

Submission of the

NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES

In relation to

Exposure Draft of

**Extradition and Mutual Assistance in
Criminal Matters Legislation 2009**

Authors: Liam Burgess
Michael Walton

7 September 2009

Contents

1. EXECUTIVE SUMMARY	2
2. HUMAN RIGHTS AND INTERNATIONAL ASSISTANCE.....	3
3. EXTRADITION TO AUSTRALIA	4
4. ‘EXTRADITION OFFENCE’	4
5. DUAL CRIMINALITY.....	4
6. POLITICAL OFFENCE EXCEPTION	6
7. DISCRIMINATION.....	6
8. PROSECUTION IN LIEU.....	7
9. JUDICIAL REVIEW SHOULD NOT BE DEFERRED.....	7
IF REVIEW IS DEFERRED IT MUST BE COMPREHENSIVE	7
10. WAIVER OF EXTRADITION	8
11. TIME LIMITS	9
12. BAIL	9
13. MUTUAL ASSISTANCE	10
POLITICAL OFFENCES.....	10
TORTURE	10
DOUBLE JEOPARDY	11
DEATH PENALTY.....	11
TELECOMMUNICATIONS SURVEILLANCE	11
FORENSIC PROCEDURES	11
14. AGENCY TO AGENCY ASSISTANCE.....	12

1. Executive Summary

1. The New South Wales Council for Civil Liberties (CCL) believes that while the Exposure Draft acknowledges some of Australia's international human rights obligations, the proposed safeguards should be strengthened and made more comprehensive. CCL Summarises its submissions as follows:
2. CCL endorses the proposals of the International Law Association (ILA) with respect to human rights protections in extradition and mutual assistance law.
3. The threshold for extradition offences should be increased, since the 12 month threshold encompasses some quite minor offences.
4. The political offence exemption should be maintained as a non-discretionary ground for refusing extradition.
5. CCL supports the proposed expansion of the grounds for refusal of extradition to include discrimination based on sex in addition to race, religion, nationality and political belief. CCL believes these criteria should also be further broadened to include a person's colour, language, opinions, social origin, property, birth, sexuality or other status.
6. CCL supports greater provision for prosecution in lieu in cases where extradition has been refused or where offences are not sufficiently serious to warrant extended detention for the purpose of extradition.
7. CCL opposes deferred judicial review, particularly if the presumption against bail is retained. If review is deferred, suspects must have the right, at an early stage, to: (a) appeal a bail decision; and (b) enforce mandatory time limits for making executive decisions.
8. A suspect should be able waive extradition. However, only a judicial officer should be able to issue warrants in waiver cases; and Section 15A(6) should contain a requirement that the court be satisfied that the receiving country will abide by international human rights standards.
9. CCL believes that Australia should implement the ILA recommendations in relation to mutual assistance.
10. CCL strongly opposes the 'streamlined' approach to the provision of telecommunications surveillance information. Such material should only be provided pursuant to a court order.
11. CCL opposes the proposed amendment that would permit DNA to be obtained from persons without consent. DNA information should not be provided to a foreign country unless its security, exclusive-use and destruction is guaranteed.

2. Human rights and international assistance

12. Extradition and Mutual Legal Assistance are important tools in fighting serious international crime. Many international treaties, to which Australia is party, oblige Australia to cooperate with other nations in the fight against international crime.¹ However, those obligations are not absolute. The United Nations has made it clear that, in the so-called wars on drugs and terrorism, international human rights obligations must also be respected.
13. In 2001, the UN General Assembly reaffirmed that 'all measures to counter terrorism must be in strict conformity with the relevant provisions of international law, including international human rights standards'.² In 2002, the UN General Assembly stressed that 'respect for all human rights is and must be an essential component of measures taken to address the drug problem'.³
14. The Exposure Draft acknowledges some of Australia's international human rights obligations, but CCL believes that the present safeguards should be simplified, strengthened and made more comprehensive. CCL endorses the proposals of the International Law Association (ILA) with respect to human rights protections in extradition and mutual assistance law. CCL encourages the Attorney-General to consider adopting the ILA's proposals.
15. In 1998, the Committee on Extradition and Human Rights of the International Law Association (ILA) accepted that 'not *any* violation of *any* human right recognised in a human rights convention will obstruct extradition' (emphasis in original).⁴ The ILA Committee proposed that extradition be prohibited when a 'serious' violation is likely, observing that 'seriousness' is a threshold known at international law, for example the ICCPR only allows for the imposition of the death penalty for 'the most serious crimes'.⁵ Their suggested re-drafting of a comprehensive mandatory refusal provision is:

Extradition shall be refused where, upon return, the requested person would face a real risk of a serious violation of his human rights under any treaty for the protection of human rights to which [Australia] is a party or under customary international law.

