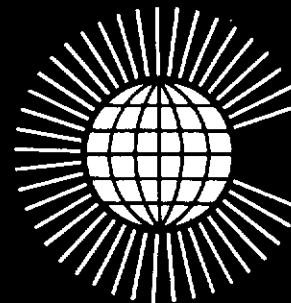


# Commonwealth Legal Assistance News



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**Extradition and Human Rights: An Australian Approach, Paper delivered to ANZSIL Annual Meeting 19 May 1996, by Sukhpal Singh, International Law News, (Journal of the International Law Section of the Law Council of Australia), No. 31, June 1996**

This paper sets out how Australia, in dealing with extradition cases, seeks to balance two important interests: first, the interest in ensuring that people legitimately sought for criminal prosecution are returned to the jurisdictions seeking them, and, secondly, the interest in ensuring that an extraditee's human rights are safeguarded, thereby ensuring that international human rights obligations are complied with.

Australia's law on extradition is embodied in the Extradition Act 1988. The article describes the extradition process in some detail and

discusses the roles of the courts and the Executive in the extradition process. Under the Australian law much of the discretion resides in executive arm of the government.

The article discusses whether the executive arm of government is well placed to make informed assessments of possible human rights violations and concludes that the channels available to governments to obtain pertinent information and material about the general human rights situation in the requesting country place them in a good position to make proper judgments.

The author examines the role of extradition treaties and their relationship with Australia's extradition legislation. The importance of treaty negotiations in sensitising treaty partners to Australia's concept of acceptable minimum human rights standards in the area of international legal cooperation is discussed.

**We look forward to receiving copies of your cases, laws, articles and information on extradition, mutual assistance and other international cooperation for inclusion in forthcoming issues of CLAN. Our thanks to those who have assisted during 1996.**

**Recent Developments in Australian Extradition Policy and Practice, A paper by Sukhpal Singh reproduced in "Proceedings of the Third Annual Meeting of the Australian and New Zealand Society of International Law" (1995), pp.167-171.**

In this article the author, who heads the extradition section of the International Branch of the Australian Attorney-General's Department, looks at developments in Australian extradition practice since 1985 when Australia first negotiated extradition treaties which dispensed with the requirement that the requesting state provide sufficient evidence to warrant trial of the accused. The author expresses the view that the courts are, since the modification of evidentiary requirements, increasingly entertaining technical challenges to extradition and construing treaty obligations in a rather limited way.

This argument is supported by examples such as the case where the court determined that an Italian fugitive was not an accused person despite the fact that the English translation of the arrest warrant described the person as "accused". The court determined that the Italian words *persona indigati* referred to a person under investigation and, ignoring the role of investigating magistrates in the civil law tradition, decided that such a person was not accused for the purposes of the treaty between Australia and Italy. The second case described in the article involved a request by Austria to Australia. The Austrian documents described the person as "strongly suspected" and the full Federal Court again held that such a description did not satisfy the requirement that the person be accused. (Fortunately this decision has been overturned by the High Court of Australia - the report will appear in the next issue of CLAN.)

The author argues that the court ought to have appreciated the position in which its decision placed the parties to the treaty. In Austria criminal proceedings cannot go ahead until the person sought appears before the investigating magistrate. If extradition cannot be granted at the "strongly suspected" stage, because this does not equate with the Australian concept of "accused", Austria, and other European countries, will never be able to seek extradition of a person to stand trial. The courts failed to read the extradition legislation which refers to accused persons together with the extradition treaty which refers to persons wanted for prosecution. In arguing this proposition the author points to the numerous cases decided by Australian courts which take into account the terms of international conventions and treaties in determining the proper ambit of Australian law. That this is not happening in extradition cases is a cause of concern to the author.

**The Admissibility of Evidence Obtained from Abroad into Criminal Proceedings - The Interpretation of Mutual Legal Assistance Treaties and Use of Evidence Irregularly Obtained, by C. Gane and M. Mackarel, European Journal of Crime, Criminal Law and Criminal Justice 1996-2, page 98.**

The authors commence their consideration of the development of mutual assistance in criminal matters arrangements by stating that the increase in crimes having cross border elements has compelled countries to cooperate to deal with this problem by concluding treaties which facilitated modern means of cooperation. The article examines briefly the history of the development of modern mutual legal assistance treaties which results from the "internationalization" of crime attributable to a number of factors including the relaxation of border controls, the phenomena of highly organised gangs and drug cartels and ease of travel between various jurisdictions.

