FEDERAL CRIMINAL LAW CONFERENCE
Sydney
5 September 2008

AUSTRALIAN EXTRADITION LAW
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ABSTRACT

Extradition legislation in Australia does not meet its own objectives. Those objectives are to facilitate the return of persons to foreign states to face criminal prosecution or punishment and to protect certain national interests and individual rights. The structure and terms of the Australian legislation and judicial interpretation of certain of the statutory provisions are such that neither of those objectives has been realized. This paper considers some of the shortcomings and offers some suggestions for reform of the law – to both expedite the process and to provide more than theoretical individual safeguards.

1 Background

While the objectives of extradition law are to strike a balance between, on the one hand, the interests of international cooperation in the enforcement of criminal laws and, on the other hand, the protection of certain State interests and individual rights,[1] internationally there has not been a strictly uniform approach taken in advancing those objectives.

Differences arise not only in relation to the relative weight given to the respective objectives, but also in relation to the ways in which the separate interests are protected. For example, in relation to the protection of individual rights, one country might require evidence of criminality and provide strong procedural protections, but not be overly concerned about what happens following surrender, while another might not require any evidence of criminality but pay relatively close attention to broader human rights protections available to the person should he or she be surrendered.

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[1] See s 3 of the *Extradition Act* 1988. In *R v Horseferry Road Magistrates' Court; Ex parte Bennett* [1994] 1 AC 42, 61-62, Lord Griffiths stated:

> 'Extradition procedures are designed not only to ensure that criminals are returned from one country to another but also to protect the rights of those who are accused of crimes by the requesting country.'

See, also, *DPP v Kainhofer* (1995) 185 CLR 528 per Gummow J; *Bou-Simon v Attorney-General (Cth)* [Federal Court, Emmett J, 8 September 1998 [30]].

Generally, there is a stark difference in approach as between civil law and common law states in relation to the treatment of a State's own nationals. Civil law states commonly refuse to extradite their citizens, adopting the Roman law position that citizens owe allegiance to their State and that the conduct of citizens reflects on that State, no matter where the conduct occurs. Accordingly, civil law states assume jurisdiction over all conduct of their citizens and, in some instances, by law they cannot be extradited to foreign states. On the other hand, Australia does not have a statutory bar to the extradition of its nationals and no separate protections are afforded.[2] Other common law states take a similar approach. Indeed, one American commentator has suggested that the United States "manifests almost an enthusiasm for extraditing its own citizens to places abroad".[3]

In any event, it remains that the objectives of extradition law are to provide relatively simple and expeditious proceedings to enable persons to be returned to foreign states to face prosecution or [where there has been a conviction] punishment and, at the same time, to provide due process and a measure of human rights protections.

Traditionally, human rights protections have been encapsulated within principles such as non extradition where there is actual or potential discrimination on account of the person's race, religion, nationality or political opinions, where the offence is a political offence, and where the person would be exposed to double jeopardy. State interests have been recognized through, for example, the principles of double criminality and speciality and, in some states, by the principle of non extradition where the person would be exposed to the death penalty.

In relation to double criminality, it is considered that a State should not be required to use its criminal processes for conduct which it does not itself consider to be criminal. Hence the principle that the conduct proscribed in the requesting State must also give rise to an offence in the requested state. The principle of speciality seeks to ensure that the requesting State does not prosecute the person surrendered in a manner inconsistent with the terms on which extradition was granted, as to do otherwise would be a breach of faith and of agreement between the two countries. Of course, these principles also serve the individual interest.[4]

In relation to the position in Australia, the processes are unduly complex, which makes difficult the appropriate and timely surrender of persons to requesting states. At the same time, certain of the legislative safeguards of individual rights have been unduly limited. This has been exacerbated by narrow judicial interpretations of some of the provisions of the *Extradition Act 1988 (Cth)* [the Act]. For example, on present judicial interpretations, the establishment of the

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2 As to the lack of a Constitutional protection in this regard, see *Vasiljkovic v Commonwealth of Australia* (2006) 227 CLR 614. In *Griffiths v United States of America* (2005) 143 FCR 182, it was held that Australia could extradite Griffiths to the United States to face charges of conspiracy to engage in internet software piracy in the United States in violation of United States law, even though at all relevant times he was physically located in Australia.

