

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

The Extradition (Commonwealth Countries) Amendment Bill 1984

Explanatory Memorandum

(Circulated by the authority of the Attorney-General Senator the
Honourable Gareth Evans)

EXTRADITION (COMMONWEALTH COUNTRIES) AMENDMENT BILL 1984

GENERAL OUTLINE

The Extradition (Commonwealth Countries) Act 1966 in conjunction with the domestic legislation of other Commonwealth countries regulates extradition between Australia and all other Commonwealth countries. This legislation is based on a scheme agreed to by Commonwealth Law Ministers in 1966. In 1983 Commonwealth Law Ministers agreed to certain amendments to that scheme to improve its operation. Those changes which require amendment to the Extradition (Commonwealth Countries) Act 1966 are incorporated in this Bill. The Bill also incorporates amendments which are considered necessary to resolve difficulties which have arisen in the practical operation of the legislation and to tidy up the drafting and organisation of the legislation.

NOTES ON CLAUSES

Clause 1 - Short title

Formal

Clause 2 - Commencement

The legislation will come into operation on a date to be fixed by Proclamation.

Clause 3 - Interpretation

This clause amends the definition section (section 4) of the Principal Act by:

- . extending the definition of 'declared Commonwealth country'. This amendment is necessary because of the addition of sub-section 8(3) to section 8 (see clause 5 below);
- . including definitions of 'extradition treaty' and 'treaty'. These definitions are necessary because of the inclusion of section 4A (see clause 4 below);
- . amending the definition of 'extradition crime' to make it clear that Australia may grant extradition for 'fiscal' offences such as offences against laws relating to taxation, customs, foreign exchange control and the revenue. This amendment was necessary because there was uncertainty under international law that extradition could be granted for such offences;
- . amending sub-section 4(3) to make it clear that evidence of guilt is required whenever extradition is requested in respect of a conviction imposed in the accused's absence whether that conviction is final or not.

Clause 4 - Variation of Schedule

This clause inserts a new section 4A which provides that the Regulations may amend the list of crimes for which extradition may be granted to give effect to obligations which Australia may undertake in the future pursuant to a treaty. This clause will remove the need for amending the Principal Act whenever Australia becomes party to a treaty which requires that extradition be granted for a specified offence.

Clause 5 - Application of Part in relation to Commonwealth countries

This clause adds sub-sections 8(3)(4)(5) and (6) to the existing section 8 to provide that the Permanent Head of the Department of Foreign Affairs may, in effect, declare a country to be a Commonwealth country for the purpose of acceding to and making requests for extradition. This procedure is considered necessary to cover the situation where a new Commonwealth country emerges before the Regulations listing Commonwealth countries can be amended.

Clause 6 - Restrictions on surrender of persons to Commonwealth countries

This amendment is necessary, in conjunction with amendments to section 17 of the Principal Act, to provide that only the Attorney-General, and not the Magistrate, may refuse extradition because the offence in respect of which extradition has been sought is an offence of a political character. This amendment follows the practice in the United States of America; it is considered that such a decision is more appropriately taken by the executive than the judiciary.

Clause 7 - Restrictions on power of Attorney-General to authorise the apprehension, or order the surrender, of a fugitive

This clause amends section 11 of the Principal Act. Section 11 gives the Attorney-General the power to refuse to extradite a person if one of three specified circumstances are met and, in addition, it would be unjust oppressive or too severe a punishment to surrender the fugitive. The three specified circumstances are the trivial nature of the offence, mala fides or lapse of time. The proposed amendment to that section will permit extradition to be refused on the grounds of unjustness, oppression etc, notwithstanding that one of the three specified circumstances does not exist.

The traditional speciality rule in extradition law is that an extradited person will not be tried in the country to which he has been extradited for any offence other than the offence for which his extradition was granted or a lesser offence provable on the same facts unless he has been given an opportunity of

leaving that country. This clause further amends section 11 to prevent the Attorney-General from surrendering a fugitive to a country unless that country's law contains a traditional speciality rule provision or it has agreed to abide by such a rule. The speciality rule previously detailed in section 11 varied, in minor ways from the traditional rule set out above.

Clause 8 - Notices by the Attorney-General

This amendment to section 12 of the Principal Act is consequential upon amendments to section 10 and section 17 of the Principal Act which provide that only the Attorney-General, and not the Magistrate, may refuse extradition because the offence in respect of which extradition has been sought is an offence of a political character.

