

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

ADVISORY REPORT
ON THE
INTERNATIONAL TRANSFER OF
PRISONERS BILL 1996

House of Representatives Standing Committee on
Legal and Constitutional Affairs

FEBRUARY 1997

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FOREWORD

The House of Representatives Standing Committee on Legal and Constitutional Affairs is pleased to present this advisory report on the International Transfer of Prisoners Bill 1996.

The concept of an international transfer scheme for prisoners has been discussed for a number of years. Support for such a scheme has been based generally on humanitarian grounds. Opposition to the concept of a transfer scheme, where it has been expressed, has focussed usually on concerns about the sovereignty and integrity of the criminal justice system of the sentencing jurisdiction.

The Committee decided that it would greatly assist its work to discuss the issues raised by the inquiry with a prisoner who might be affected by the Bill. The Committee attended Parklea Correctional Centre, Blacktown, held discussions with the Governor and took formal evidence from a prisoner who is a foreign national. The Committee found the evidence from the prisoner and other persons who might be personally affected by an international prisoner transfer scheme particularly compelling, and the Committee is sympathetic to the hardships endured by all members of a family when a family member is imprisoned in another country.

The Committee has found that in Australia, there is almost unanimous support for the philosophy of the Bill from both the public and the private sectors. While it is true that some state and territory governments have raised problems about certain aspects of the Bill, notably costs, there has been no criticism of the transfer principle itself. The Committee commends the work of the Standing Committee of Attorneys-General in developing the prisoner transfer scheme and the legislation.

The Committee is keen to see Parliament pass the Bill and for prisoner transfers to take place as soon as possible. As there is such a high level of support for a prisoner transfer scheme, the Committee urges all state and territory governments to take part in the scheme and to pass complementary legislation as soon as possible.

Kevin Andrews MP
Chairman

February 1997

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Chapter 1

Introduction

Reference of the Bill

1.1 The International Transfer of Prisoners Bill 1996 was introduced to the House of Representatives on 21 November 1996 by the Attorney-General, the Hon Daryl Williams AM QC MP. After the second reading speech, the Bill was referred by the House of Representatives to its Standing Committee on Legal and Constitutional Affairs for consideration and an advisory report by 3 March 1997.¹

1.2 The Bill provides a framework for Australia to participate in the international transfer of prisoners.² The purpose of the Bill is to enable Australians imprisoned overseas to be returned to Australia to complete their sentences. It will also enable foreign nationals imprisoned in Australia to be returned to their home countries to serve out their sentences.

1.3 As well as providing a framework for general prisoner transfers, the Bill will enable tribunal prisoners who have been convicted by certain international war crimes tribunals to be transferred to Australia to serve their sentences. The provisions in the Bill enabling transfers from these tribunals dealing with war crimes committed in the former Yugoslavia and Rwanda, will complement the *International War Crimes Tribunal Act 1995*.³

1 *House of Representatives Daily Hansard*, 21 November 1996, p. 7107.

2 Hon Daryl Williams, *House of Representatives Daily Hansard*, 'Second Reading Speech', 21 November 1996, p. 7105.

3 This Committee tabled an advisory report on the bills related to that Act in 1994 – House of Representatives Standing Committee on Legal and Constitutional Affairs, *Advisory Report on International War Crimes Tribunal Bill 1994 and International War Crimes Tribunal (Consequential Amendments) Bill 1994*, June 1994, Canberra.

The Committee's inquiry

1.4 The evidence gathered by the Committee for its inquiry includes 14 submissions and two exhibits.⁴ The Committee also held four hearings.⁵

1.5 The oral and written evidence to the inquiry contained a range of comments about international transfer of prisoners schemes in general, and the Bill in particular. The comments canvassed both possible amendments to the Bill itself, and related proposals. Where possible the Committee referred suggested amendments to the Attorney-General's Department – the department sponsoring the Bill – so that its responses could be taken into account during the Committee's deliberations.

1.6 The Committee carefully considered all the inquiry evidence and this report contains the comments it wishes to highlight.

Scope of the report

1.7 The report begins in this chapter with a brief history of the development of international transfer of prisoners schemes in general, and considers arguments for and against transfers. This is followed by an overview of the development of the Bill and of the steps necessary before prisoner transfers involving Australia may take place. This chapter concludes with an overview of the features of the Bill.

1.8 The second chapter contains the body of the report. In this chapter, the Committee identifies and discusses the main issues addressed during the

4 The names of those persons and organisations who made submissions and provided exhibits to the inquiry are listed in Appendix A.

5 The names of those persons who gave evidence before the Committee at public hearings are listed in Appendix B.

inquiry, and considers individual provisions and proposed amendments. In so doing, the Committee makes several recommendations aimed at improving the proposed international transfer of prisoners scheme.

The development of international transfer of prisoners regimes

1.9 David Biles has written that while the idea, of allowing persons sentenced to prison in foreign countries the possibility of serving part of their sentences in their own countries, has been around for more than a century, only in the past twenty years has it been discussed widely.⁶ Biles attributes the urgency and emotion surrounding this debate to the dramatic increase in the number of known foreign prisoners, which in turn has resulted from the rapid increase in international air travel since the 1970s and the rise in illegal drug use over the same period.

1.10 Many countries have concluded bilateral prisoner transfer treaties and some are party to multilateral regimes.⁷ The primary multilateral prisoner transfer convention is the Council of Europe's Convention on the Transfer of Sentenced Persons.

1.11 In 1978 at their 11th Conference, the European Ministers of Justice, discussed the problems posed by prisoners of foreign nationality, including the question of providing procedures for their transfer so that they may serve their sentences in their home countries.⁸ That discussion led to the adoption of a resolution, and eventually to the preparation of a model agreement. The

6 Biles D., *Exhibit No. 1*.

7 Attorney-General's Department, *Submissions*, p. S21.

8 Council of Europe, *Explanatory report on the Convention on the Transfer of Sentenced Persons*, European Treaty Series – No. 112, p. 9 para. 1.

Convention on the Transfer of Sentenced Persons was signed in 1983. This model agreement provides procedures for the transfer of prisoners, to be used between member states or by member states in their relations with non-member states. The word 'European' was deliberately omitted from the title of the Convention, reflecting the drafters' intention that the instrument should be open to like minded democratic states outside Europe.⁹ Indeed, several non-European countries are party to the Convention including Canada, Trinidad and Tobago, and the United States.¹⁰

1.12 The Commonwealth Scheme for the Transfer of Convicted Offenders is another multilateral transfer regime. It is intended that Australia will seek to become party to and implement existing multilateral regimes including the Convention and the Commonwealth Scheme. It is also intended that Australia will negotiate bilateral treaties as appropriate.¹¹

Opposition to international transfers of prisoners

1.13 Some nations are opposed to the international transfer of prisoners for reasons including the view that transfers would weaken the integrity of national penal systems.¹² The main reason for opposition to the idea of international transfers seems to be lack of trust between nations.

9 Council of Europe, *Explanatory report on the Convention on the Transfer of Sentenced Persons*, European Treaty Series – No. 112, p.11 para. 11.

10 Attorney-General's Department, *Submissions*, p. S32.

11 Attorney-General's Department, *Submissions*, p. S21.

12 Biles D, *Exhibit No. 1*.

Opposition in Australia

1.14 David Biles has suggested that the opposition in Australia to international transfer of prisoners schemes is strong, and seems to be based on the belief that international transfers would undermine the effort to fight serious crime, particularly drug crime.¹³

Considerations in favour of international transfers of prisoners

1.15 The principal argument in favour of the international transfer of prisoners is humanitarian.¹⁴ The deprivation of liberty can be more harsh for prisoners imprisoned in foreign countries because of absence of contact with, and support from, relatives and friends, language barriers, differences in diet and health care, alienation from local culture, intolerance of religious practices, ineffective vocational training and general prejudice against foreigners.¹⁵ A prisoner can be adversely affected both psychologically and physically, and his or her rehabilitation might be impaired.

1.16 The international transfer of prisoners is said to enhance the prospects of rehabilitation of prisoners and their reintegration into the community, as rehabilitation is thought to depend on the prisoner having the benefit of family or community support. This support is more likely where prisoners are in the same country as their families.

