

***Joint submission by state and territory Corrective Services Ministers to the Senate Legal and Constitutional Legislation Committee Inquiry into the Anti-Terrorism Bill (No.2) 2004***

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**1. Background**

- 1.1. The new security environment post-September 11 has required significant changes to the law enforcement and criminal justice system - our correctional systems are no exception.
- 1.2. People remanded for or convicted of terrorist-related offences (hereafter "terrorist inmates") are and will continue to be incarcerated in correctional centres across Australia, and this presents particular challenges to the correctional systems they are held in.
- 1.3. NSW is already holding inmates on remand for terrorist related offences, and it is likely that the number of such inmates will continue to increase. There are NSW inmates with known sympathies to extremist groups such as Hezbollah and al-Qaeda.
- 1.4. Proper preparation was needed to enable us to hold these highly dangerous inmates securely, and to prevent the possibility of them recruiting supporters or planning or encouraging terrorist acts while in custody.
- 1.5. In recognition of this, the state and territory Corrective Services Ministers and the CEOs of their departments have discussed the response to the challenges of terrorism at a number of meetings and forums over the last two years.
- 1.6. Legislative changes that the states have made or are making in response to this challenge include changes to Freedom Of Information laws and tougher penalties for inmates found in possession of mobile phones.
- 1.7. Operational changes include the acquisition of new x-ray machines, mobile phone detection devices and explosive detection dogs.
- 1.8. The states have also been lobbying the Federal Government to amend telecommunications laws to allow for a trial of mobile jamming technology at one geographically isolated correctional centre.
- 1.9. Moves are currently underway to develop a new uniform national classification for terrorist inmates, and a set of National Custodial Management Guidelines for holding these inmates. These guidelines will create national security standards, as well as uniform procedures

governing telephone calls and mail, visits, association issues, oversight<sup>1</sup>, religious contact and property.

- 1.10. An arrangement for the costs of containment or transfer of terrorist inmates and additional capital expenditure for upgrading facilities to a standard suitable for their containment is a matter still to be negotiated with the Commonwealth.

## **2. Introduction**

- 2.1. Laws to provide for the inter-state transfer of security-risk inmates were identified as a critical issue by Corrective Services Ministers and CEOs at their discussions on preparedness for incarcerating terrorist inmates.
- 2.2. Consequently, the state Corrective Services CEOs and Administrators developed a draft set of National Guidelines for the inter-state transfer of inmates on security grounds. These guidelines were based on the principle of speed of response. A copy of the draft guidelines is attached<sup>2</sup>.
- 2.3. The guidelines were due to be discussed and agreed upon at the Corrective Services Ministers' Conference in Hobart on 29 June 2004.
- 2.4. Prior to the conference, on June 17 the Commonwealth Attorney-General introduced the Anti-Terrorism Bill (No. 2) 2004, Section 4 of which amends the Commonwealth Transfer of Prisoners Act 1983 to provide for the interstate transfer of inmates on security grounds.
- 2.5. We acknowledge that the Commonwealth was responding to the states' request for changes to prisoner transfer laws. The haste associated with the inclusion of transfer provisions within this Bill has unfortunately resulted in a less than ideal proposal. The states want to avoid a second-best outcome which will hamper their ability to effectively manage terrorist inmates.
- 2.6. The Corrective Services Ministers' Conference on 29 June unanimously rejected the bill and resolved that New South Wales would coordinate a joint submission to this committee outlining their concerns on behalf of all state and territory Corrective Services Ministers.
- 2.7. This submission will outline the states' three main concerns with the proposed Bill:
  - 2.7.1. By adopting the definition of security contained in the Australian Security Intelligence Organisation Act 1979 it focuses on

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<sup>1</sup> Including by Freedom Of Information laws, Inspectors General (where applicable), Official Visitors, Ombudsmen.

<sup>2</sup> See Appendix A.

