

**Commonwealth Co-operation in the
Administration of Justice**

SIMPLIFYING EXTRADITION PROCEDURES : A PROPOSAL TO EXTEND THE SCOPE OF THE LONDON SCHEME FOR THE RENDITION OF FUGITIVE OFFENDERS

A paper by the Commonwealth Secretariat

INTRODUCTION

1. Law Officers of Small Commonwealth Jurisdictions met in Namibia in 1995. Having considered the question whether the London Scheme in its current form gave sufficient flexibility to their jurisdictions to enter into simple extradition arrangements with other countries and, in particular, with near neighbours, they requested that the issue of adding provisions to the London Scheme on the Rendition of Fugitive Offenders to facilitate simplified regional arrangements be considered by Law Ministers at their next meeting. Law Ministers may be interested to know that the Pacific Island Law Officers Meeting (PILOM) has already embarked on an exercise to revise national extradition laws in the region and to include in those national laws provisions which will permit simplified extradition arrangements to be adopted on bilaterally agreed bases between member countries.

BACKGROUND

2. As crime becomes increasingly global in nature and as criminals become internationally mobile there is a need for countries to consider whether their extradition laws are adequate to enable them to seek and grant extradition. Most Commonwealth jurisdictions have extradition laws which facilitate surrender of fugitives to other Commonwealth countries. These laws are, by and large, modelled on the 1966 London Scheme for the Rendition of Fugitive Offenders and relatively few of these laws have been amended to deal with changing global trends and an increase in crimes having an international element - even if that international element is merely the location of the fugitive.

THE COMMONWEALTH SCHEME FOR THE RENDITION OF FUGITIVE OFFENDERS (THE LONDON SCHEME)

3. Since the adoption of the London Scheme in 1966, Law Ministers of the Commonwealth have amended its provisions on three occasions. In 1983 provision was made to limit the scope of the political offence exception by permitting countries to declare that certain acts may not be held to be of a political character. The 1986 amendments abolished the list of offences for which extradition could be granted and replaced it with a simple dual criminality/minimum punishability test. The 1986 changes also introduced the concept of temporary surrender of fugitives. In 1990 an optional annex was added to the Scheme to permit countries, on a bilateral basis, to modify the documentary requirements by, in effect, abolishing the application of the hearsay rule as it applied to documentary evidence submitted in support of extradition requests.

4. To the extent that Commonwealth countries have

- (a) enacted laws to give effect to the London Scheme; and
- (b) amended those laws periodically to reflect changes made to the Scheme by Commonwealth Law Ministers

the extradition relations between Commonwealth countries are reflective of modern extradition practice amongst common law countries. It is, however, fair to say that a significant number of member countries have not yet abolished the list approach to the determination of extraditable offences with the result that many crimes of major international concern are crimes for which extradition cannot be granted by those countries. It is equally fair to say that many countries, despite having laws capable of permitting positive responses to requests for extradition, have few if any extradition cases and that the reason for this is, in part, the difficulties experienced in conducting extradition proceedings and in making successful extradition requests.

A MEANS OF SIMPLIFYING EXTRADITION RELATIONS

5. Some Commonwealth countries have been giving preliminary consideration to suggestions that

extradition relations between member countries could be significantly simplified and that consideration could be given to the revival of the **backing of warrants** system which operated between colonies and dependencies in specific regions. In this context it is relevant that the London Scheme itself envisages that additional or different arrangements may be appropriate between certain member countries. It provides in Clause 18 that "Nothing in this Scheme shall prevent the making of arrangements between two or more parts of the Commonwealth for further or alternative provision for the return of offenders."

6. Former British Colonies surrendered fugitive offenders between themselves on the basis of "backed warrants". Very simply explained, there was no requirement for the submission of formal documentation - other, of course, than the warrant issued in the requesting country, there was no inquiry into the merits of the case and, usually, little or no governmental involvement in the process. The police in one country, having secured a warrant for the arrest of a person suspected or accused of committing an offence, took that warrant to a magistrate in the country of refuge, had it "backed" or endorsed, executed it (usually with the assistance of local police, brought the fugitive before the courts, presented oral evidence to the magistrate and, subject to the right of the magistrate to refuse to issue a surrender warrant on specific grounds (now reflected in paragraph 10(3) of the London Scheme), was granted a surrender warrant and took the prisoner back to the country where he/she was wanted.

7. As former colonies enacted new extradition laws which reflected the London Scheme so they repealed the Imperial legislation which used the backing of warrant provisions between colonies in close geographical proximity to each other. There was a logical reason for this - the former colonies had attained status as sovereign nations and with that went the notion that sovereign nations dealt with the surrender of fugitive criminals between each other as an incident of sovereignty and with due formality which took into account differing legal systems and traditions.

8. The question could now be asked whether in taking on individual sovereignty Commonwealth countries really needed to throw out the benefits which came to them as constituent territories of a single sovereign? Did the attainment of independence make a real change to the relationship between them - was there a real need to abolish the structures which had worked between different colonies? Obviously some countries did not see a

necessity to restructure extradition laws when they gained independence and still extradite to Commonwealth countries on the basis of the Fugitive Offenders Act 1881 (UK). New Zealand is an example. The backing of warrants provisions of the 1881 Act applied between colonies within regions defined in UK Orders in Council. Certain groups of former colonies in Africa have continued special extradition relationships between themselves despite the attainment of independence. Despite having twice enacted new extradition legislation Australia has maintained the backing of warrants system between it and New Zealand by re-enacting the old provisions which provide the sole means of dealing with New Zealand requests. The procedures are used often and successfully by both countries - each of which (we understand) surrenders more fugitives to the other each year using these provisions than to the whole of the rest of the world.

9. Where there are special bilateral relationships between countries in a regional grouping there would seem to be good reason to give serious consideration to developing extradition relations between those countries which reflect the reality of the close relationship. Clearly the question whether a country is prepared to so simplify extradition relations with another country that it reintroduces the "backing of warrants" procedure must be determined in accordance with national policy which will take into account any relevant developments in laws to protect the interests of accused persons. It will also take into account foreign relations issues.