13 Biles D., *Exhibit No. 1*.

14 Biles D., *Exhibit No. 1*.

15 Attorney-General's Department, *Submissions*, p. S16.

Support in Australia for the international transfer of prisoners

1.17 The Attorney-General's Department has stated that in recent years a wide range of individuals and groups have supported the transfer of prisoners. Supporters include parliamentarians, academics, human rights organisations, prisoner support groups, friends and families of prisoners and prisoners themselves.¹⁶ Biles has stated that the greatest pressure for Australian participation comes from bodies such as the United Nations, Amnesty International and the International Committee of the Red Cross, all of which see such transfers as 'a matter of principle rather than politics'.¹⁷

1.18 The grounds for support in Australia include the humanitarian and rehabilitative reasons for the international transfer of prisoners. Reduced financial costs is also raised as a reason for Australia's participation. Biles has suggested that Australian participation in international prisoner transfers would be likely to result in financial savings for participating states or territories as there is expected to be a net outflow of prisoners.¹⁸ Cost is an important issue for the states and territories because participating jurisdictions have agreed to pay for the costs of incoming prisoners. This costing arrangement is consistent with the current position internationally that receiving countries will generally bear the costs of transfer.

1.19 Costs of incoming prisoners will be offset against the savings arising from outgoing prisoners. Some states consider their prison populations would be reduced and that cost savings would be significant.¹⁹ Biles has argued, however, that no one really knows how many prisoners are likely to be moved

16 Attorney-General's Department, *Submissions*, p. S15.

17 Biles D, *Exhibit No. 1*.

18 Biles D, *Exhibit No. 1*.

19 Attorney-General's Department, *Submissions*, p. S17.

in and out of Australia each year under a transfer scheme.²⁰ The Attorney-General's Department has not been able to provide statistically reliable estimates of expected prisoner transfer figures, and the Committee considers that this is not surprising given that transfers involving Australia are not likely to take place in the immediate future.

1.20 Australia's obligations under international agreements support its participation in the international transfer of prisoners: Articles 2.1 and 10.3 of the International Covenant on Civil and Political Rights; and Article 5 of the Convention on the Elimination of all Forms of Racial Discrimination. Principles 60(2) and 80 of the UN Standard Minimum Rules for the Treatment of Prisoners also support such participation. Furthermore, the Attorney-General's Department has stated that Australian participation may enhance and supplement Australia's relations with other countries in the field of criminal justice, and there is growing international pressure for Australia to participate in transfer regimes.²¹

1.21 Other possible advantages include practical benefits in terms of reduced burdens on prison administration in dealing with foreign prisoners and reduced burdens on consular staff in those countries from which a large number of Australian prisoners might transfer. The Department of Foreign Affairs and Trade has claimed that a transfer scheme will reduce the burden on consular services leading to reduced financial costs.²²

1.22 The evidence to the inquiry was overwhelmingly in favour of the philosophy of the Bill.

20 Biles D, *Exhibit No. 1*.

21 Attorney-General's Department, *Submissions*, p. S15.

22 Department of Foreign Affairs and Trade, *Submissions*, p. S37.

Development of the Bill

1.23 There are no federal prisons in Australia and prisoners, even those serving a sentence for a federal offence, are housed in prisons controlled by states and territories. Incoming prisoners would need to be housed in prisons controlled by those states and territories participating in a transfer scheme. Conversely many prisoners who will seek to transfer to another country from Australia will be serving sentences for state and territory offences. Therefore, the issue of transfers of prisoners is one which has both a Commonwealth and a State and Territory dimension.

1.24 The transfer issue was placed on the agenda of the Standing Committee of Attorneys-General (SCAG) some years ago. In July 1992 the SCAG made an in-principle decision that Australia should work towards the implementation of arrangements to enable international prisoner transfers to take place.²³

1.25 SCAG Ministers agreed to the following general principles:

- the Commonwealth will administer the scheme and pass legislation to bring treaties into effect, provide an administrative structure for transfers and regulate the status of prisoners who are to be transferred;
- states and territories will pass legislation providing the necessary authority for the transfer of state or territory offenders out of the jurisdiction and to permit the detention within their prisons of persons from outside their jurisdictions;
- jurisdictions agree to accept prisoners on transfer into their prisons on the basis of demonstrated community ties;
- the Commonwealth will meet the costs of administering the scheme and the receiving state or territory will meet the costs of transfer from overseas to Australia and of maintaining that person while in prison; and
- the scheme will apply to all offences without exception.²⁴

23 Attorney-General's Department, *Submissions*, p. S29.

24 Attorney-General's Department, *Submissions*, p. S29.

1.26 A working group prepared a paper, based largely on the Council of Europe Convention, with a view to Australia eventually becoming a party to the Convention. By late 1993 all jurisdictions, with the exception of the Northern Territory, had decided to participate in the scheme and the SCAG Ministers decided to proceed with a scheme in November 1993. Over the months that followed the details of the scheme were developed. Some of the issues discussed at length included:

- the appropriate time remaining to be served by prisoners seeking transfer;
- whether dual criminality should be a requirement;
- whether the scheme should extend to parolees, probationers and persons confined because of criminal conduct arising out of a mental disorder;
- what method for enforcing sentences in Australia should be adopted and how it should operate;
- who should bear responsibility for certain costs; and
- whether Australia should seek to recover transfer costs from prisoners.²⁵

1.27 The scheme's core legislative and administrative details were settled in November 1994, and the Parliamentary Counsel's Committee commenced preparation of a draft Commonwealth bill and a model State/Territory bill. In July 1995, the Ministers agreed to include provisions in the Bill enabling war crimes tribunal prisoners to be transferred to Australia.

1.28 Successive drafts of the bills were subject to analysis and subsequent alteration. The Committee acknowledges that because the Bill was developed through the SCAG process, any amendments to the Bill would need to be agreed with the states and territories.

25 Attorney-General's Department, *Submissions*, p. S30.

Steps necessary before prisoner transfers involving Australia can take place

1.29 The first step towards enabling prisoner transfers involving Australia to take place is to pass this Bill. Complementary legislation will also need to be enacted by the participating states and territories. Furthermore, the Bill provides for the Commonwealth and the States and Territories to enter into administrative arrangements relating to the scheme (cl. 50).

1.30 Another critical step in the process is that Australia must enter into transfer arrangements with other countries. This would usually depend on Australia being party to multilateral or bilateral treaties, or arrangements might be made in the absence of a treaty. Regardless of whether transfers are to take place under a treaty, Australia will need to undertake bilateral negotiations in each prospective transfer case.

Features of the Bill

1.31 The International Transfer of Prisoners Bill provides the framework for a prisoner transfer scheme that will apply to all offences, and will cover persons who have been convicted of a crime and sentenced to imprisonment or other deprivation of liberty, including those with a mental disorder and persons released on parole.²⁶

1.32 The Bill provides for all transfers to be considered on a case-by-case basis. All transfers must be consensual, requiring the consent of the transferring prisoner, the Australian Government – and any involved state or territory government – and the government of the other country (cl. 10). The prerequisites for transfer include:

²⁶ Attorney-General's Department, *Submissions*, p. S19.

- the prisoner is imprisoned under a final order – neither the sentence nor the relevant conviction is subject to appeal (paras 14 (1) (a), 15(1)(a));
- for transfers to Australia, the person is an Australian citizen or is permitted to travel to, enter and remain in Australia indefinitely pursuant to the *Migration Act 1958*, and has community ties with a state or territory (cl. 13);
- dual criminality, whereby the acts or omissions constituting the relevant offence would, if the acts or omissions had occurred in Australia or the other country as appropriate, have constituted an offence in that country, with a discretion of the Attorney-General to waive the dual criminality requirement (paras 14(1)(a), 14(2)(b), 15 (1) (b) and 15 (2) (b)); and
- at least six months of the sentence is remaining to be served, with a discretion of the Attorney-General to permit transfer for a shorter sentence (paras 14 (1) (c), 15(1)(c)).

1.33 Part 5 of the Bill provides for transfers of Tribunal prisoners. The main differences in relation to Tribunal prisoners are that consent from the prisoner is not mandatory, and there are no explicit citizenship or migration requirements (subclause 39 (2)).