*national security and fails to provide for the transfer of prisoners on the basis of operational security.*

- 2.7.2. By requiring the written approval of the Commonwealth Attorney-General prior to transfer, the legislation **imposes an unnecessary extra layer of bureaucracy** which will slow the urgent transfer of extreme high risk inmates.
- 2.7.3. By requiring the Commonwealth Attorney-General to approve the transfer of certain state inmates it is an **unnecessary interference in the management of the state correctional systems**.
- 2.8. Whilst state corrections systems do need tools for the inter-state transfer of inmates on security grounds, the changes proposed in this bill are not adequate.
- 2.9. The NSW Minister has also written to the Commonwealth Attorney-General explaining some of our concerns about the Bill, and attached a copy of that correspondence as an addendum to our initial submission.
- 2.10. We want to make it clear that we remain committed to working cooperatively with the Commonwealth Government to find a mutually agreed solution to this important issue.
- 2.11. The interaction between state and Commonwealth prisoner transfer laws also needs to be considered. A coordinated cooperative approach needs to be taken to consider how the entire legislative scheme, including state and Commonwealth laws, should be amended to achieve the desired outcome.

### **3. Problems with the Bill**

#### **3.1. Fails to provide for transfer on the basis of operational security**

3.1.1. New s3(1) - item 5 of Schedule 4 of the bill<sup>3</sup> defines security as:

3.1.1.1. "(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:

- (i) espionage; or
- (ii) sabotage; or
- (iii) politically motivated violence; or
- (iv) promotion of communal violence; or
- (v) attacks on Australia's defence system; or

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<sup>3</sup> pp 25-26

(vi) acts of foreign interference; whether directed from, or committed within, Australia or not; and

(b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a).”

3.1.2. This definition is the same as the Australian Security Intelligence Organisation Act 1979<sup>4</sup> – and as such is focussed on threats to national security.

3.1.3. Consequently, it is uncertain whether threats to the operational security of the correctional system could be included under this definition and used as grounds for a transfer.

3.1.4. These circumstances could include where a correctional authority or another law enforcement or intelligence agency learned that a terrorist inmate was planning, or was the subject of a planned:

3.1.4.1. escape or break-out;

3.1.4.2. attack on a correctional centre

3.1.4.3. threat or intimidation against prison officers;

3.1.4.4. attempt to organise a disturbance or other crime within a correctional centre etc.

3.1.5. In such circumstances, we need to be able to act immediately - to invoke security transfer laws to transfer that inmate, possibly to another state<sup>5</sup>, within hours.

3.1.6. Under the current definitions in the Bill it is unlikely that this could be done.

3.1.7. **The states recommend** that the definition of security be amended to include matters significant to the operational security of correctional systems (Recommendation A at 4.2).

3.1.8. For example, grounds for transfer on the basis of Operational Security could be<sup>6</sup>:

“where continuing to hold the inmate in that correctional centre constitutes or is likely to constitute a threat to:

(a) the personal safety of any other person, or

(b) the security of a correctional centre, or

(c) good order and discipline within the correctional system.”

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<sup>4</sup> See explanatory memorandum p37.

<sup>5</sup> See 3.2.2 - 3.2.4 below.

<sup>6</sup> Adapted from s.10 of the NSW *Crimes (Administration of Sentences) Act 1999* No 93

- 3.1.9. It is envisaged that transfer on the basis of operational security would not apply to the general inmate population, but would only apply to a small group of special classification inmates.

### **3.2. Extra layer of bureaucracy slows urgent transfers**

#### **The challenge of terrorist inmates – limited placement options**

- 3.2.1. As outlined above at 3.1.4, where correctional authorities gain intelligence about an imminent threat to the security of a correctional centre, they need to be able to act immediately - to transfer that inmate to another state within hours. The threat assessment would be supported by state Police, the Australian Federal Police or the Australian Crime Commission.
- 3.2.2. There are only a very limited number of correctional centres in each state that are equipped to deal with the challenges posed by holding terrorist inmates – and some states or territories may have no such facilities.
- 3.2.3. As the number of terrorist inmates in custody rises, security and association issues will further constrain placement options for these inmates.
- 3.2.4. Consequently, the power to rapidly transfer terrorist inmates between suitable correctional centres in different states is an essential operational power that state authorities need in the management of these inmates - and one that should not require the written approval of the Commonwealth Attorney General to carry out.
- 3.2.5. As such the inter-state transfer of terrorist inmates is better likened to the intra-state transfer of regular inmates.
- 3.2.6. In the case of intra-state transfer (from one correctional centre to another) of other regular federal offenders, the only obligation is to inform the Commonwealth Attorney General of the movement.
- 3.2.7. This precedent should also be applied to the transfer of terrorist inmates.

