# HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

**Reference: International Transfer of Prisoners Bill 1996**

**CANBERRA**

**Monday, 10 February 1997**

**OFFICIAL HANSARD REPORT**

**CANBERRA**

HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Members:

Mr Andrews (Chair)

Mr Andrew
Mr Barresi
Mrs Elizabeth Grace
Mr Hatton
Mr Kerr
Mr McClelland
Mr Melham
Mr Mutch
Mr Randall
Mr Sinclair
Dr Southcott
Mr Tony Smith
Mr Kelvin Thomson

Matter referred to the committee:

International Transfer of Prisoners Bill 1996.

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Monday, 10 February 1997

Present

Mr Andrews (Chair)

Mr Barresi
Mrs Elizabeth Grace
Mr McClelland
Mr Melham
Mr Mutch
Mr Randall
Mr Sinclair
Dr Southcott

The committee met at 10.35 a.m.

Mr Andrews took the chair.

**BILES, Mr David, 25 Kidston Crescent, Curtin, Australian Capital Territory**

**CHAIR**—I open this public hearing of the committee's inquiry into the International Transfer of Prisoners Bill 1996. I welcome the witness and any others present for the hearing of this committee. So far, there has been a clear message from witnesses that there is strong support for the International Transfer of Prisoners Bill and for Australia to be a party to the international transfer of prisoners for both humanitarian and rehabilitative as well as diplomatic relations grounds. This is likely to be the final public hearing of the inquiry, given the short time frame available to us. Welcome Mr Biles. In what capacity are you appearing?

**Mr Biles**—I retired nearly three years ago from the position of deputy director of the Australian Institute of Criminology. I am currently a criminologist in private practice.

**CHAIR**—Although the committee does not require you to give evidence under oath, I advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We have received a copy of your 1994 journal article entitled 'The International Transfer of Prisoners: Issues and Challenges for the 1990s'. Would you like to make some introductory remarks.

**Mr Biles**—Thank you. I would like to briefly. I will start by giving you my full support for the notion of international transfers and for the work of this committee. It occurred to me that it might be relevant if I start by saying a few words about the current situation as I see it in relation to Australian prison systems. This may have considerable bearing on the support which the states and territories may or may not give to this proposal.

In my considered opinion, Australian prison systems are going through a period of very severe crisis at present. The crisis is essentially driven by a massive increase in numbers. As recently as 1984, there were fewer than 9,500 prisoners in the whole of Australia. Currently, there are over 17,000 prisoners in the whole of Australia. That is a period of unprecedented growth in numbers. In the last four years, the numbers have increased from 14,500 to over 17,000, as I have said. That creates stresses and strains within the prison system, which tends to distract attention away from things such as the proposal for the international transfer of prisoners.

Correctional administrators, apart from coping with numbers, are facing very tight budgets. They are being asked to do more with less, as are all Commonwealth agencies. There are particular problems in Australian prisons that have occurred in the last few years, such as our learning to cope with prisoners with HIV-AIDS, an increasing ageing prison population and increasing numbers of Aboriginal prisoners, which we all know about; their increase is greater than the increase in the total number of prisoners. We know about deaths in custody. There are also problems with unconvicted prisoners, or remandees, as I call them, and non-English speaking persons.

Added to that, four of the six states in Australia are currently learning to live with semi-privatised prison systems. Queensland, New South Wales, Victoria and South Australia all have some degree of privatisation. By the end of this year, between 17 and 18 per cent of all Australian prisoners will be in

private facilities. Approximately half of all prisoners in Victoria will be in private facilities.

These problems may lead, as I suggested, to the states and territories taking the view that they are not particularly enthusiastic or supportive of this proposal. We can see in the submission from South Australia that the South Australian government says it has not yet considered whether it will or will not participate in this scheme. I am fearful, because of the pressure of numbers, that some states or territories may take the position, which would be most unfortunate, that they would be happy to lose prisoners but would decline to accept prisoners. If that happened, the spirit of the legislation would be completely lost.

