

IMBALANCE IN EXTRADITION: THE BACKING OF WARRANTS PROCEDURE WITH AUSTRALIA UNDER PART 4 OF THE EXTRADITION ACT 1999

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I. INTRODUCTION

The little known backed-warrant procedure, set out under pt 4 of the Extradition Act 1999, is a simplified extradition procedure that stems from its use between colonies dating back to imperial times.¹ Today, the backed-warrant procedure accounts for approximately half of all extradition requests to New Zealand, a trend that is unlikely to change in the future.² The procedure relies heavily on the concept of comity. Yet, despite its importance and frequent usage by the judiciary in context of the pt 4 backed-warrant procedure, the term “comity”³ is not explicitly mentioned in the 1999 Act or in its predecessors.

In a major review of the current Extradition Act, which began in 2013, the Law Commission proposed a new Act that will achieve the Commission’s objective to “strike the necessary and appropriate balance between protecting the rights of those whose extradition is sought and providing an efficient mechanism for extradition”.⁴ Under the proposed Act, further simplification of the backed-warrant procedure is recommended. The Commission stated that this would make extradition hearings more efficacious and less complex, particularly in regard to Australia.⁵ It is noteworthy that despite the Court of Appeal’s emphasis placed on comity being the reason for a fast-track procedure with Australia,⁶ the Commission makes little, if any, mention of it. Rather, the Commission refers to ingredients that are often equated with the foundations for comity with Australia, such as trust, close links and the underlying presumption of legal and procedural similarity.

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¹ M Cherif Bassiouni *International Extradition: United States Law and Practice* (5th ed, Oxford University Press, New York, 2014) at 21; and Clive Nicholls and others *The Law of Extradition and Mutual Assistance* (3rd ed, Oxford University Press, Oxford, 2013).

² Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) (Issues Paper) at [2.27].

³ More modern usage of the term comity, includes “judicial comity” and “legal comity” with connotations of deference and respect for the courts in another jurisdiction. It is also said to complement the principles of stare decisis. See for example *Hilton v Guyot* 159 US 113 (1895) at 163–64; and *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 396. Applied in *Minister of Home Affairs v Tsebe* 2012 (5) SA 467 (CC) [Tsebe] at [126].

⁴ Issues Paper, above n 2, at [1.8]–[1.9].

⁵ Law Commission *Modernising New Zealand’s Extradition and Mutual Assistance Laws* (NZLC R137, 2016) (Report) at 5. See draft Extradition Bill, cl 7(1)(a).

⁶ See *Commonwealth of Australia v Mercer* [2016] NZCA 503 at [18].

Comity is broadly defined in the non-legal sense as “courtesy and considerate behaviour towards others”.⁷ Its legal roots have been traced to private international law where it acted as a balancing principle that assisted the judiciary and executive to accommodate the doctrine of sovereignty with serving justice to private litigants.⁸ In the context of extradition, the purpose of comity was to allow states to deviate from the principle of sovereignty in order to fulfil the goal of international cooperation in transnational crime.⁹ This notion that comity enables international cooperation does not fit comfortably with the Commission’s reference to comity as interchangeable with international cooperation.¹⁰

Comity in the extradition context is often referred to as “comity of nations” which is defined in the Shorter Oxford Dictionary as being “the courteous and friendly understanding by which each nation respects the laws and usages of every other, so far as may be without prejudice to its own rights and interests.”¹¹ In *Morguard Investments Ltd v De Savoye*, the following definition of comity of nations was approved by La Forest J in the Supreme Court of Canada:¹²

‘Comity’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws ...

Comity in the context of the backed-warrant procedure may be differentiated from that used in the standard procedure in terms of the level of comity involved. The pt 4, backed-warrant procedure attracts a higher level of comity with Australia as a result of close geographical and historical links, and shared political and economic ideals. It involves mutual respect and trust for the quality and impartiality of their legal system. It is also underpinned by the presumption of legal and procedural

⁷ See *Shorter Oxford Dictionary* <www.dictionaries.com>; and HW Fowler and FG Fowler *The Concise Oxford Dictionary* (Clarendon Press, Oxford, 1929) at 224.

⁸ Thomas Shultz and Jason Mitchenson “Navigating Sovereignty and Transnational Commercial Law: The Use of Comity by Australian Courts” (2016) 12 *Journal of Private International Law* 344 at 348.

⁹ Alexander James Johnston *The New Zealand Justice of the Peace: A Treatise on the Powers, Duties and Liabilities of Magistrates, Coroners & Peace Officers in the Colony: With a Digest of the Law of Evidence and an Appendix of Acts and Forms* (M’Kenzie & Muir, Wellington, 1864) at 288-292. See further Alpheus Todd *Parliamentary Government in the British Colonies* (2nd ed, Longmans, London, 1894).

¹⁰ See Issues Paper, above n 2, at [6.42].

¹¹ See *Shorter Oxford Dictionary* above n 7 and *The Concise Oxford Dictionary*, above n 7 at 224. The usage of “comity of nations” was referred to in context of determining extradition under simplified schemes in *Tsebe*, above n 3, at [126]. See for example *Hilton v Guyot*, above n 3, at 163-64; and *CSR Ltd v Cigna Insurance Australia Ltd*, above n 3, at 396.

¹² *Morguard Investments Ltd v Savoye* [1990] 3 SCR 1077 at 256.

similarity that excuses the requirement to establish a prima facie case.¹³ There is, however, nothing currently to indicate a commonality in the fundamental rights of the requested person, such as the type of treatment to which the person will be subject in the prisons of Australia. Unlike New Zealand, Australia does not have an enforceable Bill of Rights. Whether the concept of comity with Australia ought to be reconceptualised so as to include a human rights component is beyond the scope of this article. Instead, its focus is on two proposals by the Law Commission affecting the pt 4, backed-warrant procedure.

First, the Law Commission proposes the simplification of the backed-warrant procedure, with Australia nominated as a special case.¹⁴ Of particular interest, is a proposed less onerous test for Australia in meeting the criteria for an extradition offence. The Commission's intention is to remove the requirement for double criminality, based upon factors underpinning comity with Australia, namely, close ties, trust and a presumption of similarity.¹⁵

The second proposal arises from the Commission's recommendation to shift extradition from an executive to a judicial process.¹⁶ This entails giving more emphasis to the role of the judiciary and less to the Minister in considering all of the grounds for refusing surrender¹⁷ as well as increasing the breadth of grounds on which the judiciary may consider refusing surrender.¹⁸ To this end, a new "unjust or oppressive" provision is proposed based mainly upon the equivalent ground in the Canadian Extradition Act.¹⁹ The Commission considers that the unjust limb of the provision is directed primarily at the risk of prejudice to the requested person in the conduct of the trial itself and oppression limb is directed to the hardship imposed upon the requested person resulting from their personal circumstances.²⁰ The effect of this proposed two-limbed provision is that if established to the requisite high standard, namely, that the injustice or oppression must shock the conscience of the court, the court must, rather than may, refuse to surrender the requested person.²¹

This article examines how these proposed changes will impact on the backed-warrant procedure. It argues that because of unchallenged assumptions about

¹³ See Issues Paper, above n 2, at [6.43]; Paul O'Higgins "Extradition within the Commonwealth" (1960) 9 ICLQ 486 at 487; and *Bates v McDonald* (1985) 2 NSWLR 89 [*Bates*] at 98 per Samuels JA.

¹⁴ See Issues Paper, above n 2, at [6.21]; and Report, above n 5, at [7.17].

¹⁵ Issues Paper, above n 2, at [6.23]; and Report, above n 5, at [7.25].

¹⁶ Report, above n 5, at 6.

¹⁷ At [5.11]-[5.17]; and [13](b)(i)-(ii).

¹⁸ Report, above n 5. See draft Bill, cl 20(e).

¹⁹ Report, above n 5, at [5.6(e)].

²⁰ At [5.6(e)].

²¹ At [5.6(e)]. This is the requisite standard in Canada. See *United States v Burns* 2001 SCC 7, [2001] 1 SCR 283 at [60]; *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779 at [35] and [63]; and *Canada v Schmidt* [1987] 1 SCR 500 at 522 cited in Report, above n 5, at 37.

comity, namely the degree of mutual respect and trust shown as well as the degree of similarity that exists, there are good reasons for re-examining what the Commission proposes under further simplification of the backed-warrant procedure, a question neglected in extant literature.²² At the same time, the article concludes that the need for further simplification of the backed-warrant procedure is arguable and in any event likely to be thwarted by the proposed new “unjust or oppressive” provision, which paradoxically suggests that the Commission has revised its earlier assumptions about comity with Australia and instead introduced a much stronger human rights provision. It is argued that the Commission’s new scepticism is warranted and accords with Australia’s own emphasis on protecting the interests of the person in the context of the backed-warrant procedure.

II. HISTORICAL ORIGINS OF THE BACKED-WARRANT PROCEDURE

A *Definition*

The backed-warrant procedure, or backing-of-arrest warrants, is the name given to the procedure in which a state is asked to “back”, or endorse, the warrant for arrest of a person.²³ It differs from normal extradition procedures in that it is a less formal, simplified procedure without the requirement to establish a prima facie case before an extradition court in the requested state.²⁴

B *Origins of the Backing-of-warrants Procedure in New Zealand*

The origins of New Zealand’s practice of using backed arrest warrants between colonies dates back to 1843 when the Imperial Parliament enacted the first statute, the Apprehension of Offenders Act 1843 (the 1843 Act), providing for the surrender of fugitives between British possessions.²⁵ New Zealand’s Foreign Offenders Apprehension Act 1863²⁶ (the 1863 Act) was enacted for the sole purpose of providing for surrender (referred to as “deportation”) of the requested person facing alleged felonies as well as indictable misdemeanours²⁷ in the Australasian Colonies

²² The Law Commission’s recommendations for simplification of the backed-warrant procedure were not mentioned in Paul Comrie-Thomson and Kate Salmond “Modernising New Zealand’s Extradition and Mutual Assistance Laws” [2016] NZLJ 81.

²³ It has been suggested that the term “backing of warrants” was first used in the Indictable Offences Act 1848 (UK) 11 & 12 Vict c 42. See EP Aughterson *Extradition Australian Law and Procedure* (Law Book Co Ltd, NSW, 1995) at 236.

²⁴ *Laws of New Zealand* Extradition at [5]. See *Kurtz v Aicken* (1891) 9 NZLR 673 (SC).

²⁵ Apprehension of Offenders Act 1843 (UK) 6 & 7 Vict c 34. Bassiouni, above n 1, at 21; Nicholls and others, above n 1, at 21.

²⁶ Foreign Offenders Apprehension Act 1863 27 Vict c 22. See further Solicitor-General “New Zealand Foreign Offenders Apprehension Act, 1863; (Papers relating to the case of Frederick Gleich)” Untitled, [1880] AJHR A6.

²⁷ Foreign Offenders Apprehension Act 1863 27 Vict c 22, pt III.

(New Zealand, New South Wales, Tasmania, Victoria, South Australia, Western Australia and Queensland and their respective Dependencies).²⁸ It was designed to build on the 1843 Act in order to deal with an influx of criminals escaping from Australia, particularly to the Otago goldfields.²⁹ Although assented to by the Crown, the 1863 Act was held to be ultra vires and repugnant to imperial legislation because it contained no provision that expressly allowed for the Governor-General to keep lawful detention of the surrendered person on the high seas, a passage that was unavoidable in surrendering persons between the Australasian colonies.³⁰ This difficulty was remedied by the enactment of the Fugitive Offenders Act 1881 (UK) which repealed the 1843 Act and applied to New Zealand.³¹ It contained provisions designed to improve the efficacy of extradition governing the return of defendants within the Empire. Part II, of this Act was specifically applied to groups of "British possessions", based upon their contiguity, and designated by Order in Council.³² Until it was repealed by the current Act, the 1881 Act marked the continuation of Commonwealth cooperation through the provision of simplified arrangements and accompanying safeguards with Australia.³³

C London Scheme and Extradition within the Commonwealth

When many former colonies attained independence,³⁴ "A Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth" was adopted in 1966 at a Meeting of Commonwealth Law Ministers in London. Amendment of the 'London Scheme' followed in 1990 and 2002.³⁵ At the 1966 meeting, it was agreed that the Scheme was not a treaty, but informal and similar in character to a multilateral convention,³⁶ creating the basis for Commonwealth countries to enact reciprocating and substantially uniform legislation.³⁷ Importantly, the Scheme did not preclude

²⁸ This Act was intended to broaden the scope of offences provided for in the Apprehension of Offenders Act 1843 (UK) 6 & 7 Vict c 34.

