

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

INTERNATIONAL WAR CRIMES TRIBUNAL BILL 1994

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,  
the Honourable Michael Lavarch MP)

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY  
THE SENATE TO THE BILL AS INTRODUCED



## INTERNATIONAL WAR CRIMES TRIBUNAL BILL 1994

### OUTLINE

The purpose of this Bill is to enable Australia to comply with binding international obligations which were imposed by the United Nations Security Council on 25 May 1993, when it adopted resolution 827. That resolution established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, and adopted the Statute of the International Tribunal.

The Statute imposes obligations on Member States 'to co-operate with the International Tribunal in the investigation and prosecution' of accused persons and to comply 'with any request for assistance or an order issued by a Trial Chamber'. Such requests may involve, among other things, the identification and location of persons, the taking of testimony and the production of evidence, the service of documents, the arrest and detention of persons, and the surrender of accused persons to the Tribunal.

The Bill contains provisions enabling Australia to comply with these international obligations. In particular, the Bill provides for the following matters:

- the arrest and surrender of persons to the Tribunal (Part 3);  
other forms of assistance to the Tribunal, including the taking of evidence and production of documents or other articles; search and seizure; the giving of evidence at hearings, or assisting in investigations, in foreign countries where the Tribunal is sitting; and service of process (Part 4);  
the sitting of the Tribunal in Australia (Part 5);  
the enforcement of forfeiture orders made by the Tribunal (Part 6); and  
search and seizure and arrest provisions for the purposes of the Bill (Part 7).

## FINANCIAL IMPACT STATEMENT

The Bill is expected to have little impact on Commonwealth expenditure or revenue in the short term. However, there are possible implications for Commonwealth agencies which may be affected by the legislation. There may be significant resource implications for the AFP, and cost and resource implications might arise if the Tribunal decides to sit in Australia.

These costs are unable to be quantified at all at this stage (as the extent to which the legislation will be used in Australia cannot be determined).

However, the cost implications will be examined as part of the evaluation strategy, which is to review the legislation after it has been in place for a period of 12 months to determine the extent to which the legislation has been utilised and to assess the resource implications.

## NOTES ON CLAUSES

### PART 1 - PRELIMINARY

#### Clause 1: Short Title

1. This clause provides for the short title of the Act.

#### Clause 2: Commencement

2. This clause provides that clauses 1 and 2 commence on the day the Act receives the Royal Assent, and the remaining provisions commence on a day to be fixed by proclamation or 6 months after Royal Assent, whichever is the earlier.

#### Clause 3: The objects of this Act

3. This clause sets out the underlying basis of the Act, which is to enable the Commonwealth to co-operate with the Tribunal in the investigation and prosecution of persons accused of committing Tribunal offences. The various heads of assistance covered by the Act are listed.

#### Clause 4: Definitions

4. This clause defines words and expressions used in the Act.

#### Clause 5: Some Territories to be regarded as States

5. This clause provides that the Australian Capital Territory, the Northern Territory and Norfolk Island are to be regarded as States for the purposes of this Act (other than clause 6), and are not to be regarded as Territories.

#### Clause 6: External Territories

6. This clause extends the Act to each external Territory.

### PART 2 - REQUESTS BY THE TRIBUNAL FOR ASSISTANCE

#### Clause 7: Tribunal may request assistance

7. This clause provides that requests made to Australia by the Tribunal are to be made to the Attorney-General, or to a person authorised by the Attorney-General.

Without limiting the types of requests which can be made, the clause sets out the expected types of requests in respect of an investigation or prosecution the Tribunal is conducting or proposing to conduct.

**Clause 8: Form of requests.**

8. This clause provides that a request must be in writing, and sets out the types of information that the Tribunal should provide in its request. However, the clause specifically states that failure to provide such information does not invalidate a request.

**PART 3 - SURRENDER OF PERSONS TO THE TRIBUNAL**

**Division 1 - Arrest of persons**

**Clause 9: Notice by Attorney-General**

9. This clause provides for the Attorney-General to give a notice that a request for surrender has been received from the Tribunal. The clause makes it clear that the Attorney-General does not have a discretion in the issue of this notice. The preconditions for the issue of the notice are that the Attorney-General receives from the Tribunal a request for surrender of a person, and an arrest warrant in relation to the person issued by the Tribunal or a copy of that warrant authenticated by the Tribunal. The issue of the notice is the first stage in the process of surrender to the Tribunal.

**Clause 10: Issue of warrants**

10. This clause sets out the procedure for the issue of an arrest warrant in relation to a person.

11. Sub-clause (1) provides that a magistrate is required to issue an arrest warrant in the statutory form, if an application is made on behalf of the Tribunal for issue of a warrant pursuant to a notice by the Attorney-General that a surrender request has been received from the Tribunal (under clause 9).

12. Sub-clause (2) provides for the issue of an arrest warrant otherwise than pursuant to a notice under clause 9. It recognises that there may be circumstances of urgency requiring arrest before the Tribunal has formally requested surrender and therefore before the Attorney-General has issued a clause 9 notice. The magistrate is required to issue an arrest warrant if an application is made on behalf

of the Tribunal for issue of a warrant, and the application is accompanied by a copy of an arrest warrant issued by the Tribunal, and the application contains a statement to the effect that circumstances of urgency necessitate the issue of a warrant prior to receipt of a notice under clause 9.