#### **Delaying time critical transfers**

- 3.2.8. The changes proposed by this bill require the approval of the Commonwealth Attorney General and both state ministers in

writing before a security risk inmate can be transferred – even where an inmate is not being held for Commonwealth offences.

- 3.2.9. We are very concerned that this requirement for the written consent of the Commonwealth Attorney General will hold up the time-critical transfer of inmates who pose an immediate risk to security.
- 3.2.10. The bill also provides for other bodies such as Australian Security Intelligence Organisation, the Australian Federal Police and others to be consulted for information about the transfers<sup>7</sup>.
- 3.2.11. Under the National Custodial Management Guidelines for terrorist inmates, which are currently being developed, protocols and routines can be developed for these agencies to be kept informed by the intelligence units of state correctional authorities who could circulate regular intelligence reports on terrorist inmates.
- 3.2.12. Consequently these agencies are likely to already be up to date on any emerging issues when the need to transfer an inmate arises.
- 3.2.13. We accept that agencies may need to be consulted about transfers in certain cases where the movement of an inmate has national security implications.
- 3.2.14. However we are concerned that this may further slow the transfer process.

#### **Draft guidelines prepared by Corrective Services CEOs**

- 3.2.15. The CEOs of state correctional authorities have developed a detailed set of protocols to manage the very rapid transfer of inmates on security grounds<sup>8</sup>.
- 3.2.16. Under this model, all that would be needed to approve a transfer would be the verbal approval of the two state ministers and for the Commonwealth Attorney General to be informed<sup>9</sup> of the planned transfer (at which point they could raise any objections).
- 3.2.17. The transfer could be carried out on the basis of an interim order and formal written documentation would then be completed the following working day (even if after the transfer).

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<sup>7</sup> See new s.16B(2) and s.16D(3) and explanatory memorandum p45.

<sup>8</sup> See Appendix A.

<sup>9</sup> See 3.2.6. – the precedent for this is current intra-state transfer arrangements for federal inmates.

- 3.2.18. Under the proposed guidelines, transfers could be recommended by both the state housing the inmate and any external law enforcement agency (such as ASIO or the AFP).
- 3.2.19. The guidelines also provide for a review of the transfer after three months.
- 3.2.20. **The states recommend** that approval for an inter-state transfer of an inmate on security grounds be changed to require only that verbal approval of the two state ministers be obtained and the Commonwealth Attorney General be informed<sup>10</sup> (Recommendation B at 4.2)

### **No power for states to initiate transfers**

- 3.2.21. Another problem with the Bill is that there is no provision for the states to initiate security transfers – all transfers must begin with the Commonwealth Attorney General.
- 3.2.22. The intelligence units of state correctional authorities, with day-to-day access to terrorist and other inmates, may well learn of security threats (particularly against correctional centres) first-hand.
- 3.2.23. Regardless of the final procedure for approving transfers, it is important that state ministers have the ability to initiate as well as reject transfers.
- 3.2.24. **The states recommend** that the state ministers have the power to initiate as well as reject an interstate transfer under this legislation (Recommendation C at 4.2).

## **3.3. Jurisdictional and responsibility issues**

### **Management issues**

- 3.3.1. There are no federal correctional centres in Australia. s.120 of the Constitution provides for the incarceration of Federal offenders in state correctional centres. Once federal inmates are held in state correctional centres they are managed in exactly the same way as state inmates, under the full control of the state correctional authority<sup>11</sup>.
- 3.3.2. The state correctional authorities have years of collective experience and a body of knowledge on how to effectively

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<sup>10</sup> With formal written documentation completed the following working day.

<sup>11</sup> Parole is a sentencing rather than a custodial issue and so works differently for Federal inmates.

manage a correctional system – including safely holding extreme high-risk inmates.

- 3.3.3. The states have full autonomy in all aspects of the management of those offenders, in terms of the policies used to manage them, the programs they undertake, and, where they are placed.
- 3.3.4. Ultimate responsibility for the secure incarceration of terrorist inmates lies with the state authorities. Under this bill states will lose control of a vital tool for managing these inmates – transfer and placement.
- 3.3.5. We can not afford to have divided responsibility for managing these inmates. Experience demonstrates that dividing responsibilities between levels of government frequently leads to miscommunication, and increases the risk of something going wrong.
- 3.3.6. With terrorist inmates we can not allow this to happen. The state authorities responsible for securely holding these dangerous inmates must be empowered to control their management.

