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

A thesis submitted in fulfilment
of the requirements for the degree
of
Masters of Law
at
The University of Waikato
by
RYNAE DAPHNE BUTLER



THE UNIVERSITY OF
WAIKATO
Te Whare Wānanga o Waikato

2017

Abstract

The backing-of-warrants is a fast-track procedure for extradition regulated under Part 4 of the Extradition Act 1999. This thesis critically scrutinises a recent review of the legislation by the Law Commission as it relates to the impact of its proposed new Act on the current backed-warrant procedure, particularly as it relates to Australia.¹ The Commission's proposal that its new Act 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" will be analysed and critiqued.² It will be shown that, the Commission has tipped the balance towards the liberty interests of the requested person, when it proposed to increase the breadth of grounds by which the courts may refuse surrender under a new "unjust or oppressive" provision. As a consequence, the proposed legislative provisions may risk breaching the doctrine of comity and frustrating the backed-warrant procedure. This thesis further posits that comity should not be over-emphasised, particularly as the Commission has not at all or has inadequately considered the disparity that exists between the way comity is applied in practise by the Australian and New Zealand courts. As a consequence, the proposed less onerous test for Australia, is unjustified. While the Commission's proposal gives weight to the growing importance of human rights as a determining factor in surrender nevertheless, the Commission's proposals lack coherency and fail to delineate between the standard procedure and the backed-warrant procedure. In absence of any evidence that the efficacy of the backed-warrant procedure is wanting, the impact of the Commission's proposals, are unlikely therefore to achieve the balance it strives to achieve. The argument put here is that there is a strong principled case for strengthening human rights protections in the current backed-warrant procedure. In that regard, this thesis advances the proposition that in combination, the Commission's New Zealand Bill of Rights proposal and a role for a proposed central authority - subject to reconceptualising comity in this context to one that includes a human rights component. To that end, this thesis advocates replacing the balancing act paradigm

¹ Law Commission *Modernising New Zealand's Extradition and Mutual Assistance Laws* (NZLC R137, 2016) [Report]; and Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) [Issues Paper].

² Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) [Issues Paper] at [1.8]-[1.9]. See also Report, above n 1, at 5. See Extradition Bill, cl 7(1)(a).

that purports to reconcile the competing interests underpinning extradition with an assessment of human rights as a primary determining factor in surrender at both the initial stages and latter stages of the backed-warrant procedure. This model, as proposed, will maintain the fast-track nature of the backed-warrant procedure as it would allow the judiciary to differentiate risk between low-level and gross forms of human rights violations or abuse. Finally, this thesis posits that the jurisprudential acceptance in the courts of the extraterritorial effect of the New Zealand Bill of Rights Act 1990 in relation to Australian Police conduct in New Zealand merits attention.

Acknowledgements

I would like to thank my dear mother, Daphne Butler, and my children, Emily and Raoul, for their unwavering support and patience (as well as Lazu, our precious border collie who waits optimistically by the gate). I would also like to thank my friends and the team at Lawaid International for helping me to keep my humour afloat and allowing me time and space to write. I would especially like to thank Craig Tuck as an inspiring mentor and the privileged position he has provided me in allowing me to observe his gifts as an advocate in human rights. I will never forget the wonderful and challenging opportunity he gave me to engage in preparing submissions for an actual case relevant to this thesis, nor the many other fantastic opportunities that lie ahead at Lawaid. I could not have contemplated this thesis without the help of a Masters Research scholarship and the willingness of Neil Boister to act as my supervisor. I am immensely grateful to his writing style making the law of extradition easily accessible and enjoyable to students. I am very grateful for his humour and above all, his expert guidance in the task of writing a thesis.

Table of Contents

Title page	i
Abstract	ii
Acknowledgements	iv
Table of Contents	v
List of Abbreviations	xiii
1. Introduction	1
1.1 Background to the Law Commission's proposed reform	1
1.2 Summary of the Law Commission's findings	1
1.3 Proposed new Act	1
1.4 Research question	2
1.5 The history of the backing-of-warrants	2
1.6 Surrender	2
1.7 The role of comity	5
1.8 Law Commission's proposed reforms	5
1.9 The case for an increased role for a central authority	5
1.10 The case for judicialisation	6
1.11 The case for broader grounds in refusing surrender	6
1.12 The case for further simplification	7
1.13 The case for increasing human rights protections	7
1.14 Critique of reform	7
1.15 Objective of thesis	9
1.16 Method	10
1.17 Chapter outline	10
2. Historical overview of New Zealand's backing-of-warrant procedure	12
2.1 Origins of the backing-of-warrants under imperial statutes	12

2.2	Commonwealth cooperation under The Foreign Offenders Apprehension Act, 1863 (NZ)	13
2.3	Commonwealth cooperation and the Fugitive Offenders Act, 1881 (Imp)	14
2.3.1	<i>Structure</i>	14
2.3.2	<i>Function</i>	14
2.3.3	<i>Extraterritorial jurisdiction</i>	15
2.3.4	<i>Conditions</i>	15
	2.3.4.1 <i>Extraditability</i>	15
	2.3.4.1.1 <i>Extraditable person</i>	15
	2.3.4.1.2 <i>Extraditable country</i>	16
	2.3.4.1.3 <i>Extradition offence</i>	16
	2.3.4.1.3.1 <i>Double criminality</i>	16
	2.3.4.1.3.2 <i>Penalty threshold</i>	16
	2.3.4.2 <i>Speciality</i>	16
	2.3.4.3 <i>Standard of evidence</i>	17
2.3.5	<i>Procedure</i>	17
	2.3.5.1 <i>Endorsement of original warrant</i>	17
	2.3.5.2 <i>Surrender order</i>	17
	2.3.5.3 <i>Provisional warrant</i>	18
	2.3.5.4 <i>Appeal</i>	18
2.3.6	<i>The role of comity</i>	18
2.3.7	<i>Human rights</i>	19
2.3.8	<i>Procedural safeguards</i>	20
2.3.9	<i>Restrictions</i>	21
	2.3.9.1 <i>Mandatory restrictions</i>	21
	2.3.9.2 <i>Judicial restrictions</i>	21
	2.3.9.2.1 <i>“unjust or oppressive”</i>	22
	2.3.9.2.2 <i>“circumstances of the case”</i>	23
	2.3.9.2.3 <i>“trivial nature of the offence and bad faith and in the interests of justice”</i>	24
	2.3.9.2.4 <i>“otherwise”</i>	24
	2.3.9.2.5 <i>“passage of time”</i>	26
2.3.10	<i>Summary</i>	27

2.4	The London Scheme	28
2.4.1	<i>Background to the London Scheme</i>	29
2.4.2	<i>London Scheme and Extradition within the Commonwealth</i>	28
2.4.3	<i>Amending Legislation to Implement the London Scheme</i>	29
2.4.3.1	<i>Australia</i>	29
2.4.3.2	<i>UK</i>	30
2.4.3.3	<i>New Zealand</i>	30
2.4.4	<i>Summary</i>	31
3.	Backing-of-warrants in New Zealand under Part 4 of the Extradition Act 1999	32
3.1	Structure	32
3.2	Nature	32
3.3	Function	33
3.4	Conditions under the Part 4 backed-warrant procedure	33
3.4.1	<i>Extraditability</i>	33
3.4.1.1	<i>“Extraditable person”</i>	33
3.4.1.2	<i>“Extraditable country”</i>	34
3.4.1.3	<i>“Extraditable offence”</i>	34
3.4.1.3.1	<i>Double criminality</i>	34
3.4.1.3.2	<i>Conduct Rule</i>	34
3.4.1.3.3	<i>Penalty threshold</i>	34
3.4.2	<i>Speciality</i>	35
3.4.3	<i>Standard of evidence</i>	35
3.5	Procedure	35
3.5.1	<i>Pre-Arrest</i>	36
3.5.2	<i>Endorsement of the Warrant</i>	36
3.5.3	<i>Provisional Arrest</i>	37
3.5.4	<i>Powers of the Court</i>	37
3.5.5	<i>Procedure following arrest</i>	37
3.5.6	<i>Eligibility for surrender hearing</i>	38

3.5.7	<i>Post eligibility hearing</i>	38
3.5.7.1	<i>Detention</i>	38
3.5.7.2	<i>Bail</i>	39
3.5.8	<i>Surrender order</i>	39
3.5.9	<i>Referral of case to Minister</i>	39
3.5.10	<i>Appeal</i>	40
3.5.11	<i>Other provisions</i>	41
3.5.12	<i>Outgoing requests</i>	41
3.6	The role of comity	42
3.7	Human rights	43
4.	Restrictions	45
4.1	Ministerial restrictions on surrender	45
4.1.1	<i>“compelling or extraordinary”</i>	46
4.1.2	<i>“circumstances of the person”</i>	47
4.1.3	<i>“without limitation, those relating to the age or health of the person”</i>	47
4.1.4	<i>“unjust or oppressive”</i>	48
4.2	Comity applied	52
4.3	Judicial restrictions	59
4.3.1	<i>Mandatory</i>	59
4.3.2	<i>Discretionary</i>	59
4.3.2.1	<i>“time passed”</i>	61
4.3.2.2	<i>“circumstances of the case”</i>	61
4.3.2.3	<i>“unjust or oppressive”</i>	62
4.4	Comity applied	66
4.5	Summary	66
5.	Comparative analysis with other simplified schemes	69
5.1	European Arrest Warrant (EAW)	69
5.1.1	<i>Nature of the EAW</i>	69
5.1.2	<i>Conditions</i>	70
5.1.2.1	<i>Extraditability</i>	70

5.1.2.1.1	<i>Extraditable person</i>	70
5.1.2.1.2	<i>Extraditable country</i>	70
5.1.2.1.3	<i>Extraditable offence</i>	71
5.1.2.1.3.1	<i>Double criminality</i>	71
5.1.2.1.3.2	<i>Penalty threshold</i>	71
5.1.2.2	<i>Speciality</i>	71
5.1.2.3	<i>Standard of evidence</i>	71
5.1.3	<i>Procedure</i>	71
5.1.4	<i>Restrictions</i>	72
5.1.4.1	<i>Mandatory</i>	72
5.1.4.2	<i>Optional</i>	73
5.1.5	<i>Human rights</i>	74
5.2	Nordic Arrest Warrant Scheme	74
5.2.1	<i>Background to intra-Nordic extradition</i>	75
5.2.2	<i>Nature of the Nordic Arrest Warrant Scheme</i>	76
5.2.3	<i>Conditions</i>	77
5.2.3.1	<i>Extraditability</i>	77
5.2.3.1.1	<i>Extraditable person</i>	77
5.2.3.1.2	<i>Extraditable country</i>	77
5.2.3.1.3	<i>Extraditable offence</i>	77
5.2.3.1.3.1	<i>Double criminality</i>	78
5.2.3.1.3.2	<i>Penalty threshold</i>	78
5.2.3.2	<i>Speciality</i>	78
5.2.3.3	<i>Standard of evidence</i>	78
5.2.4	<i>Procedure</i>	78
5.2.5	<i>Restrictions</i>	79
5.2.5.1	<i>Mandatory</i>	79
5.2.5.2	<i>Optional</i>	79
5.2.6	<i>Human Rights</i>	79
5.3	Summary of mutual recognition schemes operating in Europe	79
5.4	British territories	82
5.4.1	<i>Nature</i>	82
5.4.2	<i>Conditions</i>	82
5.4.2.1	<i>Extraditability</i>	82

5.4.2.1.1	<i>Extraditable person</i>	82
5.4.2.1.2	<i>Extraditable country</i>	83
5.4.2.1.3	<i>Extraditable offence</i>	83
5.4.2.1.3.1	<i>Double criminality</i>	83
5.4.2.1.3.2	<i>Penalty threshold</i>	83
5.4.2.2	<i>Speciality</i>	83
5.4.2.3	<i>Standard of evidence</i>	83
5.4.3	<i>Procedure</i>	83
5.4.4	<i>Restrictions</i>	84
5.4.5	<i>The role of comity</i>	84
5.4.6	<i>Human Rights</i>	84
5.5	Africa's backed-warrant procedure	85
5.5.1	<i>Nature of the African Acts</i>	85
5.5.2	<i>Conditions</i>	85
5.5.2.1	<i>Extraditability</i>	85
5.5.2.1.1	<i>Extraditable person</i>	85
5.5.2.1.2	<i>Extraditable country</i>	85
5.5.2.1.3	<i>Extraditable offence</i>	86
5.5.2.1.3.1	<i>Double criminality</i>	86
5.5.2.1.3.2	<i>Penalty threshold</i>	86
5.5.2.2	<i>Speciality</i>	86
5.5.2.3	<i>Standard of evidence</i>	86
5.5.3	<i>Procedure</i>	87
5.5.4	<i>Restrictions</i>	87
5.5.5	<i>The role of comity</i>	88
5.5.6	<i>Human Rights</i>	89
5.6	Australia's inter-state backing-of-arrest warrant scheme	90
5.6.1	<i>Services and Processes Act 1992 (Cth)</i>	90
5.6.2	<i>Services and Processes Act 1902 (Cth)</i>	91
5.7	Interim conclusion of reciprocal and imperial-based schemes	92

6.	Critique of the Law Commission’s recommendation relevant to the backed-warrant procedure	94
6.1	Establishing a central authority	94
6.1.1	<i>Role of the Central Authority in the backed-warrant procedure</i>	94
6.1.2	<i>Summary</i>	102
6.2	Further recommendations relevant to the backed-warrant procedure	102
6.3	Increasing the role of the judiciary	106
6.4	Increasing the breadth of judicial discretion	103
6.4.1	<i>Proposed new “unjust or oppressive” provision</i>	106
6.4.2	<i>Comity applied by Australia</i>	110
6.4.2.1	<i>Section 34(2) exception under the Extradition 1988 (Cth) Act</i>	110
6.4.2.2	<i>Hidden evidential threshold under the “interests of justice limb”</i>	116
6.4.3	<i>Summary</i>	123
6.5	Further simplification of the backed-warrant procedure	124
6.6	Implementation of extradition-appropriate NZBORA provisions	128
6.6.1	<i>Natural justice (s 27 of the NZBORA)</i>	128
6.6.1.1	<i>Natural justice in context of the backed-warrant procedure</i>	129
6.6.2	<i>Criminal process rights</i>	130
6.6.3	<i>Extraterritorial application of the NZBORA</i>	130
6.6.3.1	<i>Generality of the Dotcom determination to the backed-warrant procedure</i>	131
6.6.3.2	<i>New Zealand Police conduct in Australia</i>	132
6.6.3.3	<i>Australian Police conduct in New Zealand</i>	133
6.6.4	<i>Classification of Extradition Proceedings</i>	137
6.6.5	<i>Law Commission’s Position</i>	141
6.6.6	<i>Summary</i>	143

7. Conclusion	145
Bibliography	150

List of Abbreviations

CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
EAW	European Arrest Warrant
ECHR	European Convention of Human rights
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICERD	The International Convention on the Elimination of All Forms of Racial Discrimination
MACMA	Mutual Assistance in Criminal Matters Act 1992
NAW	Nordic Arrest Warrant
NZBORA	New Zealand Bill of Rights Act 1990
OPCAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
SEPA 1901	Services and Processes Act 1901
SEPA 1992	Services and Processes Act 1992
UN	United Nations
UK	United Kingdom

1. Introduction

1.1 Background to the Law Commission's proposed reform

On 1 November 2013, the Government referred to the Law Commission a review of the Extradition Act 1999 and the Mutual Assistance in Criminal Matters Act 1992 (MACMA).³ The purpose of the review was to ensure that these Acts are efficacious and provide safeguards for essential human rights.⁴ In 2014 the Commission released an Issues Paper making a preliminary conclusion that the Acts required reform and calling for submissions.⁵ This was followed by a final report tabled by the Minister of Justice in February 2016.⁶

1.2 Summary of the Law Commission's findings

The Law Commission President, Sir Grant Hammond concluded that both Acts are complex and convoluted and fail to come to grips with the realities of New Zealand's place within a globalised environment. The Commission said:⁷

Both statutes fail to provide a framework through which to balance New Zealand's role within the international community and the values important to New Zealanders in this context, which include protecting the rights of those accused of crimes overseas and protecting those here from unwarranted investigations from abroad.

1.3 Proposed new Act

In attempt to modernise New Zealand's extradition law, the Commission proposed a new Act that is designed to "strike the necessary and appropriate balance between protecting the rights of those whose extradition is sought and providing an efficient mechanism for extradition."⁸

³ Issues Paper, above n 1, at iv.

⁴ Issues Paper, above n 1, at [1.7].

⁵ Issues Paper, above n 1.

⁶ Report, above n 1.

⁷ Report, above n 1, at iv.

⁸ Issues Paper, above n 1, at [1.8]-[1.9]. Report, above n 1, at 5.

1.4 Research question

Given, that approximately half of all extradition requests to New Zealand fall under a backed-warrant procedure,⁹ it is appropriate to ask, how the proposed new Act will impact on this procedure and whether in developing its proposals, the Commission has appropriately delineated the standard extradition procedure from surrender under the backed-warrant procedure.¹⁰ This “simplified procedure” has received little, if any, academic attention and hence the need to research the Part 4 backed-warrant procedure. It is Part 4 of the Extradition Act 1999 (“the 1999 Act”) in relation to Australia, that is the focus of this paper.

1.5 The history of the backing-of warrants

The term 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 overseas warrant for arrest.¹¹ It differs from standard extradition, in that it is less formal and more simplified in nature, without the requirement to establish a prima facie case against the defendant.¹² The backed-warrant procedure has its origins in the long-established imperial-based procedure which existed prior to the 1991 Act.¹³ Tracing the development of the backed-warrant procedure through its imperial origins will assist in evaluating how the Commission’s proposals will impact on key aspects to the procedure.

1.6 Surrender

This thesis uses the term “surrender” in referring to the backed-warrant procedure and the term “standard extradition” in referring to the non-simplified procedure of extradition. For the purposes of this thesis, the terms “endorsement” will be adopted and the person whose surrender is being sought, will be referred to as the

⁹ Issues Paper, above n 1, at [2.27].

¹⁰ The Law Commission’s recommendations for further simplification of the backed-warrant procedure was not mentioned in a recent article by Paul Comrie-Thomson and Kate Salmond “Modernising New Zealand’s extradition and mutual assistance laws” [2016] NZLJ 81.

¹¹ Issues Paper, above n 1, at [2.15]. It has been suggested that the term “backing-of-warrants” was first used in the Indictable Offences Act 1848 (UK). See E P Aughterson *Extradition Australian Law and Procedure* (Law Book Company Limited, Sydney, 1995) at 236. The term “endorsed warrants” regime is used in the Explanatory Note of the Extradition Bill 1998.

¹² Margaret Soper “Extradition” (2004) 1 *Laws of New Zealand* at 5; and 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).

¹³ Fugitive Offenders Act 1881 (UK).

“requested person”. In addition, the term “requested country” will refer to the country where requests for surrender are received and the term “requesting country” will refer to the country from where requests originate.¹⁴

1.7 The role of comity

A key aspect to the backed-warrant procedure is the concept of comity but, despite its importance the term “comity” is not explicitly mentioned in the 1999 Act or its predecessors.¹⁵ Nor is there any judicial discussion or jurisprudence elucidating how such loose usage of the term comity evolved and is applied to the Part 4, backed-warrant procedure when determining surrender.¹⁶

Comity, is broadly defined in the non-legal sense as “courtesy and considerate behaviour towards others”.¹⁷ 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.¹⁸ 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.¹⁹ Comity in the extradition context is often referred to as “comity of nations” which is defined in the Shorter Oxford Dictionary

¹⁴ The backed-warrant procedure and other such simplified systems are variously referred to in the literature and in legislative provisions as “deportation”, “surrender”, “rendition” or “extradition”. See Solicitor-General “New Zealand Foreign Offenders Apprehension Act, 1863. (Papers relating to the case of Frederick Gleich)” Untitled, [1880] AJHR A6 available at <www.atojs.natlib.govt.nz/cgi-bin/atojs>; Limor Klimek *European Arrest Warrant* (Springer International Publishing, Switzerland, 2015) at 52; Extradition Act 1999, Part 4 and the Fugitive Offenders Act 1881 (UK). Historically, the subject of this procedure has been referred to as the “prisoner” or “fugitive” and under more recent legislation, the “person” or “requested person”. While the term “endorsement” is used under Part 4 of the 1999 Act, Australia refers to the backing of the original warrant as “indorsement” under Part 3 of the Extradition Act 1988 (Cth).

¹⁵ See Civil Aviation Act 1990, s 88 (5). In that Act, comity is referred to but not defined.

¹⁶ 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 and Others v Tsebe and Others* 2012 (5) SA 467 (CC) [Tsebe] at [126].

¹⁷ See Shorter Oxford Dictionary <www.dictionaries.com>; and H W Fowler and F G Fowler *The Concise Oxford Dictionary* (Clarendon Press, Oxford, 1929) at 224.

¹⁸ 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.

¹⁹ 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, Green, London, 1894).

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.”²⁰ In *Morguard Investments Ltd v De Savoye*, the following definition of comity of nations was approved by La Forest J at the Supreme Court of Canada:²¹

"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 ..."

In order to evaluate the impact of the Commission’s proposals on the backed-warrant procedure it is necessary to consider whether comity needs to be reconceptualised in a way that would contribute towards how comity should be currently understood. This question requires an examination of the competing interests that the judiciary or executive face in determining whether surrender of the requested person should be refused. These competing interests include the principle of sovereignty, the doctrine of comity or international cooperation and the recent concept of the fundamental rights of the requested person. In context of the backed-warrant procedure, comity may be differentiated from the standard procedure in terms of the level of comity involved. The Part 4 backed-warrant procedure attracts a higher level of comity as a result of close geographical and historical links and the presumption of similarity (such as legal and procedural similarity), which excuses the requirement to establish a *prima facie* case. By distinguishing the features of comity as it relates to the backed-warrant procedure, namely Australia, comity will pose different questions as to the balancing of such competing interests. To this end it is helpful to trace the concept of comity from its

²⁰ Shorter Oxford Dictionary, above n 17. Compare H W Fowler, above n 17, at 224. “Comity of nations” is defined as “friendly recognition as far as possible of each other’s laws and usages.” The usage of “comity of nations” was referred to in context of determining extradition under simplified schemes in *Tsebe*, above n 16 at [126]. See for example *Hilton v Guyot*, above n 16, at 163–64; and *CSR Ltd v Cigna Insurance Australia Ltd*, above n 16, at 396.

²¹ *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 at 256.

earliest position under the imperial-based simplified procedure to its current position under the Part 4 backed-warrant procedure.

1.8 Law Commission's proposed reforms

This thesis has particular regard for the Commission's proposal to: establish a central authority (nominally, the Attorney-General);²² further simplify the Part 4, backed-warrant procedure as it relates to Australia; shift the emphasis away from the executive role in the extradition process and increase the role of the judiciary; and implement extradition-appropriate provisions under the New Zealand Bill of Rights Act 1990.²³

These proposals and their underpinning human rights rationale will be examined for their impact on the backed-warrant procedure and their coherency with both the Commission's other relevant proposals and the emphasis that the Commission places on "comity" with Australia.

1.9 The case for an increased role of a central authority

This thesis begins by examining the Commission's proposal to establish a central authority with authority to oversee the entire extradition process. In terms of the Part 4, backed-warrant procedure the Commission shifted its position from one that was concerned to limit the role of a central authority to an administrative role and leave the role of the New Zealand Police intact. This measure will effectively replace the role of the New Zealand Police in the initial stages of the Part 4, backed-warrant procedure. There are a number of rationales underlying this proposal, including the proposition that human rights will be better served by creating some degree of independence from the executive. In light of this rationale, this thesis will analyse whether in changing its position the Commission is retreating from its emphasis on comity with Australia. Next, I examine the impact on the backed-warrant procedure arising from three further key proposals.

²² See further Report, above n 1, at [2.12]–[2.17] and [5.5]; and Issues Paper, above n 1, at [4.18]–[4.19].

²³ Issues Paper, above n 1, at [1.28]–[1.29]; and Report, above n 1, at 6.

1.10 The case for judicialisation

Firstly, the Commission proposes a shift towards extradition being a judicial rather than an executive process. Increasing the role of the judiciary, is consistent with a more modern and global trend away from treating extradition as a predominantly executive function.²⁴ It is the Commission's view that the judiciary can provide better human rights protection to the requested person. The backed-warrant procedure rarely involves the executive, which provides an opportunity to evaluate this proposal against relevant case law.

1.11 The case for broader grounds in refusing surrender

Closely linked to this proposal, the Commission proposes a new unjust or oppressive provision that allows the judiciary to exercise a broader discretion in refusing surrender of the requested person.²⁵ The proposed new unjust or oppressive provision encapsulates the all-encompassing provision that the Minister exercises in the discretionary grounds "compelling or extraordinary personal circumstances and "any other reason".²⁶ Consistent with overseas trends, if satisfied the judiciary must rather than may refuse surrender.²⁷ The critical provision under New Zealand's current extradition law is narrow in scope and if satisfied, the judiciary may rather than must refuse surrender.²⁸

This modification is also directed at improving human rights protections because the injustice limb is directed primarily at the risk of prejudice to the requested person in the conduct of the trial itself and oppression is directed to the hardship imposed upon the requested person resulting from their personal circumstances.²⁹ The effect of this provision, is that if established to the requisite high standard, such that the injustice or oppression must shock the conscience of the court, the court must rather than may refuse to surrender the requested person.³⁰ Moreover, this

²⁴ Kemp in Du Toit *et al Commentary on the Criminal Procedure Act* (Juta Cape Town, 2011) App B2 in Murdoch Watney "A South African Perspective on Mutual Legal Assistance and Extradition in a Globalized World" (2012) 15 Potchefstroom Electronic Law Journal 292 at 297.

²⁵ Report, above n 1, at [5.11]-[5.17] and [13](b)(i)-(ii). See draft Bill, cl 20(e) in Report, above 1.

²⁶ Extradition Act 1999, s 48(4)(a)(ii).

²⁷ Extradition Act 1988 (Cth), s 34(2) provides that if the relevant statutory ground is established the judiciary "must" refuse surrender. See also Extradition Act 2003 (UK).

²⁸ Extradition Act 1999, s 8 (1).

²⁹ Report, above n 1, at [5.6(e)]. In the course of its work, the Commission was influenced by the jurisprudence in several Commonwealth jurisdictions, particularly Canada's Extradition Act SC 1999.

³⁰ Report, above n 1, at [5.6(e)]. This is the requisite standard in Canada.

provision applies to both standard extradition and surrender under the backed-warrant procedure. It would certainly not appear to facilitate a fast-track procedure of surrender to Australia or reinforce the doctrine of trustworthiness and comity.³¹ In order to determine whether this proposal will contribute positively to the backed-warrant procedure a careful analysis of the relevant case law will be undertaken.

1.12 The case for further simplification

Secondly, I examine the Commission's recommendation to further simplify the backed-warrant procedure, with Australia nominated as a special case.³² Of particular interest, is a less onerous test proposed for Australia in meeting the criteria for an extradition offence. The Commission's intention is to remove the requirement for double criminality, based upon the importance of comity and what purportedly acknowledges more relaxed provisions under Australia's extradition law in regard to New Zealand.³³

1.13 The case for increasing human rights protection

Thirdly, this thesis will examine the Commission's recommendation to implement the New Zealand Bill of Rights Act 1990 ("the NZBORA") rights that are appropriate to the extradition process (into the new Act) and how this will impact on the backed-warrant procedure. It is suggested that in the shadow of the Dotcom litigation, the Commission's consideration for the NZBORA became skewed towards standard extradition. That being said, this thesis contests that the majority ruling by the Supreme Court in the Kim Dotcom extradition case has limited applicability to the backed-warrant procedure.³⁴

1.14 Critique of Reform

This thesis argues that the Commission has struggled to delineate between the standard extradition and backed-warrant procedure in developing its proposals.

³¹ See Report, above n 1, at 53. The view of the Commission, is that an Issues Conference will help to circumvent any delays in surrendering the requested person.

³² Issues Paper, above n 1, at [6.21]; and Report, above n 1, at [7.17].

³³ Issues Paper, above n 1, at [6.22]. Part 3 of the Extradition Act 1988 (Cth).

³⁴ *Dotcom v The United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 (and earlier judgments). In the course of its review, the Commission became aware of the Kim Dotcom extradition case and judgments which could conceivably influence the Commission's approach to reform, especially in regard to reducing cost and time. See Phil Pennington "Law Commission proposes extradition shake-up" *Radio New Zealand* (online ed, Wellington, 11 February 2016) <www.radionz.co.nz>.

These proposals are the product of weak research based on assumptions about our affinity with Australia. In some instances the Commission appears to suggest that Australia is not to be trusted in human rights matters while in others the Commission is zealous and emphatic towards the trustworthiness of Australia. In particular, the Commission has not considered how divergent the practise of comity is between New Zealand and Australia. Nor has the Commission, considered how usage of the term comity differs between standard extradition and the backed-warrant procedure.

How best to reconcile the backed-warrant procedure and the elusive concept of comity to make the surrender process align with today's human rights norms? What this thesis argues, is that comity needs to allow for the underpinning principle of mutual respect and recognition of similarity of legal systems, provided that the principle of comity does not unduly infringe the human rights of the person sought for surrender. Consequently, comity in regard to the backed-warrant procedure raises important questions. How similar are New Zealand and Australia's in their attitudes towards human rights? Should the underpinning principles of comity with Australia be adapted and applied in a manner that allows for more protection of the human rights of the requested person? There is also the fundamental question of whether clarifying the meaning and role of comity through a functional definition of comity would assist in unleashing comity's legal potential?³⁵ Would it better facilitate surrender under the backed-warrant procedure? Arising from such questions, this thesis seeks to highlight the need to review comity and its unique position in the backed-warrant procedure with Australia.

Moreover, it is the need for a functional definition of comity that is tailored to the New Zealand-Australian nexus. One possible solution is proposed which involves reconsideration of the balancing act paradigm. It is argued that in light of surrender cases being highly fact-specific, a hierarchy of human rights (from minor human rights infringements to gross forms of human rights violations) may act as a better guide in determining how comity is applied.³⁶ In such circumstances, human rights,

³⁵ A similar question concerning comity has been raised in context of private international law. See Shultz and Mitchenson, above n 18.

³⁶ For instance, due process rights are especially at risk in the early stages of the procedure, before the requested person has appeared before the court. Conversely, more gross human rights

will act as a restraining mechanism on the application of comity, to the extent that the backed-warrant procedure will constitute an infringement of human rights. For this reason, the adequacy of human rights protections as a qualifying factor for determining surrender needs to be assessed along the entire spectrum of the backed-warrant procedure.³⁷

To this end, it is recommended that reconceptualising comity with Australia to include a human rights component and replacing a balancing act paradigm with a hierarchy of human rights will more likely accommodate the human rights protections of the person without compromising the efficacy of the simplified nature of Part 4. Complementing this strategy is the combined effect of the Commission's proposals in regard to: the role of a central authority as opposed to the Police; the more prominent role of the courts throughout the backed-warrant process, and implementation of extradition-appropriate provisions of the NZBORA are largely consistent with the weight that must be given to the human rights protections of the person. To bring these provisions within the backed-warrant procedure, I suggest will allow the much needed scrutiny by the Central Authority and the courts to consider matters of due process and the potential for adverse treatment of the requested person at the earliest phase of the backed-warrant procedure. Finally, it is argued that, based upon a liberal interpretation, there is a strong principled case for giving the NZBORA extra-territorial effect insofar as Australian Police conduct in New Zealand is concerned.

1.15 Objective of thesis

To summarise, the main objective of this thesis is to provide a critique of the Law Commission's proposals, to determine the impact of these proposals on the backed-warrant procedure and evaluate these proposals for their coherency. In particular, it will examine how likely the draft Bill, contained in the Commissions' Report, will achieve efficacy and the desired balance between comity or international cooperation and the human rights interests of the requested person.³⁸ This research is important to the backed-warrant procedure of both Australia and New Zealand as it provides a perspective on the procedure that has not been researched previously.

violations may apply to the latter phase of the procedure, when the defendant is at risk of torture or other mistreatment while in prison. See EP Aughterson, above n 11.

³⁷ See *Soering v United Kingdom* [1989] 11 EHHR 439 (ECHR).

³⁸ Report, above n 1.

While this paper focuses primarily on Australian and New Zealand case law, its finding should be of interest to scholars and practitioners in other Commonwealth jurisdictions.

To that end, the second objective is to provide an assessment of the Part 4, backing of arrest warrant procedure, by firstly tracing its imperial origins and development when New Zealand became an independent Commonwealth country. An overview of procedural safeguards and the role of comity in the court's approach to restrictions on surrendering the requested person under imperial-based simplified procedures, namely the Fugitive Offenders Act 1881 (UK) will be provided. The second objective is to outline the backed-warrant procedure under Part 4 of the 1991 Act, in a similar fashion, giving cognisance to the role of comity in the court's assessment of the judicial and ministerial discretion to refuse surrender. The third objective is to briefly examine simplified systems of extradition in other Commonwealth countries to illustrate how conceptually similar they are at a global level. Areas of commonality and difference in restrictions and conditions on surrender will be highlighted, commencing with a brief overview of the backed-warrant procedure in each country. The fourth objective is to examine the Commission's key proposals affecting the backed-warrant procedure. This includes examination of case law relevant to the role of the proposed Central Authority and how the principle of comity/trustworthiness is applied by the Australian judiciary in context of determining grounds for refusing surrender. It also includes examination of whether in relation to the Part 4, backed-warrant procedure, there is a strong principled case for its further simplification and the implementation of BORA rights as well as extra-territorial application of the NZBORA insofar as Australia is concerned.

1.16 Method

The main method of analysis comprises of a positivist analysis of relevant legal instruments and comparisons between New Zealand and Australia practise of the backed-warrant procedure.

1.17 Chapter Outline

The structure of this thesis is organised as follows: The successive chapter provides an historical overview of the backing of arrest warrant procedure and the role of

comity in determining the grounds for refusing surrender under imperial-based simplified procedures, namely the Fugitive Offenders Act 1881 as well as its development under the London Scheme. The third chapter contains an overview of the backed-warrant procedure under the 1991 Act. The fourth chapter examines restrictions to surrender and the role of comity in the ministerial and judicial discretion to refuse surrender. The fifth chapter compares the backed-warrant procedure under the 1991 Act with other simplified procedures in other Commonwealth countries, particularly in regard to any restrictions and conditions on surrender. The sixth chapter provides an overview of the Commission's proposals against the background of relevant case law impacting on the backed-warrant procedure, as well as an evaluation of the Commission's position in regard to the relative importance of comity and human rights protections. Finally, some attempt is made to come to a general conclusion.

2. Historical overview of New Zealand's backing-of-warrant procedure

2.1 Origins of backing-of-warrants under imperial statutes

There were two systems of extradition affecting the development of backing-of-warrants in New Zealand and the rest of the Commonwealth. The first one involved standard extradition under treaty that provided for extradition of persons between the British Empire and other countries. The other concerned the surrender of persons within the British Empire under the backed-warrant procedure.³⁹ The former was governed by the Extradition Act 1870 (UK) and its amending Acts in force in New Zealand.⁴⁰ Early practice of the backing-of-warrants was provided for under An Act for the Better Apprehension of Certain Offenders, 1843 (“the 1843 Act”) when a warrant was issued for certain offences (“felonies” and “treason”) allegedly committed by persons in one part of the British Empire for execution in the part where the requested person was located.⁴¹ These Acts operated at a time when all possessions of the British Empire owed allegiance to the British Crown, enabling the Imperial Parliament at Westminster to maintain supremacy over all parts of the Empire.⁴² Moreover, the Imperial Parliament enabled the Colonial Legislatures to affect the liberty of British subjects beyond their jurisdiction.⁴³

³⁹ See Explanatory Note of Extradition Bill 1998. M Cherif Bassiouni, above n 12, at 21; and Clive Nicholls and others, above n 12, at 6.

⁴⁰ Margaret Soper, above n 12, at 4.

⁴¹ An Act for the Better Apprehension of Certain Offenders, 1843, 6 & 7 Vict Chp 34 <www.nzlii.org/nz>. See further Kimberly Prost “Cooperation in Penal Matters in the Commonwealth” in M Cherif Bassiouni *International Criminal Law, Vol 2: Multilateral Bilateral Enforcement Mechanisms* (3rd ed, Martinus Nijhoff Publishers, Netherlands, 2008) at 413-414. See *Re Ashman* [1985] 2 NZLR 224 at 226. See also Margaret Soper, above n 12, at 5; and Robert E Clute “Law and Practice in Commonwealth Extradition” (1959) 8 American Journal of Comparative Law at 20. See further Scott Baker, David Perry and Anand Doobay *A Review of the United Kingdom's Extradition Arrangements* (Home Office, 30 September 2011) [Baker report] at [3.15]. The practice of backing-of-warrants between English countries operated under English statute 28 Geo 2, C 26 (1750) and between Scotland and England and Wales from 1773 (13 Geo 3, C 31) and between Great Britain and Ireland under the Indictable Offences Act 1848 in Baker report, above n 41.