¹ e.g. *Convention Against Transnational Organised Crime* [2004] ATS 12 (entered into force for Australia 26 June 2004).

² UN General Assembly, *Human Rights and Terrorism* (13 February 2002) UN Doc. A/RES/56/160.

³ UN General Assembly, *International cooperation against the world drug problem* (24 January 2002) UN Doc. A/RES/56/124.

⁴ ILA Committee on Extradition and Human Rights, 'Third Report' (1998) 68 *International Law Association Reports of Conferences* 132, 135.

⁵ *International Covenant on Civil and Political Rights 1966* [1980] ATS 23, article 6(2).

3. Extradition to Australia

16. CCL does not oppose the proposed provision for the Attorney-General to give undertakings regarding maximum sentence. CCL would strongly oppose any provision that allowed the Attorney-General to give undertakings regarding minimum sentence.

4. 'Extradition offence'

17. CCL maintains that the threshold for extradition offences should be increased, since the current 12 month threshold⁶ encompasses some quite minor offences.⁷ The Exposure Draft is inadequate in this respect.
18. Individuals should not be subjected to the hardship of extradition unless they are at least accused of serious wrong-doing. The extradition process can involve lengthy incarceration and deportation to a foreign country. In the case of minor offences, the period spent in detention awaiting extradition and eventual trial may easily be longer than the actual sentence to be served (assuming the suspect is even found guilty).
19. A full-scale extradition process also seems an unjustified use of resources in the case of minor offences.⁸
20. CCL notes that after reviewing its extradition procedures in 1999 Canada requires a two-year minimum sentence before extradition will be granted and that a similar arrangement can be found in the scheme applying to Commonwealth countries.
21. Without the protection of the speciality provisions a minor offence could be used as pretext for extradition before prosecuting for other crimes, for which Australia may have been unwilling to surrender suspects.

Australia should not extradite for offences carrying a sentence of less than two years.

5. Dual criminality

22. CCL believes that Australia must continue to require dual criminality as a precondition to extradition. The reforms proposed in the Exposure Draft correctly leave the primary decision regarding dual criminality in the hands of the courts. CCL strongly opposes any further dilution of the dual criminality protection.

⁶ *Extradition Act 1988* (Cth) s.5.

⁷ for example providing misleading information and obstructive behaviour offences.

⁸ the Commonwealth DPP has noted that the cost of running such cases can be as high as \$2million: see JSCoT, Report 40, [3.10].

23. In *Riley v Commonwealth* Deane J observes that 'the principle of double criminality constitutes an important part of the matrix of rules of international law and of internationally accepted standards against which the provisions of an extradition treaty must be construed'.⁹
24. Allowing the Executive to detain and extradite people for conduct that Parliament does not consider criminal would place far too much power in the hands of the Minister. Ultimately, it is not the role of the Executive to define what does and does not constitute criminal conduct. That is the role of Parliament. Any attempt to place this role of defining criminal conduct in the hands of the Executive usurps Parliament's sovereignty.
25. Australia has decriminalised a range of conduct over the last few decades, which many other countries still treat as criminal. Obvious examples are adultery, homosexuality and prostitution. There is no valid reason why Parliament should extradite anyone for conduct that has been decriminalised in Australia.
26. CCL notes and endorses article 2 of the UN *Model Treaty on Extradition*, which expressly requires dual criminality.¹⁰

Australia should continue to require dual criminality in extradition.

Dual criminality provides a safety mechanism for the protection of individual rights and Australia's sovereignty. Dual criminality maintains Parliament's constitutional role as the definer of what does and does not constitute criminal conduct.