1.34 The Bill provides for a choice between two different forms of sentence enforcement, continued enforcement – with only such adaptation as considered necessary to ensure consistency with Australian law – and converted enforcement – substituting a different sentence (cl. 42). It is expected that Australia would generally use the continued enforcement method, however, the method used in a particular case will depend on the agreement covering the transfer.²⁷

1.35 From the date of transfer to Australia, Australia's laws apply to enforcement of sentences and conditional release or remission, as if the prisoner were a federal offender.²⁸ The Attorney-General has a limited discretion to make changes to the sentence (cl. 44).

27 Attorney-General's Department, *Submissions*, p. S20.

28 Attorney-General's Department, *Submissions*, p. S21.

Chapter 2

Issues and clauses

Introduction

2.1 At the outset, the Committee wishes to observe that there was overwhelming support for the Bill in the submissions and oral evidence to the inquiry. The Committee is mindful that the Bill is the product of a lengthy process of consideration and development by the Standing Committee of Attorneys-General (SCAG). The inevitable implication from this is that substantive changes to the Bill would need to be considered by SCAG, and that such consideration could further prolong the period before international transfers of prisoners involving Australia could take place.

2.2 The Committee received comments on issues related to the Bill as well as on particular clauses of the Bill. The Committee considered all of these comments and, while it has decided not to pursue all of the issues and clauses, this chapter contains those comments the Committee wishes to highlight and several recommendations aimed at improving Australia's proposed scheme.

2.3 The Committee is convinced of the humanitarian grounds for the scheme and urges all parties to advance the international transfer of prisoners scheme so that transfers of prisoners involving Australia can commence as soon as possible.

Recommendation 1

The Committee recommends that Parliament pass the International Transfer of Prisoners Bill 1996 following due consideration of the recommendations of this advisory report.

National application of the scheme

2.4 Before prisoners can actually transfer under Australia's transfer scheme, the states and territories must pass complementary legislation. Although the Bill was developed in the SCAG forum, it is not certain that all states and territories will participate in the scheme. The Northern Territory Government has already stated that it does not intend to participate, and the Western Australian Government has indicated that it has difficulties with some aspects of the Bill, particularly the distribution of costs for the scheme.¹

2.5 Mr Chris Meaney from the Attorney-General's Department told the Committee that while agreement between the states had been reached in SCAG, cabinet approval within some states had not yet been given. He stated that:

... it is not necessarily a foregone conclusion that all states will get through that process. I think it would be pre-emptive to assume that.²

2.6 Witnesses raised concerns about the ramifications of some states or territories refusing to participate in the scheme. One witness commented that the "whole thrust of the proposal is diminished by some jurisdictions not coming on board".³

2.7 The Human Rights Commissioner, Mr Chris Sidoti, stated that it was "absurd to have one Australian jurisdiction not part of such a scheme" and recommended that:

1 Attorney-General for Western Australia, *Submissions*, p. S33.

2 *Transcript*, p. 109.

3 Mr D Biles, *Transcript*, p. 134.

... the Bill should provide explicitly for extension to all Australian internal territories, either directly or by way of regulation if the territories themselves do not legislate.⁴

2.8 Mr Sidoti canvassed the option of the Commonwealth Parliament using its constitutional power to ensure that the territories participate. He suggested that the problem of fragmented implementation could be overcome if the relevant state minister's consent was not necessary in order to transfer a prisoner into Australia. As the prisoners are classified as federal prisoners, there is an obligation on the states to place federal prisoners in state gaols.⁵

2.9 The Attorney-General's Department drew the Committee's attention to the fact that incoming prisoners are taken to be federal prisoners only for the purpose of sentence enforcement under clause 46. The explanatory memorandum states at paragraph 128 that this mechanism is not supposed to affect the administrative arrangements entered into between the States, Territories and the Commonwealth.⁶ Mr Meaney stated that the Attorney-General's Department did not support any mechanism which would force recalcitrant states or territories to participate in the scheme.⁷ He went on to say:

We think it [the scheme] sells itself and, in the fullness of time, all the states and self-governing territories will see the benefit of it.⁸

4 *Transcript*, pp. 30 & 33.

5 *Transcript*, p. 34.

6 *Submissions*, pp. S81–S82.

7 *Transcript*, p. 108.

8 *Transcript*, p. 110.

2.10 The Committee considers it would be preferable for the scheme to operate uniformly within Australia, and is concerned that if some jurisdictions do not participate prisoners wanting transfers involving non-participating states or territories could be denied access to the scheme. However, the Committee also recognises that delaying commencement of the scheme until all states and territories have enacted enabling legislation would be undesirable and may even lead to the collapse of the scheme.

2.11 The Committee considers that this is not a matter, at this stage, in which the Commonwealth should use its constitutional powers to compel all states and territories to participate and believes that the scheme should proceed even if all jurisdictions do not intend to adopt it from the outset. The Committee strongly urges all states and territories to pass the necessary legislation to ensure that all Australians in overseas gaols and all foreign nationals in Australian gaols will have equal access to the transfer scheme. Furthermore, the Committee urges all states and territories to pass such legislation as a matter of priority.

Recommendation 2

The Committee recommends that the Attorney-General formally approach his state and territory counterparts about participating in the international transfer of prisoners scheme. The approach should emphasise the value of the scheme, the need for Australia's transfer scheme to operate on a national basis, and the need for states and territories to consider participating in the scheme as a matter of priority.

Eligibility to transfer – clauses 13 and 57

2.12 Clause 13 of the Bill sets out the eligibility requirements which must be met before a prisoner can be transferred to Australia under the scheme.

Australian citizens

2.13 Under paragraph 13(a) Australian citizens are eligible for transfer to Australia under the Bill. Provided that their citizenship can be verified, they need not satisfy any additional requirements under this clause.

Non-citizens

2.14 In the case of prisoners who are not Australian citizens (including people who had been permanent residents at some time prior to leaving Australia) the process is a little more complicated. Paragraph 13(b) states that their eligibility to transfer is dependent on their meeting the requirements of the *Migration Act 1958*. Unless prisoners are eligible under that Act to travel to, enter and remain in Australia indefinitely, they will not be able to participate in the scheme.

2.15 Clause 57 of the Bill prevents the Attorney-General from making any decision which affects a prisoner who is not an Australian citizen without the consent of the Minister for Immigration and Multicultural Affairs.

2.16 In addition to meeting these criteria, paragraph 13(b) requires the prisoner to demonstrate that he or she has 'community ties' with a state or territory.

2.17 One group which was discussed at some length at the public hearings was Aboriginal or Torres Strait Islander prisoners who had been removed from their families as children. These people may have taken on the citizenship of the adoptive parents and as a consequence may not meet the existing criteria in paragraphs 13(a) or (b). The Human Rights and Equal Opportunity Commission (HREOC) suggested that clause 13 be amended to provide for the eligibility criteria for transfer to Australia, to include 'an Aboriginal or Torres

Strait Islander prisoner who was removed from his or her family as a child'.⁹ The Human Rights Commissioner discussed further whether such a provision should be extended to apply to any person who was born in Australia and then removed from Australia as a child.¹⁰

Immigration requirements

2.18 Justice Dowd was critical of the requirement in clause 57 that the consent of the Minister for Immigration and Multicultural Affairs is needed to transfer to Australia a prisoner who is a permanent resident. He stated that "to require the consent is just an appalling power to a department with not a good track record."¹¹

2.19 The Department of Immigration and Multicultural Affairs (DIMA) has stated that:

The primary consideration of the Minister, when considering whether to agree to the transfer of a prisoner under the Bill, will be his obligations under the Migration and the Citizenship Acts.¹²

2.20 Persons who held permanent residence status when they left Australia but whose re-entry authority has expired will not be eligible to transfer under the Bill unless they successfully apply for a Resident Return Visa under the Migration Act.

2.21 Section 501 gives the Minister the discretion to refuse a visa application or to cancel a visa if the person in question would be likely to

9 *Submissions*, p. S5.

10 *Transcript*, p. 37.

11 *Transcript*, p. 72.

12 *Submissions*, p. S58.

engage in criminal conduct if he or she were allowed to enter or to remain in Australia. The Minister can also act under this section if he or she is satisfied that the person is not of good character, having regard to the person's past criminal conduct or general conduct.

