the view that extradition treaties should be liberally construed so as to give effect to the intention of the contracting parties …[65]

3.66 Australia's extradition treaty with the USA requires the requesting country to provide an outline of the evidence by affidavit or declaration: statements from witnesses are not necessary. The description of the facts need not be legally admissible evidence under Australian law and can, therefore, include hearsay evidence.[66]

3.67 Dr Chaikin referred to two Australian cases in which he had appeared, to support his argument that the "probable cause" requirement allows the courts to assess the quality of the evidence and thus gives at least some protection for the rights of the person whose surrender is sought.

3.68 The *Todhunter* case[67] concerned complex allegations of involvement in money laundering. The Federal Court found that the material did not provide reasonable grounds to believe in Mr Todhunter's guilt in relation to 23 of the 25 listed offences. In particular, there was no evidence linking Mr Todhunter with the transportation of the money.

3.69 Dr Chaikin stated that the material provided by the US Government included an affidavit by a special agent summarising a series of interviews with four witnesses, and that subsequently two of those witnesses swore statutory declarations repudiating many of the statements contained in that affidavit. Dr Chaikin argued:

> The ignorance of the US investigators and their flawed understanding of commodities markets and money laundering prejudiced them against Mr Todhunter. When the investigators could not find evidence of critical matters, they simply created the evidence by putting words into witnesses' mouths.[68]

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65 Attorney-General's Department *Submission 11*, p. 25.

66 *Todhunter v Attorney-General & Anor* (1994) 124 ALR 442. His Honour Justice Spender noted (at 464) that the nature and quality of the hearsay may bear on the question of whether "reasonable grounds" have been established.

67 *Todhunter v United States of America* (1995) 129 ALR 331 (Full Court); *Todhunter v Attorney-General (Cth) & Anor* (1994) 124 ALR 442 (Spender J).

68 Dr Chaikin *Submission 21*, p. 9. He reported that Mr Todhunter was subsequently extradited to the USA and entered a plea bargain agreement to plead guilty to one charge. The most lenient sentence possible was imposed, namely "time served" with no fine.

3.70 Dr Chaikin referred to a second case that involved allegations by the USA against a Mr Jacobi of conspiracy to import and supply illicit drugs.[69] The case relied substantially on uncorroborated assertions by an alleged co-conspirator. A previous application to Hong Kong to extradite Mr Jacobi from that country had been rejected on the ground that there was insufficient evidence to establish the required prima facie case. Although in Australia the lesser standard of "probable cause" applied, the Federal Court also refused to find Mr Jacobi eligible for surrender, criticising the witness's evidence as lacking reliability or credibility.[70]

3.71 Another witness, Professor Aughterson, also supported the "probable cause" requirement as a possible alternative to the prima facie test.[71]

3.72 During our inquiry, we did not receive any evidence to suggest that the US requirement had attracted criticism from foreign countries for being too onerous. In response to our questions on this issue, the Attorney-General's Department advised that it had sought information from the Office of International Affairs, Criminal Division, United States Department of Justice (DOJ) about the operation of the US test, and was told:

> While, occasionally, the United States encounters a case in which the requesting state has failed to meet the probable cause standard, typically, the European civil law countries do meet this standard …
>
> The DOJ sometimes receives statements of fact expressed essentially as conclusions with little or no information to allow the extradition magistrate to determine the source of the information and, hence, its reliability. However, in this area there has been recent improvement. This appears to have occurred, in part, because of the major educational efforts the DOJ has undertaken over the years … Some eastern European countries have greater difficulty, but the DOJ is continuing its education efforts in this region … In summary, the probable cause standard seems to work with the European countries. The DOJ is successful more often than not in extraditing European fugitives.[72]

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69 *Jacobi v USA & Owens* (1996) 962 FCA 1 (unreported, 8 November, Kiefel J).

70 Dr Chaikin reported that in 2000 the US District Court finally dismissed the indictment.

71 Professor Aughterson *Submission 15*, p. 6. Professor Shearer had previously supported a lesser test of "reasonable grounds to suspect" the person had committed the offence, but in his later submission supported the Canadian "record of the case" model (*Submission 20*, p. 1).

72 Attorney-General's Department *Submission 11.3*, pp. 8-9.

## The Committee's comments

3.73 There are strong arguments in support of the current "no evidence" model extradition arrangements. In particular, the prima facie case requirement is more time consuming and costly, and allows increased opportunities for extradition requests to be denied on the basis of evidentiary difficulties rather than merit.

3.74 We acknowledge that since the "no evidence" model became available in the mid 1980s the number of bilateral treaties Australia has signed[73] demonstrates that it has been easier to negotiate extradition agreements with civil law countries. Australia's network of extradition agreements is, consequently, more extensive than it might otherwise have been. It is very much in Australia's interests to be part of an effective international law enforcement network, particularly in an era of increasing transnational organised crime. It is also part of Australia's responsibility as a member of the international community.

3.75 The advantages of the "no evidence" model are especially apparent when Australia is seeking to conclude treaties so that it may apply to extradite alleged criminals from other countries to face trial on serious charges in Australia.

3.76 However, concerns about the extradition process have arisen when another country seeks the extradition of an Australian to face trial in circumstances where, if the alleged offence were committed in Australia, there would be insufficient evidence to justify prosecution. Australia's extradition arrangements are often not truly reciprocal, in that our civil law partners refuse to extradite their citizens.

3.77 It is important to acknowledge that extradition is a preliminary step towards the trial of a person in the requesting country and that judicial examination of an extradition request cannot and should not become a 'mini-trial' on the issues. Nevertheless, the consequences for a person who is facing extradition to a foreign country, where the legal system, language and availability of legal assistance may present great difficulties, mean that extradition cannot be treated merely as an administrative step.

3.78 There is always a risk that extradition policy will be developed to meet the demands of high profile cases involving very serious offences. We heard evidence from various witnesses that this was largely the impetus for the radical changes to Australia's extradition law in the mid 1980s. While we agree that fugitives must be brought to justice and acknowledge the public interest in prosecuting such cases promptly, it is also important to

73 See Chapter 2 at paragraph 2.23.s

recognise the rights of an accused person. It is not good policy to dispense with these protections simply to streamline the judicial process.

3.79 The Attorney-General's Department has argued that the Act provides safeguards through the Minister's capacity, and in some cases the Minister's duty, to consider a range of human rights issues when determining whether to surrender a person. However, we note that the Minister may not have the opportunity to consider fully whether the extradition request is soundly based, if an explanation of the supporting evidence need not be provided by the requesting country. We note also the concerns raised in evidence that the exercise of the Minister's discretion is largely unreviewable, and discuss that issue in more detail in the next chapter.

3.80 Accordingly, to provide better protection for the rights of individuals whose extradition is being sought from Australia, we believe there are persuasive grounds for Australia to consider increasing its evidentiary requirements from the default "no evidence" model.

## Our preferred approach

3.81 Although the prima facie case test has much to commend it, we accept the evidence of most witnesses that to reinstate this test as it currently exists for all extradition requests would present particular difficulties for civil law countries whose legal system and evidentiary rules are quite different from our own. This in turn could tend to inhibit effective law enforcement, particularly in relation to serious transnational crimes.

3.82 Similarly, we are not persuaded that there are compelling reasons to add further steps in the current prima facie case process by giving courts the discretion to require witnesses in foreign countries to give direct oral evidence by audio or video link and to be subject to cross-examination. In particular, we note that facilities are not always available or reliable. We consider the fact that witnesses in another country are not compellable to be a significant problem. We also acknowledge the danger of turning extradition proceedings into a preliminary trial, with the problems of increased delay and cost and the undesirable consequence of Australian courts being seen to make judgements about matters which are properly the province of foreign courts in their future criminal proceedings. To some extent Australia must demonstrate its faith in the judicial systems of foreign countries with which it has signed extradition treaties. It is a question of where the line is drawn. Our concern is the lack of **any** judicial scrutiny of the evidence from countries to which the "no evidence" model applies.

3.83 We are inclined to the view that elements of the Canadian "record of the case" approach and the US "probable cause" approach are preferable to the "no evidence" model, in that they provide the courts with a greater opportunity to assess whether any substantial evidence has been gathered against the accused person. That in turn must help in deciding whether it is in the interests of justice that the person should be surrendered to face trial.

## The practical implications of requiring more proof

3.84 If Australia were to decide to require more supporting evidence from countries requesting extradition, the ways in which it might do so and the implications of any changes need to be considered.

3.85 The Attorney-General's Department argued that, given Australia's support over the past fifteen years for the "no evidence" model as a means of facilitating extradition, it would be extremely difficult for Australia to change its position. While we acknowledge there may be some difficulty, we believe there is wisdom in Professor Shearer's argument that 'it is better to be ultimately right than persistently wrong'.[74]

3.86 One means of effecting such change would be to impose an additional requirement (whether by way of a modified prima facie case or the "reasonable grounds" test) in all bilateral treaties. This option would require renegotiation of almost all of Australia's treaties.

3.87 The Attorney-General's Department stressed that some treaties might be at risk if Australia decided to increase its evidentiary requirements.[75] We were interested to ascertain which, in their view, might be particularly under threat. In response the Department, while noting that any assessment was 'highly speculative', considered:

> … there is a significant risk that a number of states in Western and Southern Europe which have had "no evidence" treaties with Australia for over a decade, particularly those which have had the most difficulty with the prima facie case requirement in the past would consider terminating the existing extradition relationship … There is also some risk of terminations by our Latin American treaty partners.

74 Professor Shearer *Submission 20*, p. 2.

75 Attorney-General's Department *Submission 11*, pp. viii, 31; *Transcript of Evidence*, TR 21-22, 26 February 2001.

> The risk is assessed as low in the case of northern and eastern Europe.[76]

3.88 The Department also noted that an increase in evidentiary requirements would potentially place one more obstacle in the way of concluding treaties with Asian countries, a region where Australia's extradition network has many gaps.