I believe, in view of that, that it is essential we have some arrangement for the monitoring of the numbers of prisoners who come in and out under this scheme. Whether it should be a statutory requirement of the Attorney-General to report to the parliament once a year on this matter is one thing, or it could be just a convention, but I certainly urge the committee to consider recommending some degree of monitoring of the operation of the legislation when it comes into practice. My preference would be for a small Commonwealth agency to handle that and advise the minister, as was originally proposed in 1984.

On the question of the actual numbers coming in and out, I think there is a matter of concern here. I have just read this minute the latest submission to you from the Attorney-General's Department. But we are still in an unsatisfactory position as far as making firm estimates as to actually how many people will leave Australia and how many people will come back in out of this scheme. The best I can do is repeat the estimates that I gave in that paper in 1994. I have to emphasise that they were rough estimates. I am a little disappointed that no-one has done a better job than that as a background to this inquiry.

As far as the actual legislation is concerned, I have a couple of very quick points to make. I would be very happy to elaborate on them. Firstly, I quite frankly do not see any need for the legislation to cover persons on parole. It seems to me that persons released on parole either in Australia or in countries overseas are in a quite different situation from those in custody. It seems an unnecessary complication to take a sledgehammer to crack a nut in order to cope with parolees by way of legislation like this. There are better ways of doing it.

Secondly, as far as the bill is concerned, my personal view is that the requirement for dual criminality is unnecessary and inconsistent with the general tenor of the legislation. Thirdly, as far as the legislation is concerned, in my view, continued enforcement is the only acceptable approach. Having said that, to go the sentence conversion route is to create a very difficult situation as far as relations with foreign countries is concerned. It is somewhat arrogant for one country to replace a sentence imposed elsewhere, so continuous enforcement is the only way to go.

Having said that, I believe it is necessary for there to be some arrangement whereby the sentence reducing mechanisms which operate in a number of countries overseas can be taken into account for offenders who are brought back to Australia. I have in mind particularly cases where an Australian may be sentenced, for example, in Thailand, to a very long period of time—perhaps 20 or 25 years—for the possession of heroin for an offence which might get four or five years in Australia. But that prisoner in Thailand, without a scheme, would not serve anywhere near that time because there would be general amnesties, pardons, kings' birthdays and all sorts of things. Somehow we need to take that into account so

that the person is not additionally penalised by coming back to Australia. Quite frankly, clause 49, which seems to refer to the particular case where there might be new evidence, does not take up the point.

Finally, apart from the humanitarian, rehabilitative and financial aims of the bill, I am particularly interested in the extent to which it can contribute to increased international cooperation and trust between nations. One of the hats that I currently wear is as the coordinator and rapporteur for a conference called the Asian and Pacific Conference of Correctional Administrators. Within that context, the issue of international transfer is regularly discussed. It is clear to me that the crucial element is the degree to which nations trust each other. Currently, in the Asia-Pacific region there are some very strong supporters of international transfer. There are also some very strong opponents, because they simply do not trust the other country to carry out the sentences imposed in their own country. It is as simple as that. Thank you, Mr Chairman.

**CHAIR**—Thank you, Mr Biles. I return to your comments about dual criminality. In clauses 14 and 15 of the bill, the Attorney-General has a discretion to waive the dual criminality requirements. Does that address sufficiently your concerns about dual criminality?

**Mr Biles**—I think it does. I am glad that the Attorney-General has that discretion. Quite frankly, I would not have put it in at all, because I cannot see that it adds anything to the legislation. I know the reason for it. It is to cope with the apparently anomalous situation where a person might be brought back to Australia, for example, from Saudia Arabia, where they were in prison for the possession of alcohol. They may ask, 'Why am I in prison, because all I did is possess alcohol, and the possession of alcohol is not an offence?' The answer is quite clear: you are in prison because you committed an offence in Saudia Arabia, and under the arrangements of this legislation, you are allowed to serve that sentence here. Otherwise, we get ourselves in a ridiculous situation. The person who is brought back from Thailand might ask why they are serving 20 years. They are serving 20 years because that is what the court in Thailand said; it is not what a court in Australia would impose.