3 John G Kester, 'Some Myths of United States Extradition Law', (1988) 76 Geo LJ 1441 at 1474-1475.

4 In *Foster v Minister for Customs and Justice* (1999) 164 ALR 357, 368 Drummond J noted that the principle of speciality 'is not concerned only with matters affecting Australia's national interests but also with the protection of the fugitive from injustice in the extradition country'.

principle of double criminality has become a matter of form rather than substance, while it is difficult to imagine there ever being a finding of discrimination under s 7 of the Act.

There is another issue. One of the apparent underlying assumptions of the Australian extradition process is that the legal systems of requesting states are consistently fair and reasonable.[5] That view has been questioned.[6] Also, in *Cabal v United Mexican States*,[7] the Full Court of the Federal Court stated:

> 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 very 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.

2 Structure and provisions of the Act

The complexity of the Australian legislation primarily lies in the fact that there are four steps in the extradition process, each involving a discrete exercise of power.[8] In addition, each step is subject to separate judicial review. Indeed, the separation of those steps is encouraged by the finding of the courts that upon review of a decision made at, say, the third stage, matters cannot be raised that could have been taken on review at one of the earlier steps of the process.[9]

The first step involves the issue of a warrant for the arrest of the persons sought pursuant to s 12 of the Act. The magistrate must be satisfied that the person is an 'extraditable person',[10] which imports requirements that the offence be an 'extradition offence' and that the person has either been convicted or 'accused' of an offence in the requesting state.[11] In relation to the latter, a

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5 See the observations in the Report of the Joint Standing Committee on Treaties of the Parliament of the Commonwealth of Australia, *Extradition – a review of Australia's law and policy*, Report 40, August 2001, 30. Also, in *Cabal v United Mexican States (No 3)* (2000) 186 ALR 188, 268 French J stated:

> Where there is a treaty in force, its existence no doubt reflects a degree of mutual trust and confidence between the contracting parties as to their bona fides and the fairness of treatment that would be meted out by one or the other to a fugitive who has been surrendered.

See, also, *Dutton v O'Shane* [Supreme Court NSW, James J, 20 November 2002, [321]].

6 See Joint Standing Committee on Treaties Report 40, n 5 above.

7 (2001) 108 FCR 311

8 See generally, *Harris v Attorney-General of the Commonwealth* (1994) 52 FCR 386, 389, where the Full Federal Court characterised the stages of the extradition process as (1) commencement; (2) remand; (3) determination by a magistrate of eligibility for surrender; and (4) executive determination that the person is to be surrendered. See also *DPP v Kainhofer* (1995) 185 CLR 528, 533-38 for 'a brief conspectus of the Act'. See, more recently, *Brock v Minister for Justice and Customs* [2007] FCA 2091; *Minister for Home Affairs v Tervonen* [2008] FCAFC 24.

9 *DPP v Kainhofer* (1995) 185 CLR 528; *Brock v Minister for Justice and Customs* [2007] FCA 2091. See also *Tervonen v Finland* [2008] FCA 1133 per Flick J.

10 See s 6 of the Act.

11 The term 'extradition offence' is defined in s 5 and means an offence against the law of the requesting country for which the maximum penalty is death or imprisonment, or other deprivation of liberty, for a period of not less than 12 months.

distinction has been drawn between being charged with an offence and being sought merely for questioning.[12]

The second step follows remand of the person by the s 12 magistrate. This involves a determination by the Attorney-General, in terms of s 16 of the Act, as to whether or not the formal application should proceed to the next stage. The Attorney-General must consider afresh whether the person is an 'extraditable person': a reassessment of the matter already considered by the s 12 magistrate. In addition, the Attorney-General must be of the opinion that double criminality can be established and must not be of the opinion that there is an 'extradition objection' under section 7 of the Act. Both of these matters are again considered at the third step.

The third step commences when the Attorney-General determines that the application should proceed and issues a notice directing a magistrate to conduct an extradition hearing pursuant to section 19 of the Act.