Clause 9 - Proceedings after apprehension of person

This clause amends section 15 of the Principal Act in four ways:

- . it prevents a fugitive who has been refused bail by a Magistrate from applying to a Supreme Court Judge for bail. The amendment does not remove the right to apply for habeas corpus;
- . it provides for a system whereby a fugitive waives the full extradition process and consents to being voluntarily returned to the country which has sought his extradition;
- . it removes the need for production of an original overseas warrant of arrest; a copy will now suffice;
- . it details the evidence which a fugitive may lead in contesting an extradition request. The object of the amendment is to prevent an extradition hearing becoming a trial of guilt or innocence. The extradition hearing is intended to establish that there is sufficient evidence to justify the fugitive's trial in the requesting country.

Clause 10 - Review of Magistrate's decision

This clause inserts a new section 16A which in effect permits an appeal by way of rehearing to be lodged on behalf of the country requesting extradition against a decision of a Magistrate refusing extradition. Hitherto, only the fugitive had a right of appeal. The appeal lies to the Supreme Court or the Federal Court and thereafter to the Full Court of the Federal Court.

Clause 11 - Surrender of fugitive to Commonwealth country

This clause amends section 17 of the Principal Act by providing that a fugitive who is committed by a Magistrate to await extradition may only apply for a writ of habeas corpus

within the fifteen day period following that committal and may only appeal against a refusal of a habeas corpus application within a further fifteen day period. This amendment is to avoid the practical problem of fugitives applying for habeas corpus after the escorting officers have arrived from the requesting country to escort the fugitive there. As with the review of the Magistrate's decision (see clause 10) the application for habeas corpus will lie to the Supreme Court or the Federal Court and thereafter to the Full Court of the Federal Court. The clause also provides for amendments consequential upon the provisions in relation to voluntary return (see clause 9) and the amendment which permits only the Attorney-General to refuse to extradite for an offence of a political character (see clause 6).

Clause 12 - Discharge of fugitive who is not conveyed out of Australia within two months

This amendment to section 18 is consequential upon previous amendments (see clauses 10 and 11) which provide that appeals against a Magistrate's decision shall be to a Supreme Court or the Federal Court and thereafter to the Full Court of the Federal Court.

Clause 13 - Definition

This amendment to section 19 amends the definition of extraditable crime to make it clear that Australia may seek extradition for fiscal offences such as offences against laws relating to taxation, customs, foreign exchange control and the revenue (see also clause 3).

Clause 14 - Person surrendered by Commonwealth country in respect of an offence not to be prosecuted or detained for other offences

This clause amends section 22 of the Principal Act to provide that a person extradited to Australia will not be tried for any offence other than the offence for which his extradition was granted or a lesser offence provable upon the same facts unless he has been given the opportunity of leaving Australia. This clause thereby incorporates in Australian law the traditional speciality rule (see also clause 7). The previous speciality rule set out in section 22 varied in minor ways from the traditional rule.

Clause 15 - Restriction on power of Magistrate to order surrender of person

This clause provides for a new section 27 in the Principal Act which is in the Part of the Act which deals with extraditions to and from New Zealand. The previous section 27 gave the Magistrate the power to refuse to extradite a person if one of three specified circumstances were met and, in addition, it would have been unjust, oppressive or to severe a

punishment to surrender the fugitive. The three specified circumstances were the trivial nature of the offence, mala fides or lapse of time. The new section 27 will permit extradition to be refused on the grounds of unjustness, oppression etc notwithstanding that one of three specified circumstances does not exist.

Clause 16 - Review of order of Magistrate

This clause amends section 28 of the Principal Act, which is limited to extraditions to New Zealand, to provide that where a fugitive is released and the Magistrate's order of release is to be reviewed a Magistrate may issue a warrant for the apprehension of the fugitive.

Clause 17 - Jurisdiction of Courts

These amendments are consequential upon giving jurisdiction to the Federal Court and providing for an appeal by the requesting country (see clause 10).

Clause 18 - Evidence of certain matters

This clause provides for a new section 32A to facilitate proof of matters which are relevant to the new section 4A (see clause 4).

Clause 19 - Overseas documents may be admitted in evidence if duly authenticated

This clause amends section 33 of the Principal Act to make a copy of an overseas warrant of arrest admissible in evidence. Previously the original had been required (see also clause 9).

Clause 20 - Taking of evidence in respect of criminal matters pending in courts of Commonwealth countries

This clause amends section 33AB of the Principal Act by providing that:

- . evidence may only be taken in Australia for the purpose of a criminal matter pending in a Commonwealth country if the offence would also be an offence in Australia. For instance, if the criminal matter related to an offence of adultery evidence could not be taken in Australia;
- . a person accused of an offence in a Commonwealth country is competent but not compellable to give evidence in Australia for the purpose of the criminal matter pending against him. It is considered that such a person should be competent as he may be able to give evidence that would result in his acquittal.