⁴² Paul O’Higgins “Extradition within the Commonwealth” (1960) 9 The International and Comparative Law Quarterly 486 at 486.

⁴³ Justice Johnston referred to by Chief Justice Prendergast in *Solicitor-General*, above n 14, at 2. See further Alpheus Todd, above n 19, at 302.

2.2 Commonwealth cooperation under The Foreign Offenders

Apprehension Act, 1863 (NZ)

In respect of New Zealand, “The Foreign Offenders Apprehension Act, 1863 (NZ)”⁴⁴(“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 misdemeanours⁴⁵ in the “Australasian Colonies” (New Zealand, NSW, Tasmania, Victoria, South Australia, Western Australia and Queensland and their respective Dependencies).⁴⁶ 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.⁴⁷

Although assented to by the Crown, the 1863 Act was not free of controversy. In 1879, in the case of *Regina v Gleich* the majority of the New Zealand Supreme Court (Prendergast CJ, Johnston, Richmond and Williams JJ, with Gillies J dissenting), ruled that the legislation was ultra vires and that any persons alleged to have committed misdemeanours in any of the Australian colonies will not be liable for arrest in New Zealand, should they escape to this colony.⁴⁸ In that case a warrant issued in Australia for Gleich an absconding bankrupt, was endorsed by a magistrate in Wellington. 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 in the high seas, a passage that was unavoidable in surrendering persons between the Australasian colonies.⁴⁹ Accordingly the Supreme Court granted Gleich a writ of habeas corpus and ordered his discharge. The dissenting opinion of Justice Gillies considered that the warrant was validly endorsed by the magistrate and that the matter of lawful detention on the high seas was not one that should be determined.

⁴⁴ Foreign Offenders Apprehension Act 1863 (27 Victoriae 1863 No 22) <www.nzlii.org.nz>. See further Solicitor-General, above n 14.

⁴⁵ New Zealand Foreign Offenders Apprehension Act, 1863, Part III.

⁴⁶ New Zealand Foreign Offenders Apprehension Act, 1863, Part II. This Act was intended to broaden the scope of offences provided for in An Act for the Better Apprehension of Certain Offenders, 1843.

⁴⁷ John E Martin “Refusal of assent – a hidden element of constitutional history in New Zealand” (2010) 41 Victoria University Law Review at 68.

⁴⁸ *In re Gleich* (1879) OB&F (SC) 39 at 41 (SC). See also *Ex parte Thomas Rendell* (1879) OB&F, 72 (SC). The 1863 Act was repealed in 1891. See further John E Martin, above n 47, at 68.

⁴⁹ Justice Johnstone had previously highlighted the issue in *Alexander James Johnston*, above n 19, at 288-292. See also John E Martin, above n 47, at 68.

As a result of the decision in *Gleich*, the New Zealand Government sought a remedy for the defect from Britain in 1880.⁵⁰ The remedy was achieved through enactment of the Fugitives Offender Act (UK) 1881 in force in New Zealand.

2.3 Commonwealth cooperation under the Fugitive Offenders Act 1881 (Imp)

2.3.1 Structure

The 1881 Act was divided into two parts, reflecting two different situations. Part I provided for the surrender of fugitives from one part of Her Majesty's dominion to another simply by sending the original warrant issued by the requesting country for endorsement and execution in the requested country. Part II provided a separate and even more simplified procedure of backed-warrants applying specifically to groups of "British possessions" based upon their contiguity by Order in Council made in the UK.⁵¹ An Order in Council made in 1925 applied Part II to a group comprising New Zealand, Australia, and certain Pacific territories.⁵²

2.3.2 Function

The Fugitive Offenders Act 1881 (UK) ("the 1881 Act") was enacted by the Imperial Parliament for the primary purpose of improving the efficacy of surrendering fugitives within the British Empire.⁵³ The Preamble read:

Whereas it is expedient to make more effectual provisions for the apprehension and trial of offenders against the laws who may be in other parts of Her Majesty's Dominion than those in which their offences were committed.

⁵⁰ Following an intercolonial conference in Melbourne in 1867, the New Zealand and Australian Government had previously requested to Britain without success, that it extend the existing extradition legislation. See John E Martin, above n 47, at 68-69.

⁵¹ For example *In re Tressider* (1905) 25 NZLR 289 at 290, involving a request for surrender of the accused from Australia to New Zealand which required no prima facie evidence. See Fugitive Offenders Act 1881(UK), s 12. See also Clute, above n 41, at 21; Fugitive Offenders Amendment Act 1976, Explanatory Note; and O'Higgins, above n 42 at 487 citing H C Biron and K E Chalmers *The Law and Practice of Extradition* (London, 1903) at 95-96. See also how it applied between the United Kingdom and the Republic of Ireland in Paul O'Higgins, "Irish Extradition Law and Practice" (1958) 34 British Yearbook of International Law at 274-311, especially 284-291.

⁵² Fugitive Offenders Amendment Act 1976 (NZ), Explanatory Note.

⁵³ 1881 Act, s 2. See D S Bedi "Law and Practice of Extradition within the Commonwealth Countries" (1977) 19 Journal of the Indian Law Institute at 421.

Relevant to the special problem experienced by New Zealand and Australia, the 1881 Act replaced the 1843 Act and the limited offences for which the removal of fugitives could be achieved.⁵⁴

2.3.3 *Extraterritorial jurisdiction*

This Act was not free from controversy. Differing views arose in New Zealand in relation to whether the Magistrate had jurisdiction to endorse the original warrant for an offence alleged to have occurred in any part of the Commonwealth of Australia.⁵⁵ The issue was settled in the Court of Appeal in the case of *Godwin v Walker (Godwin)* which held that under Part II, the surrender of a person may be obtained from New Zealand to the Commonwealth of Australia, for an offence in any part of the Commonwealth of Australia where such an offence is alleged to have been committed.⁵⁶ In reaching its decision, the Court overruled the Full Court in *Re Munro and Re Campbell* and its conclusion that Part II did not apply to any individual state of the Commonwealth of Australia.⁵⁷ The Court of Appeal in *Godwin* determined that by virtue of the Commonwealth of Australia Constitution Act, 1900 (Imp) the whole area constitutes a “British possession” within the meaning of the 1881 Act. The Court also considered the wording of s 13 of the Act “punishable by law in that possession” in determining that under Part II, backed-warrant procedure of the 1881 Act, surrender of a person requested may be sought in relation to an offence against the laws in any part of the Commonwealth of Australia where the offence is alleged to have its origin.⁵⁸

2.3.4 *Conditions*

2.3.4.1 *Extraditability*

2.3.4.1.1 *Extraditable person*

Liability for surrender under the Part II, backed-warrant procedure of the 1881 Act applied to any person (referred to as “fugitive”) that had been accused of committing an offence in a British possession to which that part of the Act applied.⁵⁹

⁵⁴ Clute, above n at 41. See Hansard's Parliamentary Debates (1880) Third Series, vol 261, clmns 1032-1033.

⁵⁵ *Re Munro and Campbell* [1935] NZLR 159.

⁵⁶ *Godwin v Walker* [1938] NZLR 712 at 5.

⁵⁷ *Re Munro and Campbell*, above n 55.

⁵⁸ *Godwin*, above n 56, at 712.

⁵⁹ 1881 Act, s 13.

2.3.4.1.2 *Extraditable country*

Under the Part II, backed-warrant procedure of the 1881 Act applied to any British possession of a group by reason of their contiguity or by Order in Council.⁶⁰

2.3.4.1.3 *Extradition offence*

Part I applied to all offences (“misdemeanours”) along with piracy, treason and felonies whereas Part II contained no restrictions on the type of offence to achieve surrender. This remedied the difficulties New Zealand experienced with the 1863 Act that provided for a broader scope of offences than those contained in the 1843 Act.

2.3.4.1.3.1 *Double criminality*

There was no requirement to establish double criminality under Part II of the 1881 Act. Double criminality requires that an alleged crime for which extradition is sought be punishable in both the requested and requesting states.⁶¹ Its rationale is to safeguard the liberty interests of the person by ensuring their surrender will not result in prosecution by another country for conduct which the requested country did not itself consider criminal.⁶² Its removal under Part II of the 1881 Act appears to be based upon the assumption that Australia and New Zealand share broadly the same scope of criminalisation as British possessions. It followed from the removal of double criminality that no evidence would be required.

2.3.4.1.3.2 *Penalty threshold*

Part I of the 1881 Act required offences to be subject to a minimum twelve months imprisonment with hard labour, whereas Part II contained no minimum penalty threshold.

2.3.4.2 *Speciality*

There was no requirement to establish speciality under Part II of the 1881 Act. Speciality requires that a person surrendered to a requesting state not be detained,

⁶⁰ Section 13.

⁶¹ EP Aughertson, above n 11, at 59-60. I A Shearer *Extradition in International Law* (Manchester University Press, Manchester, 1971) at 137-138; M Cherif Bassiouni *International Extradition: United States Law and Practice*, above n 12, at 494; and Anne Warner La Forest *Extradition to and from Canada* (3rd ed, Canada Law Book, Ontario, 1991) at 52-53.

⁶² EP Aughertson, above n 11, at 59-60.

prosecuted or punished for any offence, committed prior to surrender, other than that for which extradition was granted.⁶³

2.3.4.3 *Standard of evidence*

Part II of the 1881 Act contained no requirement to establish a prima facie case before the court. The regime relied on there being a warrant validly issued, evidence for which sufficed if it was deposed on oath by the police officer of the requesting state.⁶⁴ In respect of surrender from New Zealand to Australia, the Supreme Court in *Kurtz v Aicken* explained that it was for the trial court to determine whether the charge was bona fide.⁶⁵

Part I contained more stringent criteria than Part II and was similar to standard extradition under treaty.⁶⁶ For example, s 5 of the 1881 Act, required there to be evidence of a strong or probable presumption that the requested person had committed the offence.⁶⁷

2.3.5 *Procedure*

2.3.5.1 *Endorsement of original warrant*

The procedure differed from standard extradition in that it was less formal and more simplified by nature.⁶⁸ Under s 13, the Magistrate could simply endorse the requesting country's original arrest warrant provided the Magistrate was satisfied that the procedural requirements of the 1881 Act were established.

2.3.5.2 *Surrender order*

In order to enable the offender to be surrendered, s 14 required the Magistrate to be satisfied: (i) that the warrant for arrest of the fugitive had been duly authenticated; (ii) that it had been issued by a person having authority in that regard; and (iii) that the identity of the fugitive to whom the warrant related was duly authenticated as

⁶³ EP Aughertson, above n 11, at 83-84; and Issues Paper, above n 1, at [2.12].

⁶⁴ *Tressider*, above n 51 at 290; and *Kurtz v Aicken* (1891) 9 NZLR 673 at 678.

⁶⁵ *Kurtz v Aicken*, above n 64, at 678. But see *Johnstone v Commonwealth of Australia* HC Christchurch A 266-98, 9 March 1999 [*Johnstone*] at 2. Reference is made by Chisholm J at the High Court to there being a prima facie case established in the District Court for the return of the requested person.

⁶⁶ See further Clute, above n 41, at 23.

⁶⁷ For example *Flickinger v Crown Colony of Hong Kong* [1990] 3 NZLR 372 at 372. However, Clute observes that the courts tended to be less stringent in regard to the standard of evidence required under Part I at 22. See Clute, above n 41.

⁶⁸ Soper, above n 12, at 5.

required by the Act (s 29 of the 1881 Act).⁶⁹ A police officer of the requesting state deposing on oath that the conditions were met in accord with s 29 was sufficient evidence to satisfy a magistrate that the procedural requirements under s 13 were met.⁷⁰

2.3.5.3 *Provisional warrant*

Usually a provisional warrant was issued pursuant to s 16, in the requested country which served as a warrant sufficient to detain the person until the original warrant was brought before the Magistrate for its endorsement.⁷¹

2.3.5.4 *Appeal*

There was no appeal provision in the 1881 Act itself.⁷² Appeals were brought under the Summary Proceedings Act 1957 although whether and if so how it applied to the 1881 Act was subject to some judicial discussion.⁷³ Under Part 1, s 5, the committing magistrate was expressly required to inform the requested person that they will not be surrendered until after the expiration of 15 days and that they have a right to apply for a “writ of habeas corpus, or other like process”.⁷⁴

2.3.6 *The role of comity*

Although comity was not made explicit in the 1881 Act, it was expressly mentioned in a number of cases.⁷⁵ The role comity played as a determining factor in surrender was unquantifiable and because it presupposed similarity between the legal and procedural systems of those countries applicable to Part II, it had the potential to be used as a convenient excuse to leave it for the trial court to consider the fundamental rights of the requested person.⁷⁶

In 1880, New Zealand’s Supreme Court Justice Johnston described the role of comity (referred to as “comity of nations”) in creating extradition treaties as “a give-

⁶⁹ See *Tressider*, above n 51, at 290; *Re Murray Ross* [1921] NZLR 292 at 292; *Cook v Superintendent of Mount Eden Prison & Ors* HC Auckland CP 184-87, AP 82-87, CP 182-87, 23 September 1987 [Cook]; and *Franic v Wilson* [1993] 1 NZLR 318.

⁷⁰ *Tressider*, above n 51, at 290; and *Kurtz v Aicken*, above n 64.

⁷¹ *R v Howard* [1985] 2 NZLR 216 at 220; and *Kurtz v Aicken*, above n 64, at 674.

⁷² *Cook*, above n 69, at 9.

⁷³ See *R v Howard*, above n 71, at 222-223.

⁷⁴ At 9.

⁷⁵ See *Police v Thomas* (1989) 4 CRNZ 454 (HC) at 458 and *Bieleski v Police* HC Auckland AP286/86, 28 November 1986.

⁷⁶ *Kurtz v Aicken*, above n 64, at 678.

and-take arrangement to enable the social intercourse of civilized nations to be carried on”.⁷⁷ It is relevant that in referring to comity Justice Johnston made no mention of the liberty interests of persons as a qualifying factor in determining surrender. In an indication of the progress in how comity is understood today somewhat differently today, Justice Arnold in *United States of America v Dotcom* qualified the importance of comity (referred to as “comity of nations”) when he said:⁷⁸

Equally, however, states committed to the rule of law have an interest in ensuring that persons they surrender will not face injustice or oppression in the requesting state.⁵ Extradition processes must take proper account of both of these important values.

2.3.7 *Human rights*

Part II of the 1881 Act reflects a practise of backing-of-warrants that was tailored to the unique needs of older Commonwealth countries (Australia, New Zealand, Canada and various countries in Africa) well before the concept of human rights standards arrived on the scene. Unsurprisingly, decisions under the 1881 Act proceeded without the necessity to give consideration to whether comity and the presumption of similarity with Australia should include similarity in human rights standards. Further, as discussed above, the backed-warrant procedure under Part II, lacked well-known safeguards in standard extradition law which functioned in part to protect the liberty interests of the requested person such as double criminality, speciality and a minimum prima facie standard of evidence.⁷⁹ There were however, procedural safeguards designed to protect the person against unlawful arrest, detention and surrender.

⁷⁷ *In re Gleich*, above n 48, at 48. See also Alexander James Johnston, above n 19, at 288-292. See also *United States of America v Dotcom* [2013] 2 NZLR 139 at [12]. In a similar vein, the term comity of nations was used by the Court of Appeal to describe its important role in the extradition processes.

⁷⁸ *United States of America v Dotcom*, above n 77, at [12] per Arnold J.

⁷⁹ See *R v Connell* [1985] [Connell] 2 NZLR 233 at 238 line 50. See also Clute, above n 41, at 21 and 23. Section 9 of the 1881 contains the double criminality requirement. The loose criteria for surrender under Part II contrasts with the repealed 1863 Act that contained a prima facie standard of evidence. See further Alexander James Johnston, above n 19, at 439. In his 1870 publication Justice Johnston cautions: “Justices must not assume that the same acts amount to felony misdemeanour in other colonies which do so in New Zealand. There are many new felonies and misdemeanours created by the New Zealand Legislature, and there may be such in other colonies also.”

2.3.8 *Procedural safeguards*

The 1881 Act required the sanction of an endorsed or provisional warrant including authority of processes recognised by the Courts. Despite those protections, in the case of *R v Hartley (Bennett)* the Court of Appeal, determined that “all the essential statutory precautions were blithely disregarded by the police in both countries.”⁸⁰

The Court of Appeal was referring to the essential statutory precautions against unlawful arrest, detention or surrender.⁸¹ Instead, the return of Bennett was accomplished by improper and unlawful means, beginning with a telephone communication from New Zealand police to Australian police and ending with Bennett “bustled” from his bed to a plane in Australia and met by New Zealand police upon his arrival in New Zealand.⁸² Having considered the factual background, and the provisions of the 1881 Act, the Court of Appeal held that, although Bennett was brought to New Zealand unlawfully, he was eventually lawfully arrested within New Zealand and by due process of law he was brought to the Court. Accordingly, the Court was in a position to exercise jurisdiction in respect of the indictment.⁸³ However, the Court determined that it had a wide discretion to discharge Bennett under either s 347(3) of the Crimes Act 1961 or by virtue of its inherent jurisdiction to prevent abuse of its own process. The Court viewed that based on the case before it, the trial Judge would probably have been justified in exercising its discretion on that ground.⁸⁴

The Court of Appeal accepted the second ground of appeal, determining that the New Zealand police had obtained statements from B by means in breach of the Judges’ Rules and they should not have been used against him. The Court of Appeal held:⁸⁵

There was clearly a serious breach of the spirit and purpose of the Judges’ Rules, and for this reason alone we think the evidence should have been excluded as a matter of discretion. It follows that on this second ground

⁸⁰ *R v Hartley* [1978] 2 NZLR 199 [*Bennett*] at 214 per Woodhouse J.

⁸¹ *Bennett*, above n 80.

⁸² At 214.

⁸³ At 215.

⁸⁴ At 215-217.

⁸⁵ At 219 per Cooke J.

his appeal must be allowed and his conviction quashed, irrespective of the matters we have discussed under the first ground.

In conclusion, the Court of Appeal granted B his appeal and his conviction was quashed. What the case of *Bennett* suggests is that police are not familiar with the need to adhere to standard procedural protections when using this process.

2.3.9 *Restrictions*

In addition to procedural safeguards there were restrictions to surrender designed to protect the requested person's liberty interests. These restrictions allowed a magistrate the power to exercise a discretion to refuse surrender, subject to comity. They did not however, make human rights protections visible. Instead, consideration for the liberty interests of the requested person, such as the right to a fair trial, were found at common law in the obscure phrase "oppressive or unjust".

2.3.9.1 *Mandatory restrictions*

Until the enactment of the Fugitive Amendment Act 1976 which allowed an exemption from extradition where the offence in question was based on political offences, race and religion, there were no mandatory restrictions on surrendering a person.⁸⁶ Nor was there any discretion given to the executive to withhold surrender under Part II of the 1881 Act.⁸⁷

2.3.9.2 *Judicial restrictions*

Section 19 of the 1881 Act listed three grounds by reason of which injustice or oppression might arise should surrender proceed: (i) the trivial nature of the offence; (ii) where the accusation is not made in good faith in the interests of justice; (iii) or otherwise, it would having regard to the distance, to the facilities of communication, and to all the circumstances of the case, be unjust or oppressive, or

⁸⁶ O'Higgins, above n 42, at 488. The rationale for making a political offence no impediment to extradition, has been attributed to the historical unity of sovereignty or common political ideals.

⁸⁷ At 488.

too severe a punishment, to return the prisoner either at all or until the expiration of a certain period.⁸⁸

2.3.9.2.1 “unjust or oppressive”

In context of s 8(3) of the Fugitive Offenders Act 1967 (UK), the words “unjust” and “oppressive” were defined by Lord Diplock in *Kakis v Government of Cyprus*.⁸⁹

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 Australian⁹⁰ and New Zealand⁹¹ courts. In the influential case, *Police v Thomas*,⁹² Fisher J, having analysed a string of authorities, established that it will only be in exceptional cases that the Court should exercise a discretion to discharge a defendant.⁹³ From those authorities, Fisher J summarised a number of relevant principles, of which one included

⁸⁸ *Re H (A Prisoner)* [1971] NZLR 982; endorsed by Fisher J in *Police v Thomas*, above n 75. See also *Coronno v Police* HC Wellington 130/86, 4 February 1987; and *R v Governor of Brixton Prison ex parte Singh* [1962] 1 QB 211. Section 10 is the applicable provision under Part 1 of the 1881 Act, however the wording is almost identical to section 19. See *Flickinger*, above n 67; and *Re Gorman* [1963] NZLR 17. The main differences are that in seeking a discharge under s 10, jurisdiction was confined solely to a “superior court” and there was no reference to appeal, whereas in s 19, jurisdiction may be exercised by either a Magistrate or a superior court, as well as a right of appeal from a Magistrate to the superior court. See *Franic v Wilson*, above n 69; *Bieleski*, above n 75; and *Loh v Commissioner of Police for Victoria* HC Auckland M1379/89, M1380/89, 11 October 1989 [*Loh*].

⁸⁹ *Kakis v Government of Cyprus* [1978] 1 WLR 779 at 782-783 per Diplock J. See EP Aughertson, above n 11, at 159.

⁹⁰ For example, *Perry v Lean* (1985) 39 SASR 515 at 520; *Ingram v Attorney-General (Cth)* [1980] 1 NSLWR 1990 at 206; in *New Zealand v Moloney* [2006] FCAFC 143 [*Moloney – Full Court*]. See also EP Aughertson, above n 11, at 159.

⁹¹ As articulated in *Perry v McLean & Another* (1986) 63 ALR 407, the passage was relied upon in *Bieleski*, above n 75. See *R v Governor of Brixton Prison ex p Naranjan Singh*, above n 88; *Coronno*, above n 88; *Re Gorman*, above n 88; and *Bieleski*, above n 75.

⁹² *Police v Thomas* above n 71.

⁹³ See *Johnstone*, above n 65, at 9; and *Police v Thomas*, above n 75. However, in *Loh*, above n 88, Gault J sitting at the High Court, expressed the view that a broader inquiry into whether the surrender of the person would be unjust or oppressive was warranted, so that each case was judged on its own merits rather than limited to establishing an exceptional case.

mention of comity and mutual respect, albeit empty of explanation as to its meaning.⁹⁴

(a) The general assumption is that the established legal processes for returning prisoners under the Act should take their course. The fact that proceedings have been commenced in another Commonwealth country is not itself a reason for impeding those legal processes. It is necessary to preserve the comity and mutual respect for law among Commonwealth countries.

An issue relevant to oppression, was whether the requested person had settled in the requested state.⁹⁵ In instances where there were financial, family, business or employment interests at stake, the courts adopted the perspective that accused persons within the same jurisdiction face similar disruptions combined with delays in their prosecution. The mere inconvenience or hardship associated with being surrendered to Australia, away from home, did not in itself suffice in cases determined under the 1881 Act.⁹⁶

2.3.9.2.2 “*circumstances of the case*”

Section 19 of the 1881 Act referred also to “circumstances of the case”. Accordingly, a broad discretion involving a non-exhaustive list of factors was viewed as falling within the s 19 exception, some of which included: the seriousness of the crime alleged; the circumstances in which the accused left the country where the crime was alleged to have occurred; the extent to which there has been delay particularly where the accused has been lulled into a false sense of security⁹⁷ and established himself in a new and meritorious life or if the delay might prejudice an effective defence; and the impact upon innocent third parties such as a new wife and children and hardship to the accused himself in being surrendered.⁹⁸

Section 19 of the 1881 Act also allowed the Magistrate to merely defer surrender “until after the expiration of the period named in the order” because “it would

⁹⁴ *Police v Thomas* above n 75, at 458. Referred to in *Loh*, above n 88, at 10.

⁹⁵ *Bieleski*, above n 75, at 11.

⁹⁶ *Coronno*, above n 88. In the case of *Police v Thomas*, above n 75, delay combined with hardship was not considered as extraordinary.

⁹⁷ Considered in *Coronno*, above n 88.

⁹⁸ *Police v Thomas*, above n 75, at 458.

having regard to the distance, to the facilities of communication, and to all the circumstances of the case, be unjust or oppressive, or too severe a punishment.”

2.3.9.2.3 “trivial nature of the offence and bad faith and in the interests of justice”

The first and second ground concerning the trivial nature of the offence and bad faith were seldom invoked. In *Re Murray Ross* the Supreme Court determined that the offence of wife-desertion which carried a sentence of three-years imprisonment was not trivial, nor was there evidence that the request had been made in bad faith in the interests of justice. In conclusion, the appeal (“motion”) was dismissed and the order made by the Magistrate under s 14 of the Act for the accused’s return to Sydney to face trial was upheld.⁹⁹ In *Re H (A Prisoner)*, (*Re H*), seven years hard labour for an alleged offence was viewed as not trivial and the Magistrate was satisfied that the request was made in good faith and in the interests of justice.¹⁰⁰

Comity was seldom referred to in the case law in the determination of these grounds for surrender. In determining the same grounds for refusing surrender, Gault J in *Loh v Commissioner of Police for Victoria (Loh)* only made indirect reference to the importance of comity in examining earlier authorities.¹⁰¹ In addition, Gault J appeared to place less emphasis on the importance of comity than Fisher J in *Police v Thomas*. This is because rather than follow the “exceptional case” standard required by Fisher J (and one that is equated with the importance of comity and mutual respect), Justice Gault preferred a broader inquiry into whether the grounds were made out in favour of the defendant. This suggests that under s 19 of the 1881 Act, the degree of importance that comity played in determining grounds for surrender, was subject to judicial variation.

2.3.9.2.4 “otherwise”

The third ground, widened the court’s discretion for refusing to surrender the person, by reason of it being considered “otherwise” unjust or oppressive, or too severe a punishment to return the prisoner, “having regard to the distance, to the facilities of communication, and to all the circumstances of the case.” Under the

⁹⁹ *Re Murray Ross*, above n 69, at 296.

¹⁰⁰ *Re H*, above n 88, at 982. See also *Coronno*, above n 88; and *Loh*, above n 88.

¹⁰¹ *Police v Thomas*, above n 75.

third ground, the poor health of the accused did give rise to a finding in favour of the accused.¹⁰² In *Re H* the Supreme Court determined that based on the accused's mental health and poor likelihood of being found fit to stand trial or eligible for bail and to the detriment of his mental health remain on remand with no prospect of cure, it would make it oppressive or too severe a punishment to surrender the accused. Accordingly, the Supreme Court discharged him absolutely.¹⁰³ Not only was any reference to comity omitted from the reasoning of Wilson J, the view that the accused was likely to suffer under the conditions described, did not bode well for the doctrine of trustworthiness. Instead, the decision may be interpreted as indifference towards the comity principle adding to the confusion as to its proper meaning. It may also reflect comity adapting to a new balancing function, from accommodating concerns for the principle of sovereignty and the need for extradition law, to accommodating that need with the growing importance of human rights.

In contrast, Justice Eichelbaum in *Coronno v Police (Coronno)* agreed with the DCJ in emphasising the importance of comity and mutual respect in dismissing an appeal against the decision of the DCJ to refuse to make a discharge under s 19 on a number of grounds advanced by the defence.¹⁰⁴ Compared to an hysterical condition working in favour of the requested person, in *Re H*, Justice Eichelbaum considered that the importance of comity and the intention of the statute did not yield to compassion or emotional influences.¹⁰⁵

In the words of Justice Chisholm in *Johnstone*: “Any prejudice can be properly considered by the trial Court in Australia.”¹⁰⁶ Had the grounds advanced in *Re H* been framed in terms of the “unjust” rather than the “oppressive or severe a punishment” limb of the grounds advanced in *Re H*, the outcome could have been different, however. That being said, it is disputed that the perceived comity between New Zealand and Australia predisposed the judiciary to a laissez faire attitude in determining the potential risks for the liberty interests of the requested person post-surrender.

¹⁰² See *Re H*, above n 88, at 984, line 13.

¹⁰³ At 986-987.

¹⁰⁴ *Coronno*, above n 88, at 7.

¹⁰⁵ At 7; and *Re Gorman*, above n 88.

¹⁰⁶ *Johnstone*, above n 65, at 16.

2.3.9.2.5 “passage of time”

The question of passage of time received considerable judicial attention, it being a matter expressly incorporated into subsequent legislation as one factor giving rise to injustice or oppression.¹⁰⁷ There has been some debate over the extent to which the injustice or oppression had to flow from or be a product of the passage of time. In *Bieleski v Police (Bieleski)* the Court determined that a delay of 20 years from the time the offence was allegedly committed was no bar to prosecution under the statute of limitations in New Zealand.¹⁰⁸ Moreover, in considering delay in a general sense, Henry J found that there was no evidence brought before him to suggest that the police had caused undue delay¹⁰⁹ or that the actual delay would create any injustice or overall unfairness to the accused¹¹⁰ such as the effects of delay on recall. His Honour’s approach was based upon the view that both the cause and effects of the delay were relevant to a section 19 determination.¹¹¹ In context of a submission relating to the death of a witness or ability to compel witnesses, the central question as to whether injustice arises, was whether the delay has some causative effect on the alleged injustice.¹¹² In that case, Henry J determined that it was a matter that would be given due weight when it was before the New South Wales Courts.¹¹³ His Honour’s reasoning is consistent with the theme identified by this thesis, that human rights concerns are cold-shouldered at the pre-surrender phase of the process.

In this context it was significant that Henry J, perceived a strong similarity in the judicial systems of Australia and New Zealand and in particular that they had similar procedural safeguards. In that regard, Henry J was persuaded that any natural justice issues would be obviated.¹¹⁴ This observation was referred to in another case dealing with delay under s 19, twelve years later, in *Johnstone v Commonwealth of Australia (Johnstone)*.¹¹⁵ Henry J did not expressly use the term

¹⁰⁷ See 1999 Act, s 8(1)(c).

¹⁰⁸ *Bieleski*, above n 75, at 4. Followed in *Johnstone*, above n 65, at 9-10.

¹⁰⁹ *Bieleski*, above n 75 at 6.

¹¹⁰ At 8.

¹¹¹ At 7. See also *Loh*, above n 88.

¹¹² *Bieleski*, above n 75, at 9.

¹¹³ At 10-11. In his reasons, Henry J distinguished the case of *Kakis*, above n 89. His Honour said that *Kakis* provided “no explanation as to the authorities’ failure to prosecute the existing charge made against the accused during the time of his presence in Cyprus and in particular when one witness vital to his defence was also present and able to give evidence.”

¹¹⁴ At 7.

¹¹⁵ *Johnstone*, above n 65.

comity. In this sense, how comity is weighed, relates to the court being confident that the accused will receive a fair trial according to “New Zealand standards.”¹¹⁶

2.3.10 *Summary*

The authorities discussed above make clear that s 19 placed a heavy onus on the accused to be able to satisfy the Court that exceptional circumstances warranted the exercise of a s 19 discretion in their favour.¹¹⁷ In determining whether that standard was satisfied, the courts considered a non-exhaustive list of relevant factors, including those classified by Fisher J in *Police v Thomas*. It would appear to have been fundamental to assessing whether to intervene, that the judiciary paid regard to comity and mutual respect for law among Commonwealth countries.¹¹⁸ However, the analysis of these decisions reveals inconsistencies in the way comity was applied, if at all. Further, judicial insights into what the concept of comity means did not give a clear picture of the concept, except that in context of the backed-warrant procedure, comity is obviously bound up with the perceived similarity of the legal system and procedural safeguards between New Zealand and the requesting country, especially in regard to Australia and New Zealand. Consequently, the rights of the person sought are governed by the procedural safeguards and the principles of comity. However, the case of *Bennett* shows that in the initial stages of the process, a person sought has a well-founded fear of having their fundamental rights violated. In particular, it illustrates how comity can be perceived by officials (and judges) as a reason to run roughshod over standard procedural protections. Given the dominant role of the Police in the initial stages of the procedure this is a recipe for abuse. While the courts have adopted a more active human rights role since the implementation of the NZBORA in 1990, the critical criminal process rights (namely ss 21-23 of the NZBORA), are only applicable when violations of these rights happen on New Zealand soil. Although *Bennett* happened a considerable time ago, the practise it exposes serves as a powerful illustration of the need to incorporate fundamental human rights into the concept of comity under Part 4. This matter is discussed in more depth, under the head of the proposed role of the Central Authority and the head of the proposed implementation of NZBORA in Chapter 5. With this background, it is appropriate to turn to the

¹¹⁶ At 4 per Henry J.

¹¹⁷ *Police v Thomas*, above n 75, at 456; and confirmed in *Johnstone*, above n 65, at 9.

¹¹⁸ *Police v Thomas*, above n 75, at 458; and *Coronno*, above n 88, at 7.

development of New Zealand's backed-warrant procedure in context of Commonwealth countries becoming independent states.

2.4 The London Scheme

2.4.1 *Background to the London Scheme*

Provision was made after many former British colonies attained independence for these newly independent states to remain aligned *inter alia* in regard to extradition.¹¹⁹ To this end, the London Scheme, formerly known as, "A Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth" (Cmnd 3008) ("the Scheme"), was adopted by the Commonwealth in 1966 at a Meeting of Commonwealth Law Ministers in London.¹²⁰

The Scheme was first conceptualised at the Commonwealth Prime Ministers' Conference in 1961. The objective was to establish an independent organisation for the provision of Commonwealth legal material and legal information sharing on "new ideas on legal matters, particularly with regard to law reform, between the governments of Commonwealth countries and for the mutual assistance by Commonwealth countries of one another in the legal field."¹²¹ The document "Plan of Mutual Assistance between Commonwealth Countries on Law Reform," sets out the purposes of the Scheme:¹²²

to disseminate information on new developments of special interest in law, and particularly in law reform, in countries of the Commonwealth and to arrange for assistance to any Commonwealth Governments which desire this in the preparation of particular pieces of legislation, the codification of particular parts of the law, or the study of other legal problems.

The Scheme is operated by the British Institute of International and Comparative Law (entrusted in 1962) and has numerous procedural advantages (simplicity,

¹¹⁹ Clive Nicholls and others, above n 12, at 6.

¹²⁰ Anthony Aust "The Theory of Practice of Informal International Instruments" 35 (4) (1986) *The International and Comparative Law Quarterly* 787. See also M Cherif Bassiouni, above n 12, at 21.

¹²¹ H H Marshall "The Commonwealth Legal Advisory Service: A Successful Experiment in Commonwealth Legal Co-operation" (1972) 21 *The International and Comparative Law Quarterly* at 435-451.

¹²² At 436.

expediency and confidentiality, flexibility) to using informal instruments over treaty arrangements.¹²³ One advantage is the ease with which it can be amended.¹²⁴

2.4.2 *London Scheme and Extradition within the Commonwealth*

The informal nature of the Scheme, described as similar in character to a multilateral convention¹²⁵ creates the basis for Commonwealth countries to put into effect reciprocating and substantially uniform legislation enacted in each member of the Commonwealth.¹²⁶

In regard to extradition, the Scheme provides for guidelines to the construction of Commonwealth statutes regulating extradition between Commonwealth countries and dependencies.¹²⁷ Nevertheless, the meeting in 1966 concluded that it was appropriate to incorporate some of the usual safeguards featured in extradition treaties.¹²⁸ For example, enumeration of extraditable offences; the requirement of establishing a *prima facie* case; and political offence exceptions.¹²⁹ It is relevant that the Scheme has not precluded special arrangements between Commonwealth countries, enabling Australia and New Zealand to preserve simplified procedures such as the 1881 backed-warrant procedure.¹³⁰

2.4.3 *Amending legislation to implement the London Scheme*

2.4.3.1 *Australia*

Australia was the first Commonwealth country to implement the Scheme to replace the 1881 Act by enacting the Extradition (Commonwealth Countries) Act 1966 (Cth) extending to the countries of the British Commonwealth. The backed- warrant

¹²³ Aust, above n 120, at 789. See further Dale "Is the Commonwealth an International Organisation?" (1982) 31 ICLQ 451.

¹²⁴ Aust, above n 120, at 790.

¹²⁵ Geoff Gilbert *Transnational Fugitive Offenders in International Law Extradition and Other Mechanisms* (Kluwer Law International, The Hague, The Netherlands (1998) at 42.

¹²⁶ I A Shearer, above n 61, at 55.

¹²⁷ Alun Jones; QC, *Jones on Extradition and Mutual Assistance* (Sweet & Maxwell, London (2001) at 50.

¹²⁸ Julian B Knowles *Blackstone's Guide to The Extradition Act 2003* (Oxford University Press, New York (2004) at 6.

¹²⁹ At 6.

¹³⁰ R Burnett *The Australia & New Zealand Nexus Annotated Documents* (Australian National University, Australia, 1980) at 701.1 and 703.1. See Gilbert, above n 125, at 45.

system was preserved in Part III of the former Australian legislation, with New Zealand as the only designated country to which the system applied.