**Mr SINCLAIR**—I was not too sure from your evidence whether you are in favour of having prisoners transferred. In your paper, which I have read, you canvass some of the issues. With this increased globalisation to the point where we are moving more and air travel provides the facility to move, is there not a problem in people being brought back to Australia when they have committed an offence overseas and they have to accept the disciplines of that country? As one who is opposed to capital punishment, I am worried about the consequences of that. At the same time, if are you going to impose on people the fact that there are different laws, is there not some advantage in at least a minimal sentence being served in that other country? I know that there are certain conditions—six months of the sentence has to be served—but I was not sure from your evidence how you regarded it, particularly at a time when our prison population is increasing and you have identified some of the difficulties there.

**Mr Biles**—I am very supportive of this legislation, but I recognise the enormous difficulties associated with it. As far as the point Mr Sinclair raised, people must recognise the validity of the law in the country where they are when they commit those acts; certainly that is the case. The underlying motivation—the humanitarian motivation, apart from the notion of being close to families and so on—is to try to take away the grossly disproportionate additional punishment that, for example, the Westernised middle class woman would experience in a prison system in some Asian countries. I do not want to overly dramatise this, but I

am terribly conscious of the fact that Australians imprisoned overseas include a large number of women, who are placed in an appalling situation, where hygiene is totally inadequate and food is inadequate or not even supplied at all; in other words, people have to look after themselves and supply their own food. There are also all sorts of cultural and language difficulties. They are punishments over and above the punishment of the time imposed by the prison sentence.

No-one is suggesting that the sentence should not be imposed. What is suggested by this scheme is that, in appropriate cases, people be allowed to serve that sentence in conditions which are more conducive to their cultural upbringing. It also brings them closer to their families, which we know is the strongest thing to help people stay out of prison. I am very supportive of it.

**Mr SINCLAIR**—Your belief in the prison system is that the prison system is really about punishment, not rehabilitation. In the nature of the sentence served, it is on the humanitarian ground that you would seek that application?

**Mr Biles**—I believe that punishment is the time imposed and the loss of liberty. It does not follow that I am anti-rehabilitation. On the contrary, I believe that we are all duty-bound to make the experience of imprisonment a positive and constructive one and to facilitate that person's reintegration into society. I do not think Australian prisons do that very well, quite frankly. I think we probably do it better than most other Asian countries, anyway.

**Mr SINCLAIR**—What about deterrence?

**Mr Biles**—We have to split deterrence into general deterrence and specific deterrence. General deterrence is about the impact of imprisonment on other people, such as the third party who may or may not commit an offence because they hear about someone being sent to prison. That is a grossly overstated argument. I know from the studies I have done over the years that in some parts of Australia where the imprisonment rate is, for example, five or six times as high as some other parts of Australia we do not get five or six times the deterrent effect. In fact, it is impossible to show that there is any greater deterrent effect. For example, New South Wales has proportionately twice as many people in prison as Victoria. Are people twice as deterred from committing crimes in New South Wales? They are not. It is a grossly overstated argument. There is some validity in it. But it depends a great deal on the publicity and information that is given about the sentences imposed.

**Mr SINCLAIR**—Deterrence between states is one thing. Surely the subject of this legislation is the deterrence that comes from committing an offence—I acknowledge that there are degrees of offence—such as bringing drugs from Thailand to Australia. If you are likely to be serving a sentence in a prison in Thailand, I would have thought that would be a far more persuasive deterrent than being able to serve your sentence in Australia.

**Mr Biles**—I am guessing, obviously. The average drug user or potential drug courier would not really be aware of the fact that there are, at the latest count, 24 Australians in prison in Thailand, for example. However, if we brought back some of those people and had them serving their time in Australian prisons, the Australian criminal class, to coin a phrase, would be much more aware of that than they are when they are

serving their time over there. To the extent that there is any validity in the deterrence argument, it would be enhanced by having some prisoners transferred back to Australia.

