



Australian Government
Attorney-General's Department

A new extradition system

A review of Australia's
extradition law and practice

December 2005

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ISBN: 0 642 21171 X

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Foreword

When the Extradition Act was introduced in 1988, it was a sophisticated and all-encompassing system which met the needs of Australia's international law enforcement activities.

However, our world in 2005 is dramatically different from our world in 1988.

International travel, both in and out of Australia, has tripled. Technology such as the internet, which we now take for granted, was only in its developmental stages in 1988. An estimated nine million Australians are now users of the world wide web.

Mobile phones were launched in Australia in 1987 and 100,000 services were connected the following year. Now, 81 per cent of Australians use a mobile and the figure is expected to increase to 94 per cent by the middle of 2006.

Transnational crime and the threat of terrorism are now among the highest priorities for law enforcement agencies.

Improved communications have made it easier for criminals to plan crimes and commit them across borders, and increased international travel has made it easier for them to escape justice.

It is time to look at new ways to improve legal cooperation between countries and ensure that criminals do not escape justice simply by crossing a border.

The Australian Government has placed a high priority on reviewing extradition legislation and practice. Regular reviews of our extradition system will mean that Australia continues to have strong law enforcement arrangements and supports other countries in fighting transnational crime.

This examination of current extradition laws and procedures will result in a new, more streamlined and comprehensive system that will once again place Australia as a world leader in extradition.

I encourage you to contribute to the review and welcome your submissions as we strive to develop an extradition system which stands Australia in good stead for the law enforcement fight against crime.



CHRIS ELLISON
Minister for Justice and Customs



Part 1: Introduction

What is the scope of this review?

This review is a wide-ranging policy review that considers all the features of Australia's extradition system, including extradition laws and practical arrangements.

The *Extradition Act 1988* provides the legislative basis for extradition in Australia. It is underpinned by international obligations in both multilateral and bilateral treaties.

In addition to the Act, there are practical arrangements in place for handling extradition requests. The key agencies involved in extradition in Australia are the Attorney-General's Department, the Commonwealth Director of Public Prosecutions, the Australian Federal Police and State and Territory law enforcement and prosecution agencies. Magistrates and Courts are also involved.

The policy framework for this review is illustrated in Figure 1 on page 5. As set out in Figure 1, the objective of this review is to develop a responsive, streamlined extradition system that effectively combats domestic and transnational crime, including terrorism, with appropriate safeguards.

This paper only deals with extradition between Australia and other countries. It does not deal with extradition between Australian States and Territories.

The terms of reference for this review are at Appendix 1.

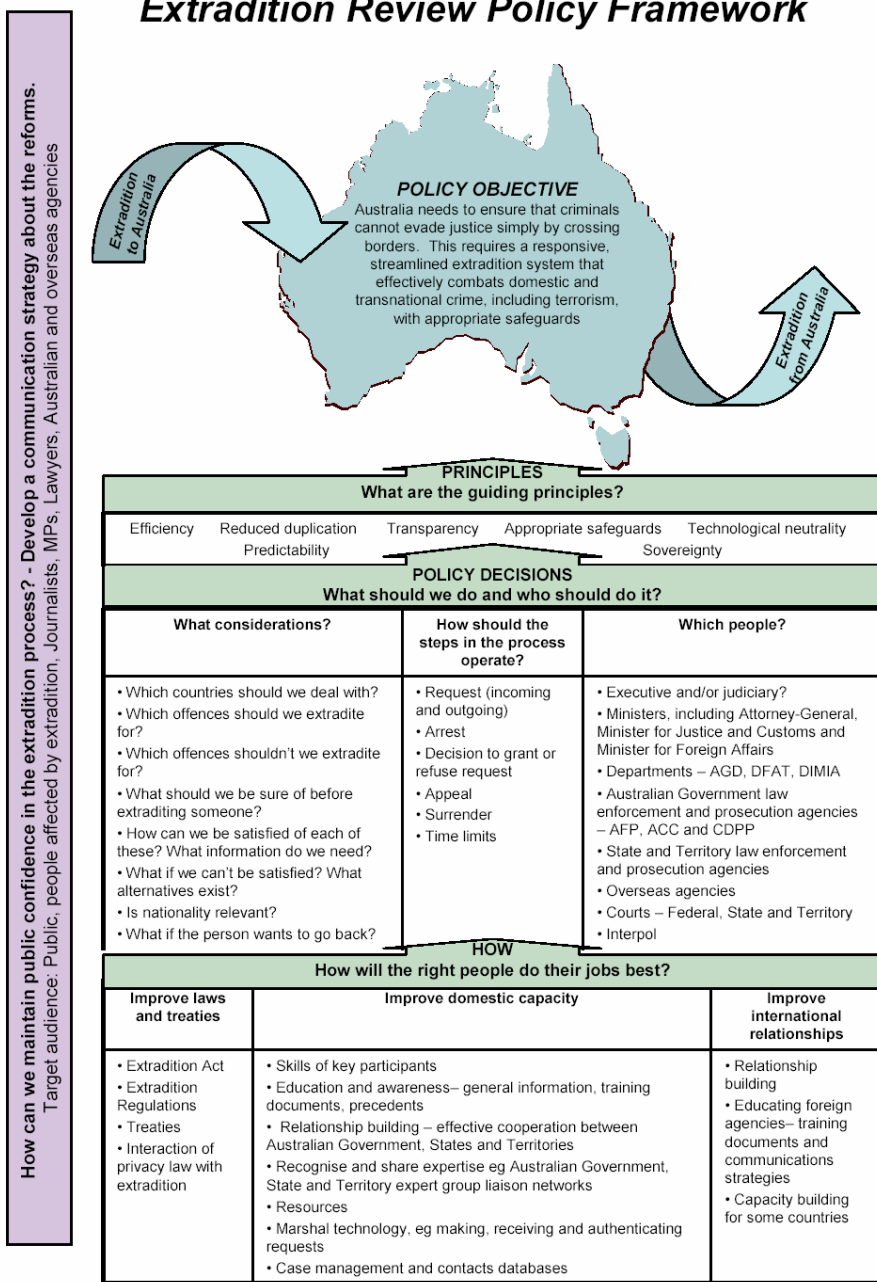
What is extradition?

Extradition allows one country to send a person to another country to face criminal charges or serve a sentence. It requires a Government to Government request.

Is extradition the same as deportation?

No. Extradition is different from deportation. Extradition is a process countries use to force a person to face a criminal process in a particular country. Deportation is one of the ways used to remove a person from a country for immigration purposes.

Figure 1: Policy Framework



Why is the Government conducting this review?

At the 2004 John Barry Memorial Lecture, Australian Federal Police Commissioner Mick Keelty noted that:

Today we live in a world where crime has become incredibly sophisticated and complex. It easily transcends borders ... and involves techniques that evolve as fast as technology is allowing...

Crimes committed with or against computers or communications systems are increasing rapidly and traditional crimes such as money laundering and the trafficking of drugs and firearms are being facilitated by new technology.

Strengthening international cooperation mechanisms, including extradition, is essential to addressing the complexities involved in bringing people to justice. A 2004 report of the United Nations' High-Level Panel on Threats, Challenges and Change notes that:

Three basic impediments stand in the way of more effective international responses: insufficient cooperation among States, weak coordination among international agencies and inadequate compliance by many States.

The purpose of this review is to ensure that Australia has the best extradition system in place so that it can cooperate effectively with other countries to combat crime.

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.

In writing this paper we have tested longstanding assumptions about extradition, for example, the necessity of the political offence exception to extradition, speciality and the 'section 19' hearing (see Issues 9, 13 and 21 in Parts 3 and 4). This approach is intended to broaden thinking on the extradition system and allow for the development of the most appropriate extradition system to take Australia into the future.

What is transnational crime?

Transnational crime offences are those whose inception, prevention and/or direct effect or indirect effect involve more than one country (United Nations, 1995). Such crimes include illegal trafficking in firearms and drugs, smuggling of stolen goods, credit card forgery, money laundering, people smuggling, and the trafficking in women and children.

What are the guiding principles for this review?

As set out in Figure 1, the extradition reform issues are guided by the following principles:

- *Efficiency*: Resources, including time, labour and money, should be used efficiently to ensure that the extradition process can be finalised without unnecessary delay. The process needs to be efficient to minimise the time a person spends in custody awaiting an extradition decision
- *Reduced duplication*: The extradition process should avoid duplication of decision making, where possible
- *Transparency*: The extradition process should be open and accountable
- *Appropriate safeguards*: The extradition process should have appropriate human rights safeguards and provide appropriate judicial review
- *Technological neutrality*: The extradition process should be flexible enough to respond to advances in technology. For example, we should be able to accept requests with ribbons and seals as well as requests transmitted electronically (either by email or lodged over the web). The extradition process should encompass the changing nature of crime over time
- *Predictability*: The extradition process should be clear and certain so that the person who is the subject of an extradition request and the countries involved know how the process works, and
- *Sovereignty*: The extradition process should operate to support Australia's national interests.

1. **Principles**: Are these principles appropriate? Should any other principles apply?

How does this paper work?

This paper provides an overview of the major issues to be considered in the review of Australia's extradition law and practice. The paper follows the framework outlined in the Extradition Review Policy Framework (Figure 1).

Part 1 is an introduction to the paper.

Part 2 describes how the current extradition system works. It includes four flowcharts of the current system, including the general system and the backing of arrest warrants system Australia uses with New Zealand.

Part 3 discusses the key considerations for extradition reform. The way these considerations are addressed will shape Australia's new extradition system.

Part 4 describes a possible new extradition system. It contains four flowcharts:

- Flowchart 1 is a model for handling incoming extradition requests generally
- Flowchart 2 is a model for handling incoming extradition requests from particular countries using a backing of arrest warrants scheme
- Flowchart 3 is a model for making extradition requests to other countries generally, and
- Flowchart 4 is a model for making extradition requests to particular countries using a backing of arrest warrants scheme.

Part 5 discusses how key people in the extradition process can do their jobs best. It discusses:

- improving laws and treaties
- improving domestic capacity
- improving international relationships
- marshalling technology, and
- simplifying authentication requirements.

Part 6 discusses how the Australian Government will communicate the details of Australia's new extradition policy to relevant stakeholders both in and outside Australia and how it will maintain public confidence and awareness in Australia's extradition system.

Part 7 discusses the next steps for this review, summarises the key issues that could lead to changes to the current system and seeks comments on this paper.

Throughout the paper there are boxed statements of key issues. These issues are a catalyst for further discussion and comments.

We seek your comments on this paper by 31 March 2006.

Please send written comments 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

Unless confidentiality is requested, we will assume that submissions can be made public.

Part 2: How does the current extradition system work?

Australia's current extradition system contains two processes:

- a process for countries other than New Zealand whereby extradition requests are made on a Government to Government basis, and
- a process for New Zealand whereby requests are effectively made on a police to police basis to back the other country's arrest warrants.

Although the Act refers to the Attorney-General, the Minister for Justice and Customs generally makes extradition decisions in the process for countries other than New Zealand. In the process for New Zealand there is no executive government involvement.

Each process is described below and is separated into incoming and outgoing requests.

Current process for incoming requests generally

Figure 2 on page 12 outlines the current process for incoming extradition requests. The process applies to countries other than New Zealand. The steps in the process are described below.

Extradition requests and urgent provisional arrest requests

The current extradition process starts with an extradition request from a foreign country (see Figure 2, box 1). The Attorney-General's Department receives the extradition request. An urgent request to provisionally arrest a person before the extradition request is received can be accepted (see Figure 2, box 1A).

Minister formally receives and accepts extradition request

The Minister for Justice and Customs has a discretion to accept an extradition request. If the Minister decides to accept the request, the Minister issues a notice to a magistrate that the request has been

received if the Minister is not of the opinion there is an extradition objection and is satisfied:

- the person is an extraditable person in relation to the extradition country, and
- that it is an extradition offence and satisfies dual criminality.

An extradition objection includes where the offence is a political offence or only a military offence, or where

Extraditable person means a person who has been convicted in a foreign country, or a person for which a foreign country has issued an arrest warrant.

Dual criminality means that the conduct would be an offence in both Australia and the foreign country.

Extradition offence means an offence punishable by at least 12 months imprisonment.

Extradition country means a country declared in regulations. Whenever Australia ratifies a bilateral extradition treaty it is enacted in regulations. In addition, Australia has declared some countries in regulations with which we do not have a bilateral extradition treaty, such as Denmark.

there is double jeopardy. The extradition objections are listed in Figure 2, box (e).

The person is arrested and the magistrate considers bail

The magistrate issues a warrant for the arrest of the person (see Figure 2, box 3). The arrest warrant is executed by the police.

The person must be remanded in custody unless there are 'special circumstances' that warrant bail being granted.

The magistrate determines if the person is eligible for surrender

The magistrate decides whether the person is eligible for surrender. The magistrate considers:

- whether the necessary documents are produced
- if there are any additional requirements imposed by regulations
- whether there is dual criminality, and
- whether there is an extradition objection (see Figure 2, box 4).

The Commonwealth Director of Public Prosecutions acts for the requesting country in extradition proceedings before the magistrate.

Review of the magistrate's decision

The person or country can seek review of the decision of the magistrate (see Figure 2, box 4B).

Minister decides if the person should be surrendered

If the magistrate determines the person is eligible for surrender, or if the person consents to extradition, the Minister for Justice and Customs decides whether to surrender the person (see Figure 2, box 5).

The person may make submissions to the Minister about the surrender decision.

The Minister considers whether there are any extradition objections, including torture, death penalty, speciality, and treaty requirements, and has a final general discretion whether to surrender the person.

Prosecution in lieu – Australian citizens

The Minister may consent to the prosecution of an Australian citizen for the offence in Australia instead of extraditing that person (see Figure 2, box 5A). This can only be done if Australia refuses extradition on the ground of citizenship and the other country would not extradite its own citizen in similar circumstances. Australia does not, as a matter of practice, refuse to grant extradition on the grounds of citizenship.