13. Sub-clause (3) requires a magistrate to send to the Attorney-General, without delay, a report stating whether the magistrate has issued the warrant.

#### Clause 11: Cancellation of warrants

14. This clause provides for the Attorney-General to direct the cancellation of arrest warrants in certain circumstances. If a person has not been arrested under a warrant, the Attorney-General must direct a magistrate to cancel the arrest warrant if:

the Attorney-General is satisfied that a request for surrender which would oblige the Attorney-General to issue a notice under clause 9 will not be received from the Tribunal. (This applies in provisional arrest circumstances, where an arrest is effected in urgent circumstances, but, for some reason, the Tribunal does not follow that up with a request for surrender); or

the Attorney-General considers for any other reason that the warrant should be cancelled. (This course could be adopted if the Attorney-General considered that, in the light of information, he would exercise his or her discretion to refuse surrender of the person).

15. Where the person has been arrested, clause 13 gives the Attorney-General the same powers in respect of release of the person as this sub-clause gives in respect of cancellation of the warrant.

#### Clause 12: Remand

16. This clause requires that persons arrested pursuant to a warrant issued under clause 10 be given certain information, and permits magistrates to remand such persons.

17. Sub-clause (1) provides that persons arrested under a warrant must, as soon as practicable:

be given a written notice specifying the Tribunal offence in respect of which the arrest warrant was issued and describing the conduct that is alleged to constitute the offence; and

be brought before a magistrate.

18. Sub-clause (2) provides that a person who has been arrested shall be remanded in custody or on bail for sufficient time to enable the Attorney-General to make a surrender determination, and, if appropriate, to enable a magistrate to remand a person in custody under clause 20 following the issue of a surrender warrant.

19. Sub-clause (3) provides that a person shall not be granted bail unless there are exceptional circumstances. Such a provision is considered necessary because experience has shown that there is a very high risk of persons sought for surrender to another country absconding.

20. Sub-clause (4) is related to sub-clause (3). It is designed to prevent 'bail-shopping' amongst magistrates. If a person is refused bail, he or she is not entitled to make applications to other magistrates for release on bail.

#### Clause 13: Release from remand on the Attorney-General's direction

21. This clause provides for the Attorney-General to direct a magistrate to order that a person who has been arrested and remanded be released from custody or discharged from bail if the Attorney-General is satisfied that a surrender request that would oblige the Attorney-General to issue a notice under clause 9 will not be received from the Tribunal, or if the Attorney-General considers for any other reason that the remand should cease. The Attorney-General has similar powers in clause 11 in relation to cancellation of warrants of arrest.

#### Clause 14: Release from remand after certain periods

22. This clause provides for release from remand in certain circumstances where a person has been arrested pursuant to a warrant issued under sub-clause 10(2) (before receipt of the Attorney-General's notice under clause 9).

23. Sub-clauses (1) and (2) oblige a magistrate to order the release of a person, or the discharge of recognisances, where the Attorney-General's notice under clause 9 is not received within 45 days after arrest and the magistrate is not satisfied that the notice will be given within a reasonable period.

24. Sub-clauses (3) and (4) oblige a magistrate to order the release of a person, or the discharge of recognisances, where the Attorney-General's notice has not been

received within the reasonable period determined by the magistrate following the 45 day period.

#### Clause 15: Application for search warrants

25. This clause provides for the application for search warrants where a person has been arrested under a warrant issued under clause 10.

26. Sub-clause (1) sets out the procedures, where a person has been arrested under a warrant, for the application for a search warrant to search premises. If a police officer has reasonable grounds for suspecting that evidential material relating to a Tribunal offence in respect of which the warrant was issued is, or within 72 hours (48 hours if the application is made by electronic means - see sub-clause (3)) will be, at any premises, the police officer may, by an information on oath setting out the grounds for that suspicion, apply for the issue of a search warrant in relation to the premises to search for the material. (Part 7 deals with the issuing and effect of search warrants).

27. Sub-clause (2) is in similar terms to sub-clause (1) except that it covers the application for search warrants in relation to persons.

#### Division 2 - Surrender of persons

##### Clause 16: Surrender determination by Attorney-General

28. This clause provides for the Attorney-General to determine whether a person remanded under Division 1 is to be surrendered to the Tribunal.

29. The Attorney-General must determine to surrender the person unless he or she is satisfied that there are exceptional circumstances. In considering whether there are exceptional circumstances, the Attorney-General must give the person a reasonable opportunity to provide documents showing exceptional circumstances, and the Attorney-General must consider any documents so provided.

30. The Attorney-General is required to make a determination on the person's surrender as soon as practicable after the person has been remanded under Division 1.

**Clause 17: Release from remand on refusal to surrender the person**

31. This clause provides that where the Attorney-General has determined not to surrender the person to the Tribunal, he or she must order the release of the person or the discharge of the recognisances on which bail was granted.