⁹ *Riley v Cth* (1985) 159 CLR 1, 16 per Deane J.

¹⁰ see <http://www.unodc.org/pdf/model_treaty_extradition.pdf>.

6. Political offence exception

27. CCL maintains that the current non-discretionary political offence exception provides an important safeguard and should not be repealed. The political offence exception constitutes an important protection for individual rights and an important safety mechanism that ensures that nations can maintain a policy of non-interference in the internal affairs of other states.
28. The discretionary political offence objection included in the Exposure Draft risks exposing the minister to diplomatic pressure from requesting countries and provoking diplomatic incidents in cases where the minister does not act in accordance with the wishes of the requesting country.
29. The mandatory exemption under the head of discrimination based on 'political opinion' is inadequate to remedy this weakness, since it is based on the opinions of the suspect rather than the nature of the alleged offence.
30. For example, consider the scenario in which Indonesia requests extradition from Australia of a West Papuan to face a charge of treason because he or she raised the Morning Star flag in Jayapura. Under existing extradition law, treason falls comfortably within the political offence exception and Indonesia cannot take great offence from the denial of the extradition request. On the other hand, if this exception is made discretionary, then the Minister is ultimately left in the unenviable position of having to inquire into the motivation of the Indonesian prosecutors – are they pursuing this charge because of the suspect's political opinions? If the Minister answers that question in the affirmative, then it could cause a serious diplomatic incident.
31. CCL notes and endorses article 3(a) of the UN *Model Treaty on Extradition*, which expressly mandates refusal of extradition for 'an offence of a political nature'.¹¹

Parliament should not transform the political offence exemption into a discretionary ground. This is an important protection and the objective nature of the exemption helps to avoid serious diplomatic incidents.

7. Discrimination

32. CCL supports the proposed expansion of the grounds for refusal of extradition to include discrimination based on sex in addition to race, religion, nationality and political.

¹¹ see <http://www.unodc.org/pdf/model_treaty_extradition.pdf>.

33. CCL believes these criteria should also be broadened to include the person's colour, language, opinions, social origin, sexuality, property, birth or other status. This will more closely reflect the equality clause of the *International Covenant on Civil and Political Rights*.¹²
34. A criterion should also be added to section 22 of the Extradition Act, providing that extradition should not proceed unless the Minister is satisfied that the foreseeable treatment of the suspect in the receiving country would be in compliance with Australia's international obligations *as if* that treatment were attributable to Australia under international law.

8. Prosecution in lieu

35. CCL supports the greater provision proposed in the Exposure Draft for prosecution in lieu in cases where extradition has been refused. CCL also believes it is appropriate for such cases to be referred for independent assessment by the CDPP.
36. In CCL's view it is also preferable that prosecution be pursued in Australia where the offence is too minor to warrant the prolonged detention necessary for extradition.

9. Judicial review should not be deferred

37. CCL opposes the proposed power to defer judicial review. If an error occurs at the first stage of the process, then under the Exposure Draft model the suspect could spend substantial time in gaol when they would have been freed under the existing arrangements. It is contrary to the rules of natural justice to deny a suspect timely appeal rights.
38. After the current extradition legislation was enacted it was noted that the Act involved 'a substantial shift away from judicial review of the extradition process towards the exercise of unreviewable executive discretion'.¹³ This trend should not be allowed to progress further.
39. CCL notes that proposed s 21A creates only a discretionary power to defer proceedings, but does not believe this alone represents an adequate safeguard.

If review is deferred it must be comprehensive

40. If review is deferred as proposed in the Exposure Draft then at the very least:
 - the presumption against bail should be abolished;
 - the magistrate's decision on bail should be open to appeal; and

¹² ICCPR article 26.

¹³ I Shearer, 'Extradition and Human Rights' (1994) 68 *ALJ* 451, 452.