The section 19 magistrate is confined to a consideration of whether the necessary documentation has been produced,[13] whether double criminality can be established, whether there are any 'extradition objections' under section 7 of the Act and, where imported by treaty or regulation, whether a *prima facie* case can be established.[14] At this step, the person cannot raise the question of whether or not he or she is an 'extraditable person'. That issue must be raised at the first step or upon review of the Attorney-General's determination at the second step of the process.[15] Pursuant to section 21 of the Act, there is a right of review and, ultimately, appeal from the finding of the section 19 magistrate.

Other matters arising under the Act or by treaty, including any additional human rights protections, are determined by the Attorney-General.[16] That determination might be subject to further, separate judicial review following the fourth step of the process.

At this fourth step, the Attorney-General must consider a number of preconditions to surrender; namely, that the death penalty will not be imposed or carried out; that a speciality assurance has been given; and that the Attorney-General is satisfied that there is no extradition objection, that the person will not be subjected to torture and that there are no exceptions to extradition arising by treaty or regulation.[17]. These matters satisfied, ultimately the decision rests on the exercise of discretion.[18]

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12 As to the term 'accused', see *DPP v Kainhofer* (1995) 185 CLR 528; *Tervonen v Finland* [2008] FCA 781 per Gyles J; *Tervonen v Finland* [2008] FCA 1133 per Flick J.

13 As to which see s 19(3) of the Act. The documents include a statement of the conduct constituting the extradition offence, which forms the basis for consideration of the principle of double criminality.

14 While, section 11(1) of the Act allows that other preconditions to extradition might arise by treaty or regulation, because of section 11(6) the only such matter that can be considered by the magistrate is a requirement to establish a *prima facie* case.

15 *DPP v Kainhofer* (1995) 185 CLR 528. See also *Tervonen v Finland* [2008] FCA 1133 per Flick J.

16 For example, in *Federal Republic of Germany v Parker* (1998) 101 A Crim R 234, 252, it was held that whether any additional information required by treaty, in that case in relation to the identity of the person sought, had been produced was a matter for the Attorney-General.

17 'Exceptions', as distinct from 'objections' to extradition, arise by treaty or regulation: see above n **Error!**

Despite the overlap of functions, so that, for example, the question of extradition objections is considered at steps 2, 3 and 4, separate determinations are made, and separate review processes arise, at each of those steps.[19]

As a result, the process is unduly complex, time consuming and repetitive. It does not provide an efficient mechanism for the arrest and surrender of alleged offenders to foreign states. Nor does it serve the interests of the person sought. The person must be mindful of the issues that need to be raised at each step of the process and, in addition to the section 19 hearing, can face a number of separate, costly challenges to decisions made. Also, a number of matters are assigned to the Attorney-General for determination and in those instances review is confined to that available under section 39B of the Judiciary Act.[20] That review is not a review on the merits of the decision, but is concerned with whether the matter was within power and whether the appropriate process was followed.[21]

In addition, certain of the provisions of the Act limit the protections afforded to the person sought. These include:

(i) The general exclusion of the need to establish a *prima facie* case or any other indicia of guilt.[22] While, by s 11 of the Act, there is potential for the incorporation of this requirement by treaty or regulation applying to a particular country, generally this has not occurred.

(ii) Limiting the s 21 review process. While the review of the s 19 decision of the magistrate is by way of rehearing so that the court can reach its own conclusions as to

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Bookmark not defined.. In relation to 'exceptions' there is a subsidiary question of whether the exception is mandatory or permissive: see s 22(3)(e) of the Act.

18 See s 22(3)(f) of the Act.

19 It has been held that the respective repositories of power exercise separate functions and, to the extent of any overlap, one does not review the formation or non-formation of an opinion or state of satisfaction or non-satisfaction of another. In *DPP v Kainhofer* (1995) 185 CLR 528, 538 Brennan CJ, Dawson and McHugh JJ state:

> the section 19 magistrate does not review the Attorney-General's non formation of an opinion under s 16; nor does the Attorney-General review the s 19 magistrate's state of non-satisfaction. The existence or possible existence of extradition objections fall to be considered by the Attorney-General under s 16, by the s 19 magistrate and again by the Attorney-General under s 22 but on each occasion the repository of the relevant power makes an independent determination of the issues on which the existence of the power depends.