**Clause 18: Surrender warrants**

32. This clause provides that, subject to clause 19, where the Attorney-General determines that a person is to be surrendered to the Tribunal, he or she shall issue a warrant, in writing in the statutory form, for the surrender of the person to the Tribunal.

**Clause 19: Persons imprisoned under Australian law**

33. The effect of sub-clause (1) (together with clause 18) is that where the Attorney-General determines that a person is to be surrendered and that person is serving a prison sentence in Australia for an offence against an Australian law, the Attorney-General shall nevertheless issue a surrender warrant. However, a surrender warrant is not to be issued unless the Attorney-General is satisfied that the Tribunal has given adequate undertakings, if required, in relation to the return of the person to Australia to serve the remainder of the sentence once the person is no longer required to be detained by, or on the order of, the Tribunal and in relation to the custody of the person while travelling, and while in other countries, for the Tribunal's purposes.

34. Sub-clause (2) makes it clear that parolees and licensees are not to be regarded as serving a sentence of imprisonment.

**Clause 20: Detention following surrender warrants**

35. This clause provides that if the Attorney-General issues a surrender warrant, the person must be brought as soon as practicable before a magistrate, who must remand the person in custody for such time as is necessary to enable the surrender warrant to be executed.

**Clause 21: Content of surrender warrants**

36. This clause provides that a surrender warrant must provide the necessary directions and authorisations to permit the person to be surrendered to be transported in custody to a specified person who is an officer of the Tribunal or

other person authorised by the Tribunal, and to authorise that specified person to transport the person in custody to a place specified by the Tribunal (which may be a place out of Australia if the Tribunal is sitting out of Australia or a place in Australia if the Tribunal is sitting in Australia) for the purpose of surrendering the person to a person appointed by the Tribunal to receive the person.

Clause 22: Execution of surrender warrants

37. This clause provides for the execution of surrender warrants according to their tenor.

Clause 23: Release from remand

38. This clause permits the Federal Court or a Supreme Court to release a person who is still in custody in Australia 2 months after a surrender warrant was first liable to be executed. However, where the court is satisfied that the warrant has not been executed (the person has not been delivered into the custody of the Tribunal) because of danger to life or prejudice to health, or for any other reasonable cause, it shall not order release.

Clause 24: Effect of surrender to Tribunal on person's terms of imprisonment

39. This clause provides in effect that the time a federal or Territory prisoner spends in the custody of the Tribunal is to count towards the person's federal sentence. It mirrors clause 38, which provides for similar treatment where the federal or Territory prisoner is a witness (but not an accused person) or otherwise assisting the Tribunal.

Clause 25: Expiry of Australian sentences while under Tribunal detention

40. This clause applies to a person who was serving a sentence of imprisonment in respect of an offence against an Australian law at the time of surrender. It provides that where the person's sentence expires while the person is being detained by, or on the order of, the Tribunal, the Attorney-General must inform the Tribunal of the expiry and that the undertakings referred to in clause 19 (if the Tribunal was required to give such undertakings) are no longer required to be complied with.

## **PART 4 - OTHER FORMS OF ASSISTANCE TO THE TRIBUNAL**

### **Division 1 - Taking evidence etc.**

#### **Clause 26: Attorney-General may authorise taking of evidence etc.**

41. This clause enables the Attorney-General, if requested by the Tribunal, to authorise an Australian magistrate to take evidence and have documents and articles produced for the purpose of transmission to the Tribunal for the purposes of a proceeding before, or an investigation conducted by, the Tribunal. The Attorney-General must not comply with the request if, in his or her opinion, it would prejudice Australia's sovereignty, security or national interest, or there are exceptional circumstances justifying non-compliance.

#### **Clause 27: Taking of evidence**

42. This clause sets out the procedures to be followed by a magistrate in taking evidence.

#### **Clause 28: Producing documents or other articles**

43. This clause sets out the procedures to be followed by a magistrate in relation to the production of documents or other articles.

#### **Clause 29: Legal representation**

44. Sub-clause (1) permits the person to whom the proceeding or investigation relates to be present or to be represented in cases where evidence is being taken under clause 27.

45. Sub-clause (2) enables a magistrate conducting a proceeding under either clause 27 or 28, or both, to permit the following to have legal representation: the person to whom the proceeding or investigation relates; any other person giving evidence or producing documents or other articles; and the Tribunal.

#### **Clause 30: Form of certificates**

46. This clause requires a certificate by a magistrate under sub-clause 27(2) or 28(2) to state whether particular persons were present when the evidence was taken or the documents or other articles produced.

Clause 31: Compellability of persons to attend etc.

47. Sub-clause (1) permits the magistrate to use the relevant compulsory powers of the jurisdiction in which the evidence, etc is being taken to require the attendance of witnesses. This sub-clause also ensures that the witness will have the same protections as a witness in a domestic proceeding.

48. Sub-clause (2) provides that the person to whom the proceeding or investigation relates cannot be compelled to give evidence.

49. Sub-clause (3) provides that the person to whom the proceeding or investigation relates cannot be compelled to answer questions or produce documents, articles, etc if the person could not be compelled to answer those questions or produce those documents by the Tribunal.

Clause 32: Tribunal immunity certificates

50. This clause provides for an authenticated Tribunal immunity certificate (defined in sub-clause (2)) to be admissible in proceedings under this Division as prima facie evidence of matters stated in the certificate.

