THE PRISONERS INTERNATIONAL TRANSFER (QUEENSLAND) BILL 1997

LEGISLATION BULLETIN NO 11/97

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BRISBANE
October 1997
ISSN 1324-860X
ISBN 0 7242 7371 9
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The Bulletin reflects the legislation as introduced. The *Queensland Legislation Annotations*, prepared by the Office of the Queensland Parliamentary Counsel, or the *Bills Update*, produced by the Table Office of the Queensland Parliament, should be consulted to determine whether the Bill has been enacted and if so, whether the legislation as enacted reflects amendments in Committee. Readers are also directed to the relevant *Alert Digest* of the Scrutiny of Legislation Committee of the Queensland Parliament.

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1. PURPOSE

International prisoner transfer schemes allow people serving sentences of imprisonment in foreign countries to serve part of their sentences in their home countries. The purpose of the Prisoners International Transfer (Queensland) Bill 1997 is to give effect in Queensland to the scheme for the international transfer of prisoners provided for under the International Transfer of Prisoners Act 1997 (Cth).¹

The Commonwealth Act, which was assented to on 18 June 1997, provides a framework for Australia to participate in the international transfer of prisoners. The Act enables Australians imprisoned overseas and foreign nationals serving prison sentences in Australia to be returned to their home countries to complete their sentences. It also facilitates the transfer to Australia to serve their sentences of prisoners convicted of international war crimes by the former Yugoslavia and Rwanda Tribunals.

Because there are no federal prisons in Australia, incoming prisoners under a transfer scheme would have to be housed in state and territory prisons. Many

¹ Prisoners International Transfer (Queensland) Bill 1997, Clause 3.
prisoners who might wish to transfer overseas will be serving sentences for state and territory offences. Thus, the international transfer of prisoners is an issue with both a Commonwealth and a state and territory aspect. Although the Commonwealth Act establishes a procedural framework to allow Australian participation in bi-lateral and multi-lateral international prisoner transfer agreements, complementary state and territory legislation must be enacted to give effect to the scheme in each Australian jurisdiction.

This Legislation Bulletin examines the background to the development of legislation, at Commonwealth and state level, to facilitate the international transfer of prisoners (Section 2). The arguments for and against the international transfer of prisoners are canvassed in Section 3 of the Bulletin. Section 4 outlines the key provisions of the Commonwealth Act. Section 5 outlines the provisions of the Queensland Bill, to which the Commonwealth Act forms an attachment. In Section 6, the limited available evidence on the number of prisoners likely to participate in the transfer scheme is examined. Section 7 of the Bulletin outlines the plans to review the operation of the legislation.

2. BACKGROUND

2.1 THE DEVELOPMENT OF INTERNATIONAL PRISONER TRANSFER SCHEMES

Interest in international transfer of prisoner schemes can be traced back more than a century, although the idea has only been widely discussed in the last decade or two. Biles suggests that the current debate has been given urgency by the rapid increase in international air travel since the 1970s together with the increase in illegal drug use. As an illustration of the differences of opinion which the subject has invoked in this part of the world, Biles quotes the following extract from the report of the 13th Asian and Pacific Conference of Correctional Administrators, held in Hong Kong in November 1993:

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With regard to the international transfer of prisoners, it became apparent that there were divergent philosophies and practices. Some nations were currently opposed to such arrangements for a variety of reasons, including the strongly held view that to maintain the integrity of the penal system, convicted offenders should serve their sentences in the place in which they were convicted. Other countries expressed the view that the difficulties faced by foreign prisoners were often such that, as a matter of humanity and with a view to achieving the aims of rehabilitation in the course of serving prison sentences, they should be repatriated to their own cultural background if it could be done consistently with justice and respect for domestic criminal laws.

Countries which reported that they were at present reluctant to enter into such arrangements included: Fiji, Japan; Macau; Malaysia; New Zealand; the Solomon Islands; and Sri Lanka. Countries which already had an active program of international transfer in place included: Canada; Hong Kong; the Republic of Korea; and Thailand. Countries which had the matter under active review included: Australia; Brunei Darussalam; the People’s Republic of China; India and Singapore.5

2.2 SUPPORT FOR TRANSFER SCHEMES IN AUSTRALIA

In Australia, the strongest support for international prisoner transfer schemes is believed to have come from organisations such as the United Nations, Amnesty International and the International Committee of the Red Cross, all of which Biles describes as seeing the issue as “... a matter of principle rather than politics”.6