### **Federal Constitutional Powers**

- 3.3.7. This bill gives the Commonwealth Attorney General the power to transfer inmates who are only remanded for or convicted of a state crime<sup>12</sup>. Whilst this requires the consent of the state minister, once an inmate has been transferred the Commonwealth Attorney General may refuse to allow them to return. This power extends to over-ride state laws, and may even prevent them from returning for court proceedings.
- 3.3.8. Questions may be raised at about the constitutional validity of laws which give the Commonwealth Attorney General the power to transfer inmates convicted of state offences to another state.
- 3.3.9. Lawyers representing terrorist inmates who have been transferred could challenge the validity of such laws on this basis.
- 3.3.10. The states are loath to give such offenders an opportunity to delay due process and expend valuable public monies, when mechanisms could be provided that would deny such grounds for appeal.

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<sup>12</sup> See Part IV s16B(1)(a) p27



## **4. Conclusion**

- 4.1. In summary, the states submit to the committee that this Bill...
- 4.1.1. fails to provide for transfer on the basis of threats to operational security as well as national security
  - 4.1.2. imposes an unnecessary delay on the urgent transfer of terrorist inmates
  - 4.1.3. does not allow the states to initiate as well as reject transfers of terrorists
  - 4.1.4. constrains the management of terrorist inmates by state authorities and conflicts with their responsibility for managing these inmates
  - 4.1.5. may raise issues of constitutional validity

## **Recommendations**

- 4.2. The states recommend ...
- A. That the definition of security be amended to include matters significant to the operational security of correctional systems.
  - B. That approval for an inter-state transfer of an inmate on security grounds be changed to require only that verbal approval of the two state ministers be obtained and the Commonwealth Attorney General be informed.
  - C. That the state ministers have the power to initiate as well as reject an interstate transfer under this legislation.
- 4.3. The states would also be prepared to explain their concerns to the Committee in a public hearing if that would be beneficial.

## APPENDIX A

### DRAFT DOCUMENT

## National Guidelines for Interstate Transfer of Inmates - National Security.

The following guidelines have been developed to compliment amendments to the Commonwealth Transfer of Prisoners Act 1983.

This document outlines the procedures to be followed to facilitate the interstate transfer of inmates charged with and/or convicted of a terrorism offence.

For the purposes of this guideline, the following abbreviations will be used:

“**SEO**” means Senior Executive Officer

“**SOPs**” Standard Operational Procedure

“**CSAC**” means Corrective Services Administrators’ Conference.

“**CSMC**” means Corrective Services Ministers’ Conference.

“**OPM**” Operations Procedures Manual

“**OIC**” Officer in charge

“**CO**” means Case Officer as appointed by external law enforcement agency responsible for charged / convicted person

“**CEO**” means Commissioner, Director General, Director or Chief Executive Officer of Corrections for the State / Territory

“**AG**” means Federal Attorney General or Commonwealth Minister for Justice as applicable

“**State**” for the purpose of this guideline includes the Australian Capital Territory and the Northern Territory

“**Minister**” means State or Territory Minister responsible for Corrections

### Identification of Inmates this Guideline refers to

- 1 A database of all inmates (and their current placement) held in custody charged with and/or convicted of a terrorist offence will be administered by each State CEO or delegated SEO.

- 2 A list of all centres that meet agreed National Security Standards suitable for housing persons charged with or convicted of terrorism offences, will be compiled. The CEO and the nominated SEO will hold this list from each State.
- 3 Bi-monthly phone link ups between nominated State SEO's will be conducted to discuss security, vacancies and any identified issues relating to National Custodial Management Guidelines.

### **Section 1 Part 1**

#### **Identification of Security Threat (By State housing inmate)**

- 1 If intelligence is obtained that indicates a possible threat to National Security, the person becoming aware of the intelligence will immediately notify the OIC of their work location.
- 2 The OIC will liaise with their SEO outlining the issues involved.
- 3 The SEO will liaise with the nominated SEO responsible for Interstate Transfers – National Security for their jurisdiction. The SEO will be apprised of all relevant information and will complete the Interim Interstate Transfer Request – National Security (attachment 1).
- 4 The SEO will assess all current intelligence and ascertain best placement options. Once a destination has been recommended the SEO will commence liaison with the SEO from the intended State.
- 5 The nominated SEO will consult with the CO from the charging authority regarding the proposed transfer.
- 6 The SEO will inform the nominated contact from the AG's Office.
- 7 The SEO will liaise with the CEO, making a recommendation for transfer placement. The CEO will contact the Minister and gain verbal approval for the transfer.
- 8 The Minister (from the State wishing to transfer the inmate) will contact the Minister (from the recommended destination) and gain verbal cooperation.
- 9 A signed Interim order must be in existence prior to the transfer occurring. Formal documentation must be completed the next working day.