Division 2 - Search and seizure

Clause 33: Attorney-General may authorise applications for search warrants

51. This clause provides for the Attorney-General to authorise a police officer to apply to a magistrate for issue of a search warrant where the Tribunal has made a request compliance with which may involve the issue of a search warrant in relation to evidential material, and there are reasonable grounds to believe that the material is in Australia. ('Evidential material' is defined in clause 4, as a thing relevant to a Tribunal offence, including such a thing in electronic form). The Attorney-General must not comply with the request if, in his or her opinion, it would prejudice Australia's sovereignty, security or national interest, or there are exceptional circumstances justifying non-compliance.

Clause 34: Applications for search warrants

52. This clause provides for applications for search warrants where a police officer has been authorised under clause 33.

53. Sub-clause (1) applies to applications for a search warrant to search premises. If an authorised police officer has reasonable grounds for suspecting that the evidential material is, or within 72 hours (48 hours if the application is made by electronic means - see sub-clause (3)) will be, at any premises, the police officer may, by an information on oath setting out the grounds for that suspicion, apply for the issue of a search warrant in relation to the premises to search for the material. (Part 7 deals with the issuing and effect of search warrants).

54. Sub-clause (2) is in similar terms to sub-clause (1) except that it covers the application for search warrants in relation to persons.

### **Division 3 - Giving evidence at hearings, or assisting in investigations, in foreign countries**

#### **Clause 35: Persons giving evidence or assisting (other than prisoners)**

55. Sub-clause (1) permits the Attorney-General, if so requested by the Tribunal, to make arrangements for the travel to a foreign country of a person (other than a prisoner) to give evidence at a hearing in connection with a proceeding before the Tribunal or to assist an investigation being conducted by the Tribunal. Before such arrangements may be made, there must be reasonable grounds to believe that the person can give evidence relevant to the proceeding or assist the investigation and the Attorney-General must be satisfied both that the person has consented to giving evidence or assisting in the foreign country and that the Tribunal (if required by the Attorney-General) has given an adequate undertaking that the person will be returned to Australia according to arrangements agreed to by the Attorney-General.

56. Sub-clause (2) provides that the Attorney-General must not comply with the request if, in his or her opinion, it would prejudice Australia's sovereignty, security or national interest, or there are exceptional circumstances justifying non-compliance.

#### **Clause 36: Prisoners giving evidence or assisting**

57. Sub-clause (1) sets out the circumstances in which the clause will apply. These are that the Tribunal requests the attendance in a foreign country of a federal or State prisoner who is in Australia (whether or not in custody) at a hearing in connection with a proceeding before the Tribunal or to assist an investigation being conducted by the Tribunal. There must be reasonable grounds

to believe that the person can give evidence relevant to the proceeding or assist the investigation, and the Attorney-General must be satisfied both that the person has consented to giving evidence or assisting in the foreign country and that the Tribunal (if required by the Attorney-General) has given adequate undertakings in respect of the matters referred to in clause 37.

58. Sub-clause (2), which applies if the prisoner is being held in custody, permits the Attorney-General, in his or her discretion, to direct that a federal prisoner be temporarily released from custody to travel to the foreign country to give evidence at the proceeding or to assist the investigation. It also requires the appropriate State approvals to be sought in relation to State prisoners and joint federal/State prisoners to enable the transfer of such prisoners to the foreign country. The Attorney-General is also empowered to make arrangements for the relevant travel of the prisoner under escort.

59. Sub-clause (3) provides that the travel to a foreign country of federal or joint federal/State prisoners who have been released from custody on parole or under licence will be subject to the obtaining of such federal or State approvals, authorities or permissions as may be required for the travel.

60. Sub-clause (4) provides that the Attorney-General must not comply with the request if, in his or her opinion, it would prejudice Australia's sovereignty, security or national interest, or there are exceptional circumstances justifying non-compliance.

61. Sub-clause (5) defines "parole" and "parole decision" for the purposes of the clause.

#### Clause 37: Undertakings relating to prisoners

62. This clause specifies the nature of the undertakings that the Tribunal may be required to give in relation to a request for a prisoner to give evidence or assist an investigation in a foreign country. The undertakings are:

that, in relation to any prisoner, the prisoner will be returned to Australia in accordance with arrangements agreed to by the Attorney-General;

that, in relation to a prisoner who is being held in custody in Australia, appropriate arrangements will be made for the prisoner to be kept in custody in the foreign country; and the prisoner will not be released from such custody unless the Attorney-General notifies the Tribunal that the prisoner is

entitled to be released under Australian law; and, if the prisoner is so released the person's accommodation and other expenses in the foreign country will be paid for by the Tribunal until such time as the Tribunal decides that the person is no longer required to give evidence in the proceeding, or to assist the investigation, to which the request relates.

Clause 38: Effect of removal to foreign country on prisoner's terms of imprisonment

63. This clause in effect gives a prisoner credit for time spent in custody overseas.

Division 4 - Custody of persons in transit

Clause 39: Transit

64. Sub-clause (1) provides that a person may be transported through Australia in the custody of another person, if a person is to be transported in custody from a foreign country through Australia to another foreign country for the purpose of giving evidence in a proceeding before the Tribunal, or giving assistance in relation to an investigation being conducted by the Tribunal, or being surrendered to the Tribunal.