Also, in *Foster v Attorney-General (Cth)* (1997) 97 A Crim R 560, 575 Cooper J stated: 'The decision at each stage takes effect either to terminate the process or constitute the condition precedent required for the next stage to occur. Further, the issues at each stage are not the same, although there may be some overlap; for example the existence or possible existence of extradition objections.'

20 *DPP v Kainhofer* (1995) 185 CLR 528, 541; *Federal Republic of Germany v Parker* (1998) 101 Crim L R 234, 252; *Foster v Minister for Customs and Justice* (1999) 164 ALR 357, 359.

21 *Foster v Minister for Customs and Justice* (2000) 200 CLR 442; *Papazoglou v Republic of the Philippines* (1997) 74 FCR 108, 128, 140; *Tervonen v Finland* [2008] FCA 1133. For a rare case in which there was a successful application under s 39B, see *De Bruyn v Minister for Justice and Customs* (2004) 143 FCR 162.

22 Section 19(5) of the Act prohibits the section 19 magistrate from receiving evidence 'to contradict an allegation that the person has engaged in conduct constituting an extradition offence'.

eligibility for surrender,[23] s 21(6)(d) of the Act provides that 'the court to which the application or appeal is made shall have regard only to the material that was before the magistrate'. A difficulty arises where the review court holds that evidence from witnesses was wrongly disallowed by the magistrate; for example, in relation to the political offence or discrimination objections.

While it has been accepted that documentary material that was proffered to the magistrate, even though rejected, can be viewed as material that was 'before the magistrate' for the purposes of section 21(6)(d) of the Act,[24] the review or appeal court cannot speculate on the oral evidence that might have been led had proper examination of the witnesses been allowed.[25] Similarly, in *Dutton v O'Shane*,[26] where the magistrate had rejected certain affidavit evidence, it was held that while the evidence should be admitted the appropriate response was to reduce the weight to be given to the material because of the lack of opportunity to cross-examine the deponents. In *Cabal v United Mexican States*, the Full Court of the Federal Court noted the unfairness of this result and considered that it should receive "urgent attention".[27] Arguably, it creates greater unfairness for the person sought, as the requesting state can bring a second application for extradition if the first fails.[28]

(iii) The unavailability of bail other than where there are 'special circumstances'.[29] In practice, bail is rarely granted. This can result in the imposition of a particularly harsh penalty where the offences are relatively minor and the extradition processes are prolonged.

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23 *Cabal v United Mexican States* (2001) 108 FCR 311, 338; *Dutton v O'Shane* (2003) 200 ALR 710, 741. Compare where there is a challenge to a finding under s 19(1)(d) of the Act: see *Brock v United States of America* (2007) 157 FCR 121. See also *Knauder v Moore* (2002) 127 FCR 327.

24 *Cabal v United Mexican States (No 2)* (2000) 172 ALR 743, 749 per French J. See, also *Dutton v O'Shane* (2003) 200 ALR 710, 743-45.

25 *Dutton v O'Shane* (2003) 200 ALR 710, 745, 746.

26 [Supreme Court NSW, James J, 20 November 2002, [327]]. See, also *Dutton v O'Shane* (2003) 200 ALR 710, 745-46 per Finn and Dowsett JJ.

27 (2001) 108 FCR 311, 348. The Court stated:

> It is obviously unfair that a person who has erroneously been prevented by a magistrate from tendering evidence in support of an extradition objection should be denied redress on review to this Court, or by the Supreme Court if that be the Court of review. At the same time it is also unfair that should such redress be granted, the requesting State is denied the opportunity to answer that material. In our view the matter should receive urgent attention.

See also *Dutton v O'Shane* (2003) 200 ALR 710, 740.

28 In *Dutton v O'Shane* (2003) 200 ALR 710, 746, where that argument was made, the Court seemed to be of the view that this was simply a consequence of the 'contrived state of affairs' created by section 21(6)(d) of the Act

29 See s 15(6) of the Act. In *United Mexican States v Cabal* (2001) 209 CLR 165, the High Court referred to Australia's obligations under international law and to the risk of flight, "because the typical extraditee is a person who has fled from another country after committing a serious crime": at 190-1. In that context, it was held that bail should be granted only when two conditions are fulfilled (at 191):

> "First, the circumstances of the individual case are special in the sense that they are different from the circumstances that persons facing extradition would ordinarily endure when regard is had to the nature and extent of the extradition charges … Secondly, there must be no real risk of flight."