The article concentrates on cases decided in the United States and in so doing necessarily considers provisions appearing in US MLATs which have been drafted to take specific account of the practices of that country - in particular the provision which appears in all US treaties and provides that the treaty is intended solely for mutual legal assistance between the parties and does not give rise to

private rights to obtain or suppress evidence. Various US cases which have decided on the rights of the subjects of requests to challenge the manner of the making of requests are considered by the authors who conclude that the courts are unwilling to accede to any perceived challenge to the sovereignty of domestic criminal law and the extension of US criminal jurisdiction despite the existence of MLATs.

The use by states of means of obtaining evidence outside the formal mechanisms provided by mutual assistance treaties is considered to be a result of the limitations imposed by treaties on the type of request which can be made and on the "use of evidence provisions" contained in bilateral treaties.

This article goes on to consider the admissibility of evidence obtained from abroad and the problems which arise where evidence has been obtained in a foreign jurisdiction where it has been obtained in a way which does not comply with the requirements of the *lex fori*. The authors examine cases decided in both Canada and the United States where the provisions of domestic criminal law of the state seeking the use the evidence have not been complied with. They conclude that the decision of the Supreme Court of the United States in *US v Verdugo-Urquidez* [(1990) 110 S.Ct. 1056] removes limitations on the exclusionary rule in the US relating to evidence gained abroad unlawfully. In this case US DEA officials together with Mexican official without warrant searched premises in Mexico and seized evidence. The article, while dealing with the unlawfulness of a search in America without warrant, fails unfortunately to consider whether the search was contrary to the law of Mexico and simply deals with the fact that the court held that the Fourth Amendment protects on "the people" of the United States and to that extent does not apply to foreign evidence. The evidence was therefore admitted.

In considering Canadian cases the authors are critical of decisions which determine that foreign evidence should be admitted unless "the principles of fundamental justice" were violated and that the provisions of the Canadian Charter of Rights and Freedoms do not have extraterritorial effect so as to automatically exclude evidence unlawfully obtained abroad.

Co-operation between the law enforcement authorities of cooperating countries is described by the authors as "irregular collusion" and is criticised as ignoring compliance with procedures for obtaining evidence. The practice of police handing evidence to the law enforcement authorities of countries having jurisdiction is also criticised as is the process of what the authors refer to as "process laundering" where proceedings are brought in a jurisdiction which will not object to the use of unlawful means of obtaining evidence in a third country.

The article concludes that the practice apparent in all countries of applying the lowest available threshold for the admission of evidence dilutes the protection of the suspect in cases which have an international character. The authors tentatively suggest that all courts should deal with such problems by asking whether the evidence would be admissible in the jurisdiction if it had been obtained by the means used in the jurisdiction where it was collected. In so doing they recognise that the application of this test would still leave open the possibility that the clear public policy of the state in which the evidence was collected would not be respected.

**Comment:** Although this article provides a useful overview of the case law on the use of foreign obtained evidence, it does do in a way which appears to overlook the expressed intention of countries to use mutual assistance treaties to collect evidence when the case falls within the treaty but to preserve other forms of cooperation to complement the use of treaties. It is, the opinion of this editor, that any test other than those applied by the courts which decided the cases referred to in this article would render international cooperation of little use and make the adducing of foreign evidence an almost insurmountable hurdle for prosecutors.

## CASE NOTES

### **Mutual assistance - political offence - fishing expeditions - words and phrases "evidence" Criminal Justice (International Co-operation) Act 1990 (UK)**

This case concerned an application by Fininvest SpA, a large Italian Corporation and others for judicial review of the decision of the Secretary of State for the Home Department to refer a request for assistance from the Italian authorities to the Director of the Serious Fraud Office under s. 4 of the Criminal Justice (International Co-operation) Act 1990, (the "1990 Act.")

The Home Secretary had received from the Italian public prosecutor letters of request under the provisions of the European Convention on Mutual Assistance in Criminal Matters 1959. The Italian authorities had requested assistance in obtaining documents held by a company in London which were relevant to allegations in Italy against the applicants of a huge fraud. One of the applicants was the subject of criminal proceedings in Italy where he was charged with making illicit payments to a former prime minister which payments were made without authority of the corporation and without records required by Italian law relating to transparency of political payments.