Clause 21 - Taking of evidence for purposes of extradition

This clause amends section 33A of the Principal Act by removing the need for the Attorney-General to authorise a particular magistrate to take evidence to support an extradition request by Australia. The amendment will permit any Magistrate to take evidence pursuant to an authority of the Attorney-General.

Clause 22 - Repeal of section 36

Section 36 of the Principal Act is repealed because the forms referred to in that section are to be placed in the Regulations.

Clause 23 - Repeal of Schedule 2

Schedule 2 contains various forms which will be included in the Regulations. The Regulations already prescribe some forms and it is considered that all forms would be more appropriately place in the Regulations, Clause 22 accordingly repeals Schedule 2.

Clause 24 - Amendments consequential on repeal of Schedule 2 to Principal Act

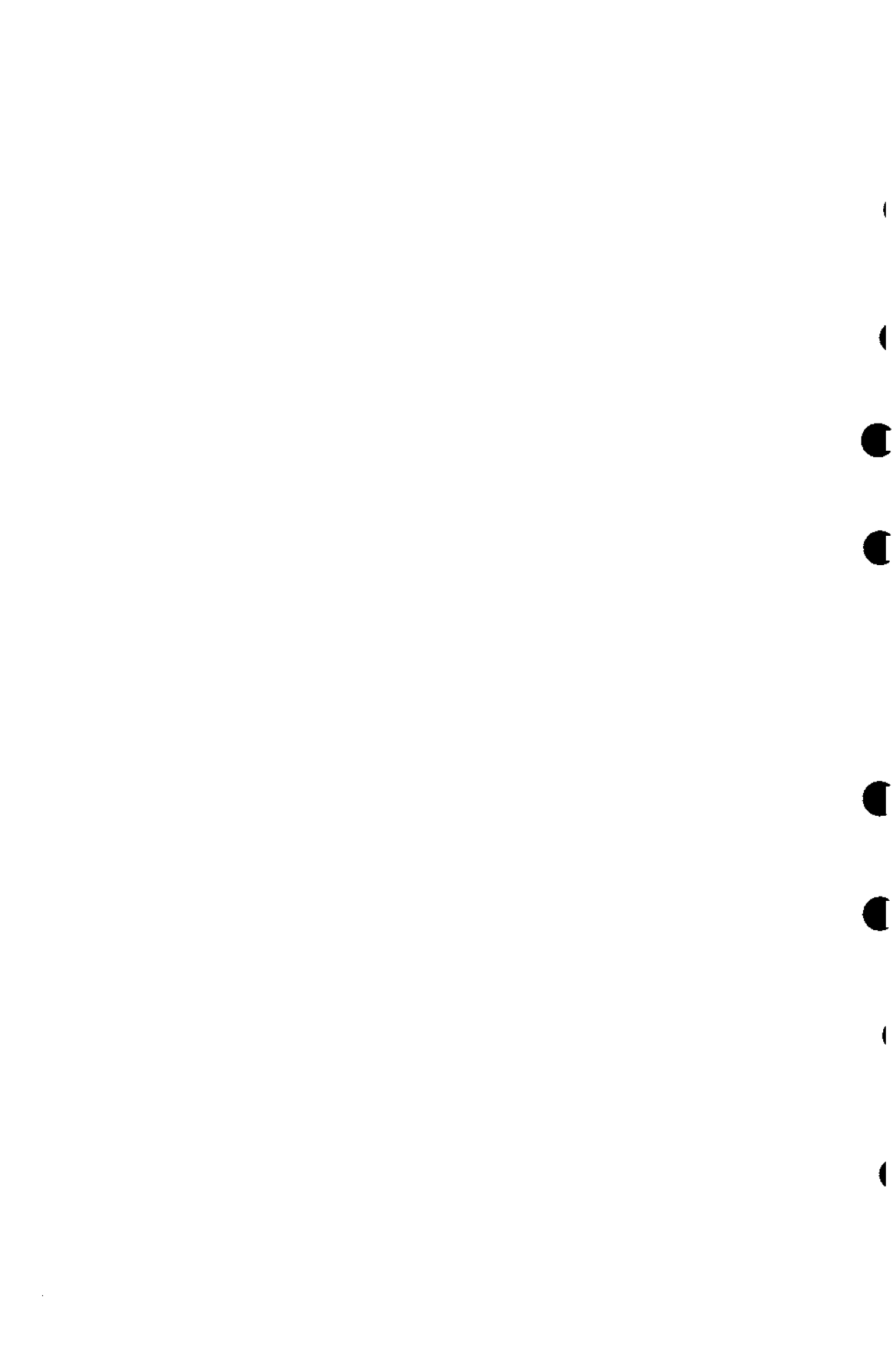
This clause provides for the amendment of each section of the Principal Act which refers to forms in Schedule 2 to the Act.