ADDING TO THE LONDON SCHEME

10. The London Scheme embodies agreed principles governing rendition. Annexes to the London Scheme contain principles which, while accepted as being a valid part of national extradition practices, are not necessarily acceptable in their content, detail or emphasis to all member countries. In other words, annexes contain discretionary provisions and alternatives to provisions in the Scheme.

11. A backing of warrant procedure is recognised as being inherently a practice which will not be universal in its adoption nor is it likely to be adopted by any one country in respect of all other countries in the Commonwealth. It is therefore appropriate that the question be considered only in the context of the adoption of an additional annex to the Scheme being an annex reflecting one form of alternative procedure already contemplated in Article 18. It would, of course, be possible to simply leave the Scheme as it is and acknowledge that it

already accepts the adoption of additional procedures. The alternative argument is that the very countries which have most need for simplified procedures are the countries which would benefit most from assistance to formulate those procedures. There is therefore very good reason for Law Ministers to consider the issue and to endorse a set of principles which will guide the small jurisdictions in their efforts to introduce simpler extradition procedures where these are appropriate.

12. The first question is whether Ministers agree in principle that the London Scheme would be enhanced by the addition of an annex which sets out a backing of warrant procedure which can be incorporated into national law and brought into practice with appropriate member countries following bilateral agreement between two governments to so do. If the answer to this question is yes (and Law Officers of Small Commonwealth Jurisdictions have expressed the preliminary view that they would find such an annex useful) Ministers must then consider the proper form of such an annex.

13. The great benefit to small jurisdictions of the system is that it removes the need for reliance on the diplomatic channel (which is often almost non-existent in such countries), it is inexpensive to run because it does not take up the time of legally trained government lawyers but is administered (in most cases) by police, it does not rely on voluminous paperwork and it takes little court time.

14. Traditional backing of warrants procedures contemplate nothing more than the issue of a warrant for the arrest of a person accused or convicted of a crime and the delivery of that warrant to an appropriate officer in the jurisdiction of refuge (usually a magistrate) who endorses the warrant so as to permit its execution in the country of refuge. When the warrant is executed the wanted person is brought before a court (again usually a magistrate) who, having heard from both the arresting police officer and the fugitive as to certain specified issues, makes a determination on surrender. If the decision is to surrender the magistrate issues his or her warrant and the person is conveyed (after any necessary committal to custody for periods necessary to enable the making of an appeal against the decision) to the requesting jurisdiction. The critical feature of traditional backing of warrants procedures is that there are fewer protections available to the person sought, for example:

- . dual criminality is not a prerequisite;
- . the minimum punishability test is not applied;

- . the rule of speciality does not apply (with one notable recent exception);
- . the political offence exception is not relevant and none of the statutory safeguards are applied.

To the extent that there are protections for the fugitive they reside in the magistrate's power to refuse surrender on the ground that the offence is trivial, the accusation is not made in good faith, there has been a lengthy lapse of time since commission of the offence or that surrender would be unjust, oppressive or too severe a punishment.

15. As mentioned earlier, the Fugitive Offenders Act 1881 (Imp.) is still in force in New Zealand (with minor modifications). The backing of warrants procedure in that Act is attachment 1 to this paper. It represents the simplest form. In its various revisions of its extradition laws Australia has on each relevant occasion re-enacted provisions which maintain this system for its extradition relations with New Zealand. The most recent Australian re-enactment is attachment 2. It maintains the traditional elements but adds to them provisions for consent surrender and temporary surrender together with modernisation of the appeal procedures.

16. Between countries with very close links the traditional system is clearly entirely workable, but to be useful to a range of small Commonwealth jurisdictions a Commonwealth-wide procedure may need to take account of differing traditions, policies and laws. A new Annex to the London Scheme may therefore need to contemplate a wider range of protections for the fugitive and for the surrendering jurisdiction. These could include issues like prejudice, political offence, dual criminality and seriousness. If protections are to be listed in an additional annex to the Scheme, consideration could be given to simply replacing the existing discretions to refuse surrender with more modern equivalents.

17. Attachment 3 to this paper is a draft annex to the London Scheme for the Rendition of Fugitive Offenders entitled "Alternative Provisions for Dealing with Requests for Surrender". While essentially adopting the traditional backing of warrants system it includes - in square brackets - some provisions designed to reflect recent international developments in extradition practice. The draft has been prepared by the Secretariat at the request of the Law Officers of Small Commonwealth Jurisdictions and is submitted for consideration. Where the London Scheme contains provisions which would facilitate administration of

a backing of warrants scheme these have been duplicated in the draft.

18. Attachment 4 to this paper contains a draft amendment to clause 19 of the Scheme which will be required if an additional annex to the Scheme is adopted.

February 1996

NEW ZEALAND

PART II

INTERCOMMONWEALTH BACKING OF WARRANTS AND OFFENCES

Application of this Part of Act

12. Application of this Part of Act to group of Commonwealth countries—This Part of this Act shall apply only to those groups of [Commonwealth countries] to which, by reason of their contiguity or otherwise, it may seem expedient to Her Majesty to apply the same.

It shall be lawful for Her Majesty from time to time by Order in Council to direct that this Part of this Act shall apply to the group of [Commonwealth countries] mentioned in the Order, and by the same or any subsequent Order to except certain offences from the application of this Part of this Act, and to limit the application of this Part of this Act, by such conditions, exceptions, and qualifications as may be deemed expedient.

The references to Commonwealth countries were substituted for references to British possessions by s. 5 (b) of the Fugitive Offenders Amendment Act 1976 (N.Z.).

As to the making or revocation of Orders under this section, see s. 31.

As to the effect of recent constitutional changes, see note to s. 18 of the Extradition Act 1870 (c. 52), Vol. 9, Halsbury's Statutes of England, 2nd Edn., p. 886. For the adaptation in relation to trust territories of enactments formerly applying to mandated territories, see the Mandated and Trust Territories Act 1947 (c. 8), Vol. 9, Halsbury's Statutes of England, 3rd Edn., p. 583.

As to Orders in Council applying Part II of this Act to groups of Commonwealth countries, see:

29th November 1884, S.R. & O. Rev. 1904; S.R. & O. 1938, No. 1362 and S.R. & O. 1939, No. 1896 (Jamaica, Turks and Caicos Islands, British Guiana, Trinidad, Leeward Islands, Barbados, St. Vincent, Grenada, St. Lucia, Tobago, the Bahamas, British Honduras, Cayman Islands, Dominica).