2.22 The Committee asked representatives from DIMA whether the mere fact that a person has been convicted of and imprisoned for an offence overseas was evidence of 'bad character'. Mr Peter Job replied:

There are a number of considerations that would be taken into account in terms of those discretionary provisions of the minister. They would include such considerations as ties with Australia, the family composition in Australia and the seriousness of the crimes committed. There are a number of factors that we would take into account. Those considerations are considered, assessed and evaluated in terms of ... cancelling the visas of people who we have concluded are not of good character and could be a risk to the Australian community.¹³

2.23 The Committee noted that clause 57 provides the Minister for Immigration and Multicultural Affairs with a power of veto over a decision of the Attorney-General to transfer a prisoner into Australia. The Committee suggested that perhaps it would be sufficient if the Bill were to enable the Minister to advise the Attorney-General on the matter, rather than requiring his or her consent. In reply Mr Job stated that the existing provisions reflected the fact that:

... the Migration Act is still the legislation which determines who can and who cannot stay in Australia and who will be permitted to remain in Australia. That has always been viewed as the overarching legislation which determines that. I think the wording which currently exists in the proposed legislation meets that objective. If you were to go to the advice line, we would then be going against the principle that has consistently applied that the Migration Act is the determining legislation for who will enter and

13 *Transcript*, p. 86.

who will be required to depart Australia and the conditions under which they should enter Australia.¹⁴

2.24 Mr Meaney from the Attorney-General's Department agreed with this explanation:

... the immigration legislation overrides this legislation and will continue to override this legislation ... If the person is not entitled to come into Australia, and that entitlement at the end of the day really is determined in accordance with the Migration Act by the Minister for Immigration, then the person will not come in.¹⁵

2.25 Mr Job explained that if prisoners were transferred into Australia without the approval of the Minister for Immigration, they could nevertheless be removed from Australia once they had served their sentence on the basis of the provisions outlined above. Mr Peter Vardos also pointed out that, had the prisoners in question offended in Australia while holding a permanent resident visa they would be subject to deportation under the Migration Act once the custodial sentence had been completed.¹⁶

2.26 Similar difficulties arise with the proposed amendment regarding Aboriginal and Torres Strait Islander prisoners. Mr Meaney pointed out the anomaly which would flow from such an amendment:

What we [would] have is a right for a class of persons – Aboriginal and Torres Strait Islanders – who have been convicted of offences overseas to return to Australia but no general right of getting back into Australia under the Migration Act for, if you like, law abiding persons of the same extraction who might have been in the same class.¹⁷

14 *Transcript*, p. 88.

15 *Transcript*, p. 103.

16 Mr P Vardos, *Transcript*, p. 87.

17 *Transcript*, p. 103.

2.27 In relation to this issue the Attorney-General's Department stated that:

It is our view that if a person is not able to enter Australia under the migration legislation, then this Bill cannot, and should not, create a separate right for convicted persons within a particular class of persons to enter Australia.

There would clearly need to be a substantial amount of consideration and consultation to determine whether it is appropriate for persons who have been forcibly removed from their parents as children to have a right of entry to Australia. If the Migration Act is amended in the future to enable persons in the class of concern to enter Australia, then such persons would be able to satisfy the eligibility requirement under the present clause 13.¹⁸

2.28 The Committee acknowledges that under the Bill any person who was taken from Australia as a child and who has lost his or her Australian citizenship as a result may face difficulties in satisfying the requirements set out under the Migration Act. The Committee recognises that there may be cases where there are good reasons for allowing such persons to return to Australia under the Bill. This matter raises complex policy issues that fall within DIMA's sphere of responsibility, and the Committee considers it would not be appropriate to recommend changes to other legislation in the context of this Bill inquiry. The Committee nevertheless considers the issues raised here merit further investigation.

Recommendation 3

The Committee recommends that the Minister for Immigration and Multicultural Affairs initiates an examination of the issues surrounding the eligibility of persons, who have been removed from Australia as children, to have a right of entry to Australia.

18 *Submissions*, p. S84.

Community ties

2.29 As noted above, paragraph 13(b) requires a non-citizen to have community ties in order to be eligible for a prisoner transfer. Justice Dowd expressed the view that the criteria by which community ties are to be established under paragraphs 4(4)(d) and 5(4)(d) are too restrictive.¹⁹ Under these criteria, a prisoner could establish community ties if he or she has a close continuing relationship with a person whose principal place of residence is in the country, state or territory (as the case may be) to which transfer is sought and the prisoner has frequent personal contact and a personal interest in the other person's welfare.

2.30 In evidence before the Committee Ms Annette Willing from the Attorney-General's Department stated that these paragraphs were intended to ensure that there is a personal relationship – and not just a business, commercial or financial relationship – between the transferee and the person who resides in the country, state or territory.²⁰ States and territories had made it clear in SCAG discussions that they would not be prepared to accept incoming prisoners unless the individuals had some personal connection with the jurisdiction.²¹

2.31 The Committee does not consider the 'community ties' requirement to be unreasonable. The requirement applies only to persons who are not Australian citizens and the definition is sufficiently broad to encompass most personal relationships. The Committee agrees that it would not be appropriate

19 *Transcript*, p. 70.

20 *Transcript*, pp. 111–112.

21 *Submissions*, p. S83.

for prisoners to be transferred back to Australia merely on the basis of a business or financial relationship.

Transfer conditions – clause 15

2.32 Subclause 15(1) establishes three conditions of transfer of prisoners to Australia under the Bill:

- (a) neither the sentence nor the conviction is subject to appeal under the law of the transfer country,
- (b) subject to subclause (3), the conduct constituting the offence for which the prisoner is serving the sentence would constitute an offence had it occurred in Australia. Subclause (3) enables the Attorney-General to determine that this requirement need not be satisfied in particular circumstances, and
- (c) at least 6 months of the sentence remains to be served.

Conviction/sentence not subject to appeal

2.33 It is not entirely clear from the Bill or from the explanatory memorandum whether the phrase 'subject to appeal' in paragraph 15(1)(a) means subject to an appeal which is awaiting consideration, or subject to any rights of appeal which remain, even if they have not and are not intended to be acted upon. If the latter is the case, then all available appeals must be exhausted or any time limits for instituting such appeals must have expired before the prisoner can be transferred.

2.34 The Committee notes that the Council of Europe Convention requires as a condition of transfer that the judgment is final.²² The explanatory report on the Convention states that:

... the judgment must be final and enforceable, for instance because all available remedies have been exhausted, or because the time-limit for lodging a remedy has expired without the parties having availed themselves of it. This does not preclude the possibility of a later review of the judgment in the light of fresh evidence, as provided for under Article 13.²³

2.35 The Convention uses the phrase 'judgment is final' rather than 'subject to appeal'. It is assumed that the intention of the provision in the Bill is to provide for a similar condition of transfer as that required by the Convention. However this is not made clear by the Bill or the explanatory memorandum.

2.36 There were also concerns about the effects of paragraph 15(1)(a), in particular, that the condition that neither the conviction nor the sentence is subject to appeal may cause undue delays in the transfer process for some prisoners. Some prisoners may not feel that they can afford to go through the appeal process, or may have been advised that an appeal would take some years and/or would have little chance of success. Some legal systems may allow appeals for an indefinite period of time, in which case the avenues of appeal may never be technically exhausted.

2.37 There was some discussion at the public hearings about whether this problem could be overcome by enabling a prisoner to waive his or her rights to appeal.

22 Council of Europe, *Convention on the Transfer of Sentenced Persons*, European Treaty Series – No. 112, Article 3(1)(b).

23 Council of Europe, *Explanatory report on the Convention of the Transfer of Sentenced Persons*, European Treaty Series – No. 112, p. 12 para. 21.

2.38 Professor Shearer stated that:

Maybe I would want to make an exception that, if the appellate process is extremely drawn out and if it is rather theoretical, the prisoner might well wish to waive any further appeal rights in the country and come back to Australia to serve the full length of sentence. I think that would probably be a matter for the personal choice of the prisoner concerned.²⁴

2.39 The Human Rights Commissioner, Mr Sidoti, was also cautious about this issue:

I must say that it would certainly place a great deal of pressure on a prisoner to forgo those rights, and it may not be in the prisoner's long-term interest to do so. My own feeling is that it is better to exhaust the criminal prosecution processes of the legal system where the prosecution commences before a transfer scheme comes into place.²⁵

2.40 The Committee notes the ambiguity of the expression 'subject to appeal' and its divergence from the language used in the Council of Europe Convention. The Committee also recognises that there is potential for difficulties to occur as a result of the requirement in paragraph 15(1)(a). The Committee further notes that while other conditions of transfer contained within clause 15 can be waived by the Attorney-General, the requirement provided for in paragraph 15(1)(a) is not the subject of a similar discretion. The Committee considers that these issues should be addressed by the Attorney-General's Department in an annual review of the operation of the scheme (see Recommendation 6 and related paragraphs below).