3 Judicial interpretation

Certain of the provisions in the Act have been given a narrow interpretation by the courts. Two provisions are particularly significant. The first relates to the operation of the principle of double criminality, while the second concerns the evidence that can be led to establish the objections to extradition under s 7 of the Act.

Double criminality

The principle of double criminality requires the conduct constituting the offence to be criminal in both the requesting and requested state. To that end, pursuant to s 19(3)(c)(ii) of the Act, one of the documents that the requesting state must produce is a statement of 'the conduct constituting the offence'.

At the s 19 extradition hearing, the magistrate must be satisfied that at the time of the extradition request that conduct or 'equivalent conduct' would have constituted an offence in the state or territory in Australia where the extradition hearing is held.[30] That is determined solely by reference to the section 19(3)(c)(ii) statement.[31]

The content of the statement of conduct is obviously important. If it is loosely drafted, so that it includes conduct beyond that necessary to establish the offence in the requesting state, then the more likely it will be that an equivalent Australian offence will be found. That gives rise to the question of what is meant by the 'conduct constituting the offence'. In that regard, s 10(2) provides:

> A reference in this Act to conduct constituting an offence is a reference to the acts or omissions, or both, by virtue of which the offence has, or is alleged to have, been committed.

The Federal Court has interpreted that provision generously to the requesting state. Rather than focusing on the words 'by virtue of which' the offence has been committed in section 10(2), in *Zoeller v Federal Republic of Germany* the Court placed emphasis on the words 'is alleged to have been committed', concluding that the statement of conduct was not invalid because it alleged facts, "which goes beyond the facts necessarily constituting the offence" in the requesting state and that it did not follow that "the magistrate may have regard only to those facts which are absolutely necessary ingredients of the foreign offence".[32] It was added that the "magistrate is no expert in foreign law. He is not required to determine what the facts are that are the necessary facts to constitute the foreign crime".[33]

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30 See s 19(2)(c) of the Act.

31 *Zoeller v Federal Republic of Germany* (1989) 23 FCR 282, 300.

32 *Zoeller v Federal Republic of Germany* (1989) 23 FCR 282, 300. See, also, *Cabal v United Mexican States* (2001) 108 FCR 311, 341. Compare *De Bruyn v Republic of South Africa* (1999) 96 FCR 290, 292-93, 296-97.

33 Ibid.

However, it is suggested that the reference in section 10(2) to the acts by which the offence 'has, or is alleged to have, been committed', simply reflects the fact that extradition may be sought of persons either charged with or convicted of an offence.

The practical effect of the approach adopted by the Federal Court is that the 'conduct constituting the offence' is whatever is specified in the section 19(3)(c)(ii) statement, regardless of whether it bears any relationship to the conduct that will be prosecuted following surrender.[34] The problem is exacerbated by the further finding of the Federal Court that there is no need for a discrete statement of conduct constituting the offence, so that the statement of conduct may be found by taking into account two or more of the extradition documents.[35]

In *Government of Canada v Aronson*,[36] where a similar provision was considered,[37] the House of Lords held that a person could be extradited only if the conduct relevant to the ingredients of the foreign offence constituted a corresponding offence under the United Kingdom law. Lord Bridge gave examples of the "startling results" were the law to be otherwise.[38] For example, double criminality would not depend on whether the acts charged were criminal in both states, but on the manner in which the statement of conduct were drafted. As noted by Lord Lowry:[39]

> The "act or omission constituting the offence" cannot in my opinion mean "the conduct, as proved by the evidence, on which the charge is grounded," because the evidence of such conduct could prove something more than what has been charged. In such a case the conduct proved would not be the act or omission constituting the offence of which the fugitive is accused …

Under the approach adopted by the Federal Court, where a person is charged with an offence that is not a crime in Australia, but, incidentally, the statement of conduct makes reference to acts or omissions that would constitute a crime in this country it seems that double criminality will be established. That will be so even though that additional conduct will have no relevance to the actual offence charged following extradition.

