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

Memorandum by the Government of Australia

Introduction

This memorandum contains the preliminary views, in brief, of the Government of Australia on Professor Shearer's draft Discussion Paper.

Reciprocal application of legislation

2. Australian practice in designating Commonwealth countries to which the Australian Extradition (Commonwealth Countries) Act 1966 applies has not been limited to independent countries within the Commonwealth. The Australian list has in the past included a number of dependent territories of the United Kingdom, where separate designation is desirable, e.g. the Colony of Hong Kong.

3. Australia has not hitherto considered it desirable to apply the Australian Act subject to conditions, adaptations or modifications to Member Countries who have not implemented the Scheme. Most of the principles set out in the Scheme are concerned with the procedures etc. governing the consideration of requests for extradition by the requested country, and Australia does not consider that their merit depends on Australian requests being subject to similar procedures. On the other hand, the requesting country's obligations under Australian legislation, e.g. in relation to the specialty rule, can be satisfied by either an agreement or an undertaking if they have not enacted "London Scheme" legislation.

Returnable offences

4. The reference in para. 12 of the Discussion Paper to the Australian additions could be extended by emphasising that they were necessary to give affect to Australia's obligations to Commonwealth countries which are parties to one or other of the Conventions. Moreover, as they are not limited in their application to parties to the Conventions, a Commonwealth country that is not a party can also secure extradition from Australia in certain circumstances where it exercises criminal jurisdiction over the acts referred to in the Conventions.

5. While Australia would have no objection to the suggestion that offences established under International Conventions to which the requested and requesting countries are parties, be included as para. C of Annex 1 of the Scheme for the sake of completeness, it should be appreciated that the obligation to make such offences extraditable would already exist by being a party of the Convention.

6. While Australia sees merit in the suggestion that Annex 1 of the Scheme be further amended by including the offences which are returnable under the laws of both the requested and the requesting Commonwealth countries, that would only partly solve the problem of a list of extraditable offences which is by no means complete. An alternative approach would be to depart from the "enumerative list" method altogether, and in its place simply provide that an offence is extraditable if it is punishable under the laws of both the requesting and the requested Commonwealth country by imprisonment or other deprivation of liberty for a specified minimum period. It would still be possible to include a list of offences if that was desired, but the list would only be indicative, and not conclusive, of the offences for which extradition may be granted. Offences which traditionally fall outside the scope of extradition arrangements, such as fiscal offences, could be excluded by agreement or, failing that, by unilateral action if that was desired. The double criminality rule would ensure that extradition is limited to what may be described as "ordinary" criminal offences.

Double criminality

7. It would appear that the exposition of *Gardner's* case is incorrect on one point. At the time that case was decided, which was before the Theft Act 1968 came into force (1 January 1969), the law in the United Kingdom required that a false pretence must relate to an existing fact and not to a statement about intention. This deficiency was rectified by the creation of the offence of obtaining property by deception [s.15(1) of the Theft Act 1968].

Citizenship of fugitive

8. Australia endorses Professor Shearer's view that, where extradition is refused on the ground of nationality, the requested State should itself be in a position to exercise jurisdiction over the fugitive. Further, this jurisdiction should, in Australia's view, extend to fugitives who have been convicted, as well as accused, of offences in the requesting State.

9. However, a prosecution in the requested country will often be prohibitively expensive unless provision is made by the requesting country for depositions taken in the requesting country to be admissible in evidence as an alternative to witnesses travelling to the requested country to give oral testimony.

Appeals by requesting Government

10. It is certainly true that in Australia there is no appeal in the strict sense from the decision of a magistrate discharging a fugitive, and the only way that such a decision can be reviewed, if at all, is by way of the Prerogative writs. However, while extradition proceedings are similar to committal proceedings, previous consideration of the question whether the Prerogative writs lie to a magistrate conducting extradition proceedings has been coloured by

the controversy in Australia as to the availability of those writs to a magistrate hearing committal proceedings [see, for example, *Connor* v. *Sandey and others* (1976) 2 N.S.W.L.R. 570].

11. Whether there should be a right of appeal in the sense that there is a rehearing on the merits, is amatter that requires careful consideration. However, it is clearly desirable that the requesting country should have a right of review.

12. A further matter which could be considered in this context is the availability of appeal from *habeas corpus* proceedings.