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SUBMISSION

To:

Extradition and Mutual Assistance Review Team
International Crime Cooperation Branch
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600
AUSTRALIA

reviews@ag.gov.au

PURPOSE:

comment on proposed amendments to Australia's extradition and mutual assistance laws.

BACKGROUND:

The Attorney General's Department (Authorised By: Branch Head, International Assistance and Treaties Branch) invited citizens and organizations to submit Submissions in relation to a comprehensive review of Australia's extradition and mutual assistance policies and processes and the operation of the *Extradition Act 1988* and the *Mutual Assistance in Criminal Matters Act 1987* , with a request that Submissions be focused on the issues boxes presented throughout the paper headed "**A new extradition system -** A review of Australia's extradition law and practice". The closing date is 14 March 2011.

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INITIAL PROBLEMS AND ISSUES WITH METHODOLOGY:

The Attorney General's Department writes: *What is the case for reform?*

The current extradition arrangements involve outdated, cumbersome legal frameworks which must be overhauled in light of the increasing globalisation of the law enforcement fight against ***transnational crime and terrorism.***

Reform is needed so that Australia can extradite to and from a larger number of countries and can grant extradition for a wider range of offences. The process must also be more responsive and streamlined in order to prevent lengthy delays and offer appropriate safeguards.

1. **Clearly the thrust is from** the Executive Arm of Government, and is looking at the issue from the **one-dimensional perspective** of **"Transnational Crime and Terrorism**".

The public policy perspectives of **"fairness**" and a "**level playing field**" that pervades the Parliamentary and Judicial Arms of Government is downplayed.
The implied and erroneous presumption is that "everyone is a potential criminal" and that a "foreign country would not send a Request for extradition unless the person is a Criminal". This is a dangerous presumption, but one common in Law-Enforcement. Many in Law-enforcement, like many areas, suffer from a "biased professional world view", ie divorce lawyers can tend to take the view that large numbers of married couples are deluding themselves and actually heading for divorce, psychiatrists can tend to take the view that large numbers of people are mentally ill eventhough the people don't recognise this, Law-enforcement officers can tend to take the view that large numbers of people are criminals and that everyone has something to hide, and so on.

This must be balance by the countervailing public policy that it is better for 5 'allegedly guilty" persons to go free rather than 1 "innocent" person go to jail for a crime they did not commit. This is the presumption of innocence.

We do not live in a world of some 191 countries where all countries are the same and treat their citizens the same, and have the same respect for humanity and life. **There is no "level-playing field.** Consequently Extradition Laws must not be based on the presumption that there is a level-playing field. A more **'holistic' approach** to the respect for humanity and life and the lack of a level playing field must be taken by Australian politicians and Governmental Officials in their duty to protect Australian Citizens. This would explain the prior Treaty approach which worked well where 2 countries agree to create a more level playing field between them in this regard.

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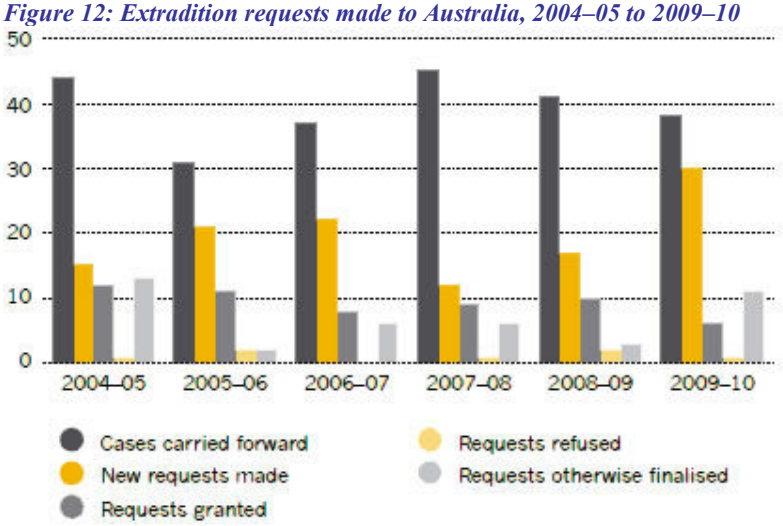
2. SMALL VOLUME – not a "flood":