3.89 However, some witnesses disputed the potential difficulties civil law countries would have in meeting any stricter requirements:

> Every time we prepare an extradition [request] in Australia, in order to get the evidence we need to go before a magistrate, we get the witness and we produce the evidence. So we actually have to go out of our way to collect the material for the purposes of the extradition, and the civil law countries can do the same. The investigative magistrate, if that witness did say A, B or C, could be called in and a statement could be taken; it is not that difficult. In my view, it is a greater protection of the truth as to what is happening in the investigation if the foreign country does that.[77]

3.90 His Honour Justice Dowd expressed a similar view:

> There is all this 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 ... 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? … Evidence Acts are easily amended to make documents admissible by simply saying they are.[78]

3.91 In supporting the "record of the case" model, Professor Shearer argued that the difficulty:

> … has been greatly exaggerated. A simple exchange of notes in relation to each such treaty would do. If Parliament indicated that it wished to change the law in this respect, I predict that our extradition treaty partners would recognize the necessity for Australia to adjust the treaties accordingly and would fall in with the change. This is especially so when they reflect that we are

76 Attorney-General's Department *Submission 11.2*, p. 8. The Department noted that Austria, Denmark, Finland, Germany, Italy, Norway and Sweden had either concluded or partly negotiated prima facie case treaties with Australia during the 1970s and early 1980s.

77 Dr Chaikin, *Transcript of Evidence*, TR 106-107, 26 March 2001.

78 His Honour Justice Dowd, *Transcript of Evidence*, TR 1-2, 13 February 2001.

> willing to surrender our own citizens, when they do not. I further predict that it would cause these countries little difficulty in practice to conform to the "record of the case" requirement: it is only an extension of the present documentary requirements of the treaties.[79]

3.92 In our previous report we had also raised the possibility of Australia issuing an interpretive declaration to a bilateral treaty, to the effect that Australia would regard the treaty's provisions as requiring evidence sufficient to raise a reasonable suspicion.[80] However, the Attorney-General's Department advised its view that this would not be workable, stressing that interpretive declarations are usually only issued to resolve ambiguity.[81] The Department argued that the requirements in its bilateral treaties are expressly stated and clearly understood by both parties, and that Australia would be seen to be refusing to be bound by the express provisions of the treaty.

3.93 Another option would be to include the stricter requirements only in new treaties. However, this carries the risk that countries might consider that Australia was discriminating against them by refusing to apply the less onerous arrangements. It also does not resolve the inconsistency in our current extradition arrangements, a matter which has been of some concern to us.

3.94 Two other options that would not require the renegotiation of existing treaties were suggested to us. The first option was to amend the Act to allow the Minister to refuse to extradite Australian nationals unless the required test (either prima facie or probable cause) was met. Dr Chaikin argued that existing treaties would not need to be renegotiated in such a case, because all Australia's extradition treaties allow for refusal of nationals.[82] This option was also suggested by Professor Aughterson.[83] We discuss whether different treatment for Australian nationals is justified in the next section.

3.95 A further alternative that would leave existing treaties intact would be to leave the evidentiary requirements unchanged but ensure that accused persons have additional safeguards within Australia.[84] For example, our courts could be given the power to hear and determine some additional

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79 Professor Shearer *Submission 20*, pp. 2-3.

80 Report No. 36, p. 15.

81 Attorney-General's Department *Submission 11*, pp. 31-32; *Submission 11.2*, pp. 15-16.

82 Dr Chaikin *Submission 21.1*, p. 1.

83 Professor Aughterson *Submission 15*, p. 5.

84 Professor Aughterson *Submission 15*, p. 6.

matters that are currently decided by the Minister. We discuss that option in Chapter 4.

3.96 In summary, while we note the Department's concern that changing the evidentiary requirements may affect our existing treaties and ultimately, to some extent, Australia's international reputation, we do not believe the problems are insurmountable, and that various means could be explored.

3.97 We note, however, the diverse range of views presented in evidence to us, and acknowledge that any change to the law may have significant consequences.[85] Accordingly we recommend that further consultation should be carried out in reviewing and developing extradition policy, and that this consultation must extend beyond the perspectives of the criminal justice agencies.

3.98 Because of its statutory independence and its role of reviewing and reforming Commonwealth laws, we consider it would be appropriate for the Australian Law Reform Commission to review Australia's extradition arrangements. A reference to the Commission is particularly desirable given the range of views and the need to consult widely. We note also that the Commission has previously completed a major review of the law relating to the surrender of persons between Australian States and Territories.[86]

85 For example, see The Victorian Bar *Submission 16*, p. 6. The submission suggested that it might be appropriate to refer such an inquiry to the Australian Law Reform Commission.

86 Australian Law Reform Commission *Service and Execution of Process*, Report No. 40, AGPS, Canberra, 1987.

### Recommendation 1

3.99 **While acknowledging the practical difficulties associated with changing the basis of Australia's extradition arrangements, we do not favour the continuation of the default 'no evidence' model in relation to requests for extradition from Australia.**

**We recommend that the Attorney-General refer for inquiry and report by the Australian Law Reform Commission matters relating to the appropriate evidentiary standard for extradition requests to Australia. The terms of reference for this inquiry should be sufficiently broad to allow the Commission to consider:**

- **the merits and consequences of adopting the 'record of the case' model used by Canada;**
- **the merits and consequences of adopting the 'probable cause' model used by the United States of America;**
- **other approaches to raising the evidentiary standard for extradition requests to Australia;**
- **international practice in relation to extradition arrangements, including the availability of appropriate safeguards for those persons subject to a request for extradition; and**
- **the impact of any changes on Australia's existing and future network of extradition arrangements.**

## Should Australian nationals be treated any differently?

3.100 In our previous report we commented that Australian citizenship 'ought to carry some genuine protection at law'.[87]

3.101 As we have noted, civil law countries generally refuse to extradite their nationals.[88] This is partly because they claim jurisdiction over their

87 Report No. 36, p. 15.

88 The United Nations model extradition treaty allows for refusal on the grounds of nationality (Article 4). Australia's model treaty is similar, but also obliges the country refusing the request to refer the case to its prosecuting authority if the requesting country seeks such action (Article 3(2)(a)). Refusal to surrender nationals may also be extended in particular treaties: for example, in Australia's extradition treaty with Norway (Article 8), Norway may refuse extradition of permanent residents who are nationals of other Scandinavian countries.

nationals wherever they might be located. By contrast, the jurisdiction in common law countries like Australia has traditionally been based on territoriality.[89]

3.102 It has also been suggested that in the inquisitorial system it is easier to hold a trial in relation to conduct that occurred outside the country because the inquisitorial process does not rely on the first-hand oral evidence of witnesses as the adversarial process does. However, it was suggested that this argument is less persuasive in an era of video-link technology.[90]

3.103 Various international conventions acknowledge that parties may refuse to surrender a person on the grounds of nationality, and impose an obligation on parties to prosecute in such cases, or at least to refer the proceedings to their prosecution authorities.[91] However, major common law countries such as the UK and the USA have generally opposed exempting nationals from extradition.[92]

3.104 Australia's legislation already allows the Attorney-General to refuse to surrender Australian citizens and instead to consent to their prosecution within Australia.[93] However, the power to prosecute instead of surrendering the person has never been exercised.[94] The Attorney-General's Department referred to the difficulties inherent in such a course, noting that Australia had sought foreign prosecution in two recent cases where civil law countries had refused to surrender their citizens, but that the process 'has proved extremely difficult'.[95]

3.105 Nevertheless, a representative from the Attorney-General's Department acknowledged the usefulness of having recourse to refuse extradition on the grounds of nationality:

> … there have been occasions in which there have been concerns about returning somebody to the foreign jurisdiction and, because that person had Australian nationality, the minister at the time

89 This has begun to change in more recent times: for example, Australia's child sex tourism legislation deals with offences committed by Australians while overseas (see Part IIIA of the *Crimes Act 1914*).

90 Professor Aughterson *Submission 15*, p. 4.

91 For example, the *Convention for the Suppression of Unlawful Seizure of Aircraft* (Article 7).

92 Shearer 1971, pp. 97, 110.

93 Section 45(4). The Attorney-General may consent to prosecution of an Australian citizen only if the Attorney-General (a) has determined that the person should not be surrendered because he or she was an Australian citizen at the time of the alleged offence; (b) was satisfied that the requesting country would not have surrendered one of its nationals to Australia for an equivalent offence committed in Australia; and (c) intended to consent to prosecution.

94 Attorney-General's Department *Submission 11*, p. 39.

95 Attorney-General's Department *Submission 11*, p. 38.

> determined that it would be inappropriate and determined it on the basis of nationality. That is not to say that that was the only reason for refusal, but that was a ground upon which refusal could be based under the treaty. But that is quite rare. The general policy which governments have adopted has been to refuse nationals and non-nationals alike.[96]

3.106 Professor Shearer, in his submissions to both the Latvian treaty inquiry and this inquiry, supported a non-discriminatory approach, arguing:

> In general principle there should be no distinction between persons on grounds of nationality. I think that all are entitled to the equal protection of Australian law against extradition on the basis of unsupported allegations of criminal conduct.[97]

3.107 In his submission to our previous inquiry, Professor Shearer had also raised the possibility, without expressing a decided opinion, that distinguishing between nationals and non-nationals might constitute a breach of Article 26 of the International Covenant on Civil and Political Rights, to which Australia is a party.[98]

3.108 The Attorney-General's Department endorsed Professor Shearer's support for a non-discriminatory approach on the basis of both principle and effectiveness:

> … it is clearly true as a general principle that obedience to the law is owed by all within the territorial jurisdiction to which it applies, and all within that jurisdiction are equally entitled to the protection of the law. One corollary of this is that a foreigner should be liable for his or her conduct within a country on the same basis as nationals of that country ... It might be considered that another corollary is that, in the absence of indications that the person will be disadvantaged because of his or her nationality … the country where the offence allegedly occurred should be allowed to exercise jurisdiction unless there is some special reason not to do so.[99]

3.109 The Office of the DPP also opposed distinguishing between nationals and non-nationals, stating that the practice of foreign countries not to extradite their nationals presented a 'major problem' for that office. The DPP said that the office had been unable to pursue a number of cases because the

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96 Mr Steven Marshall *Transcript of Evidence*, TR 22, 26 February 2001.

