

Submission of the

NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES

to the

Minister for Justice and Customs'

review of

Australia's Extradition Law

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Executive Summary

1. In response to the Justice Minister's discussion paper entitled *A New Extradition System: a review of Australia's extradition law and Practice* ('the Review Paper'), the New South Wales Council for Civil Liberties (CCL) summarises its submissions as follows:
 - (1) Justice rather than managerial efficiency must be the first priority in any new Australian extradition system;
 - (2) Extradition to countries with which Australia has not concluded an extradition treaty should not be permitted;
 - (3) Australia should not extradite for offences carrying a sentence of less than two years;
 - (4) Dual criminality should be retained as a non-discretionary ground for refusing extradition;
 - (5) Extra-territorial offences and fiscal offences should be permissible grounds for extradition;
 - (6) Minors should only be extradited in accordance with articles 37 and 40 of the Convention on the Rights of the Child;
 - (7) The political offences exception should be retained;
 - (8) Extradition to a country where the suspect may be subject to cruel inhuman or degrading treatment or punishment should be expressly prohibited;
 - (9) Death penalty assurances should only be accepted where they are signed by the head of the executive in the requesting jurisdiction;
 - (10) The discrimination provisions in the act should be extended to cover discrimination based on colour, sex, language, opinions, social origin, property, birth or other status.
 - (11) Australia should continue to extradite Australian citizens;
 - (12) Speciality requirements should be retained;
 - (13) Prosecution in lieu should be more widely available;
 - (14) Extradition subject to prisoner transfer should be encouraged;
 - (15) It is preferable that judicial review not be deferred. At whatever stage it occurs, judicial review must be comprehensive and courts must be allowed to reach their own conclusion as to the existence of an extradition objection;
 - (16) Consent to extradition by a suspect should be possible at any time subject to appropriate safeguards;
 - (17) The presumption against bail should be abolished. Bail applications must be immediately appealable even if other rights of review are deferred;

- (18) CCL endorses the recommendation of the Joint Standing Committee on Treaties that the review of extradition be referred to the Australian Law Reform Commission ('ALRC').¹ The Review Paper is an inadequate document upon which to base legislative change to extradition. A more thorough examination of the legal issues and alternatives is required. This is best done by the ALRC, rather than an interested stakeholder like the Attorney-General's Department.
- (19) Given the complexity of extradition law and procedures, Legal Aid should be provided to people facing extradition. A suspect facing extradition for capital offences should have a statutory right to Legal Aid.

¹ Joint Standing Committee on Treaties, *Extradition: a review of Australia's law and policy* (August 2001) Report No. 40.

1. Principles

➤ *Are these principles appropriate? Should any other principles apply?*

2. The most important principle of all is not listed in the Review Paper: justice. 'Transparency', 'safeguards' and 'predictability' are all ultimately functions of justice. On the other hand, efficiency and reduced duplication can be loosely grouped together as values of 'public management'. While efficiency is a laudable goal, the interests of justice are paramount and sometimes require 'inefficiency'. A commitment to justice over efficiency ensures that the rights and freedoms of individuals are protected by law.
3. In 2001, the Chief Justice of NSW, Jim Spigelman AC, delivered a speech detailing why the private-sector managerial model of 'efficiency' does not always sit well with important values underlying the administration of justice.² In that speech his Honour argued powerfully that it is inappropriate to apply a service-based or consumerist model to the courts, which are above all meant to 'administer justice in accordance with law' rather than to deliver an efficient service to consumers. His Honour continued: 'We have deliberately chosen inefficient ways of decision making in the law in order to protect rights and freedoms'.

Above all, justice is the principle to be served in extradition law, not managerial efficiency. Only a commitment to justice over 'efficiency' ensures that the rights and freedoms of individuals are protected by law.

2. Countries Australia should 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).*

4. Extradition should not occur to countries with which Australia has not concluded an extradition treaty. The treaty making process allows consideration to be given to conditions under which Australia will extradite and the protections that must be afforded. It also allows a detailed examination of a country's suitability. The treaty ratification process involving the Joint Standing Committee on Treaties allows proper parliamentary and public scrutiny to be directed towards possible extradition partners.