The request was referred by the Home Secretary to the Serious Fraud Office under s. 4 of the 1990 Act and the Serious Fraud Office implemented the request under its powers in the Criminal Justice Act 1987 by seeking, obtaining and executing a search warrant in respect of the company.

The applicants argued that the request did not comply with the Criminal Justice (International Co-operation) Act 1990 because it was not a request "for the assistance in obtaining evidence" but was rather "a fishing expedition" and further that the Secretary of State was bound to consider whether or not the offence concerned a political offence and if he had done so, would he have exercised his discretion and refused assistance.

*Held* dismissing the application:

The word "evidence" in the context of a criminal investigation necessarily had a wider meaning than the word would have once the investigation was complete. The 1990 Act created a wholly new scheme for mutual assistance with regard to criminal investigations under which it would plainly be necessary to examine altogether more material than would ultimately constitute evidence at any trial. Accordingly, the contention of the applicants that the request was a fishing expedition was rejected. Considering the investigative stage of the subject of the request a greater degree of particularisation for the offences could not be expected. The request for assistance was not vague and speculative but as precise as such a request could possibly have been in these circumstances;

The question whether or not the offence was political was to be decided according to English law. The making of illegal political donations was really an offence against ordinary law for the proper ordering of the democratic process in Italy and even though it was committed in a political context that did not make it a political offence. Even if the offence was committed with a view to influencing government policy it did not follow that any offence committed with a view to changing governmental policy was *ipso facto* to be regarded as a political offence. The offence was not intrinsically political.

*Regina v Secretary of State for the Home Department and Another, Ex parte Fininvest SpA and others*,  
The Times, November 11 1996.

## Mutual Assistance - words and phrases "court or tribunal"

Allegations were made against Peruvian government officials that they had corruptly received payments relating to the awarding of a government contract. The Peruvian Congress set up an investigative commission to investigate the charges and prepare a report. Under the Peruvian Constitution, investigative commissions report to the Attorney-General and the Congress is empowered to require the public prosecutor to proceed with criminal charges. The investigative commission applied for judicial assistance to the Cayman Islands. By *ex parte* order examination of the manager and other officers and shareholders of the Caymanian bank into which the applicants were alleged to have made payments was ordered. The appellant bank sought the setting aside of the orders.

The appellant argued that:

- (a) the respondent "investigative commission" was not a tribunal within the meaning of the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 because it could not produce a binding decision; and
- (b) no criminal proceedings had been instituted since it was the public prosecutor who could institute proceedings.

*Held*, allowing the appeal:

The Investigative Commission (CITEL) was not more than a commission mandated to make enquiries preliminary to an administrative or judicial decision and it cannot make binding decisions. The investigative commission cannot be regarded as a tribunal to bring it within the Order. The Cayman Islands court therefore cannot entertain the application for assistance from the Commission.

Although the appointment of CITEL might have been the first stage in investigating whether to institute criminal proceedings, all such proceedings in Peru were instituted by the public prosecutor. Since this had not been done, it followed that criminal "proceedings" as required by the 1978 Order had not been instituted and for this reason too, the Grand Court had no jurisdiction to entertain the application.

*Worldwide v CITEL*, 1994-95 CILR (The Cayman Islands Law Reports) 391

## Mutual Assistance in Business Regulation - Evidence - assistance to foreign court - locus standi - confidential relationships

In order to facilitate proceedings in Ontario, the Ontario Securities Commission had submitted letters rogatory to the Grand Court of the Cayman Islands seeking certain confidential information. The Commission believed that some of the parties to the Ontario proceedings were beneficial owners of companies in the Cayman Islands and some of the persons from whom evidence was sought may have been officers or agents of Caymanian companies.

The Grand Court made an *ex parte* order under the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 directing the respondents to attend to give or produce evidence. The respondents no longer had fiduciary obligations to the companies and the companies were not parties to the Canadian proceedings. The companies sought to have the order discharged.