97 Professor Ivan Shearer *Submission 20*, p. 3.

98 Report No. 36, p. 53. Article 26 refers to equality before the law and the right to equal protection against discrimination on any ground, including national origin.

99 Attorney-General's Department *Submission 11*, p. 42.

person sought had managed to reach the civil law country of which he or she was a citizen before charges could be laid. The DPP expressed concern that if Australia were to adopt the same approach, the result would be to 'make Australia a safe haven for any international criminal who happened to be an Australian citizen'.[100]

3.110 A different view was expressed by Professor Aughterson, who said that a discriminating approach could be justified. He argued:

> International law recognises nationality as a proper basis for the exercise of jurisdiction over criminal offences, no matter where the conduct occurs. It has been a basis for jurisdiction more frequently relied upon by civil law states than common law countries. That need not be the case.[101]

3.111 Professor Aughterson suggested:

> In relation to nationals, a compromise might be surrender for the purposes of prosecution on the undertaking that the person be returned to Australia for both sentencing and punishment according to Australian law. That obviates any argument as to the difficulty of conducting a prosecution in this country in relation to conduct occurring elsewhere. In relation to sentencing, it removes any criticism as to the harshness of penalties imposed in some states (and a possible reluctance to extradite for that reason). It is justifiable on the basis of the principle of reciprocity, in so far as it is consistent with the policy and laws of civil law states.[102]

3.112 Professor Shearer stated that while he did not 'fully support' Professor Aughterson's suggestion, he considered the alternative to be preferable to the present position.[103]

3.113 Dr Spry also argued that there was justification for distinguishing between nationals and non-nationals, on the grounds that 'Australian nationals have particular claims to have their welfare properly protected by their nation'. Dr Spry did not argue, however, that nationals should not be subject to extradition as a matter of principle, but rather that their extradition should not proceed unless 'strong evidence exists of their guilt

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100 DPP *Submission 9*, p. 5. Ms E Miller *Submission 10* also supported the same treatment for citizens and non-citizens.

101 Professor Aughterson, *Submission 15*, p. 3; *Transcript of Evidence*, TR 89-90, 26 March 2001.

102 Professor Aughterson, *Submission 15*, p. 5.

103 Professor Shearer *Submission 20*, p. 3. See also discussion in J Dugard & C Van den Wyngaert 'Reconciling extradition with human rights' *The American Journal of International Law* (1998) vol 92, pp. 187-212, at pp. 206-208.

on serious charges', and that a somewhat lesser standard of proof might be sufficient for non-nationals.[104]

3.114 As noted above in paragraph 3.94, Dr Chaikin acknowledged that reintroducing a higher evidentiary requirement for all extradition requests might result in the need to renegotiate numerous treaties.[105] Consequently he suggested as a compromise that Australia could refuse to extradite its nationals unless the requesting country provided supporting evidence to meet the required test.

## Conclusion

3.115 Although we maintain the view we expressed in Report No. 36 that citizenship should 'carry some genuine protection at law', we concede that, as a general principle, Australian law should not distinguish between people on the basis of their nationality.

3.116 Our concerns may be satisfied if the Government accepts a new default extradition regime incorporating higher evidentiary standards.

104 Dr Spry *Submission 17*, pp. 5-6. He suggested that in the case of non-nationals there should be either a prima facie case or 'a standard of proof which ensures at least that a strong case [is] established, and not merely a reasonable suspicion or apprehension of guilt' (p.6).

105 Dr Chaikin *Submission 21.1*, p. 1.

# 4

# Other issues

4.1 This chapter considers several other important issues that were raised in submissions and during our hearings. They are:

- the appropriate division of responsibility between the executive and the courts in determining extradition matters;
- the inability of the person whose extradition is sought to present evidence such as alibi evidence;
- the presumption against bail; and
- the type of offence for which extradition is available.

## Who should decide?

4.2 As noted previously, the Attorney-General (or Minister for Justice acting on the Attorney-General's behalf) has final responsibility for determining whether to surrender a person on request by a foreign country. Traditionally extradition has been an executive function. As the Attorney-General's Department explained:

> Extradition involves issues of international relations as well as justice. For reasons of diplomacy a government may wish to describe its grounds for refusing an extradition in less confrontational terms than a strict legal consideration of the position might suggest. Moreover a government may have access to confidential sources of information on the internal affairs of a

> requesting country; significant problems could result from any need to substantiate such information in court. There may be occasions when consideration needs to be given to the possibility of refusing extradition of an otherwise eligible person because of concerns about whether an extradition partner is fulfilling its obligations under the relevant arrangement or treaty, or indeed whether there are conditions or developments in the country which make it an unsuitable treaty partner. These are all matters which a minister is better positioned to handle than are the courts …[1]

4.3 However, there has been debate about the extent of the minister's role, with some suggestions that the courts should have a greater role in protecting the rights and interests of the person whose surrender is sought.

4.4 Professor Shearer has previously argued that, since the mid 1980s, there has been 'a substantial shift away from judicial review of the extradition process towards the exercise of unreviewable executive discretion'.[2] The High Court has commented that his view 'has force'.[3]

4.5 The Federal Court echoed this view, and also stated:

> While determinations made by the Attorney-General under ss 15 and 22 of the *Extradition Act* can be reviewed pursuant to s 39B of the *Judiciary Act*, that review is limited in scope. Even if the Attorney-General ultimately decides that a person should not be surrendered, that person may be required to spend a considerable amount of time in custody without any court having power to determine whether there is evidence to support the charges and, as this case shows, without a court having power to consider whether the proceedings against the person constitute an abuse of the court's process.[4]

4.6 We heard similar concerns in evidence during our inquiry. Mr Nyst argued that the courts should have the power to decline to make an extradition order:

> where [the] evidence is demonstrated (by cross-examination or otherwise) to be so manifestly unreliable or inherently improbable that no court could safely convict upon it … [This] would provide our courts with a mechanism which would enable them to avoid

1 Attorney-General's Department *Submission 11*, p. 42.

2 I A Shearer 1994 'Extradition and Human Rights' 68 *Australia Law Journal* 451 at 452.

3 *DPP v Kainhofer* (1995) 185 CLR 528 at 541 per Toohey J.

4 *Papzoglou v Republic of the Philippines* (1997) 74 FCR 108 at 140 (Full Court)

> becoming an unwilling party to arbitrary or otherwise inappropriate prosecution.[5]

4.7 Professor Aughterson argued:

> … by section 11(6) of the Act, certain of the protections provided in the treaties and regulations, including humanitarian considerations and the issue of injustice or oppression, are assigned for consideration not to the courts, but to the Minister. Yet they are matters that in my view, are properly the concern of the courts: the Minister does not conduct an open hearing and it is not a simple matter to establish before a court that the Minister has improperly exercised his or her discretion.[6]

4.8 Another witness, Dr Chaikin, argued that the Act should be amended to give magistrates power to hear an extradition objection in relation to all mandatory exceptions in extradition treaties.[7] He stated:

> … the executive balances the human rights considerations with those governmental policy concerns which have nothing to do with human rights. Therefore, the courts are in a far better position, from a human rights perspective, to protect those rights.[8]

4.9 Dr Chaikin elaborated on this point in his submission:

> Government decision makers in extradition cases have a ”natural bias” in favour of extraditing a “fugitive”. The decision maker in relation to initiating the extradition process in Australia is the [Minister], who in practice acts on the advice of public servants in the Attorney-General's Department. The same public servants will usually advise the [Minister] in relation to his/her determination to make a surrender determination, in cases where the courts have held that the person is eligible for surrender. It may be expected that human rights considerations except in the most extraordinary circumstances or in cases required by law (see eg death penalty safeguard) will be given a lower priority than international law enforcement interests and considerations of good bilateral relations.[9]

4.10 Dr Chaikin also drew our attention to comments by the Federal Court questioning the appropriateness of the same Departmental officers assisting the requesting country and advising the Minister in relation to

5 Mr Nyst *Submission 13*, p.5.

6 Professor Aughterson, *Submission 15*, p. 1.

7 Dr Chaikin *Submission 21.1*, p. 2.

8 Dr Chaikin *Transcript of Evidence*, TR 106, 26 March 2001.

9 Dr Chaikin *Submission 21*, p. 2.

the surrender decision.[10] There is a potential conflict of interest in performing both functions.

4.11 Dr Spry also argued that it was not appropriate for the Minister to judge whether a person should be surrendered, on the basis that:

> The Minister is a political animal and he is entitled to take into account all sorts of political considerations as well as legal consideration. It is very difficult to know exactly how he would treat any particular case. I think Australian nationals are entitled to feel safe in their country and not to have to depend upon a minister who, of course, in turn relies upon departmental advice.[11]

4.12 The Attorney-General's Department argued that Ministerial consideration of extradition objections was 'clearly necessary':

> … because some relevant evidence may not be of a type that lends itself to a judicial type of assessment in relation to a particular case. For example, general information on political influence on the administration of justice in the requesting state might not be sufficiently relevant for admission in a section 19 hearing. However, it might nonetheless cause a Minister to feel that he or she could not be satisfied that the person sought would not be disadvantaged at trial for political reasons.[12]

4.13 The Department submitted that, if the decision were made to allow the courts to consider any matters that are currently considered only by the Minister, some matters would not be appropriately given to them. In particular, magistrates should not be asked 'to speculate whether a requesting state will comply with an express undertaking it has given or to assess the effect of the law of a foreign country'.

4.14 In support of the current arrangements, the Department also argued that review of the Minister's decisions is available under the Act. The review is not a re-examination of the merits of the decision (that is, whether the outcome was the correct or most appropriate outcome), but is concerned with whether the decision-making process was properly followed and the decision was within the Minister's power.[13] Since 1988 the Minister's

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10 *Pasini v Vanstone* [1999] FCA 1271, Finn J, at paragraphs 49-50. The comments were endorsed by the Full Court in *Commonwealth of Australia v Dutton* (2000) 102 FCR 168, per Wilcox J at paragraph 7, and per Moore J at paragraph 37 (Spender J concurring).

11 Dr Spry *Transcript of Evidence*, TR 72, 14 March 2001. Concern about reliance on the Minister's discretion was also expressed by Ms J Michie *Submission 4*, p. 2.