Consent

The person may consent to extradition (see Figure 2, box 4A).

Judicial review of extradition

Key decisions in this process can be subject to judicial review (see Figure 2, box (h)).

Decision making

The decision making matrix at Appendix 2 explains each decision making stage in more detail and has a summary of the judicial review and appeal mechanisms. A number of issues, such as 'extradition objections', are considered numerous times in the process and appeals can overlap.

One of the key things we are working towards is reduced duplication of decision making.

Surrender and return of person

If the person is being surrendered, the Attorney-General's Department liaises with the foreign country about the logistics for this.

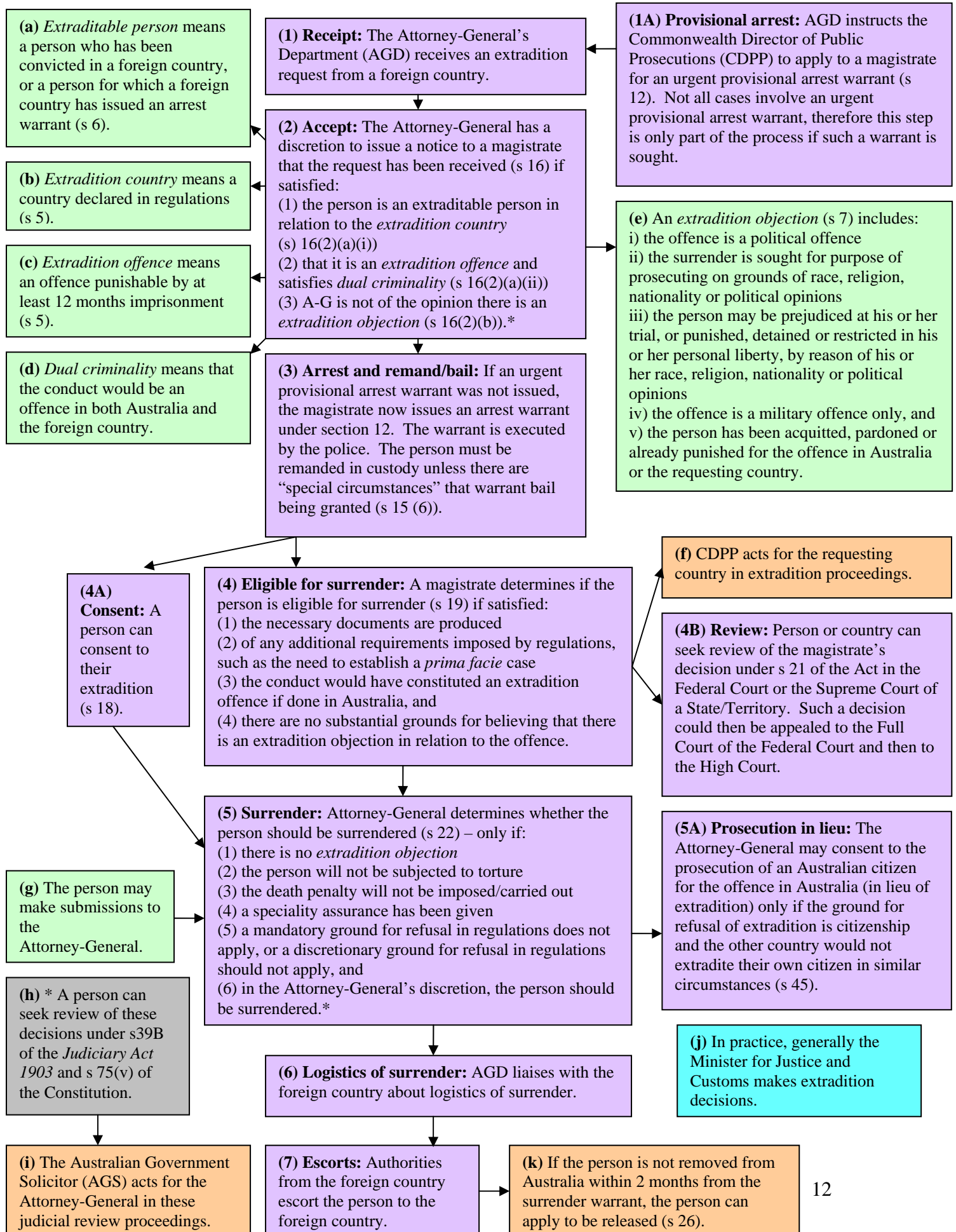
Authorities from the foreign country escort the person to the foreign country (see Figure 2, boxes 6 and 7).

If the person is not removed from Australia within 2 months from the surrender warrant being issued, the person can apply to be released (see Figure 2, box k).

Conclusion

The Extradition Act creates a tiered decision-making structure for extradition requests to Australia. In addition to a number of other factors, decisions made by the Minister take into account some of the same factors as those taken into account by the magistrate.

Figure 2: Current procedure for incoming extradition requests under the Extradition Act 1988



Current process for outgoing requests generally

Figure 3 on page 14 outlines the current process for outgoing extradition requests. This process applies to countries other than New Zealand. The steps in the process are described below.

Australian law enforcement agency identifies the need to extradite and obtains an arrest warrant

A Commonwealth, State or Territory law enforcement agency identifies the need to extradite a person from a foreign country (see Figure 3, box 1) and obtain an arrest warrant (see Figure 3, box 2).

Urgent provisional arrest requests

If it is an urgent matter the Attorney-General's Department, on receipt of an arrest warrant from the Commonwealth, State or Territory law enforcement agency, can seek a provisional arrest through Interpol or directly from the foreign country itself (see Figure 3, box 1A).

Director of Public Prosecutions drafts extradition request

The Commonwealth Director of Public Prosecutions or the relevant State or Territory Director of Public Prosecutions provides advice and drafts extradition requests (see Figure 3, box 3). The Director of Public Prosecutions undertake to prosecute the person if they are returned to Australia.

The extradition request is sent to the Attorney-General's Department to ensure the request is in the proper form and complies with the requirements of the relevant treaties and the Extradition Act (see Figure 3, box 4).

Minister decides whether to make the extradition request

The Minister for Justice and Customs signs the request (see Figure 3, box 5). The Minister's decision to make an extradition request is subject to judicial review.

Attorney-General's Department sends extradition request to foreign country

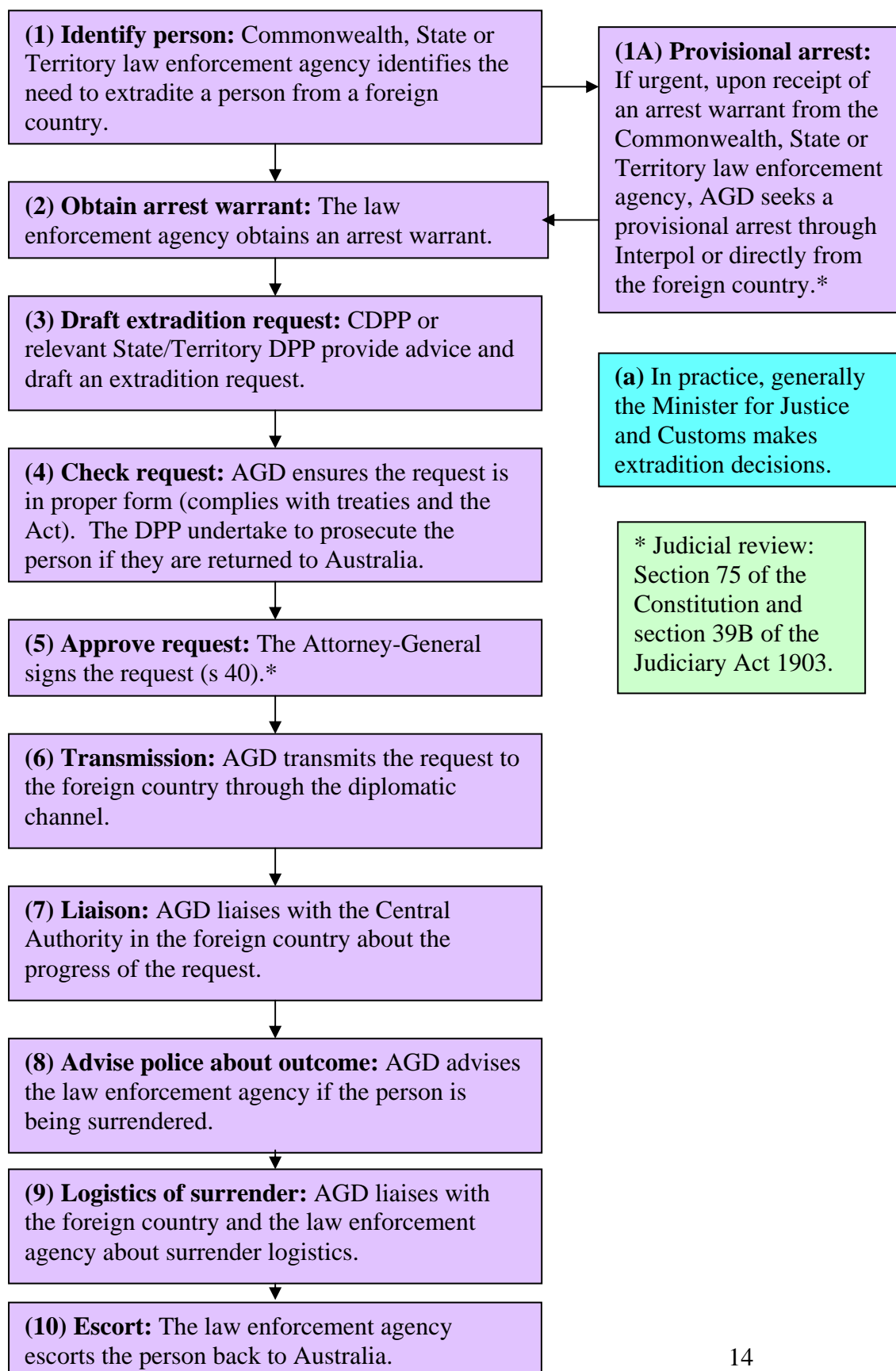
The Attorney-General's Department transmits the extradition request to the other country through diplomatic channels (see Figure 3, box 6). The Attorney-General's Department liaises with the Central Authority in the other country about the progress of the request (see Figure 3, box 7).

Surrender and return of person

The Attorney-General's Department advises the relevant Australian law enforcement agency if the person is being surrendered. The Attorney-General's Department liaises with the other country and the Australian law enforcement

agency to arrange the logistics of surrender (see Figure 3, boxes 8 and 9). The Australian law enforcement agency escorts the person back to Australia (see Figure 3, box 10).

Figure 3: Current procedure for outgoing extradition requests under the *Extradition Act 1988*



Current Australia/ New Zealand backing of arrest warrants system – incoming

Australia currently has a backing of warrants system in place with New Zealand. The process is assisted by New Zealand Police Liaison Officers who are located in Sydney and Canberra. Figure 4 on page 17 outlines the current process for incoming extradition matters from New Zealand. The steps in the process are described below.

Receipt of arrest warrant – New Zealand Police contact Australian Federal Police

This extradition process starts with the Australian Federal Police receiving an arrest warrant from New Zealand through a New Zealand Police Liaison Officer located in Australia.

Urgent provisional arrest

In urgent circumstances, a magistrate can issue an arrest warrant without receipt of a New Zealand arrest warrant where:

- an application has been made on behalf of New Zealand for the issue of a warrant
- a New Zealand arrest warrant has been issued
- no application has been made for the indorsement of the arrest warrant, and
- the issue of the arrest warrant in relation to the person is, having regard to any information that the magistrate considers relevant, justified in all the circumstances (see Figure 4, box 1A).

CDPP seeks indorsement of New Zealand arrest warrant from Australian magistrate

The Commonwealth Director of Public Prosecutions seeks indorsement of the warrant from a magistrate. The magistrate must make an indorsement on the warrant where an application is made in the statutory form for the indorsement of a New Zealand warrant, with an affidavit sworn by an Australian Federal Police Officer that the person the subject of the warrant is, or is suspected of being, in or on his or her way to Australia (see Figure 4, box 2).

This is different from the general extradition process described above as the Attorney-General's Department is not involved in the Australia-New Zealand scheme.

The person is arrested

The Australian Federal Police arrest the person who is brought before a magistrate and remanded in custody unless there are 'special circumstances' (see Figure 4, box 3).

Magistrate decides whether to surrender the person

The Magistrate shall make an order surrendering the person unless the Magistrate is satisfied by the person that, because the offence is trivial, the accusation of the offence was not made in good faith or in the interests of justice, or a lengthy period has elapsed since the offence was committed, or for any other reason, it would be unjust, oppressive or too severe a punishment to surrender the person to New Zealand, in which case the magistrate shall order that the person be released (see Figure 4, box 4).

This is different from the general extradition process described above as the Minister is not involved in the Australia-New Zealand scheme.

Surrender and return of person

The Australian Federal Police liaise with the New Zealand Police Liaison Officer to arrange the logistics for the surrender of the person (see Figure 4, box 5).

The New Zealand Police escort the person being extradited back to New Zealand (see Figure 4, box 6).