In 1984, the Commonwealth Attorney-General’s Department prepared a paper for the Standing Committee of Attorneys-General in which it was proposed that an authority to administer a scheme for the international transfer of prisoners be established (the International Transfer of Prisoners Authority). It was proposed that the new authority be created by Commonwealth legislation similar to the Transfer of Prisoners Act 1983 (Cth), which makes provision for the interstate transfer of prisoners and is complemented by reciprocal legislation in all of the Australian states and territories.7 According to Biles, the proposed scheme was not accepted:

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7 Prisoners (Interstate Transfer) Acts were enacted in Qld, NSW, South Australia and Tasmania in 1982, in Victoria, Western Australia and the Northern Territory in 1983, and in the ACT in 1993.
... largely because it was suggested in some quarters that it could be seen as “going soft on drug offenders”, the largest single group of Australian prisoners overseas. Also at that time, the much more limited scheme of interstate transfer of prisoners was in its infancy and the idea of international transfer might have been seen as far too radical.8

In July 1992, however, the Standing Committee of Attorneys-General (SCAG) made an in-principle decision that Australia should work towards the implementation of arrangements to facilitate the international transfer of prisoners. The SCAG Ministers agreed that:

- the Commonwealth should administer the scheme and enact legislation to bring treaties into effect and establish an administrative structure for transfers
- states and territories would be responsible for enacting legislation providing the necessary authority to transfer state or territory offenders out of the jurisdiction, and to allow people from outside their jurisdictions to be held in their prisons
- participating jurisdictions would agree to accept prisoners on transfer into their prisons where they demonstrated community ties with the jurisdiction
- the Commonwealth would meet the costs of administering the scheme and the receiving state or territory would meet the costs of transfer from overseas to Australia and the costs of maintaining the prisoner
- the international transfer of prisoners scheme would apply to all offences without exception.9

Core legislative and administrative details for an international transfer of prisoners scheme were agreed upon in November 1994. The Parliamentary Counsel’s Committee then began work on a draft Commonwealth Bill and a model State/Territory Bill. In July 1995, the SCAG Ministers agreed that the draft legislation should include provisions facilitating the transfer of war crimes tribunal prisoners to Australia.10

The Commonwealth International Transfer of Prisoners Bill 1996 was introduced into the House of Representatives on 21 November 1996. After the Second Reading Speech by the federal Attorney-General and Minister for Justice, Hon D R Williams MP, the Bill was referred to the Standing Committee on Legal and


9 House of Representatives Standing Committee on Legal and Constitutional Affairs, p 8.

10 House of Representatives Standing Committee on Legal and Constitutional Affairs, p 9.
Constitutional Affairs for consideration, with an advisory report to be submitted to the House by 3 March 1997. The Legal and Constitutional Affairs Committee made seven recommendations designed to improve the international transfer of prisoners scheme, most of which involved undertakings of an administrative nature. Only one recommendation involved an amendment to the legislation and this related to a technical drafting issue. The proposed technical amendment was made to the Bill in the House of Representatives.11 The Government also accepted the other recommendations made by the Committee.12 The International Transfer of Prisoners Act was subsequently assented to on 18 June 1997.

2.3 NATIONAL APPLICATION OF THE SCHEME

The passing of the Commonwealth International Transfer of Prisoners Act 1997 constituted the first step towards enabling prisoner transfers to and from Australia to take place. However, before prisoners can actually be transferred under Australia’s international prisoner transfer scheme, the states and territories must enact complementary legislation. In its Advisory Report on the International Transfer of Prisoners Bill 1996, the Standing Committee on Legal and Constitutional Affairs stated:

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\text{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 system. Furthermore, the Committee urges all states and territories to pass such legislation as a matter of priority.}^{13}\]

While the Australian Capital Territory and the states have decided to implement the international transfer of prisoners scheme, the Northern Territory has indicated that it will not participate. In reply to a question in the Northern Territory Assembly as to why the Northern Territory was not participating in the transfer scheme, the NT Attorney-General said:

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\text{The Territory has consistently opposed participation in this scheme and continues to do so, despite the most recent requests for it to reconsider its position from the federal parliament’s Standing Committee on Legal and Constitutional Affairs ... The Northern Territory government believes that Australians who offend overseas}\]


13 House of Representatives Standing Committee on Legal and Constitutional Affairs, p 16.
are aware of the risks they run. ... In any event, the Territory government should not have to pay for the transfer of prisoners from overseas and their detention in Territory prisons.