S.R. & O. 1913, No. 323 (Union of South Africa, Basutoland, Bechuanaland, Southern Rhodesia, Northern Rhodesia, Swaziland, Nyasaland).

S.R. & O. 1918, No. 28 (India and Pakistan, Ceylon, Hong Kong, Federation of Malaya, Singapore, Brunei, North Borneo, Sarawak).

S.R. & O. 1920, No. 2351 and S.R. & O. 1924, No. 1219 (Kenya Colony and Protectorate, Nyasaland Protectorate, Somaliland Protectorate, Tanganyika Territory, Uganda Protectorate, Zanzibar).

S.R. & O. 1924, No. 596 (Protectorates of Gambia, Sierra Leone; Northern Territories of Gold Coast, Nigeria; Colonies of Gambia, Sierra Leone, Gold Coast, Ashanti, Nigeria; trust territories of Togoland and Cameroons).

S.R. & O. 1924, No. 1401 (Zanzibar, Kenya Colony and Protectorate, Uganda Protectorate, Tanganyika Territory, India and Pakistan, Aden, Mauritius, and all British possessions and protectorates in Africa south of the Equator).

S.R. & O. 1925, No. 1031 (Commonwealth of Australia, Papua, Norfolk Island, New Guinea, Nauru, New Zealand, Western Samoa, Fiji, Gilbert and Ellice Islands, British Solomon Islands).

S.R. & O. 1930, No. 222 (Somaliland Protectorate, Aden, Zanzibar, Kenya Colony and Protectorate, Uganda Protectorate, India and Pakistan).

S.R. & O. 1946, No. 2260 (Muscat, Bahrein, Kuwait, Qatar, the Trucial States, Aden, India and Pakistan).

S.I. 1952, No. 458 (Tonga and Fiji).

S.I. 1961, No. 1505 (Tonga and Fiji).

S.I. 1961, No. 1506 (Western Pacific Islands).

As to Tokelau, see ss. 4A to 6 of the Tokelau Act 1948 and s. 6 of the Tokelau Amendment Act 1970, reprinted 1976, Vol. 5.

As to the application of this Act to Protected States, see s. 1 of the Fugitive Offenders (Protected States) Act 1915 (U.K.) and the notes thereto, reprinted *infra*.

Backing of Warrants

13. Backing in one Commonwealth country of warrant issued in another of same group—Where, in a [Commonwealth country] of a group to which this Part of this Act applies, a warrant has been issued for the apprehension of a person accused of an offence punishable by law in that [Commonwealth country] and such person is or is suspected of being in or on the way to another [Commonwealth country] of the same group, a Magistrate in the last-mentioned [Commonwealth country], if satisfied that the warrant was issued by a person having lawful authority to issue the same, may endorse such warrant in manner provided by this Act, and the warrant so endorsed shall be a sufficient authority to apprehend, within the jurisdiction of the endorsing Magistrate, the person named in the warrant, and bring him before the endorsing Magistrate or some other Magistrate in the same [Commonwealth country].

The references to a Commonwealth country were substituted for references to a British possession by s. 5 (b) of the Fugitive Offenders Amendment Act 1976 (N.Z.).

As to the grouping of Commonwealth countries, see s. 12 and the notes thereto.

As to the Cook Islands, see ss. 333 to 349A, and 618 of the Cook Islands Act 1915 (N.Z.), reprinted 1976, Vol. 4.

As to Niue, see Part VIII of the Niue Act 1966, reprinted 1976, Vol. 5.

As to Tokelau, see the second to last note to s. 12 of this Act.

As to Western Samoa, see the Extradition Act 1974 of Western Samoa.

As to a Magistrate, see s. 39.

14. Return of prisoner apprehended under backed warrant—The Magistrate before whom a person so apprehended is brought, if he is satisfied that the warrant is duly authenti-

cated as directed by this Act, and was issued by a person having lawful authority to issue the same, and is satisfied on oath that the prisoner is the person named or otherwise described in the warrant, may order such prisoner to be returned to the [Commonwealth country] in which the warrant was issued, and for that purpose to be delivered into the custody of the persons to whom the warrant is addressed, or any one or more of them, and to be held in custody and conveyed by sea or otherwise into the [Commonwealth country] in which the warrant was issued, there to be dealt with according to law as if he had been there apprehended. Such order for return may be made by warrant under the hand of the Magistrate making it, and may be executed according to the tenor thereof.

A Magistrate shall, so far as is requisite for the exercise of the powers of this section, have the same power, including the power to remand and admit to bail a prisoner, as he has in the case of a person apprehended under a warrant issued by him.

The references to a Commonwealth country were substituted for references to a British possession by s. 5 (b) of the Fugitive Offenders Amendment Act 1976 (N.Z.).

As to authentication of warrants, see s. 29.

As to Magistrates and oaths, see s. 39.

Under this Part of this Act an offender is tried in the country from which he fled and not in the country where he was apprehended.

15. Backing in one Commonwealth country of summons, etc., of witnesses issued in another Commonwealth country of same group—Where a person required to give evidence on behalf of the prosecutor or defendant on a charge for an offence punishable by law in a [Commonwealth country] of a group to which this Part of this Act applies, is or is suspected of being in or on his way to any other [Commonwealth country] of the same group, a Judge, Magistrate, or other officer who would have lawful authority to issue a summons requiring the attendance of such witness if the witness were within his jurisdiction may issue a summons for the attendance of such witness, and a Magistrate in any other [Commonwealth country] of the same group, if satisfied that the summons was issued by some Judge, Magistrate, or officer having lawful authority as aforesaid, may endorse the summons with his name; and the witness, on service in that [Commonwealth country] of the summons so endorsed, and on payment or tender of a reasonable amount for his expenses, shall obey the summons, and in default shall be liable to be tried and

punished, either in the [Commonwealth country] in which he is served or in the [Commonwealth country] in which the summons was issued, and shall be liable to the punishment imposed by the law of the [Commonwealth country] in which he is tried for the failure of a witness to obey such a summons. The expression "summons" in this section includes any subpoena or other process for requiring the attendance of a witness.

The references to a Commonwealth country were substituted for references to a British possession by s. 5 (b) of the Fugitive Offenders Amendment Act 1976 (N.Z.).