24 *Transcript*, p. 58.

25 *Transcript*, pp. 36–37.

Recommendation 4

The Committee recommends that the Attorney-General's Department note any difficulties which arise in the operation of the transfer scheme, as a result of either the language used in paragraph 15(1)(a) or its substantive elements, and report on any such difficulties in an annual review of the scheme (see Recommendation 7).

Dual criminal liability

2.41 The dual criminal liability requirement was discussed extensively during the public hearings. Examples of behaviour which might be an offence outside Australia include being in possession of alcohol, homosexuality or participating in demonstrations. Paragraph 15(1)(b) is subject to subclause 15(3), which gives the Attorney-General a discretion to determine that the requirement need not be satisfied in particular circumstances.

2.42 There was some debate about whether it was appropriate to include this factor as a condition of transfer. Mr David Biles felt that the requirement is "unnecessary and inconsistent with the general tenor of the legislation".²⁶ Mr Biles has earlier written about the requirement for dual criminality:

This restriction is, I believe, based on the erroneous proposition that a person could not be held in prison for behaviour which is not itself criminal in that country. The central point is that the person is being held in prison on the authority of a court in a foreign country which has a treaty with the home country. The actual behaviour that led to the sentence in the first place should not be relevant to the question of whether the prisoner is eligible for transfer or not.²⁷

²⁶ Mr D Biles, *Transcript*, p. 130.

²⁷ Biles D, *Exhibit No. 1*.

2.43 Justice Dowd was also critical of a dual criminality requirement, stating that Australia should be able to take an Australian back even where the offence for which he or she has been convicted is not an offence in this country. He asserted that it would be "appalling if you could get back here as a rapist because it is an offence in both countries" whereas someone who was convicted of committing a male homosexual act would not be eligible to return because such conduct was not a crime in Australia.²⁸

2.44 On the other hand, Professor Shearer suggested that it was unwise to enable the Attorney-General to waive the dual criminality element.²⁹ However he said that he thought Australia could not:

... in all conscience as a nation be seen to be enforcing an offence which was so contrary to our own notions of what was criminal.³⁰

2.45 This issue is further complicated by the fact that some existing multi-lateral international agreements relating to the transfer of prisoners require dual criminality as a condition of transfer. For example, dual criminality is a condition of transfer under the terms of the Council of Europe Convention, although in the Commonwealth Scheme for the Transfer of Convicted Offenders it is not.³¹ The Attorney-General's Department has advised that 'due to cost-effectiveness and scope', it is intended that Australia become a party to such existing schemes.³²

28 Justice J Dowd, *Transcript*, pp. 66–68.

29 Professor I Shearer, *Transcript*, p. 55.

30 Professor I Shearer, *Transcript*, p. 54.

31 Council of Europe, *Convention on the Transfer of Sentenced Persons*, European Treaty Series – No. 112, Article 3(1)(e).

32 *Submissions*, p. S21.

2.46 The Attorney-General's Department has stated the issue of dual criminality was discussed at considerable length in the working group set up by SCAG.³³ In that forum different views were expressed and it was agreed that the legislation had to take into account that there is a divergence of views on this issue. It was also felt that the practices of other countries currently operating transfer of prisoner schemes had to be considered. Mr Meaney submitted that:

The approach in the Bill therefore will enable Australia to become party to the Council of Europe Convention while at the same time enabling some flexibility in order to ensure that Australians imprisoned in other countries for conduct which would not constitute an offence in Australia are not totally excluded from the scheme.³⁴

2.47 The Department believes that 'the approach adopted in the Bill represents a balance of views and is the best solution in all the circumstances'.³⁵

2.48 The Committee recognises that the main object of the Bill is humanitarian. The aim is to facilitate contact with families and friends, to encourage rehabilitation and to enable prisoners to serve their terms in more culturally familiar surroundings. To achieve these objects the Committee acknowledges that there may be circumstances where a person will be required to serve a term in an Australian prison for conduct which would not constitute an offence in Australia. However repugnant this may seem, the alternative – namely that a person in those circumstances would not be able to take advantage of the transfer scheme – is also undesirable.

33 *Submissions*, p. S84.

34 *Transcript*, p. 96.

35 *Submissions*, p. S85.

2.49 The Committee does not propose to recommend amendment of the existing provision dealing with dual criminal liability because it considers the current clause 15 enables Australia to enter into the existing multilateral treaties which will facilitate the speedy implementation of the scheme, as well as providing flexibility in negotiating new treaties.

Minimum of six months sentence remaining

2.50 Paragraph 15(1)(c) requires, in the first instance, that at least six months of a prisoner's sentence remains to be served. This provision reflects one of the conditions of transfer of the Council of Europe Convention.³⁶

2.51 The provision also enables the Attorney-General to determine that, in the circumstances, transfer for a shorter period is acceptable. The Committee supports the inclusion of this discretionary element. There may be circumstances, where transferring a prisoner back to Australia who has less than six months of the sentence remaining is appropriate.

2.52 The Western Australian Government has indicated that it would prefer that prisoners have at least two more years of a sentence to serve rather than the six month period provided for in the Bill.³⁷

2.53 Considering the rehabilitative and humanitarian objects of the Bill, the Committee believes that to require that a two year minimum sentence remains would be too severe. Given that many prisoners serving sentences in foreign gaols are deported to their home countries on completion of their sentences, a two year minimum requirement would merely delay the return of prisoners, with possible adverse consequences for their rehabilitation prospects. The

36 Council of Europe, *Convention on the Transfer of Sentenced Persons*, European Treaty Series – No. 112, Article 3(1)(c).

37 Attorney-General for Western Australia, *Submissions*, p. S33.

Committee therefore believes that the six month requirement should not be lengthened.

Enforcement of sentences

2.54 The question of how sentences imposed overseas will be enforced in Australia is a central issue in international prisoner transfers. Part 6 of the Bill deals with this issue.

2.55 Two methods of enforcement in Australia are provided for prisoners transferred from overseas (clause 42). The Attorney-General may direct that *an overseas sentence is to be enforced without any adaptation, or only with such adaptation as is considered necessary to ensure consistency with Australian law (the 'continued enforcement method')*. The second method (the 'converted enforcement method') enables a different sentence to be substituted. The explanatory memorandum notes that in practice the method adopted in an individual case will depend on the particular agreement under which the prisoner is transferred. Clause 43 provides that, irrespective of the method used, the sentence to be served should not be any harsher than the original sentence.

2.56 Clause 44 would enable the Attorney-General to give certain (limited) directions in ordering a sentence to be served either under the continued enforcement or the converted enforcement method.

2.57 Under clause 45 a sentence imposed by the overseas country is not subject to appeal or review in Australia. Nor is there any appeal against a decision of the Attorney-General relating to the enforcement in Australia of a sentence of imprisonment imposed by the overseas country.

2.58 Clause 47 provides that, in the case of a prisoner transferred from Australia, the sentence of imprisonment is taken to be a sentence imposed in

the country to which the prisoner is transferred (the 'transfer country') and, subject to clause 48, is enforced accordingly. Clause 48 makes provision for pardons, amnesties or for the commutation of sentences of imprisonment in relation to prisoners transferred from Australia. Conversely, clause 49 provides for pardons, amnesties or the commutation of prison sentences in relation to prisoners transferred to Australia.

2.59 Under clause 48 the conviction of a prisoner transferred from Australia may be quashed or otherwise nullified and the prisoner may be pardoned or granted amnesty or commutation of sentence as if he or she were still in Australia. If this occurs, the Attorney-General must notify the transfer country immediately of the decision and inform that country that the sentence should no longer be enforced.

2.60 Three main questions arose in relation to Part 6 of the Bill. They are:

- which jurisdiction should grant pardons, etc?
- how can Australia be sure that sentences will be fully served once a prisoner is transferred to another jurisdiction?
- is it possible to re-open cases once an Australian prisoner has been convicted and sentenced and transferred to Australia?