... The Territory government believes it is the criminals’ own decision how they conduct themselves in their overseas criminal enterprises and it will not act as their backstop when, inevitably, they are caught.14

In evidence to the Standing Committee on Legal and Constitutional Affairs, the Western Australian government had also indicated that it had difficulties with the distribution of costs under the transfer scheme.15

In its Report, the House of Representatives Standing Committee expressed the view that the international transfer of prisoners scheme “... should proceed even if all jurisdictions do not intend to adopt it from the outset”.16

2.4 TRANSFER ARRANGEMENTS WITH OTHER COUNTRIES

To enable prisoner transfers involving Australia to take place, Australia must also enter into transfer arrangements with other countries, usually by becoming a party to multilateral or bilateral treaties. The main multi-lateral prisoner transfer convention is the Council of Europe’s Convention on the Transfer of Sentenced Persons. Another multi-lateral transfer scheme is the Commonwealth Scheme for the Transfer of Convicted Offenders. According to the submission made by the Commonwealth Attorney-General’s Department to the House of Representatives Standing Committee on Legal and Constitutional Affairs, it was intended that Australia would:

- become party to and implement existing multi-lateral regimes including the Council of Europe Convention and the Commonwealth Scheme, and
- negotiate bilateral treaties as appropriate.17

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15 Attorney-General for Western Australia, Submissions, p S33, cited in House of Representatives Standing Committee on Legal and Constitutional Affairs, p 14.

16 House of Representatives Standing Committee on Legal and Constitutional Affairs, p 16.

17 Attorney-General’s Department, Submissions, p S21, cited in House of Representatives Standing Committee on Legal and Constitutional Affairs, p 4.
The text of both the Council of Europe Convention and the Commonwealth Scheme are available in the Queensland Parliamentary Library.

3. ARGUMENTS FOR AND AGAINST INTERNATIONAL PRISONER TRANSFER SCHEMES

3.1 ARGUMENTS IN FAVOUR OF TRANSFER SCHEMES

The primary argument in favour of adopting international transfer of prisoner schemes is based on humanitarian grounds. Differences in culture, standards of living and language difficulties can all contribute to make deprivation of liberty in a foreign environment harder to bear. According to Biles:

There have been many documented cases where Australian prisoners held in South East Asian countries have been required to accept standards of hygiene and sanitation well below their normal expectations. Dietary provision and health care have frequently been unsatisfactory and have required supplementation, paid for either by the prisoners’ families or friends. Also in many cases, significant funds have been required to provide legal representation for court hearings and for appeals.

Foreign prisoners, both overseas and in Australia, are also frequently extremely isolated as they do not always speak the local language and may not have any fellow citizens in prison with them. Language isolation, exacerbated by an unfamiliar legal system and unfamiliar living conditions, is likely to cause acute psychological stress, perhaps leading to serious mental illness.18

As the previously quoted extract from the NT Attorney-General’s speech shows, the opposing argument is that people committing offences overseas are aware of the risks they run. However, Biles argues that:

Even if no sympathy were felt for Australian prisoners overseas, on the grounds that they committed the offences and must accept the consequences, it would be heartless to ignore the plight of their families. ... in many cases the families of Australian prisoners overseas are expected to provide a continuous flow of cash for food, health care and legal representation. Family members also often feel that it is necessary to visit their sons, daughters or spouses in order to provide psychological or material comfort, and they often feel compelled to make repeated pleas for assistance and relief to government authorities and welfare organisations, both in Australia and overseas. A compassionate nation would

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18 Biles, ‘The international transfer of prisoners’, p 5.
Support for international transfer schemes is also based on the argument that recidivism is less likely among prisoners who are able to have close contact with family members. The burden upon prison administrators and consular staff is also likely to be reduced. In its submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs, the Department of Foreign Affairs and Trade argued that adoption of an international prisoner transfer scheme would reduce the burden on consular services, and consequently reduce financial costs. At the 14th Asian and Pacific Conference of Correctional Administrators, held in Darwin in September 1994, Thailand’s representative reported that over 2500 of the prisoners in Thai jails were foreigners, and they had many special needs. The representative from the Republic of Korea reported that it cost twice as much to provide food for foreigners in custody as for local prisoners.

Finally, there will be cost savings resulting from an international transfer of prisoners scheme, if, as it is argued is likely, more prisoners leave Australia under a transfer scheme than return home to this country. This issue is discussed more fully in Section 6 of the Bulletin, where the limited evidence available on the number of foreign nationals housed in Australian jails, and the number of Australian prisoners overseas, is presented.