² J. J. Spigelman AC, 'Quality in an Age of Measurement: The Limitations of Performance Indicators' (Sydney Leadership Alumni Lecture, delivered to the Benevolent Society, Sydney, 28 November 2001), http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_281101.

5. If for any reason it is considered necessary to allow extradition, on an ad hoc basis, to countries with which Australia does not have a treaty, such extradition should be subject to strict and enforceable conditions. Any extradition should be subject to undertakings which must:
 - be executed so as to be binding under international law;
 - guarantee procedural standards and human rights protections;
 - provide for the return of the suspect, if convicted, to Australia to serve their sentence if they wish; and
 - contain an enforceable dispute resolution mechanism, such as referral to the ICJ.
6. Any non-treaty based extradition procedure should be subject to the principle that extradition will be refused where the result would be 'unjust, oppressive, incompatible with humanitarian considerations or too severe a punishment'. This formulation is found in Australia's model extradition treaty,³ and similar formulations have been used in regulations⁴ and legislation⁵ dealing with extradition to non-treaty states and should be made generally applicable to such extraditions. The prohibition would ensure that justice has a central place in extradition decision-making and would cover general adverse consequences,⁶ or cases where although proceedings are lawful in the receiving country they will be conducted in a way that is contrary to natural justice.⁷
7. Because it is simply not possible to imagine an appropriate sanction against a nation that executes someone contrary to an assurance that they will not, Australia should *never* extradite to a retentionist country without an extradition treaty. If extradition on an ad hoc basis to countries that retain the death penalty is to be allowed, then such agreements must always include a provision implementing the rules of speciality and dual criminality.

Extradition should not occur to countries with which Australia has not concluded an extradition treaty. Any one-off extradition procedure must be subject to enforceable human rights guarantees.

³ *Australian Model Extradition Treaty* (1986) article 3(2)(g). A copy of the model treaty is available in the submission of Attorney-General's Department to the JSCOT *Inquiry into Australia's Extradition Law, Practice and Procedure*, at <<http://www.aph.gov.au/house/committee/jsct/extradition/agd.pdf>>.

⁴ Extradition (Commonwealth Countries) Regulations 1998 (Cth), reg 7; also in regulations dealing with Iceland, Japan & Fiji.

⁵ *Extradition (Commonwealth Countries) Act 1966* (Cth) s.16 (repealed).

⁶ *Foster v Senator Amanda Vanstone* [1999] FCA 1447, [41].

⁷ *Henderson v Secretary of Home Affairs* [1950] 1 All ER 283 at 286.

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?*

8. The threshold for extradition offences should be increased, since the current 12 month threshold⁸ encompasses some quite minor offences.⁹ Australia should not extradite for offences with a maximum penalty less than 12 months.
9. Individuals must not be subjected to the hardship of extradition unless they are at least accused of serious wrongdoing. The extradition process can involve lengthy incarceration and deportation to 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).
10. The expense of extradition also seems an unjustified use of resources in the case of minor offences.¹⁰
11. CCL notes that, after reviewing its extradition procedures in 1999, Canada now requires a two-year minimum sentence before extradition will be granted. A similar arrangement can be found in the scheme applying to Commonwealth countries.
12. 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.

⁸ *Extradition Act 1988* (Cth) s.5.

⁹ for example providing misleading information and obstructive behaviour offences.

¹⁰ the Commonwealth DPP has noted that the cost of running such cases can be as high as \$2million: see JSCoT, Report 40, n 1 above, [3.10].

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?*

13. In *Riley v Commonwealth* Deane J observes that, while dual criminality is not a mandatory rule of international extradition law, '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'.¹¹ His Honour goes on to explain that the essential purpose of the principle:¹²

...is to provide an available safety mechanism whereby a state is not required to surrender up a person, possibly one of its own nationals, to be tried and punished for conduct which, according to the standards accepted by those within its boundaries, is not deserving of punishment at all. As a generally accepted limitation of obligations under extradition treaties, it avoids the international complications and ill will which are likely to result from an ad hoc refusal of extradition based on the unacceptability to the requested state of particular laws of a requesting state.