Review of surrender decision

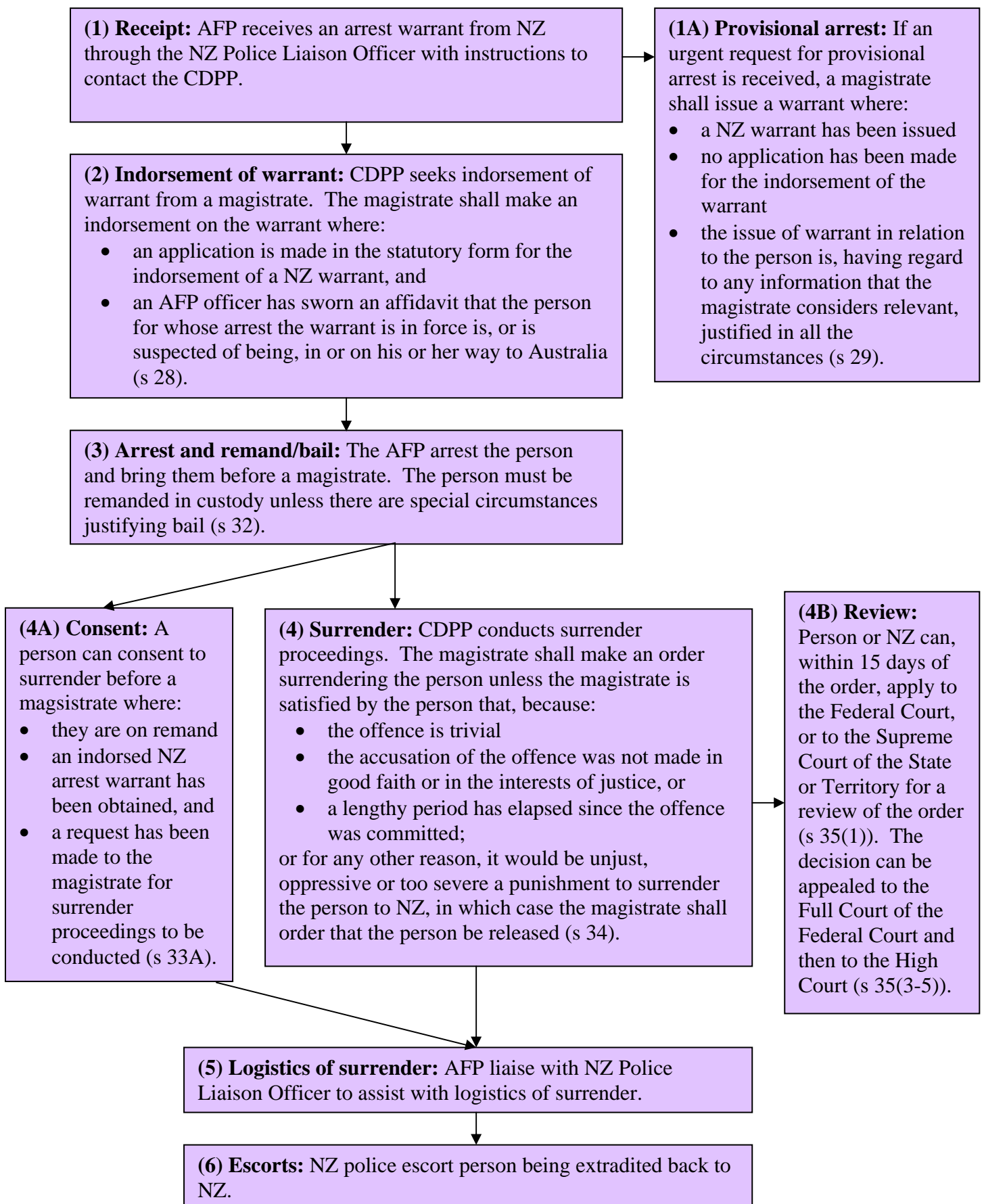
The surrender decision can be reviewed by the Federal Court or the Supreme Court of the State or Territory within 15 days. The decision can be appealed further to the Full Court of the Federal Court and then the High Court (see Figure 4, box 4B).

Consent to extradition

The person can consent to extradition once:

- they are on remand
- an indorsed New Zealand warrant has been obtained, and
- a request has been made to the magistrate to undertake surrender proceedings (see Figure 4, box 4A).

Figure 4: Current procedure for incoming extradition requests from New Zealand (NZ) under the *Extradition Act 1988*.



Current Australia/ New Zealand backing of arrest warrants system – outgoing

Figure 5 on page 19 outlines the current system for outgoing requests to New Zealand. The steps in the process are described below.

Australian law enforcement agency identifies the need to extradite

The process for an outgoing request to New Zealand starts when a Commonwealth, State or Territory law enforcement agency identifies the need to extradite a person from New Zealand (see Figure 5, box 1).

Urgent provisional arrest by Australian law enforcement agency

If it is an urgent matter, the relevant law enforcement agency obtains an arrest warrant and seeks a provisional arrest from New Zealand, through the New Zealand Police Liaison Officer (see Figure 5, box 1A).

Law enforcement agency obtains an arrest warrant

The law enforcement agency liaises with the Director of Public Prosecutions in their own jurisdiction about making an extradition request.

The law enforcement agency applies to a magistrate for an arrest warrant (see Figure 5, box 2).

Transmission of request

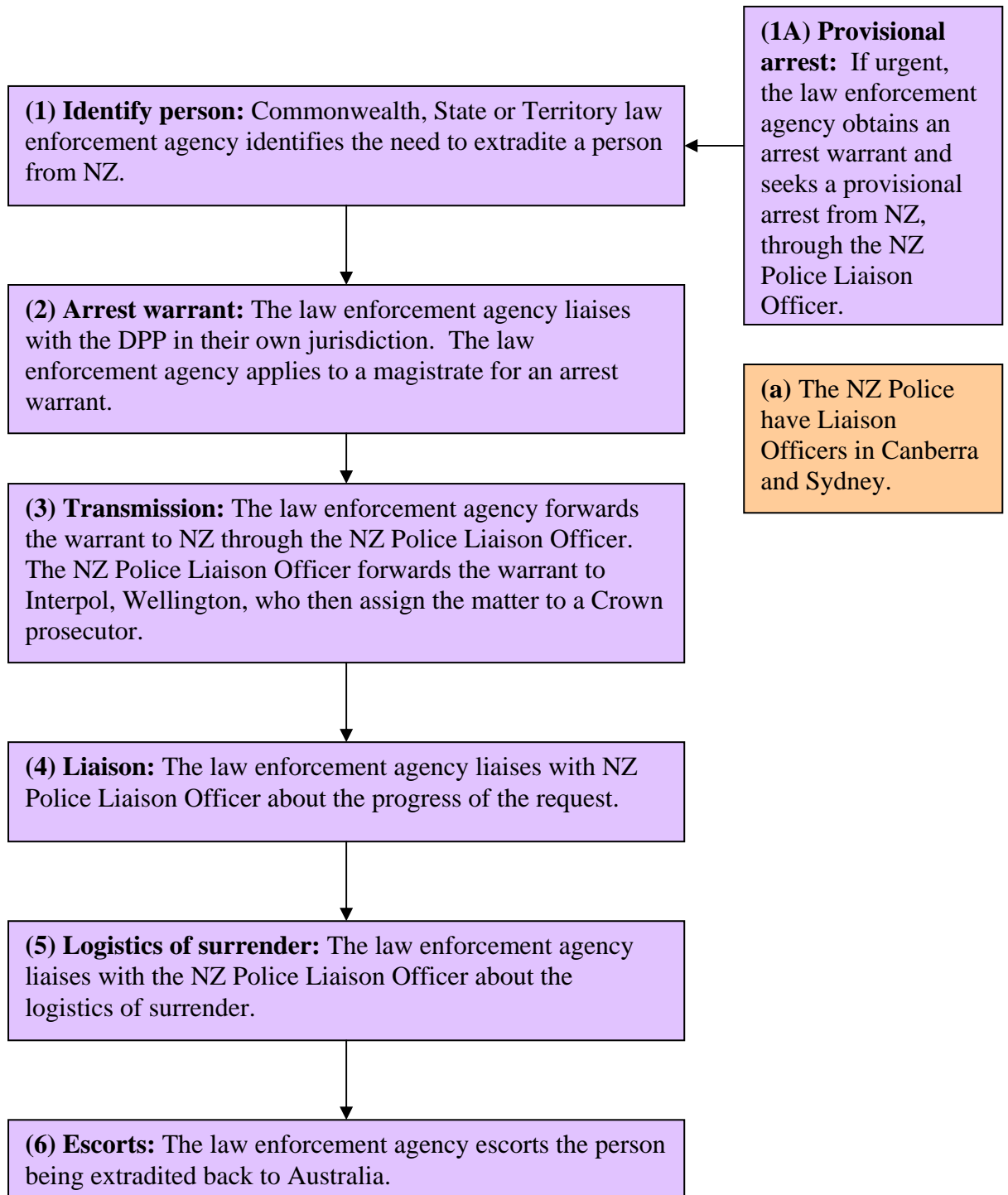
The law enforcement agency forwards the arrest warrant to New Zealand through the New Zealand Police Liaison Officer (see Figure 5, box 3).

Surrender and return of person

The matter is then subject to New Zealand processes. The Australian Police liaise with the New Zealand Police Liaison Officer about the progress of the request (see Figure 5, box 4) and the logistics of surrender (see Figure 5, box 5).

The Australian law enforcement agency escorts the person being extradited back to Australia (see Figure 5, box 6).

Figure 5: Current procedure for outgoing extradition requests to New Zealand (NZ) under the *Extradition Act 1988*.



Analysis of current system

The current extradition system has served Australia well over the years. Some of its major strengths include:

- **Standard of evidence:** The ‘no evidence’ standard applies under the current extradition system. This standard has allowed Australia to enter into extradition relations with many civil law countries that would otherwise have been unable to conduct extradition with Australia.
- **Human rights safeguards:** Australia currently applies a whole range of human rights safeguards to the extradition process. These include refusal to extradite where the person has already been acquitted or pardoned of the offence, or has undergone the punishment for the offence, or there is the possibility of the imposition of the death penalty, torture, or a discriminatory or prejudicial prosecution.
- **Backing of warrants scheme with New Zealand:** Australia currently has a backing of warrants scheme in place with New Zealand. This scheme operates on a police to police basis with no executive involvement. The posting of New Zealand Police Liaison Officers in Sydney and Canberra have provided assistance to the operation of this scheme.

There are a number of significant shortcomings in the current system which warrant review, including:

- **Duplication of decision making:** The Extradition Act creates a tiered decision-making structure for extradition requests to Australia. Decisions made by the Minister take into account the same factors as those taken into account by the magistrate, in addition to a number of other factors. This creates unnecessary complexity and delay in the extradition process.
- **Repeated appeal rights and length of time in custody:** Review and appeal options at each stage of the extradition process take considerable time to resolve. During this process, the person who is the subject of a request is likely to be held in custody for long periods of time without bail, with the possibility that the Minister might refuse surrender at the end of the process anyway.
- **Representations – no statutory deadlines:** A person who is found eligible for surrender to a requesting state is given the opportunity to make submissions against surrender to the Minister, however there is no time limit imposed on these submissions. It is difficult to be certain when final submissions have been received, and the Minister must continuously reassess new information when it is received from the person or the requesting country.
- **Consent:** A person may only consent to surrender if he or she is on remand and the Minister has issued a notice of acceptance of the extradition request. This can

take some time, during which the person is held in custody and must remain in custody until the Minister makes a determination on surrender.

- **Lengthy hearings in the existing New Zealand backing of warrants scheme:** The hearings in the backing of warrants system can sometimes take longer than the hearings in the general extradition process. This is largely due to the wide discretion given to magistrates in considering whether the person should be surrendered, which often results in a full extradition hearing.
- **Inability to receive requests from all countries:** Australia can only receive extradition requests from countries that are declared as ‘extradition countries’ under regulations. If Australia receives a request from a country that it has not dealt with before, Australia has to consider whether to make regulations to enable Australia to accept the request during which time the person who is the subject of the request may be at large in the Australian community.
- **Requirement of dual criminality:** Australia cannot extradite a person where the offence is not also a criminal offence in Australia. This requirement allows people to escape justice simply because Australia has not yet criminalised an offence.
- **Speciality:** Australia deals with requests to waive speciality on a case-by-case basis after surrender, this is an administrative procedure which can take a significant amount of time.
- **Prosecution in lieu:** Australia can prosecute in lieu only where the Minister refuses to extradite a person on the basis that they are an Australian citizen, and the requesting country would not have surrendered one of its own citizens to Australia in a similar situation. To our knowledge, this provision has never been used and does not provide sufficient capacity for Australia to prosecute in lieu to prevent Australia becoming a haven for fugitive offenders.

Involvement of States and Territories

States and Territories have considerable involvement in the extradition process, including:

- State and Territory magistrates issue arrest warrants, consider bail and determine eligibility for surrender
- State and Territory law enforcement agencies can seek the extradition of a person for State and Territory offences
- State and Territory law enforcement agencies can escort an extradited person back to Australia
- State and Territory authorities deal directly with New Zealand authorities in the Australia-New Zealand backing of warrants system, and
- a person can be incarcerated in State and Territory prisons.

Part 3: What are the key considerations for extradition reform?

There are a number of key considerations for extradition reform. Which countries should Australia deal with? What type of offences should Australia extradite for? Are there any types of offences that Australia should not extradite for? Who should we extradite? What should Australia be sure of before sending a person back to another country? If Australia is not satisfied, when should Australia prosecute the person in Australia instead? Can Australia extradite subject to international arrangements for transferring prisoners? How should the system work?

The way these questions are answered shape the extradition system. This section of the paper discusses these questions and their possible answers. The issues in this section are intended as a catalyst for further discussion and comment, and do not represent final policy recommendations.

What countries should Australia deal with?

Currently, Australia can only receive extradition requests from countries that are declared as ‘extradition countries’ in regulations. This means that if Australia receives a request from a country that it has not dealt with before, regulations have to be made to enable Australia to accept the request.

Extradition country means a country declared in regulations. Whenever Australia ratifies a bilateral extradition treaty it is enacted in regulations. In addition, Australia has declared some countries in regulations with which we do not have a bilateral extradition treaty, such as Denmark.