### 3.2 Arguments Against Transfer Schemes

A major ground of opposition to the international transfer of prisoners is that such schemes erode the integrity of national penal systems. However, Biles argues:

> Provided that there is both a clear understanding of the transfer arrangements and no unjustifiable reduction in the sentences to be served, this argument has no validity. On the contrary, for one to facilitate the serving in its own prisons of sentences that were imposed in other countries could be seen as a mark of significant trust and respect. To achieve this end, it is essential that all transfer agreements be firmly based on the premise that a sentence imposed elsewhere is nevertheless fully enforceable and valid, and is served according to the agreed principles of either continued enforcement or sentence conversion. Thus the

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19 Biles, ‘The international transfer of prisoners’, p 5.

20 Department of Foreign Affairs and Trade, Submissions, p S37, cited in House of Representatives Standing Committee on Legal and Constitutional Affairs, p 7.

authority of the law and of the judges can be seen as having much broader effect than their own national boundaries.\textsuperscript{22}

According to Biles, the major argument advanced against international transfer schemes, from Australia’s point of view, is that it would be construed as condoning serious crime, particularly the activities of illegal drug offenders, who constitute the majority of Australians imprisoned overseas.\textsuperscript{23} As the Northern Territory’s Attorney-General stated, in explaining his opposition to the scheme:

Some overseas penalties, particularly in relation to drug offences, are considerably more severe than in Australia. The availability of the scheme could reduce the deterrent effect of these punishments and actually increase the number of Australians involved in drug trafficking both here and overseas.\textsuperscript{24}

By contrast, Biles states:

If the international transfer of prisoners really did indicate a lessening of the resolve of all Australian governments to take every reasonable step to reduce serious drug offending then transfer proposals would not deserve support. But such is not the case. None of the countries that are currently parties to transfer treaties would accept that they have gone soft on drugs. It would clearly be wrong to suggest that this were the case with the United States, the nation which has given extremely strong support to numerous transfer treaties.\textsuperscript{25}

Finally, Biles points out that it could be argued that adoption of an international transfer scheme is not justified because only small numbers of prisoners are involved. However, Biles says:

... it would be indefensible if it were argued that the effort would not be made unless the numbers were greater. Compassion, humanity and justice do not become relevant only if a particular quantum of need is identified.\textsuperscript{26}

\textsuperscript{22} Biles, ‘The international transfer of prisoners’, p 6.

\textsuperscript{23} Biles, ‘The international transfer of prisoners’, p 6.

\textsuperscript{24} Answer to question from Mr Mitchell to the Attorney-General on the International Transfer of Prisoners Scheme, \textit{Northern Territory Parliamentary Record}, Part II: Questions, 29 April 1997, p 2081.

\textsuperscript{25} Biles, ‘The international transfer of prisoners’, p 6.

\textsuperscript{26} Biles, ‘The international transfer of prisoners’, p 6.
4. KEY PROVISIONS OF THE COMMONWEALTH ACT

The *International Transfer of Prisoners Act 1997* (Cth) makes separate provision for the two different types of prisoners covered by the legislation.

Parts 3 and 4 of the Act deal with general prison transfers to and from Australia, while Part 5 deals with the transfer to Australia of Tribunal prisoners (ie prisoners sentenced for war crimes by the former Yugoslavia or the Rwanda Tribunals). Parts 1, 2, 6 and 7 contain general provisions which apply to both kinds of prisoners.

4.1 GENERAL PRISONER TRANSFERS

4.1.1 Transfers to be Consensual

Under s 10 of the Commonwealth Act, both the Australian government (Commonwealth and State/Territory, where relevant) and the transfer country must agree to the transfer of a prisoner: s 10(b) & (d) and s 5. The prisoner (or his or her representative) must also give their written consent to the transfer: s 10(c). As Biles points out, without such a three-way agreement:

... there is the possibility of confusion between international transfer, which is sought by the prisoner concerned, and coerced deportment or extradition. There may also be confusion between transfer and exchange, as in the exchange of prisoners of war.27

4.1.2 Eligibility for Transfer to Australia

Section 13 sets out the circumstances in which a prisoner (other than a Tribunal prisoner) is eligible for transfer to Australia from a transfer country.

*Australian citizens*

Under s 13(a), Australian citizens are eligible for transfer without having to satisfy any additional requirements.

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Non-citizens

A prisoner is also eligible to transfer if he or she:

- is eligible to travel to, enter and remain in Australia indefinitely under the Commonwealth Migration Act 1958, and
- has “community ties” with a state or territory.

Under s 4(5) of the Act, a prisoner will be considered to have the necessary community ties with a state or territory if:

- the prisoner’s principal place of residence immediately prior to being sentenced was in that state or territory: s 4(5)(a);
- the prisoner’s parent, grandparent or child has a principal place of residence in that state or territory: s 4(5)(b);
- the prisoner is married or has a de facto relationship with someone whose principal place of residence is in that state or territory: s 4(5)(c), or
- the prisoner has a close continuing relationship, involving frequent personal contact and a personal interest in the other person’s welfare, with someone whose principal place of residence is in that state or territory: s 4(5)(d).