²⁹ John E Martin "Refusal of Assent – A Hidden Element of Constitutional History in New Zealand" (2010) 41 VUWLR 51 at 68.

³⁰ A point previously highlighted by Johnston, above n 9, at 288-292. See also Martin, above n 29.

³¹ Fugitive Offenders Act 1881 (UK) 44 & 45 Vict c 69. *Re Ashman* [1985] 2 NZLR 224 (SC) at 226; and Robert E Clute "Law and Practice in Commonwealth Extradition" (1959) 8 American Journal of Comparative Law 15 at 20. See Fugitive Offenders Act 1881 (UK) (preamble).

³² Section 12. See Clute, above n 31, at 21; and the Fugitive Offenders Amendment Bill 1976 (30-1) (explanatory note).

³³ *In re Tressider* (1905) 25 NZLR 289 (SC) at 290; *R v Hartley* [1978] 2 NZLR 199 (CA) at 214.

³⁴ Nicholls and others, above n 1, at 6.

³⁵ Great Britain Home Office *A Scheme Relating to the Rendition of Fugitive Offenders Within the Commonwealth* (Cm 3008, 1966). Anthony Aust "The Theory and Practice of Informal International Instruments" (1986) 35 ICLQ 787.

³⁶ Geoff Gilbert *Transnational Fugitive Offenders in International Law : Extradition and Other Mechanisms* (Kluwer Law International, The Hague, 1998) at 42.

³⁷ Ivan A Shearer *Extradition in International Law* (Manchester University Press, UK, 1971) at 55.

special arrangements between Commonwealth countries, enabling Australia and New Zealand to preserve existing simplified procedures (set up in the 1881 Act).³⁸

D Nature of Backing-of-warrants

The continuation of simplified arrangements between Australia and New Zealand under the 1999 Act has been regarded as symbolic of their close links in terms of geographical proximity, shared economic and political ideals and mutual respect and trust for the quality and impartiality of their legal systems.³⁹ Simplified schemes exist where other states are closely linked legally, historically, economically, politically and geographically, such as through the European Arrest Warrant, the Nordic Arrest Warrant and in Southern Africa.⁴⁰

III. CONCEPTUALISING COMITY BETWEEN AUSTRALIA AND NEW ZEALAND

The importance of “comity” between Australia and New Zealand is expressly mentioned in cases decided under the simplified procedure of extradition, beginning with the case of *Police v Thomas*.⁴¹ Comity’s importance has also been emphasised under the backed-warrant procedure of the 1999 Act in *Mailley v District Court at North Shore*⁴² [*Mailley* (CA 2013)] and recently in the *Commonwealth of Australia v B* [*Mercer* (HC 2016)] .⁴³

Nevertheless, judicial views of what comity means have not always been clear, except that in the context of backed warrants, comity is obviously bound up with the perceived similarity of the legal system and procedural safeguards between New Zealand and the requesting country, especially, Australia.⁴⁴ For example, in *Radhi v Manukau District Court* [*Radhi*], Woolford J in the High Court determined that no restrictions to surrender under pt 4 applied to the appellant in light of there being a “high level of commonality between New Zealand and Australia’s legal systems, and thus Australia could be trusted to safeguard Mr Radhi’s rights at trial.”⁴⁵ That judicial

³⁸ R Burnett *The Australia & New Zealand Nexus Annotated Documents* (Australian National University, Australia.1980) at [701.1] and [703.1].

³⁹ See Issues Paper, above n 2, at [6.42]-[6.46]; Paul O’Higgins “Extradition within the Commonwealth” (1960) 9 ICLQ 486 at 487; and *Bates v McDonald* (1985) 2 NSWLR 89 at 98.

⁴⁰ For example extradition in South Africa is governed by the Extradition Act 67 of 1962, and contains a simplified procedure in respect of extradition requests from associated states (see s 12).

⁴¹ See *Police v Thomas* (1989) 4 CRNZ 454 (HC) at 458; and *Bieleski v Police* HC Auckland AP286/86, 28 November 1986.

⁴² *Mailley v District Court at North Shore* [2013] NZCA 266 [*Mailley* (CA 2013)] at [7].

⁴³ *Commonwealth of Australia v B* [2016] NZHC 302 [*Mercer* (HC 2016)] at [20]-[21]; and *Commonwealth of Australia v Mercer* [2016] NZCA 503 [*Mercer* (CA 2016)] at [17]-[18].

⁴⁴ *Mercer* (HC 2016), above n 43, at [20].

⁴⁵ *Radhi v Manukau District Court* [2015] NZHC 3347 [*Radhi*] at [44]. See *Mercer* (HC 2016), above n 43, at 8.

fuzziness on comity is really an assumption of familiarity is well illustrated in *Mercer* (HC 2016) when Nation J said:⁴⁶

The Judge did not expressly refer to the particular comity that existed as between Australia and New Zealand. He did not need to. The issue which he had to consider was the only issue because there was such comity.⁸

In describing the pt 4 procedure, the Court of Appeal in *Mailley* (CA 2013) simply added: “[i]t reflects the high degree of comity between New Zealand and Australia.”⁴⁷

Without a precise definition of comity being agreed upon, it is difficult to know how the judiciary or executive conceptualises or weighs comity when considering grounds for refusing surrender. All that can be gleaned from cases such as *Radhi*, is that because of comity, the grounds for refusing surrender entail a high bar, it being core to the assumption that despite delay the requested person will receive a fair trial.⁴⁸

IV. BACKING-OF-WARRANTS UNDER PT 4 OF THE 1999 ACT

A *Nature*

The backed-warrant procedure in pt 4 of the 1999 Act⁴⁹ sets out a process in which New Zealand is asked to back the overseas warrant for arrest and it applies to extradition requests from Australia and any country designated by Order in Council on the recommendation of the Minister of Justice.⁵⁰ The Minister must be satisfied as to the circumstances in which a person may be arrested in the issuing country, which include similarities to the process in New Zealand, its ability to extradite to New Zealand (reciprocity), its speciality rules (the rule that “once extradited, a person cannot be detained and tried in the requesting country for an offence that is different to the one to which the extradition request related”⁵¹) and rules about surrender to a third country.⁵²

⁴⁶ *Mercer* (HC 2016), above n 43, at [20]. In *Mercer* (CA 2016), above n 43, the Court of Appeal did not mention Nation J’s interpretation of comity but referred to its own undefined usage of the term in *Mailley* (CA 2013), above n 42 at [17]-[18]. In the second appeal, there was no mention of comity at all. See *Mailley v District Court at North Shore* [2016] NZCA 83 [*Mailley* (CA 2016)].

⁴⁷ *Mailley* (CA 2013), above n 42, at [7] per French J.

⁴⁸ *Police v Thomas*, above n 41, at 457; and *Mercer* (CA 2016), above n 43, at [18].

⁴⁹ For a summary of the statutory scheme, see *Mailley v Police* [2011] 3 NZLR 223 (HC) at [21]-[38] per Ellis J.

⁵⁰ Currently only the United Kingdom and the Pitcairn islands have been designated. Extradition Act 1999, ss 39 and 40. See Issues Paper, above n 2, at [2.15].

⁵¹ Extradition Act 1999, s 30(5)(d). See Issues Paper, above n 2, at [2.12].

⁵² Extradition Act 1999, s 40(3)(c)-(d). See Report, above n 5, at [7.15].

B Conditions

(i) Extraditability

(a) “Extraditable person”

Under s 3 of the 1999 Act, a person is an “extraditable person” in relation to an extradition country if:

- (a) the person is accused of having committed an extradition offence against the law of that country; or
- (b) the person has been convicted of an extradition offence against the law of that country and—
 - (i) there is an intention to impose a sentence on the person as a consequence of the conviction; or
 - (ii) the whole or a part of a sentence imposed on the person as a consequence of the conviction remains to be served.

(b) “Extradition country”

Australia and all designated countries are defined as “extradition countries” for the purposes of the relevant part of the Act.⁵³

(c) “Extradition offence”

An “extradition offence” is defined in s 4 of the 1999 Act.

Double criminality

The principle of double criminality is preserved in s 4(2). The principle requires that an alleged crime for which extradition is sought be punishable in both the requested and requesting states.⁵⁴ The purpose of double criminality is to safeguard the liberty interests of the requested person by ensuring their surrender will not be followed by prosecution in another country for conduct that would not constitute a criminal offence in the requested country.⁵⁵

Conduct rule

In determining whether the statutory definition of an “extradition offence” is met, the expression “conduct constituting an offence” under s 5 means that the focus is on the conduct of the requested person rather than the crime alleged to have been committed.⁵⁶ Sections 4 and 5 of the 1999 Act reflect a modern approach in requiring that the conduct in question be, either in total or part, punishable under the laws of both the requesting and requested state (the conduct rule).⁵⁷ This

⁵³ Extradition Act 1999, s 2(1).

⁵⁴ Issues Paper, above n 2, at [5.13]; see also Aughterson, above n 23, at 59-60; Shearer, above n 37, at 137-138; Bassiouni, above n 1, at 494; and Anne Warner La Forest *La Forest's Extradition to and from Canada* (3rd ed, Canada Law Book, Ontario, 1991) at 52-53.

⁵⁵ *MM v United States of America* 2015 SCC 62, [2015] 3 SCR 973 at [174].

⁵⁶ *Plakas v Police* HC Auckland, CIV-2008-404-2412, 11 June 2008 at [23].

⁵⁷ *Plakas v Police*, above n 56; and Issues Paper, above n 2, at [5.15].

contrasts with the more restrictive approach that required substantial correspondence between the offences in each country.⁵⁸ The broader view accords with the London Scheme and the United Nations Model Treaty on Extradition.⁵⁹

Penalty threshold

Under s 4 an "extradition offence" contains a seriousness threshold of a minimum of twelve months' imprisonment punishable under the law of an extradition country in relation to both incoming and outgoing requests for extradition (s 4(1)(a)-(b)). This threshold accords with Australia and the United Kingdom and is within the parameters set by art 2(2) of the United Nations Model Treaty, however it is half that used by Canada⁶⁰ and the London Scheme.⁶¹ It means that a requested person may be subject to extradition under the standard and backed-warrant procedure on the basis of a relatively minor offence.⁶² In the case of the backed-warrant procedure this problem is said to be obviated because of the high level of trust that is accorded Australia and other designated countries.⁶³ Further, the trivial nature of the offence is currently one of the grounds by which the court may refuse surrender.⁶⁴

Speciality

The principle of speciality is also preserved under the backed-warrant procedure by virtue of the Minister's discretion to refuse surrender.⁶⁵

Standard of evidence

The usual requirement for extradition in Commonwealth countries, namely prima facie evidence of the requested person's guilt, has been removed under the pt 4 procedure and replaced with a requirement that the requesting state produce an arrest warrant.⁶⁶ Removal of the prima facie case standard is a result of comity.⁶⁷ This is the main point of difference between the backed-warrant procedure and the standard procedure of extradition under pt 3 of the 1999 Act.

⁵⁸ Issues Paper, above n 2, at [5.15]; and Aughterson, above n 23, at 61. See also Gavan Griffith and Claire Harris "Recent Developments in the Law of Extradition" (2005) 6 Melbourne Journal of International Law 33 at 38–41, citing *Cabal v United Mexican States* (No 3) [2000] FCA 1204, (2000) 186 ALR 188; and *Dutton v O'Shane* [2003] FCAFC 195, (2003) 132 FCR 352.