Australia has a role to play in making an effective contribution to the effort to combat transnational crime and wishes to avoid becoming a safe haven for criminals. In order to achieve these objectives, Australia could make and receive requests to and from any country without the need for treaties or regulations on a non-reciprocal basis.

Australia may have concerns about dealing with certain countries because of their political and legal systems, their human rights records, or their application of the death penalty and torture. These concerns could be addressed by applying specific safeguards included in the extradition process (see Issues 10 and 11) on a case-by-case basis, rather than by limiting the scope of countries Australia can deal with.

- 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).

What standard of information should apply?

The Extradition Act does not require a full brief of evidence from a requesting country in support of an extradition request (although this is modified by some

treaties which do require this). The Extradition Act requires that a requesting country provide a statement of the offence and the applicable penalty, the warrant for arrest and a statement setting out the alleged conduct constituting the offence in an extradition request. This standard of information is called the ‘no evidence’ standard.

The term ‘no evidence’ does not mean no information. Rather, it means that the information required for extradition does not need to include actual evidence of the alleged offence (for example, sworn affidavits).

This standard of information required for extradition requests to Australia is in line with the international trend towards simplifying extradition matters and is included in the United Nations Model Treaty on Extradition. It has allowed Australia to enter into extradition relations with many countries that would otherwise have been unable to conduct extradition with Australia, particularly civil law countries (such as France, Japan and Switzerland). This expansion of Australia’s extradition network allows Australia to contribute more effectively to the fight against transnational crime, including terrorism. The Government confirmed in its response to the Joint Standing Committee on Treaties Report on Extradition (Report 40) that the ‘no evidence’ standard will continue to apply.

What offences should Australia extradite for?

The Extradition Act provides that Australia extradites for offences which carry a maximum penalty of not less than 12 months imprisonment in the foreign country.

Given the significant implications, cost and time involved in extraditing a person, extradition should only be available for offences which reach a sufficient level of seriousness. In practical terms, it is not resource efficient to extradite people for ‘trivial’ offences, such as minor traffic offences. The extradition process takes time. It is not appropriate to arrest and detain someone for a period longer than that which they could be imprisoned for if found guilty of the offence.

3. **‘Extradition offence’:** Should Australia continue to only extradite for an offence with a maximum penalty of not less than 12 months imprisonment in the foreign country?

Should Australia require dual criminality?

The dual criminality requirement ensures that a country only extradites a person on the basis of conduct it considers to be criminal. Lack of dual criminality is a mandatory ground of refusal in the current Australian extradition process. Unless dual criminality is satisfied, Australia cannot extradite a person.

In the current international environment, it is essential that criminal justice systems around the world are as effective as possible. People should not be able to escape justice simply because Australia has not criminalised an offence.

What is dual criminality?

Dual criminality is the requirement that the conduct constituting the extradition offence, either in total or in part, be criminalised in both the requested state and the requesting state.

The criminal justice systems of nation states must be respected. As an example, while not criminalised in Australia, in some foreign countries the non-payment of child maintenance is a criminal offence. In such circumstances, the Minister could have a discretion to consider extraditing that person.

Making dual criminality a discretionary ground of refusal would be a more flexible approach to extradition and could allow Australia to extradite for a wider range of offences. As a safeguard, the Minister could retain the discretion to refuse extradition on the basis of dual criminality on a case by case basis where there are concerns about the nature of the offence for which the requesting country seeks extradition, for example if a country requested the extradition of a person to face charges of adultery.

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?

Should Australia extradite for extraterritorial offences?

Common law countries, such as Australia, have traditionally only exercised jurisdiction over offences which occur in their territory. However, most civil law countries exercise extraterritorial jurisdiction in a number of forms, most commonly over any offence committed by their nationals or against their nationals. Common law countries have begun extending the circumstances in which they assert extraterritorial jurisdiction in some circumstances.

Under Australia's current extradition system, extraterritoriality is dealt with as part of dual criminality.

Provided that Australia considers the exercise of jurisdiction by the foreign country to be legitimate as a matter of international law, Australia should not be concerned about the basis upon which the country exercises jurisdiction. For example if France requests the extradition of a person wanted for the assault of a French national in Italy, Australia could consider this request.

What are extraterritorial offences?

Extraterritorial offences are offences that occur outside the territory of a country.

Australia exercises some jurisdiction over offences occurring outside Australia. One example is child sex tourism committed by Australian nationals overseas.

5. **Extraterritoriality:** Should Australia continue to extradite for offences that occur outside the other country's territory where Australia considers that the other country is exercising jurisdiction legitimately as a matter of international law, even if Australia does not assert the same extraterritorial jurisdiction?

Should Australia extradite for military offences only?

Currently, Australia does not extradite people for military offences only. Extradition is a process involving cooperation between countries to combat crime, not a tool for assisting with issues of discipline within the military of a foreign country.

What are military offences?
Military offences are offences that are offences under military law but not also under ordinary criminal law.

Australia is not concerned with enforcing the military law of other countries and should not extradite for military offences where they are not also offences under ordinary criminal law.

6. **Military offences:** Should Australia continue not to extradite for military offences where they are not also offences under ordinary criminal law?

Should Australia extradite for fiscal offences?

Some countries consider fiscal offences to be inappropriate for extradition, for example Ireland and Switzerland. This is largely because they do not consider them to be of a criminal nature. In Australia, fiscal offences are considered to be of a criminal nature and appropriate for extradition. The Australian Government takes white collar crime and fiscal offences, such as tax fraud, very seriously and should continue to extradite for fiscal offences.

What is a fiscal offence?
Fiscal offences are generally considered to be offences in connection with taxes, duties, customs and exchange, eg defrauding the Commonwealth.

7. **Fiscal offence:** Should Australia could continue to extradite for fiscal offences (eg tax fraud)?

Should Australia extradite minors?

Currently, there is no specific provision in the Extradition Act about extraditing a minor (a person under the age of 18). This would be considered by the Minister in his general discretion when determining whether to extradite the person.

The Act could expressly deal with minors. Any extradition of minors should be consistent with standards in Australia's domestic criminal law.

Australia is a party to the Convention on the Rights of the Child. In addition to preventing a child from being subject to torture and the death penalty, the Convention provides that a sentence of life imprisonment without the possibility of release shall not be imposed on minors. This obligation applies domestically, not to extradition. However as a matter of policy, a minor should not be extradited where there is a risk

that they may be subject to torture, death penalty or a penalty of life imprisonment without the possibility of release.

8. **Minors:** Should Australia extradite minors, and if so in what circumstances?

Should Australia extradite for political offences?

Currently, Australia does not extradite for political offences. The political offence exception originated in the 18th century on the basis that it was inappropriate to punish resistance to anti-democratic political oppression or on the basis of a person's political opinions (Aughterson, 1995).

What is a political offence?

A political offence is an offence against the law of the country that is of a political character (whether because of the circumstances in which it is committed or otherwise).

The application of the political offence exception has been restricted as international conventions exclude terrorism offences, genocide, torture, the taking of hostages and the protection of internationally protected persons from the exception. The exception is rarely used and it is unclear what offences it may continue to apply to.

Any protection that the current political offence exception offered is now provided by human rights safeguards which prevent extradition where the request is made for the purpose of prosecuting or punishing a person on account of his or her race, religion, nationality or political opinions or where the trial in the foreign country may be prejudiced by these considerations (see Issue 11 below).

Some people may be concerned that abolishing the political offence exception removes a safeguard against political prosecutions. Retaining the ground of refusal where extradition is sought for the purpose of prosecuting a person on account of their political opinions could address concerns about political prosecutions. In addition, the dual criminality discretion could allow a request to be refused if the offence is not an offence in Australia. For example, if a foreign country requested extradition for a political offence which Australia does not have, the Minister could exercise discretion to refuse the request.

9. **Political offence exception:** Should the political offence exception be abolished? This is currently a mandatory ground for refusal of extradition. It has been so substantially narrowed that it is unclear what it actually refers to. For example, terrorist offences under the suite of UN Conventions have been carved out.

Australia should retain human rights safeguards

Human rights considerations are taken into account throughout the current extradition process. Before a person is surrendered to a requesting country, the Minister considers whether there is a risk of the death penalty being applied, the person being tortured, or being exposed to double jeopardy, or whether the prosecution is for the purposes of discrimination on certain grounds, or the prosecution may be prejudiced by such

discrimination. If any of these concerns exist, the Minister should not surrender the person to the requesting country. There is also a general discretion not to extradite a person if the Minister has any other concerns, including about the criminal justice system or prison conditions within that country.

How will Australia consider the death penalty?

Where a person may be subject to the death penalty, in accordance with its obligations under the Second Optional Protocol to the International Covenant on Civil and Political Rights, Australian Government policy is to refuse an extradition request unless the foreign country gives an undertaking that the death penalty will not be imposed or, if imposed, will not be carried out.

How will Australia consider torture?

The Australian Government opposes the use of torture. In line with its international obligations under the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights, Australia will only extradite if the person will not be subject to torture on return.

How will Australia consider double jeopardy?

Double jeopardy is the principle that a person should not be twice tried or punished for the same offence or for offences arising from the same conduct.

The Extradition Act currently provides that a person may not be extradited if the person has been acquitted or pardoned by a competent tribunal or authority in the requesting country or Australia, or has undergone the punishment provided by the law of the requesting country or Australia in respect of the extradition offence or another offence constituted by the same conduct as constitutes the extradition offence. If a person has been acquitted, pardoned or punished for an offence constituted by the same conduct as the extradition offence in a third country, this would currently be considered in the Minister's general discretion.

Double jeopardy provides important safeguards for the protection of the person's human rights and should be retained in the extradition process.

10. Double jeopardy: Should Australia continue to not extradite a person who has been acquitted or pardoned of the offence, or has undergone the punishment for the offence (or an offence constituted by the same conduct as the extradition offence)?

How will Australia consider discrimination issues?

Under the current Extradition Act, a person must not be extradited if the surrender of the person, in so far as it purports to be sought for the extradition offence, is actually sought for the purpose of prosecuting or punishing the person on account of his or her race, religion, nationality or political opinions.

In the same way, a person must not be surrendered to the requesting country if the person 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 opinions.

The Extradition Act could include additional grounds, such as colour, sex, language, or other status to provide sufficient protection against potential discrimination in a requesting country.

These provisions provide important safeguards for the protection of the person's human rights in the extradition process. The protection against discrimination on the grounds of political opinion would be important in light of the issue of abolishing the political offence exception.

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?

Should Australia consider citizenship?

Persons who have committed a crime, regardless of their citizenship, should as a general rule be tried and punished by the criminal justice system of the jurisdiction in which they committed the crime. Australian extradition law should not distinguish between people on the basis of citizenship.

While Australia should make no distinction as to citizenship in surrendering fugitives, consideration should be given in all extradition requests to the protection of the person's human rights after surrender.

12. Citizenship: Should Australia continue to extradite Australian citizens?

Should Australia consider speciality?

Speciality is intended to protect the person from being prosecuted for offences that the requested country would not allow extradition for. Traditionally speciality has been seen as a safeguard for the fugitive and a protection of the sovereign interests of the surrendering country.

Currently, Australia deals with requests to waive speciality on a case-by-case basis after surrender. A more efficient way of dealing with speciality could be to require a requesting country to make an appropriate undertaking when making an extradition request. This undertaking could allow the requesting country to prosecute the person for any other offences, provided certain human rights are guaranteed, for example, that the death penalty and torture will not be applied, and that the person will not be discriminated against or the proceedings will not be discriminatory. The undertaking could also encompass not extraditing the person to a third country unless those conditions were also met.

There may be concerns that if we change the way we deal with speciality, extradition could be requested by a foreign country for an ulterior purpose. These concerns are addressed by the whole suite of reform issues, which contain human rights safeguards. Given these safeguards, it is in the interests of combating crime for Australia to change its approach to the arcane rules of speciality to ensure criminals face justice.

What is speciality?

The principle of speciality requires that a person surrendered to a foreign country not be detained, prosecuted or punished for any offence committed prior to surrender, other than that for which extradition was granted, unless the foreign country has first allowed the person adequate opportunity to leave that country.

13. **Speciality:** Should Australia change the way it deals with speciality? Instead of dealing with requests to waive speciality on a case-by-case basis after surrender, should Australia require countries to make appropriate undertakings when the request is made? For example, should Australia require the country to undertake to observe human rights, including in relation to the death penalty, torture and discrimination, which would apply if they prosecute the fugitive for offences other than the offences for which extradition is sought and if they extradite the person to a third country?

Should Australia prosecute a person itself when it is unable to extradite the person?

Currently, Australia can prosecute a person in Australia in lieu of extradition. However, this can only be done where Australia refuses extradition on the ground of citizenship and the other country would not extradite its own national in similar circumstances. If Australia is unable to grant an extradition request for any reason, it should be able to consider whether to prosecute the offence in Australia instead.

Where Australia must refuse extradition, for example because a foreign country refuses to give a death penalty undertaking, it is in the interests of combating crime and protecting the Australian community to be able to consider whether the person should be prosecuted in Australia.

However, prosecution in lieu is resource intensive, expensive, and often involves significant practical difficulties. There may also be evidentiary difficulties, such as admissibility of evidence and compellability of witnesses. Therefore, it is not appropriate in all circumstances – the decision to prosecute in lieu should be discretionary.

We should consider whether there should be a general discretion to prosecute in lieu of extradition or whether such a prosecution should take place only when the person represents a threat to the Australian community.

14. Prosecution in lieu: Should prosecution in lieu be available in Australia where extradition has been refused on any ground? Whether such prosecutions proceed could be decided on a case-by-case basis.

Should Australia extradite subject to an international transfer of prisoners agreement?

The arrangements for the international transfer of prisoners enhance the rehabilitation prospects of prisoners by allowing them, once extradited and prosecuted in a foreign country, to serve their sentence in their home country. This provides prisoners with a culturally and linguistically familiar environment, and allows them to be supported by family and rehabilitation programs.