From Annual Report Attorney General's Department 2009-2010:
Figure 12: Extradition requests made to Australia, 2004–05 to 2009–10



The Attorney general's Annual Reports clearly demonstrate that given there very low number of Extradition Requests, and that the Categories of alleged Offences tend to have about only 1 or 2 for Australian Citizens annually, and 4 to 10 non-citizens. At this level, many of the Guiding Principals for the Review are difficult to implement, as the Guiding Principals tend to imply a 'critical mass or number' that is already large, and by implication growing. This is not the current situation, with very small total annual numbers of about 30-45, of which about half are refused. Further there is no evidence of any growing number of persons being sought for extradition for "transnational crime and terrorism".

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Submissions on the Issues sought by The Attorney General's Department:

A. Issue 12: Should Australia Consider Citizenship?

SUBMISSION:

1. Yes. - Sovereignty: The extradition process should operate to support Australia's national interests.

2. There should be a distinction between:-
   a) Australian Citizens,
   b) Australian Residents and
   c) Non-Citizens and non-residents.

Rights of Australian Citizens paramount

The former Prime Minister Mr Rudd[1] has spoken about the need for the interests of Australian Citizens to be paramount, especially when foreign countries arrest or take or seek to take Australian Citizens.

Any exercise of the power to extradite a Citizen must be offset by the reciprocal obligation of the Commonwealth to protect the legitimate civil and democratic rights of all Citizens. This moral imperative must not be forgotten.

Apart from the obvious downside of being faced with a serious alleged criminal charge, fighting that charge in a foreign jurisdiction involves all sorts of additional burdens. The witnesses that Australians may need to call or documents they may want to rely on may be inaccessible or thousands of miles away. They will have to engage foreign lawyers and foreign translators to try and understand what is happening around them and these may be more expensive than in Australia. The foreign system will be unfamiliar and possibly prone to delay. As a foreigner Australians may be held in detention pending a trial. The prison system there will usually be more onerous than Australia's.

Low number of Australians involved.

The Attorney Generals Annual Report clearly shows that only 1 or 2 Australians are involved for extradition on an annual basis. This number is so low that there can be no increase in efficiencies or reduced duplication. It really is a case by case situation.

As for Australian Residents, these should be considered as having the same level of protection as Citizens or at least a very near same level.

[1] Radio National News at 6.30AM on 15 July 2009

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B. Issue 2: Countries Australia will deal with

Should Australia be able to receive extradition requests from any country? Should Australia be able to make extradition requests to any country? (noting that laws in some countries might require a treaty to receive such requests)

SUBMISSION:
The public policy perspectives of **"fairness**" and a "**level playing field**" between States should continue to apply to Extradition. There are some approximate 191 Countries in the World, and these Countries have various levels of recognition between them. Some Countries may be only recognised by 1 other Country (which may support its independence – such a Turkish Cyprus), while others may have 70, and others almost universal recognition. New Countries are being regularly created, and prior Countries being dismembered. The World's 'Countries' are in a constant fluid situation, and this will not change. One only has to look at the world Map in 1990, 1939, 1950 and now to see these changes.

Australia should not recognise Requests from any 'Country', but rather continue to develop good neighbourly relations with other Countries as equals, and as that Country protects its Citizens then so should Australia consider the same protection of its Citizens. Those Countries that still follow the Law of the Jungle – that is 'everyone is my enemy' should be treated accordingly with no-one extradited. Those that follow the Old Testament Law – that is 'an eye for an eye' should also be treated accordingly, and great care taken to ensure the welfare of any non-resident being considered for extradition. Citizens should not be extradited. Finally those that follow the New Testament Law – that is 'turn the other cheek' may have a more level playing field for any non-citizen being considered for extradition.

