



Opinion by Centre
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Extradition and Mutual Assistance Changes Slip in Under the Radar

At the beginning of March this year, in the aftermath of the infamous Labor leadership showdown and when all eyes were on the Carr for Canberra drama (doesn't that all seem like ancient history!), federal Parliament passed the *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011*. Unless I missed it, the passage of this Bill into law garnered not a single headline at the time,¹ but it should have, because it makes major changes to Australia's cooperation with other countries in criminal cases.

According to the Government's press release, the Bill is aimed first and foremost at 'streamlining the extradition process and cutting delays.' A lot of this streamlining involves relieving the Attorney General of the burden of taking into account various considerations relevant to a person's eligibility for extradition (mostly rights protections) because such consideration is said to duplicate the work of the magistrates who deal with extradition applications at first instance. An alternative view is that it removes a layer of accountability from a process which has already been criticised for its lack of review rights, but it will no doubt save time as intended.

For the first time, the Commonwealth *Extradition Act 1988*, as amended by this Bill, allows a person to be extradited for minor offences (punishable by less than 12 months imprisonment) or to waive the extradition process altogether. A magistrate presiding over the case must be satisfied that the waiver is voluntary, and must inform the person of the consequences of his/her decision, but a lot of checks and balances can be bypassed this way. Thankfully, a requirement that the person be given an opportunity to have legal representation has been included, although it would be better if it were a mandatory requirement, given the gravity of the decision.

Some of the existing protections in the Act involve refusal of extradition where a person may face the death penalty or torture. They still apply after these amendments, but the wording of the death penalty protection is different if someone waives extradition. In other circumstances, before authorising 'surrender,' the Attorney-General has to consider the likelihood of the person being (a) tried, (b) convicted, and (c) sentenced to death, before proceeding to consideration of whether the death penalty is actually likely to be carried out. The new section on surrender determination after waiver simply requires her to consider whether there is a 'real risk' of the execution actually happening.

Still, there is less emphasis on diplomatic assurances from the requesting country, which is a welcome development. Such assurances are usually non-binding promises that the suspect will not be executed or tortured. Since there's no reason to seek them unless the country in question is known to persecute people, they are a dubious way of ensuring compliance with the duty not to send

people to places where we know their rights will be violated (the international obligation known as *non-refoulement*).

Unfortunately, and despite recommendations from bodies such as the Law Council, the amendments still do not prevent extradition if the person faces cruel, inhuman or degrading treatment or punishment which is not severe enough to amount to torture. Concerns over the likelihood of the person receiving a fair trial are also overlooked.

One of the more worrying aspects of these amendments is their potential effect on people who might be extradited for political offences. Before this Bill, extradition had to be refused if the alleged crime was really in the nature of a political protest. Specific crimes outlawed by multilateral treaties such as hostage-taking and war crimes have always been excluded, as have large scale crimes or attacks on diplomats or heads of State. Now though, the definition of 'political offence' will exclude 'any offence that involves an act of violence against a person's life or liberty' or 'any offence prescribed by regulations...'

The Explanatory Memorandum accompanying the Bill clarifies that terrorist offences are among those which will not be considered political offences, but there have been many instances of unpleasant governments around the world which have not hesitated to call any group agitating for better political representation or independence 'terrorists.' Not even pacifist Buddhist monks are immune. In fact, Fox News has called the Occupy protestors 'domestic terrorists,' and reported that a US Department of Defence exam labelled protests a form of 'low-level terrorism.' It is to be hoped (and expected) that the Australian Government would not extradite such people, but it would be better if the legislation excluded the possibility explicitly.

Despite these concerns, the Bill is noteworthy for some positive changes. For example, people can no longer be extradited if they 'may be punished, or discriminated against upon surrender, on the basis of [their] sex or sexual orientation.' This is in addition to the existing grounds of objection – namely race, religion, nationality and political opinion.

In addition, when it comes to the provision of official assistance in criminal matters under the 1987 *Mutual Assistance Act*, Australia can now refuse to assist if it would result in torture or discrimination on the basis of sexual orientation (in addition to existing grounds). Refusals on the basis of human rights can also be made at the investigation stage (rather than after prosecution or punishment as previously), which greatly expands this protection. However, as with extradition, ill treatment not amounting to torture and unfair trials still do not constitute grounds for refusal.

This Act constitutes major reform in the area of extradition and mutual assistance, and raises several other human rights issues (including e.g. presumptions against bail, 'serious offence' thresholds and cooperation with requests for surveillance from foreign countries). If you have an interest in this area, I urge you to familiarise yourself with these important changes and consider their implications.

1. Since I wrote about the amendments on the CastanCentre.com blog, journalist Matthew da Silva filed a piece for New Matilda about the new laws and how they might relate to Wikileaks:
<http://newmatilda.com/2012/03/27/new-laws-target-wikileaks>.