Making extradition subject to an international transfer of prisoner agreement is an important adjunct to the possibility that Australia could accept an extradition request from any country (see Issue 2). International transfer of prisoner arrangements could be undertaken where Australia cannot be satisfied that the person will receive a minimum standard of care during a term of imprisonment in the requesting country either due to the age, health, cultural, linguistic or other characteristics of the person or because of more specific human rights concerns in relation to serving a prison sentence in the requesting country.

15. International transfer of prisoners: Should Australia make and receive extradition requests that are conditional on an international transfer of prisoners agreement?

Is a backing of arrest warrants system appropriate for Australia?

Under a backing of arrest warrants system a court in one country issues an arrest warrant for a person who is in another country. The other country indorses the foreign arrest warrant and returns the person without the need for supporting documentation. The process is intended to be a simpler and speedier process than the general extradition system and is a wholly judicial process with limited executive involvement.

Australia currently uses a backing of warrants process with New Zealand (see Part 2). It may be appropriate to extend a backing of warrants process to other major extradition partners. Given the streamlined nature of the backing of warrants process, the countries that Australia deals with on this basis could be limited to particular countries designated as a backing of arrest warrants country on the basis of Australia's confidence in their criminal justice system.

Whether a country is designated as a backing of arrest warrants country could be determined by adherence to human rights conventions and reference to issues such as death penalty, torture, discrimination, double jeopardy, fair trial, independent judiciary and the right to be heard. Countries with a longstanding extradition relationship with Australia and a history of providing undertakings not to impose or carry out the death penalty could also be considered.

16. Backing of arrest warrants: Should Australia use a backing of arrest warrants process with particular countries, called 'backing of warrants extradition countries'? That is, should Australia indorse foreign arrest warrants from particular countries and ask particular countries to indorse Australian arrest warrants? 'Backing of warrants extradition country' means a country with which Australia has determined it will back arrest warrants. This could be determined by adherence to human rights conventions and reference to issues such as death penalty, torture, discrimination, double jeopardy, fair trial, independent judiciary and the right to be heard. Countries with a longstanding history of providing undertakings not to impose or carry out the death penalty could be considered.

Should Australia adopt a single judicial review mechanism?

The right to judicial review of an executive decision is a fundamental principle of Australian law. Under the current extradition process, a person is allowed repeated and partial reviews throughout the extradition process which lengthens the time that a person will spend in custody, and may ultimately be redundant if the Minister decides that the person should not be surrendered (see the summary of review mechanisms in the decision making matrix in Appendix 2).

While a person must be able to ensure that extradition takes place only in strict accordance with the law, it is also important that the extradition is efficient and effective. A single judicial review mechanism deferred until the end of the extradition process, after the Minister has made his decision on whether to surrender the fugitive, could reduce the amount of time a person spends in custody and still allow comprehensive review of all matters of law. Deferring judicial review rights would not take any rights away – it would simply postpone them. This may ultimately be more efficient as the Minister may decide not to surrender the person.

As set out in Part 4 of this paper, Flowchart 1 presents the option of removing the magistrate's decision on eligibility for surrender under section 19 of the Extradition Act. This decision can currently be appealed under section 21 of the Extradition Act. The court can confirm or quash the order of the magistrate. As a consequence of removing the magistrate's decision, the section 21 appeal would also be removed.

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?

Should a person be able to consent to extradition at any time?

In the majority of extradition cases, the person consents to surrender to the requesting country. Currently a person may only consent to extradition if he or she is on remand, the Minister has issued a notice of acceptance of the extradition request and when before a magistrate.

This can take some time, particularly if the person was arrested under a provisional arrest warrant. Once a person has consented to extradition, the magistrate issues a warrant committing the person to prison to await the Minister's consideration of all relevant matters and determination whether to surrender the person.

In a new extradition system, a person could consent to extradition before a magistrate immediately upon arrest (including provisional arrest) and at any stage thereafter. The magistrate could issue a surrender warrant prior to the Minister making a surrender decision and without referring the matter to the Minister. Consent should be fully informed. A person should not be able to consent to extradition where they would face the death penalty or would be subjected to torture without appropriate undertakings being received.

18. Consent: Should a person be able to consent to extradition at any time during the process? Who should issue a surrender warrant, the Magistrate or the Minister?

Should time limits apply to the extradition process?

Time limits could make the extradition process much more effective and timely and reduce the time that a person will have to spend in custody. Appropriate time limits could apply to actions undertaken by the executive. Subject to natural justice rights, submissions by fugitives could also be subject to time limits.

An appropriate balance should be sought in applying realistic time limits so the process is fair and the person is afforded all appropriate procedural rights, but at the same time the extradition process operates in an effective and efficient manner.

19. **Time limits:** Should time limits apply so that a person is not held for unduly long periods during the extradition process?

Part 4: How could a new extradition system work?

Part 2 of this paper outlined the current extradition system. This part outlines a possible new extradition system.

Flowcharts 1 to 4 are models for a possible new extradition system. Flowcharts 1 and 2 are models for incoming extradition requests. Flowcharts 3 and 4 are models for outgoing extradition requests. Flowcharts 2 and 4 would operate instead of Flowcharts 1 and 3 for particular countries. As in the current system, in practice, the Minister for Justice and Customs would generally make extradition decisions.

Extradition from Australia

Flowchart 1 – Incoming requests - general

Flowchart 1 is a possible model for incoming extradition requests generally. The key steps are described below.

Extradition requests and urgent provisional arrest requests

The process would start with an extradition request from a foreign country. As in the current extradition system, for urgent provisional arrest requests, the Attorney General's Department would instruct the Commonwealth Director of Public Prosecutions to apply to a State or Territory magistrate for a provisional arrest warrant (see Flowchart 1, box 1A).

The Minister formally receives and accepts the extradition request

As in the current extradition system, the Minister would have a discretion to accept the extradition request. In this model, the Minister would consider whether the request:

- is from a foreign government (authentication)
- contains adequate supporting documents
- is for an extraditable offence (see Flowchart 1, box (a))
- is for an offence for which dual criminality exists (this is discretionary) (see Flowchart 1, box (b) and Issue 4 in Part 3), and
- is not for a military offence only.

Unlike the current system, the Minister would not consider whether the offence is a political offence. Issue 9 in Part 3 of this discussion paper seeks comments on this issue.

Magistrate issues an arrest warrant and considers bail

If the Minister were to accept the extradition request, a State or Territory magistrate would issue an arrest warrant and consider bail, as in the current system (see Flowchart 1, boxes 2 and 3). The presumption against bail would be retained – a person could only be granted bail in special circumstances. Where there are special

circumstances, the magistrate would only be able to grant bail if the person was not a flight risk.

20. Bail – no change to current system: The presumption against bail would be retained.

Consent

This model has an expedited consent procedure (see Flowchart 1, box 3A). The person would be able to consent to extradition at any time and, provided the person had given informed consent, the magistrate would issue the surrender warrant. This would be a significant change from the current system, which requires the Minister to issue the surrender warrant.

Allowing the magistrate to issue a surrender warrant would reduce unnecessary waiting times and costs when a person is willing to return to the requesting country. Under this model the person would not be able to consent to extradition if the death penalty or torture could be imposed. Informed consent would be ensured by the magistrate.

Removal of magistrate's eligibility for surrender decision

This model would remove the current 'section 19' stage where a magistrate considers whether a person is eligible for surrender (see Figure 1, box 4 in Part 2). This is a major reform compared to other countries, many of which have courts duplicating the decision making of the executive. However, few alleged offenders are found ineligible for surrender at this stage. Overall the system would be more effective and efficient if this stage was abolished, as the decision is rarely made to refuse eligibility for surrender. As a consequence, the section 21 appeal of the section 19 decision would also be abolished.

21. Eligibility for surrender – possible change to current system: 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.

Minister determines eligibility for surrender and decides if the person should be surrendered

Under this model the Minister would decide whether to surrender the person after the magistrate had considered bail (see Flowchart 1, box 4). The surrender decision would retain human rights safeguards. In making the surrender decision, the Minister would consider:

- death penalty
- torture
- double jeopardy
- discrimination

- extraditable offence
- dual criminality (this could be discretionary), and
- that the offence is not a military offence only.

With respect to torture, as noted in Part 3, Australia would not extradite a person unless satisfied that the person would not be tortured. One way of doing this would be by obtaining a torture undertaking – such undertakings would be made on a case by case basis and would involve strict monitoring regimes.

The Minister would retain a general discretion to refuse to surrender the person. The person would be able to make submissions to the Minister at this stage.

Minister issues surrender warrant

If the Minister was satisfied that all requirements were met after considering both the legal requirements and any submissions made by the person, the Minister would issue a surrender warrant. The warrant would state that a condition of surrender is that the person will not be subject to the death penalty, torture or discrimination (in that country, or in a third country in the case of re-extradition).

This part of the surrender process would be a change to our approach to speciality. There would no longer be a restriction against taking proceedings against the person for crimes other than the crime or crimes for which the extradition request was made (see Issue 13 in Part 3).

Action if the Minister is not satisfied of all considerations

If the Minister was not satisfied that all considerations were sufficiently met for extradition, the Minister could:

- seek undertakings from the foreign country regarding death penalty/torture
- consider an international transfer of prisoners arrangement
- consider prosecution in lieu as an alternative to extradition, or
- release the person.

Judicial review of extradition

Unlike the current system, under this model the person could only exercise judicial review rights after the Minister had made the surrender decision (see Flowchart 1, box 5A). Judicial review would include review under section 75 of the Australian Constitution and section 39B of the *Judiciary Act 1903*. This model would reduce the duplication present in the current system, which requires that a magistrate and the Minister consider the same factors in determining whether a person can be surrendered. It would also reduce time delays by deferring all judicial review rights until the surrender decision is made. This does not mean that any rights would be taken away, but simply that judicial review of preliminary decisions would be deferred until the final surrender decision is made.

This will eliminate the possibility that a person would spend excessive amounts of time in custody while they seek review of every decision, when the Minister may

decide not to surrender the person. It would also reduce the burden on the court system and costs.

Surrender and return of person

The Attorney-General's Department would liaise with foreign countries about the logistics of surrender. Authorities from the foreign country would escort the person to the foreign country (see Flowchart 1, boxes 6 and 7).

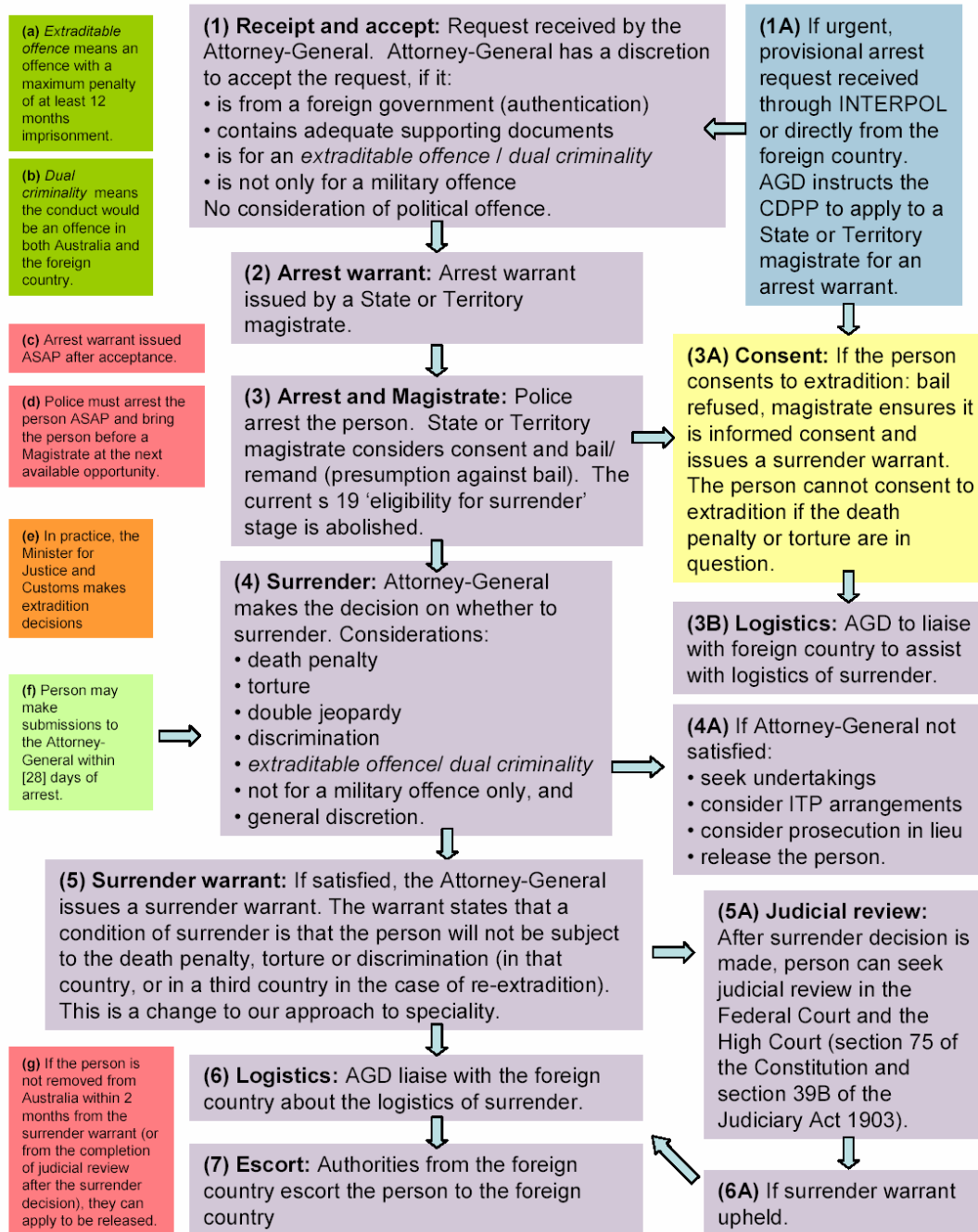
If the person was not removed within two months of the surrender warrant they could apply to be released. This time frame would be subject to any judicial review proceedings on foot (see Flowchart 1, box(g)).