14. If, as the Review Paper suggests, dual criminality is to become a discretionary matter for the Minister, it is highly likely that extradition will become a political rather than a legal issue. A country requesting extradition could take offence at a ministerial decision to apply the doctrine of dual criminality in one case and not another. Removing the mandatory requirement of dual criminality could also lead to unacceptable political and diplomatic pressure being brought to bear on the decision making process. At worst, the interests of good relations with a foreign nation might interfere with the rights of the individual in the extradition process. This injustice should not be permitted.
15. The Review Paper suggests that dual criminality should not be mandatory because a person might escape justice 'simply because Australia has not criminalised an offence'. The Review Paper illustrates this point by suggesting that the Minister should be able to extradite a person for not paying child maintenance in a foreign jurisdiction. That example ignores the fact that the Australian Parliament has chosen not to criminalise this activity. 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.

¹¹ *Riley v Cth* (1985) 159 CLR 1, 16 per Deane J.

¹² *Riley v Cth* (1985) 159 CLR 1, 17 per Deane J.

16. 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 hand to the Minister a discretion to extradite anyone for conduct that has been decriminalised in Australia.
17. CCL presumes that the unspoken concern behind this push to place so much power in the hands of the Minister is terrorism. CCL fears that the spectre of terrorism is being used, yet again, to limit the rights and freedoms of individuals. While the Review Paper does not expressly mention terrorism in this context, CCL assumes that the real concern is that terrorist suspects will be able to use Australia as a safe-harbour. Such a concern is unfounded. Australian criminal law now includes a large array of counter-terrorism laws.¹³ Terrorism is also an offence against the UN Charter, several international treaties and international customary law. One commentator has also pointed to terrorist conduct as contrary to the Geneva Conventions.¹⁴ Any suggestion that the criminal conduct of terrorists is not covered by dual criminality is simply wrong. If any concern remains, the Act could expressly provide that crimes under international law are sufficient to satisfy dual criminality.
18. CCL notes and endorses article 2 of the UN *Model Treaty on Extradition*, which expressly requires dual criminality.¹⁵

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, a role that should never be placed in the hands of the Executive.

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?*

19. Extradition for extra-territorial offences is appropriate, provided the prosecution is in accordance with international law.

¹³ e.g. *Criminal Code 1995* (Cth) Pt 5.3.

¹⁴ Devika Hovell, 'Hicks can, and should, be tried here', *The Age* (Melbourne), 27 September 2004, <<http://www.theage.com.au/articles/2004/09/26/1096137097868.html>>.

¹⁵ see <http://www.unodc.org/pdf/model_treaty_extradition.pdf>.

6. Military offences

- *Should Australia continue not to extradite for military offences where they are not also offences under ordinary criminal law?*

20. CCL notes and endorses article 3(c) of the UN *Model Treaty on Extradition*, which expressly mandates refusal of extradition for 'an offence under military law, which is not also an offence under ordinary criminal law'.¹⁶

7. Fiscal offences

- *Should Australia continue to extradite for fiscal offences (eg tax fraud)?*

21. Australia should continue to extradite for fiscal offences where criteria for extradition are otherwise met.

8. Minors

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

22. Australia should only extradite minors in accordance with the principles contained in the *Convention on the Rights of the Child*.¹⁷ Australia should only extradite minors to countries that observe the Convention. The Extradition Act should expressly require the Minister to satisfy herself that the provisions of the Convention will be observed. Specifically, extradition should not be permitted unless the receiving country complies with articles 37 and 40 of the Convention.

23. Article 37 provides that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

¹⁶ see <http://www.unodc.org/pdf/model_treaty_extradition.pdf>.

¹⁷ [1991] ATS 4 (entered into force 16 January 1991).

24. Article 40 provides that:

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings. 3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Extradition of minors should only take place in accordance with the *Convention on the Rights of the Child* (1989).

The Extradition Act should expressly incorporate the requirements in articles 37 and 40 of the *Convention on the Rights of the Child*.

The Minister should be required to be satisfied that the extraditing nation will observe the *Convention on the Rights of the Child*.