2.4.3.2 *UK*

In the UK the Scheme was embodied in the Fugitive Offenders Act of 1967 (UK)¹³¹ which repealed the 1881 Act, “creating a stricter and more demanding scheme than its predecessor”.¹³² Its repeal did not affect its validity in New Zealand however.¹³³ The 1967 Act, was primarily designed to implement the agreement reached at the Commonwealth Law Ministers Meeting 1966, concerning the problem of political offenders and the absence of safeguards in governing the surrender of offenders whose crime is of a political character under the 1881 Act.¹³⁴

2.4.3.3 *New Zealand*

New Zealand on the other hand, lagged behind Australia and the UK in choosing not to replace the 1881 Act by passing legislation to implement the London Scheme. On the contrary, ten years following the adoption of the 1966 Scheme, New Zealand passed the Fugitive Offenders Amendment Act 1976 Act (“the Amendment Act”) to overrule the decision in *R v Superintendent Mt Eden Prison; ex parte Best and Ashman*, which held that in view of the constitutional changes in the status of countries of the Commonwealth the 1881 Act applied only to “British possessions” and did not apply to New Zealand because New Zealand was no longer a Dominion in terms of the definition adopted by the Court.¹³⁵ That decision was given on 31 May 1976, and its effect was reversed, just six weeks later, by the Amendment Act.¹³⁶

A second purpose of the Amendment Act was to make provision for prohibiting the return of a person likely to face persecution on the grounds of his race, religion,

¹³¹ See Ivan A Shearer “The Current Framework of International Extradition: A Brief Study of Regional Arrangements and Multilateral Treaties” in M Cherif Bassiouni & Ved P Nanda A *Treatise on International Criminal Law* (Thomas, 1973).

¹³² *Canada v Aronson* [1990] 1 AC 579 (HL) per Lord Elwyn-Jones.

¹³³ See *Re Ashman*, above n 41 at 226.

¹³⁴ M Cherif Bassiouni, above n 12, at 21. The passing of the Extradition Act 1989 (UK) repealed the Extradition Acts 1870-1932 (1870-1932 Acts) essentially consolidating the Extradition Act (UK) and the 1870-1932 as well as the Criminal Justice Act 1988. See Knowles, above n 126, at 7.

¹³⁵ See *R v Howard*, above n 71, at 217; Soper, above n 12; and Explanatory Note in 1976 Amendment. See also *Re H*, above n 88.

¹³⁶ Burnett, above n 130, at 50.

nationality or political opinion. Australia had similar legislation relating to every Commonwealth country, except New Zealand.¹³⁷ In New Zealand's case the provision was inserted as a result of pressure from the opposition Labour Party based on its study of the British Fugitive Offenders Act and concern about return to repressive regimes in Africa such as Rhodesia and South Africa.¹³⁸

2.4.4 Summary

It has been described as striking that although New Zealand had attained full international personality, the 1881 Act remained part of the law of New Zealand preserving the old 'backed-warrant' system by continuing the operation of the 1925 Order in Council¹³⁹ until it was repealed by the Extradition Act 1999.¹⁴⁰ Until the 1999 Act, Australia was not subject to any special status (as a designated country) but continued on the basis of the simplified scheme under the 1881 Act. Although as members of the Scheme, both New Zealand and Australia could rely upon the Scheme, today Australia and New Zealand conduct their extradition relations on the basis of reciprocal legislation.¹⁴¹

¹³⁷ At 51.

¹³⁸ At 51.

¹³⁹ O'Higgins, above n 42, at 486; and Alan and Robin Burnett *The Australia and New Zealand Nexus* (The Australian Institute of Internal Affairs, Australia (1978) at 49.

¹⁴⁰ Extradition Act 1999, s 112(2). The New Zealand Parliament enacted its first Extradition Act in 1965, forming the sole basis for extradition between New Zealand and foreign states.¹⁴⁰ Section s 20(2) of the Extradition Act 1965 repealed the UK Parliamentary enactments set out under Schedule 2 of the Act. Under the Imperial Laws Application Act 1988, s 4(1), these repealed Acts (Extradition Acts 1870-1932) were no longer part of New Zealand law. Issues Paper, above n 1, at [2.9].

¹⁴¹ Gilbert, above n 125, at 45. See Extradition Act 1999, Part 4 and Australia's Extradition Act 1988 (Cth), Part III. A complete listing of Commonwealth countries' agreements, orders and the Act relating to extradition and rendition of fugitive offenders can be found on the Commonwealth Website available at <www.thecommonwealth.org>. The latest relevant development is the London Scheme for Extradition within the Commonwealth (amended in November 2002). Its most recent review and amendment took place in the 1990's (LMM(90)32).

3. Backing-of-warrants in New Zealand under Part 4 of the Extradition Act 1999

3.1 Structure

The backed-warrant procedure is currently governed by the Extradition Act 1999 (“the 1999 Act”) which replaced the Extradition Act 1965 and the 1881 Act. Before proceeding to examine the operation of the backed-warrant procedure in detail, it is important to distinguish between the backed-warrant procedure and standard extradition procedure. For that purpose it is important to understand the structure of the present Act.¹⁴²

Part 3 of the 1999 Act applies to extradition requests from a Commonwealth country; a country that New Zealand has an extradition treaty with; a country designated by Order in Council to have Part 3 of the 1999 Act apply; and for the purposes of a specific individual extradition request, a country designated under Part 5 of the 1999 Act.¹⁴³ Part 4 of the 1999 Act contains the backed-warrant procedure.

3.2 Nature

Part 4 specifically applies to surrender requests from Australia; and “other designated countries”¹⁴⁴ for “extraditable persons”¹⁴⁵ who are charged with or have been convicted of an “extradition offence”.¹⁴⁶ Designation as a Part 4 Country, is made by the Governor-General by Order in Council on the recommendation of the Minister of Justice (currently only the UK and Pitcairn Islands).¹⁴⁷ The Minister must be satisfied as to the circumstances in which a person may be arrested in the other country and similarities to the process in New Zealand, the other country’s

¹⁴² For a summary of the statutory scheme, see *Mailley v Police* [2011] 3 NZLR 223 at [21]-[38] per Ellis J.

¹⁴³ Issues Paper, above n 1, at [2.15].

¹⁴⁴ Extradition Act 1999, s 2(1).

¹⁴⁵ Section 3.

¹⁴⁶ Section 4.

¹⁴⁷ Extradition Act 1999, ss 39 and 40. See Issues Paper, above n 1, at [2.15]. For example *Brown v Territory of Pitcairn, Henderson, Ducie and Oeno Islands* [2006] 2 NZLR 281; and *Tranter v Chief Executive of the Dept of Corrections* [2012] NZCA 407 at [11].

ability to extradite to New Zealand (reciprocity), the other country's speciality rules and the other country's rules about surrendering a person to a third country.¹⁴⁸

3.3 Function

The function of the backed-warrant procedure is to provide a “simplified procedure” for New Zealand to give effect to requests for surrender from Australia and any country designated under s 40¹⁴⁹ (currently only the UK and Pitcarin Islands), in recognition of what is presupposed to be New Zealand's close ties, procedural similarities and justice system with these countries. It is for this reason that the backed-warrant procedure differs from standard extradition in terms of both the evidence required and the degree of involvement by the courts and the Minister.¹⁵⁰

3.4 Conditions under the Part 4 backed-warrant procedure

3.4.1 Extraditability

3.4.1.1 “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

¹⁴⁸ Extradition Act 1999, s 40(3)(c)-(d). See Issues Paper, above n 1, at [6.10]. For comment on the difficulty in determining how a decision is made to designate a country, see Report, above n 1, at [7.15]. See also *Mailley v District Court at North Shore* [2013] NZCA 266 [*Mailley – Court of Appeal 2013*] at [7]-[8].

¹⁴⁹ Extradition Act, s 12. Issues Paper, above n 1, at [6.6].

¹⁵⁰ Explanatory Note of the Extradition Act 1998. See Soper, above n 12, at 5. See *Kurtz v Aicken*, above n 64. That case involved a charge of larceny arising from an alleged bet at race-course – in reply to submissions for counsel of accused, evidence as to the charge being bona fide is not a matter that falls to be considered under s 19 of the Fugitive Offenders Act 1881 (UK), rather, the Court held that it was a matter to be determined on trial – for the purposes of Part II, the evidence was sufficient to bring the offence under the reach of the 1881 Act. See further, M Cherif Bassiouni, above n 12, at 21; and Clive Nicholls and others, above n 12.

(ii) the whole or a part of a sentence imposed on the person as a consequence of the conviction remains to be served.

3.4.1.2 *“Extradition country”*

Australia and all designated countries are defined as "extradition countries" for the purposes of the relevant part of the Act.¹⁵¹

3.4.1.3 *“Extradition offence”*

Under s 4 of the 1999 Act, an “extradition offence” is defined in s 4 of the 1999 Act.

3.4.1.3.1 *Double criminality*

Under s 4(2) of the 1999 Act, the principle of double criminality is preserved.

3.4.1.3.2 *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.¹⁵²

3.4.1.3.3 *Penalty threshold*

In relation to a request from Australia or a designated country to New Zealand, an offence must be punishable under the law of that country for which the maximum penalty is imprisonment for not less than 12 months or any more severe penalty. The same seriousness threshold applies in relation to requests from New Zealand to Australia or a designated country.¹⁵³

This threshold accords with thresholds set in Australia and under the European Arrest Warrant and is within the parameters set by article 2(2) of the United Nations Model Treaty. However, it is half the level used by Canada¹⁵⁴ and the London Scheme.¹⁵⁵ Technically, it means that a requested person may be subject to the

¹⁵¹ Extradition Act, s 2(1).

¹⁵² *Plakas v Police* HC Auckland, CIV-2008-404-2412, 11 June 2008 at [23] per Randerson J.

¹⁵³ Extradition Act 1999, s 4(1)(a)-(b).

¹⁵⁴ Extradition Act SC 1999, c 18, s 3.

¹⁵⁵ London Scheme for Extradition within the Commonwealth, cl 2(2); see Issues Paper, above n 1, at [5.27].

backed-warrant procedure on the basis of a relatively minor offence.¹⁵⁶ This problem is said to be obviated through the high level of trust that is accorded Australia and other designated countries.¹⁵⁷ Further, the trivial nature of the offence is currently one of the grounds on which the court may refuse surrender.¹⁵⁸ This ground appears to compensate for the low penalty threshold.

3.4.2 Speciality

The principle of speciality (as discussed in paragraph 2.3.4.4), is also preserved under the backed-warrant procedure by virtue of the Minister's selection process.¹⁵⁹

3.4.3 Standard of evidence

The usual requirement to show a prima facie standard of guilt has been removed under the Part 4 procedure and replaced with a requirement that the requesting state produce an arrest warrant rather than on the basis of evidence.¹⁶⁰ Removal of the prima facie case standard is a result of comity. It flows from the perceived similarity in the judicial system and safeguards between Australia and New Zealand and a high level of trust in their respective legal systems.¹⁶¹ It is what differentiates the backed-warrant procedure from the standard procedure of extradition under Part 2 of the 1991 Act.

3.5 Procedure

Part 4 of the 1999 Act prescribes a procedure to be followed when considering requests for surrender. It differs from standard extradition by narrowing the procedural requirements on the basis of comity and the 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.

¹⁵⁶ For example, unlawful assembly, attracts a maximum 12 months' imprisonment, under the Crimes Act 1961, s 86.

¹⁵⁷ Issues Paper, above n 1, at [5.29]-[5.32].

¹⁵⁸ At [5.24]. See Extradition Act 1999, s 8(1).

¹⁵⁹ Section 40(3)(d).

¹⁶⁰ Section 45(5).

¹⁶¹ Issues Paper, above n 1, at [6.8]-[6.10].

3.5.1 *Pre-Arrest*

In essence, the initial process of securing surrender under Part 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.¹⁶² 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.¹⁶³ This exemplifies the simplification of the process compared to the standard procedure which involves the Minister of Justice in the initial stages.¹⁶⁴

3.5.2 *Endorsement of the warrant*

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 as to:

- the identity of the requested person;
- the person is, or is suspected of being in New Zealand or on his or her way here (s 41(1)(a)); and
- a warrant for arrest has been issued (s 41(1)); and the warrant was issued by a lawful authority (s 41(1)).¹⁶⁵

Under section 41(1)(b), there must also be reasonable grounds to believe that the person is an “extraditable person”¹⁶⁶ in relation to an “extradition country”¹⁶⁷ and “extradition offence”.¹⁶⁸ Where a warrant has been endorsed “in the prescribed form”, the warrant may be executed by any constable (s 41(2)). The “prescribed form” of endorsement is Form EA6 which is found in the Extradition Regulations.

¹⁶² *Mailley – 2013 appeal*, above n 148, at [8]; and Issues Paper, above n 1, at [4.18]-[4.19].

¹⁶³ 1999 Act, s 41. See *Mailley v Police*, above n 142, at [21]-[38]; and Issues Paper, above n 1, at [4.18]-[4.19]. In *Mailley - 2013 Appeal*, above n 148, at [43] per French J. The Court of Appeal held that the appropriate applicant is the requesting country rather than the NZP but error in the naming of the applicant was a technicality which could be overcome and did not lead to prejudice. New Zealand Police “Extradition to Part 4 Countries” (Obtained under Official Information Act 1982 Request to the New Zealand Police).

¹⁶⁴ See Extradition Act 1999, s 18. See also Issues Paper, above n 1, at [2.24].

¹⁶⁵ See *Keenan v United Kingdom* [2016] NZHC 2446.

¹⁶⁶ Extradition Act 1999, s 3.

¹⁶⁷ Section 2(c).

¹⁶⁸ Section 4(1).

3.5.3 *Provisional Arrest*

Assuming endorsement of the overseas warrant, Interpol is notified so an ‘arrest border alert’ can be entered to prevent the requested person from fleeing.¹⁶⁹

Section 42 sets out provisional arrest powers, permitting arrest without an endorsed warrant, subject to meeting certain criteria (s 41(1)(a)-(c)), if it is necessary or desirable for an arrest warrant to be issued urgently (s 42(1)(d)).

3.5.4 *Powers of the Court*

In contrast to the standard procedure, the backed-warrant procedure is aligned to the Criminal Procedure Act 2011. The Criminal Procedure Act includes a form of summary proceeding for what it terms Category 2 offences, which is applied to the backed-warrant process.¹⁷⁰ Category 2 offences involve District Court Judge alone proceedings unless an order is made on application by either side to the High Court.¹⁷¹ Category 2 offences are those which carry a penalty of less than two years, or by a community-based sentence. A District Court has all the usual powers such as issuing of summons to witnesses, remand of the defendant, adjournment and stay of proceedings.¹⁷²

3.5.5 *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.”¹⁷³ Once a warrant has been endorsed and the Police have arrested the

¹⁶⁹ New Zealand Police, above n 163.

¹⁷⁰ Extradition Act 1999, s 43(1)(a).

¹⁷¹ Criminal Procedure Act 2011, s 70.

¹⁷² District Court Rules 2014; and District Courts Act 1947.

¹⁷³ Section 44(4)(b).

person sought, usually the matter is transferred to the relevant Crown Solicitors who initiate and have carriage of the court proceedings.¹⁷⁴

3.5.6 Eligibility for surrender hearing

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:

- (a) A warrant for the arrest of the defendant is produced to the court and has been endorsed under s 41(1);
- (b) That the defendant is an “extraditable person” (as defined in s 3), in relation to the extradition country;
- (c) There is an “extradition offence” (as defined in s 4) in relation to the “extradition country” (pursuant to s 39); and
- (d) There are no mandatory or discretionary restrictions under s 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.¹⁷⁵

3.5.7 Post eligibility hearing

3.5.7.1 Detention

Assuming that the eligibility criteria for surrender under s 45(2) are met and there are no applicable mandatory or discretionary restrictions, then the court must issue a warrant for the detention of the requested person pending their surrender¹⁷⁶ and inform the requested person of matters relating to time frames for their surrender, during which time the person may exercise their right of appeal or apply for a writ of habeas corpus (s 46(1)(b)). Section 46(1)(b)(i) provides that an order for

¹⁷⁴ *Mailley v Police*, above n 142, at [34]. Extradition Act 1999, ss 44-45 stipulates the procedure following arrest.

¹⁷⁵ *Smith v Police* [2014] NZHC 2676 at [6]; and *Smith v Police* [2014] NZHC 1577.

¹⁷⁶ Extradition Act 1999, s 46(1)(a).

surrender may not be executed before the 15 day-period allowed for an appeal has expired.

3.5.7.2 *Bail*

The court may grant or refuse bail when making the order for detention.¹⁷⁷ This involves the exercise of a judicial decision 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.¹⁷⁸ Although the requested person is not bailable as of right, the court must grant bail unless it is satisfied that there is just cause for the requested person's continued detention.

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 the court thinks fit in addition to any conditions that the court may impose under section 30(1), (2), and (4) of the Bail Act 2000 (s 46(3)) including conditions for estreatment of bail bond.¹⁷⁹ 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).

3.5.8 *Surrender Order*

Assuming a warrant for the detention of the requested person is issued under s 46(1)(a), s 47 obliges the court to immediately after, make a surrender order, unless the court refers the person's case to the Minister under s 48(1) or s 48(4). S 47(2) deals with time restrictions and the appellant's right to appeal or apply for habeas corpus before a surrender order takes effect.

3.5.9 *Referral of case to Minister*

Assuming the criteria for eligibility for surrender are met, the court may nevertheless refer the case to the Minister. The role of the Minister of Justice is restricted to the final decision on surrender under s 48, reflecting the object of the Act set out in s 12(d) to provide a simplified procedure for requests for extradition

¹⁷⁷ Section 46(2).

¹⁷⁸ *Archer v Police* HC Tauranga CRI-2007-463-143, 22 November 2007 at [4] and [10].

¹⁷⁹ *R v Morgan* HC Wellington, CRI-2004-485-110, 17 March 2009 at [13]. For example *Fifta v New Zealand Police* HC Auckland CRI-2006-404-145, 12 May 2006; and *R v PGD* HC Wellington CRI-2005-085-5692 24, 28 April 2006. *Mailley – Court of Appeal 2013*, above n 148, at [68]; and *Radhi v District Court at Manukau* [2015] NZHC 3347 [*Radhi*] at [29].

from Australia and other designated countries. Importantly, the court is not required to refer the case to the Minister if the extradition country is Australia or a designated country. In regard to these countries, the judiciary acts as gate-keeper to the Minister. In the rare case of a referral by the court to the Minister under s 48(4), then the Minister must determine whether the person is to be surrendered, having regard to the matters contained in s 30(2)-(4).¹⁸⁰ The Minister enjoys a wide discretionary power not available to the courts to refuse an extradition request, exemplified in their ability to refuse to do so “for any other reason” under s 30(3)(e).¹⁸¹ Section 48(4)(a)(ii) also allows the Minister to merely defer surrender, where because of present circumstances, “it would be unjust or oppressive to surrender the person before the expiration of a particular period.”

3.5.10 *Appeal*

Section 68 of the Extradition Act applies to both the standard and backed-warrant procedure under sections 24 and 45 respectively.¹⁸² It confers on a party, a right of appeal in relation to decisions that a person is eligible or ineligible for surrender, but restricted to a question of law only.¹⁸³ A person determined as eligible for surrender under s 46 may then file a notice of intention to appeal by way of case stated for the opinion of the High Court pursuant to s 68 of the 1999 Act.¹⁸⁴ Another avenue to challenge an arrest warrant is through 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.¹⁸⁵

¹⁸⁰ *Mailley – Court of Appeal 2013*, above n 148, at [12]; *McGrath v Minister of Justice* [2015] NZAR 122, at [6]; and *Radhi*, above n 179.

¹⁸¹ Extradition Act 1999, ss 30(3)(d)-(e). *Radhi*, above n 179, at [2]. See *Wolf v Federal Republic of Germany* (2001) 19 CRNZ 245 (CA) [*Wolf*] at [49]; *Mailley v Police*, above n 142, at [12]; and *Radhi*, above n 179, at [2].

¹⁸² Extradition Act 1999, s 68(1).

¹⁸³ *Commonwealth of Australia v B* [2016] NZHC 302 [*Mercer – HC review decision*] at [2]. Subpart 8 of pt 6 of the Criminal Procedure Act 2011 applies to such an appeal under s 69(2) of the 1991 Act.

¹⁸⁴ *MKR v New Zealand Police* [2013] 163 at [3].

¹⁸⁵ Extradition Act 1999, s 47(2) and 50(2). See *Commonwealth of Australia v Mercer* [2016] NZCA 503 [*Mercer – Court of Appeal*].

3.5.11 *Other provisions*

Assuming that the case has been referred to the Minister, s 49 provides that the Minister must make a determination as to the surrender of the person and enables the Minister to seek any undertakings by the extradition country (s 49 (2)). Sections 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. Section 52 provides for detention of the requested person in a place other than prison. Sections 53-59 deals with surrender by consent, temporary surrender (ss 54-55); and ss 56-59 deals with discharge of the person.

3.5.12 *Outgoing requests*

Surrender from Australia to New Zealand is determined by Part 3 (ss 28-39) of the Extradition Act 1988 (Cth) ("1988 (Cth) Act"), which is a backed-warrant procedure analogous to surrender within Australia that requires only an endorsed warrant.¹⁸⁶ There is no requirement: (a) to make a formal request for surrender; (b) to produce supporting documents characteristic of the standard extradition process; (c) meet the double criminality requirement; or (d) meet a particular threshold of seriousness for any offence.¹⁸⁷ Nor is there a requirement to provide prima facie evidence of guilt.¹⁸⁸ The Part 3 backed-warrant procedure under the 1988 (Cth) Act is analogous to New Zealand, with exception to the removal of the double criminality requirement and the penalty threshold. Removal of the penalty threshold may account for why there are grounds for refusing surrender based upon the trivial nature of the offence under s 34(2) of the Act.

Unlike New Zealand's backed-warrant procedure, there is no habeas corpus 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.

¹⁸⁶ *New Zealand v Moloney* [2006] FCAFC 143 [*Moloney – Full Court*]; *New Zealand v Johnston* [2011] FCAFC 2 [*Johnston – Full Court*] 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).

¹⁸⁷ *Moloney – Full Court*, above n 186, at [28].

¹⁸⁸ At [28].

3.6 The role of comity

Assuming the function of comity is to balance the doctrine of sovereignty with the goals of extradition, it follows that “comity” allows for an even greater softening of sovereignty as a determinative factor in deciding surrender¹⁸⁹ under the backed-warrant procedure.¹⁹⁰ This is because “comity”, as described by O’Higgins, involves shared political ideals and mutual respect for the quality and impartiality of the legal system administered in the independent members of the Commonwealth.¹⁹¹ These factors have given rise to reciprocal legislation and excused the standard of evidence required in standard extradition, which is traditionally based upon reciprocal treaties.¹⁹² That is not to say that comity per se is necessarily a determinative factor in deciding surrender. Rather, comity has to allow for the increasing importance of the basic human rights of the individual. This accords with the balancing function of the 1999 Act that the Commission has strived to improve through its proposed reform of the Act.¹⁹³

It follows that recent usage of the term “international comity” as described by the Law Commission¹⁹⁴ or “comity of nations” as reflected in the Explanatory Note of the 1998 Bill, and as similarly described by Justice Johnston in 1880, fails to reflect this changing perspective of comity. None of these definitions, adequately reflect the type of comity that should be applied to New Zealand’s extradition law in a way that reflects modern conceptions of human rights.¹⁹⁵ It is argued that a formulation of comity more closely approximating the type of comity operating under the 1999

¹⁸⁹ See Elisa D’Alterio “From judicial comity to legal comity: A judicial solution to global disorder?” (2011) 9(2) Intl Jnl of Constitutional Law 394 at 394. See for example *Hilton v Guyot*, above n 16, at 163–64 (Justice Gray for the majority) approved by *CSR Ltd v Cigna Insurance Australia Ltd*, above n 16, at 396. The explanatory note of the 1998 Draft Bill conveys the role of comity in softening the principle of sovereignty to yield international cooperation in extradition: “It is part of the comity of nations that one state should afford to another every assistance towards bringing persons guilty of such crimes to justice.”

¹⁹⁰ Issues Paper, above n 1, at [2.2].

¹⁹¹ Paul O’Higgins, above n 42, at 487. See also *Bates v McDonald* (1985) 2 NSWLR 89 (CA) [*Bates*] at 98. Referred to in *Mailley v Police*, above n 142, at [33].

¹⁹² For example, Part 3 of the Extradition Act 1988 (Cth) Act. Elisa D’Alterio, above n 189, at 399. For further discussion on the value of reciprocity see Adrian Briggs “The Principle of Comity in Private International Law” (2011) 354(65) *Recueil des Cours: Collected Courses of the Hague Academy of International Law* 140 in Timothy Endicott “Comity among Authorities” (2015) 68 *Current Legal Problems* 1 at 7.

¹⁹³ Extradition Act 1999, s 12.

¹⁹⁴ Issues Paper, above n 1, at [2.2.]. The Law Commission refers to “international comity” as “the favour accorded by one state by to another”. The Commission observes that the importance reciprocity has to extradition is diminishing however.

¹⁹⁵ See Michael Plachta “European Arrest Warrant: Revolution in Extradition?” (2003) 11 *European Journal of Crime, Criminal Law and Criminal Justice* 178.

Act, is found in the leading authority on a definition of comity provided in the Canadian case, *Morguard Investments Ltd v De Savoye* by Justice La Forest¹⁹⁶:

"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.

This formulation is more progressive in developing a modern concept of comity as its wording is broad enough to accommodate the doctrine of sovereignty in a way that complements the trustworthiness doctrine that underpins comity with Australia and the increasing importance of human rights in qualifying comity. However, there remains the difficulty in reconciling the importance of human rights as qualifying comity with the loose criteria required to achieve surrender under the Part 4 backed-warrant procedure. This is because the emphasis on similarity and mutual respect tends to strengthen the case for ascribing a more absolute form of comity to the Part 4, backed-warrant procedure than under standard extradition.

3.7 Human Rights

The fast-track nature of the Part 4 backed-warrant procedure continues to place the human rights of the requested person at risk of being compromised because of the pressure comity places on the judiciary and minister to grant surrender. In particular, comity and the unchallenged assumption of similarity between New Zealand and Australia lends itself to being used as a scapegoat for non-inquiry into the treatment of the requested person further along the surrender process.¹⁹⁷ In theory, the Court may refer the case to the Minister if there are grounds for believing the requested person might be subjected to an act of torture or imposition of the

¹⁹⁶ *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 at 1096. Referring to the formulation of comity adopted by the Supreme Court of the United States in the landmark decision of *Hilton v Guyot*, above n 16, at 163-64. Followed in *Brown v Miller* [2008] BCJ No 1905; 2008 BCSC 1351 at [63] per DJ Martinson J.

¹⁹⁷ See *McGrath – High Court*, above n 180, at [2]; *Mailley – Court of Appeal 2013*, above n 148, at [7] per French J. Case law shows that comity is a factor considered by both executive and judicial roles.

death penalty.¹⁹⁸ However, in practise and as far as the author is aware, this provision has never been invoked. Speaking in context of comity with Australia, the Court of Appeal in *Commonwealth of Australia v Mercer* (*Mercer – Court of Appeal*), said: “There is a justified expectation that the respondent’s human rights (including the right to a fair trial) will be met by Australia.”¹⁹⁹ Even if this were a safe assumption, there is no evidence to indicate that New Zealand and Australia are on par with human rights standards. In absence of a BORA or any provisions in the Australian Constitution that reflect the BORA rights of the defendant, it is questionable whether the presumption of similarity extends to the full range of human rights that ought to be considered by the courts.

¹⁹⁸ Extradition Act 1999, s 48. *Mercer – Court of Appeal*, above n 185, at [15].

¹⁹⁹ At [15].

4. Restrictions

Restrictions on surrender are essentially a safeguard to protect 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.²⁰⁰ Distinct from standard extradition under Part 3 however, comity plays a more definitive role in determining surrender under Part 4. Nevertheless, the question whether comity should be determinative, requires some balancing of the competing interests between the growing importance of human rights and an international obligation between New Zealand and Australia to make surrender as swift as possible.

In order to establish a restriction on surrender, the burden of proof rests with the requested person on the balance of probabilities that to surrender the person would be unjust or oppressive according to whichever provision is relied upon under Part 4.²⁰¹ These provisions are discussed in more detail in the following paragraphs.

4.1 Ministerial restrictions on surrender

The basis on which the court may decide that a referral to the Minister is necessary, arises from any of the restrictions on the surrender of the requested person under s 7 or 8 by virtue of s 48(4)(a)(i). Section 7 provides for mandatory restrictions on surrender such as grounds of discrimination. Section 8 provides for discretionary restrictions on surrender based upon a limited number of grounds. These include the trivial nature of the case, bad faith, interests of justice and the passage of time ("delay") and are discussed in more detail under the head judicial restrictions. Alternatively, the court may decide that a referral to the Minister is necessary under s 48(4)(a)(ii) "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".

²⁰⁰ See Report, above n 2, at [5.6(e)].

²⁰¹ *Mercer – Court of Appeal*, above n 185.

The word “or” creates two distinct statutory tests, either of which must be established before the DCJ may refer a case to the Minister.²⁰² The distinction between the two statutory tests precludes the Court from considering the mandatory or discretionary ‘restrictions on surrender’ set out in ss 7 and 8 of the Act when considering any ‘compelling or extraordinary circumstances’ under s 48(4)(a)(ii) and vice versa.²⁰³ In that regard, the High Court in *Radhi v The Manukau District Court & Anor (Radhi)*, determined that the DCJ had not made an error of law by failing to consider the impact of delay on Radhi under s 48(4)(a)(ii).²⁰⁴ Delay could only be a mandatory relevant factor under that provision if there was a nexus between the delay and personal impact on Radhi by reason of the phrase “circumstances of the person”.

Another important aspect to a ministerial discretion is 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.²⁰⁵

4.1.1 “compelling or extraordinary”

In order to qualify as extraordinary circumstances, the circumstances must be out of the ordinary, unusual, uncommon or striking, while “compelling” denotes “very persuasive” or “very strong”.²⁰⁶ The Supreme Court’s decision *Ye v Minister of Immigration* has been regarded as authority for the proposition that in determining the standard “compelling or extraordinary” all circumstances are to be assessed both discretely and cumulatively.²⁰⁷ In *Radhi*, it was recognised that Radhi’s refugee status was an “extraordinary circumstance of the person” for the purposes of assessing the s 48(4)(a)(ii) provision.²⁰⁸ In *Brougham* Judge Mathers rejected the proposition that a heightened risk of suicide “amounts to compelling or extraordinary circumstances ...”²⁰⁹ This assessment was criticised by the Court of

²⁰² *Radhi*, above n 179, at [31].

²⁰³ At [31],[32] and [46].

²⁰⁴ *Radhi*, above n 179.

²⁰⁵ At [30].

²⁰⁶ *Mailley – Court of Appeal 2013*, above n 148, at [62]. Endorsed in *Radhi*, above n 179, at 43.

²⁰⁷ *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [36] and [38]. Followed in *Mailley v District Court at North Shore* [2014] NZHC 2816 [*Mailley – HC review decision*].

²⁰⁸ *Radhi*, above n 179, at [21].

²⁰⁹ *Brougham v Commonwealth* HC Christchurch CRI-2009-409-191, 24 February 2010 at [8].

Appeal in *Mailley* – Court of Appeal 2013, as suggesting an unwarranted distinction between physical and mental health.²¹⁰

4.1.2 “*circumstances of the person*”

Discretionary restrictions under s 8(1) read with s 48(4)(a)(i) relate to the circumstances of the case, while this relates to circumstances of the person.²¹¹ In a standard extradition case, the Court in *Wolf v Federal Republic of Germany* (*Wolf*) held that the phrase “all the circumstances of the case” in s 8(1) necessarily excluded the personal circumstances of the person sought for extradition.²¹² Circumstances of the case may include consideration of such matters as delay,²¹³ issues with witnesses and the prospect of a fair trial.²¹⁴ It is also likely that the required degree of proof depends on the nature of the alleged injustice or oppression. For example, where surrender to Australia is concerned, there has been a reluctance to determine the matter trivial, lacking good faith or in the interests of justice or at risk of unfair trial or presenting a risk to the requested person’s rights.²¹⁵ Circumstances of the person on the other hand, can include matters such as the requested person’s age, health and family situation, or risk of refoulement.²¹⁶ This “bright line” distinction between the circumstances of the person and the circumstances of the case has been the source of considerable confusion for counsel, however.²¹⁷

4.1.3 “*without limitation, those relating to the age or health of the person*”

The passage “without limitation, those relating to the age or health of the person” has invoked a variety of matters for consideration under s 48(4)(a)(ii). Similar provision is contained in Australian extradition law under the Extradition (Commonwealth Countries) Regulations 1988, s Reg (1) as it applies to the Attorney-General.²¹⁸ Although the matters considered by the Minister are broad in

²¹⁰ *Mailley v District Court at North Shore* [2016] NZCA 83 [*Mailley – Court of Appeal 2016*] at [62].

²¹¹ At [35].

²¹² *Wolf v Federal Republic of Germany* [2001] NZAR 536 (HC) at [68]. Referred to in *Mailley – HC review decision*, above n 207.

²¹³ *Radhi*, above n 179, at [46]

²¹⁴ *Radhi*, above n 179.

²¹⁵ At [39].

²¹⁶ *Mailley – Court of Appeal 2016*, above n 209, at [50]. See *Radhi*, above n 179 at [19] and [22].

²¹⁷ For example *Radhi*, above n 179; and *Mailley – HC review decision*, above n 207.

²¹⁸ In *EP Aughertson*, above n 11, at 157 -158.

range, a clear nexus between the matter under consideration and the personal impact on the requested person is required.²¹⁹

Health, for the purposes of the section, is not limited to physical health, but may include suicide risk and mental health, determined as a matter of fact and degree.²²⁰ In *Brougham v Commonwealth* the requested person was sought for extradition to Australia in relation to charges that he allegedly falsely obtained goods and services tax (GST) refunds in 2004-2005.²²¹ In the context of an application for extension of time to file a case stated appeal, the High Court determined that an appeal was unlikely to succeed on the grounds that the DCJ erred in determining that a referral to the Ministry of Justice for consideration under s 48(4)(a)(ii) was not necessary.²²² After examining the evidence brought before the DCJ, including regard to significant mental health problems suffered by Brougham, Panckhurst J found that the DCJ did not err in principle because she recognised all relevant matters and did not consider irrelevant matters, nor draw a conclusion that was clearly wrong.²²³

To exemplify the unchallenged assumption of comity with Australia, the words of Judge Mathers are of interest:

[14] Australia obviously has proper medical care and psychiatric services. I have no doubt that the Australian authorities can take note of Mr Brougham's circumstances ...

In context of the Part 4, backed-warrant procedure it shows that the New Zealand courts are unwilling to inquire downstream into the human rights interests of the person.

4.1.4 “Unjust or oppressive”

The meaning of unjust and oppressive has been discussed in a number of High Court and Court of Appeal cases.²²⁴ It is doubtful that the case of *Kakis v Governor of the*

²¹⁹ *Radhi*, above n 179.

²²⁰ *Mailley – Court of Appeal 2013*, above n 148, at [62].

²²¹ *Brougham*, above n 209.

²²² At [27].

²²³ At [35].

²²⁴ *R v Franciscus Maria Schaapveld* [2016] NZDC 15560 at [15]. See *Wolf*, above n 181; *Police v Thomas*, above n 75; and *Radhi*, above n 179, at [13].

Republic of Cyprus continues to be the current authority for the meaning of the term “unjust or oppressive”. As pointed out in *New Zealand v Moloney* (*Moloney – Full Court*) the statute under which it was interpreted, is different in form to s 34(2) of the 1988 (Cth) Act.²²⁵

Likewise, the term unjust or oppressive under s 48(4)(a)(i) and s 48(4)(a)(ii) refers to either circumstances of the case or circumstances of the person as opposed to “all of the circumstances of the case” under s 19 of the 1881 Act. In 2016, the Court of Appeal in *Commonwealth of Australia v Mercer* (*Mercer – Court of Appeal*) referred extensively to various passages in *Kakis*, despite agreeing in *Mailley v District Court at North Shore* (*Mailley – Court of Appeal 2016*) with Justice Keane at the High Court in *Mailley v District Court at North Shore* (*Mailley – HC review decision*) who was “unconvinced that the English cases are useful analogies”.²²⁶ Rather than rely on *Kakis* for a meaning of unjust or oppressive, the Court in *Mailley – Court of Appeal 2016* looked to its own analysis in *Wolf*.²²⁷

Moreover, it is questionable whether decisions dating back to 1978 are applicable, especially in regard to the growing importance of human rights in both England and New Zealand. For example, the emphasis on “exceptional circumstances” as a qualifying factor in determining whether extradition would be oppressive or unjust has been criticised for its tendency to diminish the importance of human rights (discussed further below).²²⁸

As noted in *Radhi*, “the phrase “unjust or oppressive” is used in both s 8(1)(c) and s 48(4)(a)(ii).²²⁹ The Court of Appeal in *Mailley v District Court at North Shore* (*Mailley – Court of Appeal 2013*) held that whether because of the person’s circumstances, surrender would be “unjust or oppressive”, is the ultimate litmus test upon which the court assesses whether a referral to the Minister is warranted.²³⁰

²²⁵ *Moloney – Full Court*, above n 90, at [67].