Time frames

The time frames mentioned in the flowchart are for discussion. They are an indication of how the issue of timely process could be approached.

22. Flowchart 1 – possible model for incoming extradition requests generally: We seek your comments on Flowchart 1, which is a possible model for incoming extradition requests generally.

Flowchart 1: Possible Model for incoming extradition requests - general



Flowchart 2 – Incoming requests – backing of arrest warrants

Flowchart 2 is a possible model for an incoming extradition request using a ‘backing of warrants’ system. In this model, a magistrate would indorse a foreign arrest warrant rather than the Minister considering an extradition request. The backing of warrants system would operate instead of the system in Flowchart 1, but only for particular countries, known as ‘backing of warrants extradition countries’. Backing of warrants countries would be declared by regulation.

23. Backing of incoming foreign arrest warrants – no Ministerial involvement – possible change to current system: Under the possible model in Flowchart 2, the Minister would not consider extradition requests.

Determination of ‘backing of warrants extradition countries’

Australia would determine which countries are ‘backing of warrants extradition countries’ by adherence to human rights conventions and reference to issues such as death penalty, torture, discrimination, double jeopardy, fair trial, independent judiciary and the right to be heard. Countries with a longstanding history of providing undertakings not to impose or carry out the death penalty could be considered.

Existing backing of warrants systems

A system of backing arrest warrants is currently used between Australia and New Zealand and also within the European Union. Within Australia, a person named in a warrant issued in one State or Territory may be apprehended in another State or Territory without any further process. The backing of warrants scheme in Flowchart 2 is based on the current backing of warrants arrangement between Australia and New Zealand. However it would be a more streamlined system and has greater provisions for automatic recognition of foreign arrest warrants than do existing systems.

Urgent provisional arrest requests

Under the backing of arrest warrants model, an urgent request for provisional arrest would be received through Interpol or directly from the backing of arrest warrants liaison officer. The Australian Federal Police would apply to a State or Territory magistrate for an arrest warrant (see Flowchart 2, box 1B).

AFP receive arrest warrant through backing of arrest warrants liaison officer

In this model, the Australian Federal Police would receive a request to back an arrest warrant from a backing of warrants extradition country through the backing of arrest warrants liaison officer (see Flowchart 2, box 1). The Australian Federal Police would advise the Attorney-General's Department and the Commonwealth Director of Public Prosecutions that the arrest warrant has been received (see Flowchart 2, box 1A).

CDPP seeks indorsement of arrest warrant from State or Territory magistrate

In this model there would be no consideration of the offence (eg whether it is a military offence). The Commonwealth Director of Public Prosecutions would seek indorsement of the foreign arrest warrant from a State or Territory magistrate. The magistrate would indorse the arrest warrant if satisfied that the person is in Australia (see Flowchart 2, box 2).

Arrest and issue of surrender warrant by State or Territory magistrate

The Australian Federal Police would arrest the person and bring the person before a magistrate (see Flowchart 2, boxes 3 and 4). The magistrate would issue a surrender warrant (see Flowchart 2, box 4).

24. Magistrate to back incoming foreign arrest warrants – possible change to current system: Under the possible model in Flowchart 2, rather than the Minister considering extradition requests a magistrate could indorse a foreign arrest warrant.

Change to approach to speciality

Human rights safeguards would be retained in this model through a statement on the surrender warrant that a condition of surrender is that the person will not be subject to the death penalty, torture or discrimination (in that country, or in a third country in the case of re-extradition).

This is a change to our approach to speciality, as there would no longer be a prohibition on charging and prosecuting the person for an offence other than that asked for in the extradition request (see Issue 13 in Part 3).

Review of surrender decision

Once the surrender decision is made, the person would have the right to judicial review (see Flowchart 2, box 4A). Judicial review would include review under section 75 of the Australian Constitution and section 39B of the Judiciary Act. Limiting appeals to this stage of the process would ensure the system is streamlined and efficient, while also ensuring the rights of the person sought are protected.

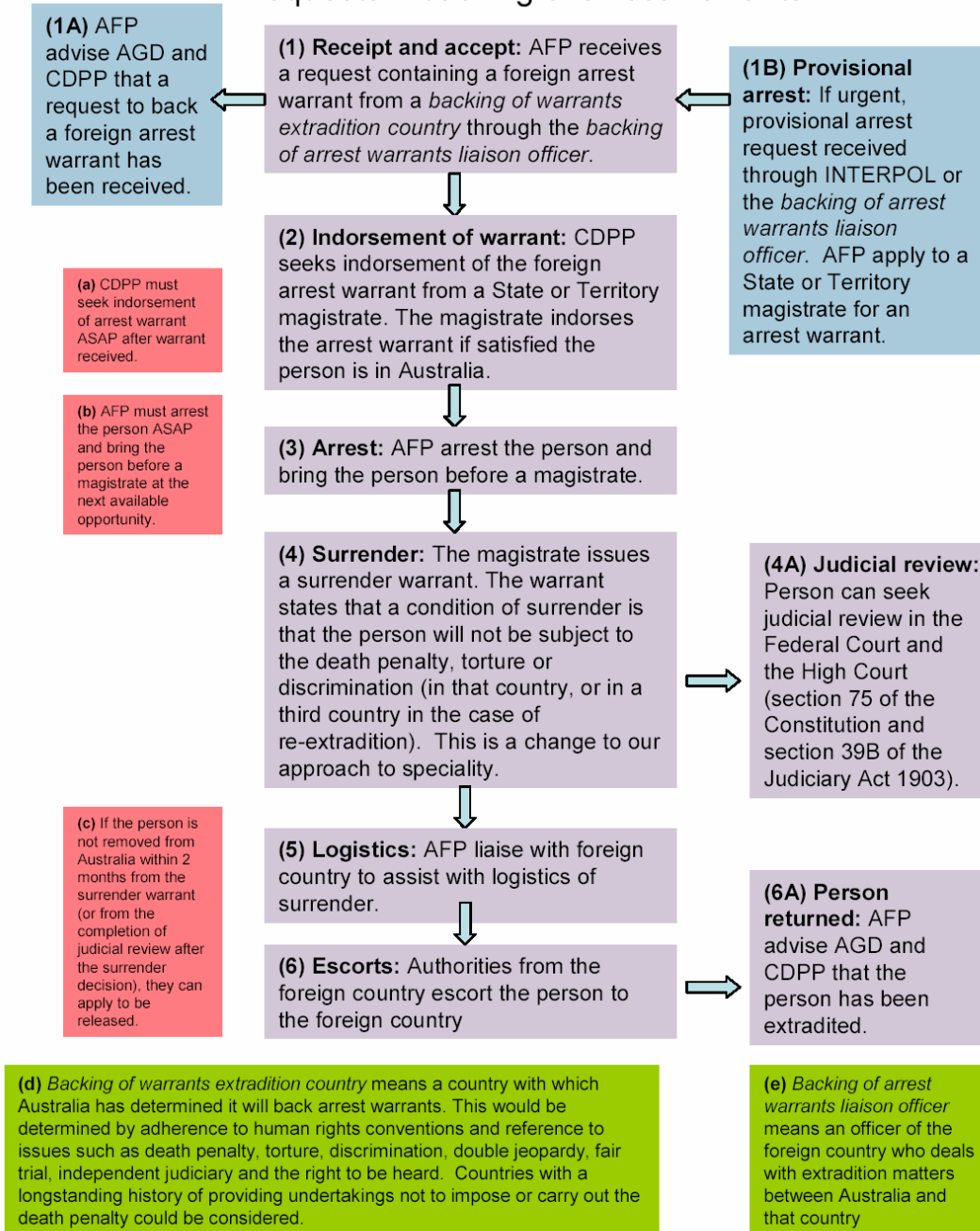
Surrender and return of person

Once a surrender warrant is issued, the Australian Federal Police would liaise with the foreign country to assist with logistics of surrender (see Flowchart 2, box 5), and authorities from the foreign country would escort the person from Australia (see Flowchart 2, box 6). The Australian Federal Police would advise the Attorney-General's Department and the Commonwealth Director of Public Prosecutions that the person has been extradited (see Flowchart 2, box 6A).

If the person is not removed within two months of the surrender warrant they could apply to be released. This time frame would be subject to any judicial review proceedings on foot.

25. Flowchart 2 – possible model for incoming extradition requests – backing of arrest warrants: We seek your comments on Flowchart 2, which is a possible model for incoming requests using a backing of arrest warrant scheme.

Flowchart 2: Possible Model for incoming extradition requests – backing of arrest warrants



Extradition to Australia

Part 2 of this paper outlines the current process for outgoing extradition requests. This part outlines a possible new system for making extradition requests to other countries.

Flowchart 3 – Outgoing requests – general

Flowchart 3 is largely the same system as the current system for outgoing requests.

A key issue is who should draft extradition requests in a new extradition system. Currently the Commonwealth, States and Territories each draft their own requests. It may be beneficial to have one central agency to draft all requests.

26. Drafting outgoing extradition requests – possible change to current system: Which agency would be best placed to draft extradition requests? Would it be useful to have a single agency draft all outgoing extradition requests or should the Commonwealth, States and Territories draft their own requests?

Australian law enforcement agency identifies the need to extradite and obtains an arrest warrant

Under the model presented in Flowchart 3, a Commonwealth, State or Territory law enforcement agency would identify the need to extradite a person from another country to face criminal charges in Australia (Flowchart 3, see box 1). The law enforcement agency would obtain an arrest warrant (Flowchart 3, box 2).

Urgent provisional arrest requests

If the law enforcement agency identifies the need for an urgent provisional arrest, the Attorney-General's Department would seek this through Interpol or directly to the foreign country (see Flowchart 3, box 1A). The person would have the right to appeal this decision under section 75 of the Australian Constitution or under section 39B of the Judiciary Act (see Flowchart 3, box (b)).

DPP undertaking to prosecute

The relevant Director of Public Prosecutions would provide an undertaking to prosecute the person if they are returned to Australia (see Flowchart 3, box 3).

Attorney-General's Department or DPP drafts extradition requests

The law enforcement agency would contact either the Attorney-General's Department, the Commonwealth Director of Public Prosecutions or the relevant State or Territory Director of Public Prosecutions, who would provide advice and draft the extradition request (see Flowchart 3, box 4).

Attorney-General's Department ensure extradition request is in proper form

The Attorney-General's Department would ensure that the extradition request complies with any relevant treaties and with the Extradition Act, and that it is in its proper form. The Attorney-General's Department would submit the request to the Minister for his consideration (see Flowchart 3, box 5).

Minister decides whether to make extradition request

If the Minister were to decide that Australia should make the extradition request, he would sign the request. The person would have the right to review of this decision under section 75 of the Australian Constitution or under section 39B of the Judiciary Act (see Flowchart 3, box (b)).

Attorney-General's Department sends extradition request to foreign country

The Attorney-General's Department would transmit the request to the Central Authority in the foreign country. Where required by the foreign country, the request would be transmitted through diplomatic channels (see Flowchart 3, box 6).

Liaison and surrender

The extradition request would then be subject to processes in the foreign country.

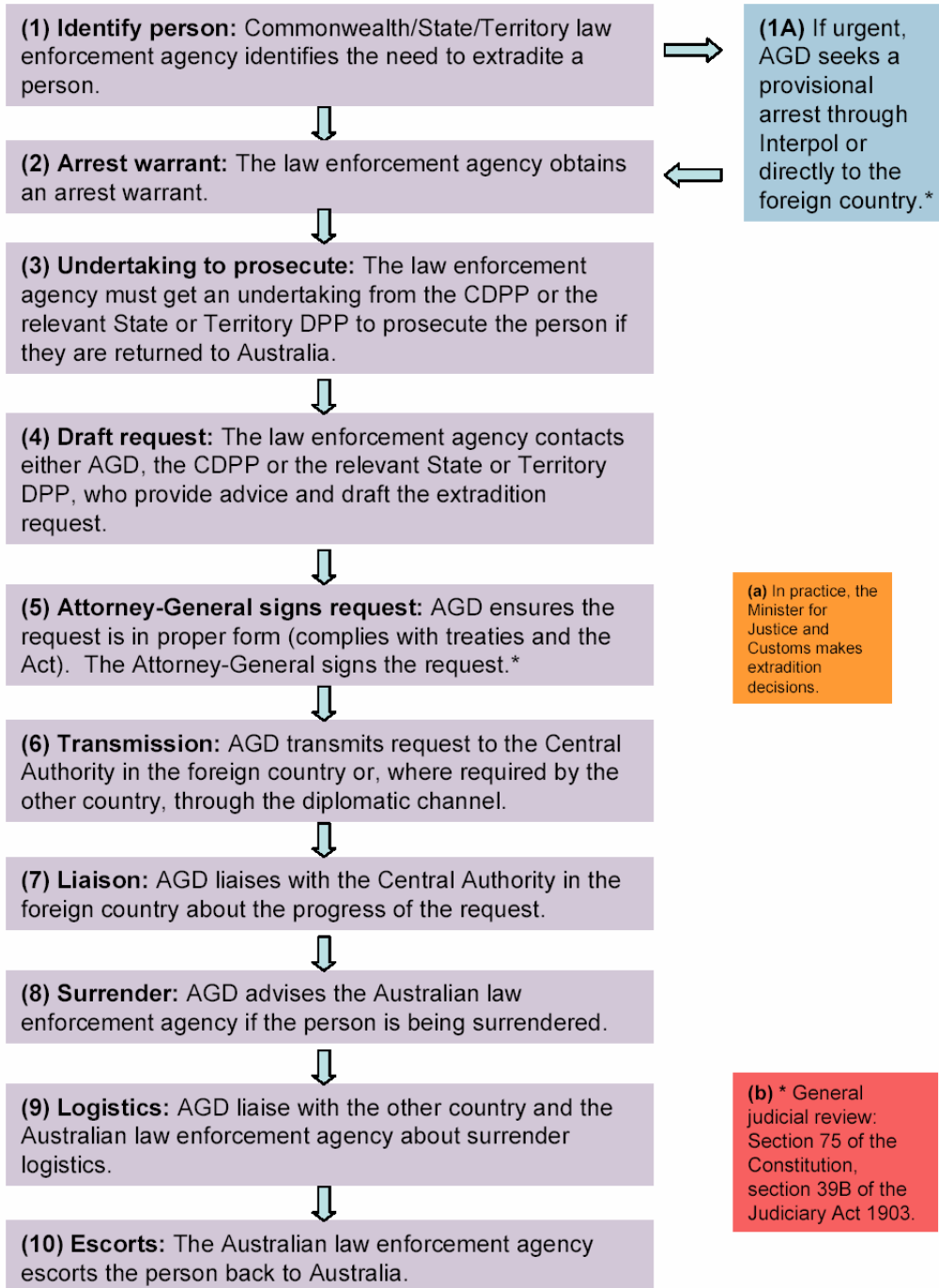
The Attorney-General's Department would liaise with the Central Authority in the foreign country about the progress of the request (see Flowchart 3, box 7) and would advise the law enforcement agency if the foreign country were to make a decision to surrender the person (see Flowchart 3, box 9).