Which jurisdiction should grant pardons, etc.

2.61 In relation to this concern Mr Martin Sides, of the Public Defender's Office in New South Wales, argued that the Bill was not sufficiently clear about whether a prisoner could take advantage of remissions in both the sentencing jurisdiction and the receiving jurisdiction.³⁸ He stated that clarification is needed 'to avoid double dipping in connection with remission.'

38 *Submissions*, p. S53.

2.62 On the other hand, the Human Rights Commissioner argued before the Committee that it would be useful to make it clear that prisoners convicted under Australian law and transferred to another country, may also be granted a pardon, amnesty or commutation of the sentence imposed in Australia. Mr Sidoti noted that subclause 48(1) specifies that Australia can provide for a pardon or an amnesty or a commutation. He suggested amendments to that provision to make it quite clear that a transfer country can also exercise local laws and local powers for pardon, amnesty and commutation.³⁹ Mr Sidoti contended that prisoners convicted and sentenced in Australia and transferred overseas should be able to take advantage of remissions granted to prisoners serving sentences in Australian prisons. It was his view that the power should lie with both countries.⁴⁰

2.63 This issue was also canvassed by Professor Shearer.⁴¹ He queried whether the operation of subclause 49(1) is too limited. Although he did not wish to put a concluded view, he raised the issue of whether an Australian convicted of an offence overseas and transferred back to Australia to serve the sentence should be able to benefit from amnesties or commutations granted by the country in which he or she was convicted and sentenced. Professor Shearer added that he could see no issue of infringement of the sovereignty of a country transferring prisoners to Australia if a prisoner was granted a few days remission in Australia because of something which has happened that is peculiar to the gaol in Australia to which the prisoner has been transferred (such as a gaol warders' strike). He thought that this arrangement is quite appropriate:

39 Mr C Sidoti, *Transcript*, p. 32.

40 Mr C Sidoti, *Transcript*, p. 35.

41 Professor I Shearer, *Transcript*, p. 53.

It would be understood in the sentencing country as being a purely local arrangement. It does not significantly make inroads on the foreign sentence.⁴²

2.64 The Attorney-General's Department contended that there is little point in amending clause 48 as suggested by Mr Sidoti since the other country will be able to exercise local laws, irrespective of the content of the Australian legislation. The Department argued that Australia's legislation cannot, and should not purport to, provide substantive rights under other countries' laws.⁴³

2.65 The Attorney-General's Department stated:

The intention of the legislation, which is consistent with accepted international practice (eg as in the Council of Europe Convention) is that, following transfer, the sentence will be enforced according to the laws of the country to which a prisoner is transferred. This does not affect the ability of either country to grant pardon, amnesty, etc, in accordance with its laws.

A prisoner will be transferred from Australia to a transfer country, pursuant to an agreement (whether multilateral or bilateral) that Australia has with that country, and in accordance with each country's legislation. On the subject of pardon, amnesty, etc, the Council of Europe Convention provides that each country may grant pardon, amnesty or commutation of the sentence in accordance with its Constitution or other laws (Article 12). It is expected that bilateral treaties would contain a similar provision. The purpose of our legislation is to enable Australia to comply with its obligations under the agreement, and the other country's legislation will enable it to do likewise. There is therefore absolutely no need, and it is misconceived, to insert the words [suggested by HREOC].⁴⁴

42 Professor I Shearer, *Transcript*, p. 60.

43 Attorney-General's Department, *Submissions*, p. S89.

44 Attorney-General's Department, *Submissions*, p. S89.

2.66 For similar reasons, the Attorney-General's Department argued that amendment of clause 49 is not necessary because that clause deals only with what can be done in Australia and does not purport to provide for what may or may not be done under the laws of another country. Under the Bill it is possible for a prisoner transferred to Australia to be granted a pardon under Australian law as if the sentence had been imposed for an offence under Australian law.⁴⁵

2.67 The Committee is persuaded that it would not be appropriate to include in the legislation provisions which purport to provide rights under other countries' legislation. The Committee accepts the evidence of the Attorney-General's Department that such provisions would have no effect and that it would be misconceived to include such provisions in the Bill.

Enforcement of sentences imposed by Australian courts

2.68 Justice Dowd expressed concern that persons may take advantage of this legislation to return to their own country, but that the receiving country may not enforce the sentence and instead, release the prisoner.⁴⁶ He also suggested that it may not be safe to rely on bilateral agreements since, from time to time, governments change.

2.69 The Committee raised this issue with another witness, Mr Biles. The Committee sought his view on whether the legislation should provide for a minimum term to be served in Australia before a prisoner could transfer to another country.⁴⁷ Such a provision would overcome Justice Dowd's concern that prisoners would be released before they had served even a minimum

45 Attorney-General's Department, *Submissions*, p. S89.

46 Justice J Dowd, *Transcript*, p. 63.

47 *Transcript*, p.131.

sentence. Mr Biles argued that such an amendment was not necessary. He pointed out that there is already sufficient flexibility in the legislation to enable a Commonwealth, State or Territory Attorney-General to veto a transfer until a prisoner had served a certain number of years. Therefore he believed that there is no need to provide explicitly that a minimum term be served in Australia before transfer can occur.⁴⁸

2.70 In relation to the general issue of guaranteeing that Australian sentences are enforced overseas Mr Meaney of the Attorney-General's Department stated that:

... it is the normal course of international business that you have to rely on. There are no absolute guarantees, but the sanction, of course, is that if we have an agreement to do certain things with other countries and we have a case where they do not honour that – they do something different or they subvert it – then we just do not do business with them any more. ... There will be countries, for example, that we just would not contemplate having prisoner agreements with. A threshold test before we actually have a prisoner agreement is some confidence in the other parties⁴⁹

2.71 The Committee tends to agree with Mr Biles that if a Commonwealth, State or Territory Attorney-General is concerned that the receiving country may not enforce the sentence there is sufficient flexibility in the provisions already in the Bill to enable him or her to refuse an application for transfer. The Committee also accepts the arguments put by the Attorney-General's Department that the general enforcement issue must be underpinned by the integrity of treaty partners and their willingness to observe the terms of the treaty.

48 Mr D Biles, *Transcript*, p. 133.

49 Mr C Meaney, *Transcript*, p. 99.

Can cases of prisoners transferred to Australia be re-opened?

2.72 In its submission to the Committee, the Attorney-General's Department noted that although it is a condition of transfer that all avenues of appeal must be exhausted or that any time limit for appeals must have expired, the possibility of a later review of the conviction remains open if fresh evidence emerges.⁵⁰ In the course of taking evidence the Committee raised with the Attorney-General's Department a concern that an Australian may be wrongfully convicted in another country and some time after transfer to Australia, fresh evidence may come to light. The Committee suggested another hypothetical situation where it becomes clear that there has been some bias or corruption in the convicting tribunal resulting in wrongful conviction. In these circumstances, the Attorney-General's Department was asked to identify the avenues open to the person who was wrongfully convicted or imprisoned.⁵¹

2.73 The Attorney-General's Department pointed out that paragraph 49(2)(b) envisages the possibility that fresh evidence could surface. It provides that a prisoner is not to be detained in custody under a sentence imposed by the transfer country if:

... the transfer country notifies the Attorney-General that the prisoner's conviction has been quashed or otherwise nullified or that the prisoner has been pardoned or granted amnesty or commutation of sentence of imprisonment under the law of the transfer country.

2.74 This arrangement however is only available following the execution of due process in the country where the prisoner was sentenced. On the issue of

50 *Submissions*, p. S13.

51 Mr T Smith, *Transcript*, p. 101.

bias or corruption in the tribunal which led to the conviction of the prisoner, the Attorney-General's Department stated that the only avenue available was provided in subclause 49(1) which provides:

During the period in which a sentence of imprisonment is served in Australia by a prisoner transferred to Australia under this Act, the prisoner may be pardoned or granted any amnesty or commutation of sentence of imprisonment that could be granted under Australian law if the sentence of imprisonment had been imposed for an offence against Australian law.