- there must be mandatory and enforceable time limits placed on executive decision makers to ensure that suspects are not detained for lengthy periods without access to a review mechanism
41. If judicial review is to be deferred, then it must not be limited to errors of law. The Act must allow for the type of hearing referred to by Hill J in *South Africa v Dutton*: 'a rehearing in which the court undertaking the review is authorised to reach its own conclusion on eligibility for surrender'.¹⁴ If the judicial review process is to be streamlined, the reviewing court must have power to:
- (a) review for errors at every stage of the process;¹⁵
 - (b) reach its own conclusion as to eligibility for surrender; and
 - (c) hear evidence as to the existence of an extradition objection.¹⁶
42. Specifically the review process must allow a court to make a determination of the sort currently made by a magistrate under s 19(2)(d). That is, the court must have power to decide whether there are 'substantial grounds' for believing that there is an extradition objection within the meaning of s 7. The court should also be empowered to consider whether there are substantial grounds to believe the suspect may suffer torture or the death penalty.

CCL opposes deferred judicial review, particularly if the presumption against bail is retained. If review is deferred, suspects must have the right, at an early stage, to: (a) appeal a bail decision; and (b) enforce mandatory time limits for making executive decisions.

10. Waiver of extradition

43. A suspect should be able to consent at any time. The proposed safeguards in section 15A of the Exposure Draft are positive measures. However, CCL maintains that in addition to those safeguards:
- Only a judicial officer should be able to issue warrants in waiver cases; and
 - Section 15A(6) should contain an additional requirement that the judicial officer be satisfied that the receiving country does not practice torture, will abide by international human rights standards and will not impose the death penalty.

¹⁴ (1997) 77 FCR 128, 133.

¹⁵ Because deferral of the review process in the name of efficiency should not result in a loss of rights.

¹⁶ An area of uncertainty considered in: *Cabal v United Mexican States* [2001] FCA 427, [153].

11. Time limits

44. If as proposed in the Exposure Draft, judicial review of intermediate steps is to be deferred then it is crucial that strict and enforceable time limits be placed on executive decision makers.

12. Bail

45. The current presumption against bail should be modified so that bail would normally be granted where the alleged crime is less serious and the suspect is at low risk of absconding. It is particularly important that bail be available if, as proposed in the Exposure Draft, judicial review is to be delayed until the end of the process.
46. In ordinary criminal proceedings there is a general presumption in favour of bail except in very serious cases.¹⁷ There is no legitimate reason to distinguish the case of extradition. The presumption against bail should be abolished. Bail should be considered on the basis of the:
- seriousness of the alleged offence;
 - possible sentence;
 - person's employment or family obligations;
 - probability they will commit further offences or interfere with witnesses;
 - extent to which detention will hinder preparation of their defence; and
 - probability that that suspect will abscond or not comply with bail conditions.
47. The fact that extradition occurs pursuant to treaty does not justify modifying these general principles. The potentially innocent suspect's interest in freedom should not be subordinated to the government's interest in carrying out its treaty obligations.
48. It is particularly important that bail be available if the no evidence criterion for arrest is maintained and judicial review is to be delayed until the end of the process. Without access to bail there is a risk that, for the duration of the lengthy administrative decision-making process, innocent people will be incarcerated without redress, even if they present no threat and even if there is no prima-facie evidence that they have committed an offence.

The presumption against bail should be repealed.

¹⁷ *R v Light* [1954] VLR 152 at 157.

13. Mutual assistance

49. CCL believes that Australia should implement the ILA recommendations in relation to mutual assistance. The ILA Committee recommends that human rights can be protected more effectively under mutual legal assistance law by the inclusion of the following mandatory refusal provision:¹⁸

[Mutual legal assistance] shall be refused if the rendering of such assistance would result in the serious violation of the human rights of any person under any treaty for the protection of human rights to which [Australia] is a party or under customary international law.

50. The ILA Committee observes that this clause 'would require the judicial or administrative authorities of the requested state to balance the seriousness of the crime for which extradition is requested against the seriousness of the potential human rights violation', which requires the application of the well-understood proportionality test.¹⁹
51. In relation to mutual legal assistance, the ILA Committee notes that human rights considerations have received little attention.²⁰ There are two ways in which human rights become relevant in mutual legal assistance: when the requesting State will use the assistance to violate the rights of an individual, for example by using requested documents in an interrogation involving torture; or when the requested State will violate the rights of an individual in executing the request, for example torturing someone to obtain the evidence.²¹ In the latter case, any evidence provided would be rendered useless because it would most likely be excluded in court for reasons of public policy. The ILA Committee's proposed provision would be more effective as a safeguard for human rights than the *ad hoc* approach taken in the Exposure Draft.
52. CCL also makes the following specific submissions in relation to the proposed mutual assistance amendments:

Political offences

53. For the reasons outlined above CCL believes that the political offence exception should be a non-discretionary ground for refusing both extradition and mutual assistance.