In evidence to the House of Representatives Standing Committee on Legal and Constitutional Affairs, an officer of the Attorney-General’s Department explained that the requirement in s 4(5)(d) was designed to ensure that a personal relationship, rather than simply a business, commercial or financial relationship, existed between the transferring prisoner and the person residing in the state or territory.28

According to submissions made to the Committee, 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”.29 After considering the community ties eligibility requirement, the Committee concluded that it was not unreasonable, stating:

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 for prisoners to be transferred back to Australia merely on the basis of a business or financial relationship.30

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29 Submissions, p S83, cited in House of Representatives Standing Committee on Legal and Constitutional Affairs, p 22.

30 House of Representatives Standing Committee on Legal and Constitutional Affairs, pp 22-23.
4.1.3 Transfer Conditions - Transfer to Australia

Section 15 of the Commonwealth Act sets out the conditions which must be satisfied before a prisoner (other than a Tribunal prisoner, or a mentally impaired prisoner) can be transferred to Australia. The three conditions are that:

- Neither the sentence nor the conviction is subject to appeal under the law of the transfer country: s 15(1)(a).
- The conduct constituting the offence for which the prisoner is serving a sentence overseas must be such that it would constitute an offence had it been committed in Australia (the dual criminality requirement) s 15(1)(b). (However, under s 15(3), the Attorney-General may decide that this requirement need not be satisfied in a particular prisoner’s case.)
- At least six months of the sentence remains to be served: s 15(1)(c). (However, where a shorter period remains to be served, the Attorney-General has the discretion to decide that, in the circumstances, transfer for a shorter period is acceptable.)

**Dual criminality**

Section 15(1)(b) requires that the offence for which the offender is imprisoned must also be an offence in the prisoner’s home country. Accordingly, an Australian imprisoned for possessing or consuming alcohol in Saudi Arabia or committing adultery in Yemen would not be eligible for transfer to Australia, as these activities are not illegal in Australia. This requirement has been criticised by writers such as Biles, who argues that it should be dropped. In a paper delivered at the International Bar Associations’ 25th Biennial Conference, held in Melbourne in October 1994, Biles said that the dual criminality criterion:

... 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.

In evidence to the House of Representatives Standing Committee on Legal and Constitutional Affairs, Biles again expressed the view that the dual criminality criterion is “... unnecessary and inconsistent with the general tenor of the

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In evidence to the Committee, Mr Justice Dowd was likewise critical of this restriction, arguing 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.\(^{34}\)

### 4.2 TRIBUNAL PRISONERS

In 1993 and 1994, the United Nations Security Council established two international war crimes tribunals to deal with war crimes committed in the former Yugoslavia and Rwanda. Individuals convicted by the tribunals are to serve their sentences in countries designated by the Tribunals from a list of countries which have indicated to the UN Security Council that they are willing to accept these prisoners.\(^{35}\) The provisions in the Commonwealth *International Transfer of Prisoners Act 1997*, enabling people convicted by the Tribunals to be transferred to Australia to serve their sentences, complement the Commonwealth *International War Crimes Tribunals Act 1995*, the purpose of which is to enable Australia to co-operate with the Tribunals in investigating and prosecuting individuals accused of committing Tribunal offences.\(^{36}\)

Under the International Transfer of Prisoners Act, a Tribunal prisoner will not be transferred to Australia unless the Commonwealth Attorney-General and the relevant Minister in the state or territory in which the Tribunal prisoner is to begin to complete their sentence (ie in Queensland, the Attorney-General and Minister for Justice) consents to the transfer: s 5(3).

By contrast with general prisoner transfers, a Tribunal prisoner’s consent to transfer is not mandatory: s 11(b).

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\(^{33}\) D Biles, Transcript, p 130, quoted in House of Representatives Standing Committee on Legal and Constitutional Affairs, p 26.

\(^{34}\) Justice J Dowd, Transcript, pp 66-68, quoted in House of Representatives Standing Committee on Legal and Constitutional Affairs, p 27.


\(^{36}\) *International War Crimes Tribunals Act 1995* (Cth), s 3.
4.3 SENTENCE ENFORCEMENT

Part 6 of the International Transfer of Prisoners Act explains how sentences imposed overseas will be enforced in Australia. Two methods of enforcing sentences are provided for under s 42. The Attorney-General may direct that a sentence of imprisonment imposed by an overseas court or tribunal is to be enforced without any adaptation, or with only such adaptations as are considered necessary to ensure consistency with Australian law (this is known as the continued enforcement method). Alternatively, a different sentence may be imposed (this is known as the converted enforcement method).