## **Section 1 Part 2**

### **Transfer of Inmate (At request of State housing inmate)**

- 1 Once approval has been granted by the Ministers, and the AG has been informed, transfer proceedings will commence.
- 2 Transport of the inmate will take place in a method agreed upon by the transferring and receiving State. (Options to be considered include Police Air Wing, chartered services, commercial flights & road transport.)
- 3 Escort costs to be met by the Commonwealth.
- 4 The CEO of the requesting State has the carriage of responsibility for organising the transfer.
- 5 Persons transferred under this act would be classified as a 'Part IIIA' prisoner until reviewed by receiving State.

## **Section 2 Part 1**

### **Identification of Security Threat (By External Law Enforcement Agency)**

- 1 If intelligence relating to National security is obtained from an external law enforcement agency the OIC of that agency will inform the CEO of the department housing the person of interest.
- 2 The CEO of the department housing the person of interest will liaise with their nominated SEO to commence transfer proceedings under recommendation of external law enforcement agency.
- 2 Steps 5 through to 9 will then be followed from Section 1 Part 1.

## **Section 2 Part 2**

### **Transfer of Inmate (At Request of External Law Enforcement Agency)**

- 1 Once verbal approval has been granted by the Ministers and the AG has been informed transfer proceedings will commence.
- 2 Transport of the inmate will take place in a method agreed upon by the transferring and receiving State.
- 3 Escort costs to be met by the Commonwealth.
- 4 The CEO of the State currently housing the person of interest has the carriage of responsibility for organising the transfer.

- 5 Persons transferred under this act would be classified as a 'Part IIIA' prisoner until reviewed by the receiving State.

### **Section 3 Part 1**

#### **Review of Interstate Transfers**

- 1 Within a three (3) month time frame from the date a transfer is affected, the two (2) involved CEO's will conduct a review of the transfer.
- 2 To assist the CEO's, a threat assessment document outlining any new information and current threat levels with a recommendation of a transfer extension or revocation will be prepared by the transferring state.
- 3 The CEO's will inform the AG of the results of the review and outline any further action / movement that may be required.

### **Section 3 Part 2**

#### **Transfer of Inmate (After Review)**

- 1 If the CEO's recommend a return to original placement transfer proceedings will commence
- 2 Transport of the inmate will take place in a method agreed upon by the transferring and receiving State.
- 3 Escort costs to be met by the Commonwealth.
- 4 The CEO of the State currently housing the person of interest has the carriage of responsibility for organising the transfer.
- 5 Persons transferred under this act would be classified as a 'Part IIIA' prisoner until reviewed by the receiving State.

### **General**

- 1 All States will amend OPM's to reflect new procedures.
- 2 All States will develop SOP's to detail transport / security issues.
- 3 This procedure will form part of National Custodial Management Guidelines to be developed for the management of 'terrorists' in custody.

<b>Transfer Of Prisoners Act 1983</b> Interstate Transfer Request – Part III A	
Summary of intelligence concerns:	
SEO checklist: SEO of other State contacted. Name: _____	
State: _____	Date: _____ Time: _____
CO contacted: Agency _____	Name: _____
Date: _____	Time: _____
CEO contacted: Date: _____ Time: _____	
Minister contacted: Name _____ Date: _____ Time: _____	
Verbal Approval given Yes: <input type="checkbox"/> No: <input type="checkbox"/>	
Signature: _____	
Minister of receiving Jurisdiction contacted: Name: _____	
Date: _____ Time: _____ Verbal Approval given: Yes <input type="checkbox"/> No <input type="checkbox"/>	
Signature: _____	
AG Office contacted: Name: _____	
Date: _____ Time: _____	
Transfer effected: From _____ To _____	
By: _____	