

# **Chapter 7**

## **Extradition, migration detention and deportation**

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As a duty lawyer, you may have to represent people who the prosecution seeks to have extradited from Queensland either interstate or overseas. The two categories are distinct and operate under different legislation. As such, this chapter deals with them separately.

You may also have to appear for a person who has had an interstate fine registered for payment in Queensland or been detained under migration legislation as a non-Australian citizen.

## A. Extradition interstate

### 7-1 *Service and Execution of Process Act 1992 (Cth)*

This is the most common form of extradition that you are likely to encounter as a duty lawyer. It involves having people who have been charged with offences in one Australian state returned to that state if they are apprehended in another state.

You may be asked to represent people who are facing extradition from Queensland to another state or territory. The [Service and Execution of Process Act 1992](#) (Cth) contains the procedure for interstate extradition.

#### Summary

Your role is limited when a person is brought before a court on an interstate warrant. There are few grounds to challenge such extradition if the necessary warrants are valid and can be produced. First ascertain whether your client wishes to challenge the warrant. If they do, you should ascertain whether:

- the name on the warrant is correct
- whether the client accepts that they are that person
- all preconditions for the issue of the warrant have been complied with (*R v Lavelle* (1995) 82 A Crim R 187)
- the person was properly apprehended and brought before the court as soon as practical.

If the warrant is not for your client, or the warrant’s preconditions have not been complied with, the warrant can be challenged as being invalid and your client discharged. If the warrant is valid, the magistrate can adjourn the matter for a further hearing or order the person to appear in the original jurisdiction. In either case, bail is possible. See below for bail issues.

Also note that, if your client is a ‘person under restraint’, the magistrate must adjourn the matter (see [7-4](#)).

After the magistrate has made a decision, advise the person of their right to seek an urgent review of the decision in the Supreme Court. If you believe that the person is eligible, they should apply for legal aid.

## 7-2 Apprehension under warrant

The person will have been apprehended and brought before the magistrates court under a warrant under s 82 of the Service and Execution of Process Act.

The person making the arrest does not need to produce the warrant at the time of apprehension (s 82(4)).

Only a police officer (state or federal), sheriff or sheriff's officer can apprehend the person (s 82(3)).

A person can be re-arrested under a warrant and released because of a failure to produce the warrant in court (see below and s 83(5)).

## 7-3 Procedure after apprehension

As soon as practical after being apprehended, the person must be brought before a magistrate. The warrant or a copy of it must be produced for the court appearance.

If the warrant or a copy is not produced, ss 83(3)–83(7) enable the magistrate to adjourn for up to five days if there is a reasonable cause for the delay. If the magistrate does adjourn, the person can be remanded in custody or on bail. At the end of the five days, the court must release the person if the warrant or a copy has not been produced. Even if this occurs, the person can be re-arrested later under the same warrant and should be advised of this.

If the warrant or a copy is produced but is invalid, the magistrate must order that the person be released (s 83(10)).

If the warrant or a copy is produced and the warrant is valid, the magistrate must order one of the following:

- 'that the person be remanded on bail on condition that the person appear at such time and place in the place of issue of the warrant as the magistrate specifies' (s 83(8)(a))
- 'that the person be taken, in such custody or otherwise as the magistrate specifies, to a specified place in the place of issue of the warrant' (s 83(8)(b)). The magistrate can make this order and then suspend it for a specified period, granting the person bail or remanding them in custody (s 83(12))
- that the proceedings be adjourned and the person remanded in custody or on bail (s 83(14)(a)).

A magistrate is not bound by the rules of evidence in proceedings under s 83 (s 83(14)(b)). If granted, bail must comply with s 85, which sets out that the magistrate must prepare the bail instrument. The instrument must be signed by the person and the magistrate, and a copy given to the court that the person has been bailed to appear before.

The law of Queensland applies to bail applications—the state in which the person has been apprehended (s 88).

## 7-4 Additional provisions if person is under restraint

Before dealing with the matter, a magistrate must make reasonable enquiries about whether the person is under restraint and, if so, in which state or states (s 84(1)).

If the person is under restraint, s 84(2)–(10) apply. They do not apply if the person is not under restraint or is under restraint only in the state that they are being extradited to.

Section 3 defines 'person under restraint' as being on bail, probation, parole or other court order. The additional provisions prevent a situation where a person would be contravening other existing orders by complying with the order the magistrate makes.

If the person under restraint is not on bail, the magistrate must adjourn for up to seven days and remand the person either on bail or in custody. As soon as practical after adjournment, the magistrate must give cause notice of the person's apprehension to the person in charge of the correction service in the state where the person is under restraint. When proceedings resume, the person so informed and a supervisor of the person under restraint may make submissions to the magistrate (s 84(4)).

