EXTRADITION (COMMONWEALTH COUNTRIES) AMENDMENT BILL 1984

Date Introduced: 30 May 1984
House: Senate
Presented by: Senator the Hon. Gareth Evans Q.C., Attorney-General

Short Digest of Bill

Purpose

To extend extradition provisions in respect of Commonwealth countries to apply to fiscal offences where there has been fraudulent intent and to amend judicial procedures, including that the determination of a "political offence" as a ground for refusal of extradition be made by the Attorney-General.

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, there is no common law of extradition, the matter is in general one for bilateral or multilateral treaties.

Extradition is not a matter for the executive or Royal prerogative and may not occur unless permitted by statute. Treaties which Australia enters into are not self-executing but require implementing legislation.

Earlier reliance on treaties negotiated and legislation enacted by the British Parliament was replaced from 1966 by Australian legislation applying respectively to Commonwealth countries and to foreign states. In the latter case, treaties originally concluded by Britain were continued in force. In the former case, section 6 of the 1966 Australian Act excludes the operation of the earlier Imperial Act, the Fugitive Offenders Act 1881.

The Extradition (Commonwealth Countries) Act 1966, to be amended by this Bill, does not generally involve treaties but constitutes uniform legislation agreed to by some 34 Commonwealth countries at a conference in London in 1966. It is therefore called the London scheme.
Extradition in British law generally is subject to a number of qualifications, some of which have been seen as ensuring certain rights of the fugitive and even as reflecting the tolerance of the British community generally.[1] Section 11 of the Australian Act, for example, restricts extradition where there are substantial grounds for believing that the motivation for the request, or the prospective trial is or may be influenced by race, religion, nationality or political opinions. The Bill amends the provisions of the Act permitting extradition to be refused or grounds that the offence for which extradition is being sought is of a political character and further introduces more general grounds for discretionary refusal to extradite by the Attorney-General.

The determination of the "political character" of an offence is transferred from the Magistrate to the Attorney-General. Judicial determinations of the scope of the term have varied from early cases requiring an attempt to overthrow the government to later cases acknowledging even an attempt to gain personal refuge. This flexibility in practice has been seen as advantageous.[2] The matter in the United States is regarded as a function for the executive.

Main Provisions

The Bill is to commence on a date fixed by Proclamation, although warrants etc. issued in accordance with Schedule 2 of the Act are preserved in effect by clause 26, following the repeal of the Second Schedule to the Act and the future prescription of forms in Regulations under the Act.

Regulations are authorised under new section 4A to modify treaties other than extradition treaties in their application to Australia where the terms of the treaty require surrender of offenders or reciprocal enforcement (clause 4). Notices, valid for up to three months may be gazetted by the Secretary to the Department of Foreign Affairs to vary the application of Part II of the Act to particular Commonwealth countries (clause 5). New section 32A facilitates proof of a treaty applicable in Australia by authorising issue of a certificate to that effect by the Attorney-General. The certificate may then be tendered as prima facie evidence in court proceedings.

A fugitive can consent, before a magistrate, to being surrendered to a Commonwealth country (clause 9). The administrative requirement for the recipient country to present evidence or a warrant for arrest may then be
dispensed with. Exceptions, such as evidence of mistaken identity, are set out in new sub-section 15(6A).

Administration is facilitated by a provision in clause 19 to make a copy of an overseas warrant sufficient, rather than to require production of the original.

Offences against laws relating to taxation, customs or foreign exchange, may henceforth be extraditable crimes (clauses 3, 13).

Decision of the Attorney-General as to whether a fugitive is being sought for an "offence of a political character" is to replace the present determination by the court under sub-section 10(1). The repeal of sub-section 10(1) and substitution of sub-section 12(2) is accomplished by clauses 6 and 8 respectively. Clause 11 amends section 17 as a consequential result.

The "speciality rule" in extradition law refers to the principle that a person be tried only for the crime which founded the extradition request. To do otherwise would negate the precautions taken by the extraditing country in excluding political etc. offences as proper crimes to found a request. Section 22 requires that the person return to, or be given an opportunity to return to, the extraditing country before he can be tried in Australia for any other offence. Under the traditional speciality rule it suffices that the person merely leave, or be given an opportunity to leave, Australia. Clause 14 implements this traditional rule. Clause 7 correspondingly amends the requirement in cases of extradition from Australia that the requesting country's law has a speciality rule in this form or that the country agrees to abide by such a rule in the particular case.

Sub-section 4(3) presently provides that a conviction in absentia which is not a final conviction shall be deemed to be an accusation and not a conviction. Clause 3 would amend the provision to deem any conviction in absentia, whether final or not, to be an accusation only.

The Bill amends sections 33AB and 33A of the Act, respectively relating to the taking of evidence in Australia for the purpose of proceedings in a declared Commonwealth country, and the taking of evidence in Australia for purposes of extradition to Australia. In the former case, the accused is made a competent, but not compellable, witness in Australia, and the provision is restricted to evidence in respect of alleged offences which would be offences if done under Australian law (clause 20). In the latter case, the Attorney-General's authorisation is still
required, but need not be specific to any one Magistrate and may authorise the taking of evidence generally (clause 21).

An exception to extradition is allowed in cases of trivial offences, mala fides or passage of time, as determined by the Attorney-General in relation to declared Commonwealth countries or a Magistrate in relation to extradition to New Zealand. Clauses 7 and 15 respectively introduce an alternative ground for refusal to surrender, that the surrender would be for any other reason unjust, oppressive or too severe a punishment. Clause 16 amends section 28 to permit the person released by decision of the Magistrate to be apprehended again pending the outcome of a review of the decision.

The Bill introduces a provision for the Commonwealth country requesting extradition to appeal against a decision refusing extradition from Australia. Clause 10 adds section 16A to permit appeal by way of rehearing in the Federal Court or the Supreme Court of the State or Territory in which the person was apprehended, with further appeal to the Full Court of the Federal Court.

Clause 11 amends section 17 to limit an application for habeas corpus to a period of 15 days following committal, with appeal from the Federal or Supreme Court to the Full Court of the Federal Court being permitted within a further 15 day period.

For further information, if required, contact:

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References