⁵⁹ London Scheme for Extradition within the Commonwealth (incorporating the amendments agreed in Kingstown in November 2002), cl 2; and Model Treaty on Extradition GA Res 45/116, A/Res/45/116 (1990), art 2(2)(b). See Issues Paper, above n 2, at [5.16].

⁶⁰ Extradition Act SC 1999 c 18, s 3.

⁶¹ London Scheme, above n 59, cl 2(2); see Issues Paper, above n 2, at [5.27].

⁶² For example, unlawful assembly, attracts a maximum 12 months' imprisonment, under the Crimes Act 1961, s 86.

⁶³ Issues Paper, above n 2, at [5.29]-[5.32].

⁶⁴ At [5.24]. See Extradition Act 1999, s 8(1).

⁶⁵ Section 40(3)(d).

⁶⁶ Section 45(5).

⁶⁷ Issues Paper, above n 2, at [6.8]-[6.10].

C Procedure

Part 4 of the 1999 Act prescribes a procedure for considering requests for surrender. It differs from standard extradition by narrowing the procedural requirements, again on the basis of comity and the underpinning presumption of similarity of legal and procedural systems with Australia and other designated countries. Consequently, there are fewer procedural safeguards and formalities in place than are found in standard extradition.

(i) Pre-Arrest

The process of securing extradition to Australia or a designated country under pt 4 of the Act involves several important steps. The procedure commences when the appropriate authority in the requesting country (usually the Australia Federal Police, in the case of Australia) makes a request for an arrest warrant to the appropriate authority in New Zealand.⁶⁸ In essence, the initial process of securing surrender under pt 4 involves police-to-police cooperation although the 1999 Act is silent on who is responsible for the receipt and vetting of backed-warrant requests as well as the decision to initiate proceedings.⁶⁹ In practice, preparation of documents, affidavits, and the application for surrender to a District Court Judge (DCJ) is made by the New Zealand Police, on behalf of the requesting state.⁷⁰ This exemplifies the simplification of the process compared to the standard procedure which involves the diplomatic channel and the Minister of Justice in its initial stages.⁷¹

(ii) Endorsement of overseas warrant (s 41)

The DCJ may endorse a warrant for arrest under s 41 if, based on affidavit evidence (authenticated in compliance with s 78 of the 1991 Act), it is satisfied of such matters as: the identity of the requested person; the person being in New Zealand or is on his or her way here (s 41(1)(a)); and the warrant for arrest being issued, including the lawful authority it is issued under (s 41(1)). There must also be reasonable grounds to believe that the person is an "extraditable person" in relation to an "extradition country" and "extradition offence" (s 41(1)(b)). The "prescribed form" of endorsement, Form EA6, is found in the Extradition Regulations.

⁶⁸ In practice, Interpol's national bureau in New Zealand receives and vets the documents and original overseas warrant before passing detailed instructions to district or business group staff.

⁶⁹ *Mailley* (CA 2013), above n 42, at [8]; and Issues Paper, above n 2, at [4.18]-[4.19].

⁷⁰ Extradition Act 1999, s 41. See *Mailley v Police*, above n 49, at [21]-[38]; and Issues Paper, above n 2, at [4.18]-[4.19]. In *Mailley* (CA 2013), above n 42, at [43] the Court of Appeal held that the appropriate applicant is the requesting country rather than the New Zealand Police but that error in the naming of the applicant was a technicality which could be overcome and did not lead to prejudice.

⁷¹ See Extradition Act 1999, s 18. See also Issues Paper, above n 2, at [2.24].

(iii) Provisional warrant (s 42)

Assuming endorsement of the overseas warrant, Interpol are notified so an “arrest border alert” can be entered to prevent the requested person from fleeing.⁷² Where there is urgency, s 42 allows for the issue of a provisional arrest warrant.

(iv) Powers of the Court (s 43)

In contrast to the sui generis standard procedure, the backed-warrant procedure is aligned to the Criminal Procedure Act 2011. The Criminal Procedure Act’s summary proceeding for what it terms Category 2 offences is applied to the backed-warrant process.⁷³ Trial for Category 2 offences involve District Court Judge alone proceedings unless an order is made on application by either side to the High Court.⁷⁴ A District Court has all the usual powers such as issuing of summons to witnesses, remand of the defendant, adjournment and stay of proceedings.⁷⁵

(v) Procedure following arrest

Whether the person is arrested on a warrant endorsed under s 41 or a provisional warrant under s 42, the person must “unless sooner discharged, be brought before a court as soon as possible” (s 44(1)). Section 44(2) sets out terms by which bail may be granted following arrest under the Bail Act 2000 (s 44(3)). Section 44(4) deals with time-frames when the person is under a provisional arrest warrant. If a reasonable time has elapsed for the endorsement of the warrant under s 41, “...the court may, and must if a reasonable time has elapsed for the endorsement of the warrant, order that the person be discharged.”⁷⁶ Once a warrant has been endorsed and the Police have arrested the person sought, usually the matter is transferred to the relevant Crown Solicitors who initiate and oversee the court proceedings.⁷⁷

(vi) Eligibility for surrender hearing (s 45)

Section 45 provides for the determination by the DCJ of the eligibility of the requested person for surrender in relation to the offences for which surrender is sought. Before ordering surrender of the requested person is possible, pursuant to s 45(2) the court must be satisfied:

⁷² New Zealand Police “Extradition to Part 4 Countries” (Obtained under Official Information Act 1982 Request to the New Zealand Police).

⁷³ Extradition Act 1999, s 43(1)(a).

⁷⁴ Criminal Procedure Act 2011, s 70.

⁷⁵ District Court Rules 2014; and District Court Act 2016.

⁷⁶ Extradition Act 1999, s 44(4)(b).

⁷⁷ *Mailley v Police*, above n 49, at [34]. Extradition Act 1999, ss 44-45. These provisions stipulate the procedure following arrest.

- A warrant for the arrest of the defendant is produced to the court and has been endorsed under s 41(1);
- That the defendant is an “extraditable person” (as defined in s 3), in relation to the extradition country;
- There is an “extradition offence” (as defined in s 4) in relation to the “extradition country” (pursuant to s 39); and
- There are no mandatory or discretionary restrictions under ss 7 and 8, respectively (s 45(3)(a)-(b)).

In determining whether the requested person is an “extraditable person”, defects in the original warrant will not necessarily render the endorsed warrant invalid particularly if the defect is without substance and can be overcome by the existence of supporting documentation.⁷⁸

(vii) Post eligibility hearing (s 46)

(a) Detention

Assuming that the court is satisfied that the person is eligible for surrender, the court must: issue a warrant for the requested person’s detention pending their surrender (s 46(1)(a)); inform the person of time frames relating to their surrender, during which time the person may lodge an appeal or apply for a writ of habeas corpus (s 46(1)(b)).

(b) Bail

The court may grant or refuse bail (s 46(2)) which is the exercise of a judicial discretion governed by a mixture of the provisions of both the Bail Act 2000 and the Extradition Act 1999 (s 46(3)). Flight risk has been found to be highly relevant in the Court’s assessment of there being a just cause to deny bail.⁷⁹

Assuming that the court grants bail to the requested person, pursuant to s 46(3) of the 1999 Act the court may impose any conditions of bail that it thinks fit in addition to any conditions that it may impose under section 30(1), (2), and (4) of the Bail Act 2000 (s 46(3)) including conditions for estreatment of bail bond.⁸⁰ In the event that the requested person is not found eligible for surrender, s 46(4) provides for their discharge subject to s 70(1).

(viii) Surrender Order (s 47)

Assuming a warrant for the detention of the requested person is issued under s 46(1)(a), s 47 obliges the court to immediately make a surrender order unless it refers

⁷⁸ *Smith v Police* [2014] NZHC 2676 at [6]; and *Smith v Police* [2014] NZHC 1577.

⁷⁹ *Archer v Police* HC Tauranga CRI-2007-463-143, 22 November 2007 at [4] and [10].

⁸⁰ *R v Morgan* HC Wellington CRI-2004-485-110, 17 March 2009 at [13]. For example *Fifita v New Zealand Police* HC Auckland CRI-2006-404-145, 12 May 2006; and *R v PGD* HC Wellington CRI-2005-085-5692, 28 April 2006.

the person's case to the Minister under ss 48(1) or 48(4). Section 47(2) deals with time restrictions and the appellant's right to appeal or apply for habeas corpus before a surrender order takes effect.

(ix) Referral of case to Minister (s 48)

Once the criteria for eligibility for surrender are met the court may refer the case to the Minister either because it considers that the exceptions in ss 7 or 8 may apply (s 48(4)(a)(i)) or "because of compelling or extraordinary circumstances of the person, including, without limitation, those relating to the age or health of the person, it would be unjust or oppressive to surrender the person before the expiration of a particular period" (s 48(4)(a)(ii)).

The word "or", creates two distinct statutory tests, either of which needs to be established before the DCJ may refer a case to the Minister.⁸¹ It should be noted that unless the statutory tests are met, the DCJ is not required to consider the purpose of the Minister's role, including the wider discretion available to the Minister and his power to seek undertakings from Australia.⁸²

In the rare case of a referral by the court to the Minister under s 48(4) the Minister must determine whether the person is to be surrendered, having regard to the matters contained in s 30.⁸³ The Minister has a comparatively broader discretion at the end of the process in deciding whether an order for surrender should be issued (s 30(3)(d)-(e)).⁸⁴ Section 48(4)(a)(ii) also allows the Minister to merely defer extradition where because of present circumstances, "it would be unjust or oppressive to surrender the person before the expiration of a particular period."

The Court is also required to refer the case to the Minister if the requested person is a New Zealand citizen, unless the requesting country is Australia or the requesting country is a designated country in terms of the legislation.⁸⁵ There are four other circumstances in which the court must refer the case to the Minister irrespective of whether the requesting country is Australia. They arise where if the person were to be surrendered it appears to the court that the requested person would be in danger of: (i) being subject to torture,⁸⁶ or (ii) the death penalty;⁸⁷ or (iii) double-

⁸¹ *Radhi*, above n 45, at [31].

⁸² At [30].

⁸³ See *Mailley* (CA 2013), above n 42; *Mailley* (CA 2016), above n 46; *McGrath v Minister of Justice* [2014] NZHC 3279 at [6]; and *Radhi*, above n 45.

⁸⁴ See *Wolf v Federal Republic of Germany* (2001) 19 CRNZ 245 (CA) at [49]; *Mercer* (CA 2016), above n 46; *Mailley* (CA 2013), above n 42; and *Radhi*, above n 45, at [2].

⁸⁵ Extradition Act 1999, s 48(3)(a)-(b).

⁸⁶ Section 48(1)(b)(i).

⁸⁷ Section 48(1)(b)(ii).

jeopardy;⁸⁸ or (iv) where it appears to the court that another request has been made under the 1999 Act for the person's surrender and a final decision on the surrender of the person in relation to that request has not been made.⁸⁹

(x) Appeal (s 68)

Section 68 of the Extradition Act 1999 applies to both the standard and backed warrant procedure under ss 24 and 45 respectively.⁹⁰ Parties have a right of appeal, by way of case-stated and/or judicial review, in relation to decisions on eligibility for surrender.⁹¹ Arrest warrants may be challenged by habeas corpus applications where the Crown is required to justify the detention of a prisoner. Assuming the Court or the Minister orders surrender, there is a 15-day window in which to apply for habeas corpus or lodge an appeal.⁹²

(xi) Ministerial Determination

Where the case has been referred to the Minister, s 49 obliges the Minister to make a surrender determination and enables the Minister to seek any undertakings by the extradition country (s 49(2)). If the Minister determines in favour of surrender, ss 50 and 51 cover provisions for the making, varying or cancelling of a surrender order, time restrictions, right to appeal, and application for a writ of habeas corpus.