65. Sub-clause (2) provides that if an aircraft or ship by which the person is being transported lands or calls at a place in Australia, the Attorney-General may direct the person to be held in custody pending continuation of the person's transportation.

66. Sub-clause (3) permits the Attorney-General to direct that the person being held in custody in Australia pursuant to sub-clause (2) be returned to the original country if the person's transportation is not continued within a reasonable time.

Division 5 - Service of process

Clause 40: Service of process

67. This clause permits the Attorney-General to arrange for the service of a process relating to a proceeding before, or an investigation conducted by, the Tribunal, if so requested by the Tribunal. However, the Attorney-General must not comply with the request if, in his or her opinion, it would prejudice Australia's sovereignty, security or national interest, or there are exceptional circumstances justifying non-compliance.

## PART 5 - SITTINGS OF THE TRIBUNAL IN AUSTRALIA

### Clause 41: Tribunal sittings in Australia

68. This clause enables the Tribunal to sit in Australia for the purpose of performing its functions, including the taking of evidence, the conducting or continuing of a proceeding before the Tribunal, or the giving of judgment in a proceeding before the Tribunal.

### Clause 42: Tribunal's powers while sitting in Australia

69. This clause provides that the Tribunal's powers whilst sitting in Australia will be such powers as are prescribed by regulations. The clause recognises that such matters will be the subject of separate agreements between the Commonwealth and the Tribunal. The clause provides that the regulations implementing such agreements may apply, adopt or incorporate, with or without modification, the rules of procedure and evidence adopted under Article 15 of the Statute of the Tribunal.

### Clause 43: Contravention of Tribunal orders etc.

70. This clause provides for offences of knowingly or recklessly contravening an order that the Tribunal makes, or of otherwise knowingly or recklessly hindering the Tribunal in the performance of its functions, while sitting in Australia. It is considered necessary for the effective exercise of the Tribunal's powers and performance of its functions while sitting in Australia.

## PART 6 - FORFEITURE OF PROCEEDS OF TRIBUNAL OFFENCES

### Clause 44: Requests for enforcement of forfeiture orders

71. Sub-clause (1) enables the Attorney-General to authorise the Director of Public Prosecutions to apply for registration, in a specified court, of a forfeiture order (defined in clause 4 as an order or declaration made by the Tribunal for forfeiture of property in respect of a Tribunal offence, or evidencing forfeiture of property under the Tribunal's Statute or rules) against property believed to be located in Australia where the Tribunal so requests and the Attorney-General is satisfied that a person has been convicted by the Tribunal of the Tribunal offence to which the order relates and that there is no further appeal available in the Tribunal against that conviction and order.

72. Sub-clause (2) provides that the specified court shall be the Supreme Court of the State or Territory where the property is believed to be located.

73. Sub-clause (3) provides that the Attorney-General must not comply with the request if, in his or her opinion, it would prejudice Australia's sovereignty, security or national interest, or there are exceptional circumstances justifying the non-compliance.

#### Clause 45: Registration of order

74. Sub-clause (1) provides that, where the DPP is authorised to apply for registration of a forfeiture order and the DPP so applies, the court must register the order and give or publish notice of the registration to specified persons in the manner and within the time the court considers appropriate.

75. Sub-clauses (2) and (3) provide for the required form of the Tribunal forfeiture order when an application is made to register such an order. There must be a copy (which may be a facsimile copy) of the appropriate order sealed by the Tribunal.

#### Clause 46: Effect of order

76. Sub-clause (1) provides that a registered forfeiture order has effect and may be enforced as if it were a forfeiture order made under the Proceeds of Crime Act 1987 at the time of registration.

77. Sub-clause (2) provides that a registration of a facsimile of a sealed copy ceases to have effect after 21 days unless the sealed copy has been registered by then.

### PART 7 - SEARCH, SEIZURE AND POWERS OF ARREST

#### Division 1 - Search warrants

#### Clause 47: When search warrants can be issued

78. Sub-clause (1) sets out the situations in which a magistrate may issue a warrant to search premises. An application must be made under sub-clause 15(1) or 34(1), and the magistrate must be satisfied by information on oath that there are

reasonable grounds for suspecting that there is, or within 72 hours (48 hours if the application is made by electronic means - see sub-clause 3) will be, any evidential material at the premises.

79. Sub-clause (2) is in similar terms to sub-clause (1), except that it relates to the issue of a warrant authorising an ordinary search or a frisk search (defined in clause 4) of a person.

80. Sub-clause (4) provides that if the person applying for the warrant suspects that, in executing the warrant, it will be necessary to use firearms, the grounds for that suspicion must be stated in the information. This is intended to alert the magistrate to the possibility of violence.

81. Sub-clause (5) requires members or special members of the Australian Federal Police to disclose to the magistrate at the time of applying for a search warrant particulars and outcomes of all previous applications in relation to the same person or premises. It is intended to curtail the opportunity for forum shopping in applying for search warrants in relation to persons or premises.