12 Attorney-General's Department *Submission 11.3*, p. 16.

13 See *Foster v Minister for Customs and Justice* (1999) 164 ALR 357, at 359-60 per Drummond J. Thus, for example, a decision could be set aside if the Minister had come to a manifestly unreasonable decision, or had taken into account matters which should not have been taken

decisions have not been reviewable under the *Administrative Decisions (Judicial Review) Act 1977*.[14] Dr Chaikin noted that the previously available remedy did at least provide 'many more opportunities of getting the reasons in terms of much wider grounds'.[15]

4.15 Dr Chaikin also stated:

> As a practical matter, challenging the Attorney-General's decision on the basis of prerogative writs is so riddled with difficulties that I am not aware of any case where it has ultimately succeeded. So it really is a hollow challenge that will take place.[16]

4.16 The Attorney-General's Department confirmed that there had been no successful applications for review of the Minister's surrender decisions since the Act commenced.[17] However, the Department argued that this did not necessarily indicate any deficiency in the courts' capacity to review those decisions, but rather reflected 'at least in part, the care with which these very important decisions are taken'.

4.17 We consider that the concerns expressed about the way in which the Act has placed responsibility for scrutiny of human rights protections in the hands of the executive rather than the courts have some force. As was pointed out to us, the exercise of the Minister's discretion is to a great extent unreviewable in practice. We believe this matter lends even more weight to our conclusion in Chapter 3 that the evidentiary standard should be increased so that the courts have a greater role in scrutinising the evidence presented by the requesting country. We recommend also that the issue of whether the courts should have the role of determining all mandatory exceptions to extradition should be further explored.

## Inability to present exculpatory evidence

4.18 Section 19(5) of the Act prohibits a magistrate from receiving evidence to contradict an allegation that a person has engaged in the conduct

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into account, or had refused to take into account relevant matters including the person's submissions.

14 This change was made in order to remove 'unnecessary duplication' and to avoid the sometimes lengthy delays caused by applicants pursuing their statutory rights to review under both Acts, sometimes concurrently: Extradition Bill 1987, Second Reading Speech, Mr L Bowen, Attorney-General, House of Representatives 1987 *Debates,* vol HR157, p. 1615.

15 Dr Chaikin *Transcript of Evidence,* TR 108, 26 March 2001.

16 Dr Chaikin *Transcript of Evidence*, TR 108, 26 March 2001.

17 Attorney-General's Department *Submission 11.3*, p. 10.

constituting the offence. In other words, the person cannot present evidence whose purpose is to prove his or her innocence.

4.19 This provision was enacted in 1985 on the basis that an extradition hearing was not intended to determine the person's guilt or innocence and that accordingly evidence to challenge the merits of the case should not be led.[18]

4.20 The Attorney-General's Department gave a second justification for the provision, that is, 'to address the problem of unduly prolonged proceedings'.[19]

4.21 By contrast, in normal committal proceedings, the defendant may lead evidence, although in practice this does not often occur.[20] The Department argued that the same approach was not appropriate in extradition matters since the purpose of the proceedings was different. In committal proceedings the defence may adduce evidence to show that there is no reasonable prospect that a jury would convict. Since in an extradition matter the trial would be conducted in another country, the Department argued that the same standard was not appropriate and that any attempt to judge the possible outcome in proceedings overseas 'would necessarily be highly speculative', since:

- the magistrate would not necessarily have all the evidence that would be available at trial, given Australia's restrictions on admissibility of evidence compared with civil law countries;
- the requesting country would not necessarily be in a position to rebut new evidence presented by the person sought during the extradition hearing;
- the magistrate would therefore be 'in a poor position to assess the relative value of conflicting evidence'; and
- the trial procedure of the requesting country would in many cases be unfamiliar to the magistrate.[21]

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18 Extradition (Commonwealth Countries) Amendment Bill 1985, Second Reading Speech, Attorney-General Mr L Bowen, Attorney-General, House of Representatives 1985 *Debates*, vol HR 140, p. 596. See also H Woltring 'Extradition Law' (1987) *Law Institute Journal* 919 at 921-922. The Attorney-General's Department (*Submission 11*, p. 33) also referred to US cases explaining the reasons for this rule, in particular *In re Wadge* 15 F, 864, per Brown J at 866 (SDNY 1883).

19 Attorney-General's Department *Submission 11.2*, p. 13.

20 See, for example, *Magistrates Court Act 1930* (ACT), s. 92(3); *Justices Act 1902* (NSW) s. 41(5); *Justices Act 1886* (Qld) s. 104(4).

21 Attorney-General's Department *Submission 11.2*, p. 13.

4.22 We heard several concerns about the operation of section 19(5) during our inquiry. The concerns fell into two main categories:

- that the person whose surrender is sought might wish to establish an "extradition objection" under the Act, but is constrained in doing so because he or she cannot lead evidence in support; and
- that the person is unable to present evidence to the court, such as alibi evidence, which would clearly exculpate him or her.

## Establishing an extradition objection

4.23 The prohibition against leading evidence applies to "extradition objections" that can be raised for the court's consideration under the Act.[22] As noted in Chapter 2, extradition objections exist where:

- the offence is a political offence or a military offence;
- the person's surrender is sought for the purpose of prosecuting or punishing him or her on the grounds of race, religion, nationality or political opinions;
- on surrender, the person may be prejudiced at trial or punished because of his or her race, religion, nationality or political opinions; or
- the person has already been acquitted, pardoned or punished for the offence.[23]

4.24 Mr Burnside on behalf of the Victorian Bar submitted that it was difficult to demonstrate a objection on the basis of persecution or prejudice on the grounds of race, religion, nationality or political opinions, without being able to lead evidence to show that the charges were false:

> … where a requested person seriously alleges [such] an extradition objection … it is likely that the person did not "engage in the conduct"… That is to say, it is likely that the person has been falsely accused. There is an argument that this prevents evidence being led to show, for example, that the requested person has been "framed" for political reasons.[24]

4.25 Mr Burnside argued that section 19(5) should be amended to state clearly that the requested person is not prevented from leading evidence to show

22 *Cabal v United Mexican States (No 3)* [2000] FCA 1204, per French J at para 216, referred to in Professor Aughterson's *Submission 15,* p. 3.

23 Section 7. The person can only be found eligible for extradition if, amongst other matters, the person has not satisfied the magistrate that there are 'substantial grounds for believing that there is an extradition objection' (section 19(2)(d)).

24 The Victorian Bar *Submission 16.1,* pp. 4-5; Mr Julian Burnside *Transcript of Evidence,* TR 79, 14 March 2001.

that he or she did not engage in the alleged conduct if the purpose of leading that evidence is to support an extradition objection. Dr Chaikin supported that view.[25]

4.26 During our inquiry we also noted that the Federal Court had referred to another issue that it considered warranted examination. The Full Court recently considered whether evidence in support of an extradition objection that had been excluded by the magistrate should nevertheless be considered when a higher court reviewed the matter. The Court noted that allowing such material to be considered could lead to unfairness to the requesting country, and recommended that the issue receive urgent attention.[26] This decision was not handed down until after our hearings had concluded and we did not receive any further evidence about the issue.

## Defences and excuses, including alibi evidence

4.27 Evidence in the nature of an alibi, or a defence such as insanity, also cannot be led by the person whose extradition is sought. The Attorney-General's Department noted that the Australian position was similar to that in the USA and Canada.[27]

4.28 However, the Department acknowledged that in the UK the position was somewhat different, in that a magistrate must receive any evidence tendered by the defence, and that alibi evidence has been considered in some cases where it related to the issue of the identity of the person sought.[28] The Department submitted that the UK position appeared to be that, while evidence could be led by the person sought, it would 'only prevent the finding of a prima facie case in circumstances where it comprehensively and convincingly undermines the credibility of that case'.[29] The issue is whether Australia should follow that precedent.

4.29 Two witnesses argued that the courts should be able to consider such evidence. Dr Chaikin recommended that the Act be amended to allow a defendant to lead evidence that 'explained' his or her conduct.[30]

4.30 In addition, Professor Aughterson argued that civil law countries take defences and excuses into account in another way when deciding whether

25 Dr Chaikin *Submission 21.1*, p. 2.

26 *Cabal v United Mexican States* [2001] FCA 427, at paragraph 153.

27 Attorney-General's Department *Submission 11*, pp. 32-33. For discussion of the US position, see Bassiouni 1996, pp. 717-720.

28 Attorney-General's Department *Submission 11*, pp. 34-35.

29 Attorney-General's Department *Submission 11*, p. 35.

30 Dr Chaikin *Submission 21.1*, p. 1. He also recommended that the person be allowed to lead evidence from any of the witnesses on whom the requesting country is relying.

to surrender a person. They adopt a stricter approach to the "double criminality" issue (that is, the requirement that the offence for which extradition is sought must also be an offence in the requested country).[31] Professor Aughterson noted that while Australia, like other common law countries, merely requires the alleged acts to constitute an offence under its domestic law, civil law countries also consider whether in the particular circumstances, the person could be prosecuted and punished. Accordingly, defences and excuses are taken into account. Professor Aughterson suggested that Australia could follow the civil law countries' lead, as part of his recommended increased safeguards.[32]

4.31 The Attorney-General's Department noted that the effect of allowing a person to argue a defence or excuse would depend on the evidentiary basis for that argument, that is, whether the argument was confined to the facts alleged in the requesting country's statement or whether new evidence was allowed.[33] If the person sought were able to lead new evidence, the issue of whether the requesting country should be able to lead evidence in rebuttal would need to be considered. The Department submitted that allowing new evidence to be introduced would lead to Australian magistrates hearing evidence on matters which were properly the concern of the trial court. If new evidence were not allowed, the Department submitted that 'only the most indisputable evidence of a defence or excuse ought to be accepted as sufficient'.

4.32 We consider there are strong arguments both for and against prohibiting the person whose surrender is sought from adducing evidence in extradition hearings. While it is necessary to avoid conducting a preliminary trial on the issues, we consider that it is undesirable that a court cannot hear evidence that would clearly exculpate a person from criminal charges and would ultimately lead to his or her acquittal. This issue is not an easy one, and we recommend that it should be considered more closely in the review of extradition law that we have proposed.