(xii) Outgoing requests from New Zealand

Extradition from Australia to New Zealand is represented by pt 3 (ss 28-39) of the Australia's Extradition Act 1988 (Cth) (1988 (Cth) Act), a backed-warrant procedure analogous to extradition within Australia requiring only an endorsed warrant.⁹³ There is no requirement: (a) to make a formal request for extradition; (b) to produce supporting documents characteristic of the standard process; (c) meet the double criminality requirement; or (d) meet a particular threshold of seriousness for any offence.⁹⁴ Nor is there a requirement to provide prima facie evidence of guilt.⁹⁵ There are however, judicial restrictions on surrender under s 34(2) of the 1988 (Cth) Act. Unlike New Zealand's backed-warrant procedure, there is no habeas corpus

⁸⁸ Section 48(1)(c)(iii).

⁸⁹ Section 48(1)(d).

⁹⁰ Section 68(1).

⁹¹ *Mercer* (HC 2016), above n 43, at [2];.

⁹² Extradition Act 1999, ss 47(2) and 50(2). See *Mercer* (CA 2016), above n 46.

⁹³ *New Zealand v Moloney* [2006] FCAFC 143, (2006) 154 FCR 250 [*Moloney* (FC)]; *New Zealand v Johnston* [2011] FCAFC 2 at [10]. The current process of securing extradition within Australia is governed by Pt 5 of the Service and Execution of Process Act 1992 (Cth).

⁹⁴ *Moloney* (FC), above n 93, at [28].

⁹⁵ At [28].

provision in Australia's extradition legislation. Another difference is that s 34(5) allows for a review of the magistrate's decision based upon a de novo hearing.

D Restrictions

(i) Judicial discretionary restrictions on surrender

Under s 45(4) of the Extradition Act 1999 courts have a discretion to determine that a person who might otherwise be eligible for surrender is not eligible because discretionary restrictions in s 8 apply. These restrictions safeguard the interests of the requested person facing prosecution and punishment for crimes alleged to have occurred in the requesting country and ensure that the court's process is not abused.⁹⁶ However, unlike standard extradition under pt 3, comity plays a more definitive role in determining surrender under pt 4, as illustrated in some of the cases discussed below. Its impact on these restrictions is not clear. The question whether comity should be determinative, requires some balancing of the competing interests between the growing importance of human rights and New Zealand's commitment to Australia to make surrender as swift as possible.

(ii) Section 8(1) "unjust or oppressive" provision

Under s 8(1) a discretionary restriction may exist on the basis of one or more of three statutory grounds:

- The trivial nature of the case; or
- If the person is accused of an offence, the fact that the accusation against the person was not made in good faith in the interests of justice; or
- The amount of time that has passed since the offence is alleged to have been committed or was committed, and having regard to all the circumstances of the case, it would be unjust or oppressive to surrender the person.

The onus is on the accused to prove to the court on the balance of probabilities that circumstances exist to warrant the intervention of a judicial discretion to be exercised in favour of the accused.⁹⁷

In similar fashion to cases determined under the 1881 Act, "the amount of time passed" (delay) under s 8(1)(c) has continued to be the category most often considered by the courts. While delay is relevant, it is not determinative. In order for delay (or whatever statutory ground is relied upon) to be found oppressive or unjust, the courts require a clear nexus between the ground relied upon and the

⁹⁶ See Report, above n 5, at [5.6(e)].

⁹⁷ *Wolf*, above n 84; and *Mercer* (CA 2016), above n 46, at [13].

“circumstances of the case”.⁹⁸ While the personal circumstances of the person (such as health issues⁹⁹ and settling into a new life¹⁰⁰) can come within the statutory phrase “circumstances of the case”, it is well established that the personal circumstances of the person are generally outside the scope of a s 8 inquiry because of the nexus required between those personal circumstances and the issues of delay.¹⁰¹

In regard to the nexus required, the Court of Appeal in *Mailley* (CA 2013), determined that health issues alone would not have achieved an outcome in favour of the appellant under s 8.¹⁰² However, it thought that the appellant was on stronger ground if he raised his health issues under s 48(4)(a)(ii) as a basis for referral to the Minister.¹⁰³ In *Smith v Police*, Smith was refused leave to appeal because the requisite nexus between the delay and the psychological stress was absent, and even if there had been such a nexus, the psychological stress was of insufficient degree to satisfy the test under s 8(1)(c).¹⁰⁴ In that case there had been a significant and unexplained delay of four years between the initial decision to prosecute the accused for sexual offences against children, and the obtaining of a warrant for his arrest in the United Kingdom and the request for his extradition from New Zealand to the United Kingdom.¹⁰⁵ The court did not consider the issue of responsibility for the delay¹⁰⁶ or whether delay is unexplained¹⁰⁷ determinative; the relevant question was the consequence of the delay and whether it made it unjust or oppressive to order surrender of the requested person.¹⁰⁸

As far as the meaning ascribed to the term “unjust or oppressive” is concerned, Lord Diplock’s definition given in the decision *Kakis v Government of Cyprus* [*Kakis*] continues to be relied on in the New Zealand Court of Appeal, albeit somewhat

⁹⁸ *Wolf*, above n 84, at [60] per French J; and endorsed in *Mercer* (CA 2016), above n 46, at [35]; *Mailley* (CA 2013), above n 42, at [48]; *Smith v Police* [2014] NZHC 2676 at [9]; and *Smith v Police* [2014] NZHC 1577 at [39]-[45].

⁹⁹ *Mailley* CA 2013, above n 42.

¹⁰⁰ *Smith v New Zealand Police* [2014] NZHC 1577; and *Smith v New Zealand Police* [2014] NZHC 2676.

¹⁰¹ *Mailley* (CA 2016), above n 46, at [39]; and *Wolf*, above n 84, at [58]. See also *Smith v New Zealand Police* [2014] NZHC 2676 at [8].

¹⁰² At [48].

¹⁰³ *Mailley* (CA 2013), above n 42 at [49].

¹⁰⁴ *Smith v Police* [2014] NZHC 2676 at [8].

¹⁰⁵ At [9].

¹⁰⁶ At [31].

¹⁰⁷ At [9].

¹⁰⁸ At [9].

inconsistently.¹⁰⁹ Lord Diplock defined “unjust” and “oppressive” in the context of s 8(3) of the Fugitive Offenders Act 1967 (UK) as follows:¹¹⁰

Unjust I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, ‘oppressive’ as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; that there is no room for overlapping, and between them they would cover all cases where to return him would be fair.

The passage has been cited with approval in both Australian¹¹¹ and New Zealand¹¹² courts.

The recent case of *Commonwealth of Australia v Mercer* [*Mercer*]¹¹³ illustrates the indeterminate impact of good neighbourliness on these restrictions. The Court of Appeal allowed an appeal against the decision of the High Court that upheld the District Court decision to refuse Mercer’s surrender to Australia. Mercer was sought for extradition to Australia in relation to charges of indecent treatment of a boy under 17 years.¹¹⁴ The crimes were alleged to have occurred between 1985 and 1986 in Queensland and Mercer was subject to an Australian arrest warrant issued on 31 October 2013. The Court of Appeal determined that on “the balance of possibilities” (equated with likelihood), Mercer failed to meet the unjust limb of s 8(1)(c).¹¹⁵ In reaching its conclusion that surrender of Mercer would not be unjust, the Court emphasised what it perceived to be similarity in the legal and procedural system between New Zealand and Australia and the lack of evidence produced by Mercer that met the high threshold required to meet the s 8(1)(c) unjust limb.¹¹⁶

In regards to the oppressive limb of s 8(1)(c), the Court stressed the importance of oppression linking to the prospect of surrender.¹¹⁷ While it accepted that delay may in some cases be relevant to whether there is oppression,¹¹⁸ it viewed this as a

¹⁰⁹ *Mercer* CA 2016, above n 46, at [33]. See also *Kim v Prison Manager, Mt Eden Corrections Facility* [2015] NZCA 2.

¹¹⁰ *Kakis v Government of Cyprus* [1978] 1 WLR 779 (HL) at 782-783 per Diplock J.

¹¹¹ For example, *Perry v Lean* (1985) 39 SASR 515 at 520; *Ingram v Attorney-General (Cth)* [1980] 1 NSLWR 1990 at 206; in *Moloney* (FC), above n 93. See also Aughterson, above n 23, at 159.

¹¹² As articulated in *Perry v McLean* (1986) 63 ALR 407, the passage was relied upon in *Bieleski v Police* HC Auckland AP286/86, 28 November 1986. See *R v Governor of Brixton Prison ex parte Singh* [1962] 1 QB 211; *Coronno v Police* HC Wellington 130/86, 4 February 1987; and *Re Gorman* [1963] NZLR 17 (SC).

¹¹³ The *Commonwealth of Australia v B* [2015] NZDC 22153; and *Mercer* (CA 2016), above n 46, at [1].

¹¹⁴ *Mercer* (CA 2016), above n 46. See also *The Commonwealth of Australia v B* [2015] NZDC 22153.

¹¹⁵ *Mercer* (CA 2016), above n 46, at [44].

¹¹⁶ At [45].

¹¹⁷ At [52].

¹¹⁸ At [53]. Referring to *Kakis* where Lord Edmund-Davis used the term “inexcusably dilatory” in context of delay by the requesting state. See *Kakis*, above n 110.

matter best dealt with by the requesting state.¹¹⁹ Only in borderline cases was the Court prepared to consider that prosecutorial delay may tip the balance in favour of a finding of oppression.¹²⁰ Given there was limited evidence as to the cause of delay, the Court rejected the matter of delay as a factor relevant to oppression. The Court rejected all other matters viewed by the High Court as relevant to oppression. The Court determined there was no evidence of a significant change in circumstances linked with the delay, previous convictions and deportation to justify a finding of oppression in surrendering Mercer to Australia.¹²¹ It allowed the appeal and on request of Mercer's counsel remitted the case to the District Court to consider a possible referral to the Minister under s 48.

The *Mercer* litigation suggests that differences exist between the approaches of the lower court and that of the Court of Appeal. The Court of Appeal displays a more restrictive reading of what qualifies as "oppression". In the absence of any treaty between New Zealand and Australia that would impose an obligation to read such provisions restrictively, it is reasonable to infer that comity is operating as a justification for this restrictive reading. Why else would the Court of Appeal not read liberally in favour of liberty?

E Summary

The authorities discussed above illustrate the importance of comity between New Zealand and Australia and the role it plays in the judiciary's determination that circumstances exist to warrant their intervention in the surrender process under pt 4.¹²² This restrictive role appears to be based upon a presumption of similarity, it being core to the assumption that the person will receive a fair trial downstream in Australia.¹²³ Interestingly, the New Zealand Court of Appeal considers it to be "a justified expectation that the respondent's human rights (including right to a fair trial) will be met by Australia". Comity, however, does not extend the scope of similarity between New Zealand and Australia to the full gamut of human rights.¹²⁴ Comity in this context is without a human rights dimension. Because comity rests on a presumption of similarity, it is used as an excuse for leaving the issue of human rights of the requested person for the trial court. It allows the New Zealand courts to presume that fundamental human rights will be observed by Australia, thus avoiding any inquiry employing a New Zealand Bill of Rights Act 1990 (NZBORA) standard as

¹¹⁹ *Mercer* (CA 2016), above n 46, at [59].

¹²⁰ At [53].

¹²¹ At [2]-[16] and [65].

¹²² *Mercer* (HC 2016), above n 46, at [14] and [21].

¹²³ *Police v Thomas*, above n 41, at 457; and *Mercer* (HC 2016), above n 46, at [14]; and *Mercer* (CA 2016), above n 46, at [18].