82. Sub-clause (6) provides that a magistrate in New South Wales or the Australian Capital Territory may issue a search warrant in relation to premises or a person in the Jervis Bay Territory. This recognises that there is no resident magistrate in the Jervis Bay Territory.

83. Sub-clause (7) provides that a magistrate in a State or internal Territory may issue a warrant for search of premises or of a person in that State or Territory or in an external Territory. The magistrate may also issue such warrants for execution in another State or internal Territory if he or she is satisfied that it is appropriate to do so. This is to cover situations where warrants need to be simultaneously executed in a number of jurisdictions (for example, it would be undesirable for applications to be made in different jurisdictions if officers with the necessary knowledge of the matter are located in one jurisdiction).

#### Clause 48: Content of warrants

84. Sub-clause (1) sets out the matters which must be specified in a warrant.

85. Sub-clause (2) ensures that the 7 day (or 48 hour) limit on the duration of warrant (referred to in paragraph (e) of sub-clause (1)) does not prevent the issue of further warrants for the same premises or person.

86. Sub-clause (3) sets out the additional matters which the magistrate is to specify in a warrant that relates to premises. Paragraph (a) requires the magistrate to state that the warrant authorises the seizure of evidential material, other than the evidential material for which the warrant was specifically issued, which is found or things relevant to an indictable offence against an Australian law where seizure is necessary to prevent concealment, loss or destruction or use of the thing in committing a Tribunal offence or an indictable offence against an Australian law. Paragraph (b) requires an express statement as to whether the warrant authorises a frisk or ordinary search of persons at, or near, the premises. This is designed to ensure that the magistrate considers the appropriateness of authorising the search of persons.

87. Sub-clause (4) sets out the additional matters which the magistrate is to specify in a warrant that relates to a person. Paragraph (a) is in similar terms to paragraph (3)(a), and it requires the magistrate to specify that the warrant authorises the seizure of things other than the evidential material for which it was specifically issued in certain circumstances. Paragraph (b) requires the magistrate to state whether a frisk or ordinary search is authorised.

Clause 49: The things authorised by a search warrant in relation to premises

88. Sub-clause (1) sets out the activities authorised by a warrant to search premises.

89. Sub-clause (2) obliges those executing a warrant to comply with limitations particularised in the warrant relating to the hours during which it may be executed.

Clause 50: The things authorised by a search warrant in relation to a person

90. Sub-clause (1) sets out the activities authorised by a warrant to search a person.

91. Sub-clauses (2) and (3) oblige those executing a warrant to comply with limitations particularised in the warrant relating to the hours during which it may be executed, and as to the type of personal search which may be conducted.

Clause 51: Restrictions on personal searches

92. This clause provides that a search warrant can not authorise either a strip search or a search of a person's body cavities.

Clause 52: Warrants may be issued by telephone etc.

93. This clause enables applications for the issue of a warrant to be made by telephone, telex, facsimile or other electronic means in an urgent case or where delay could frustrate the execution of the warrant. The clause covers the procedure for such applications and the issuing of warrants in these circumstances.

Clause 53: Formalities relating to warrants issued by telephone etc.

94. This clause sets out the procedures if a magistrate issues a warrant under clause 52. The magistrate is required to inform the applicant by the appropriate electronic means of the terms of the warrant and the date and time at which it was signed. The applicant must then complete a form of warrant which sets out the substance of those terms and states the name of the magistrate and the date and time at which the warrant was signed. The applicant must, not later than the day after expiry of the warrant, or the day after the warrant was executed, whichever is the earlier, give or transmit to the magistrate the completed form of warrant and if the information had not been sworn, the sworn information. The clause also provides that in any court proceedings concerning the exercise of a power under the warrant, if the warrant signed by the magistrate is not produced, the court is to assume, unless the contrary is proved, that the exercise of the power was not duly authorised.

## Division 2 - Provisions relating to execution of search warrants

Clause 54: Availability of assistance and use of force in executing a warrant

95. This clause provides that, in executing a warrant, the executing officer may obtain such assistance and use such force as is necessary and reasonable in the circumstances. It provides that where the person assisting is not a police officer, he or she may only use force in relation to things, and not persons.

Clause 55: Copy of warrant to be shown to occupier etc.

96. This clause provides that if a warrant in relation to premises or a warrant in relation to a person is being executed, a copy of the warrant must be made available to the occupier of the premises or the person being searched. The clause covers the different situations and the manner in which this should be done.

**Clause 56: Specific powers available to officers executing warrants**

97. This clause sets out specific powers available to officers executing warrants in relation to premises, including the taking of photographs (including video recordings) in certain circumstances, and the completion of the execution of a warrant after particular interruptions to such execution.

**Clause 57: Use of equipment to examine or process things**

98. This clause covers the use of equipment to examine or process things. It permits the taking of equipment to premises to determine whether things are liable to seizure, the movement of things to another place in certain circumstances so that examination or processing can be carried out, and the operation of equipment already at the warrant premises in certain circumstances to determine whether things are liable to seizure.