Australian law enforcement agency to escort person back to Australia

Once the decision to surrender the person is made by the foreign country the Attorney-General's Department would liaise with that country and with the Australian law enforcement agency about the logistics of the surrender (Flowchart 3, box 9). The Australian law enforcement agency would escort the person back to Australia (Flowchart 3, box 10).

27. Flowchart 3 – possible model for outgoing extradition requests - general: We seek your comments on Flowchart 3, which is a possible model for outgoing extradition requests generally.

Flowchart 3: Possible Model for outgoing extradition requests - general



Flowchart 4 – Outgoing requests – backing of arrest warrants

Flowchart 4 is the backing of arrest warrants version of an outgoing extradition request, and would work in conjunction with the model in Flowchart 2 for particular countries. There would be no Ministerial involvement in this model and it would be a significantly streamlined model. As in Flowchart 2, the relevant law enforcement agency and Director of Public Prosecutions would have responsibility for extradition in this model. This model builds on the current outgoing backing of arrest warrants arrangements between Australia and New Zealand.

Determination of ‘backing of warrants’ countries

A backing of warrants extradition country would mean a country with which Australia has determined it will back arrest warrants. This would be determined by adherence to human rights conventions and reference to issues such as death penalty, torture, discrimination, double jeopardy, fair trial, independent judiciary and the right to be heard. Countries with a longstanding history of providing undertakings not to impose or carry out the death penalty could be considered (see Flowchart 4, box (d)).

28. Backing of outgoing foreign arrest warrants – no Ministerial involvement – possible change to current system: Under the possible model in Flowchart 4, the Minister would not consider extradition requests.

Australian law enforcement agency identifies the need to extradite and obtains an arrest warrant

Under this model, Commonwealth, State or Territory law enforcement agencies would identify the need to extradite somebody from a *backing of warrants extradition country*. The law enforcement agency would contact the relevant Director of Public Prosecutions in their jurisdiction (see Flowchart 4, box 1) and obtain an arrest warrant for the person (see Flowchart 4, box 2).

DPP undertaking to prosecute

The Director of Public Prosecutions would give the law enforcement agency an undertaking to prosecute the person if they are returned to Australia before the law enforcement agency would contact the foreign country (see Flowchart 4, box 3).

Urgent provisional arrest requests

If the law enforcement agency were to identify the need for an urgent provisional arrest, the law enforcement agency would seek this through Interpol or directly to the foreign country (see Flowchart 3, box 1A). The person would have the right to judicial review of this decision under section 75 of the Australian Constitution or under section 39B of the Judiciary Act (see Flowchart 3, box (b)).

Law enforcement agency transmits arrest warrant to foreign country

The law enforcement agency would send the arrest warrant to the foreign country where the person is located through the backing of arrest warrants liaison officer (Flowchart 4, box 4). At this stage, the law enforcement authority would advise the Attorney-General's Department and the Commonwealth Director of Public Prosecutions that a request to back an arrest warrant had been sent (see Flowchart 4, box 4A).

Surrender and return of person

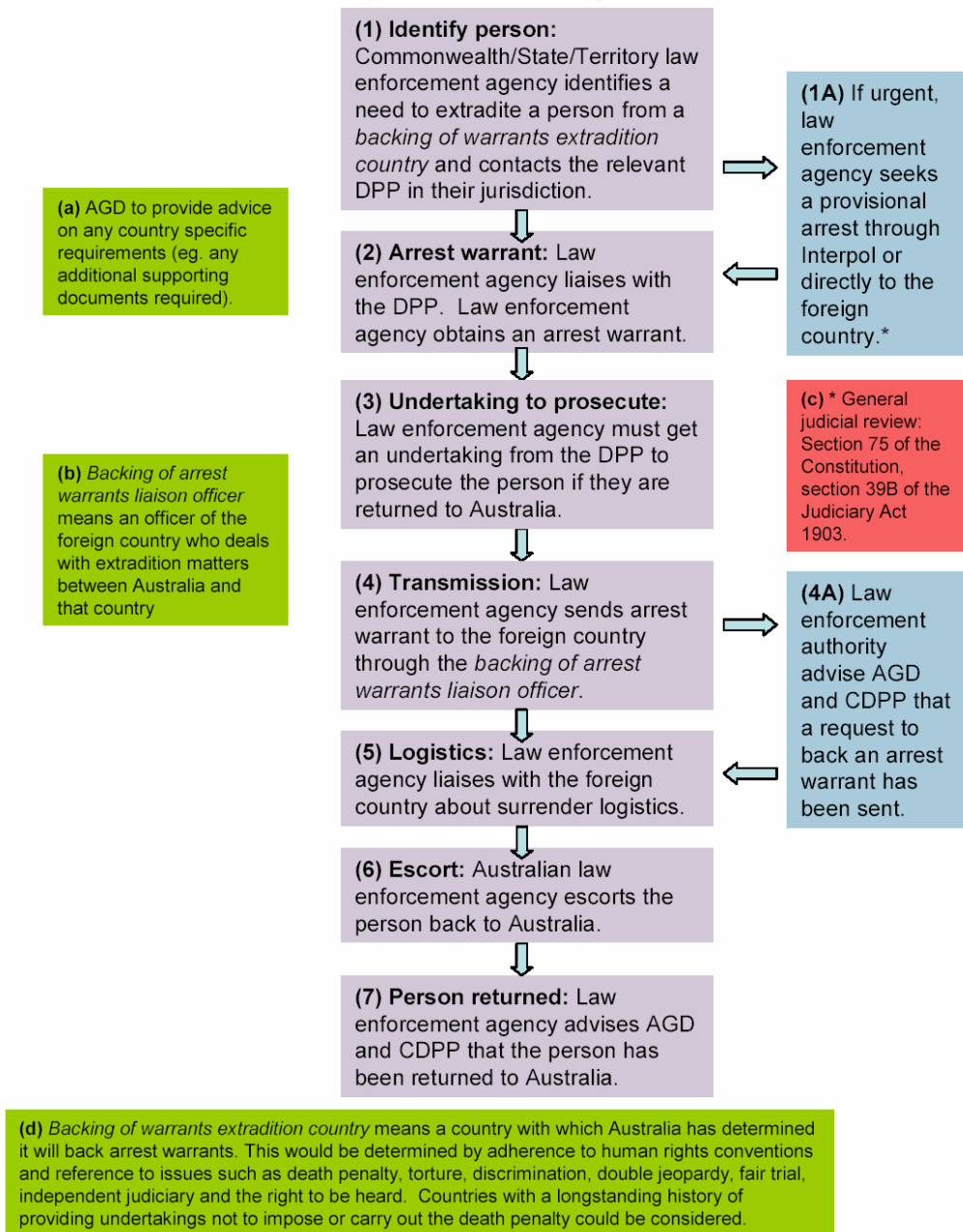
The law enforcement agency would then liaise with the foreign country about surrender logistics (see Flowchart 4, box 5) and the Australian law enforcement agency would escort the person back to Australia (see Flowchart 4, box 6). When the person was returned to Australia, the law enforcement agency would advise the Attorney-General's Department and the Commonwealth Director of Public Prosecutions (see Flowchart 4, box 7).

Judicial review of extradition

Under the backing of arrest warrants model for outgoing extradition requests, there would be a general right to judicial review under section 75 of the Australian Constitution and section 39B of the Judiciary Act.

29. Flowchart 4 – possible model for outgoing extradition requests – backing of arrest warrants: We seek your comments on Flowchart 4, which is a possible model for outgoing extradition requests using a backing of arrest warrants scheme.

Flowchart 4: Possible Model for outgoing extradition requests – backing of arrest warrants



Part 5: How will the right people do their jobs best?

There are many people involved in the extradition process. These include law enforcement officers, prosecutors, magistrates, the Minister for Justice and Customs and public officials. The solid legal framework which will result from Australia's revised extradition laws and treaties will assist the work of this diverse group of people. Strengthened communication mechanisms between States and Territories and between Australia and other countries will improve the capacity of these people. Continuing education and the increasing use of technology to facilitate extradition requests will also help the right people do their jobs best.

Improve laws and treaties

Extradition laws and treaties

Domestic legislation and bilateral and multilateral treaties form the legal framework for extradition in Australia. Australia will improve this legal framework in developing a new extradition system.

Australia is party to over 30 bilateral treaties and 12 multilateral treaties with extradition provisions. Australia has also inherited 20 United Kingdom extradition treaties. These treaties are crucial to ensure effective cooperation between countries in extradition matters and for protecting the rights of the person sought for extradition. Renegotiating treaties is a top priority for Australia, especially those that contain outdated provisions and those between Australia and its closest extradition partners. A strengthened international treaty framework is a valuable asset in the fight against transnational crime.

Privacy laws

Effective law enforcement requires information sharing. Australia's privacy laws should be clarified to provide appropriate law enforcement exceptions in the extradition process.

30. Australia could implement changes to the domestic legal framework and negotiate and renegotiate treaties where required.

Improve domestic capacity

Enhance skills and knowledge

Australia should focus on ensuring all participants in the extradition process have the necessary skills and knowledge to work effectively. Australia could develop information packages, training courses and precedents that can be used by government agencies. Resources could be identified for ad hoc and ongoing projects.

The Australian Government should work with all participants in the extradition process to clarify roles and responsibilities, including, where appropriate, developing Memorandums of Understanding between agencies.

Australia could develop an effective case management system to ensure all matters are monitored and progressed in a timely manner. New software similar to the program that is being developed by the United Nations Office on Drugs and Crime to help facilitate mutual assistance could be developed in Australia, for the purposes of extradition. An internet-based database could be created to record the details of all officers in Australia who are involved in extradition. This would be an important tool for maintaining channels of effective communication.

31. Australia could develop ways of ensuring participants in the extradition process have the necessary skills and knowledge.

Working cooperatively with States and Territories

The extradition process requires considerable involvement of State and Territory authorities. State and Territory courts are involved in the process and State and Territory law enforcement agencies can be involved in seeking extradition for State and Territory offences. A person whose extradition is sought can be incarcerated in State and Territory prisons. In order for the extradition process to run as efficiently as possible, it is important that the Commonwealth, States and Territories build strong, enduring relationships.

One way of doing this is to establish State and Territory expert groups and liaison networks so that the States and Territories can recognise and share their expertise. A regular forum for States and Territories could be held to exchange information and expertise.

There could be a central officer in each State and Territory, trained and supported by the Attorney-General's Department, who could co-ordinate extradition issues with each State and Territory.

32. The Australian Government could liaise with States and Territories about improving cooperation in international extradition.

Improve international relationships

Australia could continue to build strong and enduring relationships with key extradition partners by focusing on bilateral and regional treaty negotiations with these countries. Australia's backing of warrants extradition relationship with New Zealand could be improved by creating the position of an extradition liaison officer in Australia who could quality control all extradition requests sent to New Zealand. This could also be done with other backing of warrants extradition countries.

Australia could help build extradition capacity for countries in the region. Regular meetings of countries in the region could facilitate the creation of a streamlined regional cooperation mechanism. In addition, regional workshops on extradition, hosted by Australia, could encourage trust and understanding between practitioners. These workshops could include discussion on how to best make an extradition request, how countries are experiencing the extradition process and ways of improving the extradition process.

33. Australia could continue to focus on developing regional extradition relationships and capacity building.

Marshal technology

It is desirable to have ways of making, receiving and authenticating requests that are efficient and standardised between countries. Electronic or web-based lodgement of extradition documents could make the extradition process more efficient. Case management and databases of important extradition contacts could also speed up the extradition process by enabling the constant availability of key information.

The extradition system must be able to keep up with the changing pace of technologically sophisticated crime. Renegotiation of treaties and the drafting of high tech crime laws that are consistent between countries would assist extradition of offenders for crimes relating to technology.

Simplify authentication

The Extradition Act requires extradition requests to be signed by a judge, magistrate or officer of the extradition country and authenticated by the oath or affirmation of a witness or sealed with a public seal.

A number of countries have expressed concern that these authentication requirements are too onerous. Authentication requirements can cause undue delay in obtaining finalised documents and have even attracted litigation in some cases. It is unnecessary and unproductive to retain rigid authentication requirements.

