Extradition Bill 1987

Date Introduced: 28 October 1987
House: House of Representatives
Presented by: The Hon. Lionel Bowen, M.P., Attorney-General

Digest of Bill

Purpose
To consolidate and amend the Extradition (Commonwealth Countries) Act 1966 and the Extradition (Foreign States) Act 1966. In particular, the amendments will modify the 'political offence' exception, provide for additional objections against extradition from Australia, clarify evidentiary requirements, and provide Australia with a limited right to prosecute Australian citizens in lieu of extradition.

Background
Extradition refers to the surrender of a fugitive by one country to another country in whose jurisdiction the person is alleged to have committed some offence. In international law, the matter is generally addressed in bilateral or multilateral treaties. Extradition is not a matter for the executive or Royal prerogative and thus may only occur where it is permitted by statute. Treaties which Australia enters into require implementing legislation in order to have the force of law in Australia.

Prior to 1966, Australia relied for its extradition arrangements on treaties negotiated, and legislation enacted, by the British Parliament. The present system for regulating extradition between Commonwealth countries, known as the London Scheme, was agreed to by Commonwealth Law Ministers in that year and was incorporated in Australian Law by the Extradition (Commonwealth Countries) Act 1966. The system is based on reciprocal Acts passed in other Commonwealth countries. With the enactment of the Extradition (Foreign States) Act 1966 (Foreign States Act), Australia continued applying the basic principle of the earlier Imperial Act, the Extradition Act 1870, that extradition should only be granted to foreign countries where a treaty with that country was in existence. Amendments in 1974 enabled the Principal Act to apply to certain countries providing reciprocating treatment, even where no treaty had actually been concluded.

Following a meeting between Commonwealth Law Ministers in London in 1983 on Commonwealth extradition arrangements, both Australian Extradition Acts were amended in 1985 to permit extradition to be refused on the
grounds that the offence for which extradition is being sought is of a political character. The exception has its origins in the Imperial Act of 1870, when it was regarded as necessary to protect groups fighting governments of continental countries viewed by Britain with disfavour. In recent years, escalating violence by members of various political groups has compounded the interpretation of the concept, 'offence of a political character'. Two United States cases in 1981 illustrate a divergence of approach. In one, a member of the Provisional IRA was able to claim the benefit of the exception to avoid extradition to the United Kingdom on a charge of murder of a British soldier in Northern Ireland. The earlier case concerned a member of the PLO's Al Fatah wing. Wanted for murder and attempted murder by the Israeli Government, he failed to satisfy the magistrate that he had committed the offences for political reasons. To counter this problem, this Bill will expressly exclude from the definition of 'political offence' certain types of offences dealt with in multilateral conventions to which Australia is, or will become, a party.

The Foreign States Act was further amended in 1985. As a result of Australia's unsuccessful attempt to extradite Robert Trimbole from Ireland on charges of murder in connection with the illegal drug industry, the 'Trimbole amendment' abrogated the requirement that a foreign country support its request for extradition with evidence that would be sufficient to warrant the committal for trial of the fugitive if the offence had been committed in Australia. The requirement meant that a country had to produce not only sufficient evidence, but evidence in a form that was admissible under Australian law. While civil law countries (in Western Europe) were forced to deal with totally unknown evidence laws, difficulties also arose with common law countries, so that fugitives were able to avoid extradition purely technical grounds. The requirement has been expressly preserved in applying the Act to South Africa. Otherwise, the amendment provides that the regulations may require a foreign country to produce a statement of the acts and omissions alleged against a fugitive. Additional information may be sought where this is necessary to establish that the conduct would have constituted an extradition offence (generally one that carries a penalty of not less than 12 months' imprisonment under the laws of Australia and the requesting country).

The Bill will clarify a further 1985 amendment giving effect to the common law principle that extradition proceedings are not trials to determine guilt or innocence. Thus, evidence tending to establish the innocence of the accused is not admissible. Recently, the provision has been the subject of some controversy, with supporters of the two US citizens who are charged by Israel with stealing the schooner 'Orionia' arguing that it overturns the presumption of innocence.

Main Provisions
Clause 5 contains the interpretation provisions. An 'extradition offence' will, in general, be one that carries a penalty of not less than 12 months' imprisonment. The definition of 'political offence' will expressly exclude a number of offences covered by international
conventions: hijacking, acts which jeopardise the safety of airlines, offences against internationally protected persons (including diplomats), genocide, hostage-taking, torture and other cruel or inhumane conduct. These offences are the subject of multilateral treaties to which Australia is, or shortly will become, a party. In addition, provision will be made for regulations to exclude certain offences against the head of state or government of a particular country, or against that person’s family, and offences against a person which collectively endanger the lives of other people.

An ‘extradition objection’ will apply to the surrender of a person for a political offence; for an offence that falls within the military law but not the ordinary criminal law of Australia; or for an offence for which the person has been acquitted, pardoned or punished. The objection will also apply where the real reason for seeking extradition is the person’s race, religion, nationality or political opinion, or where any of those factors would prejudice the person’s trial or personal liberty (clause 7).