## The presumption against bail

4.33 Several witnesses appearing before the Committee queried the presumption against the granting of bail in extradition proceedings.[34]

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31 Professor Aughterson *Submission 15*, p. 4. See also Aughterson 1995, pp. 59-83.

32 Professor Aughterson *Submission 15*, p. 6.

33 Attorney-General's Department *Submission 11.3*, pp. 14-15.

34 Justice Dowd *Transcript of Evidence*, TR 2, 13 February 2001; Professor Aughterson *Submission 15*, pp. 4-5; Mr Nyst *Submission 13*, p. 4.

4.34 In ordinary criminal proceedings, there is a general presumption in favour of bail (other than for certain very serious offences), in recognition of a person's prima facie right to liberty.[35] Various matters are taken into account, the main consideration being the likelihood that the person will answer bail. The court will consider such matters as the nature of the alleged offence, the severity of the possible sentence, the person's employment and family ties, and his or her previous record in relation to any bail undertaking. Other factors that will be considered include the risk that the person may commit further offences or interfere with witnesses pending trial, and that refusal of bail may hinder the preparation of the person's legal defence.

4.35 In extradition proceedings, the Act requires that an arrested person is remanded in custody unless "special circumstances" exist.[36] Those special circumstances can be extremely difficult to establish, but have been found in a few cases where, amongst other matters, the person is considered to be at a low risk of absconding and is suffering from a mental condition that is likely to be aggravated by continued detention.[37]

4.36 The presumption against bail did not exist in Australia's previous extradition legislation. It was inserted on the basis that 'experience had shown' there was very high risk of the person escaping, particularly since in many cases the person had fled the jurisdiction for Australia to evade justice.[38]

4.37 There is also the very real consideration that Australia should be able to meet its treaty obligations in relation to surrender of persons sought.[39] However, there has been some judicial disagreement as to the weight to be given to the requesting country's interests when bail is considered. Professor Aughterson referred to a 1997 case in the USA, in which the Federal Court of Appeals rejected the notion that the person's 'strong interest in liberty' should be subordinated to the government's interest in avoiding the risk of being able to carry out its treaty obligations 'however

35 *R v Light* [1954] VLR 152, at 157 per Scholl J. The common law position has been modified by statute in most jurisdictions, but there is generally a presumption in favour of bail except in the case of some serious offences such as murder (see, for example, *Bail Act 1992* (ACT), *Bail Act 1977* (Vic) and *Bail Act 1978* (NSW)).

36 Section 15(6). The person is not entitled to apply to any other magistrate for release on bail during the remand period (section 15(3)). A Federal or Supreme Court reviewing the magistrate's order is similarly constrained (section 21(6)).

37 See for example *Cabal v United Mexican States* [2000] FCA 1892; *Holt v Hogan* (1993) 117 ALR 378.

38 Explanatory Memorandum to the Extradition Bill 1987.

39 This is one of the principal objects of the Act (section 3). See also *Schoenmakers v DPP (No. 2)* (1991) FCR 429, at 441-442 per Foster J, and Aughterson 1995, pp. 192-195, where he notes that some treaties incorporate express obligations to ensure adequate measures are taken to prevent the person absconding.

attenuated that risk might be'.[40] However, as Professor Aughterson noted, special circumstances are still difficult to establish in both the USA and Australia.[41]

4.38 The consequences to those persons whose surrender has been sought can be very onerous. They may be in custody for a very long time without ever being surrendered. One witness described two clients who had been in custody for more than two years.[42] As well as the hardship to the person of being deprived of his or her liberty and the consequences to family members, incarceration makes the process of instructing legal representatives more difficult. As one Federal Court judge noted in an extradition matter,

> In my opinion it can never be regarded as anything but a special circumstance that a person should have to spend a year in prison unconvicted of any offence. A presumption in favour of liberty and against deprivation of liberty without just cause runs through the traditions of the common law which Australia has inherited from the United Kingdom.[43]

4.39 In that case the person, a dual citizen whose immediate family lived in WA, had cooperated voluntarily with police and had been in custody for nearly a year. The USA had sought his extradition on charges that carried a possible sentence of life imprisonment. The Federal Court released him on bail on stringent conditions, but it should be noted that he in fact absconded, thus illustrating the risk of flight in bail decisions.

4.40 Another case, concerning an extradition request by the USA in the early 1990s, was drawn to our attention during this inquiry.[44] Mrs Holt spent nine months in maximum security in Brisbane Women's Prison before being released on bail by the Federal Court.[45] She was considered to be at a low risk of absconding, given that her husband was also in custody pursuant to an extradition request. There was evidence that the incarceration had had adverse consequences on her mental state, and the

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40 Professor Aughterson, *Submission 15,* p. 4, referring to *Paretti v USA* 122 F 3d 758 at 780 (9th Cir 1997). His submission states that the court considered it 'unthinkable' that a person who was not at risk of flight or a danger to the community should be held without bail pending ordinary domestic criminal proceedings, and that it was 'equally unthinkable' to hold such a person in custody pending an extradition hearing.

41 Professor Aughterson, *Submission 15,* p. 4.

42 Mr Burnside, referring to Messrs Cabal and Pasini who are currently fighting extradition requests by Mexico to face serious charges and who were arrested in November 1998. Mr Pasini was released on bail by the Federal Court in December 2000 but Mr Cabal remains in custody.

43 *Schoenmakers v DPP* (1991) 30 FCR 70, at 74-75 per French J.

44 Mr Chris Nyst *Submission 13,* p. 4.

45 *Holt v Hogan* (1993) 117 ALR 378.

court was concerned that she was considering pleading guilty in order to end her incarceration and that consequently her choice to do so was not free and informed. The application for her extradition was ultimately refused.[46] As a result, she spent a long period in custody without ever facing trial.

4.41 The Attorney-General's Department argued that the statutory provision did not make a 'fundamental change' to the previous position, as the common law 'did not in principle allow for bail to be readily granted in extradition matters'.[47] The Department's submission referred to various UK and Australian cases in support of that view.[48] The submission argued that the function of the statutory provision was 'to remind the court of the need for particular caution' in extradition matters.[49] However, it is open to argument whether a statutory prohibition can properly be characterised as no more than a reminder. While it may be considered appropriate to give guidance to magistrates in making bail decisions, the particular wording of that provision and the strength of the presumption against bail in all extradition proceedings are questions of degree.

4.42 During our inquiry, a witness raised another issue concerning the conditions under which people are detained pending the resolution of extradition proceedings. The Act provides that State and Territory laws dealing with people remanded in custody pending trial are to apply to those detained under the Act.[50] Mr Burnside argued that when the legislation was enacted, all States and Territories had facilities to hold remand prisoners separately from convicted persons. However, in Victoria the two categories of prisoners are no longer separated (subject to security classifications). Mr Burnside referred to the Federal Court's expressions of concern in relation to a person whom he has represented and who has been in custody for over two years.[51] He stated:

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46 We were advised that her husband was surrendered for trial in the USA, but was ultimately acquitted.

47 Attorney-General's Department *Submission 11.3*, p. 6.

48 The submission referred to *R v Spilsbury* [1898] 2 QB 615 where a British court observed there were 'special grounds for care and caution' when the person had been committed to prison to await extradition; *Hempel and Etheridge v Moore* (1987) 13 FCR 480, at 488 per French J, and *Zoeller v Federal Republic of Germany* (1989) 64 ALJR 137, at 138-139 per Mason CJ, concluding that bail should only be granted by the Federal Court and High Court respectively in 'exceptional circumstances' pending appeal.

49 The Department submitted that 'This is perhaps a more pressing need in Australia, where such cases may be dealt with by a wide range of magistrates and judges, than in the United Kingdom, where extradition cases are normally reserved to the Bow Street Magistrates Court' (*Submission 11.3*, p. 7).

50 Section 53.

51 The case concerns Messrs Cabal and Pasini. Mr Burnside did not provide either a reference to or transcript of the comments to which he referred. However, we note that in *Cabal v United Mexican States* [2000] FCA 7, Goldberg J, although refusing to grant bail to the applicants,

> The Commonwealth ought not be powerless to ensure appropriate treatment of its extradition prisoners, especially when the Commonwealth has assumed positive obligations in international law to ensure that they (as well as other prisoners) are accorded certain minimum standards of treatment. In this context, it is of particular concern that once a detainee's case is laid before the Attorney-General – for final consideration on the question of surrender or release – no Commonwealth authority has power to release the detainee from prison. Neither the executive nor the judiciary have any power to grant bail, or its equivalent … A detainee … released on bail because of what prison has done to him – faces the prospect of a return to the same prison, from which no court or power will be able to free him, while he puts his case to the Attorney.[52]

4.43 We did not receive any other evidence that specifically addressed the conditions of detention of persons awaiting extradition, and note that, given that the same conditions apply to people in custody awaiting trial for offences against federal laws, the separation of convicted and unconvicted prisoners raises issues broader than the terms of this inquiry.

4.44 The issue of when bail should be granted needs to be considered carefully. It should not be overlooked that if the person were arrested in the foreign country, he or she would probably spend a long period in prison if the offence were serious and there was a high risk of flight.[53] It is an unfortunate reality that people awaiting trial often spend lengthy periods in custody.

4.45 We acknowledge that it will rarely be appropriate that a person who is facing serious charges is released on bail pending resolution of extradition proceedings. The possible outcome of extradition proceedings (namely, that the person is sent to a foreign country to be incarcerated pending trial under foreign law and potentially subjected to imprisonment in that country), make the consequences more severe than charges in Australia for a similar offence. Consequently the risk of flight will be increased. However, we are concerned that a vulnerable person who is subject to an extradition request for a less serious offence and who has proven strong

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expressed concern (at paragraphs 65-66) about the conditions of transport to and from prison and the applicants' treatment by officers during the transportation. His Honour noted that if Australia was unable to provide adequate or appropriate detention facilities 'that factor may in an appropriate case constitute a special circumstance warranting release on bail' (at paragraph 70).