Example:
On the International stage, for example, the newly created Country of Croatia, which emerged in the 1990's from the illegal and violent secession of the former Yugoslav republic, still embraces covert Racial Discrimination (Amnesty International 2010 Report) against a substantial portion of the former population of that former Yugoslav republic. This Country also engaged in the largest single act of ethnic cleansing in Europe in August 1995 when over 250,000 civilians were displaced and fled.

As a result of that illegal and violent secession Croatia is seeking the Extradition of an Australian Citizen Daniel Snedden for the purposes of seeking to question him in relation to events that occurred in the County of Yugoslavia in early 1990, while elements within that former Yugoslav republic were seeking to illegally and violently create a new independent entity.

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This new Croatia, after waiting some 15 years, and only after Mr Snedden had been defamed in Australia, did a Magistrate in Croatia, pursuant to a repealed procedural Law, and on the basis of a repealed Law, issue an unlawful Detention Order for the questioning of Mr Snedden and then issued an unlawful Arrest Warrant. However these illegalities were simply ignored and a Request submitted to Australia by the Croatian Minister, who proffered a document full of illegalities. Regardless, Croatia is seeking to use the 'no-evidence rule' to hide all of these illegalities, and attack Mr Snedden personally. The Attorney General is well aware of these issues, but the result is that Mr Snedden (who is presumed innocent) has spent some 4 years in detention as a result.

There is no Level-playing field between Australia and Croatia.
This is demonstrated by the fact that in the first "Independent Croatian Constitution" there was an express prohibition banning the extradition of Croatian Citizens. When Australia in September 1996 entered into a Note of understanding, one of the Treaties that was envisaged to continue in force was the Treaty between Serbia & Great Britain of 1900 (based on mutuality and reciprocity). However the new Croatia had unilaterally repudiated this mutuality and reciprocity – but said nothing. Even now, after recently amending its Constitution, it is still prohibited from extraditing its Citizens to Australia (notwithstanding arguments that it can extradite non-croatians to Australia (and being silent on the continued non-extradition of its citizens). An Al-quaida terrorist with a Croatian citizenship could well cause harm and do large damage in Australia, and then escape to Croatian, and be immune from the threat of extradition to Australia.

What about other countries where there is no 'level-playing field'?
Countries such as Iraq, Iran, Afghanistan, to name but a few, should have any Requests for Extradition heavily vetted and reviewed to avoid innocent Australians being sent there simply on the basis of 'allegations without any proof" and be held in their detention centres. Are our soldiers at risk of being Requested to be sent there for questioning and to sit in their jails pending their justice systems ?

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C. Issue 4: Dual criminality

Should Australia extradite for offences that do not constitute an offence under Australian law? Should Australia retain a discretion to refuse to extradite a person if the conduct is not considered criminal under Australian law? Should dual criminality be a discretionary ground to refuse extradition?

SUBMISSION:
Yes, as in some Countries, as referred to above , the Old Testament Law of 'an eye for an eye' applies. Further no-one should be made to face the possibility of extradition to Countries that do not have Anti-discrimination Laws, or who do not actively promote anti-discrimination.

However this area is hard to reconcile with the request for focus on "terrorism" or "transnational crime", and the review needs to be wider than the narrow constraints sought.

D. Issue 9: Political offence exception

Should the political offence exception be abolished?

SUBMISSION
1. No. Maximum protection should be provided to Australian Citizens, Residents and Non-residents from politically motivated requests.

E. Issue 11: Discrimination

Should Australia continue to not extradite a person sought for the purpose of prosecuting or punishing the person on account of his or her race, religion, nationality or political opinion? Should Australia continue to not extradite where the person sought may be prejudiced at his or her trial or punished, detained or restricted in his or her personal liberty, by reason of his or her race, religion, nationality or political opinion?

Should Australia extend these grounds in the Extradition Act to include colour, sex, language, and other status?