In introducing the Commonwealth legislation to the House of Representatives, the federal Attorney-General explained that:

While the bill provides for a choice between two different forms of sentence enforcement, the method actually adopted in a particular case will depend on the agreement with the country or the tribunal. For example, if a bilateral treaty with a particular country provides for only one method of sentence enforcement, that method would be used in relation to transfers from that country.\(^37\)

Whatever method of sentence enforcement is chosen, s 43 provides that it must not be harsher, in legal nature or duration, than the original sentence. Under s 44, the Attorney-General may give certain directions in ordering a sentence to be served under either the continued enforcement or the converted enforcement method.

4.4 PARDONS, REMISSIONS

Section 48(1) provides that the conviction of a prisoner transferred from Australia may be quashed or otherwise nullified and the prisoner may be pardoned or granted any amnesty or commutation of sentence as if he or she was still serving the sentence of imprisonment in Australia (ie Australia can provide for a pardon, amnesty or commutation of the sentence imposed in Australia). Under s 49(1), where a prisoner is transferred to Australia, the prisoner may be pardoned or granted any amnesty or commutation of sentence that could be granted under Australian law if the sentence of imprisonment had been imposed for an offence under Australian law.

A number of submissions to the House of Representatives Standing Committee on Legal and Constitutional Affairs discussed the issue whether a prisoner under the transfer scheme would be able to take advantage of remissions in both the

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sentencing country and the country to which he or she was transferred. For example, according to Mr M Sides of the New South Wales Public Defender’s Office, clarification of the Commonwealth legislation was needed to “... avoid double dipping in connection with remission”.38

By contrast, Mr Sidoti, the Human Rights Commissioner, argued that s 48(1) should be amended to make it clear that the country to which a prisoner convicted under Australian law is transferred could also exercise its local laws and local powers for pardons, amnesty and commutation. Professor Shearer raised the issue whether s 49(1) was too limited in its operation. Without expressing a concluded view, he raised the issue whether an Australian convicted of an offence overseas and transferred back to Australia should be able to benefit from amnesties or commutations granted by the country in which the prisoner was sentenced.

In response, the Commonwealth Attorney-General’s Department argued that amendment of s 48 was unnecessary because the transfer country will be able to exercise local laws, regardless of the content of Australian legislation. Nor was amendment of s 49 considered necessary because that provision deals only with what can be done in Australia and does not purport to provide for what may or may not be done under another country’s laws. In its submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs, the Attorney-General’s Department said:

_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._39

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38 Submissions, p S53, quoted in House of Representatives Standing Committee on Legal and Constitutional Affairs, p 31.

39 Attorney-General’s Department, Submissions, p S89, quoted in House of Representatives Standing Committee on Legal and Constitutional Affairs, p 33.
5. THE QUEENSLAND BILL

Clause 3 of the Queensland Bill states that the proposed legislation’s object is:

... to give effect to the scheme for the international transfer of prisoners set out in the Commonwealth Act by enabling prisoners to be transferred to and from this jurisdiction under the scheme.

As explained by the Attorney-General in his Second Reading Speech, the Prisoners International Transfer (Queensland) Bill is part of a Commonwealth/State scheme “... to open the way to Australian participation in international prisoner transfer agreements”40 (ie the Commonwealth Act (discussed in Section 4 above) contains the core elements of the scheme, while complementary state/territory legislation gives effect to the scheme in each participating jurisdiction).

5.1 CONFERRAL OF FUNCTIONS

Clause 6 of the Bill allows a Queensland Minister or his delegate to perform functions conferred by the Commonwealth Act.

Clause 7 allows a prison officer, police officer or other State official to perform functions conferred on the official by the Commonwealth Act or a corresponding law, or under arrangements entered into between the Commonwealth and Queensland under Clause 8 of the Bill.

Section 50 of the International Transfer of Prisoners Act 1997 provides that the Governor-General may make arrangements with the Governor of a State, the Chief Minister of the ACT or the Administrator of a Territory relating to the administration of the Commonwealth Act, including arrangements relating to the exercise by officers of the State or Territory of functions under the Commonwealth Act. Clause 8 of the Queensland Bill complements the power given to the Governor-General under s 50 of the Commonwealth Act by empowering the Governor to make arrangements with the Governor-General for the administration of the Commonwealth Act, including arrangements relating to the performance by Queensland officers of functions conferred by the Commonwealth Act.