52 The Victorian Bar *Submission 16.1*, p. 8.

53 Mr Grahame Delaney, Office of the DPP *Transcript of Evidence*, TR 33, 26 February 2001.

links to the community may find it impossible to prove "special circumstances" that would justify release on bail.

4.46 We appreciate the high risk of absconding that many people, particularly non-nationals, present when a request for their extradition to another country to face trial has been made. However, we are also concerned that a strict requirement of 'special circumstances' could work to the detriment of a person who faces less serious charges, who has strong ties to the community and who would be considered to be at low risk of absconding in ordinary criminal proceedings. This matter is particularly serious given that a person may be held in detention for an extensive period if he or she exercises the right to challenge the extradition request.

4.47 Consequently we recommend that the statutory presumption against bail be re-examined in our recommended review of extradition law.

## Type of offence

4.48 Another issue we considered was whether the threshold for an extraditable offence was too low, being not less than twelve months imprisonment.[54]

4.49 The current definition was inserted as part of the changes made in the mid 1980s. It replaced the previous practice of listing specific extraditable offences. (However, some of the older treaties, including those inherited from the UK that are still in effect in Australia, apply only to listed offences: extradition for any other offence is purely discretionary.)

4.50 The listing of specific offences is problematic in bilateral treaties for several reasons: criminal laws change, new offences are created and the name or definition of a particular offence may not readily coincide with offences listed in the treaties.[55] However, one witness, Dr Spry, argued that the current threshold was too low, noting that some less serious offences that should be considered to be insufficient to justify extradition might nevertheless attract a maximum term of several years' imprisonment.[56]

4.51 While some regulations specifically refer to the trivial nature of the offence as being a relevant factor for the Attorney-General to take into account in

54 For Commonwealth countries, the penalty has been increased by regulation to not less than two years: Extradition (Commonwealth Countries) Regulations, reg 5.

55 Department of Premier and Cabinet, Victoria *Submission 19,* p. 2.

56 Dr Spry *Submission 17,* p. 6; *Transcript of Evidence*, TR 71, 14 March 2001.

declining to order the surrender of a person,[57] this requirement is not uniform.

4.52 In practice, it is hard to imagine that an Attorney-General acting reasonably would surrender a person if the nature of the offence were trivial. Australia's model treaty includes a provision that allows extradition to be refused if the requested state considers that the extradition would be 'unjust, oppressive, incompatible with humanitarian considerations or too severe a punishment'.[58]

4.53 Given that the extradition process is costly and time-consuming, it is also difficult to envisage that any country would set proceedings in train if the only offence for which prosecution was envisaged were minor. Nor would a foreign country be able to use a minor offence as a pretext for prosecution for more serious offences, given the "specialty" requirement.[59]

4.54 We note that the United Nations Model Treaty, in its definition of extraditable offences, gives the option of a maximum period of imprisonment or deprivation of liberty of at least either one or two years.[60] The European Convention on Extradition has a threshold of one year. When Canada reviewed its extradition laws in 1999, it imposed a minimum penalty of at least two years' imprisonment. This was also the threshold adopted in 1990 in the London Scheme applying to Commonwealth countries.

4.55 The Attorney-General's Department noted that Commonwealth offences punishable by a maximum of one year's imprisonment included summary offences such as those relating to failure to provide information or providing false or misleading information, as well as obstructive behaviour and minor property offences against the Commonwealth.[61] The Department did not raise any objection in principle to raising the threshold to either more than one year imprisonment, or at least two years' imprisonment, while noting that Australian States and Territories should be consulted about any proposed change given that most criminal laws fall within their jurisdiction.

4.56 However, the Department noted some 'practical concerns' about changing the threshold, particularly in relation to the time-consuming process if all

57 For example, the Extradition (Commonwealth Countries) Regulations, discussed in paragraph 2.31.

58 Article 3(2)(g).

59 Section 22(3) provides that the Attorney-General may not agree to surrender the person if the requesting country has not given a "specialty assurance", namely that the person will not be detained or tried for any offence other than those in the extradition request.

60 Article 2(1).

61 Attorney-General's Department *Submission 11.3*, pp. 2-3.

existing bilateral treaties required renegotiation of that term. The Department also queried the effectiveness of introducing such a change:

> Concerns tend to arise more because the alleged facts are argued to constitute only a minor example of the offence, and so to be liable to attract only a minor penalty, than because the type of offence charged is inherently minor. Ultimately, raising the threshold will not preclude this problem arising unless extradition is to be restricted to a handful of extremely serious offences … The best protection against unreasonably minor requests is a humanitarian ground for refusal of extradition requests.[62]

4.57 We note the Department's comments. However, given the serious consequences of extradition to a foreign country, we consider it inappropriate that extradition should be available in respect of minor offences. There are two options: either that the threshold for an extradition offence be increased to at least two years imprisonment or deprivation of liberty, or that the Act specify that the trivial nature of the offence is a matter that the Attorney-General must consider in determining whether to surrender a person.

4.58 We recommend that the minimum threshhold for extradition offences be considered in our recommended review of the Act and model treaty.

## Who should pay?

4.59 A final issue that arose during the hearings concerned the financial cost to a person who is extradited from Australia to face trial.

4.60 The Attorney-General's Department had no specific information about the costs, but noted:

> In principle the cost of an extraditee's return to Australia, whether upon acquittal or on completion of any sentence imposed in the requesting country, is a matter between the extraditee and the requesting country … Unless the requesting country makes special assistance available in such a case or deports the person, the person would need to meet their own costs of return. The issue is not addressed in Australia's Model Extradition Treaty.[63]

4.61 We consider that the issue of who should bear the cost of return to Australia should also be examined as part of our recommended review.

62 Attorney-General's Department *Submission 11.3,* p. 3.

63 Attorney-General's Department *Submission 11.2,* p. 7. The Department also noted that emergency financial assistance might be available through Australian consulates.

## Determining an 'extraditable person'

4.62 After the conclusion of our hearings for this inquiry, the Australian Solicitor-General, Mr David Bennett QC, drew our attention to another issue.

4.63 As has been discussed, a magistrate must determine whether a person is eligible for surrender under section 19 of the Act. The matters that the magistrate must consider do not include whether the person is an "extraditable person". However, before giving the notice which is effectively the commencement of the extradition process, the Attorney-General must be of the opinion that the person is an extraditable person.[64] There are three elements to whether a person is an extraditable person: an arrest warrant must be in force (or the person has been convicted of the offence and the extradition is sought for imposing the sentence); the offence must be an extradition offence; and the person must be believed to be outside the requesting country.[65]

4.64 Mr Bennett suggested that the Act should be amended to provide that the magistrate would also have to determine during the hearing whether the person was an "extraditable person". The reason for this suggestion is to avoid any argument that the Attorney-General must give notice to the person at an early stage in the proceedings, that is, when giving a notice to the courts that a request has been received. There would be an undesirable risk in some cases that the person might flee if advised by the Attorney-General that a notice was to be issued. If the proposed amendment were made, the person would still have the opportunity to raise the issue at a later stage in proceedings.

4.65 We did not have the opportunity to consider this suggestion in any detail or to seek other views on it. However, in light of the need to ensure that unnecessary obstacles in the extradition process are removed but that individual rights are properly safeguarded, we consider that this issue should be considered further in the course of our recommended review.

64 Section 16. The Attorney-General must be of the opinion that the person is an extraditable person before issuing a notice to the courts that an extradition request has been received.

65 Section 6.

## Conclusion

4.66 There are strong arguments to suggest that the courts should have an expanded role in:

- scrutinising the evidence presented by a requesting country;
- considering objections to extradition;
- considering other evidence, such as strong exculpatory evidence, led by persons who are subject to extradition requests; and
- determining whether a person is an extraditable person.

4.67 Similarly there are good reasons to suggest that:

- the presumption against bail may be overly strict in some cases;
- the current threshold for extraditable offences is too low; and
- a person who has been surrendered to another country to face trial should not have to pay for the cost of his or her return to Australia.

4.68 Because the law relating to extradition is complex and changes could have significant consequences, we recommend that the review we have proposed should consider these matters in more detail.

## Recommendation 2

4.69 **We recommend that the Australian Law Reform Commission inquiry recommended above also examine:**

- **the extent of the court's role in considering extradition requests, specifically:**
  - **in scrutinising the evidence presented in support of an extradition request;**
  - **in considering objections to extradition,**
  - **in considering evidence that may be led by persons whose extradition is sought, and**
  - **in determining whether a person is an extraditable person;**
- **whether the current presumption against bail unless there are special circumstances should be modified in light of the onerous consequences to persons who might be considered to be at low risk of absconding;**
- **whether the threshold for extraditable offences should be increased; and**
- **who should pay the costs of return to Australia of a person who has been surrendered to a foreign country to face trial.**

**ANDREW THOMSON MP**

Committee Chairman

26 June 2001

A

# Appendix A - Submissions and exhibits

## List of submissions

| Submission No. | Organisation/Individual |
|---|---|
| 1 | Ms Joyce Trimas |
| 2 | Mr Dennis Trimas |
| 3 | Ms Kathleen Styles, Mr John Beavan, Ms Gloria Beavan and Mr Jim Sinclair |
| 4 | Ms Joan Michie |
| 5 | Mr Robert Williams and Mrs Joy Lawrence |
| 6 | Ms Jane Howarth |
| 7 | Australia/Israel and Jewish Affairs Council |
| 8 | Ms Judith Townsend |
| 9 | Commonwealth Director of Public Prosecutions |
| 10 | Ms Eliana Freydel Miller |
| 11, 11.1, 11.2, 11.3 & 11.4 | Attorney-General's Department |
| 12 | Mr Michael Vescio |
| 13 | Mr Christopher Nyst |
| 14 | Refugee Council of Australia |
| 15 | Professor Ned Aughterson |
| 16 & 16.1 | The Victorian Bar |
| 17 & 17.1 | Dr I C F Spry QC |
| 18 | Mr Tom Bostock |
| 19 | Department of Premier and Cabinet, Victoria |
| 20 | Professor Ivan Shearer |
| 21, 21.1 & 21.2 | Dr David Chaikin |
| 22 | Mr David Bennett QC, Solicitor-General |