As to the grouping of Commonwealth countries, see s. 12 and the notes thereto.

As to a Magistrate, see s. 39.

16. Provisional warrant in group of Commonwealth countries—A Magistrate in a [Commonwealth country] of a group to which this Part of this Act applies, before the endorsement in pursuance of this Part of this Act of a warrant for the apprehension of any person, may issue a provisional warrant for the apprehension of that person, on such information and under such circumstances as would in his opinion justify the issue of a warrant if the offence of which such person is accused were an offence punishable by the law of the said [Commonwealth country] and had been committed within his jurisdiction, and such warrant may be backed and executed accordingly; provided that a person arrested under such provisional warrant shall be discharged unless the original warrant is produced and endorsed within such reasonable time as may under the circumstances seem requisite.

The references to a Commonwealth country were substituted for references to a British possession by s. 5 (b) of the Fugitive Offenders Amendment Act 1976 (N.Z.).

For the corresponding provisions of Part I of this Act, see s. 4, which however has no provision for the discharge of an offender if the original warrant is not produced in a reasonable time.

As to the grouping of Commonwealth countries, see s. 12 and the notes thereto.

17. Discharge of prisoner not returned within one month to Commonwealth country of same group—If a prisoner in a [Commonwealth country] whose return is authorised in pursuance of this Part of this Act is not conveyed out of that [Commonwealth country] within one month after the date of the warrant ordering his return, a Magistrate or a superior court, upon application by or on behalf of the prisoner, and upon proof that reasonable notice of the intention to make such application has been given to the person

holding the warrant, and to the Chief Officer of the Police of such [Commonwealth country] or of the province or town where the prisoner is in custody, may, unless sufficient cause is shown to the contrary, order such prisoner to be discharged out of custody.

Any order or refusal to make an order of discharge by a Magistrate under this section shall be subject to appeal to a superior court.

The references to a Commonwealth country were substituted for references to a British possession by s. 5 (b) of the Fugitive Offenders Amendment Act 1976 (N.Z.).

As to similar provisions to this section in Part I of this Act, see s. 7, in which however there is no right of appeal.

As to Magistrate, and superior court, see s. 39.

18. Sending back of prisoner not prosecuted or acquitted to Commonwealth country of same group—Where a prisoner accused of an offence is returned in pursuance of this Part of this Act to a [Commonwealth country], and either is not prosecuted for the said offence within 6 months after his arrival in that [Commonwealth country], or is acquitted of the said offence, the [Minister of Justice or Attorney-General] of that [Commonwealth country], if he thinks fit, may, on the requisition of such person, cause him to be sent back, free of cost, and with as little delay as possible, to the [Commonwealth country] in or on his way to which he was apprehended.

The references to a Commonwealth country were substituted for references to a British possession by s. 5 (b) of the Fugitive Offenders Amendment Act 1976 (N.Z.), and the words in the third set of square brackets were substituted for the word "Governor" by s. 5 (c) of that Act.

19. Refusal to return prisoner where offence too trivial—Where the return of a prisoner is sought or ordered under this Part of this Act, and it is made to appear to a Magistrate or to a superior court that, by reason of the trivial nature of the case, or by reason of the application for the return of such prisoner not being made in good faith in the interests of justice or otherwise, it would having regard to the distance, to the facilities of communication, and to all the circumstances of the case, be unjust or oppressive, or too severe a punishment, to return the prisoner either at all or until the expiration of a certain period, the court or Magistrate may discharge the prisoner either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the Magistrate or court seems just.

Any order or refusal to make an order of discharge by a Magistrate under this section shall be subject to an appeal to a superior court.

As to Magistrate and superior court, see s. 39.

AUSTRALIA

PART III—EXTRADITION FROM AUSTRALIA TO NEW ZEALAND

Indorsement of New Zealand warrants

28. Where:

- (a) an application is made, in the statutory form, on behalf of New Zealand to a magistrate for the indorsement of a New Zealand warrant under this subsection; and
- (b) the magistrate is informed by affidavit that the person for whose arrest the warrant is in force is, or is suspected of being, in or on his or her way to Australia;

the magistrate shall make an indorsement on the warrant, in the statutory form, authorising the execution of the warrant in Australia by any police officer.

Provisional arrest warrants

29. Where:

- (a) an application is made, in the statutory form, on behalf of New Zealand to a magistrate for the issue of a warrant in relation to a person under this section;
- (b) the magistrate is informed by affidavit that a New Zealand warrant has been issued in relation to the person;
- (c) no application is before the magistrate under section 28 for the indorsement of such a warrant; and
- (d) the magistrate considers that the issue of a warrant in relation to the person under this section is, having regard to any information that the magistrate considers relevant, justified in all the circumstances;

the magistrate shall issue a warrant, in the statutory form, for the arrest of the person.

Search and seizure upon arrest

30. (1) Where a police officer:

- (a) arrests a person under an indorsed New Zealand warrant or a provisional arrest warrant; and

- (b) has reasonable grounds for suspecting that property in the vicinity of the person that is under the apparent control of the person:
 - (i) may be material as evidence in proving any offence in relation to which the provisional arrest warrant or any indorsed New Zealand warrant in relation to the person was issued; or
 - (ii) has been acquired by the person as a result of such an offence;

the police officer may seize that property.

- (2) Where a police officer:
 - (a) arrests a person under an indorsed New Zealand warrant or a provisional arrest warrant; and
 - (b) has reasonable grounds for suspecting that there is on the person, in the clothing that the person is wearing or in or on any property in the vicinity of the person that is under the apparent control of the person, any thing, including a sum of money:
 - (i) that may be material as evidence in proving any offence in relation to which the provisional arrest warrant or any indorsed New Zealand warrant in relation to the person was issued; or
 - (ii) that has been acquired by the person as a result of such an offence;

the police officer may search that person, that person's clothing or that property, and may seize any thing found as a result of that search.

(3) Subsection (2) does not authorise a police officer to remove, or to require the person to remove, any of the clothing that the person is wearing.

(4) A person shall not be searched under subsection (2) except by a police officer of the same sex.

(5) A police officer may retain any property or thing seized under subsection (1) or (2) pending any direction from the Attorney-General as to the manner in which the thing is to be dealt with.