Torture

¹⁸ ILA Committee on Extradition & Human Rights, 3rd Report (1998), n 4, 139.

¹⁹ ILA Committee on Extradition & Human Rights, 3rd Report (1998), n 4, 137.

²⁰ ILA Committee on Extradition & Human Rights, 3rd Report (1998), n 4, 139.

²¹ ILA Committee on Extradition & Human Rights, 3rd Report (1998), n 4, 139.

54. CCL supports the proposed express mandatory ground for refusal where there are substantial grounds to believe the provision of assistance would result in a person being subjected to torture.

Double Jeopardy

55. CCL strongly believes that the principle of double jeopardy should continue to apply to mutual assistance and CCL opposes the proposed amendment making double jeopardy a discretionary ground for refusal.

Death penalty

56. CCL supports the extension of the mandatory refusal requirement to circumstances where a person has been arrested or detained on suspicion of committing an offence that carries the death penalty regardless of whether formal charges have been laid.

Telecommunications Surveillance

57. CCL strongly opposes the 'streamlined' approach to the provision of telecommunications surveillance information. Such material should only be provided pursuant to a court order.
58. CCL further believes that Telecommunications Interception ('TI') material should not be provided to foreign agencies until the serious existing deficiencies in the federal *Telecommunications (Interception) Act 1979* (Cth) are remedied.
59. CCL strongly opposes the introduction of a procedure to permit TI warrants to be issued at the request of a foreign agency.
60. CCL also opposes any amendment that would allow for the provision of historical telecommunications data on an agency-to-agency basis without the need for a mutual assistance request. Providing the discretion to make these decisions to the AFP does not provide adequate protection in relation to the privacy issues associated with provision of such information.
61. CCL believes that Australia should not provide TI material in relation to any investigation that could result in the imposition of the death penalty.

Forensic procedures

62. CCL opposes the proposed amendment that would permit DNA to be obtained from persons without consent. Such information is highly personal and should be protected. This is a principle of both human dignity and privacy. There should be statutory prohibition on the provision of DNA information, unless waived by the individual. No adverse inference should be drawn from refusing to exercise the waiver.

63. DNA information should only be provided to a foreign country under the strict condition that all copies of the information will be destroyed once the investigation or prosecution is over. A guarantee should also be sought and provided that the DNA information will only be used for the purposes of this particular investigation and prosecution.
64. Under no circumstances, for example, should the DNA provided to a foreign country end up on a centralised DNA-database operated by a foreign government. In other words, any DNA information provided to a foreign country must be stored separately from that country's own DNA database. This will ensure that inadvertent copies are not made on, for example, database backup tapes.
65. A guarantee should also be sought and obtained from the foreign country that the storage of the DNA information is secure.

DNA should not be obtained without consent. DNA information should not be provided to a foreign country unless its security, exclusive-use and destruction is guaranteed

14. Agency to agency assistance

66. Extradition and Mutual Legal Assistance are two of the three main methods of international criminal assistance. The third is police-to-police assistance, which disappointingly has not been the subject of the recent review. CCL encourages the Attorney-General to undertake a full public inquiry into this form of international criminal assistance.
67. CCL notes that police-to-police assistance is but one form of agency-to-agency assistance. This form of international assistance is relatively new and is very poorly regulated. While extradition and mutual legal assistance are regulated by statute, agency-to-agency assistance is not comprehensively regulated by statute. CCL encourages the Attorney-General to establish minimum human rights safeguards in an *Agency-to-Agency Assistance Act*. Such legislation should mandate that the action of Australian agents should be consistent with Australia's international human rights obligations.

CCL recommends that the draft bill be amended to include a provision covering the voluntary provision of coercively-obtained information. This will broaden the existing request-driven approach and ensure that the Act's human rights safeguards provide protection in these situations.

CCL also recommends that even informal assistance be accompanied by guarantees that it will not be used in a way that results in the execution or torture of any person.