Clause 25 - Formal amendments

This clause provides for minor drafting amendments.

Clause 26 - Savings

This is a normal savings provision to validate documents executed prior to the repeal of Schedule 2 to the Principal Act.



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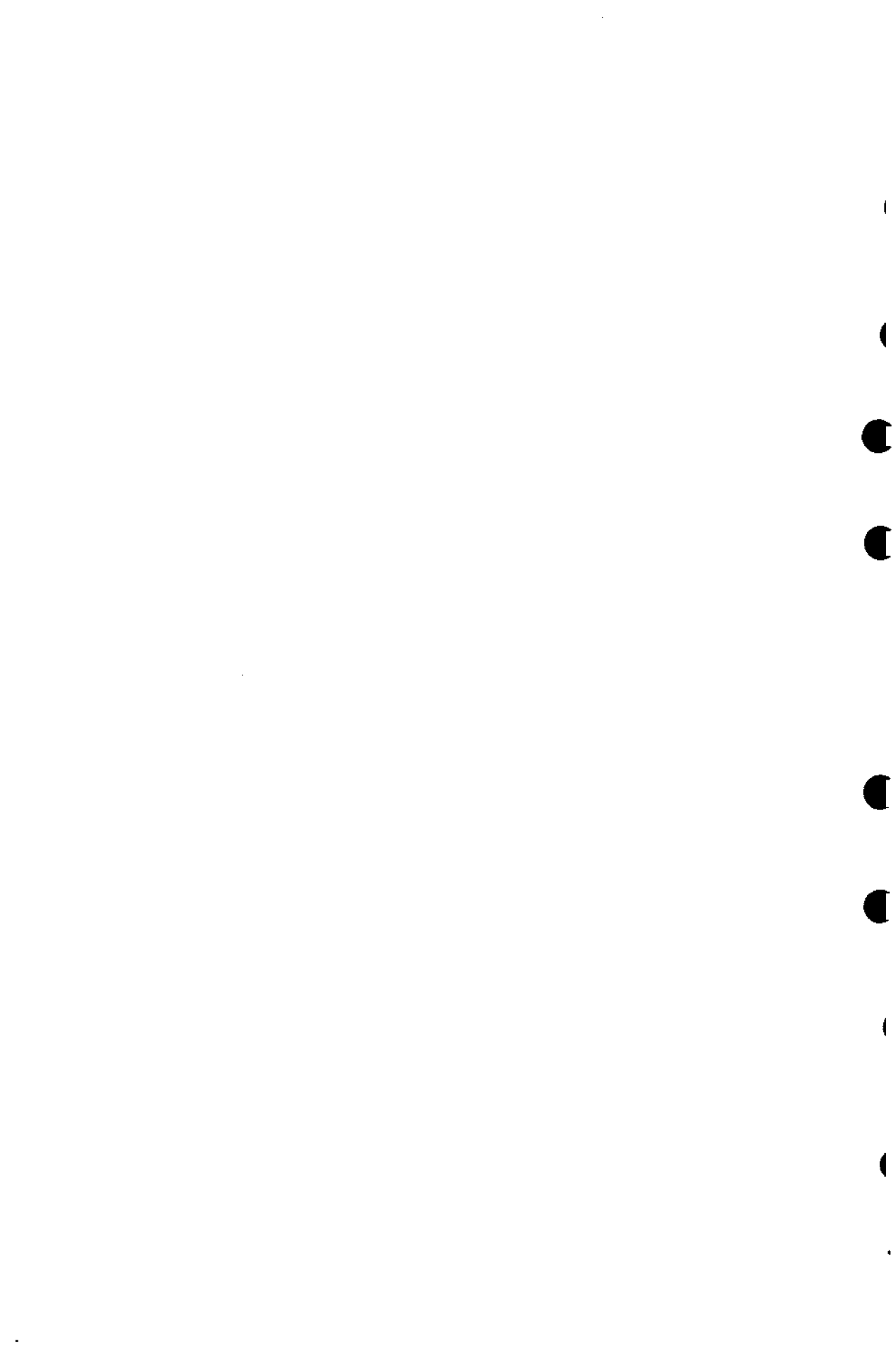
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