That is the very outcome that the principle of double criminality was intended to avoid.

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[34] More recently, the term 'acts or omissions by virtue of which an offence is alleged to have been committed' was considered by the High Court of Australia in *Truong v The Queen* (2004) 205 ALR 72, in the context of the operation of the speciality principle under s 42 of the Act. In relation to that decision, see Aughterson, 'The Extradition Process: An Unreviewable Executive Discretion', [2005] AYBIL 13, n 51.

[35] See *McDade v United Kingdom* [1999] FCA 1341; [1999] FCA 1868. In that case, the primary statement was a 19 page document of a police officer containing a "summary of the investigation and allegations" made. Other documents were said to be incorporated by reference. See also *Bennett v Government of the United Kingdom* [2000] FCA 916; *Mahew v United States of America* (2004) 142 FCR 59.

[36] [1990] 1 AC 579.

[37] Under s 3(1)(c) of the Fugitive Offenders Act, a person could be extradited only if 'the act or omission constituting the offence' would constitute an offence against the law of the United Kingdom. Compare the consideration of *Aronson* in *Zoeller v Federal Republic of Germany* (1989) 23 FCR 282, 296-97.

[38] [1990] 1 AC 579, 589-90.

[39] Ibid 609.

Evidence of extradition objections

By their nature, the objections to extradition will never be easy to establish. For example, in relation to the discrimination objection, in *Cabal v United Mexican States (No 3)*, French J stated:[40]

> It is no light matter for the magistrate or this Court to conclude that there are substantial grounds for believing that the requesting country is acting in bad faith, especially given the necessary assumption that the offence has been committed. There is also the existence of the Treaty itself to which regard must be had. Where there is a treaty in force, its existence no doubt reflects a degree of mutual trust and confidence between the contracting parties as to their bona fides and the fairness of treatment that would be meted out by one or the other to a fugitive who has been surrendered.

However, the difficulty is exacerbated by the interpretation by the courts of the scope of s 19(5) of the Act. That sub-section provides:

> In the proceedings, the person to whom the proceedings relate 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 an extradition offence for which the surrender of the person is sought.

This provision was first enacted in 1985, with the abolition of the requirement to establish a *prima facie* case, on the rationale that an extradition hearing is not intended to determine guilt or innocence and, accordingly, evidence to that effect should not be led.[41] The provision can be well understood in that context.

However, in *Cabal v United Mexican States (No 3)*,[42] it was held that s 19(5) also operated to exclude exculpatory evidence where the person objected to extradition on the basis of actual or potential discrimination on account of his or her race, religion, nationality or political opinions, and that the provision:[43]

> excludes debate before the magistrate that the charges have been falsely fabricated because of the person's political opinion. That wider consideration, if available at all, is reserved for the Attorney-

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40 (2000) 186 ALR 188, 268. See, also, *Dutton v O'Shane* [Supreme Court NSW, James J, 20 November 2002, [321]]. However, the same approach is not taken by all states. As noted by North J in *McCrea v Minister for Justice and Customs* [2004] FCA 273 para 56:

> The reluctance of courts in some jurisdictions such as Australia to adjudicate upon decisions of sovereign states concerning extradition is not universal. For instance, in some European countries it has been held to be legitimate for adjudicative bodies to enquire into the sufficiency and effectiveness of assurances: Aylor (1993) 100 ILR 665; see especially the submission of Commissionaire du Gouvernement Vigouroux which sets out the practice of a number of European nations. In due course, the law in Australia may take account of such jurisprudence and move to an acceptance that the doctrine of non-adjudication has less of a place in cases involving questions of fundamental human rights, such as cases involving the death penalty.

41 Extradition (Commonwealth Countries) Amendment Bill 1985, Second Reading Speech, Attorney-General Mr L Bowen, House of Representatives 1985 Debates, vol HR 140, 596. See, also, Joint Standing Committee on Treaties Report 40, n 5 above, 58.

42 (2000) 186 ALR 188, 266 per French J.

43 Ibid.

> General in deciding whether to issue a notice under s 16 and, ultimately, whether to surrender the requested person under s 22.