If the magistrate adjourns proceedings, they can remand the person under restraint in custody or on bail.

If the person under restraint is on bail and informs the magistrate of this, the magistrate must, before dealing with the matter, reasonably enquire about any reporting requirements. If the person fails to answer, or gives false or misleading answers to any of those enquiries, the penalty is \$3000 (s 84(2) and (3)).

Upon application by a police officer or the person under restraint, the magistrate may adjourn the proceedings for no more than seven days (s 84(5)). If they do adjourn, they must remand the person under restraint on bail or in custody.

If the person is required to report to an officer of a state corrections service or the police in a state other than the state where apprehended, the magistrate must, as soon as practical after adjournment, give cause notice of the person's apprehension to the person in charge of that corrections service or a police officer where the person is required to report (s 84(6)(a)).

When proceedings resume, the person's supervisor, any officer of the police force of any state and any member of the Australian Federal Police may make submissions to the magistrate (s 84(6)(b)).

## 7-5 Review

If a Queensland magistrate has made an order under s 83, the person may apply to the Supreme Court of Queensland for a review of the order. The person should be advised that this avenue of appeal exists. Legal aid would be granted for a review only if there was a reasonable prospect of success.

The person must apply within seven days of the magistrate making the order. The respondent must be the Commissioner of Queensland Police or, if the person applying is the same person to whom the warrant was directed, the apprehended person (s 86(1)–(3)).

Pending its review, the Supreme Court may stay the order's execution and order the person to be remanded on bail or in custody. The review is by way of a re-hearing. The Supreme Court may confirm, vary, suspend or revoke the order. If the Supreme Court revokes the order, it may make a new order (s 86(5)–(10)).

The Supreme Court of the state is not bound by the rules of evidence during review proceedings (s 86(14)).

# B. Extradition overseas

## 7-6 Summary

The issues involved in extradition overseas are complex. Your role should be limited to advising the person of their legal options and right to legal representation, exploring bail issues and, if the person is eligible, taking a legal aid application.

## 7-7 Legislation

The relevant legislation is the [Extradition Act 1988](#) (Cth). An extraditable person is a person who has a warrant out for their arrest in relation to an offence they:

- are alleged to have committed in a foreign country
- have been convicted of in a foreign country but not yet fully punished for (s 6).

An extradition order can be objected to under s 7, which lists the following five categories of potential objection:

- (a) 'the extradition offence' is a political offence in relation to the extradition country;
- (b) the surrender of the person, in so far as it purports to be sought for the extradition offence, is actually sought for the purpose of prosecuting or punishing the person on account of his or her race, religion, nationality or political opinions or for a political offence in relation to the extradition country;

- (c) on surrender to the extradition country in respect of the extradition offence, the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, religion, nationality or political opinions;
- (d) assuming that the conduct constituting the extradition offence, or equivalent conduct, had taken place in Australia at the time at which the extradition request for the surrender of the person was received, that conduct or equivalent conduct would have constituted an offence under the military law, but not also under the ordinary criminal law, of Australia; or
- (e) the person has been acquitted or pardoned by a competent tribunal or authority in the extradition country or Australia, or has undergone the punishment provided by the law of that country or Australia, in respect of the extradition offence or another offence constituted by the same conduct as constitutes the extradition offence’.

Under s 12, a magistrate can issue a warrant once satisfied that the person is extraditable.

Once a person has been arrested under such a warrant, the magistrate can, under s 15, adjourn the matter so that proceedings can be conducted under s 18 (voluntary consent by the person to surrender to the extradition country) or s 19 (determination of eligibility to be extradited). You should seek an adjournment even if the person wishes to voluntarily surrender so they can get specialist legal advice.

## 7-8 Remand

Under s 15:

- ‘(1) A person who is arrested under a provisional arrest warrant shall be brought as soon as practicable before a magistrate in the State or Territory in which the person is arrested.
- (2) The person shall be remanded by a magistrate in custody, or, subject to subsection (6), on bail, for such period or periods as may be necessary for proceedings under section 18 or 19, or both, to be conducted.
- (3) If a person is remanded in custody after making an application for bail, the person cannot make another application for bail during that remand unless there is evidence of a change of circumstances that might justify bail being granted.
- (4) At any time before proceedings under section 18 or 19 commence in relation to a person (in this section called the transferee) who is on remand under subsection (2), the Attorney General may, by warrant in the statutory form:
  - (a) where the transferee is in custody—direct a magistrate to order the release of the transferee into the custody of a specified police officer and authorise that police officer to take the transferee in custody to appear before a magistrate in a specified State or Territory; or
  - (b) where the transferee has been granted bail—direct a magistrate to order the discharge of the recognizances on which bail was granted and authorise a specified police officer to take the transferee in custody to appear before a magistrate in a specified State or Territory.
- (5) The transferee shall be remanded by a magistrate in the specified State or Territory in custody, or, subject to subsection (6), on bail, for such period or periods as may be necessary for proceedings under section 18 or 19, or both, to be conducted.
- (6) A magistrate shall not remand a person on bail under this section unless there are special circumstances justifying such remand’.