9. Political offences 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.*

25. The political offence exception has been controversial for a long time.¹⁸ While it has been narrowed by multilateral and bilateral agreements between nations, it still provides an important protection of 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.
26. The Review Paper seems to recommend the abolition of this exception. The alternative it offers is the mandatory exemption under the head of discrimination based on 'political opinion'. Unfortunately, the Review Paper fails to appreciate the important distinction between the two exemptions. One is based on the nature of the alleged offence, the other on the (political) opinions of the suspect.
27. 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 abolished, 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.
28. 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'.¹⁹

Parliament should not abolish the political offence exemption. This exemption is an important safeguard of individual rights. The objective nature of the exemption also helps to avoid serious diplomatic incidents.

¹⁸ Geoff Gilbert, *Transnational Fugitive Offenders in International Law: extradition and other mechanisms* (1998) Ch 6 'The Political Exemption'.

¹⁹ see <http://www.unodc.org/pdf/model_treaty_extradition.pdf>.

10. Human rights safeguards

- *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)?*

29. CCL is concerned at the lack of coverage of the issue of the death penalty and torture in the Review Paper. These are significant issues that need to be addressed in more detail. The cursory nature with which they have been dealt is disturbing.

10.1 Torture

30. CCL notes and endorses article 3(f) of the UN *Model Treaty on Extradition*, which expressly mandates refusal of extradition if a person 'has been or would be subjected...to torture or cruel, inhuman or degrading treatment or punishment'.²⁰
31. Australia has ratified the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.²¹ Currently the *Extradition Act* only prohibits the Minister from granting an extradition request if the suspect might be subjected to torture.²² This falls far short of the UN Model Treaty.

Parliament should amend the *Extradition Act* to prohibit the extradition of anyone who has been subjected to torture or cruel, inhuman or degrading treatment by the requesting nation.

Parliament should also amend the *Extradition Act* to extend the prohibition on extradition to anyone who might be tortured by the requesting nation, to include anyone who might be subjected to cruel, inhuman or degrading treatment by the requesting nation.

10.2 Death penalty

32. CCL notes and endorses article 4(d) of the UN *Model Treaty on Extradition*, which expressly permits refusal of extradition if 'the offence for which extradition is requested carries the death penalty'.²³ The Model Treaty acknowledges the acceptability of the customary assurance by the requesting country that 'the death penalty will not be imposed or, if imposed, will not be carried out'.

²⁰ see <http://www.unodc.org/pdf/model_treaty_extradition.pdf>.

²¹ [1989] ATS 21 (entered into force 7 September 1989).

²² *Extradition Act 1988* (Cth) s.22(3)(b).

²³ see <http://www.unodc.org/pdf/model_treaty_extradition.pdf>.

10.2.1 who should be competent to provide assurances?

33. It should be noted that this assurance is backed up by the force of treaty law. An important aspect of treaty law is the legal doctrine of *pacta sunt servanda*, which means that treaty obligations will be honoured. If Australia is to enter into ad hoc extraditions, as the Review Paper proposes,²⁴ then such assurances need to be backed up by similar legal force.
34. A recent decision of the Federal Court²⁵ concerning extradition and the death penalty confirms that the federal Attorney-General may lawfully authorise the extradition of an individual to a country that could very well execute that individual.²⁶
35. Under the *Extradition Act 1988* (Cth) the federal Attorney-General has the final say on who will be extradited from Australia. The Attorney-General can only authorise the extradition of an individual for a capital offence if the extradition country undertakes that:²⁷

(i) the person will not be tried for the offence; [or]

(ii) if the person is tried for the offence, the death penalty will not be imposed on the person; [or]

(iii) if the death penalty is imposed on the person, it will not be carried out.

36. This discretion was examined in the Federal Court case of *McCrea v Minister for Customs & Justice*.²⁸ In that case an applicant facing extradition to Singapore for the capital offence of murder unsuccessfully challenged an undertaking, given by the Singaporean government to the Australian government, not to execute him if he was found guilty.
37. North J concluded that Australian courts do not have the power to inquire into whether an extraditing country will honour such an undertaking.²⁹ The Act does not require that the undertaking “be effective to prevent the execution of the fugitive offender”, only that such an undertaking is made. So the role of the court is limited to determining whether such an undertaking has in fact been made and that it conforms to the provisions of the Act.³⁰

²⁴ see “2. Countries Australia should deal with” on page 4 above.