**Mr SINCLAIR**—We were talking about clause 49 of the bill and the degree to which there is some commutation of sentence. Do you think there should be in this legislation a requirement that a minimal sentence of the one imposed be served? You mentioned in the paper you gave the remission of sentence granted to the Rainbow Warrior criminals in France. Obviously, to the degree to which you are going to get reciprocity, there needs to be a feeling that some part of the sentence imposed, whatever the process of justice, be served. There are difficulties, because the right of appeal and the processes of the court system in some countries leave so much to be desired. Do you think there should be a minimal sentence imposed?

**Mr Biles**—I think to some extent the requirement for a minimum time to be served in the country of the offence is taken up simply by the slowness of the criminal justice system not only in Australia but in many other countries. It takes an awful long time to get through the prosecution-remand in custody-trial-appeal stage. Even if there were no requirement for a minimum term to be served, the prisoner has already done a lot of time in prison overseas. Some countries, such as Thailand, require, even though they are very supportive of international transfer schemes, a certain proportion to be served in that country before they will agree. The Thai authorities are pretty harsh in that respect, quite frankly. I would tend not to support that.

As far as the Rainbow Warrior case is concerned, my argument with what happened there was not the transfer of the two offenders from New Zealand to a Pacific island but the fact that the French did not abide by the agreement to leave those two offenders on that Pacific island for the proposed three years. They violated this agreement, so that broke international trust. Next time a case like that came along, if it were similar circumstances, you cannot imagine the New Zealand authorities saying yes. They would not agree to it, because they have been let down by that.

**Mr SINCLAIR**—That is all a bit of pious hope. The difficulties are that that sort of high profile case—in that case it occurred in New Zealand—could easily occur in Australia.

**Mr Biles**—Easily, yes.

**Mr SINCLAIR**—I am not thinking of our prisoners being sentenced abroad but our prisoners being sentenced in Australia. It is for them that I have a prior concern that we ensure there is some minimal sentence and that we do not get people to serve part of their sentence back in their country of origin.

**Mr Biles**—That is covered by the legislation. There is a three-way agreement. In fact, it is a four-way agreement in Australia. You have the Commonwealth government and the government of the state where the person is. There is also the potential receiving country and the individual prisoner. It may well be felt, for perfectly valid reasons, that in the case you have in mind—which was very high profile and caused a lot of public anxiety—while we do not want to be unnecessarily cruel in Australia, we will require, for example, half of the sentence to be served before we would agree. There is sufficient flexibility in the legislation for that to occur. I do not think we need to write it in as a hard and fast rule. It is a matter of political discretion.

**Mr McCLELLAND**—You have mentioned in your evidence concerns regarding, for want of a better

term, a dog in the manger attitude potentially by some states. Is there too much complexity in the proposed scheme in so far as it requires the consent of the federal Attorney-General and the relevant state Attorney-General?

**Mr Biles**—That is a very good question. I would love the system to be as simple as possible. The closer one gets to this idea, the more complex and difficult it becomes. The bill before you is probably as simple and straightforward as it can be. What I saw as the dog in the manger attitude I have seen in practice. With the interstate transfer of prisoners legislation, various states said that they agreed in principle with it and that it be a matter of reciprocal legislation throughout the whole of Australia. They agreed in principle, but they now say, 'We are so busy and full that we cannot take anyone at all. We'll not consider it.' The whole thing has stopped.

If that happened with international transfers and people said, 'We'll let some prisoners go but we won't take any back', that would be a very sad day. Perhaps the only answer is monitoring and an annual report. That is why I would like to see the Attorney or an authority say what has happened in the last 12 months. They can take some kudos from the fact that some states took some back and let some go and so on. I see it as very much a matter of maturity in international relations that we are able to go down this track.