2.75 The Attorney-General's Department conceded that this provision does not authorise vitiation of the conviction though relief of the sentence could be obtained under it.⁵² However, the Department cautioned against seeing this as a provision which could be used freely to grant such relief. Mr Meaney stated:

There are possibilities to enable you to raise the issue here. It is legally possible. We would imagine that they would be few and far between. What you have to realise is that, if there is going to be any fallout, you can prevent the injustice in the instant case if you want to make that your cause, but your agreement is likely to go west and everybody else who might benefit from it.⁵³

2.76 On balance, the Committee concludes that the scheme could only operate if the terms of the agreement governing the transfer of prisoners were honoured by the countries which entered into them. The Committee considers that it is preferable to have a scheme in operation that will enable the return of prisoners. It may be that a situation arises where a prisoner is wrongfully convicted and is required to remain in prison in Australia under the terms of a multilateral or bilateral agreement. However, the Committee believes that this

⁵² Mr C Meaney, *Transcript*, p. 101.

⁵³ Mr C Meaney, *Transcript*, p. 101.

is not likely to be a common problem and that the humanitarian benefits on which the scheme is based outweigh the risk of such injustice.

Attorney-General's discretion

2.77 The Bill grants the Attorney-General a broad discretion in making certain decisions. For example, decisions regarding the enforcement of sentences (Part 6), the waiving of the dual criminality requirement as a condition of transfer (subclauses 14(3) and 15(3)) and the giving of consent to a transfer (cil. 20 and 24). Some of these discretions, which are not regulated in any way, were brought to the attention of the Committee during public hearings.

2.78 One witness recommended restricting the degree of discretion being invested in the Attorney-General.⁵⁴

2.79 The NSW Council for Civil Liberties and the organisation Justice Action suggested that the use of the discretionary provisions and the general operation of the Bill be reviewed once the Bill had been in operation for some time.⁵⁵

2.80 Mr Meaney explained that the Bill provided for a wide range of discretions to be vested in the Attorney-General. He explained that this was:

... because we are treading largely into the unknown ... [and] we really do not want to put ourselves in a position of making it so claustrophobic that when you get a legitimate case we find out that we have so hamstrung the Attorney-General that we cannot produce a reasonable result in all the circumstances.⁵⁶

54 Justice J Dowd, Transcript, pp. 67, 69 & 71.

55 *Submissions*, p. S6 and Mr T Anderson, *Transcript*, pp. 14–15.

56 *Transcript*, p. 119.

2.81 Mr Sidoti thought it was appropriate that the Attorney-General have a discretion and suggested that the legislation provide that when exercising the discretionary powers under the Act, the Attorney-General should have regard to human rights and humanitarian considerations.⁵⁷ This principle was supported by Ms Elizabeth Evatt, who stated that:

I would like to think that all the discretions that will be exercised under the Act will be exercised in a manner compatible with our international human rights obligations ...

I would like this committee to make a strong statement like that as a guiding principle to the way that the Act should be exercised. If it is in your report, it will be there for all time for whoever is exercising discretions and it will be there if any act of any government officer or Attorney-General comes up for judicial review as a question of exercise legally. They will be able to look at that to see that it was the intention that we should at all times be compatible with human rights standards and not risk a violation by a transfer.⁵⁸

2.82 The Committee considers that it is appropriate with legislation of this nature that a broad discretion be vested in the Attorney-General so that all the relevant issues can be considered in determining each case. The Committee agrees that human rights considerations should be a factor in making decisions under the legislation.

Attorney-General's discretion and prison conditions

2.83 Some witnesses argued that the Attorney-General should exercise his or her discretion to refuse consent to transfer prisoners to countries which did not meet certain human rights standards.⁵⁹

57 Mr C Sidoti, *Transcript* pp. 31 & 35.

58 *Transcript*, p. 23.

59 Mr M Sides QC, Senior Public Defender, *Submissions*, p. S52.

2.84 Ms Evatt supported this view:

I would like to think that ... they will not at any point put a prisoner who is to be transferred – particularly out of Australia – in a situation where there is any likelihood of a violation of human rights standards.⁶⁰

2.85 The Committee's attention was drawn to Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁶¹ This article states:

No State Party shall expel, return ... or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2.86 Mr Sidoti recommended that the Bill expressly provide:

... that the Attorney-General is not to consent to the transfer of a prisoner where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.⁶²

2.87 In relation to torture, the Attorney-General's Department stated that it would be unlikely that Australia would enter into an agreement for the transfer of prisoners with a country in which torture was prevalent, however, he suggested that it is difficult to determine exactly what constitutes 'torture'.⁶³

2.88 The Attorney-General's Department also put a concluded view on the matter:

If a prisoner is fully informed and freely consents to transfer, notwithstanding an awareness of possible harsh treatment, etc,

60 Ms E Evatt, *Transcript*, p. 23.

61 Mr C Sidoti, *Transcript*, pp. 31–32.

62 Mr C Sidoti, *Transcript*, p. 32.

63 Mr C Meaney, *Transcript*, p. 117.

then we do not believe that the Attorney-General should be required to make some form of paternalistic judgment and refuse to transfer the prisoner. It is possible that prisoners would prefer to be in worse prison conditions if they are able to be closer to their family, culture, etc. Why shouldn't prisoners be allowed to make this choice so long as they make fully informed decisions?⁶⁴

2.89 The Committee believes that if a prisoner consents to a transfer having been fully informed of all the relevant circumstances, including the prison conditions, the Attorney-General should not withhold consent to the transfer purely on the basis of those conditions. There may be extraordinary circumstances in which there is a compelling case for refusing consent on the basis of what may happen to the prisoner after being transferred. However the Attorney-General would have to consider all of the relevant circumstances, including the fact that the prisoner in question has consented to the transfer.

Informed consent – clause 6

2.90 Clause 6 of the Bill requires that before a prisoner is transferred to another country under this scheme he or she must consent to the transfer. However, Ms Evatt and Mr Sidoti expressed some concern about the adequacy of this provision. Ms Evatt argued:

I think the Attorney-General should have an obligation to make sure that the prisoner is fully informed and has the means of accessing the information that the prisoner needs. If the Attorney-General knows anything that might create a risk he should recommend either that the prisoner does not act or that, if the prisoner really wants a transfer, the prisoner is informed about such risks.⁶⁵

64 *Submissions*, p. S86.

65 *Transcript*, pp. 23–24.

2.91 She suggested that subclause 6(3) should state that, in addition to the requirement that a prisoner must be informed of the legal consequences of the transfer, the prisoner should be provided with information about the prison conditions in the country he or she wanted to transfer to.⁶⁶

2.92 Mr Sidoti also emphasised the need for informed consent. He stated:

For that reason, we recommend that clause 6(4) state clearly that consent is required not only to the transfer itself but also to the terms and conditions in relation to the transfer. Clause 6 deals with consent. What we would propose is the addition of words in relation to that consent in a new subclause (4) to make it clear that consent goes to the whole question of transfer and not just the fact of it.⁶⁷

2.93 Most witnesses supported the idea that, as far as practicable, prisoners should have access to information about prison conditions in the country they wanted to transfer to. It was recognised that this may not be an easy task.⁶⁸ It seems that there are likely to be difficulties in collecting information about prison conditions in other countries. Witnesses also commented that prison conditions vary greatly within countries, and that relevant information would require knowledge of the particular prison to which a prisoner would be transferred.

2.94 Despite these problems, there was general agreement that information regarding prison conditions in the country a prisoner wanted to transfer to should be provided to a prisoner before he or she consents to the transfer. Some witnesses suggested that this should be incorporated into the legislation.⁶⁹ Mr Meaney stated that provision for such information could be

66 *Transcript*, p. 21.

67 *Transcript*, p. 31.

68 Mr D Biles, *Transcript*, p. 137.

69 For example, Ms E Evatt, *Transcript*, p. 21.

included in the regulations.⁷⁰ He cautioned that the information which is provided should not include Australia's views on prison conditions. Rather, it would be preferable to require Australia to provide prisoners with relevant publications and contact details in order to give a prisoner the opportunity to obtain further information on prison conditions from relevant international

Recommendation 5

The Committee recommends that the regulations provide that prisoners be given information about either prison conditions in the country they want to transfer to, or relevant organisations that provide such information, prior to making the decision about being transferred to that country.

2.95 On a related matter, Mr Sidoti expressed the view that subclause 6(6) should be amended to make explicit that a prisoner can withdraw consent to transfer up until the time of transfer. Subclause 6(6) provides that a prisoner's consent cannot be withdrawn after the prisoner leaves the country from which he or she is being transferred. The Attorney-General's Department stated that it is intended that consent can be withdrawn up until that time. Mr Meaney did not see that the suggested amendment would make any substantive difference.⁷¹

2.96 The Committee considers that the proposed amendment would not effect any substantive change to existing subclause 6(6), and is therefore not persuaded that an amendment is necessary.