¹²⁴ *Mercer* (CA 2016), above n 46, at [18].

to what kind of protection of fundamental rights they are likely to receive in Australia. Importantly, Australia does not have a Bill of Rights or any similar provisions reflected in the Australian Constitution. Other than what is provided by international human rights instruments and the few procedural safeguards in place to protect the rights of the person sought, the current backed-warrant procedure may be rightly accused of imposing an obligation of "blind trust". A similar proposition was made in relation to the principle of mutual recognition and problems identified with fundamental rights in context of European Union law.¹²⁵ The Law Commission appears, however, to be having second thoughts.

V. A CRITIQUE OF THE LAW COMMISSION'S PROPOSALS

A *Proposed New "Unjust or Oppressive" Provision*

In its Issues Paper, the Commission suggested removal of some or all of the grounds for refusing surrender, placing great emphasis on the importance of comity and reciprocity with Australia.¹²⁶ However, in its Report, tabled in February 2016, the Commission decided against this option, now being more concerned with the importance of human rights. The Commission also struggled to delineate the standard from the backed-warrant procedure. For instance, in the Issues Paper, the Commission suggested expanding the number and nature of grounds to be considered for refusal under the 1999 Act. Its rationale was a proposed shift towards placing the extradition process in the hands of the judiciary rather than the executive¹²⁷ to reflect modern international and domestic expectations.¹²⁸ While acknowledging that such changes meant that a hearing may become more complex and costly,¹²⁹ the Commission decided that greater emphasis on the interests of the person being sought was justified. In support of that proposition, the Commission highlighted the merits that such a proposal has for considering the evidence of the person's offending,¹³⁰ a consideration that is irrelevant to the backed-warrant procedure. The Commission's failure to consider risks of impediment to the backed-warrant procedure is further exemplified through the proposed new "unjust or oppressive" provision, in that it makes s 8(1) subject to a broader discretionary power of the court rather than confined to three grounds. In suggesting a new

¹²⁵ See Koen Lenaerts "The Principle of Mutual Recognition in the Area of Freedom, Security and Justice" (paper presented to The Fourth Annual Sir Jeremy Lever Lecture All Souls College, University of Oxford, January 2015) at [4].

¹²⁶ Issues Paper, above n 2 at [6.22]-[6.23].

¹²⁷ At [8.18] and [8.32].

¹²⁸ At [8.16].

¹²⁹ At [8.33].

¹³⁰ At [8.35].

“unjust or oppressive” provision the Commission believed it would capture a wider range of circumstances where extradition would be unjust or oppressive.¹³¹

Initially, the Commission considered that a general ground could be added, namely “any other sufficient cause”, wording that is found in the London Scheme, and the equivalent of “for any other reason” under pt 3, s 34(2) of the 1988 Australian Act.¹³² The Commission believed that such an expanded ground would be able to encapsulate the broader discretion conferred on the Minister, namely “compelling or extraordinary personal circumstances”¹³³ and “any other reason”.¹³⁴ Described as the “corner-stone of our reform” the final result is reflected in cl 20 of the Bill that reads (emphasis added):¹³⁵

- (e) that the extradition of the respondent would be unjust or oppressive *for reasons including (but not limited to) –*
- (i) the likelihood of a flagrant denial of a fair trial in the requesting country; or
 - (ii) exceptional circumstances of a humanitarian nature;

This option conflicts with the Commission’s recommendation to further simplify the backed-warrant procedure. By its own admission, the Commission anticipates that expanding the number of grounds for refusal may result in more complexity and cost to the extradition hearing.¹³⁶ This concern is exacerbated by the fact that under the proposed new Act the judiciary will no longer exercise discretion in refusing surrender but will be compelled to refuse surrender if grounds are established.¹³⁷

The problems associated with broadening the injustice or oppression ground of refusal may be ameliorated by the emphasis on the high threshold required to satisfy the court that the circumstances warranting refusal are unjust or oppressive.¹³⁸ The “unjust” limb is intended to allow “the Courts to refuse an extradition request if it has grave concerns about how the person will be treated by the foreign authorities upon return” whereas the “oppressive” limb addresses the impact of extradition in light of their personal circumstances.¹³⁹ Instead of looking to English cases, such as *Kakis*, as a guide to determining the boundaries of such a

¹³¹ At [8.78].

¹³² At [8.78]. The words “for any other reason” were introduced in the Extradition (Commonwealth Countries) Amendment Act 1985 (Cth); see *Narain v Director of Public Prosecutions* (1987) 15 FCR 411 [*Narain*]. See Extradition Act 1999, s 8(1); the London Scheme, above n 59, cl 15(2)(b); Extradition Act 1988 (Cth) s 34(2); Extradition Act 2003 (UK), ss 14, 25, 82 and 91; and Extradition Act SC 1999 c 18, s 44(1)(a).

¹³³ Extradition Act 1999, s 48(4)(ii).

¹³⁴ Section 30(3)(d).

¹³⁵ Report, above n 5, at 196

¹³⁶ Issues Paper, above n 2, at [8.33].

¹³⁷ Report, above n 5, at [5.1].

¹³⁸ Issues Paper, above n 2, at [8.79]-[8.84].

¹³⁹ Report, above n 5, at 196.

broad term, the Commission has chosen the Canadian threshold.¹⁴⁰ The Canadian threshold for standard extradition requires the circumstances to “shock the conscience”¹⁴¹ or be “fundamentally unacceptable to our notions of fair practice and justice.”¹⁴²

Irrespective of the high threshold required for any of the grounds under this new provision to succeed, the broad nature of the wording is likely to result in more rather than fewer appeals being filed by the person requested. Procedurally, the Commission anticipates that the delays caused by the unsuccessful raising of grounds for refusal will be circumvented by having these grounds considered by the Court at the extradition hearing, after having been raised by the respondent at another of the Commission’s innovations - the Issues Conference.¹⁴³ In the context of the backed-warrant procedure, the impact of the Issues Conference on the new unjust and oppressive provision, depends on the accuracy of the suggestion made by the Commission that it is “unlikely that grounds for refusal arguments would succeed in the case of an approved country, due to the nature and values of that country’s criminal justice system.”¹⁴⁴ The backed-warrant procedure under pt 4 already suffers lengthy delays arising from protracted litigation. For example, the Mailley litigation dates back to 2005 when the original warrant was “backed” by Judge Morris in the District Court, North Shore. Mailley was arrested in 2008 for the purposes of extradition to Australia to face trial for fraud charges. Numerous appeals followed and did not reach their final conclusion until his last ditch effort to resist extradition was dismissed by the Supreme Court in 2016.¹⁴⁵

Notwithstanding the risks of frustrating the fast-track nature of pt 4, the new provision does attempt to give more emphasis to the importance of human rights. For the purposes of clarity, the Bill illustrates the high threshold required with two examples: (e)(i) reflecting fair trial concerns, covering abuse of process and delay measured according to international minimum standards as opposed to the

¹⁴⁰ It is notable that the Commission’s preferred interpretation of the “unjust or oppressive” limb, conflicts with that of the Court of Appeal which refers to the definition expressed in *Kakis*. See *Mercer* (CA 2016), above n 46, at [33]-[34] and [53]-[55]. But see also *Mailley* (CA 2016), above n 46 where the same Court (but different Judges) considered *Kakis* less useful than its own earlier analysis of the “unjust or oppressive” limb in *Wolf*.

¹⁴¹ Report, above 5, at 196; citing *Suresh v Canada (Minister of Citizenship and Immigration)* 2002 SCC 1, [2002] 1 SCR 3.

¹⁴² At 196.

¹⁴³ Report, above n 5, at 5.

¹⁴⁴ Issues Paper, above n 2 at [8.137]–[8.138]; and Report, above n 5, at [7.30].

¹⁴⁵ *Mailley v District Court at North Shore* [2016] NZSC 73. Compare *Bujak v District Court at Christchurch* [2009] NZSC 96 and *Bujak v Minister of Justice* [2010] NZSC 8 (see earlier extradition hearings). The Commission highlighted the six years it took to process an extradition request under the standard procedure. See Issues Paper, above n 2, at [1.7] and [9.63].

NZBORA;¹⁴⁶ and (e)(ii) the “compelling or extraordinary personal circumstances” ground in s 30(3)(d) of the 1999 Act.

The language in the latter provision has been imported from s 207 of the Immigration Act 2009, tailored to reflect a modernised concept of human rights issues.¹⁴⁷ What the Commission has not considered, are the decisions that distinguish deportation from extradition in considering grounds for refusing surrender.¹⁴⁸ Furthermore, it is questionable whether reference to the language of the Immigration Act 2009, assists with the furtherance of human rights. Lord Mance in *Norris v Government of the United States of America (No 2)* identified a trap that the courts have fallen into when by focussing on:¹⁴⁹

...some quite exceptionally compelling feature [they tend to] divert attention from consideration of the potential impact of extradition on the particular persons involved ... towards a search for factors (particularly *external* factors) which can be regarded as out of the run of the mill.

In a case that dealt with the issue of the rights of the child in context of the European Arrest Warrant (a simplified-procedure of extradition), Lady Hale in *HH v Deputy Prosecutor of the Italian Republic, Genoa* emphasised “some potentially grave consequences are not out of the run of the mill at all”¹⁵⁰ and exceptionality is not a test but a prediction about whether the gravity of harm to the right at stake is justified by the public interest pursued.¹⁵¹

To a degree, the “unjust and oppressive” provision conflicts with the Commission’s recommendation to simplify the backed-warrant procedure, because it risks lengthy delays by emphasising the interests of the person. Despite the weaknesses identified with this proposal, it is argued that the potential for enhancing the human rights interests of the person sought, provides a strong principled case for its application to the backed-warrant procedure. It will appear that unlike New Zealand, the Australian judiciary has a less restrictive application of comity, suggesting that Australia places more emphasis on the interests of the person.

¹⁴⁶ At 196. *Soering v United Kingdom* (1989) 11 EHRR 439 (ECHR) is cited as the source of wording “flagrant denial of a fair trial”.

¹⁴⁷ Issues Paper, above n 2 at 196.

¹⁴⁸ *Radhi*, above n 45; and *Mercer* (CA 2016), above n 46.

¹⁴⁹ *Norris v Government of the United States of America (No 2)* [2010] UKSC 9; [2010] 2 AC 487 at [109].

¹⁵⁰ *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, [2013] 1 AC 338 at [32].

¹⁵¹ At [32] per Lady Hale.

B Comity: The More Sceptical Australian Perspective

Initially, the Commission considered that the case for removal of some or all of the grounds for refusing surrender is strongest in relation to Australia whose extradition legislation already accommodates New Zealand in this way under the 1988 (Cth) Act. The Commission makes the point that the only statutory bar to extradition to New Zealand is found in s 34(2):¹⁵²

Further, instead of the usual “extradition objections” applying, the only bar to extradition is for reasons of: triviality, bad faith, delay or any other reason it would be “unjust, oppressive, or too severe a punishment to surrender the person to New Zealand”.

The Commission fails to recognise that by virtue of the words in s 34(2), “for any other reason”, there is potential for the requested person to raise broad grounds for refusing surrender in Australia. There is, however, a further test to satisfy the court under the “unjust or oppressive” limb. Section 34(2) of the 1988 (Cth) Act provides “that if a magistrate is satisfied by a person arrested on an endorsed New Zealand warrant that for one of the reasons specified, 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.”¹⁵³

The historical background of s 34(2) needs mentioning as it highlights the Commission’s misconception that there is only a single statutory bar to surrender in Australian law. The historical origins of s 34(2) are linked to the Australian Parliament’s intention to bring the backed-warrant procedure with New Zealand into line with interstate extradition under the Services and Execution of Process Act 1901 (Cth) (SEPA 1901)¹⁵⁴ by widening the scope for a refusal to surrender.¹⁵⁵ This was achieved by amendment in 1985 to the Extradition (Commonwealth Countries) Act 1966 (the 1966 Act) which had been carried forward into the 1988 (Cth) Act.¹⁵⁶ As a result, the Commission is misled in its appraisal of the reciprocal nature of the statutory scheme in Australia as far as surrender to New Zealand is concerned, or in the words of the Commission: “How Australia treats New Zealand”.¹⁵⁷ Aside from the enduring rhetoric about the particular comity that is said to exist under pt 4, there is

¹⁵² Report, above n 5, at [7.21].