## List of exhibits

| Exhibit No. | From | Description |
|---|---|---|
| 1 | Director of Public Prosecutions | Transcript of *McDade v United Kingdom & Anor* P54/2000 (unreported, 23 October 2000) |
| 2 | Professor Ivan Shearer | Submission on an extradition agreement with Latvia (Report No. 36) |

B

# Appendix B - Witnesses at public hearings

## Tuesday 13 February 2001 - Sydney

The Hon Justice John Dowd, President, Australian Section, International Commission of Jurists

## Monday 26 February 2001 - Canberra

**Attorney-General's Department**

Mrs Maggie Jackson, First Assistant Secretary, Criminal Justice Division

Mr Michael Manning, Senior Legal Officer, International Branch, Criminal Justice Division

Mr Steven Marshall, Assistant Secretary, International Branch, Criminal Justice Division

**Australian Federal Police**

Mr Andrew Hughes, General Manager, International and Federal Operations

**Commonwealth Director of Public Prosecutions**

Mr Grahame Delaney, Principal Adviser, Commercial Prosecutions and Policy

Mr Geoffrey Gray, Assistant Director, Criminal Assets and International

## Wednesday 14 March 2001 - Melbourne

**Australia/Israel and Jewish Affairs Council**

Mr Tzvi Fleischer, Editor, *The Review*

Mr Jamie Hyams, Researcher, Australia / Israel and Jewish Affairs Council

Dr Colin Rubenstein, Executive Director and Editorial Chairman, *The Review*

**The Victorian Bar**

Mr Julian Burnside QC

Mr John Manetta

**Individual**

Dr Ian Spry QC, Member, Council for the National Interest and Editor, *The National Observer*

## Monday 26 March 2001 - Canberra

Professor Ned Aughterson, Foundation Professor of Law, Northern Territory University, Darwin (by videoconference)

Dr David Chaikin, Barrister

D

# Appendix D - Australia's extradition relations

The following summary of those countries with which Australia has extradition arrangements was provided by the Attorney-General's Department.

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**GENERAL NOTES**

1. Australia has modern extradition treaties in place with 31 countries. Five signed extradition treaties have yet to enter into force. Modern extradition treaties generally require that the conduct in question constitutes a criminal offence for which the maximum penalty is at least one year's imprisonment in both countries. They generally require production by the requesting country of a written statement setting out the conduct constituting the offence but not evidence sufficient to establish a prima facie case against the fugitive.

2. In addition, Australia regards itself as having succeeded to 20 UK extradition treaties (not counting those which have been displaced by a modern treaty or non-treaty arrangement) which now cover 25 countries. These treaties were negotiated in the late 19th and early 20th centuries and applied to Australia as a colony or were extended to it as a dominion prior to 1939. In many cases it is unclear whether these countries regard themselves as having an extradition treaty in place with Australia. Reliance on the inherited treaties can present problems because:

    - the parties undertake to extradite for a list of specified offences, which

is now outdated, and extradition for any other conduct which is a criminal offence in both countries is purely discretionary; and

- because they are required to provide evidence sufficient to establish a prima facie case, which is often extremely difficult for non-common law countries.

3. The *Extradition Act 1988* may also be applied to countries with which Australia has no extradition treaty. The principal use of non-treaty application of the Act is to provide for extradition between Australia and other Commonwealth countries. However, the Act has been applied to a small number of non-Commonwealth countries on a non-treaty basis.

4. A number of multilateral conventions to which Australia is a party require parties to either prosecute or extradite persons found in their territory for convention offences. Convention offences include terrorist acts against aircraft and airports, piracy, drug, torture and genocide offences. To this end Australia has applied the Extradition Act to other countries which are parties to these multilateral conventions to allow for extradition in relation to specified convention offences.

5. Extradition to New Zealand is governed by a separate regime set out in Part III of the Extradition Act. Similarly to extradition between Australian jurisdictions, the procedure involves endorsement by Australian courts of warrants issued in New Zealand, without any requirement for approval by a Minister of the decision to extradite.

6. It should be noted that some countries will extradite persons without any requirement for an extradition arrangement to be in place.

7. Many countries are prohibited by their law from extraditing their own nationals to another country, or have a long-standing practice of refusing to extradite their nationals. Where this is known to be the case, it is indicated in the following lists. Most bilateral extradition treaties provide a discretion for the requested State to refuse to surrender its nationals. In theory, the country of nationality in such a case can try the fugitive for an offence he or she is alleged to have committed in another country, but in practice trial of a person in Europe or Latin America for an offence alleged to have been committed in Australia is extremely difficult, as witnesses located in Australia cannot be compelled to give evidence in a foreign country and, if they do agree to give evidence, the costs of their attendance will be considerable.

## BILATERAL EXTRADITION TREATIES

### In force and under negotiation

**Note:** This list includes:

(a) countries with which Australia has a modern extradition treaty in force (name in **bold**);

(b) countries with which Australia is negotiating, or has signed but not yet brought into force, a modern extradition treaty; and

(c) countries with which Australia has an extradition treaty inherited from the UK.

Unless the contrary is indicated, treaties in this list provide for 'no evidence' extradition.

The status of inherited extradition treaties from the viewpoint of the other party is often uncertain. Moreover, in a few cases (viz, the successor states to the former Czechoslovakia and Yugoslavia, and Latvia and Lithuania) the treaty is not implemented in Australian domestic law. This difficulty arises from the fact that there have been some unforeseen developments since 1985 when a list of inherited treaty partners was scheduled to the *Extradition (Foreign States) Act 1966.*

| Country | Entry into Force | Comments |
|---|---|---|
| Albania | 11 July 1927 | Inherited UK Treaty. Requires prima facie case. |
| **Argentina** | 15 February 1990 | |
| **Austria** | 6 February 1975 and amended by Protocol of 1 February 1987 | Extradition of Austrian nationals is prohibited. |
| **Belgium** | 19 November 1986 | Belgian nationals are almost never extradited. |
| Bolivia | 4 November 1898 | Inherited UK Treaty. Requires prima facie case. |

| Country | Entry into Force | Comments |
|---|---|---|
| Bosnia and Herzegovina | 13 August 1901 | Inherited UK Treaty. Requires prima facie case. |
| **Brazil** | 1 September 1996 | Extradition of Brazilian nationals is prohibited (unless citizenship acquired after offence) |
| **Chile** | 13 January 1996 | |
| Colombia | 16 December 1889 | Inherited UK Treaty. Requires prima facie case. |
| Croatia | 13 August 1901 | Inherited UK Treaty. Requires prima facie case. |
| Cuba | 22 May 1905 | Inherited UK Treaty. Requires prima facie case. |
| Czech Republic | 15 December 1926 | Inherited UK-Czechoslovakia Treaty. Requires *prima facie* case. Text of a modern 'no evidence' treaty is under negotiation. |
| **Ecuador** | 1 August 1990 | |
| El Salvador | 13 January 1883 | Inherited UK Treaty. Requires prima facie case. |
| **Finland** | 23 June 1985 and amended by Protocol of 14 February 1986 | Extradition of Finnish nationals is prohibited. |
| **France** | 23 November 1989 | Extradition of French nationals is prohibited. |
| **Germany** | 1 August 1990 | Extradition of German nationals is prohibited. |
| **Greece** | 5 July 1991 | Extradition of Greek nationals is prohibited. |
| Guatemala | 26 February 1912 | Inherited UK Treaty. Requires prima facie case. |
| Haiti | 21 February 1876 | Inherited UK Treaty. Requires prima facie case. |

| Country | Entry into Force | Comments |
|---|---|---|
| **Hong Kong** | 29 June 1997 | Requires *prima facie* case. Extradition only for modernised list of offences. |
| **Hungary** | 25 April 1997 | Extradition of Hungarian nationals is prohibited. |
| **Indonesia** | 21 January 1995 | |
| Iraq | 31 August 1934 | Inherited UK Treaty. Requires prima facie case. |
| **Ireland** | 29 March 1989 | |
| **Israel** | 3 January 1976 | Requires *prima facie* case.<br>Extradition of Israeli nationals is prohibited. |
| **Italy** | 9 May 1976 and amended by Protocol of 1 August 1990 | |
| **Korea, South** | 16 January 1991 | Requires a statement establishing reasonable grounds ('probable cause') to believe that the person sought committed the offence. |
| Latvia<br>(see also under Non-Treaty Extradition Relations) | 1 January 1926 | Inherited UK Treaty. Requires prima facie case. A modern "no evidence" treaty was signed on 14 July 2000 but is not yet in force. |
| Liberia | 23 March 1894 | Inherited UK Treaty. Requires prima facie case. |
| Lithuania | 4 May 1928 | Inherited UK Treaty. Requires prima facie case. |
| **Luxembourg** | 12 August 1988 | Luxembourg nationals are almost never extradited. |
| Macedonia, Former Yugoslav Republic of | 13 August 1901 | Inherited UK Treaty. Requires prima facie case. |

| Country | Entry into Force | Comments |
|---|---|---|
| **Mexico** | 27 March 1991 | Mexico does not extradite its nationals in practice. |
| **Monaco** | 1 August 1990 | |
| **Netherlands** | 1 February 1988 | Netherlands nationals may only be extradited if they will be returned to the Netherlands to serve any term of imprisonment imposed. |
| Nicaragua | 19 July 1907 | Inherited UK Treaty. Requires prima facie case. |
| **Norway** | 2 March 1987 | Extradition of Norwegian nationals is prohibited. Norway also reserves the right to refuse extradition of permanent residents of Norway who are nationals of Denmark, Finland, Iceland or Sweden.<br><br>Norway reserves the right to refuse extradition if the evidence provided is insufficient to establish a presumption that the fugitive is guilty of the alleged offence. |
| Pakistan<br>(see also under Non-Treaty Extradition Relations) | — | Treaty signed 16 March 2000 but not yet in force. |
| Panama | 26 August 1907 | Inherited UK Treaty. Requires prima facie case. |
| Paraguay | 30 May 1999 | |
| Peru | 20 May 1907 | Inherited UK Treaty. Requires prima facie case. |
| **Philippines** | 18 January 1991 | |
| Poland | 2 December 1999 | Extradition of Polish nationals is prohibited. |