**CHAIR**—On that point, are there difficulties if any states or territories of Australia refuse to participate?

**Mr Biles**—The whole thrust of the proposal is diminished thereby. The Northern Territory attitude at present does diminish it marginally. The number of prisoners in the Northern Territory is minuscule compared with the rest of Australia. I have no doubt, because the Northern Territory is very much a part of Asia and international in its composition, that there would be some foreign nationals serving time in the Northern Territory. I would be rather surprised if there were not any Australians from the Northern Territory currently serving time overseas among those 184 I listed. It is actually 110 under sentence. The numbers are all fairly small, quite frankly.

**Mr RANDALL**—I want to follow up a couple of points you made earlier. I want to move off on a tangent from what we were talking about before. You mentioned private prisons. Are private prisons possibly the future in Australia?

**Mr Biles**—I do. I did some work on this in the last couple of weeks. I was rather surprised when I did the research to find that Australia already has a much higher proportion of its prisoners in private prisons than England. By the end of this year, we will have 17.6 per cent. England has about 8.6 per cent. The United States has only 3.9 per cent. The United States has 65,500 people in private prisons, but there are 1.6 million people in federal, state and local county gaol systems in the United States. So it is a tiny proportion. We are way ahead of any other country in the world. I think that will possibly increase by the end of this century to about 25 per cent, even though this is getting away from the issue of international transfers. Provided that certain conditions are met and there is the adequate monitoring of standards and performance, I welcome that development.

**Mr RANDALL**—You said that in that 12-year period between 1984 and 1996 there has been almost

a doubling of prisoners in Australian prisons and that this may lead to pressure not to accept prisoners. Could you comment on the fact that there were extraordinary circumstances in that period. We did not have the high rate of car theft and social crimes then. The drug issue 12 years ago was probably not as large as it is now. Has it been a matter of course?

**Mr Biles**—I do not accept that at all, with respect. Imprisonment rates are not driven by crime rates. One can do this longitudinally. One can look at it nationally or in individual states and look at where crimes are increasing or decreasing and the impact on imprisonment rates. One finds no statistical correlation there. One can also do the exercise cross-sectionally. One can look at the eight jurisdictions in Australia and look at crime and imprisonment rates in each one. Again, one finds that the crime rates do not drive imprisonment rates in that simplistic way.

It is certainly true that the jurisdiction in Australia with the highest crime rates is the Northern Territory. It also has the highest imprisonment rate. But if you look at the rest of Australia, such as New South Wales versus Victoria, one does not find any link. It is true that the drug issue has become more important in that period since 1984. It was certainly there in 1984. What has happened is that public fear of crime has increased. That has been reflected in legislation at the state level, particularly in things such as truth in sentencing, which had the impact, for example, in New South Wales of increasing the number of prisoners from 4,500 to 6,500. It is as simple as that. It has nothing to do with crime but the legislation governing sentencing.

**Mr SINCLAIR**—I was interested in your comment that the population of Australian prisoners is ageing.

**Mr Biles**—It is. It is around the world.

**Mr SINCLAIR**—I would have thought that more younger people were being sentenced than older people.

**Mr Biles**—We are going through demographically in Australia a period where the high crime group, which is those aged 15 to 25, is a decreasing proportion of the total population. That element is still very significant as far as crime is concerned. There are an awful lot of young prisoners. In recent years, not only in Australia but around the world, the number of older prisoners has increased dramatically.

I was reading recently that in the United States federal system there are currently over 400 prisoners over the age of 85 years. To some extent, that is a direct result of legislation such as truth in sentencing and three strikes and you are in. Any legislative control of sentencing which reduces judicial discretion creates situations where, inadvertently, people are going to end up spending an awful lot of time in prison. Other factors that are relevant to the ageing situation is the widespread and genuine concern about sex crimes, such as paedophilia and so on, in recent years. There has been a police operation around the whole of Australia call Operation Pegasus, which has resulted in a number of older people being prosecuted. That includes people in their 60s and 70s being sent to prison.

**Mr SINCLAIR**—Do you think age should be a factor in the transfer of prisoners? You mentioned

middle aged women. Is that a factor that ought to be written into the legislation?