²⁵ *McCrea v Minister for Customs & Justice* [2004] FCA 1273

²⁶ for the purposes of this discussion, this paper uses the term ‘Attorney-General’ because that is the term used in the Act. In reality, the Attorney-General’s powers under the Act have been delegated to the Justice Minister since August 1997: Media Release, ‘Senator Chris Ellison’, Attorney-General (10 August 1997), http://www.law.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Media_Releases_1997_August_1997_Senator_Chris_Ellison.

²⁷ *Extradition Act 1988* (Cth) ss 22(3)(c) & 25(2)(b).

²⁸ *McCrea v Minister for Customs & Justice* [2004] FCA 1273 per North J. <http://www.austlii.edu.au/au/cases/cth/federal_ct/2004/1273.html>.

²⁹ *McCrea v Minister for Customs & Justice* [2004] FCA 1273, [38]-[39].

³⁰ *McCrea v Minister for Customs & Justice* [2004] FCA 1273, [17].

38. Even more significantly, North J stressed that the Attorney-General has an overriding discretion to extradite.³¹ This means that the Attorney-General, after having considered all relevant considerations, can still lawfully decide to surrender a suspect for extradition.³²
39. His Honour noted that Parliament has given the Attorney-General, and not the courts, the final say in extradition. To support his Honour's conclusion that this is as it should be, North J gives two reasons of policy:³³

The first is that extradition involves international relations because it requires cooperation between sovereign states for the purpose of arranging for the return of fugitive offenders to face justice. The second is that the conduct of international relations in Australia is a function undertaken by the executive arm of government. The constitutional separation of powers means that the judiciary has no direct function in the conduct of international relations.

40. The decision in *McCrea* means that, while it might be relevant for the Attorney-General to consider whether the undertaking not to execute the extradited suspect will be honoured, he or she may still lawfully decide to surrender the individual for extradition. All that is required of the Attorney-General is to obtain an undertaking, not an iron-clad guarantee that the undertaking is binding.
41. CCL has long been concerned that the nature of these assurances are inadequate. Quite often these assurances are signed by prosecutors and undersigned by the national Attorney-General. For example, death penalty assurances from US States are generally signed by the local District Attorney and endorsed by the US Attorney-General. CCL is concerned that such assurances are inadequate because they are not constitutionally protected. The best way to ensure that an assurance is ironclad is to have the assurance signed by the Executive head of the jurisdiction. So, for example, an assurance provided to support an application for extradition to California founded on a state criminal charge should be signed by the Governor of California. Constitutionally, only the Governor has the ultimate power to grant clemency. Such an assurance, signed by the head of the Executive, would act as an ironclad guarantee. Australia should not be satisfied with anything less.

Australia should only accept death penalty assurances signed by the head of the Executive of the requesting jurisdiction. It should be made clear in extradition treaties that Australia will not accept assurances from prosecutors or anyone else who cannot ultimately grant clemency if a death sentence is imposed.

³¹ *Extradition Act 1988* (Cth) s 22(3)(f).

³² *McCrea v Minister for Customs & Justice* [2004] FCA 1273, [21]-[22].

³³ *McCrea v Minister for Customs & Justice* [2004] FCA 1273, [18].

10.2.2 Memorandum of Understanding relating to air marshals

42. CCL is deeply concerned by a media report that Australia has signed a Memorandum of Understanding with the United States on the operation of air marshals that permits extradition of suspects to face capital charges without requiring US authorities to guarantee that the death penalty will not be imposed or carried out.³⁴ This would appear to violate the *Extradition Act 1988* (Cth).
43. On 6 February 2006, CCL wrote to the Justice Minister asking for confirmation of this media report, but to date CCL has not received a reply.

As a matter of urgency, all Memoranda of Understanding and Treaties should be reviewed to ensure that they do not permit extradition for capital offences without a guarantee that the death penalty will not be imposed or carried out.