**Clause 58: Use of electronic equipment at premises**

99. This clause provides for the use of electronic equipment at premises. The executing officer or an officer assisting (who under clause 4 may be a person who is not a police officer but is authorised by the executing officer to assist, for example a computer expert) may operate equipment at the premises to see whether evidential material is accessible if he or she believes that the equipment may be operated without damaging it. If evidential material is accessible, the executing officer or officer assisting may seize the equipment or any disk, tape or other associated device, or operate the equipment to obtain a printout and seize documents produced, or copy the records to another storage device and remove it from the premises. The seizure of printouts or duplicate disks is encouraged wherever possible.

100. The executing officer or officer assisting may secure the equipment by locking it up or guarding it if he or she believes on reasonable grounds that the evidential material may be accessible by operating the equipment at the premises but expert assistance is needed to operate the equipment and the evidential material may be destroyed or otherwise interfered with if the equipment is not secured in the meantime. Notice must be given to the occupier in this situation. The equipment may be secured for up to 24 hours, or until such time as expert assistance is obtained to operate the equipment. This period may be extended in certain circumstances.

Clause 59: Compensation for damage to electronic equipment

101. This clause provides for compensation to be paid to the owner of equipment if damage is caused to equipment in certain circumstances.

Clause 60: Copies of seized things to be provided

102. This clause requires an executing officer or officer assisting, on request, to give (to the occupier or his or her representative) a copy of a thing or information seized that can be readily copied. This does not apply if no original material was seized under sub-clause 58(2) or if possession of the thing seized could constitute an offence against an Australian law.

Clause 61: Occupier entitled to be present during search

103. This clause entitles occupiers of premises or their representatives to observe the searching of the premises, providing they do not impede the search. For practical reasons, the right to observe the search does not preclude the police from searching two or more areas of the premises at the same time. In these circumstances, the person could move from area to area or elect to observe particular parts of the search. In some cases, it will be necessary to search different parts of the building at once because of its size or where there is an opportunity for the destruction or concealment of evidentiary material.

Clause 62: Receipts for things seized under warrant

104. This clause requires receipts to be issued for things seized under a warrant or moved pursuant to sub-clause 57(2). It is possible for two or more items to be listed on the same receipt, so that police would not be required to identify absolutely every item individually where those items can be adequately identified by a class description.

Division 3 - Stopping and searching conveyances

Clause 63: Searches without warrant in emergency situations

105. This clause applies where a police officer suspects on reasonable grounds that evidential material is in an aircraft, vessel or vehicle. The police officer must also suspect that it is necessary to seize the material to prevent concealment, loss or destruction and that it is necessary to act without the authority of a search warrant

because the circumstances are so serious and urgent. Under such circumstances, the police officer may stop, detain and search the conveyance, and seize the material.

106. If in the course of the search the police officer finds other evidential material or a thing relevant to an offence against an Australian law, it may be seized to prevent its concealment, loss or destruction if the circumstances are so serious and urgent.

107. The police officer is required to exercise his or her powers subject to clause 63, which provides various safeguards.

Clause 64: How a police officer exercises a power under section 63

108. This clause sets out the manner in which a police officer may exercise powers under clause 63.

#### Division 4 - Arrest and related matters

Clause 65: Power to enter premises to arrest person

109. This clause provides that if a police officer has power to arrest a person and the police officer believes on reasonable grounds that the person is on any premises, the police officer may enter the premises at any time (subject to the conditions in sub-clause (2) being met), using such force as is necessary and reasonable in the circumstances for the purpose of searching for, and arresting, the person.

110. Sub-clause (2) states the general rule that entry to domestic premises to effect arrest should not be conducted at night. It precludes a police officer entering a dwelling house (defined in sub-clause (3)) to arrest a person between 9 pm and 6 am on the following day unless the police officer believes on reasonable grounds that it would not be practicable to arrest the person in any place at another time, or that it is necessary to prevent the concealment, loss or destruction of evidential material.

Clause 66: Use of force in making arrest

111. This clause sets out the use of force which may be used in the course of arresting a person under this Act or pursuant to a warrant issued under this Act.

Clause 67: Persons to be informed of grounds of arrest

112. This clause provides for a person to be informed, at the time of arrest, of the Tribunal offence in respect of which he or she is being arrested, or if the arrest is under clause 78 or 79, to be informed of the reason for arrest. This does not require a technical statement of the terms of the offence or the reason but merely of its substance. This requirement does not apply if the arrested person should, in the circumstances, know the substance of the Tribunal offence or reason, or if the arrested person's actions make it impracticable.

Clause 68: Power to conduct a frisk search of an arrested person

113. This clause provides that a police officer may, upon or soon after arrest, conduct a frisk search (quick running of the hands over the person's outer garments) and seize any seizable items (anything that would present a danger to a person or that could be used to assist a person to escape). The police officer must suspect on reasonable grounds that it is prudent to ascertain if the arrested person is carrying any seizable item.

114. 'Frisk search' and 'seizable item' are defined in clause 4, and pursuant to clause 73 must, if practicable, be conducted by a person of the same sex.

Clause 69: Power to conduct an ordinary search of an arrested person

115. This clause provides that a police officer may, upon or soon after arrest, conduct an ordinary search and seize any evidential material relating to the Tribunal offence to which the person's custody relates or seizable items. The police officer must suspect on reasonable grounds that the person is carrying such items.