²²⁶ *Mailley – HC review decision*, above n 207, at [85]. See *Mailley – Court of Appeal 2016*, above n 211, at [39] and [52].

²²⁷ *Wolf*, above n 180.

²²⁸ *H(H) v Deputy Prosecutor of the Italian Republic (SC(E))* [2012] UKSC 25, [2013] 1 AC 338 [*H(H)*].

²²⁹ *Radhi*, above n 179, at [8].

²³⁰ See *Mailley – Court of Appeal 2013*, above n 148.

That being said, the case law shows that from a judicial perspective, comity with Australia is an influential part of the court's assessment.

On similar facts to *Brougham*, the case of *New Zealand Police v Mailley* concerned a request from Australia to New Zealand for the surrender of Mr Mailley (Mailley) in relation to charges in Queensland for allegedly committing fraud and attempting to commit fraud between 1999 and 2002, amounting to a total of A\$2m by fraudulently obtaining credit cards while in receipt of welfare benefits.²³¹

In 2008 the DCJ determined, under Part 4, that Mailley was eligible for surrender and subsequently made an order for his surrender. Mailley then challenged that decision by way of appeal in point of law and by application for judicial review.²³²

Mailley then appealed to the Court of Appeal. The issue of interest was to determine whether the proceedings miscarried because of the failure of the District and High Courts to consider whether Mailley's health problems warranted referral to the Minister under s 48(4)(a)(ii). Of significance was the oversight on part of counsel for Mailley and the District Court in their failure to consider evidence of his health condition.

The Court of Appeal found in favour of Mailley, on this third ground of appeal and quashed the surrender order. Having considered all of the circumstantial facts relating to Mailley's mental and physical health against an interpretation of s 48(4)(a)(ii) "rendering it unjust or oppressive to surrender the person before the expiration of a particular period", it was determined that it would be unjust to surrender him without s 48(4)(a)(ii) being addressed. Accordingly the case was remitted back to the District Court for determination concerning Mailley's health issues.²³³ This suggests that the existence of comity in the backed-warrant procedure does little to protect the person sought but, rather it can be perceived by judges as a reason to run roughshod over humanitarian concerns.

²³¹ *Mailley v New Zealand Police* DC North Shore CRI-2000-063-544086, 11 September 2009; and *Mailley – Court of Appeal 2013*, above n 148.

²³² *Mailley v New Zealand Police*, above n 142.

²³³ At [63]-[64].

In 2016, a second appeal to the Court of Appeal was made against the judicial review decision of the High Court.²³⁴ The main issues related to whether the High Court made the correct interpretation of s 48(4)(a)(ii) of the 1999 Act. The Court of Appeal dismissed the appeal. In reaching its conclusion the Court agreed with the District Court and High Court that Mailley's personal circumstances as set out failed to meet the high s 48(4)(a)(ii) threshold when viewed either separately or collectively.²³⁵ Mailley then appealed unsuccessfully to the Supreme Court.²³⁶

The Court of Appeal decision, shows the high level of comity that is applied by the judiciary in determining whether there are grounds warranting a referral to the Minister. It also suggests that there is strength in the proposition that consideration for the importance of human rights under s 48(4)(a)(ii) may be inappropriately narrowed by the emphasis on "extraordinary circumstances". The Court of Appeal said that to qualify as extraordinary circumstances ". . .the circumstances must be out of the ordinary, unusual, uncommon or striking, while compelling denoted "very persuasive" or "very strong".²³⁷

Some would argue that by its own standard, there is nothing run of the mill about a heart condition, bipolar affective disorder, personality disorder and risk of suicide if surrendered.²³⁸ Despite acknowledging that such matters can fall within the meaning of "compelling or extraordinary" the Court was satisfied that the High Court took the right approach in upholding the District Court's conclusion that whether together, or even combined such circumstances were less than compelling or extraordinary.²³⁹ The main criticism of this approach is that the courts have shown an unwillingness to consider the person's human rights once they are subject to the health and legal system of Australia. It illustrates how too much emphasis is placed on comity and trustworthiness, which in turn prevents an inquiry into whether the health and legal system of Australia meets the key standards of New Zealand.

²³⁴ *Mailley – Court of Appeal 2016*, above n 210; *Mailley – HC review decision*, above n 207; and *Commonwealth of Australia v Mailley* DC North Shore CRI-2008-044-1978, 20 June 2014.

²³⁵ *Mailley – Court of Appeal 2016*, above n 210, at [72].

²³⁶ *Mailley v District Court at North Shore* [2016] NZSC 73.

²³⁷ *Mailley – Court of Appeal 2016*, above n 210, at [98].

²³⁸ *Mailley – Court of Appeal 2013*, above n 148, at [62].

²³⁹ *Mailley – Court of Appeal 2016*, above n 210, at [113].

4.2 Comity applied

The case law discussed below exemplifies the restrictive function comity has on the judicial and ministerial discretion to refuse surrender. It illustrates how a rigid attitude towards the purpose of the backed-warrant procedure under Part 4 in relation to Australia and the importance of comity tends to subordinate the fundamental rights of the person sought.

In *Radhi* the DCJ rejected the view that the “circumstances of the person”, for the purposes of s 48(4)(a)(ii), included hardship suffered by others, such as Mr Radhi’s family.²⁴⁰ Some would view it as repugnant to a modern conception of human rights that the best interests of the children who will or may be affected by surrender are not treated as a relevant consideration under the broad ambit of the phrase “circumstances of the person” in light of other factors applicable to the surrender process.ⁱ To some extent this approach was recognised as incorrect on appeal at the High Court where Woolford J preferred a broader interpretation of the phrase “circumstances of the person”. His Honour accepted the proposition that the 1999 Act should be interpreted according to New Zealand’s obligations in complying with applicable international instruments, namely Article 3(1) of the United Nations Convention on the Rights of the Child.²⁴¹ Woolford J, nevertheless, determined that the children’s rights were not directly engaged.²⁴²

In determining how family circumstances should be weighed in the extradition context, Woolford J referred to the Supreme Court, UK decision of *H(H) v Deputy Prosecutor of the Italian Republic (H(H))* and simply noted its emphasis on the ‘imperative’ nature of extradition and the underlying principle of international cooperation in combatting transnational crime as distinguishable from the policies underlying deportation.²⁴³ That reasoning has been subsequently endorsed in the Court of Appeal.²⁴⁴

²⁴⁰ *Radhi*, above n 179, at [21].

²⁴¹ *Radhi*, above n 179, at [34]-[35]. Referring to *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24]. United Nations Convention on the Rights of the Child (UNCROC) GA Res 44/25 (1989) <www.unhcr.org>. New Zealand ratified the UNCROC in 1993 and entered three reservations <hrc.co.nz/your-rights/human rights/international>. Article 3(1) of UNCROC provides that in all actions concerning children undertaken by courts of law, the best interests of the child shall be a primary consideration.

²⁴² *Radhi*, above n 179, at [35].

²⁴³ *H(H)*, above n 228. Cited in *Radhi*, above n 179, at [37].

²⁴⁴ *Mailley - Court of Appeal 2016*, above n 210, at [71].

It is suggested that His Honour and consequently the Court of Appeal, have misunderstood the Supreme Court's view of how the courts should approach convention rights in determining extradition as opposed to deportation cases. The convention rights under issue concerned article 8 rights of the European Convention of Human Rights (ECHR) and their applicability to determining extradition under the EAW as reflected in the Extradition Act 2003 (UK) ("the 2003 Act").

Article 8 of the ECHR provides:²⁴⁵

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

In its extensive analysis of the criticisms levelled at how previous authorities have dealt with the matter, the UK Supreme Court did not accept that the article 8 rights had to be "radically different" between extradition and deportation.²⁴⁶ The Court reasoned that consideration of the Convention rights are an inherent part of the extradition process by virtue of s 21 of the 2003 Act.²⁴⁷ The Court emphasised that "the court has still to examine carefully the way in which it will interfere with family life."²⁴⁸ Its analysis was not limited to article 8 but also included consideration to the applicability of article 3.1 of the UN Convention on the Rights of the Child (CRC).²⁴⁹ Referring to the differences between deportation and extradition the Court said, that the only difference between these contexts is "the nature and weight of interests to be put into each side of the scale."²⁵⁰

These views are not reflected in Justice Woolford's analysis of *H(H)* in *Radhi*, however. Despite the incorrect interpretation given to the phrase "personal circumstances of the person" by the DCJ, Woolford J was satisfied that the DCJ

²⁴⁵ European Convention on Human Rights (entered into force 3 September 1953) <www.echr.coe.int>.

²⁴⁶ *H(H)*, above n 228, at [29] per Lady Hale and at [141] per Lord Kerr.

²⁴⁷ Section 21 of the Extradition Act 2003 (UK) "requires the judge to decide whether the person's extradition would be compatible with the Convention rights and to discharge the person if it would not." Cited in *H(H)*, above n 228, at [29].

²⁴⁸ *H(H)* above n 228, at [8] and [30].

²⁴⁹ At [155]. UN Convention on the Rights of the Child GA Res 44/25 (opened for signature 29 November 1989, entered into force 2 September 1990) <www.ohchr.org>.

²⁵⁰ At [8] and [30].

arrived at the correct conclusion²⁵¹ but, it is not obvious how, if at all, the DCJ weighed the relevant interests of the surrender context. In fact, Woolford J recognised that Judge Moses “did consider the hardship on Mr Radhi’s family, albeit in an abbreviated fashion.”²⁵² In doing so, it is likely that Judge Moses was focussing on “some exceptionally compelling feature” for the purposes of s 48(4)(a)(ii). The UK Supreme Court in *H(H)* was critical of precisely this approach as it predisposes the court “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”.²⁵³

In considering the relevance of *H(H)*, Woolford J disregarded the UK Supreme Court’s emphasis on the need for a careful examination of the nature and extent of the interference in family life.²⁵⁴ Instead, His Honour appears to have selected aspects of the Court’s judgment that are compatible with the importance of comity. Consequently, the human rights of the requested person were simply cold-shouldered by an interpretation of New Zealand’s international obligations in respect of article 3 of the UNCRC to one that was fitting with comity.

As an aside, it is unclear how New Zealand courts approach English cases in context of these cases. The applicability of English cases was discussed by the Court of Appeal in *Mailley – Court of Appeal 2016*.²⁵⁵ On the one hand the Court of Appeal distinguished English cases as guidance for an interpretation of s 48(4)(a)(ii) because: the legislation under which they are decided (Extradition Act 1989 (UK) and Extradition Act 2003 (UK)) is framed differently from the 1999 Act; the role of the court as opposed to the Minister in determining whether the person should be surrendered; the proportionality approach to human rights which is foreign to the statutory scheme under the 1999 Act, especially considering the words “...compelling or extraordinary circumstances of the person” and the restricted scope of the matters falling to be considered under s 48(4)(a)(ii).²⁵⁶ On the other

²⁵¹ *Radhi*, above n 179, at [35]-[36].

²⁵² At [47].

²⁵³ *H(H)*, above n 228, at 32 per Lady Hale referring to Lord Mance in *Norris v Government of the United States of America (No 2)* [2010] UKSC 9; [2010] 2 c 487 [2010] 2 WLR 572 at [109].

²⁵⁴ *H(H)*, above n 228, at [32].

²⁵⁵ *Mailley – Court of Appeal 2016*, above n 209.

²⁵⁶ At [53]-[55].

hand, the Court of Appeal endorsed the passage in *Radhi* citing the English case *H(H)*. The contradiction lies in the fact that the analysis of the decision in *H(H)* was inextricably related to the same features upon which the Court of Appeal earlier distinguished the 1999 Act on the grounds of there being a weak analogy to cases under the Part 4, backed-warrant procedure.²⁵⁷

It is even more puzzling that the same Court relied extensively on English cases in *Mercer – Court of Appeal* albeit dealing with a different provision of the Part 4 procedure (s 45(4)). Irrespective of whether the Court was focussing on a judicial restriction to surrender under 8(1)(c) for the purposes of s 45(4)²⁵⁸ or a referral of the case to the minister under s 48(4)(a)(ii)²⁵⁹ both provisions contain the phrase “unjust or oppressive”.

As to determining whether any restrictions under either s 7 or s 8 of the 1991 Act applied or required the matter to be referred to the Minister, Woolford J endorsed the view of the DCJ, that Australia could be trusted to safeguard Mr Radhi’s rights.²⁶⁰ Woolford J agreed with the DCJ that Radhi would have opportunity to raise delay as an issue in Australia, 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.”²⁶¹ Woolford J, was also satisfied that various provisions in the Australian Migration Act obviated any danger of refoulement to Iraq where he might face persecution.²⁶²

As comity applies to the Minister’s role in restricting surrender, the litigation of *McGrath v Ministry of Justice (McGrath)* illustrates how the rationale of comity in that context has diverted attention from the individual rights of the requested person.²⁶³

²⁵⁷ *Mailley – Court of Appeal 2016*, above n 210; and *Mailley – High Court*, above n 207, at [85].

²⁵⁸ *Mercer – Court of Appeal*, above n 185. The Court referred extensively to *Kakis*, above n 89; *Woodcock v Government of New Zealand* [2003] EWHC 2668 (Admin), [2004] 1 WLR 1979; and *Knowles v Government of United States of America* [2006] UKPC 38, [2007] 1 WLR 47. See *Mercer – Court of Appeal*, above n 185, at [33]-[36],[50]-[55] and [60].

²⁵⁹ *Mailley – Court of Appeal 2016*, above n 210.

²⁶⁰ At [39].

²⁶¹ At [44]-[45].

²⁶² At [49].

²⁶³ *McGrath* DC Christchurch CRI-2012-009-13556, 12 June 2013 [Surrender decision]; *McGrath v Commonwealth of Australia* [2013] NZHC 2348 [Surrender appeal decision]; *McGrath v Ministry of Justice* [2015] NZAR 122 [Referral appeal decision].

The Minister's role is to weigh all of the relevant circumstances and assess the potential consequences for the requested person in being subjected to the legal system of the requesting country. The test is whether surrender would be unjust or oppressive. In this way, referral to the Minister is designed to provide for an extra-layer of protection of the rights of the requested person.

McGrath involved a request from Australia to New Zealand for surrender of Mr McGrath (McGrath) in relation to charges of sexual offending against 35 complainants alleged to have occurred while employed in Australia between 1977 and 1986. Judge Farish at the District Court determined that McGrath was eligible for surrender.²⁶⁴

McGrath appealed on the ground that Judge Farish was wrong not to exercise a judicial discretion under s 48(4) to refer the case to the Minister. On that ground, the High Court found in favour of McGrath and the matter was remitted back to the District Court.²⁶⁵ In arriving at his decision, Whata J sitting at the High Court, "was concerned that the DCJ may have unduly restricted her analysis of McGrath's personal circumstances by reference to the Australian judicial system."²⁶⁶ Subsequently, Judge Farish at the District Court determined that there existed compelling or extraordinary circumstances making it unjust or oppressive to surrender McGrath. Accordingly, Judge Farish exercised her discretion to refer the case to the Minister.²⁶⁷

The Minister, the Honourable Judith Collins, determined that none of the mandatory and discretionary restrictions on surrender in relation to the request from Australia to surrender McGrath applied in his case. McGrath appealed that decision on the grounds that the Minister erred in law in her assessment of his case not constituting extraordinary or compelling circumstances pursuant to s 30(3)(d). Specifically, McGrath alleged that the Minister was guilty of (a) apparent bias; (b) breaches of natural justice; (c) material errors of fact; (d) error of law; (e) unreasonableness;

²⁶⁴ *McGrath* DC Christchurch CRI-2012-009-13556, 12 June 2013 [Surrender decision].

²⁶⁵ *McGrath v Commonwealth of Australia* [2013] NZHC 2348 [Surrender appeal decision] at [3].

²⁶⁶ At [3].

²⁶⁷ *Commonwealth of Australia v McGrath* DC Christchurch CRI-2012-009-13556, 8 April 2014 [Referral decision].

and (f) abdication of responsibilities.²⁶⁸ Mander J sitting at the High Court, rejected every ground of appeal.²⁶⁹

The Court's response to the contention that the Minister made an error of fact in making no finding as to the submission that McGrath had "no guarantee of sufficient funding by way of legal aid in order to properly defend the charges",²⁷⁰ exemplifies the role of comity in the Minister's decision-making process.²⁷¹ In rejecting that ground of appeal, Mander J held that the issue of legal aid and its purported inadequacy was not a matter which imposed a duty of inquiry on the Minister.²⁷² In that regard, Mander J accepted the submission by the Minister stressing the importance of having regard to comity and similarity in legal systems, especially between New Zealand and Australia under Part 4 of the 1999 Act.²⁷³ Further, Mander J held that the Minister "was entitled to conclude that Australia would make adequate provision for state-funded legal assistance, and the recognition by its Courts of the centrality of the rights to counsel in criminal trials."²⁷⁴

In finding that the Minister's assessment did not amount to "abdication of responsibility", Mander J considered the weighting of the principle of comity versus the factors which may establish a basis for concluding there are compelling or extraordinary circumstances which could make it unjust or oppressive to surrender McGrath to Australia. Mander J recognised that the principle of comity cannot of itself divest the Minister of responsibility to examine the factors that might satisfy the statutory test, it being irrelevant that the extradition country is a Part 4 jurisdiction.²⁷⁵ At the same time, Mander J determined that in the course of assessing whether it would be unjust or oppressive to surrender McGrath, the Minister is legitimately entitled to take into account the ability of the Australian legal system to examine the issues raised by McGrath.

²⁶⁸ *McGrath v Ministry of Justice* [2015] NZAR 122 [Referral appeal decision] at [8].

²⁶⁹ *McGrath v Ministry of Justice* [2015] NZAR 122 [Referral appeal decision].

²⁷⁰ At [33] and [39].

²⁷¹ At [56].

²⁷² At [40].

²⁷³ At [44].

²⁷⁴ At [44].

²⁷⁵ At [67].

Overall, the approach in *Radhi* and *McGrath* borders on a pre-World War II approach to extradition that treats human rights considerations with indifference.²⁷⁶ It allows comity to prevent judges from inquiring into the legal system of Australia. This is partly attributable to the fact that comity and its historical roots under the backed-warrant procedure is locked into a pre-human rights movement tradition.

While the recognition of similarity in procedural safeguards suggests a degree of human rights protection, this is limited to low-level infringements of human rights such as due process. The reasoning of Mander J in *McGrath* reflects the degree of trust that both the judiciary and Minister are prepared to place in Australia's ability to ensure the protection of the person's human rights by a presumption of similarity in due process. It illustrates the restricting function of comity in determining whether there is a basis for refusing surrender making explicable why there is such a high-bar. In doing so, comity as it is conceptualised, restricts the judiciary from a more generous assessment of the rights of the requested person. The *McGrath* litigation shows that even when the presumption of similarity is rebutted, such as inadequacies in legal aid, comity will still favour restriction of the judicial or ministerial power to refuse surrender.²⁷⁷ What would happen, for example, if a person identified as Maori, argued that they would likely to be racially discriminated against or subject to culturally inapt treatment in an Australian prison? It remains to be seen.²⁷⁸

²⁷⁶ See Holly Cullen and Bethia Burgess "Extradition from A to Z: Assange, Zentai and The Challenge of Interpreting International Obligations" (2015) Australian Law Review 208 at 211.

²⁷⁷ Schultz and Mitchenson, above n 18, at 353. Similar comments have been made in reference to comity and its role in interpretation of legislation extra-territorially.

²⁷⁸ See International Covenant on Economic, Social and Cultural Rights (ICESCR) GA Res 2200A, XXI (opened for signature 16 December 1966, entered into force 3 January 1976) available at <www.unhcr.org>. New Zealand ratified on 28 December 1978 <www.hrc.org.nz>. See also the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) GA Res 2106, XX (opened for signature 21 December 1965, entered into force 4 January 1969) available at <www.unhcr.org>. New Zealand ratified on 22 November 1972 <www.hrc.org.nz>.

4.3 Judicial restrictions on surrender

4.3.1 Mandatory

Under Part 4, s 45(3)(a) mandatory restrictions are set out under s 7, that relate primarily to cases in which extradition is sought for a military offence, crimes of a political character or for which the penalty that the person may be subjected is due to that person's race, ethnic origin, religion, nationality, sex or other status. There is also a mandatory restriction in cases which offend against the principle of double jeopardy (non bis in idem) and where the person is detained under the Mental Health (Compulsory Assessment and Treatment) Act 1992 or the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 relating to mental health and disability.

Additionally, s 45(3)(b) requires the defendant's surrender to accord with provisions of the treaty (if any) between New Zealand and the extradition country.

4.3.2 Discretionary

A further safeguard is provided by the judicial discretionary restriction under s 8(1) that exists if, because of:

- (a) the trivial nature of the case; or
- (b) 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
- (c) 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.

This discretion may be invoked by the requested person under the Part 4, backed-warrant procedure by virtue of s 45(2). Under s 45(4), there is a judicial discretion to determine that a person who might otherwise be eligible for surrender in terms of the criteria in s 2 is not eligible because discretionary restrictions as provided under s 8 are applicable.

Another discretionary restriction under s 8(2) concerns forum bar, where the requested person “has been accused of any offence within the jurisdiction of New Zealand (other than an offence for which his or her surrender is sought), and the proceedings against the person have not been disposed of.” *Plakas v Police* is the only known case dealing with s 8(2).²⁷⁹ In that case, the accused was sought by Australia for extradition in relation to alleged fraud charges while facing pending proceedings in relation to similar charges in New Zealand. In considering the appellant’s application for leave to the Court of Appeal, Randerson J sitting at the High Court, rejected the grounds of appeal in relation to it being contested that the DCJ was wrong in determining there was no s 8(2) discretion applicable to the case.

In her reasons, Judge Aitken found:²⁸⁰

...that the New Zealand charge was aimed at the “very same conduct” covered by the criminal charges laid in Victoria alleging a loss to Mr Morgan. While she found that the ingredients of the offending may be different, she was not persuaded that this made the offences different to the point where a discretionary restriction on surrender existed.

In *Plakas v Police*, Randerson J agreed with Judge Aitken’s approach in considering the rule of conduct in ss 4 and 5 in assisting in a proper interpretation of whether s 8(2) may be triggered.²⁸¹ He observed as follows:

[23]...Sections 4 and 5 make it clear that it is unnecessary for there to be any precise correspondence between the offence alleged in the extradition country and the comparable offence pending in New Zealand. The focus is not on the precise terms or ingredients of the offences in the extradition country and in New Zealand. Rather, the statutory focus is on the conduct of the person in question viewed in a broad way...

[24] There are, as the Judge noted, some differences in the ingredients of the offence alleged against Mr Plakas under s 240(1)(d) Crimes Act in New Zealand and the offences under s 81(1) of the Victorian Crimes Act.

²⁷⁹ *Plakas v Police*, above n 152.

²⁸⁰ At [14] per Randerson J.

²⁸¹ *Plakas v Police*, above n 152, at [14]-[17], [23].

However, the essential elements are deception or dishonesty resulting in again to the perpetrator or a loss to the victims. In both cases, deliberate or reckless conduct may be relied upon to constitute the offence. Like the Judge, I am satisfied that the conduct of Mr Plakas which is alleged to constitute an offence in Victoria would, if perpetrated in New Zealand, have constituted an offence here.

Under s 8 the onus is on the accused to prove to the court on the balance of probabilities that circumstances exist to warrant the exercise of a judicial discretion in favour of the accused.²⁸² The following paragraphs illustrate the high bar required to establish grounds for refusing surrender under s 8(1), reinforcing the restrictive function that comity has in the power of the judiciary to refuse surrender.²⁸³

4.3.2.1 “time passed”

In a similar fashion to cases determined under the 1881 Act, “the amount of time passed” (referred to herein as “delay”) under s 8(1)(c) has continued to be the category most often considered by the courts. While delay is relevant, in considering grounds for refusing surrender under s 8, it is not determinative. In order to make delay or whatever statutory ground is relied upon, oppressive or unjust, the courts require a clear nexus between the ground relied upon and the circumstances of the case.²⁸⁴

4.3.2.2 “circumstances of the case”

“All the circumstances of the case” include personal circumstances, such as health issues or having residence in New Zealand, because it is well established that personal circumstance can come within this statutory phrase and be relevant to a s 8 inquiry.²⁸⁵

In reference to the nexus required between the ground relied upon and the circumstances of the case, the Court of Appeal in *Mailley – Court of Appeal 2013*, determined that health issues alone would not have achieved an outcome in favour

²⁸² *Wolf*, above n 181; and *Mercer – Court of Appeal*, above n 185, at [13].

²⁸³ *Police v Thomas*, above n 75, at 457; and *Mercer – Court of Appeal*, above n 185, at [14].

²⁸⁴ *Wolf*, above n 181, at [48] per French J; and endorsed in *Mercer – Court of Appeal* above n 185; *Mailley – Court of Appeal 2013*, above n 148, at [48]; *Smith v Police* [2014] NZHC 2676 at [9]; and *Smith v Police* [2014] 1577 at [39]-[45].

²⁸⁵ *Mailley – Court of Appeal 2013*, above n 148, at [48].

of the appellant under s 8.²⁸⁶ In that case, Australian authorities sought surrender of the accused in relation to alleged fraud. Two issues were raised in the District Court under s 8(1): lack of good faith on the part of the Queensland Police (s 8 (1)(b); and delay (s 8 (1)(c)).²⁸⁷ Upon review of the evidence, these issues were withdrawn by the appellant before the matter went to the Court of Appeal. In obiter, the Court of Appeal commented with reference to previous authorities approach to the nexus required, that in the appellant's case, health issues alone would not have achieved an outcome in favour of the appellant under s 8.²⁸⁸

4.3.2.3 “unjust or oppressive”

As mentioned earlier, the meaning ascribed to the term “unjust or oppressive” in *Kakis* continues to be reinforced in the Court of Appeal albeit somewhat inconsistently.²⁸⁹ The proposition that the delay has lulled the requested person into a false sense of security such as to make surrender oppressive is drawn from English cases, namely *Kakis*.²⁹⁰ Its significance has depended upon evidence adduced in support of the requested person having cause to believe that there is no prospect of being prosecuted or having to face trial.²⁹¹ Where it has been invoked, other than *Kakis*, no decisions that have resulted in an outcome in favour of the requested person.²⁹²

In *Smith v Police (Smith)*, Smith was refused leave to seek appeal to the Court of Appeal, because the requisite nexus between the delay and the psychological stress, or accepting there was such a nexus, that the psychological stress was of sufficient degree to render the delay unjust or oppressive.²⁹³ In that case, Smith was sought for extradition in the UK for alleged sexual offending against children²⁹⁴ and was subject to a significant and unexplained delay of four-years between the initial decision to prosecute the accused and the obtaining of a warrant and the request for

²⁸⁶ At [48].

²⁸⁷ At [46].

²⁸⁸ At [48].

²⁸⁹ *Mercer – Court of Appeal*, above n 185, at [33]. See also *Kim v Prison Manager, Mt Eden Corrections Facility* [2015] NZCA 2.

²⁹⁰ See *Keenan v United Kingdom* [2016] NZHC 2446. *Kakis* above n 89, at [790] per Lord Scarman. Considered in *Mercer – Court of Appeal*, above n 185, at [34].

²⁹¹ *Mercer – Court of Appeal*, above n 185, at [48] and [55].

²⁹² *Mercer – Court of Appeal*, above n 185.

²⁹³ At [8]–[9].

²⁹⁴ *Smith v Police* [2014] NZHC 2676.

surrender from New Zealand to the UK.²⁹⁵ However, identifying responsibility for the delay²⁹⁶ or whether delay is unexplained²⁹⁷ does not weigh in the balance. The relevant question concerns the consequences of that period of delay and whether it makes it unjust or oppressive to order surrender of the requested person.²⁹⁸

In regard to the circumstances assessed, Smith raised the argument that the passage of time affected the ability and reliability of the complainants' recall; affected the ability of the accused to obtain assistance in his defence through contacts with people in the UK; allowed him to settle into a new life in New Zealand; and caused significant psychological stress. Having considered all of the relevant factors, the Court was not satisfied that Smith had met the test. In particular, Smith failed to satisfy the Court that there was the requisite nexus between the delay and the psychological stress or that accepting there was, the psychological stress was of sufficient degree to satisfy the test under s 8(1)(c).

Of particular interest is the recent litigation surrounding the *Commonwealth of Australia v Mercer (Mercer)* which commenced four years ago. That case involved a request for surrender from Australia to New Zealand Australia in relation to charges of indecent treatment of a boy under 17 years of age.²⁹⁹ The crime was alleged to have occurred between 1985 and 1986 in Queensland when the boy was 13 years-old. The requested person (Mercer) was subject to an Australian arrest warrant issued on 31 October 2013. The High Court dismissed an appeal against the decision of Judge Murfitt in the District Court in refusing to make an order to surrender Mercer to Australia.³⁰⁰ Having considered a number of factors relating to Mercer's personal circumstances, Judge Murfitt concluded that based upon delay, it would be unjust or oppressive to surrender Mercer.

Nation J was satisfied that in exercising his discretion against requiring surrender, the DCJ had recognised and correctly applied the factors he had to consider, arising

²⁹⁵ At [9].

²⁹⁶ At [31].

²⁹⁷ At [9]. Goddard J endorsing the passage of the DCJ at [39].

²⁹⁸ At [9].

²⁹⁹ *Mercer – HC review decision*, above n 183. See also *The Commonwealth of Australia v Mercer* [2015] NZDC 22153.

³⁰⁰ *The Commonwealth of Australia v Mercer* [2015] NZDC 22153; and *Mercer – HC review decision*, above n 183, at [1].

out of the particular circumstances of the case, and the requisite nexus to the delay.³⁰¹ These matters included:

- (a) a lengthy delay of thirty years since the alleged offending, taking into consideration that such delays are not unheard of in cases involving historical sexual abuse;
- (b) the fact Mercer had already been subject to criminal sanctions for similar offending, involving the same peer group and in the same period as the current complainant for which he was sentenced to probation;
- (c) awareness of the Queensland police that at the time the complainant volunteered a complaint in 2002, Mercer had been sentenced, some months prior to imprisonment for offences against other victims;
- (d) lack of interest shown by the Queensland police in pursuing the enquiry once the complainant engaged in the prosecution process in 2002;
- (e) the fact that since the 2002 complaint, Mercer had been tried, sentenced and had served a term of imprisonment in Australia, and was deported to New Zealand despite the Australian prosecutorial forces being aware of the 2002 complaint and in a position to bring a prosecution; and
- (f) Mercer having established himself in New Zealand, living at his father's home, apparently without any known offending.

The Commonwealth of Australia then appealed successfully to the Court of Appeal, which held that a discretionary restriction under s 8(1)(c) was not made out for Mercer.³⁰² After considering numerous authorities in relation to the unjust limb of s 8(1)(c) the Court extracted a number of principles relating to the conditions in which the defendant's right to a fair trial may be in jeopardy.³⁰³ These included the importance of any relevant injustice linked to the act of surrender rather than the prospect of trial and the likelihood of there not being a fair trial based upon evidence, such as absence of an essential witness because of delay or unfitness to

³⁰¹ *Mercer – HC review decision*, above n 183, at [23].

³⁰² *Mercer – Court of Appeal*, above n 185.

³⁰³ At [43].

stand trial.³⁰⁴ In light of those principles the Court determined that on “the balance of possibilities” (equated with likelihood) Mercer failed to meet the unjust limb.³⁰⁵ 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.³⁰⁶

As to the oppressive limb of s 8(1)(c) the Court stressed the importance of oppression linking to the prospect of surrender.³⁰⁷ While the Court accepted that delay may in some cases be relevant to whether there is oppression,³⁰⁸ it was viewed as a matter best dealt with by the requesting state.³⁰⁹ It was only in borderline cases that the Court was prepared to consider that prosecutorial delay may tip the balance in favour of a finding of oppression.³¹⁰ In terms of other factors being relevant to whether a case was made out, the Court considered a number of English cases³¹¹ and *New Zealand v Johnston* involving surrender from Australia to New Zealand and *McGrath v Commonwealth of Australia*, involving surrender from New Zealand to Australia.³¹² Based upon 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.³¹³ Accordingly, the Court 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 as opposed to a more liberal reading of what qualifies as “oppression”. In absence of

³⁰⁴ At [43].

³⁰⁵ At [44].

³⁰⁶ At [45].

³⁰⁷ At [52].

³⁰⁸ 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 89.

³⁰⁹ *Mercer – Court of Appeal*, above n 185, at [59].

³¹⁰ At [53].

³¹¹ At [53].

³¹² *Kakis*, above n 89; *New Zealand v Johnston* [2011] FCAFC 2 (2011) 274 ALR 509 [Johnston – Full Court]; and *McGrath v Commonwealth of Australia* [2013] NZHC 2348 [Surrender appeal decision] respectively.

³¹³ *Mercer – Court of Appeal*, above n 185, at [2]-[16] and [65].

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 a restrictive reading. Why else would the Court of Appeal not read liberally in favour of liberty?

4.4 Comity applied

In describing the Part 4 procedure, the Court of Appeal in *Mailley* simply added: “It reflects the high degree of comity between New Zealand and Australia.”³¹⁴ In the second appeal, there was no mention of comity at all by the Court of Appeal.³¹⁵ Where comity is mentioned, it is given a vague meaning as illustrated by the ambiguous expression in *Mercer – High Court* from Nation J who said:³¹⁶

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

All that links comity to a definition under a Part 4 procedure is that it exists because of the presumption that there is commonality of legal processes and safeguards, especially in regard to Australia and New Zealand. There is nothing to indicate commonality in fundamental rights of the requested person, such as the type of treatment the person will be subject to in the prisons of Australia. It is also concerning that Australia does not have an enforceable bill of rights.

4.5 Summary

The authorities discussed above illustrate the continuity of the importance of comity between New Zealand and Australia and the role it plays in restricting both the judiciary and the minister in determining that circumstances exist to warrant the intervention of the surrender process under Part 4.³¹⁷ This restrictive role appears to be based upon a presumption of similarity, it being core to the assumption that

³¹⁴ *Mailley – Court of Appeal 2013*, above n 148, at [7] per French J. See also *McGrath*, above n 263; and *Mercer – HC review decision*, above n 183, at [20] per Nation J.

³¹⁵ *Mailley – Court of Appeal 2016*, above n 210.

³¹⁶ *Mercer – HC review decision*, above n 183, at [20] per Nation J. In *Mercer – Court of Appeal*, above n 185, the Court did not mention His Honour’s interpretation of comity. Instead the Court referred to its own undefined usage of the term in *Mailley – Court of Appeal 2013*, above n 148.

³¹⁷ *Mercer – HC review decision*, above n 183, at [14] and [21].

the person will receive a fair trial.³¹⁸ Importantly, the authorities inadequately address what should be the true scope of similarity as an underpinning principle of comity. Despite what the New Zealand Court of Appeal considers to be “a justified expectation that the respondent’s human rights (including right to a fair trial) will be met by Australia”, comity does not extend the scope of similarity between New Zealand and Australia to the full gamut of human rights.³¹⁹ This is because comity in this context is without a human rights tradition. Because comity presumes 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, preventing them from demanding a New Zealand Bill of Rights 1990 standard of protection of fundamental rights from 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 Part 4, 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 EU law.³²⁰

Cognisance needs to be given to the question of whether New Zealand can trust Australia in complying with fundamental human rights. Due to the lack of parity with New Zealand in legislating for the protection of human rights, it is argued that comity should not restrict the judiciary from inquiring into the fundamental rights of the requested person in being subject to the legal system of Australia. To this end, clarifying the meaning of comity in a way that takes into consideration a human rights component would transform comity from an amorphous concept into a more useful legal tool.³²¹ If comity is to be understood as a judicial device for balancing and weighing competing interests (international cooperation, sovereignty and the

³¹⁸ *Police v Thomas*, above n 75, at 457; and *Mercer – HC review decision*, above n 183, at [14]; and *Mercer – Court of Appeal*, above n 185, at [18].

³¹⁹ *Mercer – Court of Appeal*, above n 185, at [18].

³²⁰ 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]. Koen Lenaerts is Vice-President of the Court of Justice of the European Union, and Professor of European Union Law, University of Leuven.

³²¹ See Schultz and Mitchenson, above n 18, at 346. A similar argument is advanced in context of private international law.

interests of the person sought) one of the challenges this model faces concerns identifying the point along the spectrum of human rights interests at which the test of comity should allow the judiciary to permit surrender or intervene. This is likely to involve a sliding threshold in degree of judicial power to be exercised as a function of the level of human rights violation. For example, risk of gross forms of human rights violations such as torture, would favour comity allowing a less restrictive view of judicial power in determining surrender. On the other hand, risk of lower-level transgressions such as of due process, would favour comity allowing a more restrictive view of judicial power in determining surrender.