10.3 double jeopardy

44. CCL notes and endorses article 3(d) of the UN *Model Treaty on Extradition*, which expressly mandates refusal of extradition if a final judgment has already been rendered against the person with respect to the extraditable offence.³⁵

The Extradition Act should continue to prohibit extradition where the rule against double jeopardy is engaged.

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?*
45. Australia must continue to refuse extradition where a person is sought for the purpose of prosecution on the basis of race, religion, nationality or political opinions.

³⁴ Michael McKenna, 'Extradition covers death penalty', *Courier Mail* (Brisbane), 21 September 2004, 2.

³⁵ see <http://www.unodc.org/pdf/model_treaty_extradition.pdf>.

46. The criteria of which the Minister must be satisfied before a person can be extradited³⁶ should be broadened. Currently, the Minister needs to be satisfied that the person will not be prosecuted or prejudiced on account of their 'race, religion, nationality or political opinions'. This should be broadened to include the person's colour, sex, language, opinions, social origin, property, birth or other status. This will more closely reflect the equality clause of the *International Covenant on Civil and Political Rights*.³⁷
47. A criteria 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.

12. Citizenship

- *Should Australia continue to extradite Australian citizens?*

48. Extradition decisions should be based on considerations of justice and human rights, not the citizenship of a suspect.

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?*

49. CCL notes and endorses article 14 of the UN *Model Treaty on Extradition*, which expressly implements the rule of speciality.³⁸
50. Another important reason why speciality should be preserved is to ensure that a suspect cannot be charged with a non-capital offence, extradited and then re-charged with a capital offence. This would violate Australia's international treaty obligations. The rule of speciality insures against such a nightmare scenario.

³⁶ *Extradition Act 1988* (Cth) ss.7 & 22.

³⁷ ICCPR article 26.

³⁸ see <http://www.unodc.org/pdf/model_treaty_extradition.pdf>.

51. Abolition of speciality is particularly problematic if the dual criminality and political offences exceptions are also abolished. A country could seek extradition for an accepted crime such as fraud (bearing in mind they need not put forward any evidence) and then, on obtaining the suspect, prosecute for a political or sexual offence that is not criminalised in Australia, such as flag burning, homosexuality or membership of a group not banned in Australia.

The principle of speciality is an important safeguard and should be maintained. Without speciality the Minister has no way of ensuring that suspects will not be charged with crimes for which extradition would not have been granted.

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.*
52. Prosecution in lieu should be available in cases where extradition has been refused. In CCL's view it is preferable that prosecution be pursued in Australia where:
- The offence is too minor to warrant the prolonged detention necessary for extradition; or
 - Appropriate procedural and human rights safeguards could not be guaranteed if the person was extradited.
53. Whether such prosecution is appropriate should be determined on a case by case basis by referral to the DPP.

15. International transfer of prisoners

- *Should Australia make and receive extradition requests that are conditional on an international transfer of prisoners agreement?*
54. CCL supports the proposition that extradition should be subject to the existence of a prisoner transfer agreement. CCL has long been a supporter of prisoner transfer agreements and has actively lobbied for them. Former NSW CCL President, Kevin O'Rourke, visited prisoners in Thailand in advance of Australia's first prisoner transfer treaty entered into with that country. He saw first hand the devastating impact on Australians imprisoned in a foreign country over and above the impact of imprisonment generally. The separation of prisoners from their families, most of whom could not bear the cost of travel, was particularly acute; even more so when the prisoners had young children. Language was also a barrier, along with a myriad of other cultural factors. The health of prisoners appears to deteriorate faster in these circumstances, and rehabilitation becomes a more remote prospect.