## 7-9 Bail

If the matter is adjourned under s 15, which it will be in almost all first mentions involving a duty lawyer, the magistrate can remand in custody or grant bail. However, s 15(6) makes obtaining bail more difficult than in other situations, as it mandates that a magistrate cannot remand a person on bail unless special circumstances justify it. Satisfying the criteria in the [Bail Act 1980](#) (Qld) will not be enough unless special circumstances also exist. The Act does not define ‘special circumstances’.

The leading case on bail in overseas extradition cases is *United Mexican States v Cabal* (2001) 209 CLR 165; [\[2001\] HCA 60](#). In this case, it was held that that bail should be granted in extradition cases only when two conditions were fulfilled:

- the case's circumstances were special, i.e. different from those that people facing extradition would ordinarily endure when considering the nature and extent of the extradition charges, and
- there was no real flight risk, considered independently of the effect of the proposed bail.

## 7-10 Special provisions for extradition to New Zealand

Part 3 of the Extradition Act covers extradition to New Zealand and is designed to streamline procedures for extradition. Warrants issued by New Zealand courts can have an 'indorsement' made by an Australian magistrate (s 28).

Bail is covered by s 32 rather than s 15, but the same restriction on granting bail applies. Additionally, the court is likely to use the two-part test outlined above in *United Mexican States v Cabal* (2001) 209 CLR 165; [\[2001\] HCA 60](#).

The result of s 15(6) is that, to succeed in a bail application, you must persuade the court that there are special circumstances.

# C. Non-payment of interstate fines

## 7-11 Effect of amendment to Service and Execution of Process Act

The Service and Execution of Process Act was amended in 2010 and a new regime for enforcing interstate fines was brought in (ss 112–122). The practical result for you as the duty lawyer is that an interstate fine can be enforced in Queensland if it has been registered as payable in Queensland under s 113. The fine then becomes enforceable as if it were a Queensland fine.

If the fine has not been registered in Queensland, it cannot be enforced here.

## 7-12 Effect of registration (s 114)

### Effect

- '(1) Subject to this section, a registered fine:
- (a) has the same force and effect; and
  - (b) may give rise to the same actions by way of enforcement;

as if the fine had been imposed on the offender by a court of the registering State.'

### Enforcement only by registering State

- '(2) A registered fine cannot be enforced in the originating State for the fine.'

Note: This subsection does not prevent voluntary payment of the fine in the originating State—see sections 115 and 116.'

### Fine capable of enforcement

- '(3) A registered fine is capable of being enforced in or by the registering State only if, and to the extent that, when the action for enforcement is or is to be taken, the fine could, but for subsection (2), be enforced in the originating State.'

### No imprisonment

- '(4) Despite anything in the laws of the registering State, a registered fine cannot be enforced by the imposition of a sentence of imprisonment on the offender.'

The effect of s 14 is that the fine can be enforced as if it were a Queensland fine, subject to the ‘no imprisonment’ clause in s 114(4). There seems to be no reason why such a fine could not be referred to the State Penalties Enforcement Registry (SPER), though, as at March 2012, SPER were denying that they were managing the payment of any interstate fines.

Any challenge to the fine’s validity must be made in the originating state, though the fine cannot be enforced in Queensland until that challenge has been determined (s 120(3)).

## D. Migration detention

### 7-13 Legislation

Migration detention is authorised under the [Migration Act 1958](#) (Cth). As a duty lawyer, you may need to appear for people who have been detained as unlawful non-citizens under s 189, usually because they have been charged with other substantive criminal law offences, bringing them before the court, and they have been separately detained under the Migration Act.

The Migration Act, which governs their detention, has been heavily litigated; is the subject of many amendments (and will probably continue to be regularly amended); and requires specialist knowledge. It is not the same as a remand in custody, though its effect on the person is similar.

### 7-14 Bail

Migration detention under the Migration Act does not preclude a person from being granted bail on criminal law charges before a court. You must be aware that migration detention is a separate issue from remand in custody and you will not be able to change migration detention status. It may still be worth seeking bail on the criminal charges but a grant of bail will not affect migration detention status.

You should explain this to the defendant when deciding whether to seek bail. If bail is granted but the defendant remains in migration custody, they are not free but none of their time in custody will be counted as time served if they are eventually convicted.

### 7-15 Legal representation

A person detained under the Migration Act should seek legal representation but legal aid is not usually available for migration matters. You should get legal advice on migration detention matters.