(6) Nothing in this section shall be taken to prevent or restrict the search of a person or of clothing worn by, or of property under the immediate control of, a person, upon the admission of the person as an inmate of a prison after having been charged with an offence.

(7) The powers conferred by this section are in addition to, and not in derogation of, any other powers conferred by law.

s. 31**Search and seizure warrants**

31. (1) Where a magistrate is informed by affidavit that there are reasonable grounds for suspecting that there may be in any place any thing:

- (a) that may be material as evidence in proving any offence in relation to which an indorsed New Zealand warrant or a provisional arrest warrant was issued; or
- (b) that has been acquired by a person as a result of such an offence;

and the affidavit sets out those grounds, the magistrate may issue a warrant, in the statutory form, authorising a police officer named in the warrant, with such assistance, and by such force, as is necessary and reasonable:

- (c) to seize the thing;
- (d) to enter upon or into the place and to seize the thing; or
- (e) to enter upon or into the place, to search the place for any such thing and to seize any such thing found in the place.

(2) The magistrate shall not issue the warrant unless:

- (a) there has been given to the magistrate by affidavit such further information (if any) as the magistrate requires concerning the grounds on which the issue of the warrant is being sought; and
- (b) the magistrate is satisfied that there are reasonable grounds for issuing the warrant.

(3) The warrant shall state:

- (a) the purpose for which it is issued, including a reference to the nature of any offence referred to in paragraph (1) (a);
- (b) whether entry is authorised to be made at any time of the day or night or during specified hours of the day or night;
- (c) the kind of things authorised to be seized; and
- (d) that it ceases to have effect on a specified day, not being later than 1 month after the day of issue of the warrant.

(4) If, in the course of searching in accordance with the warrant for a thing that may be material as evidence in proving an offence or that has been acquired as a result of an offence, being a thing of a kind stated in the warrant:

- (a) a police officer finds any thing that the police officer believes on reasonable grounds to be connected with the offence, although not of a kind stated in the warrant; and
- (b) the police officer believes on reasonable grounds that it is necessary to seize that thing in order to prevent its concealment, loss or destruction;

the warrant is deemed to authorise the police officer to seize the thing.

(5) Where a police officer seizes a thing in accordance with this section, the police officer may retain the thing pending any direction from the Attorney-General as to the manner in which it is to be dealt with.

(6) In this section:

“**place**” includes any public place, area of water, premises, vessel, aircraft or vehicle in any part of Australia;

“**thing**” includes a vessel, aircraft or vehicle.

Remand

32. (1) A person who is arrested under an indorsed New Zealand warrant or under a provisional arrest warrant shall be brought as soon as practicable before a magistrate in the State or Territory in which the person is arrested.

(2) The person shall be remanded by a magistrate in custody, or, subject to subsection (3), on bail, for such period or periods as may be necessary for proceedings for the purposes of section 34 to be conducted.

(3) A magistrate shall not remand the person on bail unless there are special circumstances justifying such remand.

(4) Where a magistrate remands the person in custody after the person has made an application for bail, the person is not entitled to apply to any other magistrate for release on bail during that remand.

Release from remand

33. Where:

- (a) a person has been remanded after being arrested under a provisional arrest warrant;
- (b) an indorsed New Zealand warrant has not been obtained in relation to the person; and
- (c) a magistrate is satisfied that there has been reasonable time for such a warrant to be obtained;

the magistrate shall:

- (d) if the person is held in custody—order that the person be released; or
- (e) if the person has been granted bail—order the discharge of the recognizances on which bail was granted.

s. 33A**Consent to surrender****33A. (1) Where:**

- (a) a person is on remand under section 32; and
- (b) an indorsed New Zealand warrant has been obtained in relation to the person; and
- (c) a request has been made to a magistrate by or on behalf of the person or New Zealand for proceedings to be conducted under section 34;

the person may inform the magistrate that he or she consents to being surrendered to New Zealand in relation to an offence for which the indorsed warrant has been obtained.

(2) Unless there is reason to believe that the consent was not given voluntarily, the magistrate must:

- (a) advise the person that the effect of so consenting will be that:
 - (i) the person will be committed to prison without any proceedings being conducted under section 34; and
 - (ii) the person will be surrendered to New Zealand as soon as practicable; and
- (b) if, after the person has been so advised, the person again consents to being surrendered:
 - (i) by warrant in accordance with subsection 38 (1), order that the person be surrendered to New Zealand as soon as practicable; and
 - (ii) by warrant in the statutory form, order that, pending the execution of the warrant referred to in subparagraph (i), the person be committed to prison.

Surrender warrants**34. (1) Where:**

- (a) either:
 - (i) a person has been remanded after being arrested under an indorsed New Zealand warrant; or
 - (ii) a person has been remanded after being arrested under a provisional arrest warrant and an indorsed New Zealand warrant has been obtained in relation to the person; and
- (b) a request is made to a magistrate by or on behalf of the person or New Zealand for proceedings to be conducted under this section;

the magistrate shall, unless the magistrate makes an order under subsection (2):

- (c) by warrant in accordance with subsection 38 (1), order that the person be surrendered to New Zealand; and
 - (d) by warrant in the statutory form, order that, pending the execution of the warrant referred to in paragraph (c), the person be committed to prison.
- (2) If the magistrate is satisfied by the person that, because:
- (a) the offence in relation to which any indorsed New Zealand warrant in relation to the person was issued is of a trivial nature;
 - (b) if that offence is an offence of which the person is accused—the accusation was not made in good faith or in the interests of justice; or
 - (c) a lengthy period has elapsed since that offence was committed or allegedly committed;

or for any other reason, it would be unjust, oppressive or too severe a punishment to surrender the person to New Zealand, the magistrate shall order that the person be released.

(3) The magistrate shall, after making an order in relation to the person under paragraph (1) (c), inform the person that he or she may, within 15 days after the day on which the order is made, seek a review of the order under section 35.

(4) In the proceedings under this section, the person is not entitled to adduce, and the magistrate is not entitled to receive, evidence to contradict an allegation that the person has engaged in conduct constituting an offence in relation to which any indorsed New Zealand warrant was issued.