5. Comparative analysis with other simplified schemes

New Zealand is not alone in providing for backing-of-arrest warrants. Conceptually similar schemes exist in other states. These include the European Arrest Warrant (EAW), the Nordic Arrest Warrant (NAW), and the backing-of-warrants between the UK and the British territories, as well as between states of Africa and Australia. There is some dichotomy between these schemes in the sense of the mechanism that drives them. Most operate on the basis of the principle of reciprocity (New Zealand and designated countries under Part 4; the British Territories and the UK; and Africa) whereas the NAW and EAW operate on the basis of the mutual recognition principle. The following discussion illustrates how these schemes share in common an historical arrangement relating to extradition, it being simpler than usual extradition agreements because of the close links that exist between and within each set of states.³²²

5.1 European Arrest Warrant (EAW)

5.1.1 Nature of the EAW

The European Arrest Warrant (EAW) represents a simplified system of interstate cooperation, reflected in there being a standardised form of arrest warrant issued in one state which may be executed in any other member state of the EU for the purposes of surrendering the person to the issuing member state.³²³ Its distinction from extradition is symbolised by the introduction of new terminology with the replacement of ‘requested State’ with ‘executing Member State’ and ‘requesting

³²² Geoff Gilbert *Transnational Fugitive Offenders in International Law Extradition and Other Mechanisms* (Kluwer Law International, The Hague, The Netherlands, 1998) at 42. See also Per Ole Traskman “Mutual Trust and Political Intentions: The European Arrest Warrant and the Nordic Arrest Warrant” in Maria Bergstrom and Anna Jonsson Cornell (eds) *Police and Criminal Law Co-operation: Swedish Studies in European Law* (vol 5, Oxford and Portland, Oregon, 2014) at 143.

³²³ Article 1.1 of the Framework Decision 2002/584/JHA [“the EU Framework Decision”](entered into force on 1 January 2004). See also Julian B Knowles *Blackstone’s Guide to The Extradition Act 2003* (Oxford University Press, Oxford, 2004); and Limor Klimek *European Arrest Warrant* (Springer International Publishing, Switzerland, 2015) at 58.

State’ now the ‘issuing Member State’.³²⁴ The term ‘extradition’ is now replaced with ‘surrender’ of the requested person.³²⁵

The EAW³²⁶ abolished existing extradition arrangements between the EU Member States, replacing a time-consuming and complicated system based on treaty and national law, with a fast-track process of surrender.³²⁷ The legal basis of the EAW is the Council Framework Decision (“the EU Framework Decision”) of 13 June 2002 adopted by the Council of the European Union.³²⁸

Despite there being incompatibility between legal systems within the European Union (EU), the principle of mutual recognition is the cornerstone of the EAW.³²⁹ Mutual recognition means that a judicial decision in one member state is automatically accepted in all other member states with similar effects.³³⁰ In theory, the principle of mutual recognition means that there are few or no grounds for refusal to surrendering the requested person or enquiry into the procedures of the requesting State.³³¹

5.1.2 Conditions

5.1.2.1 Extraditability

5.1.2.1.1 Extraditable person

The requested person means a person which has been convicted of an offence or because he/she is being prosecuted.³³²

5.1.2.1.2 Extraditable country

Surrender of the requested person under the EAW applies only to Member States of the EU of which there are currently 28.³³³

³²⁴ Per Ole Traskman, above n 322, at 130.

³²⁵ At 130.

³²⁶ EU Framework Decision.

³²⁷ Klimek, above n 323.

³²⁸ EU Framework Decision; and Klimek, above n 323.

³²⁹ Per Ole Traskman, above n 322, at 128.

³³⁰ Per Ole Traskman, above n 322.

³³¹ Per Ole Traskman, above n 322.

³³² Klimek, above n 323, at 53.

³³³ Article 1.1 of the EU Framework Decision.

5.1.2.1.3 Extradition offence

5.1.2.1.3.1 Double criminality

More liberal than Part 4 of the 1991 Act, a distinctive feature of the EAW is partial derogation of the double-criminality requirement by reason of Article 2(2). It reflects an agreed upon list of thirty-two of the most serious offences for which double criminality is not required.³³⁴

5.1.2.1.3.2 Penalty threshold

The agreed list of offences requires at least three years' imprisonment in the requesting state. For other criminal acts, the double criminality requirement remains intact provided the acts are punishable in a requesting State by at least 12 months' imprisonment, or in the case of convicted defendants, they were serving a sentence of at least four months imprisonment.³³⁵

5.1.2.2 Speciality

In addition, the EAW provides no impediment to extradition based upon the principle of speciality. Instead, the EAW introduced special provisions on the rule of speciality under Article 2(2) of the EU Framework Decision, which includes exceptions and the application of the rule of speciality in case of subsequent surrender to another EU Member State and to third States.³³⁶

5.1.2.3 Standard of evidence

In common with other simplified systems in the Commonwealth, there is no requirement for the requesting state to establish a *prima facie* case.

5.1.3 Procedure

Procedurally, the EAW is more 'judicialised' with stricter time limits than Part 4 of the 1991 Act.³³⁷ A major distinction is that under the EAW there is no provision allowing the executive to determine whether there are grounds to refuse surrender.

³³⁴ Baker Report, above n 41, at 345.

³³⁵ Article 2(4) of the EU Framework Decision.

³³⁶ Klimek, above n 323, at 84-85.

³³⁷ Article 1(1) defines the EAW.

Instead, the role of the executive is confined to deciding between competing requests for extradition, although it may prevent extradition on grounds of national security.³³⁸

Another distinction from Part 4 under the 1991 Act, is the provision under the EAW for a central authority, (namely the Ministry of Justice, the Ministry of Foreign Affairs or the General Prosecutor's Office) whose role is confined to administrative matters, such as giving assistance to judicial authorities in coordinating the process, handling the receipt and transmission of requests for extradition.³³⁹ The question of who can act as a judicial authority under the EAW is uncertain however. In practise, across the contracting States, it is usually the courts or the public prosecutor.³⁴⁰

5.1.4 *Restrictions*

A major distinction from the New Zealand backed-warrant procedure under Part 4 of the 1991 Act, is that based on the rationale of mutual recognition, there are fewer restrictions and conditions to be met, with few grounds for refusing surrender under the EAW.³⁴¹ Importantly, the principle of mutual recognition,³⁴² the underlying rationale for removing traditional exceptions to surrender, does not completely preclude exceptions to surrender.³⁴³ Restrictions to extradition under the EAW are divided into four groups: mandatory, optional, decisions in absentia; and special situations.

5.1.4.1 *Mandatory*

There are three mandatory restrictions on surrendering the requested person (under Article 3). These involve an amnesty for the offence for which extradition is requested, the acts for which extradition is requested offend the principle of *ne bis in idem* (double jeopardy) and by reason of the person's age for criminal responsibility.³⁴⁴

³³⁸ Klimek, above n 323.

³³⁹ Article 7(1)(2) of the EU Framework Decision.

³⁴⁰ See Klimek, above n 323.

³⁴¹ Klimek, above n 323, at 57. Based upon the EAW embracing the principle of citizenship of the EU the EAW provides no impediment to extradition based on whether the offence is fiscal, political and whether the person sought is a national.

³⁴² See Article 1(2) of the EU Framework Decision.

³⁴³ Klimek, above n 323.

³⁴⁴ Klimek, above n 323, at 151-159.

5.1.4.2 *Optional*

There are optional restrictions, “in the sense that Member States may choose whether to include them in their national legislation”.³⁴⁵ These include: absence of double-criminality (outside of those offences falling within the list of framework offences to which double criminality does not apply); the acts for which extradition is requested offends the second, third or fourth principle of *ne bis in idem* (double jeopardy);³⁴⁶ the criminal prosecution or punishment is statute-barred; the requested State undertakes to execute the sentence or detention order; and the lack of jurisdiction.³⁴⁷ There is nothing preventing Member States creating discretionary grounds on which surrender may be refused additional to those set out in the Framework Decision however.

Part I, s 11(1) of the Extradition Act 2003 (UK) illustrates the EAW’s implementation in practice. It includes eight grounds which the judge must consider in determining the requested person’s eligibility for surrender. The majority of these correspond with the Framework Decision. Section 14 of Part 1 of the 2003 Act is roughly equivalent to s 8(1)(c) of Part 4 in respect of passage of time:

14. Passage of time. A person’s extradition to a category 1 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have committed the extradition offence or since he is alleged to have become unlawfully at large (as the case may be).

The test is simpler than in Part 4 of New Zealand’s 1999 Act. No nexus is required to be established by reason of there being no words to the effect of “circumstances of the case” or “circumstances of the person”. Instead, the passage of time only needs to be determined unjust or oppressive. Another difference is the narrower scope of these optional provisions on the grounds of injustice or oppression. It is no

³⁴⁵ J R Spencer “European Arrest Warrant” in Bell J, Kilpatrick C (eds) *The Cambridge Year Book of European Legal Studies* (Hart, Oxford, 2005) at 201-207.

³⁴⁶ Klimek, above n 323, at 159-160. The second principle of *ne bis in idem* means that “the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based”. The third principle of *ne bis in idem* means that “the executing judicial authorities have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or a final judgment has been passed.” The fourth principle of *ne bis in idem* means that “the requested person has been finally judged by a third State in respect of the same acts”.

³⁴⁷ Klimek, above n 323, at 159-160.

longer possible as it was under the Extradition Act 1989 (UK) to refuse surrender on the basis that the offence is trivial, or that the accusation was not made in good faith or more generally that it would be “unjust or oppressive” to order surrender.³⁴⁸

Another important difference, is that, if the judge decides that any of the grounds for refusing surrender are established, the judge must order the person’s discharge.³⁴⁹

5.1.5 *Human Rights*

In addition to these mandatory and optional restrictions there are two other restrictions to surrender which relate to the right to be present during the hearings of the trial (decisions in absentia)³⁵⁰ and special situations that risk infringement of human rights.

Article 1(3) and Recital 12 and 13 of the Preamble to the Framework Decision refers to human rights. Recital 12 of the Preamble requires Member States to implement the Framework Decision in accordance with respect for the fundamental rights and observance of the principles recognised by the Charter of Fundamental Rights of the European Union (“the EU Charter”). In particular, Article 6 of the EU Charter guarantees some procedural rights, such as the right to a fair trial.³⁵¹ Recital 12 allows for refusal to surrender to a State where there is a risk that the issuing of the EAW is for discriminatory reasons or that the person’s position may be prejudiced for any of these reasons.³⁵²

Like the EAW, adopted by the EU, the Part 4 backed-warrant procedure in New Zealand is designed to fast-track the surrender process. As reflected in *Radhi*, New Zealand nevertheless lags behind the EAW in lacking the same judicial recognition

³⁴⁸ See *New Zealand v Moloney* [2006] FCAFC 143 [*Moloney – Full Court*] at [44].

³⁴⁹ Extradition Act 2003 (UK), s 11(3). It is also mandatory rather than discretionary for the person to be discharged or subject to an adjournment on account of the person’s physical or mental condition (s 25(1) of the Extradition Act 2003 (UK)).

³⁵⁰ Pursuant to the United Nations International Covenant on Civil and Political Rights (ICCPR) GA Res 2200A, XXI (1966) art 14(3)(d) <www.unhcr.org>. See Klimek, above n 323, at 163-166.

³⁵¹ See Preamble, Recital 12 and 13 of the EU Framework Decision. See also Michael Plachta “European Arrest Warrant: Revolution in Extradition?”(2003)11 *European Journal of Crime, Criminal Law and Criminal Justice* 178 at 181; Spencer, above n 344; and Klimek, above n 323, at 59-60.

³⁵² Recital 12 of the Framework Decision of the EAW.

of the need to give due weight to the human rights of the requested person.³⁵³ In this regard, the EAW covers more safeguards for the rights of the person facing surrender than are provided in New Zealand under s 7 of the 1999 Act. In particular, there is no provision under the Part 4, backed-warrant procedure that accommodates claims that surrender would lead to a serious risk of the requested person being subject to torture or cruel and inhumane treatment.³⁵⁴ Nor is there any provision for the rights of the child or respect for private and family life.³⁵⁵ That is not to say that these rights are inapplicable, they are just not made visible.³⁵⁶ Concerns for the need to guard against the risk of the requested person being subject to torture or cruel and inhumane treatment are validated by the way human rights in detention facilities in Australia have become a focus.³⁵⁷ The difficulty is that, comity and its presumption of similarity and trust obstructs the New Zealand courts from inquiring into whether Australia will comply with such fundamental human rights. In this way, comity restricts the court's inquiry into the fundamental rights of the person to the early stages of the backed-warrant procedure rather than further down-stream at the trial and punishment stage.

5.2 Nordic Arrest Warrant Scheme

5.2.1 Background to intra-Nordic extradition

Reputedly more efficacious than the EAW, intra-Nordic extradition (Denmark, Finland, Iceland, Norway and Sweden) was developed during the second half of the 20th century.³⁵⁸ During the late 1950's and early 1960's these Scandinavian countries entered into a cooperative informal approach towards extradition, without treaty obligations or duty to extradite under national law. Early practice of intra-Nordic extradition was characterised by the way requested persons were handled at

³⁵³ See further Holly Cullen and Bethia Burgess, above n 276, at 211. Referring to the challenges of interpretation faced by the judiciary in *Minister for Home Affairs of the Commonwealth v Zentai* [2012] HCA 28; and *Assange v the Swedish Prosecution Authority* [2012] UKSC 22.

³⁵⁴ Recital 13 of the Preamble of the EU Framework Decision allows for refusal to surrender to a State where there is a serious risk of being subject to the death penalty, torture or other inhuman or degrading treatment or punishment.

³⁵⁵ CRC, art 3.1; and ECHR, art 8.

³⁵⁶ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987) available at <www.unhcr.org>.

³⁵⁷ 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) <www.un.org>.

³⁵⁸ Gjermund Mathisen "Nordic Cooperation and the European Arrest Warrant: Intra-Nordic Extradition, the Nordic Arrest Warrant and Beyond" (2010) 79 *Nordic Journal of International Law* at 1–33.

the police's discretion without any judicial supervision. On 29 May 1958, the Norwegian Council on Criminal law commented:³⁵⁹

... the situation may now be said to be that, practically speaking, one does not go through extradition in relations between the Nordic countries but that, instead, one has put to use an informal procedure for return of such persons where the police alone handles the case.

The regime simply operated on the basis of mutual trust, respect for certain national differences³⁶⁰ and cooperation with reportedly very effective results.³⁶¹ These Nordic countries adopted reciprocal domestic legislation on extradition, in force in the 1960's.³⁶² For example, extradition between Sweden and other Nordic countries was contained in 'The Nordic Extradition Law' 1959:254.³⁶³ The function of the legislation was to specify requirements to be met for extradition to be permissible.³⁶⁴ Similar to the minimal formalities of backing of arrest warrants in other Commonwealth countries, the legislation regulating intra-Nordic extradition had less restrictive conditions and more simplified procedures than what is provided in normal extradition law.³⁶⁵

5.2.2 *Nature of the Nordic Arrest Warrant Scheme (NAW)*

Shortly following adoption of the Framework Decision on the EAW, the Nordic states replaced this regime with the NAW adopted in 2005 at The Nordic Convention on a Nordic Arrest Warrant.³⁶⁶ Compared to the earlier intra-Nordic surrender system and the EAW, the NAW is slightly more developed, attributable to what is regarded by some as the higher degree of cooperation and similarity in criminal systems that exists between Nordic states than Members States of the EU.³⁶⁷ One major difference is that unlike the earlier Nordic system, satisfying a

³⁵⁹ Cited in Mathiesen, above n 358, at 6.

³⁶⁰ Per Ole Traskman, above n 322, at 138.

³⁶¹ Mathiesen, above n 358, at 10.

³⁶² For example, the Swedish Act was adopted on 5 June 1959 (1959:254).

³⁶³ Abolished by the implementation of the NAW into Swedish law under Law (2011:1165) on surrender from Sweden according to a Nordic Arrest Warrant.

³⁶⁴ Mathiesen above n 358, at 5-6.

³⁶⁵ Jorn Vestergaard "The European Arrest Warrant (EAW) and its Implementation in the Member States of the European Union" (paper presented to the International Conference, Country Report, Kraków, Denmark, 2006) at 1.

³⁶⁶ Convention on a Nordic Arrest Warrant 2005 [Convention] (signed 15 December 2005, entered into force 16 November 2012) See Per Ole Traskman, above n 322, at 130.

³⁶⁷ Traskman, above n 322, at 139; and Karri Toltila "The Nordic Arrest Warrant: What Makes for Even Higher Mutual Trust?" (2011) 3 New J Eur Crim L 368.

surrender request is now no longer optional,³⁶⁸ except where there are grounds for refusing surrender applicable under the Convention. Equivalent changes have been made to the terminology of the NAW. For example, the traditional term ‘extradition’ has been replaced with the expression ‘surrender’ and by nature is more judicial than political.³⁶⁹

5.2.3 Conditions

Reflecting the strength of the principle of mutual recognition and the degree of mutual trust operating in the intra-Nordic context, few conditions and restrictions are imposed.

5.2.3.1 Extraditability

5.2.3.1.1 Extraditable person

Article 1.1. of the Convention refers to the meaning of a person eligible for surrender under a definition of the NAW:

. . . a judicial decision issued by a Nordic State with the aim that another Nordic state shall apprehend and surrender a wanted person for a criminal procedure or for the execution of a sentence of imprisonment or another sanction consisting of the deprivation of liberty.

5.2.3.1.2 Extraditable country

Surrender under the NAW applies to Denmark, Finland, Iceland, Norway and Sweden.

5.2.3.1.3 Extradition offence

³⁶⁸ See Sweden’s implementation of the NAW in LAW (2011:1165) s 2.2; and Convention, art 4 and 5.

³⁶⁹ Article 1.1. See Per Ole Traskman, above n 322, at 130.

5.2.3.1.3.1 Double criminality

Compared to the EAW there is complete abolition of the double-criminality requirement.

5.2.3.1.3.2 Penalty threshold

There is no minimum penalty threshold for an offence to be considered eligible for surrender. There is simply the requirement that the crime for which surrender is sought, carry a sentence of imprisonment or other form of detention.³⁷⁰

5.2.3.2 Speciality

The principle of speciality does not apply in general, instead it is tightly circumscribed.³⁷¹ In addition, the NAW has borrowed from the previous system of intra-Nordic extradition, by introducing “accessory extradition” (Article 2(2) defined by Mathieson:³⁷²

... in cases of extradition for several criminal acts it is sufficient for the penalty threshold to be met by one of them. The other acts may be punishable with no more than for example a fine and still give rise to extradition, known as “accessory extradition”, together with the one act that does meet the penalty threshold.

5.2.3.3 Standard of evidence

Similar to other simplified schemes there is no requirement that a prima facie case be established by the requested State.

5.2.4 Procedure

Procedurally, the NAW is similar to the EAW, except there are shorter time limits, attributable to the closer cooperation between Nordic states than member states of the EU.³⁷³ Assuming the requested person does not consent to being surrendered, the normal time limit is 30 days after arrest instead of the EAW’s 60 days (Article

³⁷⁰ Article 2.1 of the Convention, above n 366.

³⁷¹ Toltila, above n 367, at 376 and article 23 of the Convention, above n 366.

³⁷² Mathiesen, above n 358, at [19].

³⁷³ Toltila, above n 367.

14(1)). If the requested person consents to surrender, the time limit is three days (Article 14(2)).³⁷⁴

5.2.5 Restrictions

Less strict than its predecessor, extradition for political and military offences are provided for under the NAW. Nor is there any impediment to a State extraditing its own nationals.

5.2.5.1 Mandatory

Equivalent to the EAW, there are three compulsory grounds for refusing to surrender: amnesty; a prohibition on ne bis in idem; and age of criminal responsibility.³⁷⁵

5.2.5.2 Optional

Deviating from the traditional regime of intra-Nordic extradition and somewhat looser than the EAW, there are fewer optional grounds for refusing surrender under the Nordic Convention. For example, unlike the EAW, neither double criminality nor limitation due to lapse of time serve as optional grounds for refusing surrender.³⁷⁶

5.2.6 Human Rights

Similar to the Framework Decision on the EAW, the Nordic Convention contains provisions referring to the European Convention on Human Rights. This functions as a safeguard against surrender if surrender is considered to be a breach of a provision under the Convention.

5.3 Summary of mutual recognition schemes operating in Europe

The EAW and NAW are somewhat different from that of the Part 4, backed-warrant procedure in that both are based upon mutual recognition rather than reciprocal legislation. The degree of simplification and efficacy of these mutual recognition schemes appears to vary as a function of the degree to which there is cooperation

³⁷⁴ At 376.

³⁷⁵ The EU Framework Decision, art 3(1)-(3); and the art 4(1)-(3) of the Convention, above n 366.

³⁷⁶ Compare article 4(1) of the EU Framework Decision, to art 4(4) of the Convention, above n 366.

and similarities between and within states, historically, culturally, legally and linguistically.³⁷⁷ In this regard, the NAW has been described as more successful than the EAW resulting from a higher degree of mutual trust underlying the principle of mutual recognition.³⁷⁸

The EAW appears more liberal than Part 4 of the 1991 New Zealand Extradition Act because conditions are less strict and there are fewer restrictions. These restrictions and other procedural matters canvassed, (role of the Central Authority) are relevant to a critique of the Commission's proposals impacting on the backed-warrant procedure in the succeeding section.

The NAW is a step more liberal than the EAW, bare of any conditions or restrictions, save for those applicable to the ECHR. Another fundamental difference between the EAW and the NAW lies in the scope of application – the EAW is applicable in all EU Member States, whereas the application of the Nordic System is confined to Nordic countries. The more liberal approach of the NAW has been viewed as tangible proof of the NAW showing close adherence to the principle of mutual recognition and the underpinning degree of mutual trust for which it relies.

The key features that most distinguishes the EAW and NAW from surrender in New Zealand under Part 4, relates to a softening if not removal of the double-criminality and speciality requirement and to a lesser degree the seriousness threshold. In addition, the grounds for refusing surrender are considerably fewer and narrower, coupled with much less executive involvement than exists under Part 4.

Of particular importance, is the observation that the 1991 Act lags behind the EAW and NAW, in not expressly applying equivalent fundamental human rights and procedural rights contained in the NZBORA. Express provision for the Charter makes the EAW and NAW, at least in principle, more developed in recognising the importance of human rights than is provided for under Part 4. Although the narrower scope of the “unjust or oppressive” provision under the Extradition Act 2003 (UK) suggests less protection is provided to the requested person, in practice

³⁷⁷ Mathiesen, above n 358, at 6.

³⁷⁸ Toltila, above n 367, at 368.

the role of national legislation, namely the Human Rights Act 1998 (UK) in subjecting UK courts to the ECHR is said to obviate this risk.³⁷⁹ Further, s 21 of the 2003 Act requires a judge to determine whether the surrender of a person would be compatible with ECHR rights. For example, article 6 of the ECHR enshrines the fundamental principle that everyone is entitled to a fair trial.³⁸⁰

Notably, there are no provisions in either the EAW or NAW which allude to comity.³⁸¹ Speaking in context of the Area of Freedom, Security and Justice (“AFSJ”), Koen Lenaerts opined:³⁸²

In the AFSJ, the successful operation of the principle of mutual recognition implies that Member States must trust each other when it comes to complying with fundamental rights. This means that the principle of mutual recognition presupposes mutual trust and comity among the national judiciaries.

The type of comity referred to by Lenaerts is qualitatively different from comity as it relates to the Part 4 backed-warrant procedure, however. This is because in the context of the EU, comity does not entail a reciprocal arrangement with stark political interest involved. Nonetheless, the explicit mention of human rights provisions in the NAW and EAW scheme aligns with the view of this thesis that comity ought to have a human rights component. To this end, comity requires a functional definition and legislative change designed to enhance trust in the presumption of similarity when it comes to complying with fundamental human rights.

³⁷⁹ *Moloney – Full Court*, above n 186, at [45].

³⁸⁰ For example *Soering v United Kingdom* [1989] ECHR 14 at [113].

³⁸¹ See Klimek, above n 323, at 91.

³⁸² Koen Lenaerts, above n 320, at 4. Koen Lenaerts is Vice-President of the Court of Justice of the European Union, and Professor of European Union Law, University of Leuven.

5.4 British territories

5.4.1 Nature

Simplified systems of extradition are used between the UK and British territories (non-EU members), namely the Channel Islands (Jersey, Guernsey, Alderney and Sark) and the Isle of Man.³⁸³ Backing of arrest warrants between the UK, Channel Islands and the Isle of Man is a long-standing arrangement, for which the legal basis is found in the Indictable Offences Act 1848 (UK).³⁸⁴ In this situation, the UK Act has extraterritorial effect for offences committed in the UK and in the Islands.³⁸⁵

These schemes are based upon the principle of reciprocity, as opposed to the principle of mutual recognition underlying the EAW and NAW. Section 13 reflects the principle of reciprocity in that the first half provides for the arrest of persons accused of crimes in England and Wales, who resort to the British Territories. The second half of s 13 provides for the arrest of persons accused of crimes in the British Territories, who resort to England and Wales.³⁸⁶

5.4.2 Conditions

5.4.2.1 Extraditability

5.4.2.1.1 Extraditable person

The backed-warrant procedure under s 13 of the 1848 Act is applicable to any person for whom there is a warrant issued for any indictable offence and who “shall escape, go into, reside, or be, or be supposed or suspected to be, in the requested country.

³⁸³ The Extradition Act 1989 continues to apply to these Islands for the purposes of extradition. Baker Report, above n 41 at 3.96. See also HM Attorney-General *Arrest and transfer to UK of Isle of Man resident – Use of UK law in Island* (17 November 2009) 127 Tynwald Hansard at 248-250, available at <www.tynwald.org.im>; The Police Procedures and Criminal Evidence (Jersey) Law 2003, Part 4, s 28(13) represents the statutory authority in Jersey law for the backing of warrants and s 81 of the Summary Jurisdiction Act 1989 represents the statutory authority in Manx law for the backing of warrants in the Isle of Man. Evidence that a legal basis for Backing of Warrants (Republic of Ireland) Act 1965 continues to apply in the Isle of Man, (set to change under the draft Extradition Bill 2011) is found the Island’s International Criminal Court Act 2003.

³⁸⁴ Nicholls, above n 12, at 43. See s 13 of the Indictable Offences Act 1848.

³⁸⁵ HM Attorney-General, above n 383, at 248, line 765-770.

³⁸⁶ *Richards v Attorney General of Jersey and another* [2003] EWHC 3365 (Admin), CO/6231/2003 at [59].

5.4.2.1.2 *Extraditable country*

The backed-warrant procedure under s 13 of the 1848 Act is applicable to the British Territories and the UK.

5.4.2.1.3 *Extraditable offence*

Under the 1848 Act an extradition offence includes any indictable offences.

5.4.2.1.3.1 *Double criminality*

Under the 1848 Act there is no double-criminality requirement.

5.4.2.1.3.2 *Penalty threshold*

Under the 1848 Act there is no minimum penalty threshold.

5.4.2.2 *Speciality*

Under the 1848 Act there is no speciality requirement.

5.4.2.3 *Standard of evidence*

There is no prima facie requirement under the 1848 Act.

5.4.3 *Procedure*

Procedurally, the original warrant for arrest of the requested person is brought by police or other law enforcement officer with a power to arrest, accompanied by an affidavit or other supporting documentation used to obtain the original warrant issued by any court, justice of the peace, or magistrate in the UK or Islands.³⁸⁷ The original warrant is received by the UK or Islands' police and/or the Attorney-General³⁸⁸ for endorsement or backing by the judicial authorities in the UK or Islands. Endorsement of the warrant only requires that the judicial authority is satisfied that it is authenticated as sworn by the police officer producing it, for its execution by any constable.³⁸⁹ In the Isle of Man, a Justice of the Peace will endorse

³⁸⁷ For example Summary Jurisdiction Act 1989, s 81(1)). See 'Summary Jurisdiction Bill – Consideration of Clauses Concluded' (9 May 1989) House of Keys, Hansard at K887 <www.org.im>. See also an unreported judgment from the Samedi Division of the Royal Court in Jersey, 1998/4 AG v *Young and Cantrade* [1998] UR 4 (12 January 1998) at 18. Sir Godfray Le Quesne QC, Commissioner, refers to a lengthy excerpt of an affidavit sworn by a Detective from the Jersey Police before the Deputy Baliff in the UK seeking endorsement of the warrant for the purpose of arrest and return of the accused to the Island to face trial. See also *Richards v Attorney General of Jersey and another*, above n 386.

³⁸⁸ Mutual Legal Assistance Guidelines <www.govt.je>.

³⁸⁹ See for example, the backing-of-warrants provisions in the Isle of Man under The Summary Jurisdiction Act 1989, ss 81(3).

the original warrant³⁹⁰ and in Jersey, the Baliff (Senior Judge), has the power to endorse the warrant. Endorsement of the warrant is followed by arrangements for a police or other law enforcement officer who has a power to arrest, to travel to the island with the original warrant and supporting documentation. The backing of arrest warrant procedure pursuant to s 13 of the Indictable Offences Act 1848, is however subject to the availability of a writ of habeas corpus and the European Court of Human Rights.³⁹¹

5.4.4 *Restrictions*

There are no restrictions to surrender under the 1848 Act in contrast to the s 19 provisions of the 1881 Act.

5.4.5 *The role of comity*

There is no explicit mention of comity in the 1848 Act or to the knowledge of the author, in any case law.

5.4.6 *Human Rights*

An abuse of process, such as unlawful arrest, falls to be considered under the ECHR to which the 1848 Act are also subject. For example, a warrant for a person's arrest issued from the UK on the basis of an EAW issued from another EU member state (Category 1), cannot be backed in the Islands' courts.³⁹²

³⁹⁰ Summary Jurisdiction Act 1989, s 81(2). See 'Summary Jurisdiction Bill – Consideration of Clauses Concluded', above n 387, at K887. See also (23 February 2010) 127 Legislative Council Hansard 247.

³⁹¹ *Bryce-Richards v Att Gen of Jersey & States of Jersey Police* [2003] EWHC 3365 at 65 cited in Nicholas Le Quesne *Haebus Corpus* in Jersey (2013) Jersey & Guernsey Law Review; and *Richards v Attorney General of Jersey*, above n 386. See also *R (on the application of Hammond) v Metropolitan Police Commissioner* [1965] AC 810, [1964] 2 All ER 772. In that case that applicant succeeded in grant of writ of habeas corpus through a technical defect in the ways s 13 of the 1848 Act was performed. Both cases were grounded in the argument that the arrest warrants issued infringed human rights, namely the European Convention on Human Rights, for which s 13 of the 1848 is subject to.

³⁹² For example the case of Dr Dirk Hoehmann examined by the Social Affairs Policy Review Committee in Standing Committee of Tynwald Public Accounts *Medical Staff Investigaton* (5 December 2012) at 2 <www.tynwald.org.im>; Standing Committee of Tynwald on Public Accounts *Report on the Handling by the Manx Authorities of the case of Dr Dirk Hoehmann* PP 0097/13 (2012-2013) PP 0097/13; and Council of Ministers *Response to the Standing Committee of Tynwald on Public Accounts Report on the Handling by the Manx Authorities of the case of Dr Dirk Hoehmann* in Tynwald Order Paper (15 October 2013) GD NO 0051/13 <www.tynwald.org.im>. The HM Attorney General, advised that the only way to achieve Dr Hochman's return to Germany was by an extradition request from the Germany Authorities to the Home Office and a warrant for the defendant's arrest being issued under the Extradition Act 1989 (2012-2013) at 17.

5.5 Africa's backed-warrant procedure

5.5.1 *Nature of the African Acts*

Simplified schemes in Africa also operate on a reciprocal basis. For example, in Kenya, the backing of warrants is reflected in Part III of the Extradition (Contiguous and Foreign Countries) Act entitled "reciprocal backing of warrants" which means "contracting nations issued in accordance with the contracting agreement."³⁹³

5.5.2 *Conditions*

5.5.2.1 *Extraditability*

5.5.2.1.1 *Extraditable person*

Persons liable to be surrendered under the backed-warrant procedure are defined under most of Africa's extradition law as any person accused or convicted of an offence.³⁹⁴

5.5.2.1.2 *Extraditable country*

A more simplified procedure applies to any contiguous country with reciprocal provisions for backing of warrants under the extradition law of Uganda,³⁹⁵ Tanzania,³⁹⁶ and Kenya.³⁹⁷ South Africa has a similar arrangement by way of extradition agreement with any foreign state that has reciprocal provisions for backing of warrants.³⁹⁸

³⁹³ See s 2 of the Extradition (Contiguous and Foreign Countries) Act ["the Kenyan Act"] in relation to Kenya. See also s 12 of the Extradition Act 67 of 1962 ["the South African Act"] in relation to South Africa; Part II of the Uganda Extradition Act 1964 ["the Ugandan Act"]; and Part III of the Tanzania Extradition Act 1965 ["the Tanzanian Act"].

³⁹⁴ See s 3 of the South African Act; s 1 of the Ugandan Act; s 2 of the Kenyan Act; and s 12 of the Tanzanian Act.

³⁹⁵ See Part II of the Ugandan Act.

³⁹⁶ See Part III of the Tanzanian Act.

³⁹⁷ See Part III of the Kenyan Act. Simplified procedures exist between the neighbouring territories of East Africa, formerly provided for under the 1881 Act passed in the East African territories (Tanzania, Uganda). Cited in Republic of Kenya, The National Assembly, House of Representatives Official Report, First Parliament inaugurated, vol VIII, 7 June 1963 <www.parliament.go.ke> at 314.

³⁹⁸ See s 6 of the South African Act. The term 'associated State' is used under s 1 of the South African Act to mean any foreign State for which section 6 applies. Section 6 reflects associated States which are neighbouring states in Africa, which have treaty arrangements with South Africa. For example Botswana is an associated State by virtue of The Extradition Treaty concluded with South Africa as contemplated by s 6. It is associated States for whom a more simplified procedure for surrender operates. See also Watney, above n 24, at 299.

5.5.2.1.3 Extraditable offence

Surrender under the backed-warrant procedure is not confined to the serious offences listed under the Schedule applicable to standard extradition in the Uganda Extradition Act 1964 (“Ugandan Act”); Extradition (Contiguous and Foreign Countries) Act (“Kenyan Act”); Extradition Act 67 of 1962 (“South African Act”); or the Tanzania Extradition Act 1965 (“Tanzanian Act”).³⁹⁹ The term ‘extraditable offence’ is used under s 1 of the South African Act and explicitly excludes any offence under military law which is not also an offence under the ordinary criminal law of the Republic and of such foreign State.

5.5.2.1.3.1 Double criminality

It is only the South African Act that preserves the double requirement under its definition of an ‘extraditable offence’.⁴⁰⁰

5.5.2.1.3.2 Penalty threshold

The South African Act requires a minimum penalty threshold of at least six months imprisonment.⁴⁰¹ The Ugandan Act, Kenyan Act and the Tanzanian Act contain no minimum penalty threshold or requirement that the offence is one that attracts a custodial sentence or some other form of deprivation of liberty.

5.5.2.2 Speciality

It is only the South African Act that contain a speciality requirement.

5.5.2.3 Standard of evidence

Consistent with the 1881 Act, none of the other simplified schemes contain a prima facie standard of guilt.

³⁹⁹ For example “extradition crime” is defined under s 28 of the Ugandan Act and applies to the “fugitive criminal” under standard extradition.

⁴⁰⁰ African Act, s 1.

⁴⁰¹ But see the Protocol on Extradition (signed 3 October 2002, entered into force 2006) <www.sadc.int>, art 3(1).

5.5.3 Procedure

Procedurally, the backing of arrest warrant schemes in Uganda and Kenya are by and large similar to the 1881 Act.⁴⁰² In order to engage the simplified procedure under the South African Act, the magistrate has to determine in context of an extradition enquiry, as to whether the surrender request should be dealt with on the basis of an associated state or as a foreign state.⁴⁰³ If it is the former, the magistrate is authorised to order the requested person's surrender as set out in s 12 of the South African Act, subject to restrictions pursuant to 12(2).⁴⁰⁴ If however, it is the latter, the magistrate only has the power to order the person's imprisonment because his/her surrender is determined by the minister.

The South African Act has considerably fewer procedural safeguards. For instance, there is no requirement for the magistrate to find reasonable cause to suspect the person is on his or her way or in the country.⁴⁰⁵ Less strict than Kenya and Uganda, there are no authentication requirements as to identity of the person sought for surrender or the original warrant issued.⁴⁰⁶

5.5.4 Restrictions

In most respects, the grounds for refusing surrender are identical to those under s 19 of the 1881 Act.⁴⁰⁷ One exception is the South African Act which contains a broader provision for refusing surrender under s 12(1)(c)(i) by virtue of the words "for any other reason" as found in s 34(2) of the 1988 Act. It appears that the South African Act provides an even lower threshold for refusing surrender by reason of the word "unreasonable" instead of "oppressive". In this respect, the judiciary is entitled to the same power to refuse surrender as the minister under s 11(b)(i)-(iv) of the South African Act.