When the respondents were required to disclose confidential information, they applied for directions

under the Confidential Relationships (Preservation) Law, s. 3A. The companies sought to intervene in this application. The Commission submitted that the companies had no *locus standi* and that they were not entitled to intervene in the s. 3A application.

*Held*, dismissing the applications in substantial part:

The companies had no *locus standi* to seek the discharge of the order acceding to the letters rogatory. They were neither parties to the proceedings in Ontario from which the letters originated nor respondents in the Cayman Islands and had no legal interest in either of the proceedings. A commercial or proprietary interest in the information sought was not enough. They could therefore not be heard in their summons to set the order aside. Although the companies have a commercial interest in the information to be disclosed they have not shown a legal interest which could fall to be determined either in the letters rogatory proceedings or in the proceedings in Ontario.

The companies were not within the classes of persons specified in s. 3A who were entitled to apply for directions because they were not persons required to give confidential information (as opposed to the former officers and agents of the companies). Neither were they parties to the Ontario proceedings and no interest could make them into parties. In this case the witnesses have long ceased to be fiduciaries of the Cayman companies. While audience cannot be granted to the companies in the capacity of parties to the proceedings, there are dangers and strictures of the narrow construction of section 3A. The court, however, has an inherent jurisdiction, unaffected by s. 3A, to allow a person who was not otherwise entitled to do so, to address it. It would exercise this discretion to allow the companies to appear on the application for directions since they would not, in the circumstances of this case, be represented by their agents.

*In The Matter of The Ontario Securities Commission*, 1994-95 CILR (The Cayman Islands Law Reports) 131.

**Extradition - copies of documents - common law offences - conspiracy to commit a statutory offence**

The appellant had been committed to custody to await surrender for the common law offence of conspiracy to commit an offence under the Prevention of Fraud (Investments) Act 1958 of the United Kingdom.

Application was made for the issue of a writ of habeas corpus on two main grounds. First that the documents submitted in support of the request for surrender were copies of documents properly admitted in the courts in the United Kingdom and no explanation for non-production of the originals in the extradition proceedings was given. The second ground of appeal was that the warrant did not refer to relevant offences within the meaning of the Fugitive Offenders Act 1967 as extended to the Cayman Islands.

*Held* granting the application

There is no statutory equivalent in the Cayman Islands of the UK Prevention of Fraud (Investments) Act and it is therefore necessary to consider whether a conspiracy to contravene the provision is a conspiracy at common law. The court rejected the argument that it is not a criminal offence, other than by statute in the United Kingdom, to induce a person to invest by means of misleading, false or deceptive statements and consequently a conspiracy to achieve that purpose is not a criminal conspiracy on the ground that conspiracies have been held to be indictable where the object of the conspiracy was unlawful though not criminally punishable. Here the alleged conspiracies would have

been indictable in the Cayman Islands since they were designed to deceive and cause loss to investors.

There are three possible courses which can be adopted in relation to documentary exhibits to be produced in the Cayman Islands. First, an original document may be tendered before the court in the requesting country and submitted duly authenticated with the request for extradition. Second an original document may be tendered at the hearing before the court of the requesting country and a duly authenticated copy thereof submitted with the request for extradition. Third, if there is evidence giving a proper explanation for the failure to produce the original, a copy of a document may be tendered at the hearing before the court of the requesting country and submitted, duly authenticated with the request for extradition.

In this case no evidence was led explaining the failure to produce the originals to the court in the requesting country and accordingly the basic rules governing the admissibility of documents in evidence in the Cayman Islands had not been complied with. As there was insufficient other evidence submitted the application for the grant of a writ of habeas corpus was granted.

*In the matter of Harris* 1952-1979 Cayman Islands Law Reports 277 (1978 case)

## LEGISLATION

### **Mutual Assistance in Criminal Matters Legislation Amendment Act 1996 (Australia)**

On 9 October 1996 Royal Assent was given to the Australian Mutual Assistance in Criminal Matters Legislation Amendment Act 1996. The Amendment Act was drafted following a thorough review of the operation of Australia's 1987 mutual assistance law.

The Mutual Assistance in Criminal Matters Act as amended now makes it clear that it provides the exclusive means of dealing with foreign requests for the exercise of compulsory powers in Australia and also for Australian authorities to request the exercise of compulsory powers in other countries. As a consequence of limiting the operation of the Act to matters involving compulsory or executive powers, the list of assistance which can be provided has been amended to delete all reference to assistance which does not require the exercise of such powers. The exclusivity of the legislation now means that court letters of request must be forwarded through the Central Authority.