55. The transfer of prisoners on humanitarian grounds is compelling and Australia has recognised this with a legislative framework now in existence in each State and Territory as well at the Commonwealth level. Treaties are now in place with Thailand and Hong Kong, and CCL is aware of negotiations underway with at least Indonesia and Cambodia.
56. In the light of the many compelling reasons in favour of prisoner transfer treaties, and their support by the Commonwealth, States and Territories, it seems logical to encourage the negotiation of further treaties with other countries. And when other countries seek Australia's assistance in extraditing persons in Australia to those countries, it seems logical to ensure that a prisoner transfer scheme is in place with that country. This will achieve a more satisfactory and balanced outcome for those concerned. The foreign country can ensure that justice is done in respect of offences committed within its jurisdiction, and Australia can thereby ensure that the sovereignty of the foreign country is respected. At the same time, the prisoner is treated humanely and can serve their sentence closer to their families with all the benefits noted above. It is not a soft option; the prisoner must still serve the sentence imposed by the foreign country.
57. CCL acknowledges that it takes time to negotiate treaties. It might be practically difficult to insist that a prisoner transfer treaty be concluded as a prerequisite to extradition during treaty negotiations, as this would mean that offenders might escape justice during the period of those negotiations. It might therefore be appropriate to have a transitional provision lasting, say, two years in which it would be sufficient to satisfy the prerequisite for extradition if Australia and the foreign country had agreed to enter into a prisoner transfer treaty and were engaged in formal negotiations. At the end of the two year transitional period, however, it should be a requirement that a prisoner transfer treaty be concluded as a prerequisite to extradition. This would have the added advantage of being a stimulus to conclude further prisoner transfer treaties.

CCL believes that extradition should be subject to the existence of a prisoner transfer agreement.

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.*

58. Australia should only back arrest warrants from countries which:

- adhere to human rights Conventions;
- do not practice torture;
- have *abolished* the death penalty; and
- have a legal system which ensure a fair trial, freedom from discrimination or double jeopardy and judicial independence.

59. Countries that have not abolished the death penalty should *never* be considered. This includes retentionist countries like the United States of America and the Peoples Republic of China.

60. A backing of warrants arrangement with a particular country should only be created by statutory amendment and in circumstances where a treaty guaranteeing appropriate safeguards has been signed. This is necessary to ensure proper parliamentary oversight and human rights guarantees. It should not be possible to allow for extradition by backing of warrants to be expanded to previously ineligible countries through regulation or executive discretion.

CCL supports expanded backing of arrest warrants only to receiving countries that have: entered treaties with Australia guaranteeing appropriate safeguards; and been specifically approved by parliament.

17. Judicial review

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

17.1 Review should not be deferred

61. CCL opposes the deferral of judicial review. If an error occurs at the first stage of the process, then under the proposed model the suspect will spend substantial time in gaol when they would have been freed under the existing arrangements.
62. 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'.³⁹ This trend should not be allowed to progress further.

17.2 If review is deferred it must be comprehensive

63. If review is deferred the presumption against bail should be abolished and the magistrate's decision on bail should be open to appeal.
64. There must also 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.
65. 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'.⁴⁰ 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;⁴¹
 - (b) reach its own conclusion as to eligibility for surrender; and
 - (c) hear evidence as to the existence of an extradition objection.⁴²
66. 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, human rights abuses, 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. Final review must be comprehensive and must allow the court to reach its own conclusions on eligibility.

³⁹ I Shearer, 'Extradition and Human Rights' (1994) 68 *ALJ* 451, 452.

⁴⁰ (1997) 77 *FCR* 128, 133.

⁴¹ Because deferral of the review process in the name of efficiency should not result in a loss of rights.

⁴² An area of uncertainty considered in: *Cabal v United Mexican States* [2001] *FCA* 427, [153].

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?*

67. A suspect should be able to consent at any time. However in consent cases a judicial officer should issue the warrant and should do so only if they are satisfied that:

- the consent is genuine;
- the suspect has had adequate legal advice; and
- the receiving country does not practice torture, will abide by international human rights standards and will not impose the death penalty.

19. Time limits

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

68. Time limits may be appropriate to ensure that individuals are not subject to unnecessarily long periods of detention. An accused should be able to apply to a court for an extension of time in appropriate circumstances.

69. If judicial review of intermediate steps is deferred it is crucial that strict and enforceable time limits be placed on executive decision makers.

70. Time limits should only apply to an accused who is legally represented. one of the great concerns CCL has with extradition law is that, in NSW at least, Legal Aid is not provided to people facing extradition. Given the complexity of extradition law, this is unacceptable. The lack of Legal Aid means that suspects must rely on pro bono lawyers or their own financial resources. This is made all the more difficult by the fact that most people will be refused bail, making it even more difficult to seek out legal advice.