5.2 **ENFORCEMENT OF SENTENCES**

Clause 9 of the Queensland Bill provides that, for the purpose of enforcing a sentence, prisoners (including Tribunal prisoners) transferred to Australia under the Commonwealth Act are to be treated as if they were federal prisoners. Without limiting **Clause 9(1)**, **Clause 9(2)** sets out a number of specific circumstances in relation to which a prisoner will be treated or will receive an entitlement as if he or she was a federal prisoner (eg in relation to conditions of imprisonment, release on parole and eligibility to participate in prison programmes).

Clause 9(3) provides that a direction which the Commonwealth Attorney-General gives under s 44 of the Commonwealth Act (ie about sentence enforcement) is to be given effect to in Queensland.

Clause 9(4) provides that a direction which the Commonwealth Attorney-General gives under s 49 of the Commonwealth Act (ie about a prisoner transferred to Australia who is pardoned or granted amnesty or commutation of his or her sentence of imprisonment) is to be given effect to in Queensland.

Clause 10(1) provides that where a prisoner is transferred from Australia under the Commonwealth Act, the sentence of imprisonment imposed by a Queensland court ceases to apply. However, **Clause 10(2)** ensures that a prisoner transferred from Australia to complete his or her sentence overseas may still be pardoned or granted amnesty or commutation of sentence as if he or she was still in Queensland.

6. **THE COSTS OF TRANSFER SCHEMES**

As explained in the Explanatory Notes to Queensland’s Prisoners International Transfer (Queensland) Bill:

> The scheme is predicated on the internationally accepted “receiver pays” principle, which means that, subject to any alternative treaty or arrangement, all costs of the transfer incurred exclusively in the territory of the sending country will be borne by that country, and all other costs will be borne by the receiving country.

> Under the Standing Committee of Attorneys-General (SCAG) Agreement, Queensland will meet all transfer costs for general prisoner transfers into the state including sending escort officers, returning prisoners (including airfares) and the cost of maintaining prisoners during the terms of sentences in Australia.\(^{41}\)

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\(^{41}\) Prisoners International Transfer (Queensland) Bill 1997, *Explanatory Notes*, p 2. The Commonwealth Act does allow for the recovery of costs and transfer expenses as part of the terms of transfer where appropriate: s 51.
As mentioned previously, in Section 3.1 of this *Bulletin*, one argument advanced in favour of transfer schemes is that they are likely to result in financial savings for Australia. This argument is based upon the belief that a transfer scheme will result in more prisoners leaving Australia than coming in. However, as Biles points out, reliable estimates are unfortunately difficult to obtain:

*On the one hand it is sometimes suggested that we don’t want hundreds of criminals who have committed terrible crimes in foreign countries coming back to live in the comfort of our prisons at our expense. This argument becomes especially powerful if we do not believe that many, or perhaps even any, of the foreign prisoners in our gaols would seriously choose to leave. ... The truth of the matter is that no one really knows with any degree of confidence how many prisoners are likely to be moved in and out of Australia each year if a transfer scheme is established.*

In the remainder of this section, cost estimates of the likely impact of the adoption of a transfer scheme by Australia are presented, based on figures brought together by Biles, and evidence submitted to the House of Representatives Standing Committee on Legal and Constitutional Affairs during its consideration of the International Transfer of Prisoners Bill 1996.

According to Biles, over 1000 Australians are arrested overseas every year, and between 180 and 200 are held in prison at any one time. Figures for Australian prisoners overseas at October 1991 showed that Australian citizens were serving sentences in almost 40 overseas countries, the greatest numbers of Australians being imprisoned in Thailand, New Zealand, the United Kingdom and the United States. As Biles points out, the actual figures for Australians imprisoned overseas may be somewhat higher, as the figure of 180 to 200 prisoners is based on the number of cases that come to the attention of Australian consular authorities. On the other hand, the number of prisoners who would participate in a transfer scheme is likely to be lower than the number actually imprisoned overseas because:

- not all of these prisoners would necessarily wish to return home;
- a significant proportion (probably more than half) would be ineligible for transfer because they are awaiting trial or the outcome of appeals against conviction or sentence

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43 Department of Foreign Affairs and Trade, “Australian Prisoners Overseas, October 1991”, Table 1 in Biles, The international transfer of prisoners’, p 1.
• some prisoners would have insufficient time remaining to serve.\textsuperscript{44}