The Extradition Act could be amended to reduce or eliminate authentication and certification requirements for extradition documents submitted to Australia by an extradition country. Deeming provisions could be inserted in the Act to allow dispensing of authentication requirements in certain cases. The key requirement is that documents supplied by the foreign country must be admissible in extradition proceedings. This could be achieved without the documents being authenticated.

Part 6: Communication & awareness

How can we maintain public confidence in, and awareness of, the extradition process and the extradition reforms?

With the increased profile of extradition, the Australian Government wants to ensure the public has a good understanding of extradition. The Australian Government will adopt a comprehensive communication strategy about the extradition process and the extradition reforms.

Public confidence in the extradition process is important to the success of a new system. The Australian Government will use effective communication strategies to maintain the confidence of the public, including journalists, members of Parliament, lawyers, other Australian agencies involved in the extradition process and overseas agencies that we deal with.

The Australian Government will use a strong communication strategy to:

- increase public understanding of what extradition is and how we propose to reform extradition
- increase public understanding of the differences between deportation and extradition, and
- increase and maintain public confidence in the extradition process.

These goals could be achieved by:

- being open and accountable regarding extradition procedures and cases
- developing and maintaining a comprehensive website that details current extradition laws and procedures and reform proposals
- maintaining up to date public information documents
- providing detailed media releases to increase awareness
- involving the Minister in public promotion of the extradition reviews and, once the review is complete, in managing public perceptions of extradition
- undertaking a “roadshow” event to inform magistrates, law societies and the public in States and Territories about the reforms, and
- using the media as a means of relaying information by increasing journalists’ understanding of extradition through targeted information packages.

34. Australia could implement a comprehensive communication strategy to inform the general public about the extradition process and extradition reforms.

Part 7: Next steps and key issues that could change the current system

Next steps

We invite your comments on the issues we have presented for discussion in this paper. The public consultation phase of the review is an important part of the policy development process. Please send comments to the Attorney-General's Department by 31 March 2006.

Please send written comments 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

We invite you to focus your submissions on the issues boxes presented throughout this paper. These issues are intended to be a catalyst for comments and further discussion and do not represent the final policy recommendations that will be presented to Government. The Attorney-General's Department looks forward to receiving comments on these issues.

A summary of the key issues that could represent changes to Australia's international extradition system are presented below.

Summary of key issues that could change the current system

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)

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?

Issue 8: Minors

Should Australia extradite minors, and if so in what circumstances?

Issue 9: Political offence exception

Should the political offence exception be abolished?

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?

Issue 13: Speciality

Should Australia change the way it deals with speciality? Instead of dealing with requests to waive speciality on a case-by-case basis after surrender, should Australia require countries to make appropriate undertakings when the request is made? For example, should Australia require the country to undertake to observe human rights, including in relation to the death penalty, torture and discrimination, which would apply if they prosecute the fugitive for offences other than the offences for which extradition is sought and if they extradite the person to a third country?

Issue 14: Prosecution in lieu

Should prosecution in lieu be available in Australia where extradition has been refused on any ground? Whether such prosecutions proceed could be decided on a case-by-case basis.

Issue 15: International transfer of prisoners

Should Australia make and receive extradition requests that are conditional on an international transfer of prisoners agreement?

Issue 16: Backing of arrest warrants

Should Australia use a backing of arrest warrants process with particular countries, called 'backing of warrants extradition countries'? That is, should Australia indorse foreign arrest warrants from particular countries and ask particular countries to indorse Australian arrest warrants? 'Backing of warrants extradition country' means a country with which Australia has determined it will back arrest warrants. This could be determined by adherence to human rights conventions and reference to issues such as death penalty, torture, discrimination, double jeopardy, fair trial, independent judiciary and the right to be heard. Countries with a longstanding history of providing undertakings not to impose or carry out the death penalty could be considered.

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?

Issue 18: Consent

Should a person be able to consent to extradition at any time during the process? Who should issue a surrender warrant, the Magistrate or the Minister?

Issue 19: Time limits

Should time limits apply so that a person is not held for unduly long periods during the extradition process?

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.

Issues 23 and 28: Backing of arrest warrants – no Ministerial involvement

Under the possible models in Flowcharts 2 and 4, the Minister would not consider extradition requests.

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.

Issue 26: Drafting outgoing extradition requests

Which agency would be best placed to draft extradition requests? Would it be useful to have a single agency draft all outgoing extradition requests or should the Commonwealth, States and Territories draft their own requests?

APPENDICES

Appendix 1 – Terms of reference

Review of Australia’s extradition and mutual assistance arrangements

Having regard to:

- the critical importance of extradition and mutual assistance in effectively combating terrorism and transnational and domestic crime
- the need to increase capacity for law enforcement cooperation between Australia and other countries on extradition and mutual assistance matters
- the importance of ensuring that these two Acts provide a meaningful legal framework for international law enforcement in the 21st century, and
- Australia’s international legal obligations,

comprehensive reviews 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* will be undertaken.

Scope

These reviews will consider:

- a. changes needed to reflect the changing nature, scope and extent of transnational and domestic crime, including the types of offences that are captured and the range of circumstances where responses are time critical
- b. increasing the efficiency, effectiveness and quality of current extradition and mutual assistance processes, including by:
 - streamlining the operation of the Acts
 - remedying any anomalies in the operation of the Acts
 - incorporating advancements in technology, such as videolink technology, and
 - examining the interaction of existing legislation with extradition and mutual assistance processes.

Consultation

The reviews will be undertaken by the Commonwealth Attorney-General’s Department and will include:

- a. the release of discussion papers on extradition and mutual assistance on the Department’s website
- b. consultation with key stakeholders within the Australian Government, including the Australian Federal Police, the Commonwealth Director of Public Prosecutions, the Australian Government Solicitor, the Department of Prime Minister and Cabinet, the Department of Foreign Affairs and Trade, the Department of Immigration and Multicultural and Indigenous Affairs, the

Australian Security Intelligence Organisation, the Ombudsman and the Human Rights and Equal Opportunity Commission

- c. consultation with other key stakeholders including relevant State and Territory agencies and the Law Council of Australia
- d. consultation with other interested persons, and
- e. consultation with a range of international stakeholders.

Note: The Australian Government's response in May 2004 to the Joint Standing Committee on Treaties Inquiry into Australia's Extradition Law and Policy (Report 40) will be the starting point for the reviews.

Appendix 2 – Current extradition decision making matrix

Section of the Extradition Act	What are the essential decisions?	What is the purpose of the decision?	Who is the decision-maker?	What is considered at each decision?	What is the consequence of the decision?
Section 16	Extradition request received	<p>Gateway: to allow extradition process to commence</p> <p>Safeguard</p>	<p>Minister for Justice and Customs</p> <p>(Has broad discretion)</p>	<p>Extraditable person (s 6)</p> <ul style="list-style-type: none"> • Warrant for arrest (s 6(a)(i)) or person has been convicted (s 6(a)(ii)) • Extradition offence (s 6(b)) • Outside the requesting country (s 6(c)) <p>Dual criminality (s 16(2)(a)(ii))</p> <p>No extradition objection (s 7)</p> <ul style="list-style-type: none"> • Political offence (s 7(a)) • Discriminatory prosecution (s 7(b)) • Discriminatory prejudice (s 7(c)) • Military offence (s 7(d)) • Double jeopardy (s 7(e)) 	<p>Warrant to arrest person (s 12) and person remanded in custody or on bail (s 15(2)).</p> <p>Magistrate can determine eligibility for surrender (s 19) or accept person's consent to surrender (s 18).</p> <p>If not, the person is released under s 17.</p>

Section 19	Is the person eligible for surrender?	Eligibility: to determine legal requirements for extradition to occur	Magistrate (Does not have a broad discretion)	Supporting documents produced to magistrate (s 19(2)(a)) Any other documents required by a treaty (s 19(2)(b)) Dual criminality (s 19(2)(c)) No extradition objection (s 19(2)(d))	Minister can make a surrender determination (s 22(2)) If the person is not eligible for surrender, the person is released under s 19(10).
Section 22	Should the person be surrendered?	Surrender: to determine whether the person should be surrendered or not	Minister for Justice and Customs (Has a broad discretion)	No extradition objection (s 22(3)(a)) Will not be subjected to torture(s 22(3)(b)) Death penalty undertakings(s 22(3)(c)) Speciality assurance(s 22(3)(d)) Other treaty limitations/conditions regarding surrender (s 22(3)(e)) Discretionary considerations(s 22(3)(f))	Minister can issue a surrender warrant under s 23 or temporary surrender warrant under s 24 If the person should not be surrendered, the person is released under s 22(5) The warrant must be executed within 2 months (s 26(5)) or the person can apply to be released.

Summary of review mechanisms under the Extradition Act¹

Section of the Extradition Act	Source of power for review/appeal	Forum	Grounds	Remedies	Time limit	Alterable?
Section 16	Section 39B Judiciary Act	Federal Court, then High Court	Judicial Review Grounds	Mandamus, prohibition, injunction, certiorari.	None	Yes
Section 19 (magistrate decides eligibility)	Section 21 Extradition Act	1. Federal Court or Supreme Court, then 2. Full Federal Court, then 3. High Court	Review the order with regard to the material before the magistrate (merits)	1. Confirm or quash 2. Order arrest/ release/ continued custody	Within 15 days of previous forum's order	Yes
Section 22	Section 39B Judiciary Act	Federal Court, then High Court	Judicial Review Grounds	Mandamus, prohibition, injunction, certiorari.	None	Yes
Sections 16, 22	Section 75(v) Constitution	High Court	Judicial review on constitutional grounds / original jurisdiction	Mandamus, prohibition, injunction ²	None	No ³

¹ This table does not include habeas corpus action.

² Section 75(v) does not specify other judicial review remedies such as certiorari. These are available provided the matter would fall under the High Court's original jurisdiction otherwise – for example if it also falls under section 75(iii).

³ Parliament cannot directly limit this jurisdiction of the High Court. However, Parliament may regulate the *procedure* by, for example, imposing a time limit within which an applicant must seek relief, provided this is not in substance a prohibition on review.

Appendix 3 – Overview of extradition reviews in other countries

United Kingdom

In 2001 the United Kingdom began a review of extradition. The major motivation for the review was to enable the United Kingdom to implement various European Union arrangements in relation to extradition, including a backing of arrest warrants scheme for European Union countries. The review also aimed to provide a less complex, more effective and efficient system for dealing with non-European Union extradition partners. New legislation was enacted in 2003.

The *Extradition Act 2003 Chapter 41* is available at http://www.bailii.org/uk/legis/num_act/2003/20030041.html

Canada

Canada undertook a complete review of its extradition process in the 1990s. Prior to this, Canada's extradition scheme was based on legislation from the 1800s and extradition was not available at common law or in the absence of a treaty. The major objective of Canada's extradition review was to produce a comprehensive, effective, modern statute capable of addressing the growing concern for the activities of transnational organised crime and to prevent Canada from becoming a safe haven for criminals. New legislation was enacted in 1999. A major feature of the legislation is a streamlined appeal process.

The *Extradition Act, [1999, c. 18]* is available at <http://www.canlii.org/ca/sta/e-23.01/>

New Zealand

New Zealand modernised its extradition law in 1999. Prior to this New Zealand needed an extradition treaty in order to extradite a person to a non-Commonwealth country. The new Act gives greater flexibility to deal with requests from other countries and provides a simplified procedure for New Zealand to give effect to requests for extradition from Australia and certain other designated countries.

The *Extradition Act, 1999, No 55*, is available at http://www.unodc.org/unodc/en/legal_library/nz/legal_library_2001-09-17_2001-1.html

United Nations Office on Drugs and Crime

In 2004, an expert working group was formed to prepare a report on Effective Extradition Casework Practice for the United Nations Office on Drugs and Crime. The group identified and extensively reviewed the most important common problems impeding prompt predictable extradition, particularly between countries of the world's different major legal traditions.

Report: Informal Expert Working Group on Effective Extradition Casework Practice is available at http://www.unodc.org/pdf/ewg_report_extraditions_2004.pdf

Appendix 4 – Where can I get more information on extradition?

The Attorney-General's Department's Extradition and Mutual Assistance Review Website: <http://www.ag.gov.au/extraditionandma>

Primary sources

The *Extradition Act 1988* is available at:

[http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/730B5EA036676E14CA256F71004E8393/\\$file/Extradition88.pdf](http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/730B5EA036676E14CA256F71004E8393/$file/Extradition88.pdf)

The *Extradition Regulations 1988* are available at:

[http://www.comlaw.gov.au/comlaw/legislation/legislativeinstrumentcompilation1.nsf/0/50C2D074243AB324CA256F710043963A/\\$file/Extradition88.pdf](http://www.comlaw.gov.au/comlaw/legislation/legislativeinstrumentcompilation1.nsf/0/50C2D074243AB324CA256F710043963A/$file/Extradition88.pdf)

Cases on extradition are available on Austlii: <http://www.austlii.edu.au>

Parliamentary debate on the Extradition Act 1988:

Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 28 October 1987, pp1615 – 1619

Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 9 December 1987, pp3055 – 3111

Commonwealth of Australia, *Parliamentary Debates*, Senate, 14 December 1987, pp2992 – 2994

Commonwealth of Australia, *Parliamentary Debates*, Senate, 19 February 1988, p298 – 316

Other

Joint Standing Committee on Treaties, *Extradition – a review of Australia's Extradition Law and Policy*, Report 40, 2001:

<http://www.aph.gov.au/house/committee/jsct/reports/report40/report40.pdf>

Government Response to the Joint Standing Committee on Treaties Inquiry into Australia's Extradition Law and Policy, 2004:

<http://www.aph.gov.au/house/committee/jsct/governmentresponses/40th.pdf>

EP Aughterson, *Extradition: Australian Law and Procedure*, 1995

United Nations Model Treaty on Extradition:

http://www.unodc.org/pdf/model_treaty_extradition.pdf

Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States:

http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_190/l_19020020718en00010018.pdf