Review of magistrate's order

35. (1) Where a magistrate of a State or Territory makes an order under section 34 in relation to a person:

- (a) in the case of an order under paragraph 34 (1) (c)—the person; or
- (b) in the case of an order under subsection 34 (2)—New Zealand;

may, within 15 days after the day on which the magistrate makes the order, apply to the Federal Court, or to the Supreme Court of the State or Territory, for a review of the order.

- (2) The Court may, by order:
- (a) confirm the order of the magistrate; or
 - (b) quash the order of the magistrate and direct a magistrate to:

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- (i) in the case of an order under paragraph 34 (1) (c)—order the release of the person; or
- (ii) in the case of an order under subsection 34 (2)—order, by warrant, that the person be surrendered to New Zealand.

(3) The person or New Zealand, whether or not the person or New Zealand was the applicant for review under subsection (1), may appeal to the Full Court of the Federal Court from the order of the Federal Court or the Supreme Court.

(4) The person or New Zealand is not entitled to appeal to the Full Court more than 15 days after the day on which the order of the Federal Court or the Supreme Court is made.

(5) The High Court shall not grant special leave to appeal against the order of the Full Court made on the appeal referred to in subsection (3) if the application for special leave is made more than 15 days after the day on which the order of the Full Court is made.

(6) Where the person or New Zealand:

- (a) applies under subsection (1) for a review of an order;
- (b) appeals under subsection (3) against an order made on that review; or
- (c) appeals to the High Court against an order made on that appeal;

the following provisions have effect:

- (d) in the case of an application for review—the court to which the application is made shall review the order by way of rehearing, and may have regard to evidence in addition to or in substitution for the evidence that was before the magistrate;
- (e) in the case of an appeal—the court to which the appeal is made shall have regard only to the material that was before the court that conducted the review;
- (f) if, because of the order referred to in paragraph (a), (b) or (c), as the case requires, the person has been released, the court to which the application or appeal is made may order the arrest of the person;

- (g) if:
- (i) because of the order referred to in paragraph (a), (b) or (c), as the case requires, the person has not been released; or
 - (ii) the person has been arrested under an order made under paragraph (f);

the court to which the application or appeal is made may:

- (iii) order that the person be kept in such custody as the court directs; or
- (iv) if there are special circumstances justifying such a course, order the release on bail of the person on such terms and conditions as the court thinks fit;

until the review has been conducted or the appeal has been heard.

Temporary surrender warrants

36. (1) Subject to this section, where:
- (a) a surrender warrant has been issued in relation to a person under subsection 34 (1) or in compliance with an order of a court under subparagraph 35 (2) (b) (ii) (including on any appeal referred to in section 35);
 - (b) no proceedings are being conducted or available under section 35 in relation to the order set out in the warrant or the order of the court, as the case requires;
 - (c) the person is serving a sentence or sentences of imprisonment in relation to an offence or offences against a law of Australia;
 - (d) the offence in relation to which any indorsed New Zealand warrant in relation to the person was issued is an offence of which the person is accused; and
 - (e) the Attorney-General is satisfied that:
 - (i) it is in the interests of the administration of justice that a warrant under this subsection should be issued; and
 - (ii) New Zealand has given adequate undertakings to the Attorney-General in relation to:
 - (A) the trial of the person in New Zealand for any offence referred to in paragraph (d) of which the person is accused;
 - (B) the return of the person to Australia; and
 - (C) the custody of the person while travelling to and from, and while in, New Zealand;

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subject to subsection (4), the Attorney-General may issue a warrant under this subsection.

(2) For the purposes of paragraph (1) (c), the person shall be taken not to be serving a sentence of imprisonment if the person has been released on parole or licence, or has been otherwise conditionally released, for the remainder of the sentence.

(3) Where the Attorney-General issues a warrant under subsection (1), the surrender warrant referred to in paragraph (1) (a) is by force of this subsection cancelled.

(4) Where any offence referred to in paragraph (1) (c) is an offence against the law of a State, the Northern Territory or Norfolk Island, the Attorney-General shall not issue the warrant unless:

- (a) the Attorney-General is satisfied that the law of the State, the Northern Territory or Norfolk Island, as the case may be:
 - (i) would permit the release of the person for the purpose of surrender to New Zealand under such a warrant; and
 - (ii) would, if the person were surrendered to New Zealand under such a warrant, permit the time spent by the person in custody in connection with the warrant (including time spent in custody outside Australia) to be counted towards the sentence or sentences in respect of the offence; and
 - (b) consent to the surrender of the person to New Zealand under such a warrant has been given to the Attorney-General by:
 - (i) the appropriate Minister of the Crown of the State;
 - (ii) the appropriate Minister of the Northern Territory; or
 - (iii) the Administrator of Norfolk Island;
- as the case requires.

(5) Where, while the person is in New Zealand pursuant to the warrant, the person ceases to be liable to serve the sentence or sentences of imprisonment in Australia referred to in paragraph (1) (c), the Attorney-General shall inform New Zealand that the undertakings referred to in subparagraph (1) (e) (ii) are no longer required to be complied with.

(6) Where any offence referred to in paragraph (1) (c) is an offence against a law of the Commonwealth or of a Territory (other than the Northern Territory or Norfolk Island), any time spent by the person in custody in connection with the warrant (including time spent

in custody outside Australia) shall be counted as time served towards the sentence or sentences of imprisonment referred to in that paragraph.

Surrender warrants after temporary surrender

37. Where:

- (a) a person is surrendered to New Zealand under a temporary surrender warrant;
- (b) the person is returned to Australia in pursuance of undertakings referred to in subparagraph 36 (1) (e) (ii); and
- (c) New Zealand still seeks the surrender of the person;

the Attorney-General may, in his or her discretion, issue a warrant for the surrender of the person to New Zealand under this section.

Form and execution of surrender warrants and temporary surrender warrants

38. (1) A surrender warrant or a temporary surrender warrant in relation to a person (in this subsection called the "eligible person") shall:

- (a) authorise a police officer to take the eligible person into custody, to transport the eligible person in custody and, if necessary or convenient, to detain the eligible person in custody, for the purpose of enabling the eligible person to be placed in the custody of a specified person (in this subsection called the "New Zealand escort officer") and transported out of Australia;
- (b) authorise the New Zealand escort officer to transport the eligible person in custody out of Australia to a place in New Zealand for the purpose of surrendering the eligible person to a person appointed by New Zealand to receive the eligible person; and
- (c) be in writing in the statutory form.