¹⁵³ *Moloney* (FC), above n 93, at [143].

¹⁵⁴ The SEPA 1901 was amended under the Service and Execution of Process Amendment Act 1991 (Cth), then replaced by the SEPA 1992 following a report of the Law Reform Commission on service and execution of process.

¹⁵⁵ *Kenneally v New Zealand* (1999) 166 ALR 625 at [46]-[47]. For example *Bannister v New Zealand* [1999] FCA 362, (1999) 86 FCR 417 [*Bannister*].

¹⁵⁶ Extradition (Commonwealth Countries) Amendment Act 1985 (Cth).

¹⁵⁷ Report, above n 5, at [7.20].

an unchallenged assumption that recognition of comity is a two-way street as far as Australia is concerned.

To illustrate, in interpreting “unjust” and “oppressive” in the context of s 34(2), in *Binge v Bennett*¹⁵⁸ (decided under the SEPA 1901) Mahoney JA said:

The words ‘unjust and oppressive’ given their ordinary meaning have a broad connotation. I do not think that, so understood, they exclude matters going to, for example, the nature and incidents of the justice system to which the person in question is to be returned or to the circumstances or mode of his treatment pending trial in that system.

This shows the influence of SEPA 1901 in providing a basis for the Australian courts to inquire into the human rights of the person further along the backed-warrant procedure. There is nothing comparable to the SEPA 1901 in New Zealand. Under the SEPA 1901 matters considered by the courts include amongst others, the likelihood of conviction and prison conditions in the requesting state. These matters are downstream in the backed-warrant procedure and are simply not considered by New Zealand courts because of the unchallenged assumption of comity and its underpinning principle of similarity and trustworthiness.

In practice, s 34(2) of the 1988 (Cth) Act has led the Australian courts to breach the comity doctrine, creating significant delays in processing extradition requests to New Zealand. This raises the question of whether the backed-warrant procedure under the Law Commission’s proposed new Act, will follow the same trend as Australia. If it does, the new Act is likely to give less weight to the principle of comity in favour of the interests of the person. This would be a better approach to protecting the human rights of the person sought for surrender. The Commission feels that the “broadly framed ground builds necessary flexibility into the Bill to ensure that the New Zealand authorities can refuse to extradite in appropriate cases.”¹⁵⁹ But the Commission is unlikely to have intended it to be interpreted so broadly as to enable the ability of Australia’s legal system to guarantee a fair trial to be called into question.

The contrasting approach to comity between Australia and New Zealand is illustrated by how the Australian Federal Court decision *Moloney v New Zealand* [*Moloney* (FC)]¹⁶⁰ impacted on the New Zealand High Court bail decision in *R v PGD*¹⁶¹ where the appellant had been surrendered from Australia to face charges in New Zealand.¹⁶² The two accused were subject to a request for surrender to New Zealand

¹⁵⁸ *Binge v Bennett* (1988) 13 NSWLR 578 at 596 cited in *Moloney* (FC), above 93, at [68].

¹⁵⁹ Report, above n 5, at 194.

¹⁶⁰ *Moloney v New Zealand* [2006] FCA 438 [*Moloney* (FCA)] at 62.

¹⁶¹ *R v PGD* HC Wellington CRI-2005-085-5692 24, 28 April 2006.

¹⁶² At [14]-[15].

to face trial on an allegation of historic sex abuse. The accused succeeded on appeal against the magistrate's finding that there were no grounds established that made it unjust or oppressive to surrender the accused. The quality of the trial that the accused might face formed part of the Court's assessment in determining pursuant to s 34(2) that 'for any other reason' it would be unjust or oppressive to surrender the accused to New Zealand. In the view of Madgwick J, a fair trial was not possible because on account of delay, it would be unjust to surrender the accused. The nub of the decision, turned on what Madgwick J perceived was a disparity between New Zealand and Australia in the mandatory requirement of a Judge to warn a jury of the difficulties an accused faces in defending historic sexual assault allegations. The requirement Madgwick J was referring to, was based upon the approach in *Longman v R*, known as the "Longman warning".¹⁶³ This mandatory requirement was said to contrast with the New Zealand position that does not accept the directions required by the *Longman* warning.¹⁶⁴ Madgwick J also considered differences in "cross-admissibility" between Australia and New Zealand because, unlike in New Zealand, in Australia any trial for sexual offences involving multiple complainants would most likely be severed unless the evidence of each complainant was admissible as part of the case in relation to the other complainants.¹⁶⁵

After examining the decision of the primary judge in *Moloney* (FC), Ronald Young J in *R v PGD* accepted the submission that the chance of a second request for surrender succeeding was low because of differences perceived by the Australian judiciary in the way New Zealand law governs warning juries in the context of historic sex abuse cases.¹⁶⁶ Although Ronald Young J challenged the soundness of that reasoning,¹⁶⁷ it is important to note that for the purposes of questioning the trustworthiness assumed to exist between New Zealand and Australia, that the perceived lack of parity in the legal system between Australia and New Zealand significantly influenced the outcome of the bail decision for the applicant.¹⁶⁸

Ronald Young J did not have the advantage of being able to make reference to the decision in October 2006 of *Moloney* (FC) which held that it was not established that it would be unjust to return the respondents to New Zealand.¹⁶⁹ Accordingly, the magistrate's decision to order release of the accused was quashed and instead, their

¹⁶³ *Longman v R* (1989) 168 CLR 79.

¹⁶⁴ At [11]. See *Moloney* (FC), above n 93; and *Moloney* (FCA), above n 160.

¹⁶⁵ *Moloney* (FC), above n 93, at [11].

¹⁶⁶ At [11]-[12].

¹⁶⁷ *R v PGD*, above n 161, at [13].

¹⁶⁸ At [11].

¹⁶⁹ *Moloney* (FC), above n 93, at [231] and [233]-[235].

surrender to New Zealand was ordered and costs awarded against them.¹⁷⁰ The Full Court was also not persuaded that disparity between *Longman* warning requirement in Australia and the flexible approach towards warning the jury in New Zealand was as significant as the accused (respondents) contended.¹⁷¹ Particular emphasis was given to the recognition that New Zealand courts share a mutual objective in ensuring a fair trial, which is supported by provisions of the NZBORA.¹⁷² The Full Court took the view that Madgwick J had erred in law by giving too much weight to the need for a *Longman* warning to be given in assessing whether the accused could receive a fair trial in New Zealand.¹⁷³ The assumption that any trial in New Zealand will be fair was reinforced in the following passages:¹⁷⁴

[36] As has been seen, New Zealand has long been equated, for extradition purposes, with the Australian States and Territories. The fact that the backing of warrants, without more, is regarded as sufficient, itself demonstrates confidence in the integrity of the New Zealand criminal justice system.

[37] Even apart from the special arrangements that govern extradition from Australia to New Zealand, the close relationship between our two countries, and the respect and high regard with which New Zealand courts are held in Australia, would support an assumption of fairness. Section 34(2) must be understood in the light of that assumption.

However, the reality that in practice Australian courts find that there are exceptions to the assumption of there being a fair trial in New Zealand, limits the impact of the Full Court's attempt to rescue the trustworthiness doctrine. In *Bannister v New Zealand*¹⁷⁵ the Court refused to surrender the accused to New Zealand based upon procedural disparity between New Zealand and Australia in relation to sexual offending charges. Because New Zealand sought the extradition of the accused to face trial on representative charges, a situation the Australian High Court considered had previously given rise to a risk of miscarriage of justice, the Court concluded "that it would be unjust, within the meaning of s 34(2), to surrender the respondent to New Zealand to face trial on such charges."¹⁷⁶ *Bannister* was influential in the *Moloney* litigation¹⁷⁷ and although, the Full Court determined that Madgwick J failed

¹⁷⁰ Subsequent to the Full Court decision, the Federal Court in *New Zealand v Moloney* [2006] FCA 1363, dismissed the accused's application to stay the orders of the Full Court.

¹⁷¹ At [219].

¹⁷² Citing *R v MCA187/95*, 13 November 1995.

¹⁷³ *Moloney* (FC), above n 93, at [222] and [226].

¹⁷⁴ *Moloney* (FC), above n 93. These passages have been cited favourably in subsequent decisions. For instance *Newman v New Zealand* [2011] QSC 257 at [9]. See also *MM v United States of America* [2015] SCC 62, 2015 SCR 973 at [119]-[120].

¹⁷⁵ *Bannister*, above n 155.

¹⁷⁶ At [13].

¹⁷⁷ At [129].

to apply the ratio in *Bannister* correctly to the facts of the case,¹⁷⁸ the Full Court rejected New Zealand's contention that *Bannister* should be overruled.¹⁷⁹

To the extent that it found the judge of first instance erred in applying *Bannister* and *Longman*, the Full Court, at least in part, re-settled the trustworthiness doctrine. Four years later, the issue of comity was revisited in *New Zealand v Johnston*.¹⁸⁰ In that case the Full Court overruled the primary judge in refusing to surrender the accused to New Zealand on the basis that surrender would be unjust. What this indicates is a tendency for the lower courts of Australia to adopt a less restrictive view of comity as a determining factor in surrender than Australia's higher courts consider appropriate.

C. The Hidden Evidential Threshold in Australia under the "Interests of Justice" Limb

Another infringement of comity by Australia relates to qualification of the prohibition against consideration of the strength of the case against the person sought.¹⁸¹ This exception is also triggered under s 34(2) of the 1988 (Cth) Act but, here, it is based upon the "unjust or oppressive" limb of the test. If, for instance, the requested person can show that there is no evidence to support the charge, or that there are other reasons why the prosecution cannot succeed, the court is likely to conclude that the accusation was not made in good faith or in the interests of justice, within the meaning of s 34(2)(b) and that the surrender of the person would be unjust or oppressive.¹⁸² This exception was considered by the Full Court in *Moloney* to be "... the sole qualification to the rule that courts of the requested state are not concerned with the strength of the case against the accused...".¹⁸³ The origins of this exception have been traced to the SEPA 1901 as explained above.¹⁸⁴

¹⁷⁸ *Moloney* (FC), above n 96, at [202]-[204].

¹⁷⁹ At [132] and [139].

¹⁸⁰ *New Zealand v Johnston* [2011] FCAFC 2 [*Johnston* (FC)]; and *New Zealand v Johnston* [2010] FCA 958 [*Johnston* (FCA)].

¹⁸¹ Extradition Act 1988 (Cth), s 34(4). This provision corresponds to s 45(5) of the 1991 Act (NZ). See *Moloney* (FC), above n 93, at [33].

¹⁸² At [28]. Referring to the Magistrate's decision. See *Bates v McDonald* [1985] 2 NSWLR 89 at [102]; and *Binge v Bennett* (1988) 13 NSWLR 578 at 585.

¹⁸³ *Moloney* (FC), above n 93, at [52]-[59], [64]. The test for the prima facie exception was developed in cases that applied to extradition within Australia, under the SEPA 1901 and applied to extradition requests from New Zealand under s 27 of the Extradition (Commonwealth Countries) Act 1966 (Cth). See further *Ex parte Klumper* (1967) 1 NSWLR 161.

¹⁸⁴ The Australian courts consider that the "unjust, oppressive or too severe a punishment" limb under s 34(2) of the 1988 (Cth) Act should be construed in accordance with various cases determined under the SEPA 1901. See the cases considered in *Kenneally v New Zealand* [1999] FCA 1320 (1999) 91 FCR 292, at [50]-[51].

In *Kenneally*, the Full Court said:¹⁸⁵

The introduction into the Act of the expression 'for any other reason' it would be unjust, oppressive or too severe a punishment' avoids the necessity to construe s 34(2)(b) in such a way as to cover the situation where there is a hopeless case, but no evidence of any collateral purpose or lack of bona fides.