The extent of restrictions in place as it relates to political offences and on the grounds of discrimination varies across Africa's simplified schemes. The South

⁴⁰² See s 11 of the Kenyan Act; South African Act; and Ugandan Act.

⁴⁰³ Section 10 of the South African Act.

⁴⁰⁴ "Associated state" is defined as a foreign state that has entered a reciprocal extradition agreement. See *Misozi Chanthunya v S* [2013] ZANWHC 45 at [30].

⁴⁰⁵ South African Act, s 6. Contrast s 17 of the Ugandan Act.

⁴⁰⁶ Compare s 14 of the Kenyan Act, and s 18(1) of the Ugandan Act.

⁴⁰⁷ See s 21 of the Ugandan Act; s 16(3) of the Kenyan Act; and s 12(c)(i) of the South African Act.

African Act contains a discretionary rather than mandatory ground for refusing surrender on the grounds that “the person concerned will be prosecuted or punished or prejudiced at his or her trial in the associated State by reason of his or her gender, race, religion, nationality or political opinion.”⁴⁰⁸ In addition, the South African Act entitles the Minister to order cancellation of warrants of arrest or discharge of detained persons, at any time, if the offence for which surrender is sought, is political in nature.⁴⁰⁹ The Ugandan Act; Kenyan Act and Tanzania Act are stricter but narrower in scope in regard to restrictions on surrender under the backed-warrant procedure. These Acts prohibit the surrender of political offenders⁴¹⁰ but, there are no other applicable discrimination exceptions.

5.5.5 *The role of comity*

Exemplifying the variance by which comity is defined, the South African Constitutional Court has regarded comity as qualified by the importance of a state complying with its own domestic laws. This approach to comity accords with *Hilton v Guyot* where the American Supreme Court expressed the following opinion:⁴¹¹

Comity is neither a matter of absolute obligation nor a mere courtesy and good will. It is a 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 other persons who are under the protection of its laws. The comity thus extended to other nations is not impeachment of sovereignty. It is the voluntary act of the nation by which it is offered and is inadmissible when contrary to its policy or prejudicial to its interests.* But it contributes so largely to promote justice between individuals and to produce a friendly intercourse between the sovereignty to which they belong, that courts of justice have continually acted upon, as a part of the voluntary law of nations. It is not the comity of the courts but the comity of the nation which is administered and ascertained in the same way and guided by the same

⁴⁰⁸ South African Act, s 12(2)(c)(ii).

⁴⁰⁹ South African Act, s 15.

⁴¹⁰ Ugandan Act, s 22; Kenyan Act, s 16(1)(a); and Tanzanian Act, ss 16(1)(a) and 1.

⁴¹¹ *Hilton v Guyot*, above n 16. See Momodu Kassim-Momodu “Extradition of fugitives by Nigeria” (1986) ICLQ 35(3) 512 at 512. See also *Tsebe*, above n 16, at [128]. In context of determining eligibility for surrender under a simplified scheme between South Africa and Botswana, of which the latter risks imposing the death penalty. This passage was considered in *Tsebe*, above n 16, at [127].

reasoning by which all other principles of municipal law are ascertained and guided. [Emphasis added]

This formulation of comity aptly describes the importance of safeguarding sovereignty, the rights of the requested person and the international expectation of the efficiency with which surrender of the requested person should take place. It shows a greater understanding for the differences between a traditional definition of comity of nations, as described by the Law Commission,⁴¹² and a modern definition that is of significance to the purpose of this thesis.

5.5.6 *Human Rights*

With exception to restrictions on the grounds of political offences and in one case, grounds of discrimination, there are no human rights provisions contained in the Acts examined. Instead, the impact of human rights on surrender is derived from the fact that most states, including South Africa, Uganda and Kenya are party to the African Charter on Human and Peoples' Rights international human rights conventions.⁴¹³

There are also human rights instruments within each state impacting upon surrender, such as the Bill of Rights of the Constitution of South Africa. A pertinent human rights issue impacting on simplified schemes based upon extradition agreements, is the issue of the death penalty in retentionist versus abolitionist states. For example, Botswana and Malawai retain the death penalty whereas South Africa, under its constitution is an abolitionist state.⁴¹⁴ In contrast to backing-of-warrants between Australia and New Zealand, these simplified schemes, are confronted with gross forms of human rights violations impacting significantly on international cooperation.

⁴¹² Issues Paper, above n 1.

⁴¹³ Watney, above n 24, at 310. African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) <www.achpr.org/instruments>.

⁴¹⁴ Botswana and Malawai are associated states by virtue of an Extradition Treaty concluded with South Africa, as contemplated by s 6 of the South African Act. For example *Mohamed and Another v President of the RSA and Others* 2001 (3) SA 893 (CC). The Constitutional Court ruled that there is an absolute bar on extraditing or deporting a person from South Africa to any country that poses a risk of the death penalty being imposed. See *S v Makwanyane* 1995 3 SA 391 (CC). See also *Tsebe*, above n 16, at 4; and *Canada v Schmidt* [1987] 1 SCR 500, 522 (per La Forest J).

Illustrating the procedural weaknesses in the South African Act, the Court in *Misozi Chanthunya v The State Criminal Appeal* determined that at the extradition enquiry stage of the process, the magistrate as opposed to the minister, has no power to consider any constitutional issues or sufficiency of assurances given as to the death penalty in the extradition agreement, namely assurances regarding the death penalty.⁴¹⁵ This is because the magistrate's role in s 10 is confined to the issue of there being sufficient evidence to prosecute in the foreign state and liability for surrender.⁴¹⁶ In this way, there is more benefit in being imprisoned to await the minister's decision in regard to surrender, especially if the associate State provides insufficient assurance against imposition of the death penalty.⁴¹⁷

5.6 Australia's inter-state backing of arrest warrants scheme

5.6.1 *Services and Process Act 1992 (Cth)*

Part 5 of the Australian Services and Process Act 1992 (Cth) ("the SEPA 1992") is another simplified scheme providing for the return of persons interstate.⁴¹⁸ Procedurally, a person may be arrested in one State on the basis of an arrest warrant issued in another State with the intention of taking the person before a magistrate in that State, upon which the arrest warrant of the "issuing State" is produced.⁴¹⁹ For example, in *Mok v Director of Public Prosecutions (NSW)* a warrant issued by a DCJ in New South Wales for the accused who failed to appear on fraud offences, but surfaced in Victoria, was given effect in Victoria, under s 82 of the SEPA 1992.⁴²⁰

Distinctly more liberal than its predecessor the Services and Execution of Process Act 1901 (Cth) ("the SEPA 1901"), under the SEPA 1992 the magistrate has no statutory discretion to refuse to surrender the requested person to the State that

⁴¹⁵ *Misozi Chanthunya v S* [2013] 2 NANWHC 45. The Constitution of South Africa Act 108 of 1996 is applicable to South Africa's extradition law. Relevant are ss 10,11 and 12(1)(e) which have been invoked in prohibiting extradition to a country where the death penalty might be imposed.

⁴¹⁶ *Tsebe*, above n 16, at [69].

⁴¹⁷ *Tsebe*, above n 16.

⁴¹⁸ The Service and Execution of Process Act 1992 has been in force since 10 April 1993.

⁴¹⁹ Section 82(1)-(2) of the SEPA 1992.

⁴²⁰ *Mok v Director of Public Prosecutions (NSW)* 2016 HCA 13 at [5]-[8].

issued the arrest warrant.⁴²¹ The magistrate has the power to consider the validity of the warrant and grant bail however. Owing to what is regarded as its administrative character,⁴²² the magistrate must simply make an order, to either remand the person on bail to appear in the issuing State at a specified time and place⁴²³ or order that the person be taken in custody or otherwise as the magistrate specifies, to a specified place in the issuing State.⁴²⁴

5.6.2 *Services and Execution of Process Act 1901 (Cth)*

Of particular relevance to the backing of warrants between New Zealand and Australia is the Services and Execution of Process Act 1901(Cth) (“SEPA 1901”).⁴²⁵ This is because of the general proposition espoused by the Australian judiciary that the unjust or oppressive bar to extradition under s 18(6) the SEPA 1901 is relevant and helpful when considering the grounds for refusing surrender of the requested person to New Zealand (discussed below).⁴²⁶ This is partly because of its longevity and the copious authorities dealing with its interpretation. Notably, this analogy forms the rationale for applying a prima facie exception to the backing of warrant regime between New Zealand and Australia – discussed below. For instance, the Full Court in *Moloney - Full Court* thought that “New Zealand has been long equated, for extradition purposes, with the Australian States and Territories.”⁴²⁷ Evidently, the single, albeit broad, statutory bar to surrendering persons to New Zealand under s 34(2) of the 1988 Act, was modelled upon s 27 of the Extradition (Commonwealth Countries) Act 1966 (Cth). That language was modelled upon s 18(6) of the SEPA 1901, which itself was derived from s 10 of the Fugitive Offenders Act 1881 (UK).⁴²⁸

⁴²¹ SEPA 1992, ss 83-86. See *Moloney & Garchow v New Zealand* [2006] FCA 438 [*Moloney – Federal Court*] at 62.

⁴²² *Mok v Director of Public Prosecutions (NSW)* (2015) 320 ALR 584 [2015] NSWCA 98 (*Mok (No 3)*) at [25].

⁴²³ SEPA 1992, s 83(8)(a).

⁴²⁴ Section 83(8)(b). For example, *Mok v Director of Public Prosecutions (NSW)* [2016] HCA 13 [2016] 330 ALR 201 at [1] and [8]. See further Douglas Brown “Judicial Scrutiny of Inter-State Extradition” (1976-1976) UW Austl Rev 298.

⁴²⁵ 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.

⁴²⁶ *Moloney - Full Court*, above n 186, at [54].

⁴²⁷ At [36].

⁴²⁸ *Moloney - Full Court*, above n 186, at [20]; [52] and [103]. See also EP Aughertson, above n 11, at 236. Considered by *Moloney – Full Court*, above n 348, at [20].

In support of this proposition, the Full Court in *Moloney* referred to the Replacement Explanatory Memorandum to the Extradition Bill 1987:

The procedures for extradition to New Zealand are more simple than the procedures under Part II and are based on the backing of warrant procedure used for extradition between the Australian States.⁴²⁹

Further supporting the rationale that there is a legislative intention to assimilate the principles governing the backed-warrant procedure between New Zealand and Australia to those governing backing of warrants within Australia, the Full Court in *Moloney* noted Wilcox and Jackson JJ in *Narain v Director of Public Prosecutions* referred to an extract from the Attorney-General's second reading speech for the Extradition Bill 1987 (Cth):

The Bill contains a special part which governs extradition relations with New Zealand. Our close ties with that country have made appropriate a reciprocal regime which bears a very close similarity to the extradition relations between the various *Australian States and Territories contained in the Service and Execution of Process Act 1901*.⁴³⁰

5.7 Interim conclusion of reciprocal and imperial-based schemes

The discussion above reveals how influential the models pioneered in the imperial-based statutes continue to be in the operation of many simplified schemes. There could not be a more simplified arrangement for the surrender of persons in the commonwealth than what exists between the British territories and the UK. Despite there being no conditions, or restrictions on surrender and few procedural safeguards, expressly built into the 1848 Act, by all accounts there has not been any criticism of the regime.

The African Acts contain similar language to imperial-based statutes (namely, the 1881 Act). Differences are found between the African Acts in respect of the inclusion or not of conditions and restrictions on surrender as well as procedural safeguards. These schemes also tend to place more emphasis on the role of the

⁴²⁹ Cited in *Moloney - Federal Court*, above n 421, at [36]) per Madgwick J.

⁴³⁰ Cited in *Moloney - Full Court*, above n 348, at [105]) referring to Sackville J at 163-164 in *Narain v Director of Public Prosecutions* (1987) 15 FCR 411 [*Narain*] at 419.

executive than most other simplified schemes. Importantly, there are differences in how the usage of the term comity is applied by the Constitutional Court in South Africa, compared to how comity in context of the Part 4, backed-warrant procedure is applied by the New Zealand courts. This reflects how the flexible nature of comity as a concept may lend itself to arbitrary usage.

Despite there being no express provision for the applicability of the African Charter to the African Acts or the ECHR to the 1848 Act, there are authorities establishing this to be the case. In this respect, it is fair to say that Part 4 of the 1991 Act is less developed in leaving it open to question how far the NZBORA applies to Part 4.

The influence of imperial-based statutes is especially relevant to the impact that the SEPCA 1901 appears to have on requests for surrender by New Zealand to Australia. The SEPA 1901 is therefore relevant to a critique of the Commission's proposals and confidence in the degree of mutual trust/comity between New Zealand and Australia.

6. Critique of the Law Commission's recommendations relevant to the backed-warrant procedure

6.1 Establishing a central authority

The primary focus of the Commission's draft Bill is the establishment of a central authority (nominally, the Attorney-General) and modifications to the standard procedure. It is envisaged that the Central Authority will decide whether to commence an extradition proceeding, based upon the likelihood of success and if the decision is in the affirmative, will oversee the entire extradition process, from the time a request arrives until the moment a person sought is either discharged or extradited from New Zealand.⁴³¹

6.1.1 Role of the Central Authority in the backed-warrant procedure

In regard to the backed-warrant procedure, it is helpful to consider the Commission's shift in position towards the role of the Central Authority. Initially, the Commission evaluated the surrender request process undertaken by the New Zealand Police in a positive light⁴³² and saw the place of the Central Authority as limited to an administrative role; reporting numbers and outcome, rather than a procedural role.⁴³³

This limited role of the executive branch is characteristic of the EAW but for different reasons. In limiting the role of the Central Authority, which is usually the Ministry of Justice or Ministry of Foreign Affairs, to administrative assistance for the judicial authorities, the EAW is achieving its object of reducing the role of the executive.⁴³⁴ Similar to the Part 4, backed-warrant procedure, it relies upon direct cooperation between judicial authorities rather than a central authority for the purpose of eliminating the problems associated with the standard extradition procedure such as potential delay and the potential for political pressure to reign over the decision to surrender.⁴³⁵ A major difference from the Part 4 backed-warrant procedure, is the involvement of the police in the initial stages of the

⁴³¹ Report, above n 1, at 4.

⁴³² Issues Paper, above n 1, at [4.18]-[4.19].

⁴³³ At [4.19].

⁴³⁴ Klimek, above n 323, at 79. Recital 9 of the Preamble of the EU Framework Decision, above n 322.

⁴³⁵ Neil Boister and Robert J Currie (eds) *Routledge Handbook of Transnational Criminal Law* (Routledge, New York, 2015) at 165.

procedure whereas under the EAW the judicial authorities have sole responsibility for the procedure.⁴³⁶ It would appear, that the Commission's initial rationale for limiting the role of the Central Authority,⁴³⁷ was based on the view that the police liaison aspect to the backed-warrant procedure works effectively. This was in turn because of the close working relationships between New Zealand and the designated countries.⁴³⁸ This rationale, was also consistent with the Commission's emphasis on comity and trustworthiness with Australia warranting further simplification of the backed-warrant procedure.

Comparatively, the emphasis placed on the police in the initial stages of the procedure is similar to the early practice of intra-Nordic arrest warrants.⁴³⁹ Such practise has been attributed to the result of a mutual feeling of affinity and trust between the Nordic states.⁴⁴⁰ A high level of trust resulting from these similarities has left the Nordic states well-prepared for the practise of direct communication between judicial authorities under the NAW,⁴⁴¹ without the involvement of a central authority. In contrast, the EAW does not have the same degree of mutual trust because there are more differences in the criminal systems of the EU.⁴⁴²

From the African perspective, the more prevalent role of the Executive is associated with more differences between African states, namely the death penalty, which helps to explain why Africa's simplified procedures of extradition are not unified in terms of the role of the Executive.⁴⁴³

Aside from the role of trustworthiness and similarity in determining the role of a central authority, simplified schemes of extradition appear to vary according what is perceived as convenient and the degree to which traditional practise is rigidly viewed as the better option. More fundamental is the role of principles long-established which guide the involvement of a central authority. The simplified procedure of surrender under the 1848 Act between the British Islands and the UK

⁴³⁶ Plachta above n 351, at 187.

⁴³⁷ Issues Paper, above n 1, at [4.18]-[4.19].

⁴³⁸ At [4.43]-[4.44].

⁴³⁹ Toltila, above n 367, at 363.

⁴⁴⁰ At 375.

⁴⁴¹ Toltila, above n 367.

⁴⁴² See Toltila, above n 367.

⁴⁴³ For example *Tsebe*, above n 16.

is one such example. Its reportedly long track-record of success,⁴⁴⁴ based upon a procedure akin to the 1881 Act, suggests it is less open to reform, let alone the notion of a central authority involved in the surrender procedure. A similar approach is found in context of the backing-of-arrest warrants under the SEPA 1901, a predominantly judicialised process modelled off the 1848 Act and the 1881 Act.⁴⁴⁵ In contrast, the EAW is more recent and should be viewed from a different historical context, with reference to the predominance of a central authority that has in part, been attributed to the unworkability of extradition within the EU.

Given the emphasis placed on the similarity and trustworthiness of Australia as well as the importance placed on aligning New Zealand's extradition law with overseas trends in reducing the role of the executive, it is not surprising that the Commissioner opted to confine the role of a central authority.

However, the Commission appears to have changed its mind and currently it recommends that the Central Authority be responsible for both procedural and administrative matters,⁴⁴⁶ while maintaining a close working-relationship with the Police.⁴⁴⁷ This more cautious approach means, that under the new Act, responsibility is given to the Central Authority rather than the Police, for the receipt and vetting of requests and decision for initiating proceedings under Part 4.⁴⁴⁸

The Commission gives a number of reasons given for this change of plan. For example, the rationale for having the Central Authority as the applicant, as opposed to the requesting country, is based upon the need for a more integrated approach and the importance of maintaining independence from the requesting country so that the interests of the New Zealand Government are upheld.⁴⁴⁹ More generally, the role of the Central Authority is thought to ensure that proceedings are conducted according to New Zealand values.⁴⁵⁰ Of particular significance is the proposition that human rights are better served by the dominant role of the Central Authority in the surrender process.⁴⁵¹

⁴⁴⁴ See Hohemann, above n 392.

⁴⁴⁵ Douglas Brown "Judicial Scrutiny of Inter-State Extradition" (1976-1976) *UW Aust L Rev* 298.

⁴⁴⁶ Report, above n 1, at [2.11]-[2.12].

⁴⁴⁷ At [2.13]-[2.15].

⁴⁴⁸ At [2.2].

⁴⁴⁹ At [2.16]-[2.17].

⁴⁵⁰ At [2.16]-[2.17].

⁴⁵¹ At [2.12]- [5.5].

It is difficult to reconcile this shift in position with the Commission's earlier statement in regard to its positive assessment of the Police role in preserving the efficiency of the backed-warrant procedure. Also problematic is how this position reconciles with the trust/comity doctrine that is emphasised by the Commission in warranting further simplification of the backing-of-arrest warrant procedure. It reflects on the difficulty experienced by the Commission in delineating the standard procedure from the backed-warrant procedure. For example, in recommending that the applicant be the Central Authority, would conflict with the more limited administrative role initially proposed by the Commission.

Aside from these inconsistencies, it is my thesis, that there is in any case, a strong principled reason for making the Central Authority applicable to the backed-warrant procedure. Evidence in support of this proposition is examined below.

The case of *Bennett*⁴⁵² is a good illustration for why the role of the Police should be replaced with the Central Authority, particularly in the initial stages of the backed-warrant procedure. Had there been a central authority responsible for overseeing the entire surrender process, the police in both New Zealand and Australia may have been less inclined to ignore the statutory procedure for the surrender of Bennett from Australia to New Zealand.

An Australian example offering persuasive argument for why a central authority should replace the role of the police in the backed-warrant procedure is found in the Australian decision, *Samson v McInnes and Another (Samson)*.⁴⁵³ In that case, Samson, 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. This was explained by what appears to be erroneous advice given to a South Australian Police Officer (Detective Kahl) "within the Police Department".⁴⁵⁴ The original warrant related to charges for alleged armed robbery in New Zealand. At the same time and on the basis of prior information shared between New Zealand Police and Australian Police, Samson was told that he was illegally in Australia.

⁴⁵² *Bennett*, above n 80.

⁴⁵³ *Samson v McInnes and Another* [1998] 159 ALR 367 [*Samson*].

⁴⁵⁴ At 53.

The day following Samson's arrest, Samson was brought before a DCJ who determined that he had no jurisdiction to consider the matter and directed that Samson should be brought before a magistrate. Later on the same day, Samson was brought before a magistrate and remanded in custody until the following day.

Late in the evening, an officer of the Commonwealth Director of Public Prosecutions recognised that the original warrant was defective at the time of its execution because it had not been endorsed by a magistrate.⁴⁵⁵ On the following day, the original warrant was accompanied by a supporting affidavit and the prescribed application form under s 28 of the 1988 Act. A magistrate ("Swain") signed the form and returned it with the warrant to Klotz. The warrant itself was not endorsed however. Eventually the warrant was endorsed by Swain and on that basis, Samson was brought before the Magistrate's Court later that same day before a second magistrate ("McInnes"). After being advised that the warrant, at the time of its execution, had been defective, McInnes ordered that Samson be released. Shortly after, Samson was arrested again on the basis of the endorsed warrant and brought once again before McInnes which resulted in Samson being held in custody until his appearance in the Adelaide Magistrates Court approximately three weeks from date of arrest.⁴⁵⁶ On that occasion, a stipendiary magistrate ordered that he be surrendered to New Zealand, pursuant to s 34(1)(a)(i) of the Extradition Act 1988 (Cth) (the Act).

Samson, then sought appeal of the magistrate's order under s 35(1) of the Act, to the Supreme Court of South Australia. He was unsuccessful. On 28 August 1998, a judge of that court confirmed the order of the magistrate.⁴⁵⁷ Samson, then appealed to the South Australia District Registry ("the Court") from the order of the Supreme Court.

The issue before the Court was to determine whether the efforts of Klotz and the first magistrate (Swain) were sufficient to remedy the earlier omissions? The Court agreed unanimously to allow the appeal and declared the surrender warrant invalid because there was no endorsed New Zealand warrant within the meaning of s

⁴⁵⁵ Extradition Act 1988 (Cth), s 28. *Samson*, above n 453, at 53.

⁴⁵⁶ At 54.

⁴⁵⁷ At 54.

34(1)(a)(i) of the Extradition Act 1988 (Cth) before the second magistrate (McInnes), when she purported to issue it.⁴⁵⁸

In allowing the appeal, the South Australia District Registry of the Federal Court took a literal interpretation of the language of s 28 (that is, “the magistrate shall make an indorsement of the warrant”) and considered that sound reasons exist for requiring that the Form 17 endorsement must be found on the back of the warrant and not as an accompanying document.⁴⁵⁹ The Court held that the arresting officer did not have a warrant that could be validly acted upon and accordingly the arrest was irretrievably flawed.⁴⁶⁰ The Court maintained.⁴⁶¹

Without such an endorsement, the arrestee would be entitled to challenge the right of a police officer to execute a warrant of a foreign country in Australia. The production of a separate document containing the Form 17 endorsement may not self-evidently link it to the relevant warrant; but an endorsement on the back of the warrant puts the issue beyond doubt.” Further, it was recognised, that “endorsement directs the arresting police officer what is to happen with the arrested person, namely, that he or she be brought before a magistrate as soon as practicable. In the present case this did not occur as there was no direction to that effect on the New Zealand warrant.

Accordingly, the surrender warrant was quashed and Samson’s release was ordered immediately.

It was emphasised by the Court that Samson was arrested despite s 28 of the 1988 (Cth) Act clearly and expressly prohibiting an Australian police officer from executing a New Zealand warrant on its mere existence.⁴⁶²

A similar case involving an abuse of process in context of a simplified procedure is found in the case of Dr Hoehmann (“the Hoehmann case”). Dr Hoehmann, was an

⁴⁵⁸ At 55.

⁴⁵⁹ *R v Metropolitan Police Commissioner; Ex parte Melia* [1957] 3 All ER 440, followed in *Samson*, above n 453, at 55-56.

⁴⁶⁰ *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 70 ALR 225, followed in *Samson*, above n 453, at 55-56.

⁴⁶¹ At 57.

⁴⁶² At 53.

ENT consultant employed at Noble's Hospital, in the Isle of Man.⁴⁶³ The case involved a complicated sequence of events surrounding the Manx Constabulary's knowledge of Dr Hoehmann's criminal record and the existence of an EAW issued by Germany to the Serious and Organised Crime Agency in the UK. Similar to *Samson* the Heohmann case involved the wrongful arrest of the requested person, arising from the Isle of Mann constabulary confusing the procedure under the EAW with that under the 1848 Act. As it transpired, the EAW cannot be lawfully executed in the Isle of Man. In order to have the arrest warrant backed in the Islands' courts, the person sought, needs to have committed an arrestable offence in the UK. Alternatively, if the person residing in the Islands, enters the UK or any EU Member State, their arrest can occur on the basis of the EAW.

It is conceded that these latter two foreign examples do not directly reflect on the procedural competence of the New Zealand Police in the backing of warrant process. It would be unwise to assume that the New Zealand Police do not have the potential to behave as ruthlessly or as haplessly as these foreign police forces. The case of *Bennett* removes any doubt as to there being any evidence lacking in that regard.

A central authority utilising a team specialised in extradition matters with familiarity in the surrender process, would better protect the interests of the person subject to arrest. This would create a positive spin-off for the efficacy of the backing-of-warrants. As *Samson* illustrates, police bungling in the initial stages of the simplified procedure has the potential to create costly and lengthy proceedings when the requested person resists surrender. It is of some concern that other than appeal there is no way of determining whether other unchallenged cases similar to *Bennett* and *Samson* exist.

A more moderate view of the problem is reflected in the Hoehmann case. In the context of that case, a Report in 2013 by the Department of Home Affairs, offers some insight into how the efficacy of the backed-warrant procedure is viewed.⁴⁶⁴

⁴⁶³ Draft Extradition Bill 2011 <www.gov.im>. The case of Dr Hohemann was examined by the Social Affairs Policy Review Committee, above n 392.

⁴⁶⁴ Hon Juan Watterson *Report of the Department of Home Affairs on the legislation, regulation or procedures for extradition between the Island and the UK* (Minister for Home Affairs, December 2013) at 11.

. . . Clearly, over a long period of time there will be occasions when misunderstandings may occur, where standard procedures are not followed as they should be by one or more parties or where things do not work out as they should. Nevertheless, the Isle of Man Constabulary has advised that the system has worked effectively, by and large, for over a century.

Confidence in the backed-warrant procedure is reinforced in the recent draft Extradition Bill 2011 which indicates no intention to alter the backed-warrant procedure between the UK and Isle of Man.⁴⁶⁵ Similar confidence in the backing of warrant procedure is shown in respect of Jersey. In the case of *Richards v Attorney General of Jersey and another* Justice Jackson said:⁴⁶⁶

[60] The simple and expeditious procedure, which s 13 of the 1848 Act lays down, is a reflection of the confidence which the English courts have in the criminal justice systems of the Channel Islands and the confidence which the Channel Island courts have in the criminal justice system of England and Wales. Those reciprocal provisions have stood the test of time. Section 13 of the 1848 Act was enacted in the early years of the reign of Queen Victoria. Over the last one and a half centuries Parliament has not seen fit to abandon the simple, expeditious and reciprocal procedure there set out.

But the efficiency of the process is in some degree countered by the fact that it is not that common and thus always not that well executed, suggesting the Commission is correct to suggest supervision by a central authority.

⁴⁶⁵ Draft Extradition Bill Consultation – additional note <www.gov.im>. The only proposed change affecting the backed-warrant procedure is between the Isle of Man and the Republic of Ireland. It is proposed that surrender should be dealt with under standard extradition provisions as is the case between the UK and Ireland and between Ireland and Jersey.

⁴⁶⁶ *Richards v Attorney General of Jersey and another*, above n 386. For recent examples of trials held by the Royal Court arising from backed-warrant procedure: *Attorney-General v McNally* [2015] JRC171 (arrest warrant for defendant relating to offences in Jersey backed in Glasgow); and *Attorney-General v Maria Ermelinda Abreu De Andrade* [2016] JRC020 (arrest warrant for defendant relating to offences in Jersey for which she absconded from the Island, backed in England, defendant surrendered when seven years later she moved from Madeira to London).

6.1.2 Summary

In sum, without a central authority acting in a procedural role, at least in the initial stages of the backed-warrant procedure, it is difficult to see how except by appeal, the types of human rights violations featuring in the above authorities may be avoided. Despite the inconsistency that stricter procedural measures such as executive involvement has with the comity/trustworthiness doctrine, these authorities offer persuasive support for the need to replace the dominant role of the police with a central authority.

6.2 Further recommendations relevant to the backed-warrant procedure

Another factor which limits the extent to which the role of the Central Authority may obviate risks to the arrested person's liberty interests is the degree to which other modifications designed to improve efficiency of the extradition process are consistent with enhancing human rights. Innovations proposed by the Commission, designed to create more transparency and efficiency, namely the Notice of Intention to Proceed (NIP)⁴⁶⁷ and an Issues Conference⁴⁶⁸ are relevant here. It is envisaged, that the Issues Conference will be the forum at which likely issues regarding human rights concerns are to be raised, in the hope that doing so will avoid unnecessary delay through multiple appeal processes.⁴⁶⁹

The following recommendations by the Commission are more closely related to the question of whether the Commission's proposed modifications are consistent with strengthening human rights under Part 4:

- (1) increasing the role of the judiciary and the breadth of grounds by which the judiciary may consider grounds for refusing surrender;⁴⁷⁰
- (2) further simplification of the backed-warrant procedure, especially in relation to Australia;⁴⁷¹ and
- (3) implementing appropriate NZBORA rights into the new Act;⁴⁷²

⁴⁶⁷ Report, above n 1, at [8.14]-[8.21]. See Extradition Bill, cls 26 and 39.

⁴⁶⁸ Report, above n 1, at [8.24]-[8.28]. See Extradition Bill, cls 31 and 42.

⁴⁶⁹ At [8.24]-[8.28].

⁴⁷⁰ At [13](b)(i)-(ii) and [5.11]-[5.17].

⁴⁷¹ At [7.9]-[7.30]; and Issues Paper, above n 1, at [6.22] and [11.14]-[11.17].

⁴⁷² Issues Paper, above n 1, at [1.28]-[1.29]; and Report, above n 1, at 6.

These three key recommendations are examined below with reference to how they will impact on the backed arrest warrant procedure in achieving the Commission's objective to strike the right balance between protecting the liberty interests of the person and the efficiency of the backed-warrant procedure.

6.3 Increasing the role of the judiciary

In order to balance the liberty interests of the requested person with the importance of international cooperation and comity, one measure proposed by the Law Commission in the new Act is to give more emphasis to the role of the court and less to the Minister in deciding all of the grounds for refusing surrender.⁴⁷³

The rationale for a shift away from the executive towards the judiciary in the extradition process, relates to decreasing the personal nature of the assessment that a Government Minister might face, obviating any political pressure attached to some decisions.⁴⁷⁴ This approach is consistent with other simplified schemes, namely the EAW and NAW that represent a departure from viewing extradition as an aspect of international relations in the hands of the executive.⁴⁷⁵ The Commission's concern to obviate any political pressure attached to some decisions is exemplified in the simplified schemes of Africa. On the one hand the South African Act is more judicialised by providing the judiciary with the same power to refuse surrender as the minister. One important exception relates to the breadth of issues on which the magistrate may exercise his/her discretion, notably the death penalty or any constitutional issues.⁴⁷⁶

In favour of extradition being judicialised, Kemp makes the following points:⁴⁷⁷

- (i) human rights and due process are best protected when viewed as an

⁴⁷³ Report, above n 1, at 6. See also Issues Paper, above n 11, at [8.18]. It is also suggested by the Commission, that the minister's decision to defer extradition for a period to resolve or treat personal concerns, under s 30 of the 1999 Act, should be given to the court and exist as a ground that should be combined with the proposed general injustice or oppression ground for the courts to consider under new extradition legislation. In relation to that ground, the Commission reinforces that a high threshold would be needed before that ground would apply.

⁴⁷⁴ Report, above n 1.

⁴⁷⁵ Watney, above n 24, at 297.

⁴⁷⁶ *Misozi Chathunya v S*, above n 415.

⁴⁷⁷ At 297. Citing Kemp, above n 24.

extension of the criminal justice system rather than as a matter of international relations; and (ii) the aim of extradition should be effective criminal justice (with the concomitant requirements of due process and human rights protection) rather than interstate relations.

It is important to highlight that the executive and judicial role in the standard and backed-warrant procedure are quite differentiated. In the standard procedure the decision to extradite a person is ultimately an executive one whereas in the backed-warrant procedure, the decision to refer the matter to the minister is a judicial one. In most respects, the backed-warrant procedure under Part 4 is comparatively more judicial in nature. This is exemplified in s 18 of the 1991 Act which requires requests for surrender to be transmitted to the Minister of Justice as opposed to Part 4, which is in fact silent on this point. For this reason, it is appropriate to confine the following examination to the question of whether the comparatively more judicialised backed-warrant procedure provides support for the proposition that the New Zealand courts are better placed to protect human rights interests.

It is questionable whether Kemp's confidence in the judiciary to protect the liberty interests of the person, can be applied to the New Zealand judiciary. To some extent, what erodes confidence in the preparedness of the New Zealand judiciary to use its own inherent power to avoid trials or processes oppressive to the accused is Richmond P's disavowal of *Bennett* when reflecting on it in *Moevao v Department of Labour*.⁴⁷⁸

However, and as a result of reading what was said in *Humphrys* and the Canadian cases, I am now inclined to the view that *Bennett's* case could not have been properly disposed of on the basis that the prosecution was an abuse of process. That is because I now see difficulty in using the oppressive conduct of the police towards *Bennett* to support an argument that the process of the Supreme Court was itself being abused. However my purpose in mentioning the matter is merely to sound a warning. The question whether illegal or "unfair" conduct by the police in the course of investigating a crime can so taint a subsequent prosecution as to render it an abuse of process must remain for determination in a suitable case...

⁴⁷⁸ *Moevao v Department of Labour* [1980] 1 NZLR 464 at 470 per Richmond P.

According to the reasoning of *Richmond P*, had Samson been surrendered to New Zealand without a valid endorsed warrant, it is doubtful that he would escape prosecution on his return, leaving it open to question whether the person's fundamental rights are better protected by the judiciary here in New Zealand. This comment, however, occurred a decade prior to the implementation of the NZBORA. More protection is likely to be afforded to the person if it can be established that there has been a breach of BORA rights. This depends, however, on the preparedness of the judiciary to recognise the applicability of the NZBORA to the backed-warrant procedure (a matter discussed below).⁴⁷⁹

The degree to which the person's liberty interests are better protected by the New Zealand courts, also depends on the degree of importance placed on comity, it being a core assumption that a person will receive a fair trial in Australia. Closely linked to this is the Commission's confidence in the courts' ability to give a more objective assessment of the risk and threshold standard.⁴⁸⁰ It is argued that the amorphous concept of comity lessens the strength of this proposition. Ultimately how comity is construed plays an important role in determining the importance of the person's liberty interests.

Notwithstanding these weaknesses, *Bennett* lends support to the rationale for shifting the emphasis away from the executive to that of the judiciary because of the important role it has in assessing whether the accused should be surrendered.⁴⁸¹ A principled case for the increased role of the judiciary in the backed-warrant procedure, may be strengthened if the Commission's third recommendation to

⁴⁷⁹ Also applicable to the backed-warrant procedure are New Zealand's international obligations as follows: United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987) available at <www.unhcr.org>; Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) A/Res/59/199 (2006); CRC GA Res 44/25 (opened for signature 29 November 1989, entered into force 2 September 1990) <www.ohchr.org>; ICCPR 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976); ICESCR GA Res 2200A, XXI (opened for signature 16 December 1966, entered into force 3 January 1976) <www.unhcr.org>; International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) GA Res 2106, XX (opened for signature 21 December 1965, entered into force 4 January 1969) available at <www.unhcr.org> and the Second Optional Protocol to the International Convention on Civil and Political Rights, aiming at the abolition of the death penalty 1642 UNTS 414 (opened for signature 15 December 1989, entered into force 11 July 1991).

⁴⁸⁰ Issues Paper, above n 1, at [8.18].

⁴⁸¹ M Cherif Bassiouni, above n 12, at 650-651.

implement NZBORA rights comes to fruition and there is focus on developing the concept of comity in a way that accommodates the importance of human rights.

