1985

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

THE EXTRADITION (FOREIGN STATES) AMENDMENT BILL 1985

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister representing
the Attorney-General
Senator the Honourable Gareth Evans, Q.C.)

(This Memorandum takes account of amendments made
by the House of Representatives to the Bill as introduced)

11761/85 Cat. No. 85 5463 8—Recommended retail price 80c

Printed by Authority by the Commonwealth Government Printer

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General Outline

In 1983 Commonwealth law Ministers agreed to amendments to the Commonwealth scheme which regulates the extradition of fugitive offenders between Commonwealth countries to improve the operation of the scheme. That scheme is the basis of domestic legislation in Commonwealth countries (in Australia's case the Extradition (Commonwealth Countries) Act 1966) which now requires amendment as a result of the changes agreed to by Commonwealth law Ministers. Since many of the amendments agreed to by Commonwealth law Ministers would also improve the operation of the Extradition (Foreign States) Act 1966 which regulate Australia's extradition relations with non-Commonwealth countries similar amendments will be made to that Act by 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. In particular the Bill incorporates amendments which are designed to facilitate the conclusion of extradition treaties with other countries.

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 Procalamation.

Clause 3 - Interpretation

This clause amends the definition section (section 4) of the Principal Act by, in particular -

- amending the definition of extradition crime to:

  (a) enable extradition to be granted for any offence which carries a penalty of death or imprisonment for not less than 12 months. Previously there was the additional requirement that the offence had to be listed in a Schedule to the Act. The 'no-list' approach now provided for avoids problems which arise from countries describing the same offence differently and should facilitate treaty negotiations with, in particular, European countries;

  (b) 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 occured in Australia;

(c) 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;

(d) 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.

- making 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.

- removing the provisions which provide that the taking of the life of the head of state of certain prescribed foreign states shall not be taken to be an offence of a political character. Those provisions are unnecessary as a decision can be taken by the Attorney-General whenever a particular case arises.

- amending the definition of magistrate to ensure that all State magistrates are covered.

Clause 4 - Application of Act in relation to foreign states to which Extradition Acts 1870 to 1935 apply.

This clause amends section 9 of the Principal Act to facilitate proof -

- that the Act applies to certain countries which have concluded treaties with Britain to which Australia has succeeded. Those countries are to be listed in a Schedule to the Act.

- of the terms of those treaties which limit the application of the Act to the country concerned.

Clause 5 - Restrictions on surrender of persons to foreign states.

This amendment makes it clear that a person is not liable to be surrendered where the offence for which his extradition is sought is an offence of a political character or because the request for extradition has in fact been made with a view to try or punish a person for an offence of a political character.

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 an offence provable on the same facts, unless he has been given an opportunity of leaving that country. This clause amends section 13 of the Principal Act 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 13 varied in minor ways from the traditional rule set out above.

Clause 6 - Notices by Attorney-General

The amendments to sub-section 15(1) of the Principal Act permit any Magistrate, rather than a particular Magistrate as previously provided, to act on a notice by the Attorney-General and permit such notices to be given when a fugitive is in or on the way to Australia. Previously such notices could not be given unless the fugitive was in or suspected of being in Australia.

The amendment to sub-section 15(2) of the Principal Act makes it clear that where a request for extradition is made the Attorney-General shall not initiate extradition proceedings if he is satisfied that the person is not liable to be surrendered, or is of the opinion that the offence for which the extradition is requested is an offence of a political character, or that the request for extradition has in fact been made with a view to try or punish a person for an offence of a political character.

Clause 7 - Issue of warrants

This clause amends section 16 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 8 - Proceedings after apprehension of person

This clause amends section 17 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 17(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, or a period specified in any relevant treaty, has 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 17(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 17(5A), (5B), (5C)).

- it removes the requirement (in the absence of a specific obligation in the extradition arrangements between Australia and the country concerned) for the country requesting extradition of Australia to supply sufficient evidence to justify the trial of the fugitive. Instead of evidence the country must now supply a warrant of arrest or copy, a description of each offence for which extradition is requested together with the relevant penalty and a statement of the acts or omissions alleged against the fugitive. It is hoped that this amendment will facilitate the negotiation of treaties with civil law countries whose systems have difficulty in adapting to supplying pre-trial evidence, (Paragraphs 17(6)(a) and (b)).

- it provides that a fugitive may not adduce evidence to contravert 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 in the situation where the relevant extradition arrangements require a requesting country to supply evidence to justify trial. The extradition hearing in such cases is intended to establish that there is sufficient evidence to justify the fugitive's trial in the requesting country (Sub-section 17(6A)).

Clause 9 - Review of Magistrate's decision

This clause inserts a new section 17A which, in effect, permits an appeal by way of re-hearing 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 10 - Surrender of fugitive to foreign state

This clause amends section 18 of the Principal Act by providing that a fugitive who is committed by a Magistrate to await extradition may only apply for 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 at the instance of the requesting country (see clause 9) the application 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 8), and makes it clear that even where a person consents to surrender the Attorney-General should still be satisfied that the person is liable to be surrendered, and not of the opinion that the offence for which his extradition is requested is an offence of a political character, or that the request for extradition has in fact been made with a view to try or punish the person for an offence of a political character.

Clause 11 -Discharge of fugitive who is not conveyed out of Australia within two months

This amendment to section 19 is consequential upon previous amendments (see clause 9 and 10) 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 12 - Interpretation

This clause amends section 20 of the Principal Act by defining an extraditable crime as any offence which carries a penalty of death or imprisonment for not less than twelve months. An extraditable crime is a crime for which Australia may seek extradition. The amendment corresponds to the no-list approach adopted with extradition crimes (see clause 3). The amendment also makes it clear that Australia may seek extradition for fiscal offences.

Clause 13 - Person surrendered by foreign state in respect of an offence not to be prosecuted or detained for other offences

This clause amends section 23 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 an 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 5). The previous speciality rule set out in section 23 varied in minor ways from the traditional rule.

Clause 14 - Jurisdiction of courts

This clause inserts a new section 24A in the Principal Act to remove any doubt as to how the jurisdiction of a State Supreme Court may be exercized.

Clause 15 - Evidence of certain matters

This clause inserts a new section 25A in the Principal Act to facilitate proof of Australia's treaty arrangements.

Clause 16 - Documents may be admitted in evidence if duly authenticated

This clause amends section 26 of the Principal Act which deals with the due authentication of documents submitted by the requesting country to take account of the amendments to section 17 of the Principal Act in relation to the documentation which must be produced by the requesting country (see clause 8).

Clause 17 - Taking of evidence in respect of criminal proceedings in foreign states

This clause amends section 27 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. In other words Section 27 should not be used at the inquisititorial stage and before charges have been levied.

- 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 18 - Taking of evidence for purposes of extradition

This clause amends section 27A 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 27A the Magistrate does not act judicially and exercizes purely a recording function. The clause therefore amends section 27A to make it clear that the accused person is not entitled to appear or be represented.

Clause 19 - Repeal of section 30

Section 30 of the principal Act is repealed because the forms referred to in that section are to be placed in the Regulations.

Clause 20 - Schedules to Principal Act

This clause repeals Schedule 1 and Schedule 2. Schedule 1 is repealed because of adoption of the no-list approach. Schedule 2 is repealed because all the forms are now to be placed in Regulations. The new schedule is included as a consequence of the amendment to section 9 (see clause 4).

Clause 21 - Formal and consequential amendments

This clause provides for minor drafting amendments.

Clause 22 - Savings

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