The effect of this approach may be seen in numerous cases dealing with surrender from Australia to New Zealand.¹⁸⁶ They reflect the willingness of the Australian judiciary to address a submission of injustice or oppression based upon the proposition that there is little likelihood of the requesting State ultimately securing a conviction for the offence, or that the allegations against the accused were "wholly misconceived", that they "could not be possibly right" and that it was "demonstrably clear that the proceedings could have no foundation at all",¹⁸⁷ expressions first used in *Willoughby v Eland* [*Willoughby*] and *Bates v McDonald* [*Bates*].¹⁸⁸

Although a finding of injustice or oppression under this exception is not treated lightly,¹⁸⁹ the preparedness of the judiciary to pay consideration to the standard of evidence against the requested person, places Australia in direct conflict with the concept of comity as described by the Commission:¹⁹⁰

The interest in comity leads to extradition proceedings that show respect for the criminal proceedings of the requesting state. This can be achieved, for instance, through an approach that removes or reduces the requested country's inquiry into the case against the person by making the extradition hearing more akin to a preliminary hearing than a full trial, or by relaxing admissibility of evidence standards for foreign evidence in extradition hearings.

Bates was an appeal against a magistrate's order for surrender from Australia to New Zealand under the 1966 Act, before the 1985 amendment to s 27 of the 1966 Act took effect. In that case, the requested person had absconded to Australia from New Zealand while on bail in relation to trial proceedings for drug offences. The New South Wales Court of Appeal held that under s 27(b) of the 1966 Act, the only issue was whether the accusation against the appellant was "wholly misconceived" or "could not possibly be right".¹⁹¹ Despite the fact that there was no obligation on New Zealand to establish a prima facie case, the Court held that it may examine the

¹⁸⁵ At [46]-[47].

¹⁸⁶ *Bates*, above n 182, at 95,100 and 102.

¹⁸⁷ At 95. Considered in *Moloney* (FC), above n 93, at [59].

¹⁸⁸ *Willoughby v Eland* (1985) 79 FLR 130 [*Willoughby*] at 134; and *Bates*, above n 182, at 95.

¹⁸⁹ *Moloney* (FC), above n 93, at [35]. See also *Kenneally*, above n 184, at [55].

¹⁹⁰ Report, above n 5, at [7.41].

¹⁹¹ *Bates*, above n 182. See dicta of Kirby P at 95; Samuels JA at 100; and McHugh JA at 104. Cited in *Moloney* (FC), above n 93, at [60].

depositions of criminal proceedings in New Zealand, albeit for the purpose of ensuring that a request for surrender was not made for an improper purpose, particularly in regard to s 27(b), and not for the purpose of adjudicating disputed questions of fact or law.¹⁹² After examining the depositions and evidence produced before the Court, the appellant failed to establish under s 27(b) of the 1966 Act that the accusation was not made in good faith or in the interests of justice.¹⁹³ Kirby P narrowed the issue of injustice or oppression to where “there was no scintilla of evidence”.¹⁹⁴ In this sense, a sufficiency of evidence is potentially applicable in Australia’s backed-warrant procedure, albeit at an extremely low threshold.

The practice in Australia in this regard is not, admittedly, always consistent. Notwithstanding his concern about the evidence relating to the charge against the accused sought for extradition to New Zealand, Yelham J in *Daemar v Parker* [*Daemar*]¹⁹⁵ believed that the s 27(b) “interests of justice” exception did not permit a magistrate to refuse surrender in a case in which it appeared that the prosecution must fail.¹⁹⁶ However, Hope JA in *Willoughby* expressed a contrary view.¹⁹⁷ Yelham J’s conclusion in *Daemar* was largely based upon his examination of the SEPA 1901 (repealed) relating to interstate extradition, considered analogous to the backed-warrant procedure in New Zealand. In particular, s 18(6)(c) of the SEPA 1901’s exception that “for any other reason, it would be oppressive to return the person” allowed for an extensive evaluation of the evidence in order to prove an abuse of process for the purpose of establishing whether the accusation was “not...made in good faith or in the interests of justice” in terms of s 18(6)(b).¹⁹⁸ Finding that there was a corresponding provision under pt II but not pt III of the 1966 Act, Yelham J felt that there was a need for legislative change to bring pt III into line with s 18(6)(b) of the SEPA 1901.¹⁹⁹ In *Narain*, Wilcox and Jackson JJ considered that the insertion in s 27, by the 1985 amendment, of a reference to “or for any other reason” reconciled these two sections.²⁰⁰ Consequently, the expression “or for any other reason” has been construed in accord with a long line of authority dealing with an application under the SEPA 1901.²⁰¹ In *Narain*, a Full Court of the Federal Court noted that a court is justified in refusing extradition “where it positively finds that

¹⁹² *Bates*, above n 182, at 100. See *Willoughby*, above n 188 at 151-152. But see *Daemar v Parker* (1975) 45 FLR 405 [*Daemar*] at 409.

¹⁹³ *Bates*, above n 182.

¹⁹⁴ *Bates*, above n 182.

¹⁹⁵ *Daemar*, above n 192.

¹⁹⁶ At 409. See *Narain v Director of Public Prosecutions* (1987) 15 FCR 411 [*Narain*].

¹⁹⁷ See *Willoughby*, above n 188, at 134-135. Followed in *Bates*, above n 182.

¹⁹⁸ *Daemar*, above n 192, at 407.

¹⁹⁹ At 411.

²⁰⁰ *Narain*, above n 196.

²⁰¹ *Kenneally*, above n 184, at [47].

the offence was not committed".²⁰² In a statement of some significance to the exception of no evidential threshold, it held:²⁰³

...if the material before the magistrate had positively demonstrated, in relation to either charge, that the offence had not been committed, it would have been correct to hold that it would be unjust and oppressive to surrender the appellant on that charge. But this was not the case.

The same evidential threshold approach has been employed successfully under the 1988 (Cth) Act in *Kenneally v New Zealand*, on the grounds that it was unjust to surrender the accused. A magistrate had ordered Kenneally's surrender from Australia to New Zealand in relation to drug offences. He appealed to the Supreme Court of New South Wales. The primary judge had allowed evidence (affidavit evidence and transcripts of intercepted conversations) from the respondent (New Zealand) to be adduced in support of its application for Kenneally's surrender. The primary grounds of appeal concerned the contention that the respondent's (New Zealand) accusations against him were not made in the "interests of justice".²⁰⁴ The primary judge dismissed the application for review on two grounds. First, that it was not for an Australian magistrate, or judge on review to decide which version of the transcript of the intercepted conversation was the more accurate.²⁰⁵ Secondly, it could not be assumed that there was no other evidence available to support the charges.

Kenneally then appealed to the Full Court of Federal Court of Australia,²⁰⁶ which held that the evidence relied upon by the New Zealand authorities, fell substantially below the prima facie standard. The Full Court said:²⁰⁷

...where the Court is satisfied, upon all of the evidence before it, that the evidence taken as its highest for the prosecution fails to disclose a prima facie case, and it is clear that it has available to it no other evidence of any significance, the words of s 34(2) suggest that extradition should be refused.

In finding that the primary judge had erred in not assuming that there was no evidence apart from the taped conversation, the Full Court reasoned that the standard of proof which must be met, is the civil standard. Although it has been described as an unusual case,²⁰⁸ *Kenneally* remains current authority for there being

²⁰² At [424]. Cited in *Moloney* (FC), above n 93, at [61].

²⁰³ *Narain*, above n 196, at 8.

²⁰⁴ *Kenneally*, above n 184, at [24].

²⁰⁵ At [38].

²⁰⁶ *Kenneally*, above n 184.

²⁰⁷ At [56].

²⁰⁸ At [79].

an exception to the no evidence requirement.²⁰⁹ Following the test enunciated in *Bates*, a Full Court determined that it would be “unjust” for the appellant to be surrendered to New Zealand.²¹⁰

The Full Court in *New Zealand v Johnston* exhibited some reluctance at being dragged into an ever deeper inquiry into the criminal justice process in New Zealand. When determining that the primary judge had erred in concluding that delay had rendered the accused’s trial unfair, it noted the reasons how the delay might prejudice the accused’s trial were speculative.²¹¹ It also responded negatively to counsel’s invitation that the Full Court assess the strength of the prosecution’s case, and, having done so, should conclude that it is hopeless or so weak that it would be unjust to surrender the respondent to New Zealand:²¹²

This Court is not permitted to make this kind of assessment of the prosecution case. It has not been put that the case has some fatal flaw or that it is clearly bound to fail. What was put by the first respondent’s advocate was that, having regard to the matters referred to at [133] above, the case would not succeed. That conclusion is based upon an assessment of the facts which is an assessment for the New Zealand courts to make, not this Court.

Yet, despite the emphasis by the Full Court in *Moloney* that judicial intervention in extradition cases relating to evidence and strength of prosecution case should only occur in the most exceptional of circumstances,²¹³ the lower court decision in *Johnston* (FC) more accurately exemplifies Australian courts’ attitude to the concept of comity.

In summary, the scope of s 34(2) under the 1988 (Cth) Act allows the Australian judiciary to engage in a wide-ranging consideration of the merits of the New Zealand criminal justice system.²¹⁴ It might be argued that the evidential threshold approach would not succeed in the New Zealand courts because of comparatively stricter adherence to comity. However, it could be invoked under the “unjust or oppressive” limb of s 8(1) of New Zealand’s Extradition Act 1999 in context of either a judicial discretion under s 45(4) or referral to the minister under s (48)(4)(a)(ii). Support for this proposition is found in the recent Court of Appeal decision in *Mercer* (CA 2016) *appeal* where the Court considered *Moloney* (FC).²¹⁵ Moreover, in the context of the

²⁰⁹ *Kenneally*, above n 184.

²¹⁰ In *Moloney* (FC), above n 93, at [79].

²¹¹ *Johnston* (FC), above n 180, at [120]; and *Johnston* (FCA), above n 180, at [54] and [58].

²¹² At [133]-[134].

²¹³ *Moloney* (FC), above n 93.

²¹⁴ *Moloney* (FC), above n 93.

²¹⁵ *Mercer* (CA 2016), above n 46, at [50].

backed-warrant procedure under the 1881 Act, Justice Salmond, in *Re Murray Ross*, conceded that it was conceivable to find cases in which: ²¹⁶

... the innocence of the accused is so clearly demonstrated as to show that his return is not being asked for in good faith and in the interests of justice; in such a case the power of discharge under s 19 may be properly exercised in accordance with the terms of that section. But the present is not a case of that description.

The Australian cases do illustrate that there is a tendency to apply more substantive conditions to the backing-of-warrants in Australia when considering grounds for refusal than would be suggested by rigid adherence to comity. It is possible that under the Law Commission's introduction of a broader "unjust or oppressive" provision, the New Zealand courts may be willing to follow this practice, particularly on the basis of reciprocity. Ultimately, however, the approach of Australia's lower courts tends to undermine the comity/trustworthiness doctrine relied on by the Law Commission for its further simplification of the backed-warrant procedure.

D Further simplification of the backed-warrant procedure

As part of the aim to further simplify the backed-warrant procedure, the Commission suggested treating Australia even more "favourably" by placing it in a category of its own under the new Act.²¹⁷ In deciding whether differentiation from other categories of countries is necessary, the Law Commissioner considered: ²¹⁸

- that most extradition traffic is with Australia;
- Australia is a country with a similar legal system to New Zealand;
- a high degree of trust held by New Zealand in Australia's legal system; and
- New Zealand is singled out as being a special category under the Extradition Act 1988 (Cth).

For these reasons, the Commission has recommended the removal of the requirement of double criminality in regard to requests from Australia.²¹⁹ The recommendation reflects the high degree of comity that underpins the pt 4, backed-warrant procedure with Australia.

The case of *Radhi v New Zealand Police* [*Radhi*] was highlighted by the Commission as an illustration of the difficulties encountered in trying to meet the double criminality requirement.²²⁰ Radhi appealed against the decision in the District Court that he was eligible for surrender to Australia in relation to an alleged people-

²¹⁶ *Re Murray Ross* [1921] NZLR 292 (SC) at 292.