It is suggested that that was not the objective of s 19(5). As noted above, the provision was introduced in the context of the general abolition of the requirement to establish a *prima facie* case. That issue was no longer the concern of the magistrate at the section 19 hearing. However, extradition objections remain a matter for the magistrate and there will be circumstances where apparent innocence of the offence could be suggestive of an ulterior purpose on the part of the requesting state.

In a submission to the Joint Standing Committee on Treaties, Julian Burnside QC made the compelling point that it is difficult to demonstrate discrimination without being able to lead evidence that the charges were false:[44]

> … 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.

4 Proposals for reform

Following from the matters noted above, it is suggested that there is ample room for reform of Australia's extradition law. Possible reforms could include the following:

A more efficient process

Significantly reducing the involvement of the Attorney-General in the process would have several advantages. First, it would reduce the time required to make appropriate evaluations as is now required by steps two and four. Second, it would remove the opportunity or need for separate review processes. Third, the court is the more appropriate forum to consider matters such as human rights protections arising by treaty.

Assigning matters to the courts has the advantage of providing a forum that is accustomed to making the necessary judgments in relation to relevant issues and, at the same time, provides an open, transparent and objective process. In relation to matters considered by the Attorney-General there is a right to make written submissions only and no opportunity, for example, to cross-examine witnesses. Also, the need to send written submissions to and fro between the parties for response delays the making of a determination.

Certainly, it is difficult to understand why the same issues have to be reconsidered at separate stages of the process. While the formal extradition application should be processed through the office of the Attorney-General to enable vetting and the possible exercise of the discretion of the Attorney-General to refuse the application at an early stage, other matters presently considered at

[44] Joint Standing Committee on Treaties Report 40, n 5 above, 59.

step two can be assigned exclusively to the courts. In relation to stage 4, it is suggested that the Attorney-General be confined to a consideration of the assurances given by the requesting state in relation to the speciality assurance and non imposition of the death penalty.

A flexible process

The present extradition arrangements assume that all requesting states, other than New Zealand (see Part III of the Act), should be treated in the same way.

This does not reflect reality. The legal processes and individual protections offered are not consistent among all states.[45] There is no reason why a uniform approach has to be adopted. The United Kingdom legislation, for example, provides for differing procedures,[46] while, generally, civil law states refuse altogether to surrender their nationals.

The precise manner of differentiation is open to debate. However, concern has been expressed in Australia in relation to the general abolition of the requirement to establish a *prima facie* case.[47] As with the United Kingdom legislation, there might at least be a specification that requesting states provide such evidence unless a state is specifically designated as not having to meet that requirement.[48] Alternatively, there could be a requirement to establish a *prima facie* case where the person sought is an Australian national, or surrender could be made conditional on the national being given an option to return to Australia to serve any sentence imposed. As, generally, Australian criminal laws do not provide for the prosecution of nationals for conduct abroad, an absolute refusal to extradite would mean that the person would escape punishment altogether.

Flexibility goes both ways. While in relation to some states more exacting requirements might be imposed, in relation to others there could be a relaxation of the process. The backing of warrants procedure that currently exists in relation to New Zealand might be extended, perhaps in a modified form,[49] to some other countries that have legal standards and values similar to those in Australia. With the growth of transnational crime and the ready capacity of persons to move between states, the need for efficient processes is becoming increasingly important.

A substantive principle of double criminality

As presently applied in Australia, the principle of double criminality is governed by form rather than substance. The principle is understood and applied in all states. It is not an onerous burden to impose on a requesting state a requirement to supply a discrete document that clearly sets out

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[45] See notes 5-7, above, and related text.
[46] See *Extradition Act 2003 (UK)* and Aughterson, n 34 above.
[47] See, generally, Joint Standing Committee on Treaties Report 40, n 5 above.
[48] See s 84 *Extradition Act 2003 (UK).*
[49] It is noted that in relation to the European Community, where a 'European Arrest Warrant' can be executed in member states, extradition from one member state to another cannot take place where it would be contrary to a person's rights under the European Convention on Human Rights: see Aughterson, n 34 above.

the conduct constituting the offence; that is, the conduct relevant to the ingredients of the offence that has been charged.