**Mr Biles**—It may well be one of the factors which inclines one to more urgently want to encourage a transfer. For example, an older person in an Asian setting may be suffering very seriously because of the change in diet and lack of medical care and so on. That might be a consideration. We should not solely dwell on Australians in Asian prisons—it is a very significant matter—because we have a lot of Australian citizens in prisons in many other countries, such as the United States and England.

**Mr RANDALL**—The second highest group is in Greece.

**Mr Biles**—And New Zealand. I will say something about New Zealand. New Zealanders are opposed in principle to international transfer schemes because they are fearful that they will be flooded with New Zealand citizens coming back from Australia. You can understand that. I visit Australian prisons quite a lot. Every time I meet a New Zealander in Australian prisons, I like to have a chat and say, 'If you had a chance, would you like to serve the remainder of your sentence back home in New Zealand?' In every case except one, I have found that they are perfectly happy here. They say, 'Why would I want to go back?'

Before Christmas, I was in the maximum security prison Casuarina in Western Australia. I saw a traditionally tattooed Maori prisoner there. I was having a very interesting chat with him. He said that if he had a chance, he would go back, even if he was going back to Paremoremo, which is the ultra maximum security prison near Auckland. He would choose that because he would be closer to his family and so on. It seems that the New Zealand anxiety about being flooded with people coming back is overstated, in my view. I do not think the numbers would be particularly great. There are Australians in prison there. It might fairly well balance. The New Zealanders will take a lot of convincing before they will sign any treaty on this subject.

**CHAIR**—On the question of prison conditions, there have been expressions of concern to the committee about the need to ensure that any prisoner who is contemplating making an application pursuant to such legislation is aware of the conditions to which or she would likely to be transferred. Do you have any comments about how a prisoner can have some informed knowledge of the likely conditions?

**Mr Biles**—In some of the submissions, that point was raised. It is a very difficult one. The reference to the provision of information, towards the end of the act, is really a provision of information about the legislation rather than about prison conditions. I do not realistically see any easy way of doing that. If a person wanted to go back to America—I have been in contact with a number of American prisoners in Queensland who are very anxious to return to America—and if one pursued that line of thought, one would have to provide information about whether that person was going to have an individual cell or be in a dormitory, whether the cell would have its own plumbing and whether there were constructive work and education programs and all that sort of thing. I guess one might try to do that. Perhaps Australian consular services could do something along those lines. I think it is an extraordinarily difficult task. It would rebound on us. We cannot afford to be too proud of our prisons. We have our shortcomings and deficiencies. Our prisons are not all that wonderful.

**Mr McCLELLAND**—How parental do you think the Attorney-General should be if he feels that a

prisoner is going back to a substandard prison? Should he intervene to prevent that occurring, or should he say that that prisoner, being informed, has elected to nonetheless return?

**Mr Biles**—That point was raised by Justice Elizabeth Evatt in her submission to you. My position would be that if the Attorney-General is satisfied that the prisoner has a rough idea about the conditions, it is up to him. One of the strengths of this legislation is that there must be at least a three-way agreement between all the parties. Even though, as Justice Evatt says, a voluntary decision does not waive the rights of the person, we can become over-protective.

I do not think there would be many cases where a person would choose to go back to conditions which were totally uncongenial as far as their culture was concerned. I could imagine, for example, Indonesian fishermen who have been imprisoned here for violating immigration and being here illegally and so on being transferred back to an Indonesian prison. They would then be close to their families and there would be Indonesian food and so on. They may not have individual cells, but they would not expect that, I would think. In most cases where people want to be transferred out, they would be transferred from Australia to the United States, England, New Zealand and other Western countries.

**CHAIR**—There being no further questions, I thank you for your attendance here today and your assistance to the committee in its deliberations.

**Mr Biles**—My pleasure. Thank you.

**CHAIR**—I declare this meeting of the committee closed.

Resolved (on motion by Mr Randall):

That this committee authorises publication of the proof transcript of the evidence given before it at public hearing this day.

**Committee adjourned at 11.15 a.m.**