⁷⁰ *Transcript*, p. 107.

⁷¹ *Transcript*, p. 113.

Number of transferring prisoners

2.97 There is considerable uncertainty about the number of prisoners who would transfer into and out of Australia under an international transfer scheme for prisoners. It is difficult to ascertain how many foreign nationals are in Australian gaols, and how many of them would wish to apply for transfer to their home countries. The evidence available supports the proposition that more prisoners would be leaving Australia under the scheme than would be returning.⁷²

2.98 The Department of Foreign Affairs estimates that there are approximately 101 Australians serving sentences in overseas gaols.⁷³ Of these, 26 are in New Zealand, 19 are in Thailand and 13 are in the United States. There are also 63 Australian prisoners overseas who have not yet been sentenced.

2.99 According to the Department of Immigration and Multicultural Affairs, there are at least 632 prisoners currently held in Australian gaols who would be liable to removal or deportation on release, and therefore who would be eligible to transfer.⁷⁴

2.100 The Attorney-General's Department wrote to all state and territory corrective service authorities requesting information that would assist in determining the number of prisoners in Australian gaols who might be interested in applying for transfer under the scheme. The responses are as follows:

72 Biles D, *Exhibit No. 1*.

73 *Submissions*, p. S42. Information as at 30 June 1996.

74 *Submissions*, pp. S66–S68.

Queensland	57 prisoners indicated they would be interesting in participating in the scheme.
Victoria	421 prisoners have a nationality of a country other than Australia.
New South Wales	899 prisoners were born in another country and are not naturalised Australians.
Tasmania	5 prisoners were born in another country and claim nationality of place of birth.
Northern Territory	17 prisoners have citizenship of another country.

2.101 Western Australia and South Australia had not submitted responses at the time the submission was compiled.

2.102 While these numbers still do not indicate how many prisoners would wish to apply for a transfer under the scheme, they tend to support the assertion that there will be a net outflow of prisoners under the scheme.

Review of the legislation

2.103 The NSW Council for Civil Liberties and Justice Action suggested that the use of the Attorney-General's discretion and the general operation of the legislation be reviewed once the Act has been in operation for some time.⁷⁵

2.104 Mr Biles also argued that there be some degree of monitoring of the operation of the legislation. His specific concern was that the number of prisoners who come in and go out under the scheme should be monitored. He suggested that a small Commonwealth agency could carry out this monitoring role and advise the minister, as had been suggested when a scheme for the international transfer of prisoners was proposed in 1984.⁷⁶

⁷⁵ *Submissions*, p. S6 and Mr T Anderson, *Transcript*, pp. 14–15.

⁷⁶ *Transcript*, p. 129.

2.105 Mr Meaney agreed that review of the operation of the legislation was desirable.⁷⁷ The Department's preferred position was that a general review of the operation of the legislation take place in three years.⁷⁸ Mr Meaney expressed the view that there would not be sufficient transfers in a year to carry out a meaningful review of the scheme on an annual basis. There were also concerns that the confidentiality of the individuals concerned may be breached if reviews were to take place each year.⁷⁹

2.106 The Committee believes that the breadth of the discretions in the Bill and the uncertainty surrounding the scheme's operation warrants a regular review of the legislation. However, the Committee does not accept that there is a need for a separate authority to perform the task. Further the Committee considers that the Attorney-General's Department should be given resources to fulfil the function. The successful operation of the scheme will rely on a number of events – the implementation of complementary state and territory legislation, the negotiation of international agreements and the establishment of administrative procedures to deal with applications and consent.

Recommendation 6

The Committee recommends that the operation of the International Transfer of Prisoners Act be reviewed by the Attorney-General's Department annually and that a report of that review be tabled in Parliament.

⁷⁷ *Transcript*, p. 119.

⁷⁸ *Transcript*, p. 107.

⁷⁹ *Transcript*, pp. 106–107.

Technical drafting issue

2.107 Clause 24 commences 'The Attorney-General **may** consent to a request . . . '. Justice Dowd suggested that clause 24 should be changed to 'The Attorney-General **shall** consent to a request . . . '.⁸⁰ He argued that the clause provides a qualifying discretion on lines 5 and 6 ' . . . if the Attorney-General is satisfied that the transfer can be made in compliance with section 10.' Justice Dowd argued that these two expressions create a double discretion which he suggested was unnecessary.

2.108 In addressing this issue, the Attorney-General's Department agreed that Justice Dowd's comments had identified a problem with the technical drafting of the provision.⁸¹ The Department stated that the issue would need to be discussed with a drafter. The intention of the provision is to provide the Attorney-General with a discretion to refuse consent, in which case the word 'may' would be appropriate. The Department suggested that the provision would be improved by deleting the qualifying discretion on lines 5 and 6 ie ' . . . if the Attorney-General is satisfied that the transfer can be made in compliance with section 10.'

2.109 The Committee agrees that the problem with the provision seems to be one of a technical rather than a substantive nature. It is therefore appropriate that rather than recommend a form of words the provision should be referred for review by a legislative drafter.

80 Justice J Dowd, *Transcript*, p. 71.

81 Attorney-General's Department, *Submissions*, p. S87.

Recommendation 7

The Committee recommends that clause 24 be redrafted to clarify that the Attorney-General will have a discretion to refuse consent to a request for a transfer, and to clarify the interaction between clause 24 and other provisions.

Kevin Andrews MP
Chairman

25 February 1997

APPENDIX A - SUBMISSIONS

- 1 Elizabeth Evatt
- 2 Human Rights and Equal Opportunity Commission
- 3 New South Wales Council for Civil Liberties Inc.
- 4 Professor Ivan Shearer, The University of Sydney, Faculty of Law
- 5 Attorney-General for the ACT, Mr Gary Humphries MLA
- 6 Attorney-General's Department
- 7 Attorney-General for Western Australia, Hon Peter Foss QC MLC
- 8 Attorney-General for South Australia, Hon K Trevor Griffin MLC
- 9 Acting Premier of Tasmania, Hon Sue Napier MHA
- 10 Department of Foreign Affairs and Trade
- 11 Public Defenders
- 12 Department of Immigration and Multicultural Affairs
- 13 Attorney-General's Department
- 14 Attorney-General's Department
- 15 Mrs Tracey Garnett
- 16 Mr Martin Garnett
- 17 Ms Claudia Murphy
- 18 Human Rights and Equal Opportunity Commission

EXHIBITS

- 1 Extract from *The Criminal Lawyer* 'The International Transfer of Prisoners: Issues and Challenges for the 1990s', December 1994, pp. 3-5, David Biles, Criminologist
- 2 Extracts of letters to Ms Lyn Garnett from her son
- 3 Material provided by Mrs Tracey Garnett

APPENDIX B - WITNESSES

Blacktown 31 January 1997

Private Citizen

Mr Victor Pereira

Sydney 31 January 1997

Human Rights and Equal Opportunity Commission

Mr Christopher Sidoti, Human Rights Commissioner

International Commission of Jurists

Mr Justice John Dowd, President, Australian section

New South Wales Council for Civil Liberties

Mr Tim Anderson, Assistant Secretary

Mr John Marsden, President

Private Citizens

Ms Elizabeth Evatt

Ms Lyn Garnett

Professor Ivan Shearer

Canberra 6 February 1997

Attorney-General's Department

Mr Christopher Meaney, Assistant Secretary, International Branch, Criminal Law Division

Ms Maureen Kelleher, Principal Government Lawyer, Criminal Justice Branch, Criminal Law Division

Ms Annette Willing, Senior Government Lawyer, International Branch, Criminal Law Division

Department of Foreign Affairs and Trade

Mr Robert Hamilton, Assistant Secretary, Consular Branch

Mr Paul Smith, Director, Consular Policy

Mr Mark Webster, Consular Operations

Department of Immigration and Multicultural Affairs

Mr Peter Vardos, Assistant Secretary, Compliance and Enforcement Branch

Mr Peter Job, Director, Compliance and Enforcement Branch

Canberra 10 February 1997

Private Citizen

Mr David Biles