Nor is it particularly burdensome to allow expert evidence as to foreign law in those cases where the person sought wishes to argue that the alleged conduct does not constitute an offence in the requesting state.[50] The occasions where that will arise are likely to be few. It does not involve a consideration of whether or not the conduct occurred, but simply whether the conduct as alleged constitutes an extraditable offence in the foreign state.

On the other hand, in a number of treaties there is also a requirement of mutuality in relation to jurisdiction.[51] Given the rise in transnational crime and the differing jurisdictional basis claimed by states, it is questionable whether there is need for 'double criminality' in relation to jurisdiction. Offences such as money laundering, corruption and computer generated crimes often cross state boundaries and persons should not avoid liability simply because of differing jurisdictional basis adopted in one country or another.[52]

A more comprehensive review process

Confining the review court to a consideration of the material before the magistrate creates problems in circumstances where evidence was wrongly excluded by the magistrate. This difficulty can be cured by giving the court discretion to allow additional evidence in such cases.

A broader analysis of extradition objections

The present proscription against leading evidence to contradict an allegation that the person has engaged in conduct constituting an extradition offence should not be extended to circumstances where a person seeks to establish an extradition objection. It is suggested that that was not the original purpose of s 19(5) of the Act and its extension very much limits any argument based, in particular, on the discrimination objection.

On the other hand, there is good argument for abolition of the political offence objection to extradition. It has always caused great difficulty in definition and there is a fine line between a political offence and terrorism. There is also a question of whether a state should formally sanction the use of violent means to achieve political change, particularly in countries that adopt

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[50] In refusing to look at the question of what conduct constitutes the offence in the requesting state, the Australian courts have said that the "magistrate is no expert in foreign law. He is not required to determine what the facts are that are the necessary facts to constitute the foreign crime": *Zoeller v Federal Republic of Germany* (1989) 23 FCR 282, 300.

[51] See, for example, the Treaty with Germany, in which article 1(2) provides:

> When the offence has been committed outside the territory of the Requesting State, the Requested State shall grant extradition according to the provisions of this Treaty if its laws would provide for the punishment of such an offence committed in similar circumstances.

[52] Some allowance might need to be made in relation to certain commercial crimes, where, for example, Australia is disinclined to recognize the protective principle or long arm theory adopted by countries such as the United States. In that context, see, for example, Australia's *Foreign Proceedings (Excess of Jurisdiction) Act* 1984.

a democratic system.[53] Alternative safeguards are available through the discrimination objections under s 7 of the *Extradition Act*, including discrimination on account of political opinions or a political offence.

A broader discretion in relation to bail

While it is understandable that there is concern to meet treaty obligations in relation to extradition, the present blanket requirement of special circumstances is unduly restrictive and can seriously impinge on individual liberty; particularly given the time it can take to complete all processes.[54]

5 Conclusions

Extradition law incorporates two primary values: first, ensuring that those who commit crimes are not able to seek refuge in foreign states and, second, given that individual liberty is at stake, preserving human rights and due process. The latter includes the right to be heard by an independent and objective tribunal.

The present Australian extradition law is unduly complex and does not adequately protect individual rights. A significant improvement could be made by divesting the Attorney-General of a number of responsibilities and assigning these to the courts. In addition, certain of the principles are in need of reconsideration.

As noted by Gyles J in *De Bruyn v Republic of South Africa*:

> The 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. ... The questions which arise under this statute cannot be dealt with as though they are ordinary commercial or administrative law issues.[55]

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[53] The political offence objection has been abolished in the United Kingdom. That is consistent with art 9 of the 14 October 2002 protocol to the 2000 *Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union*, which provides that no offence may be regarded as a political offence as between member states. There is provision for member states to derogate from this principle, but not in relation to defined terrorist offences. However, under the UK *Extradition Act* 2003 the political offence exception has been discarded generally.

[54] Compare, for example, the position in the United Kingdom, where under s 198 of the *Extradition Act* 2003 the usual presumption in favor of bail is preserved.

[55] (1999) 96 FCR 290, 295. See, also, *Timar v Republic of Hungry* [Full Court of Federal Court, 5 November 1999, per Weinberg J].