(2) Subject to this section, a surrender warrant or a temporary surrender warrant shall be executed according to its tenor.

(3) A surrender warrant issued under paragraph 34 (1) (c) shall not be executed while any proceedings under section 35 in relation to the order of the magistrate set out in the warrant are being conducted or are available.

(4) A surrender warrant issued in compliance with an order of a court under subparagraph 35 (2) (b) (ii) shall not be executed while any proceedings under section 35 in relation to the order are being conducted or are available.

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- (5) Where a surrender warrant is issued in respect of a person:
- (a) who is in custody; or
 - (b) to whom bail has been granted;

in respect of an offence that is alleged to have been committed, or of which the person has been convicted, in Australia, the warrant shall not be executed before the person has been released from custody in respect of that offence or any recognizances on which the person has been granted bail in respect of that offence have been discharged, as the case requires.

(6) For the purposes of subsection (5), a person who is serving a sentence of imprisonment shall be taken not to be in custody if the person has been released on parole or licence, or has been otherwise conditionally released, for the remainder of the sentence.

(7) Where:

- (a) a surrender warrant or a temporary surrender warrant is issued in relation to a person;
- (b) the person is in custody in Australia under the warrant, or otherwise under this Act, more than 1 month after the day on which the warrant was first liable to be executed;
- (c) the person applies to the Federal Court or the Supreme Court of the State or Territory in which the person is in custody; and
- (d) reasonable notice of the intention to make the application has been given to the Attorney-General;

the Court shall, subject to subsection (8), order that the person be released from that custody.

(8) Where the Court is satisfied that the person has not been conveyed out of Australia under the warrant within the period of 1 month or since the person last made an application under subsection (7), as the case may be:

- (a) because to do so would have been dangerous to the life or prejudicial to the health of the person; or
- (b) for any other reasonable cause;

the Court shall not order that the person be released from custody.

Delivery of property to New Zealand

39. Where:

- (a) property or a thing is seized under section 30 or 31; and
- (b) the property or thing:

- (i) may be material as evidence in proving an offence in relation to which an indorsed New Zealand warrant or the provisional arrest warrant referred to in that section was issued; or
- (ii) has been acquired as a result of such an offence;

the Attorney-General may, whether or not a surrender warrant or a temporary surrender warrant is issued in respect of the person to whom the warrant referred to in subparagraph (b) (i) relates, direct, by notice in writing, that the property or thing be sent to New Zealand.

PART IV—EXTRADITION TO AUSTRALIA FROM OTHER COUNTRIES

Requests for surrender of persons to Australia

40. A request by Australia for the surrender of a person from a country (other than New Zealand) in relation to an offence against a law of Australia of which the person is accused or of which the person has been convicted shall only be made by or with the authority of the Attorney-General.

Surrendered persons to be brought into Australia

41. Where a person is surrendered to Australia in relation to an offence against a law of Australia of which the person is accused or of which the person has been convicted (whether or not pursuant to a request under section 40), the person shall be brought into Australia and delivered to the appropriate authorities to be dealt with according to law.

Speciality

42. Where an extraditable person in relation to Australia is surrendered to Australia by a country (other than New Zealand), the person shall not, unless he or she has left, or has had the opportunity of leaving, Australia or, in a case where the person was surrendered to Australia for a limited period, has been returned to the country:

- (a) be detained or tried in Australia for any offence that is alleged to have been committed, or was committed, before the surrender of the person, other than:
 - (i) any offence in respect of which the person was surrendered or any other offence (being an offence for which the penalty is the same or is a shorter maximum period of imprisonment or other deprivation of liberty) of which the person could be convicted on proof of the conduct constituting any such offence; or

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- (ii) any other offence in respect of which the country consents to the person being so detained or tried, as the case may be; or
- (b) be detained in Australia for the purposes of being surrendered to another country for trial or punishment for any offence that is alleged to have been committed, or was committed, before the surrender of the person to Australia, other than any other offence in respect of which the country that surrendered the person to Australia consents to the person being so detained and surrendered.

Evidence for purposes of surrender of persons to Australia

43. (1) Where the Attorney-General suspects that a person is an extraditable person in relation to Australia (whether or not the Attorney-General knows or suspects the person to be in a particular country or has made a request under section 40 or otherwise in relation to the person), the Attorney-General may, by notice in writing in the statutory form, authorise the taking of evidence for use in any proceedings for the surrender of the person to Australia.

(2) Where the Attorney-General authorises the taking of evidence under subsection (1), a magistrate may take the evidence on oath or affirmation of each witness appearing before the magistrate to give evidence in relation to the matter and the magistrate shall:

- (a) cause the evidence to be reduced to writing and attach a certificate, in the statutory form, in relation to the taking of the evidence; and
- (b) cause the writing and the certificate to be sent to the Attorney-General.

(3) At a proceeding in relation to a person before a magistrate under this section, a legal or other representative of the person is not entitled to appear.

Persons temporarily surrendered to Australia

44. (1) Where a person is surrendered by a country to Australia pursuant to an undertaking by the Attorney-General of Australia in relation to:

- (a) the trial of the person in Australia in respect of a particular offence or offences;
- (b) the return of the person to the country; and
- (c) the custody of the person while travelling to and from, and while in, Australia;

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ANNEX 4

ALTERNATIVE PROVISIONS FOR DEALING WITH REQUESTS FOR SURRENDER

It may be provided by a law in any part of the Commonwealth that the procedures contained in this Annex to the London Scheme shall govern the rendition of fugitive offenders between it and any other part of the Commonwealth to which the provisions of a law reflecting this annex shall apply.

1. A fugitive offender will only be returned if a warrant for his arrest has been issued in that part of the Commonwealth to which his return is requested and that warrant is endorsed by a magistrate in the part in which he is found (in which case, the endorsed warrant will be sufficient authority for his arrest).

