

## REVIEW OF THE 1966 COMMONWEALTH SCHEME RELATING TO THE RENDITION OF FUGITIVE OFFENDERS

Memorandum by the Government of Nauru

### *Designation and reciprocity*

1. Nauru, which in accordance with the 1966 Commonwealth Scheme, enacted the Extradition of Fugitive Offenders Act 1973, is one of the Commonwealth countries which has used designation procedures selectively (cf. para 10 of Professor Shearer's Paper).

2. By terms of the 1973 Act, Nauru cannot make (s.4(5)) an unrestricted "designation order" in respect of a foreign country unless the foreign country has made or agreed to make "substantially similar provision" for reciprocity in relation to relevant offences. It is a matter open to some question as to whether a Commonwealth country which has not enacted legislation under the 1966 scheme has made "substantially similar provision" if it continues to rely on the "increasingly archaic Fugitive Offenders Act 1881 (Imp.)". (Professor Shearer's description—see para. 3(a)).

3. Further, because of the terms of s.4(5) of the Nauru Act, Nauru must be satisfied that the foreign country either has designated or will agree to designate Nauru under its own "substantially similar" legislation. It is not possible for Nauru, in terms of its own law, to make a "blanket designation" of Commonwealth countries, as has been done by some other countries.

4. The definition of "foreign country" in s.2(1) of the Nauru Act is not limited to Commonwealth countries but extends to all countries of the world.

5. Nauru has not refused designation under its Act to any Commonwealth country which has requested it; nor is it likely to do so in the future provided the conditions of s.4(5) of the Nauru Act are met. Designation Orders have been made under s.4(5) of the Nauru Act in relation to the United Kingdom, Gilbert Islands (now Kiribati), Tuvalu, Fiji, Australia and Sri Lanka. Reciprocal designation with Western Samoa is under negotiation.

6. It has been Nauru's position that it would itself seek reciprocal designation under the 1966 Scheme with those Commonwealth countries which are in, or fringe, the Pacific Basin but would consider any approach from any Commonwealth country outside that area.

7. The proviso to s.4(5) of the Nauru Act enables "restricted designation order" to be made where a foreign country's legislation does not include provision for return in respect of all "relevant offences."

8. Nauru's whole approach to designation of other Commonwealth countries under its 1973 Act has been on the basis of reciprocity; it has not been

prepared to designate a country if reciprocal rights for return of fugitive offenders are not available to Nauru in that country.

9. Nauru would not be likely to agree to extend, by amendment, the operation of its Act to tax and other fiscal offences. Nauru might be prepared to amend the 1973 Act to cover "offences established under international conventions to which both Nauru and the foreign country requesting return are parties" (cf. para. 11 of Prof. Shearer's Paper).

### *"Double criminality"*

10. Section 5(1)(b) of the Nauru Act is in *pari materia* to s.3(1)(c) of the United Kingdom Act: *R. v. Brixton Prison ex parte Gardner* [1968] 2 Q.B. 399 and *R. v. Brixton Prison ex parte Rush* [1969] 1 All E.R. 316 would be followed by the Courts of Nauru.

11. It is suggested that the so-called "double criminality rule" runs contrary to the principles of the 1966 Scheme and that all Commonwealth "1966 scheme legislation" which contains provisions in *pari materia* to s.3(1)(c) of the United Kingdom Act should be amended to read, in the relative provision, "facts . . . on which the request is grounded." This would, as Prof. Shearer says, remove the difficulties, posed by *Gardner's case*. It would not remove that difficulty, constituted by *Rush's case*. If it were desired to remove that difficulty, it is suggested that (c) of s.3(1)(c) should be repealed and s.3(1)(a) should be amended by the deletion of the semicolon at the end of it and the addition of the following:

"and even if the act or omission constituting the offence would not constitute an offence against the law of the United Kingdom; and . . ."

11. While the Transfer of Offenders (cf. para. 26 of Prof. Shearer's Review) is outside the scope of his Paper, Nauru would welcome discussion at the 1980 meeting of Commonwealth Law Ministers on this topic.

12. Equally, Nauru would welcome discussion on the possibility of extending the 1966 Scheme to terrorist activities.

### *Fugitive's health and personal circumstances*

13. Nauru would not, in general terms, favour the amendment to clause 9 of the 1966 Scheme proposed in para. 30 of Prof. Shearer's Paper. The amendment is felt to be too wide in scope for it would enable every fugitive to argue "personal circumstances"—e.g. (i) that his family would not be able to afford to visit him if he was imprisoned in the requesting country, (ii) that his wife was pregnant, (iii) that he was intending to apply for citizenship of the requested country and his return would break the uninterrupted period of residence required in the requested country.

While it may be appropriate to provide that the fugitive whose state of health was or would be affected might not be returned to the requesting country, it should, it is suggested, be dependant on the authorities in the requested country being satisfied that grave harm to the health of the fugitive would, on the balance of possibilities, be suffered if he were returned and that such grave harm would be significantly greater than if he were to stand trial in the requested country for that offence. Further, it is suggested, such provision is bested linked to an obligation of the requested country itself to try the fugitive.

#### *Costs*

14. In the two cases where Nauru has requested the return of a fugitive, Nauru has been assisted by the requested country providing and meeting the cost of legal representation; in both such cases Nauru has agreed to reciprocate should it, at a future date, be the requested country.

#### *Consent Orders*

15. It would appear sensible to include provision for Consent Orders for return.