SUBMISSION:
1. Yes, Racial or other forms of discrimination must be considered in relation to the bona fides of any Requests. This is in keeping with the 'level-playing field' policy of protecting Citizens and their civil rights from abuse.
2. The recent case of Mr Snedden , referred to in detail above, demonstrates the issues confronting a Citizen where there is no level-playing filed, such as with Croatia, a Country which overtly and covertly embraces inter alia racial discrimination (see Amnesty International Reports 2010 and earlier Reports).

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F. Issue 17: Judicial review mechanism

Should Australia adopt a single judicial review mechanism? Should judicial review be deferred until the end of the extradition decision making process?

SUBMISSION:

1. There should be the right to seek bail on more that the one occasion as at present and the power in Magistrates and Judges to grant bail at any time. This limitation to only 1 bail hearing severely restricts a Citizen who may be jailed for years from being properly able to give instructions, even where he is being held on a Request to ask Questions about an allegation.
2. The current system should be retained in some form to allow Australian Citizens the maximum protection against Requests based on other than good intentions.
3. There should be an onus on the Requesting Country, where it does not use English, to prove that its translations are absolutely correct, and without errors, as these can lead to Magistrates and Judges and the Minister being mislead. It could be a requirement that Requesting Countries use and pay Australian Certified Translators for such documentation. Lack of a level-playing field.
4. There should be an onus on the Requesting Country, where it does not use English, to prove that its documentation is in compliance with its Criminal and Procedure Laws , to avoid miscarriages of justice. At the present time this is presumed, and in real situations it is left to the Citizen at his expense to try and obtain detailed legal advise as to the validity of the documentations in the Requesting Country, before any judicial processes. Lack of a level-playing field.
5. There should be allowed in Judicial Review the ability to introduce fresh and more up-to-date evidence about matters surrounding the Request, rather than be limited to the matters presented to the Magistrate only. The Citizen should have the right to introduce and rely upon additional facts and evidence of which he may not have been aware of at the Magistrate initial Hearing into the Request and its associated matters. The onus should be on the Requesting Country to provide as much detail as possible, including things which do not support its Request, to be presented.

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G. Issue 21: Eligibility for surrender

Australia could remove the magistrate's current section 19 stage decision on the person's eligibility for surrender. The Minister could decide whether the person is eligible for surrender.

SUBMISSION:

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2. There should be an onus on the Requesting Country, where it does not use English, to prove that its translations are absolutely correct, and without errors, as these can lead to Magistrates and Judges and the Minister being mislead. It could be a requirement that Requesting Countries use and pay Australian Certified Translators for such documentation. Lack of a level-playing field.
3. There should be an onus on the Requesting Country, where it does not use English, to prove that its documentation is in compliance with its Criminal and Procedure Laws , to avoid miscarriages of justice. At the present time this is presumed, and in real situations it is left to the Citizen at his expense to try and obtain detailed legal advice as to the validity of the documentations in the Requesting Country, before any judicial processes. Lack of a level-playing field.

H. Issue 24: Backing of foreign arrest warrants

Under the possible model in Flowchart 2, rather than the Minister considering extradition requests, a magistrate could indorse a foreign arrest warrant.

1. There should be an onus on the Requesting Country, where it does not use English, to prove that its translations are absolutely correct, and without errors, as these can lead to Magistrates and Judges and the Minister being mislead. It could be a requirement that Requesting Countries use and pay Australian Certified Translators for such documentation. Lack of a level-playing field.
2. There should be an onus on the Requesting Country, where it does not use English, to prove that its documentation is in compliance with its Criminal and Procedure Laws , to avoid miscarriages of justice. At the present time this is presumed, and in real situations it is left to the Citizen at his expense to try and obtain detailed legal advise as to the validity or illegality of the documentations in the Requesting Country, before any judicial processes. Lack of a level-playing field. The case of Mr Snedden is a clear example of such abuse.

14 march 2011
SYDNEY