2. Where a fugitive offender is, or is suspected of being, in or on his way to any part of the Commonwealth but no warrant has been endorsed as mentioned in clause 1, a magistrate in that part of the Commonwealth may issue a provisional warrant for his arrest on such information and under such circumstances as would, in the magistrate's opinion, justify the issue of a warrant and for the purposes of this paragraph information contained in an international notice issued by the International Criminal Police Organisation (INTERPOL) in respect of a fugitive may be considered by the authority, either alone or with other information, in deciding whether a provisional warrant should be issued for the arrest of that fugitive.

3.(a) A person who is arrested under either a warrant which has been endorsed as mentioned in clause 1 or a provisional warrant issued in accordance with clause 2 shall be brought as soon as practicable before a magistrate.

(b) The person shall be remanded by a magistrate in custody or on bail for such period or periods as may be necessary for proceedings for the purpose of clause 5 of this Annex to be conducted.

4. Where a person has been remanded after being arrested under a provisional warrant and an endorsed warrant has not been obtained in relation

to the person and the magistrate is satisfied that there has been reasonable time for such a warrant to be obtained, the magistrate shall, if the person is held in custody, order the release of the person or, if the person is remanded on bail, order the discharge of the recognizances on which bail was granted.

5. Where a person has been remanded after being arrested under an endorsed warrant or has been remanded after being arrested under a provisional warrant and an endorsed warrant has been obtained in relation to the person the magistrate shall either:

- (a) (i) by warrant, order that the person be surrendered to the part of the Commonwealth in which the endorsed warrant issued; and
- (ii) order that, pending the execution of the warrant referred to in paragraph (a), the person be committed to prison; or
- (b) if the magistrate is satisfied by the person that because
 - (i) the offence in relation to which the endorsed warrant was issued is of a trivial nature;
 - (ii) the accusation was not made in good faith or in the interests of justice; or
 - (iii) a lengthy period has passed since the offence was committed or allegedly committed; [or
 - (iv) the facts on which the request for his return is grounded do not constitute an offence under the law of the country or territory in which he is found; or
 - (v) the offence is an offence only under military law or a law relating to military obligations; or
 - (vi) the offence in respect of which the endorsed warrant was issued is of a political character; or

- (vii) **the person may be prejudiced at trial or punished, detained or restricted in his or her personal liberty by reason of race, religion, nationality or political opinions]**

it would, having regard to all the circumstances of the case be unjust, oppressive or too severe a punishment to return the fugitive, he shall order the person to be released.

[(c) In proceedings under this clause, the person is not entitled to adduce and the magistrate is not entitled to receive evidence to contradict an allegation that the person has engaged in conduct constituting an offence in relation to which any endorsed warrant was issued.

(d) The magistrate shall, after making an order in relation the person under paragraph (a), inform the person that he or she may, within 15 days of the day on which the order is made, seek a review of the order.]

6. A fugitive offender may waive the right to have a hearing for the purposes of clause 5, and if satisfied that the fugitive offender has voluntarily and with an understanding of its significance requested such waiver, the magistrate may make an order by consent for the committal of the fugitive offender to prison, or for his admission to bail, to await return.

7.(a) an application may be made to a court of competent jurisdiction by or on behalf of a fugitive offender for a writ of habeas corpus or other like process.

(b) an application may be made to a court of competent jurisdiction by or on behalf of the government of the requesting part of the Commonwealth for review of the decision of the magistrate.

(c) the Court may by order confirm the order of the magistrate and order, by warrant, that the person be surrendered or quash the order of the magistrate and order the release of the person.

8.(a) Where after the expiry of the period mentioned in paragraph (b) a fugitive offender has not been returned, an application to the competent judicial authority may be made by or on behalf of the fugitive for his discharge and if

(i) reasonable notice of the application has been given to the competent executive authority, and

(ii) sufficient cause for the delay is not shown, the competent judicial authority will order his discharge.

(b) The period referred to in paragraph (a) will be one expiring either

(i) not later than two months from the fugitive's committal to prison as mentioned in clause 5, or

(ii) not later than one month from the date of the order for his return made as mentioned in clause 7.

9.(a) Subject to the following provisions of this clause, where a fugitive offender

(i) has been charged with an offence triable by a court in that part of the Commonwealth in which he is found, or

(ii) is serving a sentence imposed by a court in that part of the Commonwealth,

then until such a time as he has been discharged (whether by acquittal, the expiration or remission of his sentence, or otherwise) his return will either be precluded by law or be subject for refusal by the competent executive authority as the law of the country or territory concerned may provide.

(b) Subject to the provisions of this Annex, a prisoner serving such a sentence who is also a fugitive offender may, at the discretion of the competent executive authority of that part of the Commonwealth in which the prisoner is held, be returned temporarily to another part of the Commonwealth in which he is accused of a returnable offence to enable proceedings to be brought against the prisoner in relation to that offence on such conditions as are agreed between the respective parts of the Commonwealth.

10.(a) In the case of a person who -

(i) has been convicted of a returnable offence by a court in any part of the

Commonwealth and is unlawfully at large before the expiry of his sentence for that offence, and

(ii) is found in some other part of the Commonwealth, the provisions set out in this Annex, as applied for the purposes of this clause by paragraph (b), will govern his return to the part of the Commonwealth in which he was convicted.

(b) For the purposes of this clause this Annex shall be construed, subject to any necessary adaptations or modifications, as though the person unlawfully at large were accused of the offence of which he was convicted and, in particular any reference to a fugitive offender shall be construed as including a reference to such a person as is mentioned in paragraph (a), and

(c) The references in this clause to a person unlawfully at large shall be construed as including reference to a person at large in breach of a condition of a licence to be at large.

11. Provisions of the law of the requested country relating to search for, seizure of and return (to the part of the Commonwealth in which the endorsed warrant was issued) of property which may be material evidence of the offence of which the person is accused shall apply *mutatis mutandis* to cases dealt with under this Annex.

12. Provisions of the law of the requested country relating to the transit of fugitive offenders through a part of the Commonwealth for the purpose of surrender to another part of the Commonwealth shall apply *mutatis mutandis* to cases dealt with under this Annex.

If an additional annex to the London Scheme for the Rendition of Fugitive Offenders is adopted there is a need to amend Clause 19 of the Scheme by adding a reference to the Annex and its intended scope of operation. The following draft is proposed for consideration:

- (3) Two or more parts of the Commonwealth may make arrangements under which in matters of rendition between them the provisions of Annex 4 will replace the provisions of the Scheme.