²¹⁷ Issues Paper, above n 2, at [6.21].

²¹⁸ Report, above n 5, at 51; and Issues Paper, above n 2, at [6.22]–[6.24] and Q 13.

²¹⁹ Report, above n 5, at 47, Recommendation 15. See draft Bill cl 7(1)(a) which omits the requirement of double criminality.

²²⁰ *Radhi v New Zealand Police* [2013] NZHC 163 [*Radhi*]; and Issues Paper, above n 2, at [5.19].

smuggling offence. His grounds were that the offence upon which extradition was based was not an offence in New Zealand under s 142(fa) of the Immigration Act 1987, when in October 2001 the offence was alleged to have occurred. The High Court determined that the relevant New Zealand offence at the time of the offending required the arrival in New Zealand of the persons being smuggled to flow from the accused's conduct of wilfully assisting and aiding.²²¹ It is relevant that the offence under s 232A of the Migration Act for which Radhi was sought, did not require arrival into Australia of illegal immigrants, and that was not alleged by the Australian Federal Police.²²² Accordingly, the High Court found in favour of Radhi, that at the relevant time, the conduct attributed to him did not constitute an offence in New Zealand and the requisite double criminality standard was not met. In 2014, the Court of Appeal, overturned the decision of the High Court on this point, finding instead, that Radhi's conduct can be construed to fall within the relevant offence.²²³ In anticipation of further cases like *Radhi*, which it viewed as creating unnecessary impediment to extradition through the difficulties identified with an interpretation of s 5, the Commission has contemplated further widening the conduct rule in assessing double criminality.²²⁴ But for Australia, as noted, it contemplates removal.

It is doubtful whether there is a sound basis for removing the requirement for Australia to establish double criminality.²²⁵ For example, while Australia criminalises cartels to regulate cartel conduct currently and somewhat controversially, New Zealand does not.²²⁶ Someone arrested for such conduct in New Zealand on a backed Australian warrant would be unable to use the current unjust or oppressive provision on the grounds the matter was trivial, because the Australian cartel offence carries a maximum 10-year penalty.²²⁷ The oppressive limb of the provision may be of greater assistance, but the court would need to be persuaded that the civil rather than criminal nature of the offence in New Zealand would meet the high threshold standard associated with this provision. Even then this ground for refusal could not be invoked until the extradition request had proceeded through most of

²²¹ *Police v Radhi* [2014] NZCA 327 at [15].

²²² At [15].

²²³ At [15]-[27].

²²⁴ Issues Paper, above n 2, at [5.21].

²²⁵ Report, above n 5, at [7.24]-[7.27].

²²⁶ See Commerce Act 1986 and Commerce (Cartels and Other Matters) Amendment Bill 2011 (341-2) . See also Anna Kingsbury "Cartel Regulation in New Zealand: Undermining the per se Rule?" (2016) 37ECLR 282; and Jesse Tizard "Get Out of Jail Free: A Wrong Turn in New Zealand Cartel Regulation" (2016) 22 NZBLQ 46 at 49.

²²⁷ Competition and Consumer Act 2010 (Cth), pt VI, s 79.

the procedure, something hardly compatible with a fast-track system of extradition.²²⁸

My principal criticism of the Commission's rationale for relaxing these restrictions, however, relates to Australia's purported trustworthiness.²²⁹ In the view of the Commission, a country's trustworthiness is measured according to there being: reciprocity; a human rights record; membership of international schemes such as the London Scheme; assurances as to there being safeguards in place to guard against breaches of fundamental restrictions on extradition; and whether the wider criminal investigation and prosecution systems include adequate checks and balances.²³⁰ These factors are said to assist in establishing the criteria by which countries may fall into a more simplified backed-warrant category. The Commission also regards this trust as reflected in the secure Trans-Tasman relationship, evidenced in the Trans-Tasman Proceedings Act 2010. Specifically, the Commission cited the formal acknowledgement given of "each Party's confidence in the judicial and regulatory institutions of the other Party."²³¹ However, that statement is given in the context of private international law and has a civil rather than criminal underpinning.²³²

The Commission's unchallenged assumption about Australia's trustworthiness neglects to consider cases such as *Samson v McInnes*.²³³ In this case, a New Zealand citizen was arrested, interviewed twice, and remanded in custody by South Australian Police simply on the basis of the original arrest warrant issued by a DCJ in New Zealand. The failure to have the warrant properly endorsed before execution was explained by erroneous advice being given to the arresting South Australian Police Officer.²³⁴ Moreover, Australia's recent track record on human rights is poor and does not seem to be improving.²³⁵ Finally, Australia's own practice in regard to New Zealand extradition cases belies this trust. The Australian backed-warrant

²²⁸ See Issues Paper, above n 2, at [5.22]. It is uncertain how effective a mechanism such as an Issues Conference will reduce delay.

²²⁹ Issues Paper, above n 2, at [7.9].

²³⁰ Report, above n 5, at [6.41]-[6.46].

²³¹ At [7.19]. See Agreement between the Government of New Zealand and the Government of Australia on the Trans-Tasman Court Proceedings and Regulatory Enforcement [2013] ATS 32 (signed 24 July 2008, entered into force 11 October 2013)(preamble).

²³² See further John Turner "Enforcing Foreign Judgments at Common Law in New Zealand: Is the Concept of Comity Still Relevant" (2013) NZ L Rev 653; and Thomas Shultz and Jason Mitchenson "Navigating Sovereignty and Transnational Commercial Law: The Use of Comity by Australian Courts" (2016) 12 Journal of Private International Law 344.

²³³ *Samson v McInnes* (1998) 89 FCR 52 [*Samson*]. See also *R v Hartley* [1978] 2 NZLR 199 (CA) at 214 per Woodhouse J.

²³⁴ *Samson*, above n 233, at 53.

²³⁵ Ben Doherty, "Offshore detention may hurt Australia's bid for UN Human Rights Council seat" *The Guardian* (online ed, UK, 7 April 2017). See also UN News Centre "Australia's Aboriginal children 'essentially being punished for being poor' – UN rights expert" *UN News Centre* (online ed, UN, 4 April 2017).

procedure may give the appearance of strong adherence to the principle of comity, but as the above analysis of case law dealing with s 34(2) under the 1988 (Cth) Act reveals, there are even tighter safeguards in place to protect the interests of the person than would seem proportionate to the importance of comity. In other words, the Commission's representation of the comparatively more 'matey' extradition process to New Zealand is a fiction, because it is based upon unchallenged assumptions about Australia's adherence to comity.

VI. CONCLUSION

Extradition is meant to be expeditious and efficient. At the same time, the process must provide adequate protection to the rights of the person sought for extradition. These principles underlie the Law Commission's rationale for the proposals examined above. It is, however, argued that in proposing a new Act, the Commission has shown limited consideration for the impact of its proposals on the backed-warrant procedure and how, by extension, these two principles are affected.

First, this article has sought to show how the Commission's failure to delineate between the standard and backed-warrant procedure in proposing a new Act, impacts negatively on its proposals for the backed-warrant procedure. At the root of the problem is a lack of consideration of any case law relevant to the backed-warrant procedure, which might have otherwise compelled the Commission to reconsider its position in making across-the board proposals, such as the proposed "unjust or oppressive" provision. Instead, the Commission simply drew a parallel with Australia's extradition legislation,²³⁶ without giving adequate consideration to the implications relevant case law concerning s 34(2) of Australia's 1988 (Cth) Act, has for the backed-warrant procedure. Arguably, this proposed new unjust or oppressive provision will breach comity and impede rather than enhance the expediency of that pt 4 procedure. Notwithstanding that the backed-warrant procedure relies heavily on comity, the Commission clearly has reservations about this practice, indicated by its inconsistent application of comity. Another more subtle example of the Commission's failure to delineate between the standard and backed-warrant procedure, relates to how comity is understood and applied by the decision-maker, which may vary according to whether extradition involves a standard or simplified procedure. How each country is categorised gives rise to further definitional differences. Arguably, comity under pt 4 in relation to Australia is qualitatively different from comity in relation to the United Kingdom, as a function of geographic proximity and economic importance for instance.²³⁷

²³⁶ Extradition Act 1988 (Cth), s 34(2).

²³⁷ Issues Paper, above n 2, at [6.23].

Secondly, this article has demonstrated how the Commission's emphasis on comity, has been inconsistently applied. In the first instance, the Commission placed too much importance on comity by proposing removal of some or all grounds for refusing surrender in the case of Australia. Then, the comity rationale was abandoned altogether, when the Commission changed tack and recommended leaving the grounds for surrender under the backed-warrant procedure intact. The Commission's final position is consistent with a blanket approach, and one that limits rather than enhances the importance of comity. I argue, that such an approach, insofar as the backed-warrant procedure is concerned, does not, in the words of the Commission, "strike the necessary and appropriate balance between protecting the rights of those whose extradition is sought and providing an efficient mechanism for extradition". Consequently, there is a lack of coherency in the Commission's proposals and underlying rationale. These particular proposals are hard to reconcile with other proposals to simplify procedures that are built upon the importance of trustworthiness and comity in regard to Australia. This leaves open the question whether the Commission has as much faith in comity with Australia as it appears to profess.

Thirdly, this article has demonstrated that the Commission has based its proposals on unchallenged assumptions about comity in regard to Australia. The impact of this tendency is most relevant to the proposal to further simplify the backed-warrant procedure. Analysis of Australian case law shows that the Australian judiciary flouts comity as far as the required standard of evidence is concerned. There are appreciable differences in how comity and liberty interests are weighed in context of the 1988 (Cth) Act compared to the 1991 Act. It may be the result of a partitioning between the influence of a broad latitude given to the judiciary by virtue of s 34(2) "for any other reason" and what the Australian judiciary regard as firmly established authority for considering an exception to the prima facie requirement and the role of the SEPA 1901, in assessing the grounds for refusing to surrender a requested person to New Zealand. It is difficult to reconcile these findings with the assumption of there being mutual trust and comity between New Zealand and Australia.

It follows therefore, that the Commission's proposal for further simplification of the backed-warrant procedure, in regard to Australia, places too much emphasis on comity and trustworthiness. The overestimation of similarity between New Zealand and Australia weakens the case for the proposed removal of the double criminality requirement. Further simplification of the backed-warrant procedure is unjustified and would be, in principle, an unnecessary sacrifice of the person's human rights in favour of comity. In any event, the need for any further simplification of the backed-warrant procedure is arguable and likely to be thwarted by the proposed new "unjust or oppressive" provision.

As a result of all of the issues identified above, it is uncertain what policy the Commission has or should have towards the backed-warrant procedure. It remains to be seen whether the effect of the new “unjust and oppressive” provision, if implemented, will frustrate the backed-warrant procedure and suffer the same judicial fascination with fair trial issues as evidenced in Australian case law, or whether the problem can be avoided by the newly proposed Issues Conference. Perhaps a solution would be to amend these proposals in a way that delineates the standard from the backed-warrant procedure completely. Ultimately, it should be determined whether the current backed-warrant procedure actually discourages surrender requests and suffers the same delays associated with the standard procedure²³⁸ before tampering with the current balance.

In recommending removal of some or all of the grounds for refusing surrender,²³⁹ it is contended that the emphasis placed on comity is based upon unchallenged assumptions about New Zealand’s relationship with Australia. At the same time, it is argued that under the new proposed “unjust and oppressive” provision, akin to that of Australia,²⁴⁰ the Commission’s change of heart, in leaving intact the grounds for refusing surrender, suggests that we follow the lead of the Australian judiciary and exercise a more cautionary approach.²⁴¹

²³⁸ Issues Paper, above n 2, at [9.63].

²³⁹ Issues Paper, above n 2, at [6.22]-[6.23].

²⁴⁰ Extradition Act 1988 (Cth), s 34(2).

²⁴¹ Report, above n 5, at 37. See draft Bill, cl 20(e).