Strict and enforceable time limits should apply to executive decision makers. Time limits should only apply to suspects where they have access to legal advice. Courts should have the power to extend time limits in the interests of justice.

20. Bail

- *The presumption against bail would be retained.*

71. 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.

72. In ordinary criminal proceedings there is a general presumption in favour of bail except in very serious cases.⁴³ 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 the suspect will abscond or not comply with bail conditions.
73. 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.
74. It is particularly important that bail be available if the no evidence criteria 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 situation will be further aggravated if extradition is to be allowed for more minor offences than allowed under present law.

The presumption against bail should be repealed.

⁴³ *R v Light* [1954] VLR 152 at 157.

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.*

75. If the section 19 step is abolished, it is crucial that the court with ultimate authority to review the extradition process has power to reach its own conclusions on the existence of extradition objections. This power is currently vested in a magistrate under section 19(2)(d). If section 19 is abolished, it is not sufficient to simply allow administrative review of the Minister's determination under section 22. It is crucial that a court be allowed to reach its own view on this issue and not be restricted to considering only whether the Minister could have been subjectively satisfied that the criteria has been met.

30. Changing domestic law

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

76. CCL is concerned by the reference in the Review Paper to the need for changes to Australia's privacy law to accommodate exceptions for "appropriate law enforcement" information sharing. The Review Paper does not enumerate what these changes should be or provide any detail on why these changes are necessary.

77. If information sharing contrary to Australia's existing privacy law is to take place, then it should be subject to strict terms and conditions. Such information should only be shared where there is an explicit undertaking that the information will not be used by the requesting nation to execute, torture, harass or discriminate against anyone, including the family and friends of the suspect.

78. When extradition treaties are renegotiated they should include an article similar to those found in mutual legal assistance treaties that permit the placing of conditions on any information shared. This will reserve Australia's right to refuse to share information if the foreign country chooses not to be bound by the conditions.

79. An example of such a provision is article 11 of the *Second Protocol to the European Convention on Mutual Assistance in Criminal Matters*, which states that investigating authorities of one country can conditionally offer information to another country.⁴⁴ The country being offered the information is told the nature of that information and can then choose to accept or refuse the conditions and the information. This Article applies both before and after charges are laid. The Article reads:

⁴⁴ <<http://conventions.coe.int/treaty/en/Treaties/Html/182.htm>>.

Article 11 – Spontaneous information

- 1 Without prejudice to their own investigations or proceedings, the competent authorities of a Party may, without prior request, forward to the competent authorities of another Party information obtained within the framework of their own investigations, when they consider that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings, or might lead to a request by that Party under the Convention or its Protocols.
- 2 The providing Party may, pursuant to its national law, impose conditions on the use of such information by the receiving Party.
- 3 The receiving Party shall be bound by those conditions.
- 4 However, any Contracting State may, at any time, by means of a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to be bound by the conditions imposed by the providing Party under paragraph 2 above, unless it receives prior notice of the nature of the information to be provided and agrees to its transmission.

Extradition treaties should include an article placing conditions on any information shared. Information should be shared only where there is an explicit undertaking that it will not be used in a way that will lead to execution, torture, harassment or discrimination against anyone, including the family and friends of a suspect.

31. Conclusion

80. CCL has serious concerns with a number of the proposals put forward in the Review Paper. Dual criminality, speciality and the political offences exception are not simply barriers to expeditious decision-making; they are fundamental safeguards. These principles serve both to protect suspects from potential rights abuses and to insulate executive decision makers from undesirable diplomatic or political pressure. They must be retained.
81. Australia should never extradite where there is a risk that the suspect will face the death penalty, human rights abuses, or an unfair trial. To minimise these dangers a number of safeguards are necessary. At the structural level, extradition must only occur pursuant to properly evaluated treaties and internationally binding undertakings as to treatment. At the individual level, suspects must have access to legal advice and to a comprehensive judicial examination of their case.
82. Above all CCL notes that the purpose of extradition is to ensure that justice is done, and any reformed procedure must ensure that the requirements of justice are not compromised in the name of efficiency.