6.4 Increasing the breadth of judicial discretion

The Commission recommends that the courts be granted a broader discretionary power of the Court under s 8(1) in order that the courts rather than the Minister be given responsibility for deciding whether there exists to the requisite standard “extraordinary and compelling circumstances”. Another important change, is that the judiciary will no longer exercise a discretion in refusing surrender but will be compelled to refuse surrender if grounds are established.⁴⁸²

6.4.1 Proposed new “unjust or oppressive” provision

Initially, the Commission proposed removal of some or all of the grounds for refusing surrender, placing great emphasis on the importance of comity and reciprocity with Australia.⁴⁸³ Removal of the grounds for refusing surrender would place the backed-warrant procedure in a similar position to the British Islands and UK simplified scheme under the 1848 Act. However, in its Report tabled February 2016 by the Minister of Justice, the Commission abandoned this proposal because it was concerned to strike the correct balance between the importance of upholding New Zealand’s human rights values and the need to maintain the integrity of a simplified process.⁴⁸⁴ In practical terms, the Law Commission viewed that any delays would be circumvented by having those grounds considered at the extradition hearing after being raised by the respondent at the Issues Conference.⁴⁸⁵

The human rights rationale for deciding against removal of some or all of the grounds for refusal in respect of Australia is problematic. This suggests that the Commission either developed some doubts in respect of the degree of comity that is said to exist between New Zealand and Australia or has plainly contradicted itself. For instance, not only has the Commission recoiled from its bold proposal to remove grounds for surrender in the case of Australia (and by doing so suggests it considers that human rights protections are on par with New Zealand), the

⁴⁸² Report, above n 1, at [5.1].

⁴⁸³ Issues Paper, above n 1, at [6.22]-[6.23].

⁴⁸⁴ Report, above n 1, at 53.

⁴⁸⁵ At 53.

Commission has then proposed stricter measures than currently exist under Part 4. This is exemplified by the Commission's failure to consider risks of impediment to the backed-warrant procedure through the proposed new "unjust or oppressive" provision, in that it makes s 45(2)(d) subject to a broader discretionary power of the court to refuse surrender.

Its breadth is found in its design to capture all circumstances where extradition would be unjust or oppressive. Having considered various definitions recognised by a long line of authorities,⁴⁸⁶ the Commission proposed a measure designed to encapsulate the all-encompassing provision that the Minister enjoys in the discretionary grounds "compelling or extraordinary personal circumstances" and "any other reason" – discussed above. In the Issues Paper, the Commission recommended that a general ground be added: "any other sufficient cause", wording that is found in the London Scheme, and the equivalent "for any other reason" under Part 3, s 34(2) of the 1988 (Cth) Act.⁴⁸⁷

Described as the "corner-stone of our reform" the final result is reflected in clause 20 of the Bill that reads:⁴⁸⁸

- (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;

[emphasis added]

⁴⁸⁶ Issues Paper, above n 1, at [8.76]-[8.84].

⁴⁸⁷ At [8.78]. The words "for any other reason" were introduced in the Extradition (Commonwealth Countries) Amendment Act 1985 (Cth); see *Narain*, above n 430, at 479. See Extradition Act 1999, s 8(1); the London Scheme for Extradition within the Commonwealth (incorporating the amendments agreed in Kingstown in November 2002), formerly known as Commonwealth Scheme on the Rendition of Fugitive Offenders, adopted in 1966, art 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).

⁴⁸⁸ Report, above n 1, at 196

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 NZBORA;⁴⁸⁹ and (e) (ii) the “compelling or extraordinary personal circumstances” ground in s 30(3)(d) of the 1999 Act. In regard to the latter provision, the language has been imported from s 207 of the Immigration Act 2009, tailored to reflect a modernised concept of human rights issues.⁴⁹⁰ In this regard, the Commission has not considered the decisions that rightly or wrongly, distinguish deportation from extradition in considering grounds for refusing surrender.⁴⁹¹ 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* identified a trap that the courts have fallen into by focussing on “...some quite exceptionally compelling feature ...”⁴⁹² they tend to:⁴⁹³

... 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 context of a case that dealt with the issue of the rights to the child in context of the EAW, Lady Hale in (*H(H)*) emphasised “some potentially grave consequences are not out of the run of the mill at all”⁴⁹⁴ 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.⁴⁹⁵

What would make the New Zealand courts approach to an interpretation of the high threshold required more aligned to current jurisprudence, is to have the fundamental rights of the person more visible in New Zealand’s extradition law. Unlike the simplified schemes of Africa, which is clearly

⁴⁸⁹ Report, above n 1, at 196. For example *Soering v United Kingdom* (1989) 11 EHRR 439 (ECHR) is cited as the source of wording “flagrant denial of a fair trial”.

⁴⁹⁰ Report, above n 1, at 196.

⁴⁹¹ *Radhi*, above n 179; and *Mercer – Court of Appeal*, above n 185.

⁴⁹² *Norris*, above n 239, at 56 per Lord Mance.

⁴⁹³ At 109, per Lord Mance.

⁴⁹⁴ *H(H)*, above n 228, at [32] per Lady Hale.

⁴⁹⁵ At [32] per Lady Hale.

capable of diminishing the importance of human rights, the Part 4 backed-warrant procedure is not governed by treaty arrangements.⁴⁹⁶

It is notable, that the Commission's interpretation of the "unjust or oppressive" limb, conflicts with that of two recent Court of Appeal decisions in *Mercer* and *Mailley*. Instead of looking to English cases namely *Kakis*, as a guide to determining the boundaries of such a broad term, the Commission has chosen the Canadian threshold. More puzzling is that the decision in *Mercer – Court of Appeal*, preferred the definition expressed in *Kaki*⁴⁹⁷ whereas in *Mailley* it was rejected by the same court in favour of its own earlier analysis in *Wolf*. Nevertheless, the analysis in *Wolf* accords better with the distinction between "circumstances of the person" and "circumstances of the case".⁴⁹⁸ However, the new unjust or oppressive provision makes no such distinction, allowing for broader circumstances to fall under consideration and which in turn will enhance human rights.

The Canadian threshold for standard extradition requires the circumstances to "shock the conscience"⁴⁹⁹ or be "fundamentally unacceptable to our notions of fair practice and justice."⁵⁰⁰ 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.⁵⁰¹

In some measure, the new unjust and oppressive provision, conflicts with the Commission's recommendation to further simplify the backed-warrant procedure, because it risks lengthy delays by placing emphasis on the liberty interests of the person. Further, under the new Act, the judiciary will no longer exercise a discretion in refusing surrender but similar to the EAW, will be compelled to refuse surrender if grounds are established.⁵⁰²

⁴⁹⁶ See *Tsebe*, above n 16.

⁴⁹⁷ *Mercer – Court of Appeal*, above n 185, at [33]-[34] and [53]-[55].

⁴⁹⁸ *Mailley – HC review decision*, above n 207; and *Mailley – 2016 appeal*, above n 210, at [39]. See *Wolf v Federal Republic of Germany* (2001) 19 CRNZ 245 (CA).

⁴⁹⁹ Report, above 1, at 196; citing *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3.

⁵⁰⁰ At 196.

⁵⁰¹ At 196.

⁵⁰² At [5.1].

What this suggests is that the Commission has revised its position in regard to unchallenged assumptions about comity with Australia and instead introduced a much stronger human rights provisions. It is argued that the Commission's new scepticism is warranted and accords with Australia's emphasis on protecting the liberty interests of the person in context of the backed-warrant procedure. In support of this argument, the following paragraphs examine an historical tendency for the Australian courts to interpret the equivalent provision under the Australian Act, in a way that subordinates comity in favour of protecting the liberty interests of the person.

6.4.2 *Comity applied by Australia*

6.4.2.1 *S 34(2) exception under the Extradition Act 1988 (Cth)*

Initially, the Commission considered that the case for removal of grounds for refusing surrender is strongest in relation to Australia whose extradition legislation already accommodates New Zealand in this way under the Extradition Act 1988 (Cth) Act ("1988 (Cth) Act"). 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."⁵⁰³

The Commission correctly recognises that the only statutory bar to surrender is found in s 34(2) of the 1988 (Cth) Act.⁵⁰⁴

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".

That being said, 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

⁵⁰³ *Moloney – Full Court*, above n 186, at [143].

⁵⁰⁴ Report, above n 1, at [7.21].

broad grounds for refusal,⁵⁰⁵ equivalent to what might be considered by the Minister under s 48 of the Extradition Act 1999 Act (NZ) (“the 1999 Act”).⁵⁰⁶

The historical background of s 34(2) is worthy of mention as it highlights the Commission’s misconception of there only being a single statutory bar to surrender in Australian law. The historical origins of s 34(2) is linked to the intention of the Australian Parliament to bring the backed-warrant procedure with New Zealand into line with interstate extradition (the SEPCA 1901) by widening the scope for a refusal to surrender.⁵⁰⁷ 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.⁵⁰⁸

In this way 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”.⁵⁰⁹ Aside from an enduring rhetoric about the particular comity that is said to exist under Part 4, there is an unchallenged assumption that recognition of comity, is a two-way street as far as Australia is concerned.

To illustrate, the meaning given to the words “unjust” and “oppressive” in context of s 34(2) has relied on *Binge v Bennett* as the basis for refusing surrender. It is significant that *Binge v Bennett* was decided under the SEPA 1901. In that decision Mahoney JA said:⁵¹⁰

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.

⁵⁰⁵ EP Aughterson, above n 11, at 242.

⁵⁰⁶ *Radhi*, above n 179, at 55.

⁵⁰⁷ *Kenneally v New Zealand* (1999) 166 ALR 625 at [46]-[47]. For example *Bannister v New Zealand* [1999] [Bannister] FCA 362, (1999) 86 FCR 417.

⁵⁰⁸ Extradition (Commonwealth Countries) Amendment Act 1985 (Cth).

⁵⁰⁹ Report, above n 1, at [7.20].

⁵¹⁰ *Binge v Bennett* (1988) 13 NSWLR 578 at 596 in *Moloney – Full Court*, above 186, at [68].

What this shows, is 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. Moreover, comity does not apply to the SEPA 1901, yet the SEPA 1901 has been influential in shaping an interpretation of s 34(2) of the 1988 (Cth) Act. One problem for the presumption of similarity underpinning comity is that under the SEPA 1901 matters considered by the courts include inter alia, 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 practise, as we shall see, 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 important question of whether the backed-warrant procedure under the new Act and therefore, subject to the new unjust and oppressive provision, 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 liberty interests of the person. It is argued that this is a better approach in respect of protecting the liberty interests of the person sought for surrender. Consequently, the importance of considering human rights grounds will be set at a level similar to that of its Australian counter-part under s 34(2).

On the other hand, the Commission is unlikely to have intended such a broad provision to cover cases in which the ability of Australia's legal system to guarantee a fair trial is called into question. Against the option of a narrower provision, the Commission viewed 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."⁵¹¹

⁵¹¹ Report, above n 1, at 194.

Procedurally, the Commission anticipates that the delays in having grounds for refusal unsuccessfully raised, will be circumvented by having these grounds considered by the Court at the extradition hearing, after having been raised by the respondent at the Issues Conference.⁵¹² In 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.”⁵¹³ It is argued that viewed in this way, the proposed Issues Conference mechanism has degraded the Commission’s new scepticism by allowing comity to prevail.

Illustrative of the tendency to place too much emphasis on comity is the Australian Federal Court decision *Moloney & Garchow v New Zealand (Moloney – Federal Court)*⁵¹⁴ and the impact that decision had on the New Zealand High Court bail decision in *R v PGD*⁵¹⁵ where the appellant had been surrendered from Australia to face historic sexual abuse charges in New Zealand.⁵¹⁶ Similar to *Moloney – Federal Court* the two accused were subject to a request for surrender to New Zealand 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

⁵¹² Report, above n 1, at [7.12].

⁵¹³ Issues Paper, above n 1, at [8.137]–[8.138]; and Report, above n 1, at [7.30].

⁵¹⁴ *Moloney – Federal Court*, above n 421.

⁵¹⁵ *R v PGD* HC Wellington CRI-2005-085-5692 24, 28 April 2006.

⁵¹⁶ At [14]–[15].

warning”.⁵¹⁷ This mandatory requirement was said to contrast with the New Zealand position that does not accept the directions required by the Longman warning.⁵¹⁸

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.⁵¹⁹

After examining the decision of the primary judge in *Moloney – Federal Court*, 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.⁵²⁰

Although Ronald J challenged the soundness of that reasoning,⁵²¹ it is important to note, 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.⁵²²

What Ronald J did not have, however, was the advantage of the decision in October 2006 by the Full Bench of the Full Court (*Moloney – Full Court*). The Full Bench of the Full Court held that it was not established that it would be unjust to return the respondents to New Zealand.⁵²³ Accordingly, the magistrate’s decision to order release of the accused was quashed and instead, their surrender to New Zealand was ordered and costs awarded against them.⁵²⁴

⁵¹⁷ *Longman v R* (1989) 168 CLR 79.

⁵¹⁸ At [11]. See *Moloney – Full Court*, above n 186; and *Moloney – Federal Court*, above n 421.

⁵¹⁹ *Moloney – Full Court*, above n 186, at [11].

⁵²⁰ At [11]-[12].

⁵²¹ *R v PGD*, above n 515, at [13].

⁵²² At [11].

⁵²³ At [231], [233]-[235].

⁵²⁴ 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.

In terms of the *Longman* warning, the Full Bench of the Full Court was not persuaded that disparity between its requirement in Australia and the flexible approach towards it in New Zealand was as significant as the accused (respondents) contended.⁵²⁵ 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 as laid down in *R v M*.⁵²⁶ The 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.⁵²⁷

The assumption that any trial in New Zealand will be fair was reinforced in the following passages:⁵²⁸

[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 practise 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 re-settle the trustworthiness doctrine. In *Bannister v New Zealand (Bannister)* 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.⁵²⁹ Because New Zealand sought the extradition of the accused to face trial

⁵²⁵ At [219].

⁵²⁶ *R v M* unreported, CA187/95, 13 November 1995, cited favourably.

⁵²⁷ *Moloney – Full Court*, above n 186, at [222], [226].

⁵²⁸ *Moloney – Full Court*, above n 186. These passages have been cited favourably in subsequent decisions. For instance *Newman v New Zealand* [2011] QSC 257 at [9]. See also *M (M) v United States of America* [2015] SCC 62, 2015 CSC 62 at [119]-[120].

⁵²⁹ *Bannister*, above n 507.

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.”⁵³⁰ It should be noted that *Bannister* was influential in the *Moloney* litigation⁵³¹ and although, the Full Court determined that Madgwick J failed to apply the ratio in *Bannister* correctly to the facts of the case,⁵³² the Full Court rejected New Zealand’s contention that *Bannister* should be overruled.⁵³³

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 (Johnston – Federal Court)*.⁵³⁴ 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 is appropriate. The trustworthiness doctrine is not settled because such breaches of comity observed in the lower appellate courts of Australia only surface on appeal.

6.4.2.2 *Hidden evidential threshold under the “interests of justice” limb*

Another breach of comity by Australia relates to one qualification given to a prohibition against consideration of the strength of the case against the person sought for surrender to New Zealand.⁵³⁵ This exception is triggered under s 34(2) based upon the “unjust or oppressive” limb. 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

⁵³⁰ At [13].

⁵³¹ At [129].

⁵³² *Moloney – Full Court*, above n 186, at [202]-[204].

⁵³³ At [132], [139].

⁵³⁴ *Johnston – Federal Court*, above n 534.

⁵³⁵ Extradition Act 1988 (Cth), s 34(4). This provision corresponds to s 45(5) of the 1991 Act (NZ). See *Moloney – Full Court*, above n 186, at [33].

oppressive.⁵³⁶ This exception was discussed by the Full Court in *Moloney* as being “... the sole qualification to the rule that courts of the requested state are not concerned with the strength of the case against the accused...”⁵³⁷ The origins of this exception have been traced to the SEPA 1901 as explained above. In *Kenneally*, the Full Court said:⁵³⁸

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 under Part III of the 1966 Act may be seen in numerous cases dealing with surrender of the requested person from Australia to New Zealand.⁵³⁹ These cases 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”.⁵⁴⁰ These expressions were derived from *Willoughby v Eland* and *Bates v McDonald*.⁵⁴¹ Moreover, the Australian judiciary consider that the expression “or for any other reason, it would be unjust, oppressive or too severe a punishment” under s 34(2) of the 1988 (Cth) Act should be construed in accordance with various cases determined under the SEPA 1901.⁵⁴²

⁵³⁶ 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.

⁵³⁷ *Moloney – Full Court*, above n 186, 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* (1966) 86 WN (Pt 1) (NSW) 142.

⁵³⁸ *Kenneally – Full Court*, above n 507, at [46]-[47].

⁵³⁹ *Bates*, above n 536, at 95,100 and 102.

⁵⁴⁰ At 95. Considered in *Moloney – Full Court*, above n 186, at [59].

⁵⁴¹ *Willoughby v Eland* (1985) 79 FLR 130 at 134; and *Bates*, above n 536, at 95.

⁵⁴² For example *Ex parte Klumper*; *Re Services and Execution of Process Act* (1966) 86 WN (Pt 1) (NSW) 142; *Rider v Champness* [1971] VR 239; *Re Alstergren & Nosworthy* [1947] VLR 23; and *O’Donnell v Heslop* [1910] VLR 162. Considered in *Kenneally - Full Court*, above n 507, at [50]-[51].

Although a finding of injustice or oppression under this exception is not treated lightly,⁵⁴³ 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.⁵⁴⁴

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 v McDonald was an appeal against a magistrate's order for surrender from Australia to New Zealand under the 1966 Act, prior to 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".⁵⁴⁵ Contrary to there being no prima facie requirement, the Court held that it may examine the 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.⁵⁴⁶ 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.⁵⁴⁷ Kirby P narrowed the issue of injustice

⁵⁴³ *Moloney - Full Court*, above n 186, at [35]. See also *Kenneally - Full Court* above n 507, at [55].

⁵⁴⁴ Report, above n 1, at [7.41].

⁵⁴⁵ *Bates*, above n 536. See Kirby P at 95; and Samuels JA at 100 and McHugh JA at 104. Cited in *Moloney - Full Court*, above n 186, at [60].

⁵⁴⁶ *Bates*, above n 536, at 100. See *Willoughby v Eland* (1985) 79 FLR 130 at 151-152 followed. But see *Daemar v Parker* (1975) 45 FLR 405 [*Daemar*] at 409. Yelham J considered that unlike Part II of the Act there is no provision in Part III corresponding to s 17 of the Service and Execution of Process Act 1901, that allows the powers of the magistrate and of the court to examine whether there was any evidence sufficient to justify an order for committal.

⁵⁴⁷ *Bates*, above n 536.

or oppression to where “there were no scintilla of evidence”.⁵⁴⁸ In this sense, there is a standard of evidence applicable to Australia’s backed-warrant procedure, albeit an extremely low one.

Not all cases under the 1966 Act have shown uniformity of opinion as to whether an accusation would not be “in the interests of justice” if it was made to appear beyond argument that no case could be made out.⁵⁴⁹ Notwithstanding concern about the evidence relating to the charge against the accused sought for extradition to New Zealand, Yelham J in *Daemar v Parker (Daemar)* believed that the s 27(b) “interests of justice” exception precluded a magistrate to refuse surrender in a case in which it appeared that the prosecution must fail.⁵⁵⁰ In contrast, Hope JA in *Willoughby v Eland* expressed a contrary view.⁵⁵¹

The conclusion of Yelham J in *Daemar*, was largely based upon his examination of the SEPA 1901 (repealed) relating to interstate extradition, which is apparently regarded as analogous to the backed-warrant procedure under Part III in regard to New Zealand. In particular, s 18(6)(b) of the SEPA 1901 allowed for considerable flexibility (which contained a provision, “for any other reason, it would be oppressive to return the person” under s 18(6)(c)) and 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”.⁵⁵² Finding that there was a corresponding provision under Part II but not Part III of the 1966 Act, Yelham J, expressed a need for legislative change to bring Part III into line with s 18(6)(b) of the SEPA 1901.⁵⁵³

In *Narain*, Wilcox and Jackson JJ considered that the insertion in s 27, by the 1985 amendments, of a reference to “or for any other reason” reconciled these two

⁵⁴⁸ *Bates*, above n 536.

⁵⁴⁹ *Bates*, above n 536, at 102.

⁵⁵⁰ *Daemar*, above n 546, at 409. See *Narain*, above n 430.

⁵⁵¹ *Willoughby v Eland* 79 FLR 130 at 134-135. Followed in *Bates*, above n 536.

⁵⁵² *Daemar*, above n 546, at 407. Referring to *Aston v Irvine* (1955) 92 CLR 353 at 366; [1955] ALR 890 at 894. The High Court in dealing with an application under s 18 subsection (6) of the Service and Execution of Process Act 1901 said: “It would be unjust or oppressive to return the accused to Adelaide if the facts as they are alleged or appear make it clear that there was no indictable conspiracy.” See also *Ex parte Klumper* (1966) 86 WN (Pt 1) (NSW) 142. Section 18(6)(b) corresponds with s 19 of the Fugitive Offenders Act 1881 (UK).

⁵⁵³ *Daemar*, above n 546, at 411.

sections.⁵⁵⁴ 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 1901.⁵⁵⁵ In *Narain*, a Full Court of the Federal Court reinstated a surrender order under the amended 1966 Act, which had been set aside by the primary judge. In that case, Wilcox and Jackson JJ noted that a court is justified in refusing extradition “where it positively finds that the offence was not committed”.⁵⁵⁶ In a statement of some significance to the exception of no evidential threshold, it was held:⁵⁵⁷

...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 (Kenneally)* based on it being unjust to surrender the accused. In that case, the requested person was sought for surrender from Australia to New Zealand in relation to drug offences. Kenneally then appealed to the Supreme Court of NSW against the decision of the magistrate to order his surrender. In the review proceedings, the primary judge allowed evidence from the respondent (New Zealand) to be adduced in support of its application for Kenneally’s surrender. That being decided, the evidence adduced consisted of affidavit evidence from the New Zealand and Australian Police of which had annexed two versions of a transcript of intercepted conversations as well as audio discs.

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”.⁵⁵⁸ Having considered the evidence before him, the primary judge dismissed the application for review on two bases. First, that it was not for an Australian

⁵⁵⁴ *Narain*, above n 430.

⁵⁵⁵ *Kenneally*, above n 507, at [47].

⁵⁵⁶ At [424]. Cited in *Moloney – Full Court*, above n 186, at [61].

⁵⁵⁷ *Narain*, above n 430, at 8.

⁵⁵⁸ *Kenneally*, above n 507, at [24]. In advancing his case, Kenneally relied upon a number of authorities such as *Bates*, above n 536; *Willoughby v Eland* (1985) 79 FLR 130 at 134; 59 ALR 147 at 152; *New Zealand v Venkataya* (1995) 57 FCR 151 at 165; and *Narain*, above n 430, at 419.

magistrate, or judge on review to decide which version of the transcript of the intercepted conversation was the more accurate.⁵⁵⁹ Second, it could not be assumed that there was no other evidence available to support the charges. In regard to that point, the primary judge distinguished *Bates* where there had been committal proceedings.

Kenneally then appealed to the Full Court of Federal Court of Australia⁵⁶⁰ against the decision of the primary judge. The Full Court held that the evidence upon which New Zealand authorities based its charges against the requested person, fell substantially below the prima facie standard. The Full Court said:⁵⁶¹

...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 being prepared to assume that there was no other evidence, apart from the taped conversation, the Full Court reasoned that the standard of proof which must be met is the civil standard only. Although it has been described as an unusual case,⁵⁶² *Kenneally* remains current authority for there being an exception to the no evidence requirement.⁵⁶³ In accord with the test enunciated in *Bates*, a Full Court determined that it would be “unjust” for the appellant to be surrendered to New Zealand.⁵⁶⁴

In contrast, the Full Court in *New Zealand v Johnston* (*Johnston – Full Court*) was led into making a comment about the no evidence approach when determining that the primary judge had erred in concluding that delay had rendered the accused’s trial unfair because his reasons were speculative as to how the delay might prejudice the accused’s trial.⁵⁶⁵ The Full Court noted that the approach taken by the primary

⁵⁵⁹ *Kenneally*, above n 507, at [38].

⁵⁶⁰ *Kenneally v New Zealand* [1991] FCA 1320.

⁵⁶¹ *Kenneally- Full Court*, above n 507, at [56].

⁵⁶² At [79].

⁵⁶³ *Kenneally*, above n 507.

⁵⁶⁴ In *Moloney – Full Court*, above n 186, at [79].

⁵⁶⁵ *Johnston – Full Court*, above n 186, at [120]; and *Johnston – Federal Court*, above n 534, at [54] and [58].

judge elevated speculation into fact.⁵⁶⁶ It also noted the tendency for counsel for the first respondent to argue that the Full Court should 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 first respondent to New Zealand in order to meet that case.⁵⁶⁷ In response, the Full Court said:⁵⁶⁸

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.

Despite what is emphasised by the Full Court in *Moloney*, that judicial intervention relating to evidence and strength of prosecution case in extradition of the requested person should only occur in the most exceptional of circumstances,⁵⁶⁹ the lower court decision in *Johnston – Full Court*, exemplifies that the concept of comity has not been properly understood and applied, let alone reflects an embodiment of reciprocity.

In principle the evidential threshold exception could be invoked under the “unjust or oppressive” limb of s 8(1) of the 1999 Act 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 -2016 appeal* where the Court considered *Moloney – Full Court*.⁵⁷⁰ In context of the backed-warrant procedure under the 1881 Act, Justice Salmond, in *Re Murray Ross*, conceded that it was conceivable to find cases in which:

... 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

⁵⁶⁶ *Johnston – Full Court*, above n 186, at [120], [122].

⁵⁶⁷ At [133].

⁵⁶⁸ At [134].

⁵⁶⁹ *Moloney – Full Court*, above n 186.

⁵⁷⁰ *Mercer – Court of Appeal*, above n 185, at [50].

exercised in accordance with the terms of that section. But the present is not a case of that description.⁵⁷¹

Some would argue that the evidential threshold approach would not succeed in the New Zealand courts because of comparatively stricter adherence to comity. Further, the tendency of the lower courts in Australia allowing comity to play a less restrictive approach in deciding whether or not to refuse surrender appears to be driven by the analogy drawn between backing of warrants under s 18 of the SEPA 1901 and backing of warrants in relation to New Zealand under Part 3 of the 1988 (Cth) Act.⁵⁷² Judicial interpretation of one enactment that relies upon another in this way, undermines the whole procedure of backing of warrants.⁵⁷³ Notwithstanding this practise, 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 Commission's introduction of a broader unjust or oppressive provision, the judiciary may be willing to follow this practise, particularly on the basis of reciprocity in how warrants are treated.

6.4.3 *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, or otherwise, of the New Zealand criminal justice system.⁵⁷⁴ On the one hand, there is merit in introducing broader grounds for refusing surrender from a human rights point of view. On the other, it is contestable whether the Issues Conference and NIP are adequate measures to obviate risking harm to the expediency of the backed-warrant procedure, if say the New Zealand judiciary showed a willingness to apply the exception to the no evidence requirement as recognised by Australian authorities.

Unsurprisingly, the scope of s 34(2), has resulted in a significant number of impediments to surrender of persons from Australia to New Zealand in regard to allegations of serious offences. That being said, the above authorities show that the

⁵⁷¹ *Re Murray Ross*, above n 69, at 296.

⁵⁷² *Samson*, above n 453.

⁵⁷³ Various authorities have regarded the SEPA 1901 as interchangeable with Part 3 of the 1988 (Cth) Act. See *Moloney – Full Court*, above n 186; *Narain*, above n 430; and *Johnston – Full Court*, above n 186; *Kenneally*, above n 507; and *New Zealand v Venkataya*, above n 558.

⁵⁷⁴ *Moloney – Full Court*, above n 186.

judicial approach in Australia towards s 34(2) has not been a unified one. In general, the lower courts have allowed comity to play a less restrictive approach in determining grounds for surrender under s 34(2). It is concerning that this breach of comity has not been determined until it reaches the higher appellate courts. Consequently, these findings undermine the comity/trustworthiness doctrine upon which the Commission's rationale relies.

6.5 Further simplification of the backed-warrant procedure

As part of the aim to further simplify the backed-warrant procedure, the Commission in its Issues Paper proposed treating Australia even more "favourably" by placing it in a category of its own under the new Act.⁵⁷⁵ In deciding whether differentiation from other categories of countries is necessary, the Law Commissioner considered:⁵⁷⁶

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

For these reasons, the Commission entertained the possibility of removing the requirement of speciality, a step which acknowledges what are purportedly more relaxed provisions under Part 3 of the Australian Extradition Act 1988 (Cth) in regard to New Zealand.⁵⁷⁷

The possibility of Australia not having to meet the "extradition offence" test is more controversial.⁵⁷⁸ The Commission highlighted the observation that Australia is more relaxed towards extradition requests from New Zealand in not requiring there to be *inter alia* a seriousness threshold, double criminality or speciality.⁵⁷⁹ As to

⁵⁷⁵ Issues Paper, above n 1, at [6.21].

⁵⁷⁶ Report, above n 1, at 51; and Issues Paper, above n 1, at [6.22]–[6.24] and Q 13.

⁵⁷⁷ Issues Paper, above n 1, at [6.22] and Report, above n 1, at [7.9].

⁵⁷⁸ Issues Paper, above n 1, at [6.22].

⁵⁷⁹ Report, above n 1, at [7.20].

the seriousness threshold, the Commission has not recommended any change to Part 4, compared to the increase proposed under the standard procedure. The Commission has, however, recommended removing the requirement for Australia to establish double criminality and as mentioned earlier, removal of the requirement of Australia to comply with speciality.⁵⁸⁰

The case of *Radhi v New Zealand Police* was highlighted by the Commission as an illustration of the difficulties encountered in trying to meet the double criminality requirement.⁵⁸¹ That case involved an extradition request from Australia for Radhi who was sought in relation to an alleged people-smuggling offence. Radhi appealed to the High Court against the DCJ decision that he was eligible for surrender on the grounds that the offence for 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 is alleged to have occurred. Despite the broad approach relating to the conduct rule under s 5, 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 before the offence was complete.⁵⁸² 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 AFP.⁵⁸³ 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.⁵⁸⁴

In anticipation of further cases like *Radhi*, which it viewed as creating unnecessary impediment to extradition through the difficulties identified with an interpretation

⁵⁸⁰ Report, above n 12, at [7.17]. See draft Bill cl 123(3).

⁵⁸¹ *Radhi v New Zealand Police* [2013] NZHC 163; and Issues Paper, above n 1, at [5.19].

⁵⁸² *Police v Radhi* [2014] NZCA 327 at [15].

⁵⁸³ At [15].

⁵⁸⁴ At [15]-[27]. Related to the issue of double criminality is a discretionary restriction, namely s 8(2), that may be invoked by the person under s 45(4) of Part 4. Section 8(2) provides: on surrender exists if the person has been accused of an offence within the jurisdiction of New Zealand (other than an offence for which his or her surrender is sought), and the proceedings against the person have not been disposed of. Because of its overlap with the double criminality restriction, the Commission recommends that the matter of s 8(2) is better dealt with under s 32. See Issues Paper, above n 3, at [8.85]-[8.87]. See also *Plakas v Police*, above n 152.

of s 5, the Commission has contemplated further widening the conduct rule.⁵⁸⁵ Section 4 and 5 of the 1999 Act, reflect a modern approach in requiring that the conduct in question to be either in total or in part punishable under the laws of both the requesting and requested state (“the conduct rule”).⁵⁸⁶ This contrasts with the traditional, restrictive approach that required substantial correspondence between the offences in each country.⁵⁸⁷ The broader view accords with the London Scheme and the United Nations Model Treaty on Extradition.⁵⁸⁸

It is contestable, whether there is a sound basis for removing the requirement for Australia to establish double criminality.⁵⁸⁹ For example, the criminalisation of cartels in Australia is problematic because currently and somewhat controversially, it remains for New Zealand in the civil jurisdiction.⁵⁹⁰ The fact that Australia operates a dual civil and criminal system to regulate cartel conduct, weakens the principled basis for the removal of the double criminality requirement in regard to Australia. In this case, the new unjust or oppressive provision invoked on the grounds of being a trivial matter, is of no assistance to the person, because criminal sanction for cartel conduct includes up to 10-years imprisonment for individuals found to have committed a cartel offence.⁵⁹¹

My principal criticism of the Commission’s rationale for relaxing these restrictions, however, relates to Australia’s purported trustworthiness.⁵⁹² 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

⁵⁸⁵ Issues Paper, above n 1, at [5.21].

⁵⁸⁶ *Plakas v Police*, above n 152; and Issues Paper, above n 1, at [5.15].

⁵⁸⁷ Issues Paper, above n 1, at [5.15]; and EP Aughterson, above n 11, at 61. See also Gavan Griffith and Claire Harris “Recent Developments in the Law of Extradition” 6 (2005) MJIL 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.

⁵⁸⁸ 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 1, at [5.16].

⁵⁸⁹ Report, above n 1, at [7.24]–[7.27].

⁵⁹⁰ See Commerce Act 1986 (New Zealand) and Commerce (Cartels and Other Matters) Amendment Bill 2011 (New Zealand). See also Anna Kingsbury “Cartel regulation in New Zealand: undermining the per se rule?” (2016) 37(7) ECLR 282; and Jesse Tizard “Get Out of Jail Free: A Wrong Turn in New Zealand Cartel Regulation” (2016) 22 NZBLQ 46 at 49.

⁵⁹¹ Competition and Consumer Act 2010 (Cth), Part VI, s 79.

⁵⁹² Issues Paper, above n 1, at [7.9].

criminal investigation and prosecution systems include adequate checks and balances.⁵⁹³ These factors are said to assist in establishing the criteria by which countries may fall into a more simplified backed-warrant category. Another proposition is that trustworthiness is reflected in what the Commission regards as New Zealand's 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."⁵⁹⁴ However that statement is given in the context of private international law and different considerations arguably apply in that legal context which has a civil rather than criminal underpinning.⁵⁹⁵

Further, the trustworthiness doctrine as one of the factors underpinning the argument for further simplifying the backed-warrant procedure was substantially undermined in the *Samson* and *Bennett* litigation when in the latter case, the Court of Appeal recognised that proceedings against Bennett would amount to an abuse of process, given the circumstances in which his surrender had been achieved.⁵⁹⁶ As to human rights, Australia has shown a poor track record and has no enforced bill of rights legislation.⁵⁹⁷

There are loose criteria for surrender in some areas of the Australian backed-warrant procedure, giving the appearance of strong adherence to the principle of comity. However, 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 liberty 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. It is further

⁵⁹³ Report, above n 1, at [6.41]-[6.46].

⁵⁹⁴ 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) at Preamble.

⁵⁹⁵ See further John Turner "Enforcing Foreign Judgments at Common Law in New Zealand: Is the Concept of Comity Still Relevant" (2013) NZLR 653; and Thomas Schultz and Jason Mitchenson, above n 18.

⁵⁹⁶ *Bennett*, above n 80.

⁵⁹⁷ Ben Doherty, "Offshore detention may hurt Australia's bid for UN Human Rights Council seat" *The Guardian* (online ed, UK, 7 April 2017) <www.theguardian.com>. 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) <www.un.org>.

argued, that the aim to improve efficiency in the backed-warrant procedure, relies on the assumption that the backed-warrant procedure suffers the same complex and convoluted issues identified in the standard procedure.⁵⁹⁸

6.6 Implementation of extradition-appropriate NZBORA provisions

Since its passing, the New Zealand Bill of Rights Act 1990 (“the NZBORA”) and its relationship to extradition proceedings has attracted considerable judicial attention. The applicability of the NZBORA to extradition proceedings has been discussed under three main headings: (a) extraterritorial application; (b) criminal process rights (namely ss 24-25); and (c) classification of extradition proceedings. The primary issue for extradition proceedings, is the way some provisions of the NZBORA are aimed at protecting persons charged with an offence while others are aimed at more general rights.

In relation to the backed-warrant procedure, it is helpful to refer to relevant case law, particularly, the Supreme Court ruling in *Dotcom v The United States of America (Dotcom)*, the position of the Law Commission and comparative review with overseas jurisprudence.⁵⁹⁹ What is evident from this analysis, is that there has been little, if any, focus on how the issues identified with the NZBORA might differ in respect to the backed-warrant procedure, particularly in regard to Australia. Instead, the Commission’s review appears to be overshadowed by the issues raised in the *Dotcom* litigation. It is important to note that the *Dotcom* litigation addressed the issue of the NZBORA specifically in regard to the standard procedure. I will show that there are compelling reasons why some of the issues raised in *Dotcom* may be decided differently in context of the backed-warrant procedure.

6.6.1 Natural justice (s 27 of the NZBORA)

Section 27 of the NZBORA concerns the right to fundamental principles of justice, including the person’s liberty and freedom. Having considered these key values underpinning s 27, the Supreme Court in *Dotcom* held that s 27 of the NZBORA is applicable to extradition proceedings.⁶⁰⁰ It emphasised the importance of ensuring

⁵⁹⁸ Issues Paper, above n 1, at [1.7] and [9.63]. Referring to six years to process an extradition request in relation to *Bujak v District Court at Christchurch* [2009] NZSC 96 and *Bujak v Minister of Justice* [2010] NZSC 8 (see earlier extradition hearings). This was a case dealt with under the standard procedure however.