| Country | Entry into Force | Comments |
|---|---|---|
| **Portugal** | 29 August 1988 | Extradition of Portuguese nationals is prohibited. |
| Romania | 21 May 1894 | Inherited UK Treaty. Requires prima facie case. |
| San Marino | 19 March 1900 | Inherited UK Treaty. Requires prima facie case.<br><br>Extradition of San Marino nationals is prohibited by law. |
| Slovakia | 15 December 1926. | Inherited UK-Czechoslovakia Treaty. Requires prima facie case. |
| Slovenia | 13 August 1901 | Inherited UK Treaty. Requires prima facie case. |
| South Africa<br>(see also under Non-Treaty Extradition Relations) | Not yet in force. | As initially signed 13 December 1995 required prima facie case. Following a change in South African law, a revised treaty providing for 'no evidence' extradition was signed on 9 December 1998. |
| **Spain** | 5 May 1988 | Extradition of Spanish nationals is prohibited. |
| **Sweden** | 10 March 1974 and amended by Protocols of 6 October 1985 and 10 June 1989 | Sweden will not extradite its nationals to Australia. |
| **Switzerland** | 1 January 1991 | Extradition of Swiss nationals without their consent is prohibited. |
| Thailand<br>(see also under Non-Treaty Extradition Relations) | 24 November 1911. | Inherited UK Treaty. Requires prima facie case. |
| Turkey | Not yet in force | Signed 3 March 1994. Extradition of Turkish nationals is prohibited. |

| Country | Entry into Force | Comments |
|---|---|---|
| **United States** | 8 May 1976 and amended by Protocol of 21 December 1992 | Requires evidence establishing reasonable grounds ('probable cause') to believe that the person sought committed the offence. |
| Uruguay | 20 March 1885 | Inherited UK Treaty. Requires prima facie case.<br><br>A modern 'no evidence' treaty was signed on 7 October 1988.. |
| **Venezuela** | 19 December 1993 | |
| Yugoslavia | 13 August 1901 | Inherited UK Treaty. Requires prima facie case. |

## NON-TREATY EXTRADITION RELATIONS

**Note:** This list includes:

(a) Commonwealth countries; and

(b) a small number of other countries to which the Extradition Act has been applied on a non-treaty basis

<u>The requirement for prima facie evidence applies unless the contrary is indicated.</u>

The Act is applied to Commonwealth countries, except South Africa, Fiji, Cameroon and Mozambique, by the Extradition (Commonwealth Countries) Regulations, which give effect to the Scheme for the Rendition of Fugitive Offenders within the Commonwealth (the London Scheme).

South Africa and Fiji are included below but are dealt with by separate regulations.

| *Country* | *Date on which Act applied* | *Comments* |
|---|---|---|
| Anguilla | 1 December 1988 | |
| Antigua and Barbuda | 3 May 1985 | |
| Bahamas | 3 May 1985 | |
| Bangladesh | 28 November 1975 | |
| Barbados | 1 May 1967 | |
| Belize | 3 May 1985 | |
| Bermuda | 1 December 1988 | |
| Botswana | 1 May 1967 | |
| British Antarctic Territory | 1 December 1988 | |
| British Indian Ocean Territories | 1 December 1988 | |
| British Virgin Islands | 1 December 1988 | |
| Brunei Darussalam | 3 May 1985 | |
| Canada | 1 May 1967 | |
| Cayman Islands | 1 December 1988 | |
| Cook Islands | 27 May 1992 | |
| Cyprus | 1 May 1967 | Extradition of Cypriot nationals is prohibited. |
| Denmark | 3 May 1985 | Extradition is to be conducted on a 'no evidence' basis.<br><br>In practice Danish nationals are not extradited. |
| Dominica | 3 May 1985 | |
| Estonia | 2 March 1999 | Extradition is to be conducted on a 'no evidence' basis. |
| Falkland Islands | 1 December 1988 | |
| Fiji | 17 December 1970 | Act applied by separate regulations from 23 May 1991 on |

| *Country* | *Date on which Act applied* | *Comments* |
|---|---|---|
| | | 'prima facie' basis. |
| Gambia | 1 May 1967 | |
| Ghana | 1 May 1967 | |
| Gibraltar | 1 December 1988 | |
| Grenada | 3 May 1985 | |
| Guyana | 1 May 1967 | |
| Iceland | 1 December 1988 | Extradition is to be conducted on a 'no evidence' basis.<br><br>Extradition of Iceland nationals is prohibited. |
| India | 1 May 1967 | |
| Jamaica | 1 May 1967 | |
| Japan | 3 May 1985 | Extradition is to be conducted on a 'no evidence' basis.<br><br>Extradition of Japanese nationals, unless provided for by a treaty, is prohibited. |
| Kenya | 1 May 1967 | |
| Kiribati | 17 December 1970 | |
| Latvia<br>(see also under Extradition Treaties) | 12 July 2000 | Extradition is to be conducted on a 'no evidence' basis. |
| Lesotho | 1 May 1967 | |
| Malawi | 1 May 1967 | |
| Malaysia | 1 May 1967 | |
| Maldives | 3 May 1985 | |
| Malta | 1 May 1967 | |
| Marshall Islands | 30 June 1993 | Extradition is to be conducted on a 'no evidence' basis. |

| *Country* | *Date on which Act applied* | *Comments* |
|---|---|---|
| Mauritius | 1 May 1967 | |
| Montserrat | 1 December 1988 | |
| Namibia | 27 May 1992 | |
| Nauru | 17 December 1970 | |
| New Zealand | 1 May 1967 | Part III of the Act provides for extradition to New Zealand by backing of warrants, similar to procedures for extradition between Australian jurisdictions. |
| Nigeria | 1 May 1967 | |
| Pakistan (see also Extradition Treaties) | 27 May 1992 | |
| Papua New Guinea | 28 November 1975 | |
| Pitcairn, Henderson, Ducie and Oeno Islands | 1 December 1988 | |
| St Kitts and Nevis | 3 May 1985 | |
| St Helena | 1 December 1988 | |
| St Helena Dependencies | 1 December 1988 | |
| St Lucia | 3 May 1985 | |
| St Vincent and the Grenadines | 3 May 1985 | |
| Samoa | 17 December 1970 | Extradition on 'record of the case'. |
| Seychelles | 3 May 1985 | |
| Sierra Leone | 1 May 1967 | |
| Singapore | 1 May 1967 | |
| Solomon Islands | 17 December 1970 | |

| *Country* | *Date on which Act applied* | *Comments* |
|---|---|---|
| South Africa (see also under Extradition Treaties) | 3 May 1985 | Act initially applied on a 'prima facie' basis. From 21 May 1997 the Act has been applied to South Africa on a 'no evidence' basis. A 'no evidence' treaty has been signed. |
| South Georgia and South Sandwich Islands | 1 December 1988 | |
| Sri Lanka | 1 May 1967 | |
| Swaziland | 17 December 1970 | |
| Tanzania | 1 May 1967 | |
| The Sovereign Base areas of Akrotiri and Dhekelia | 1 December 1988 | |
| Thailand (see also under Extradition Treaties) | 6 December 1995 | Extradition is to be conducted on a 'no evidence' basis. However, the most recent extradition *from* Thailand was effected under the 1911 UK-Siam Treaty. |
| Tonga | 17 December 1970 | Extradition on 'record of the case'. |
| Trinidad and Tobago | 1 May 1967 | |
| Turks and Caicos Islands | 1 December 1988 | |
| Tuvalu | 17 December 1970 | |
| Uganda | 1 May 1967 | |
| United Kingdom | 1 May 1967 | |
| Vanuatu | 3 May 1985 | |
| Zambia | 1 May 1967 | |
| Zimbabwe | 3 May 1985 | |

## EXTRADITION OBLIGATIONS UNDER MULTILATERAL CONVENTIONS

**Note:** Australia is a party to numerous multilateral conventions which impose extradition obligations on parties in relation to offences established in accordance with the requirements of each convention. Accordingly, the *Extradition Act 1988* has been applied to the other parties to these conventions in respect of convention offences, subject to conditions applying to the existing bilateral extradition relationship, if any. Where Australia has no existing bilateral extradition relationship (whether arising from a modern bilateral treaty, an inherited Imperial treaty or a non-treaty arrangement) with one of these countries, the Act applies to the country on a "no evidence" basis. The following list states how many countries in this residual group the Act applies to pursuant to each convention.

| ***CONVENTION*** | ***NO. OF PARTIES OTHER THAN BILATERAL EXTRADITION TREATY PARTNERS*** |
|---|---|
| Convention for the Suppression of Unlawful Seizure of Aircraft, done at the Hague on 16 December 1970 ("the Hague Convention") | 52 |
| Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971 ("the Montreal Convention") | 49 |
| International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979 ("the Hostages Convention") | 18 |
| Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973 ("the IPP Convention") | 22 |
| United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna on 20 December 1988 ("the 1988 UN Drugs Convention") | 58 |
| (IAEA) Convention on the Physical Protection of Nuclear Material, done at Vienna on 3 March 1980 ("the Physical Protection Convention") | 7 |
| Convention for the Suppression of Unlawful Acts against the Safety | 2 |

| ***CONVENTION*** | ***NO. OF PARTIES OTHER THAN BILATERAL EXTRADITION TREATY PARTNERS*** |
|---|---|
| of Maritime Navigation, done at Rome on 10 March 1988 ("the Ships Convention") | |
| Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988 ("the Fixed Platforms Protocol") | 2 |
| Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the United Nations on 10 December 1984 ("the Torture Convention") | 16 |
| International Convention and Protocol for the Suppression of Counterfeiting Currency, done at Geneva on 20 April 1929 ("the Currency Convention") | 18 |
| Single Convention on Narcotic Drugs, 1961, as amended by the Protocol of 25 March 1972 amending the Single Convention on Narcotic Drugs, 1961 ("the amended Single Convention") | 23 |
| Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, done at Paris on 17 December 1997 ("the Bribery Convention") | 1 |

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