The regulations will be able to state the extent to which the Bill applies to specified extradition countries to give effect to bilateral extradition treaties, or otherwise. Until the regulations provide otherwise, the Bill will apply to all foreign states to which the Extradition (Foreign States) Act 1966 applies before the Bill comes into operation. Those extradition countries which are required to satisfy the ‘sufficient evidence test’ will now be required to satisfy the ‘prima facie evidence test’. The major difference between the tests is that the ‘prima facie evidence test’ proceeds on the basis that the evidence sufficient to justify trial or committal will be uncontrovertible. The ‘prima facie evidence test’ will apply in every jurisdiction in Australia (clause 11).

Part II of the Bill (clauses 12 to 27) deals with the procedure for extradition from Australia to extradition countries other than New Zealand.

A person who has been brought before a magistrate and remanded in custody will not be entitled to apply to another magistrate for release on bail during that remand. Bail is only to be granted in special circumstances (clause 15).

Upon receipt of an extradition request from an extradition country, the Attorney-General may notify a magistrate accordingly, but only if the Attorney-General is of the opinion that the person is accused or convicted of an extradition offence in that country and that the conduct in question, had it occurred in Australia at the relevant time, would have constituted an extradition offence in Australia (i.e., the principle of ‘dual criminality’). In addition, such notice is not to be issued if the Attorney-General is of the opinion that there is an extradition objection (clause 16).
Clause 17 will oblige a magistrate to order a person’s release from custody or discharge from bail if the Attorney-General decides not to issue the above notice or considers that the remand should cease, or if the notice has not been received within 45 days of the person’s arrest and the magistrate is not satisfied that it will be given within a reasonable period. If the magistrate was so satisfied, and the notice has still not been received within the reasonable period, the person is to be released.

A magistrate may only proceed under clauses 18 and 19 upon receipt of a notice under clause 16. Clause 18 will provide for a person on remand to consent to surrender. Clause 19 deals with proceedings to determine whether a person is eligible for surrender. To fulfil the eligibility criteria, all supporting and other relevant documents must have been produced to the magistrate; the magistrate must be satisfied that there is dual criminality; and the person must have failed to satisfy the magistrate that there are substantial grounds for believing that there is an extradition objection. It will be expressly provided that the person is not entitled to adduce, and the magistrate is not entitled to receive, evidence to contradict an allegation that the person has engaged in conduct constituting the extradition offence in question. Otherwise, any duly authenticated document will be admissible. Upon determination of the ‘eligibility’ issue, the magistrate will make appropriate orders for imprisonment pending surrender, or release.

Clause 20 will enable a person to consent to surrender for offences in addition to the non-extradition offences, provided these have been listed by a country in its extradition request.

A person who has been found eligible for surrender is only to be surrendered if the Attorney-General is satisfied that no extradition objection exists and that the person will not be subjected to torture. If the offence is one that attracts the death penalty, the extradition country must give an assurance that the person will not be tried for the offence, or if tried, the death penalty will not be imposed or, if it is, it will not be carried out. In addition, the extradition country must have provided a speciality assurance, by law, treaty or undertaking, that the person will only be dealt with for the ‘surrender offence’, or lesser offences arising from the same conduct, or offences to which the Attorney-General consents (clause 22).

Clause 24 will enable the Attorney-General to issue a warrant for the temporary surrender to an extradition country of a person who is serving a prison sentence for offences committed in Australia.

Part III (clauses 28 to 39) deals with extradition from Australia to New Zealand.

Clause 28 will enable a magistrate to indorse a New Zealand warrant for the arrest of a person suspected of being in or on their way to
Australia. In addition, a magistrate will be able to issue a provisional arrest warrant upon receipt of an affidavit that a New Zealand warrant has been issued (clause 29).

Upon receipt of a request from New Zealand or from a person who has been remanded following arrest, a magistrate is to order that person's surrender to New Zealand or imprisonment. The magistrate is to order the person's release, however, if satisfied that the alleged offence is trivial; the accusation was not made in good faith or in the interests of justice; too much time has passed since the offence was allegedly committed; or where surrender would, for any other reason, be unjust, oppressive or too severe a punishment (clause 34).

Provision will also be made for the issue of a temporary surrender warrant (clause 36).

Part IV (clauses 40 to 44) contains provisions for extradition to Australia from other countries.

Only the Attorney-General will be able to make or authorise a request by Australia to another country (except New Zealand) for the surrender of a person accused of an offence against Australian law (clause 40).

Clause 42 contains the 'speciality assurance', similar to that required from other countries and described in clause 22.

Part V contains miscellaneous provisions.

If an Australian citizen returns to Australia after engaging in conduct in another country that would not usually constitute an offence against Australian State or Territory law, the person will be regarded as having committed an offence against this sub-clause (sub-clause 45(1)). Proceedings may only commence with the Attorney-General's consent (sub-clause 45(3)). Consent will only be given if extradition has been sought and the Attorney-General has determined that the person will not be surrendered because of their citizenship and because the Attorney-General is satisfied that the extradition country would not carry out a reciprocal surrender of one of their own nationals (sub-clause 45(4)).

The Governor-General will be able to make regulations consistent with this Bill (clause 55).

References
2. Ibid., at 921.

For further information, if required, contact the Law and Government Group.
This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

© Commonwealth of Australia 1987

Except to the extent of the uses permitted under the Copyright Act 1968, no part of this publication may be reproduced or transmitted in any form or by any means, including information storage and retrieval system, without the prior written consent of the Department of the Parliamentary Library. Reproduction is permitted by Members of the Parliament of the Commonwealth in the course of their official duties.