⁵⁹⁹ *Dotcom v The United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 [*Dotcom*].

⁶⁰⁰ *Dotcom v The United States of America*, above n 599.

that the content of natural justice be properly contextualised in the extradition setting.⁶⁰¹ Consequently, absence of a prima facie requirement under the Part 4 backed-warrant procedure, limits the extent to which s 27 is applicable, precluding the requested person from adducing evidence otherwise permissible under the standard procedure. Instead, its application underpins the concept of unjust and oppressive as it appears in s 19 of the 1881 Act (corresponding to s 8(1) of the 1991 Act).⁶⁰² Thus, notwithstanding the narrow scope of the discretionary power under s 8(1), it is likely that s 27 affords some protection to the accused under the Part 4, of the backed-warrant procedure.

To the extent that s 27 of the NZBORA may apply to the requested person in extradition proceedings, the courts approach in the backed-warrant procedure has been fairly consistent with *Dotcom*.⁶⁰³ These cases are considered below.

6.6.1.1 *Natural justice in context of the backed-warrant procedure*

Addressing natural justice, the Court in *Johnstone v Commonwealth of Australia*, viewed the applicability of NZBORA as helpful in assisting whether “it would be *“unjust”* or *“oppressive”* in terms of s 19 of the 1881 Act, to return the prisoner or whether an order should be denied because the Court's process has been abused”.⁶⁰⁴ Subsequently, the decision in *Franic v Wilson* clarified that the only bearing the NZBORA was found to have on the nature of submissions for the appellant, was s 27, in relation to a hearing under Part II of the 1881 Act with reference to section 19.⁶⁰⁵ Doogue J, sitting at the High Court, held that the DCJ was wrong in refusing the accused an application for adjournment of the proceedings in order to prepare a proper defence. Having considered Australian and New Zealand authorities,⁶⁰⁶ Doogue J made an interpretation of s 19, consistent with the applicability of s 27 and the right to obtain adequate particulars in being able to lead evidence. Doogue J was careful to differentiate an interpretation of s 19 from an interpretation of the Part II procedure, which like s 45 of Part 4 under the 1999 Act, precludes the

⁶⁰¹ At [118], [120] per McGrath J and Blanchard J.

⁶⁰² *Franic v Wilson*, above n 69.

⁶⁰³ *Dotcom v United States of America*, above n 599, at [184].

⁶⁰⁴ *Johnstone v Commonwealth of Australia* HC Christchurch A 266-98, 9 March 1999 [*Johnstone*].

⁶⁰⁵ *Franic v Wilson*, above n 69, at 320.

⁶⁰⁶ *Franic v Wilson*, above n 69. For example, *Callahan v Superintendent of Mt Eden Prison* [1992] 1 NZLR 541; and *Narain*, above n 427.

accused from adducing evidence and would be inconsistent with the applicability of s 27.⁶⁰⁷

This conclusion is consistent with the ruling in *Dotcom*, that the content of the right to natural justice is contextual.⁶⁰⁸ The relationship statutory context and subject matter have to s 27 was also highlighted in *McGrath* when the Court accepted that s 27 is applicable to the minister's consideration of the grounds for surrender, under s 30 of the 1999 Act.⁶⁰⁹ Strangely, the interpretation of s 27 in the *Dotcom* decision, was not considered by Mander J in *McGrath*. In a step that was telling of the judicial gap in determining how extradition cases should be classified (discussed below), Mander J looked to authorities solely in the civil jurisdiction.⁶¹⁰

6.6.2 *Criminal process rights*

Compared to more general rights, there are other NZBORA rights with dubious application to extradition, particularly those relating to the charging of an offence, namely ss 24-25.⁶¹¹ Based on the rationale that the NZBORA contemplates that these due process rights apply only to criminal trials in New Zealand, the defendants in extradition proceedings accused of an overseas offence, do not enjoy these protections. This is the current position in New Zealand arising from the majority ruling of the Supreme Court in *Dotcom* and one that is consistent with an earlier case decided by the High Court in *Callahan v Superintendent of Mt Eden Prison*.⁶¹²

6.6.3 *Extraterritorial application of the NZBORA*

Another difficulty is the limited scope of the NZBORA to New Zealand officials pursuant to s 3. Section 3 provides:

This Bill of Rights applies only to acts done—

- (a) by the legislative, executive, or judicial branches of the
Government of New Zealand; or

⁶⁰⁷ *Franic v Wilson*, above n 69, at 322, line 23; and 323, line 32.

⁶⁰⁸ *Dotcom v United States of America*, above n 599, at [50], [87], [120], [212], [281].

⁶⁰⁹ *McGrath v Ministry of Justice* [2015] NZAR 122 [Referral appeal decision] at [23]-[26].

⁶¹⁰ *McGrath*, above n 609. For instance *Webster v Auckland Harbour Board* [1987] 2 NZLR 129 (CA) at 132; *Furnell v Whangarei High Schools Board* [1973] 2 NZLR 705 (PC) at 718; and *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130.

⁶¹¹ Report, above n 1; *Dotcom v The United States of America*, above n 599. See also, with reference to s 18(1) of the NZBORA, *Franic v Wilson*, above n 69, at 321.

⁶¹² *Callahan*, above n 585.

- (b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

This means that the provisions in the NZBORA have not extended their applicability outside of New Zealand, such as to Australia Police conduct in New Zealand.⁶¹³ Nor has it extended the scope of s 3 to New Zealand Police conduct in Australia.⁶¹⁴ In advance of the proposition that there needs to be a liberal interpretation of s 3, the Court of Appeal in *Flickinger v Crown Colony of Hong Kong* adopted observations of the Privy Council in *Minister of Home Affairs v Fisher* that the provisions of the New Zealand Bill of Rights Act (in that case s 23(1)(c)) were to be construed generously so as to give individuals the full measure of the fundamental rights and freedoms referred to.⁶¹⁵ In accord with that reasoning, it is argued that the NZBORA ought to apply to New Zealand Police conduct overseas.

6.6.3.1 *Generality of the Dotcom determination to the backed-warrant procedure*

In relation to cases dealing with the backed-warrant procedure with Australia, the situation regarding the extraterritorial effect of the NZBORA and criminal process rights is not as clear cut. It should be noted that *Dotcom* was considered in the context of standard extradition pursuant to Part 3 of the 1999 Act, which I suggest, limits its application. The authorities examined in reaching that decision were also subject to the standard extradition process, such as *Callahan*⁶¹⁶ and *Poon*.⁶¹⁷

Absent of any comprehensive or clear direction of the ruling as it applies to the backed-warrant procedure, the issue remains open to question, whether decided in the context of the surrender process under Part 4, the Court may have approached

⁶¹³ *Johnstone*, above n 65, at 11.

⁶¹⁴ *R v Matthews* (1994) 11 CRNZ 564.

⁶¹⁵ Cited in *Plakas v Police*, above n 152, at [9]. See *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439. The Court adopted observations of the Privy Council in *Minister of Home Affairs v Fisher* [1980] AC 19, at 328-329.

⁶¹⁶ *Callahan*, above n 606.

⁶¹⁷ *Poon v Commissioner of Police* [2000] NZAR 70 (HC). See also consideration of *Canada v Schmidt* [1987] 1 SCR 500.

the matter of extraterritorial application and criminal process rights of the NZBORA differently.

This is primarily based on the rationale that human rights are at risk because there is no judicial supervision in the initial stages of the backing-of-warrant procedure, it being a police-to-police cooperation process.⁶¹⁸ While it is indisputable that appropriate weight must be given to comity and its role in loosening the criteria for surrender to Australia, this, in my view, should not be interpreted to deny the requested person the protections of the NZBORA for Australian Police conduct on New Zealand soil.

First, the inherent nature of surrendering a person to another country, let alone without establishing a *prima facie* case, is a serious matter because it interferes with the person's liberty interests.⁶¹⁹ *Bennett* and *Samson* are cases in point. These decisions illustrate the propensity for the Australian Police to abuse their authority in requiring New Zealand citizens to be removed to New Zealand. There are no protections against similar conduct of Australian Police in New Zealand, leaving it open for Australian Police to act in a way that is dissonant with key values held by New Zealand, as reflected in the NZBORA. Two decisions of relevance decided under the 1881 Act, are given in support of this argument and illustrate another distinction with *Dotcom* in the sense of there being persuasive authority from the High Court for the extraterritoriality application and criminal process rights of the NZBORA, at least as far as Australia is concerned. Strictly speaking, the following authorities deal with BORA rights in the context of mutual legal assistance as opposed to extradition/backed-warrants. However the overlap between these procedures maintains its relevance.

6.6.3.2 *New Zealand Police Conduct in Australia*

In *R v Matthews (Matthews)*, a New Zealand Detective was an observer in a party of Australian Police that attended the address of the accused for the purposes of executing a provisional warrant and search of Matthews' house. Matthews was later interviewed by the same detective for a charge of alleged sexual offending.⁶²⁰ The accused was sought for extradition in relation to sexual offending alleged to

⁶¹⁸ *Bennett*, above n 80; and *Samson*, above n 453.

⁶¹⁹ *Plakas v Police*, above n 152, at [10]. In reference to submission by counsel for Plakas.

⁶²⁰ *Matthews*, above n 614.

have occurred in New Zealand. The New Zealand High Court determined that Australian Federal officers executing a provisional arrest warrant and search warrant on Australian soil were not subject to the NZBORA, even though the purpose of the exercise related to a New Zealand crime. Nor was the New Zealand detective under any statutory power in Australia that might make him subject to the NZBORA.⁶²¹ Although s 23 was not held to be an applicable right if the interview is taking place outside New Zealand, Tipping J viewed that “as a matter of fairness that a New Zealand police officer wishing to interview a suspect overseas, in circumstances de facto covered by s 23, should give the suspect Bill of Rights advice as if the interview were taking place in New Zealand.”⁶²² This raises the issue of whether the Court has given s 23 of the NZBORA extraterritorial effect.

It is, however, a less persuasive argument for its relevance to the backing-of-warrant procedure. In considering s 23(1)(b) (the right to consult and instruct a lawyer without delay and be informed of that right), Tipping J was careful to characterise the applicability of BORA rights of Matthews arising from an interview with New Zealand police for the purpose of prosecuting Matthews, as opposed to any extradition-related purpose.⁶²³

6.6.3.3 *Australian Police conduct in New Zealand*

Matthews was considered in *Johnstone* in regard to the applicability of the NZBORA to Australian Police conduct in New Zealand. Similar to *Matthews*, there was an interview (“the interview”) with an Australian detective, characterised as being for the purpose of investigating an alleged sexual offending against an 11 year old boy, rather than for any purpose related to his surrender. On appeal the interview was one aspect to the contention that there had been unreasonable delays. The delay between the interview and in making the application for surrender of Johnstone was approximately two years.⁶²⁴

Judge Chisholm at the New Zealand High Court held that an Australian detective conducting an interview in a New Zealand with the a person later sought for surrender to Australia in relation to charges alleging sexual offending, was not

⁶²¹ At 1.

⁶²² At 567.

⁶²³ At 566.

⁶²⁴ *Johnstone*, above n 604, at 2.

subject to the NZBORA.⁶²⁵ His Honour reasoned that protection of BORA rights in this context will likely depend upon satisfying the Court that the Australian authority is “performing a public function, power or duty conferred or imposed on him by or pursuant to law” under s 3(b) of the NZBORA.⁶²⁶ On the facts, Judge Chisholm inferred that the Australian detective was “probably not performing a public function,”⁶²⁷ Judge Chisholm’s decision reflects an unwillingness by the judiciary to place too liberal an interpretation on s 3 of the NZBORA, whereupon a broader interpretation might concur with the proposition that an Australian police officer is acting “officially” under New Zealand law.

After examining the evidence relating to the interview with the Australian detective, Chisholm J, determined that even if the NZBORA was applicable in the present case, there was no prejudice to the accused in the sense of s 24 (a) (“shall be informed promptly and in detail of the nature and cause of the charge”) and s 24(c) (“shall have the right to consult and instruct a lawyer;”).⁶²⁸ In regard to the latter, Justice Chisholm held that whilst it would have been a breach of the NZBORA, His Honour determined there had been no specific prejudice. Instead, Justice Chisholm accepted the submission by counsel for the respondent, (Commonwealth of Australia) that there had been no admissions or confessions and at the most an inconsistency which could be elevated to a lie.⁶²⁹

A different approach is found in *Matthews* however. Justice Tipping held that the NZBORA is a good indication of what is to be regarded as fair conduct on the part of those investigating New Zealand crimes overseas, including BORA advice as if the interview were taking place in New Zealand. Assimilating that reasoning with the circumstances in *Johnstone*, it is contested that the NZBORA should at the very least, be regarded as a good indication of what is to be regarded as fair conduct on the part of those involved in facilitating the investigation of Australian crimes including BORA advice when the interview is taking place in New Zealand.

⁶²⁵ At 11.

⁶²⁶ At 11.

⁶²⁷ At 11.

⁶²⁸ At 14.

⁶²⁹ At 14-15.

In particular, Justice Tipping held that “if the suspect does wish to have legal advice the obtaining of that advice from a “lawyer” should be facilitated to the extent reasonably possible according to the circumstances prevailing.” In the case of *Johnstone*, the provision of the suspect’s BORA rights, namely the right to a lawyer, could have been facilitated under far less complicated circumstances than in *Matthews*. Instead, Justice Chisholm chose to focus on fairness in terms of any specific prejudice at trial resulting from being denied a lawyer whereas in *Matthews* the focus was fairness in all the particular circumstances.

The extraterritoriality issue signifies another illustration of the difficulties that the Commissioner has shown in delineating between the standard and simplified procedure. In reference to the new proposed unjust and oppressive ground, the Commission stressed that the example given relating to fair trial concerns (covering abuse of process and delay) – discussed above, must be assessed with reference to the international minimum standards for a fair trial, not by directly applying the relevant provisions in the NZBORA as if the trial were to be conducted in New Zealand. It was further suggested by the Commission:⁶³⁰

If we required all foreign trials to be conducted in the same manner that they would be conducted in New Zealand, then very few extraditions would ever occur. Legitimate differences need to be accommodated in criminal justice systems. Judges may find the concept of a “flagrant denial of a fair trial” from the European Court of Human Rights jurisprudence a useful point of departure in considering this ground.

Aside from the inconsistency this creates in recommending at the same time, that certain rights, including fair trial rights (ss 24 and 25) in the NZBORA apply to the surrender context (discussed below), what this overlooks is that New Zealand’s backed-warrant procedure with Australia hinges upon there being comity/trustworthiness and the underpinning recognition of legal and procedural similarities including, it is argued, respect for the same human rights standards. It follows, that applicability of the NZBORA to fair trial concerns under the backed-

⁶³⁰ Report, above n 1, at 196.

warrant procedure, particularly in relation to Australia, ought to be treated as an exception to the decision by the majority of the Supreme Court in *Dotcom*.⁶³¹

Reference to ‘international minimum standards’ may be fitting in context of the standard procedure under the 1991 Act, that deals with heterogeneous political and legal systems. For instance, the Charter of Fundamental Rights of the European Union is designed to function in heterogeneous political and legal systems across Europe.⁶³² These rights inter alia, include the right to a fair trial.⁶³³ However, the Commission has not distinguished the standard from the backed-warrant procedure, particularly in relation to Australia, where the legal and political system is characterised by similarities rather than differences.

Consideration of the applicability of the NZBORA, rather than “reference to international minimum standards for a fair trial”, in *Johnstone* and *Matthews* (discussed above), also supports this proposition. Further support may be drawn from the Australian Full Court in *Moloney* (discussed above), that gave particular emphasis to the recognition that New Zealand courts share a mutual objective with Australia in ensuring a fair trial, supported by provisions of the NZBORA, namely ss 25(1)(a) and (f).⁶³⁴

For the above reasons, it is considered that there is persuasive argument for the extraterritorial application of the NZBORA to Australian Police conduct in New Zealand including what might be properly classified as mutual legal assistance in context of investigating a crime for the purposes of the backing-of-warrant procedure. It is argued that the case for extra-territorial application of the NZBORA to Australia is explicable when framed in terms of the comity/trustworthiness doctrine.

⁶³¹ Arguably, if it were in issue, the *Dotcom* decision suggests that the majority in the Supreme Court are likely to favour the trustworthiness /comity doctrine with Australia and rule against its extraterritorial application, let alone recognise any applicable criminal process rights.

⁶³² For further discussion on the adequacy of human rights provisions relating to the EAW, see Baker report, above n 41.

⁶³³ Klimek, above n 323, at 59-60.

⁶³⁴ *R v M* (unreported, CA187/95, 13 November 1995). Cited in *Moloney- Full Court*, above n 186, at [161].

6.6.4 *Classification of Extradition Proceedings*

Another issue for the court's consideration of the NZBORA in extradition cases is the contentious matter of how extradition proceedings are classified.⁶³⁵ The Law Commission recognises that assigning extradition proceedings to discrete categories of law, civil, criminal, international or domestic is not straightforward, and any delineation of the correct protections for the rights of the requested persons needs to take account of values from quite different areas of law.⁶³⁶

In contrast, the Supreme Court in *Dotcom*, viewed the classification of extradition proceedings as less murky.⁶³⁷ Emphasising the importance of classification, the majority of the Supreme Court held that sections 24 and 25 of the NZBORA are framed to protect the rights of persons who are to be the subject of the criminal trial process, not the extradition process, which has a different limited purpose.⁶³⁸ In reaching that decision, the Court considered a string of authorities in the UK, European Commission and Court of Human Rights and Canada.⁶³⁹

In *Kirkwood v United Kingdom*, it was held that while an extradition hearing involves a limited examination of the issue to be decided at trial, it does not constitute or form part of the process for determination of guilt or innocence.⁶⁴⁰ According to this reasoning, the backing-of-warrant procedure is even more remote from criminal process rights than standard extradition because it does not seek to establish a prima facie standard of guilt.⁶⁴¹

The Court was further persuaded by Canadian authorities, that emphasise the criminal process rights under s 11 of the Canadian Charter of Rights and Freedoms as confined to trials conducted by the Canadian government as opposed to those conducted by a foreign government in a foreign territory for offences under its law.⁶⁴² The Court also considered and overruled *Poon v Commissioner of Police*

⁶³⁵ Issues paper, above n 1, at [1.28].

⁶³⁶ At [1.28].

⁶³⁷ *Dotcom v The United States of America*, above n 599.

⁶³⁸ At [115].

⁶³⁹ At [108]-[115]. For instance *Maaouia v France* (2000) 33 EHRR 1037 (ECHR); and *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 494.

⁶⁴⁰ Issues Paper, above n 1, at [4.7]. Referring to *Kirkwood v United Kingdom* (1984) 37 DR 158; and *Pomiechowski v District Court of Legnica, Poland* [2012] UKSC 20, [2012] 1 WLR 1604.

⁶⁴¹ See *Dotcom v The United States of America*, above n 599, at [115].

⁶⁴² At [111] per McGrath J.

and the judgment of Baragwanath J, whose view of the Canadian case, *Canada v Schmidt*⁶⁴³ was aligned to the dissenting view of Wilson J, that the fugitive had been “charged with an offence” for the purposes of the Charter, the offences being those he was charged with in the overseas jurisdiction.⁶⁴⁴ From the perspective of Baragwanath J, the effect of the analogy in New Zealand was limited by there being some provisions of ss 24 and 25 inapplicable to extradition cases, however. Also Baragwanath J viewed differently the scope of the words “charged with an offence” in ss 24 and 25 of the NZBORA, in that he held that “to the extent that the language of the Bill of Rights can reasonably be applied to public sector conduct affecting a person in New Zealand it should be applied ...”.⁶⁴⁵ In conclusion, the majority favoured the predominant view in overseas cases that save rights to natural justice (namely s 27), extradition proceedings did not trigger criminal process rights (namely ss 24-25).

Alternatively, it could be argued that the classification of extradition proceedings by the Supreme Court is incorrect. Extradition proceedings have been wrongly viewed as an administrative proceeding, when in fact a defendant under either the standard or backed-warrant procedure can be arrested, provisionally arrested and held in custody. Moreover, under a backing-of-warrant procedure, the requested person faces deprivation of liberty on the basis of a mere allegation without the entitlement to adduce evidence as to whether there is a case to answer. For example, in the course of writing this thesis the author had direct experience with a Part 4 surrender process. In the first instance, there was considerable delay in obtaining legal-aid resulting from the application being referred to a Specialist Advisor in the civil rather than criminal section of the Legal Services Agency. Indeed, case law has acknowledged, extradition proceedings are “criminal proceedings, albeit of a very special kind”.⁶⁴⁶ As pointed out by Pyle, extradition proceedings initiate criminal trials and foreign prosecutors initiate extradition.⁶⁴⁷

⁶⁴³ *Canada v Schmidt* [1987] 1 SCR 500. See also *Argentina v Mellino* [1987] 1 SCR 536.

⁶⁴⁴ *Poon*, above n 617.

⁶⁴⁵ *Poon*, above n 617, at 76 per Baragwanath J.

⁶⁴⁶ *R (Government of the United States of America) v Bow Street Magistrates’ Court* [2006] EWHC 2256 (Admin), [2007] 1 WLR 1157, cited favourably in *Dotcom v The United States of America*, above n 599.

⁶⁴⁷ Christopher H Pyle *Extradition, Politics, and Human Rights* (Temple University Press, Philadelphia, 2001) at 303.

Further, extradition proceedings are subject to the Bail Act 2000, granted in the most “special circumstances” and in the case of the backed-warrant procedure, the Criminal Procedure Act 2011 is invoked which means that the surrender hearing is conducted as a preliminary hearing comparable to the process that a person would face if charged with a Category 2 offence in this country. Referring to the wider legislation applicable to the standard process, namely the Summary Proceedings

Act, Elias J held in dissent in *Dotcom*:⁶⁴⁸

Those facing committal hearings under Part 5 of the Summary Proceedings Act for New Zealand offences were clearly entitled to observance of a number of the rights contained in ss 24 and 25 in a hearing to the same effect as the determination of eligibility for surrender.

By analogy with the Criminal Procedure Act, the same point applies to Part 4 of the 1999 Act. Yet, the disparity in how rights under the NZBORA are applied is exemplified in the passage from *Dotcom* where McGrath and Blanchard JJ noted:⁶⁴⁹

We see no sound basis in human rights jurisprudence or otherwise for an interpretation of the criminal process rights protections in the BORA that would apply them to an extradition hearing. Their application would change the preliminary nature of the hearing and give it an altogether different character.

Granted, the inherent nature of the extradition process, renders some NZBORA rights inapplicable to an extradition hearing,⁶⁵⁰ but McGrath J fails to elaborate on how the preliminary nature of the hearing would change if ss 24-25 rights protections in the NZBORA applied to an extradition hearing. A similar point is raised by the dissenting views of Elias J and Glazebrook J, who both agreed with Baragwanath J in *Poon*.⁶⁵¹ Elias J commented:⁶⁵²

⁶⁴⁸ *Dotcom v The United States of America*, above n 599, at [51] per Elias J.

⁶⁴⁹ At [115] per McGrath and Blanchard JJ.

⁶⁵⁰ At [51] per Elias J.

⁶⁵¹ At [51] per Elias; and at [277]-[281] per Glazebrook J. See *Poon*, above n 617.

⁶⁵² *Dotcom v The United States of America*, above n 599, at [51] per Elias J.

As Baragwanath J pointed out in an extradition context, the policy for differentiating in the of fundamental values between those in custody for extradition purposes and those in custody because they faced charges in New Zealand is elusive. In both cases the underlying justification for the exercise of judicial authority is that the individual is charged with an offence.

Exemplifying the strength of this observation, are extradition cases that are followed by the surrendered person making an application for a stay of proceedings (discussed above).⁶⁵³ In these cases, the Court has shown a willingness to venture into the heart of the extradition process as part of its assessment of whether or not there was a breach of s 25(b) of the NZBORA. Justification for considering the extradition process is that section 25(b), which provides for the right to be tried without undue delay, arises from the accepted view that pre-charge delay might in certain circumstances have an influence on the overall determination as to whether post-charge delay is unreasonable.⁶⁵⁴

For instance, in context of a stay of proceedings applied for after the accused was surrendered from Australia to New Zealand to face charges of sexual offending, the High Court in *R v BJ*, determined that there had been no breach of s 25(b) of the NZBORA.⁶⁵⁵ Having consideration for the higher threshold required to justify a stay of proceedings in cases of sexual offending, the High Court considered that as a matter of resources, it was reasonable for Police to await the outcome of the Australian prosecution before taking extradition proceedings.⁶⁵⁶ The High Court also attributed some of the delay to the accused, arising from his decision to resist surrender.⁶⁵⁷

The question of the applicability of s 25(b) to Part 4 was also considered in *Plakas v Police*.⁶⁵⁸ In that case the requested person, Plakas, was sought for surrender to Australia in relation to fraud offences. At the same time, Plakas faced New Zealand

⁶⁵³ *Plakas v Police*, above n 152; and *R v BJ* HC Auckland, CRI-2009-092-009763, 20 October 2011.

⁶⁵⁴ See *Rust v R* (1995) 13 CRNZ 621 (HC) at 627.

⁶⁵⁵ *R v BJ* HC Auckland, CRI-2009-092-009763, 20 October 2011.

⁶⁵⁶ At [95].

⁶⁵⁷ At [96].

⁶⁵⁸ *Plakas v Police*, above n 152, at [7].

charges, which he was informed may subject him to extradition proceedings for similar offending. Randerson J at the High Court, granted Plakas a stay of proceedings in relation to the New Zealand charges based upon its inherent jurisdiction to prevent an abuse of process in relation to prosecutions in New Zealand. In his reasons, His Honour determined that it would be unjust to the accused and a breach of his rights under s 25(b) of the NZBORA to allow his surrender to the Australian authorities but require him to await the outcome of those proceedings before a decision is made about the future of the New Zealand charge.⁶⁵⁹

What these authorities demonstrate, is that the Supreme Court in *Dotcom* has not considered that extradition proceedings may in fact trigger appropriate BORA rights, namely ss 24 and 25 in certain circumstances, particularly where matters relating to the criminal trial process and the extradition proceedings are interconnected. To the extent that the accused person's s 25(b) BORA rights are concerned, it is clear that the High Court recognises their application in context of a request for surrender to and from Australia under the backed-warrant procedure. Thus, the impression that there is a difference in regard to the application of the NZBORA in extradition and criminal proceedings is not only arbitrary and elusive, but sometimes illusory, at least as far as backed-warrants are concerned.

6.6.5 Law Commission's position

Another approach is that of the Commission and its de-emphasis on the need to classify extradition proceedings as criminal or civil altogether.⁶⁶⁰ To this end, the Commission has teased apart those NZBORA rights that are applicable to extradition proceedings from those that relate to persons charged with offences rendering them inapplicable. The rationale being that "the extradition process is not, and should not try to be, a criminal process designed to establish the guilt or innocence of the person sought."⁶⁶¹ At the same time, the Commission recognises that many of the rights under the NZBORA overlap with a range of intended restrictions and safeguards designed to balance the interests of the requested

⁶⁵⁹ At [32], [34].

⁶⁶⁰ Issues Paper, above n 1, at [1.29].

⁶⁶¹ Report, above n 1, at 6.

person.⁶⁶² Restrictions and safeguards designed to protect the defendant under the backed-warrant process have been considered above. I have also illustrated how extradition proceedings under Part 4 intersect with the NZBORA in context of an application for a stay of proceedings.

In an attempt to remedy the low level of procedural rights currently afforded to the accused in extradition proceedings, the Commission analysed ss 21-27 of NZBORA and assigned them to three categories of varying applicability to each stage of the proposed procedures for extradition.⁶⁶³ Many of the rights under ss 21-27, which would otherwise be determined as inapplicable to the requested person, are proposed in the draft Bill to reflect the importance the NZBORA values has to extradition proceedings. For instance, general rights which do not offend against the view that the provisions of the NZBORA relating to a charged offence are inapplicable to extradition proceedings, includes s 21 (the right to be free from unreasonable search and seizure); and s 22 (the right not to be arbitrarily detained).⁶⁶⁴

In this way, (although the Commission view their approach reflecting more the Supreme Court unanimous decision, that s 27 natural justice provisions apply to extradition proceedings),⁶⁶⁵ the Commission's recommendations actually align fairly well with the dissenting view of Elias CJ and Glazebrook J in *Dotcom*.⁶⁶⁶ Accepting that some of the provisions under ss 24 and 25 have no relevance to extradition proceedings, Elias J thought some of them did and could see no reason to deny these rights on the basis that the underlying offence, although it must be equivalent to an offence in New Zealand, is not a New Zealand offence. The examples given by Elias J are largely reflected in the Commission's proposed amending legislation, designed to ensure: the right to be informed "in detail of the nature... of the charge"; "the right to adequate time and facilities to prepare a

⁶⁶² For example, s 7 contains mandatory grounds for refusing extradition which are based on established anti-discrimination and human rights standards and s 8 contain discretionary grounds based upon fundamental rights to justice such as fair trial rights relating to delay and good faith, captured by the unjust and oppressive provision. For example, *Mercer – Court of Appeal*, above n 185; and *Mailley – Court of Appeal 2016*, above n 210.

⁶⁶³ Report, above n 1, at [4.16].

⁶⁶⁴ At [4.4].

⁶⁶⁵ See Issues Paper, above n 1, at [1.29].

⁶⁶⁶ See *Dotcom v The United States of America*, above n 599, at [51]-[52] per Elias J; and at [277] per Glazebrook J.

defence” and “rights to legal assistance and the assistance of an interpreter”.⁶⁶⁷ These recommendations also align fairly well with case law considered above under the backed-warrant procedure⁶⁶⁸ and assist in reconciling the tension identified in relation to consideration of pre-charge delay under s 25(b).

The Commission’s recommendations under this head align with well-established practise across the simplified schemes of other states using surrender. For example, both the EAW and NAW are amenable to the Charter of the EU, adherence to which is considered a necessary prerequisite to their existence. Even the most archaic and inchoate backed-arrest warrant scheme, namely, the British Islands and the UK under s 13 of the 1848 Act is subject to the ECHR. Those in Africa, are subject to the African Charter⁶⁶⁹ and national bills of rights.

Without such measures, the requested person is subject to significant consequences for their liberty, by virtue of the provisions for arrest and detention without the possibility of bail. Exacerbating that concern, is the absence of the restriction requiring the prosecution to establish a *prima facie* case under Part 4.

6.6.6 Summary

The above discussion reveals that as far as current authority is concerned, namely *Dotcom*, the applicability of the NZBORA to extradition proceedings is limited to the right to natural justice under s 27. The applicability of the NZBORA is particularly contentious under three heads of argument relating to criminal process rights, extra-territoriality and classification of rights. The main point this thesis makes is that the *Dotcom* position, in this regard, is not necessarily generalizable to the backed-arrest warrant procedure, at least as far as Australia is concerned. The familiar theme of the Commission’s tendency to blur the standard procedure with the backed-warrant procedure in its proposals, reappears in reference to the NZBORA. Ultimately, however, the Commission’s proposal to implement extradition-appropriate NZBORA rights, aligns fairly well with the dissenting view

⁶⁶⁷ At [52] per Elias J. Compare to Report, above n 12, at [4.16].

⁶⁶⁸ For example, *Matthews*, above n 614; and *Johnstone*, above n 604.

⁶⁶⁹ African Charter on Human and Peoples’ Rights (adopted on 27 June 1981, entered into force on 21 October 1986) <www.achpr.org/instruments>.

in *Dotcom*, and what is similarly the case under other simplified schemes operating in other Commonwealth countries.

7. 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 Part 4, backed-warrant procedure and how by extension these two principles are affected.

First, this thesis 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 to any case law relevant to the backed-warrant procedure, which might have otherwise compelled the Commission to reconsider its position in making blanket proposals, namely, a proposed new unjust or oppressive provision. Instead, the Commission simply drew a parallel with Australia's extradition legislation,⁶⁷⁰ without giving adequate consideration to the implications relevant case law concerning s 34(2) of Australia's 1988 (Cth) Act, has for the Part 4, backed-warrant procedure. Arguably, this proposed new unjust or oppressive provision will breach comity and impede rather than enhance the expediency of the Part 4, backed-warrant procedure. Notwithstanding that the backed-warrant procedure relies heavily on comity, the Commission clearly has reservations about this practise, indicated by its inconsistent application of comity. This thesis has also shown that in being led by the Dotcom litigation, the Commission has narrowly focussed upon the NZBORA as it applies to the standard procedure. It is, however, apparent that there are appreciable differences in how the NZBORA is applied by the New Zealand courts between the standard procedure and backed-warrant procedure. 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 Part 4 in relation to Australia is qualitatively different from comity in

⁶⁷⁰ Extradition Act 1988 (Cth), s 34(2).

relation to the UK, as a function of geographic proximity and economic importance for instance.⁶⁷¹

Secondly, this thesis 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 Part 4, backed-warrant procedure intact. Similarly, the role envisioned for a central authority in the backed-warrant procedure, shifted from being a fairly confined, in a manner consistent with the need to preserve its perceived efficiency, to one that is more pervasive. 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 Part 4, 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 that are built upon the importance of trustworthiness and comity in regard to Australia, namely the proposal to further simplify the backed-warrant procedure. This leaves it open to question whether the Commission has as much faith in comity with Australia as they appear to profess. This thesis has shown that the concern is well-founded, however, and in the face of cases such as *Bennett* and *Samson*, strengthens the case for the proposed role of a central authority as opposed to the Police, at least in the initial stages of the backed-warrant procedure.

For this reason, this thesis is aligned to the Commission's decisive position in favour of importing into the 1999 Act more provisions of the NZBORA than judicial authority has thus far determined apply. Thus the Commission has provided valuable contributions in attempt to resolve the problem in respect of ss 24-25 of

⁶⁷¹ Issues Paper, above n 1, at [6.23].

the NZBORA and the values they reflect, without compromising the objective of the extradition process. This would bring New Zealand in alignment with overseas trends (most other simplified schemes incorporate human rights instruments) and the weight that must be given to the liberty interests of the person.

To bring these provisions within the backed-warrant procedure, I suggest will allow the Central Authority to consider matters of due process at the request phase and Issues Conference, respectively. It is the combined effect of the proposal to establish a Central Authority, implement extradition-appropriate BORA rights, that will more likely accommodate the liberty interests of the person without compromising the efficacy of the backed-warrant procedure. For instance, there is reason to doubt that the court is prepared to use its inherent power to guarantee protection against an abuse of process, in context of the backed-warrant procedure. Justice Randerson's disavowal of *Bennett*, suggests that another layer of protection against an abuse of process is appropriate. In these circumstances, it would be prudent to make explicit provision for the NZBORA as proposed by the Commission. At all times, before and after arrest, the NZBORA should bind the New Zealand Police, even when it acts outside of New Zealand. The case for extra-territorial application of the NZBORA, to Australia requires a liberal interpretation of the existing jurisprudence, however.

Thirdly, this thesis 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. In particular, this thesis argues that based upon the above analysis of case law, the Australian judiciary has proven itself to be a flouter of comity as far as the required standard of evidence is concerned. This approach by the Australian judiciary, particularly the lower courts, is not aligned with the majority of Commonwealth countries that operate simplified schemes. 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. Thus it is difficult to reconcile these findings with the assumption of there being mutual trust and comity between New Zealand and Australia. In my view, comity demands that Australia should not interpret one enactment with another (namely, SEPCA 1901 and Part 3 of the 1988 Act).

It follows therefore, that the Commission's proposal for further simplification of the backed-warrant procedure, under Part 4, in regard to Australia, places too much emphasis on comity and trustworthiness. In critiquing the Commission's suggestion to further simplify the backed-warrant procedure, this thesis has also emphasised the significance of protecting against an abuse of process, exemplified in the authorities considered, namely *Bennett*, *Samson* and *Hohemann*. Further simplification of the backed-warrant procedure, is therefore unjustified and would be in principle, an unnecessary sacrifice of the person's liberty interests in favour of comity and international cooperation. In any event, the need for 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 by the government, 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. To that end, it would be helpful to consider how the judiciary is understanding comity and whether it needs to be re-conceptualised, and operationally defined in the new Act, so that it fits consistently with the Commission's attempt to modernise our extradition legislation. Ultimately, it should be determined whether the current backed-warrant procedure, is discouraging surrender requests and suffering the same delays associated with the standard procedure,⁶⁷² before tampering with the current balance.

⁶⁷² Issues Paper, above n 1, at [9.63].

To sum up then, in recommending removal of some or all of the grounds for refusing surrender,⁶⁷³ 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,⁶⁷⁴ 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 distrust them a little more.⁶⁷⁵

⁶⁷³ Issues Paper, above n 1, at [6.22]-[6.23].

⁶⁷⁴ Extradition Act 1988 (Cth), s 34(2).

⁶⁷⁵ Report, above n 1, at 37. See draft Bill, cl 20(e) in Report, above n 12.

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