One of the major changes to the legislation is the abolition of the requirement that a country must be designated before assistance can be granted. This amendment will enable assistance to be provided more expeditiously. It also removes an unnecessary impediment under the original act which impliedly, or in some cases specifically, limited the countries to which Australia could make requests for assistance. Because assistance can now be granted to a country with which Australia has no bilateral mutual assistance arrangement a new provision which empowers the Attorney-General to refuse assistance has been added. Under this provision assistance may be refused where the Attorney-General considers that, in all the circumstances, assistance should not be provided. It is not completely clear from the Act or the Second Reading Speech whether this new provision will affect the provision of assistance to countries with which Australia has MA treaties and to which the Act still applies subject to the treaty.

The Act has an interesting provision which expressly provides that where Australia requests the taking of evidence or the production of documents the manner in which the request is given effect in the requested country is not constrained by the law governing the taking of that evidence in Australia. The provision also expressly permits Australia to request that evidence be taken by video link.

The original legislation did not expressly deal with requests by defendants for the taking of evidence overseas. To remove any doubt that the legislation could be so used, the Amendment Act expressly provides that a defendant may apply to a relevant court for a certificate that it would be in the interest of justice for the Attorney-General to make a mutual assistance request to a particular foreign country on behalf of the defendant. Although the Attorney-General is not bound to make a request following the issue of a certificate by a court, the Attorney-General, in his second reading speech on the Bill, stated that the discretion not to make a request would be exercised with great caution but the existence of the discretion would allow the Attorney to take into account Australia's wider mutual assistance relationship with a particular country before making a request.

Of particular interest is the insertion into the legislation of a provision which requires that, in making a decision on the granting of a mutual assistance request, regard must be had of the possibility of imposition of the death penalty by the country which has requested assistance. The new provision requires that the Attorney-General refuse a request for assistance where the death penalty can be imposed upon the person charged with the offence for which assistance is sought. Refusal is not mandatory where the Attorney-General is of the opinion that there are special circumstances - for example where the granting of assistance may be of an exculpatory nature and assist the defendant in the foreign country to meet the charges. Where charges have not been laid the granting of assistance is discretionary rather than prohibited and the Attorney-General is required to take into account the interest of international criminal cooperation and the circumstances of the case before making a decision to grant assistance in such cases.

The inclusion of rules relating to the use of evidence obtained by Australia from foreign countries is a valuable addition to the legislation and enshrines in domestic law the undertaking on use and confidentiality contained in bilateral treaties.

Of domestic interest are the new provisions of the Act relating to search and seizure in cases where the request relates to a foreign serious offence. These new provisions mirror changes made to the federal criminal law and ensure that the procedures used to execute foreign requests are the same throughout Australia rather than relying, to a greater or lesser extent, on the laws of the various states and territories. Of these provisions, those relating to the right of officers executing warrant to gain access to electronically held evidence at the searched premises are interesting.

Where the foreign request relates to proceeds of crime, the Amendment Act makes it clear that interim restraining orders may be obtained on behalf of a foreign country in limited circumstances where charges have not been laid. The circumstances are the same as those which pertain in Australia - namely that orders may be sought and granted provided charges are to be laid within 48 hours.

Copies of the Amendment Act and the Explanatory Memorandum are available on request.

### **International Co-operation in Criminal Prosecutions: Report of the South African Law Commission, December 1995**

The South African Law Commission has completed a comprehensive report on proposals to reform the laws on International Co-operation in Criminal Prosecutions. The Report makes recommendations on the enactment of laws and the establishment of mutual assistance regimes which will facilitate international co-operation in the investigation and prosecution of offences. The Report deals also with the need to amend South Africa's extradition laws so as to give effect to the London Scheme on the Rendition of Fugitive Offenders. The recommendations on extradition include one relating to the introduction of new and simplified evidentiary requirements. Finally the Report deals with proceeds of crime, forfeiture and the enforcement of foreign orders. Model legislation to implement all of the recommendations is included in this very useful and wide ranging Report. Recent reports suggest that the South African Government is taking action on these recommendations at this time.