

1985

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

THE EXTRADITION (COMMONWEALTH COUNTRIES) AMENDMENT BILL 1985

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Honourable Lionel Bowen

Deputy Prime Minister and Attorney-General.)

EXTRADITION (COMMONWEALTH COUNTRIES) AMENDMENT BILL 1985

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.

This legislation has no financial implications.

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 -
 - (a) enable all the acts or omissions alleged against the fugitive to be taken into account to ascertain whether his conduct would have amounted to an offence if the acts or omissions had occurred in Australia.
 - (b) 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.

(c) provide that the offence in respect of which extradition is sought must be an offence against the law of both countries at the time when the request for extradition is made.

- . amending the definition of Magistrate to ensure that all State Magistrates are covered.
- . 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 declared 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 reference to the circumstances under which the offence is alleged to have been committed is also omitted as frequently a person seeking relief under this section would dispute that he has committed an offence.

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 - Notice by Attorney-General

This clause inserts a new sub-section 12(1) in the Principal Act which corresponds to the equivalent provision in the Extradition (Foreign States) Act 1966 by giving the Attorney-General a discretion to issue the notices referred to. In addition it is provided that the notices need not be directed to a particular Magistrate.

The clause also inserts a new sub-section 12(2) in the Principal Act 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 the extradition because the offence in respect of which extradition has been sought is an offence of a political character.

Clause 9 - Issue of Warrants

This clause amends section 14 of the Principal Act by providing that -

- . a Magistrate may issue a provisional warrant for the arrest of a fugitive on the basis of the existence of a warrant of arrest in the country requesting extradition. Previously evidence to justify arrest was required.

- . a police officer executing a warrant of arrest may search for and seize articles which are material as evidence or have been acquired as a result of the offence.

Clause 10 - Proceedings after apprehension of person

This clause amends section 15 of the Principal Act in the following ways -

- . it prevents a fugitive who has been refused bail by a Magistrate from applying to a Supreme Court Judge for bail (sub-section 15(2B)). The amendment does not remove the right to apply for habeas corpus.
- . it provides that a Magistrate may not release a fugitive who has been arrested, on the basis that the Magistrate has not received a notice from the Attorney-General that an extradition request has been received within a reasonable time, until at least forty five days have elapsed. Previously the fugitive could have been released on the basis of non-receipt of a notice within a reasonable time, at any time (sub-section 15(5)).
- . it provides for a system whereby a fugitive waives the full extradition process and consents to being voluntarily extradited to the country which has sought his extradition (sub-sections 15(5A), (5B), (5C)).
- . it removes the need for production of an original overseas warrant of arrest: a copy will now suffice (paragraphs 15(6)(a)).

- . consequent upon the amendment to the definition of extradition crime to enable all acts or omissions to be taken into account (see clause 3) sub-paragraph 15(6)(b)(i) is amended.
- . it provides that a fugitive may not adduce evidence to controvert an allegation that he has committed an act or omission in respect of which his surrender is requested. 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 (sub-section 15(6A)).

Clause 11 - Power of Magistrate or court to release, or postpone the surrender of, a person: Review of Magistrate's decision

This clause provides for a new section 16 in the Principal Act. The new section gives the same powers to a Magistrate or a court to release a fugitive on the grounds of oppression etc. as are given to the Attorney-General in section 11 (see clause 7).

This clause also 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 12 - 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 11) 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 10) and the amendment which permits only the Attorney-General to refuse to extradite for an offence of a political character (see clause 6). In addition the Attorney-General is given a specific final discretion; as in the Extradition (Foreign States) Act, to issue or not issue a warrant for the fugitive's surrender.

Clause 13 - 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 11 and 12) 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 14 - Interpretation

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 15 - 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 16 - Powers of entry search and seizure

This clause inserts a new section 25A in the part of the Act dealing with extraditions to and from New Zealand to enable a police officer executing a warrant of arrest to search for and seize articles which are material as evidence or have been acquired as a result of the offence.

Clause 17 - Proceedings after apprehension of person

This clause amends section 26 of the Principal Act which is in the Part of the Act dealing with extraditions to and from New Zealand to provide that a Magistrate can direct property to be delivered to New Zealand rather than to New Zealand with the fugitive.

Clause 18 - 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 too 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. The new section 27 is cast in the same terms as the new sub-section 11(2) (see clause 7) and the new section 16 (see clause 11).

Clause 19 - Review of order of Magistrate

This clause amends section 28 of the Principal Act, which is in the Part of the Act which deals with extraditions to and from 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. The amendment further provides that the appeal lies to the Federal Court or a Supreme Court, and thereafter to the Full Court of the Federal Court.

Clause 20 - Discharge of person who is not conveyed out of
Australia within one month

This amendment to section 29 is consequential upon the amendment to section 28 (see clause 18) providing that the review of a Magistrate's decision shall be by a Supreme Court or a Federal Court and thereafter the Full Court of the Federal Court.

Clause 21 - Jurisdiction of Courts

This clause inserts a new section 32 in the Principal Act to remove any doubt as to how the jurisdiction of a State Supreme Court may be exercised.

Clause 22 - Evidence of certain matters

This clause inserts a new section 32A in the Principal Act to facilitate proof of Australia's treaty arrangements.

Clause 23 - Overseas documents may be admitted in evidence if duly authenticated

This clause provides for the admission in evidence and due authentication of copies of overseas warrants.

Clause 24 - Taking of evidence in respect of criminal proceedings in Commonwealth countries

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

- . evidence may only be taken for the purpose of a pending criminal matter if that criminal matter relates to the trial of an accused or proceedings to place an accused person on trial.
- . evidence may only be taken in Australia for the purpose of a criminal matter pending in a foreign state 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 foreign state 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 25 - 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. In proceedings under section 33A the Magistrate does not act judicially and exercises purely a recording function. The clause therefore amends section 33A to make it clear that the accused person is not entitled to appear or be represented.

Clause 26 - 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 27 - 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 placed in the Regulations. Clause 22 accordingly repeals Schedule 2.

Clause 28 - 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 29 - Formal amendments

This clause provides for minor drafting amendments.

Clause 30 - Savings

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