According to Biles:

\begin{quote}
When trying to estimate the number of prisoners who might return to Australia each year it must be recognised that the total of 180-200 at any time represents the accumulation of cases built up over several years without a transfer scheme. In the first year of operation, a transfer scheme would be expected to handle a larger number of long-term prisoners than would be the case in later years. Taking all of the factors into account, my best guess is that in the first year Australia might receive back between 40-50 prisoners, but in later years the total would be around 20-30.\textsuperscript{45}
\end{quote}

According to Biles, estimating the number of foreign prisoners serving sentences in Australia is even more difficult than estimating how many Australians are imprisoned overseas, as there is “no national record of the number of foreign citizens in Australian prisons”.\textsuperscript{46} A small-scale survey, conducted in all Queensland prisons except one in 1992, identified 96 prisoners as people whose birthplace was overseas and who had not become Australian citizens. Of these 96 prisoners, 86 completed a survey conducted by ASETT (Australians Supporting European Transfer Treaty for Sentenced Prisoners) and the Catholic Prison Ministry. Forty-five of those who completed the survey form said that they would elect to serve the remainder of their sentences in prisons in their countries of origin, while 41 said that they would elect to stay in Australia.\textsuperscript{47}

Biles commented:

\begin{quote}
This survey, small and incomplete as it is, is very important because it gives us for the first time a basis for estimating the total number of foreign prisoners currently in Australia who would leave if a transfer scheme were introduced. Assuming that the Queensland sample is representative of all Australian prisoners, and assuming the survey results are reliable, my calculations lead to a national figure of approximately 380 foreign prisoners who would go. That figure may be slightly inflated as on close examination of individual cases some may not be eligible, but there can be no doubt that the net result of a transfer scheme would be a small overall reduction in the number of prisoners in Australia.\textsuperscript{48}
\end{quote}

\textsuperscript{44} Biles, ‘The international transfer of prisoners: issues and challenges for the 1990s’, p 5.
\textsuperscript{45} Biles, ‘The international transfer of prisoners: issues and challenges for the 1990s’, p 5.
\textsuperscript{46} Biles, ‘The international transfer of prisoners: issues and challenges for the 1990s’, p 5.
\textsuperscript{47} Biles, ‘The international transfer of prisoners: issues and challenges for the 1990s’, p 5.
\textsuperscript{48} Biles, ‘The international transfer of prisoners: issues and challenges for the 1990s’, p 5.
In a submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs, the Department of Foreign Affairs estimated that approximately 101 Australians were imprisoned overseas as at 30 June 1996.\(^{49}\)

In its submission to the Committee, the Department of Immigration and Multicultural Affairs estimated that there were at least 632 prisoners serving sentences in Australian gaols who would be liable to be removed or deported upon release, and who would thus be eligible to transfer.\(^{50}\) The following responses were received to enquiries made by the Commonwealth Attorney-General’s Department to all state and territory corrective service authorities for information that might assist in determining the number of prisoners in Australian gaols who might be interested in applying under an international prisoner transfer scheme:

- **Queensland**: 57 prisoners indicated interest in participating in the scheme.
- **Victoria**: 421 prisoners were nationals of a country other than Australia.
- **New South Wales**: 899 prisoners were born overseas and were not naturalised Australians.
- **Tasmania**: 5 prisoners were born overseas and claimed the nationality of their place of birth.
- **Northern Territory**: 17 prisoners identified themselves as citizens of another country.

After considering the evidence presented to it, the House of Representatives Standing Committee concluded:

> 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.\(^{51}\)

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\(^{49}\) Department of Foreign Affairs, Submissions, p S42, cited in House of Representatives Standing Committee on Legal and Constitutional Affairs, p 44.

\(^{50}\) Department of Immigration and Multicultural Affairs, Submissions, pp S66-S68, cited in House of Representatives Standing Committee on Legal and Constitutional Affairs, p 44.

\(^{51}\) House of Representatives Standing Committee on Legal and Constitutional Affairs, p 45.
7. REVIEWING THE LEGISLATION

In its Advisory Report, the House of Representatives Standing Committee on Legal and Constitutional Affairs recommended that the operation of the International Transfer of Prisoners Act should be reviewed annually by the Commonwealth Attorney-General’s Department and that a report of the review should be tabled in Parliament.  

In evidence to the Committee, David Biles specifically suggested that the number of prisoners transferring in and out of Australia should be monitored.

The Explanatory Notes to the Queensland Bill indicate that the legislation will be reviewed after twelve months “… to determine the extent to which the legislation has been utilised and to assess the resource implications”.

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52 House of Representatives Standing Committee on Legal and Constitutional Affairs, p 46.

53 D Biles, Transcript, p 129, cited in House of Representatives Standing Committee on Legal and Constitutional Affairs, p 45.

BIBLIOGRAPHY