116. 'Ordinary search' is defined in clause 4 and means a search of a person, or of articles in the person's possession, that may include requiring the removal of specified outer clothing, gloves, shoes and hat and an examination of those items. Clause 73 requires such a search to be conducted, where practicable, by a person of the same sex as the person to be searched.

Clause 70: Power to conduct search of arrested person's premises

117. This clause provides that a police officer who arrests a person at premises, or who is present at such an arrest, may seize things in plain view at those premises

which the police officer believes to be evidential material relating to the Tribunal offence to which the person's custody relates or seizable items.

**Clause 71: Power to conduct an ordinary search or strip search**

118. This clause details the circumstances in which an ordinary search or a strip search may be conducted. ('Ordinary search' and 'strip search' are defined in clause 4). The provision does not confer power to take any body samples or search body cavities but only to examine the body surface for things such as bruises, scratches and identifying marks.

**Clause 72: Rules for conduct of strip search**

119. This clause sets out the procedure to be followed whenever a strip search is conducted as an incident of arrest.

**Division 5 - General**

**Clause 73: Conduct of ordinary searches and frisk searches**

120. This clause provides that both ordinary searches and frisk searches must, if practicable, be conducted by a person of the same sex as the person being searched. It also provides that only police officers may take part in ordinary or frisk searches of persons under this Part.

**Clause 74: Announcement before entry**

121. This clause provides that before any person enters premises (to carry out a search or to arrest a person), a police officer must announce that he or she is authorised to enter and give any person at the premises an opportunity to allow entry to the premises, unless there are reasonable grounds to believe that immediate entry to the premises is required to ensure the safety of a person or that the effective execution of the warrant or the arrest is not frustrated.

**Clause 75: Offence for making false statements in warrants**

122. This clause creates an offence of knowingly making a false or misleading statement in an application for a warrant under this Part. The maximum penalty for an offence under this clause is imprisonment for 2 years.

Clause 76: Offences relating to telephone warrants

123. This clause creates offences arising from the preparation, and execution, of a form of warrant obtained by telephone or other electronic means under clause 52. It is an offence for a person to name a magistrate in a form of warrant under clause 52 unless that magistrate issued the warrant, or to knowingly state in a warrant something materially different from that authorised by the magistrate. It is also an offence to purport to execute an unauthorised or false form of warrant or to give a magistrate a form of warrant that is not the form that the person purported to execute. Offences under this clause, which are intended to prevent abuses of telephone search warrants, are punishable by imprisonment for up to 2 years.

Clause 77: Retention of things seized

124. This clause provides for the manner in which things are to be dealt with after they are seized under this Part.

125. A police officer who seizes a thing is required to deliver it into the custody and control of the Commissioner of Police of the Australian Federal Police, who is required to retain the thing pending any direction from the Attorney-General as to the manner in which it is to be dealt with. The Commissioner is also required to inform the Attorney-General when a thing has been so delivered, and to comply with any direction that the Attorney-General gives under sub-clause (3) about how to deal with the thing (which may include a direction that the thing be sent to the Tribunal).

126. Sub-clause (5) imposes a restriction on the power to retain a thing indefinitely, by requiring the Attorney-General to direct the Commissioner to return the thing in certain circumstances.

## PART 8 - MISCELLANEOUS

Clause 78: Arrest of persons escaping from custody

127. This clause permits the re-arrest of persons who have escaped from any custody authorised by the Act and permits the return of such persons to the originally authorised custody.

**Clause 79: Arrest of person released on bail**

128. This clause enables a police officer to arrest without warrant a person who refuses or fails to comply with a condition of a recognisance upon which the person was remanded on bail under the Act, or who the police officer believes on reasonable grounds is preparing to contravene such a condition.

**Clause 80: Aiding persons to escape, etc.**

129. This clause provides for the application of certain sections of the Crimes Act 1914 to enable prosecution of persons who assist, aid, etc the person's escape. It provides that sections 46 (Aiding prisoner to escape), 47A (Rescuing a prisoner from custody etc) and 48 (Harbouring etc an escapee) of the Crimes Act 1914 will apply (so far as they are relevant) to persons aiding, rescuing, harbouring, etc prisoners/escapees under the Act.

**Clause 81: Arrangements with States**

130. This clause permits the making of arrangements between the Commonwealth and the individual States (including the Northern Territory, the Australian Capital Territory and Norfolk Island) for the administration of the Act and in particular to permit magistrates in those places to perform functions conferred on magistrates under the Act.

131. Arrangements made under this power are required to be published in the Gazette.

**Clause 82: Delegation**

132. This clause permits the Attorney-General to delegate his or her powers under the Bill, apart from powers under Part 3 and the power under subclauses 26(3), 33(2), 35(2), 36(4), 40(2) and 44(3) (power to decide not to comply with a request by the Tribunal) to an officer of the Attorney-General's Department.

**Clause 83: Act not to limit other provision of assistance**

133. This clause makes it clear that this Act will not prevent the provision of any assistance to the Tribunal which may be provided otherwise than under this Act.

**Clause 84: Regulations**

134. This clause provides for a general regulation-making power.









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