

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

INTERNATIONAL WAR CRIMES TRIBUNAL BILL 1994

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and New Clauses to be Moved on Behalf of the Government

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





## GENERAL OUTLINE

The amendments are of two general types.

1. Amendments consequential on amendments to the Crimes (Search Warrants and Powers of Arrest) Amendment Bill 1994 (the SWAP Bill).

These amendments all flow from proposed Government Amendments (with the exception of one amendment which was proposed by the Democrats and accepted by the Government) to the SWAP Bill.

Part 7 of the International War Crimes Tribunal Bill 1994 (the War Crimes Bill), which deals with search, seizure and powers of arrest, picks up many provisions of the SWAP Bill. The proposed amendments to the SWAP Bill should therefore also be reflected in the War Crimes Bill. Not all the proposed amendments to the SWAP Bill are relevant to the War Crimes Bill and for this reason only some of the SWAP Bill amendments will be picked up in the amendments considered here.

The amendments to the SWAP Bill have been prepared in response to suggestions raised at the hearing of the Senate Standing Committee on Legal and Constitutional Affairs and they accord with the recommendations of the Government members of that Committee.

The primary purpose of the amendments is to increase safeguards available to persons and their property when subject to search warrants and procedures ancillary to arrest. In the case of property it is intended that proper notice be given to occupiers that their equipment is to be moved elsewhere for examination. Subject to practical considerations, occupiers would be allowed to be present at searches provided they do not impede the search and there is a requirement to issue receipts to occupiers where things are seized, (this is currently left to police procedures).

Children and incapable persons are to be given added protection under the sections relating to strip searches. It is now required that presence of a parent or guardian must be acceptable to the child.

The Democrat related amendment (Amendment 6) is designed to curtail forum shopping in applications for search warrants. It requires a member or special member of the Australian Federal Police to disclose to the magistrate at the time of applying for a search warrant all prior applications for warrants in relation to the same person and/or premises.

2. Minor amendments to address deficiencies in the present Bill.

These amendments clarify the procedure relating to applications for the issue of arrest warrants, expand the provision dealing with custody of persons in transit to cover the situation of transit through Australia for the purpose of being surrendered to the Tribunal, and insert new provisions enabling the arrest of persons who have escaped from lawful custody pursuant to the Act and pick up the relevant aiding/assisting types of offences in the Crimes Act 1914 for the purpose of the War Crimes Bill.

FINANCIAL IMPACT

The amendments are not expected to have any financial impact on Government expenditure.

## NOTES ON CLAUSES

### Amendment 1

1. This amendment to subclause 10(1) makes it clear that an application in the statutory form must be made to the magistrate for issue of an arrest warrant, whether the application be pursuant to a notice from the Attorney-General under clause 9 (specifying that a request has been received from the Tribunal), or whether it be otherwise than pursuant to such a notice (ie in urgent situations).

2. The purpose of the amendment is to clear up the present inconsistency between subclause 10(1) and paragraph 10(2)(a). Clause 10 provides for the issue of an arrest warrant. Subclause 10(1) covers the ordinary situation where a magistrate has received a notice from the Attorney-General under clause 9, whereas subclause 10(2) provides for issue of a warrant in urgent situations where a notice has not yet been received from the Attorney-General. In all cases, an application will be made to the magistrate for issue of a warrant. While it may not be necessary to specifically mention this requirement in the legislation, there is presently an inconsistency in that the requirement is mentioned in paragraph 10(2)(a), but not in subclause 10(1). The amendment will therefore make the clause clearer and more consistent.

### Amendment 2

3. The purpose of this amendment is to make it clear that an application to a magistrate for issue of an arrest warrant will be made on behalf of the Tribunal. Previously the subclause stated that an application would be made on behalf of the Attorney-General.

### Amendment 3

4. This amendment is to ensure that clause 38, which deals with custody of persons in transit, covers all possible transit situations. It adds the situation of transit through Australia for the purpose of being surrendered to the Tribunal.

5. Previously, it only covered transit through Australia where a person is transported in custody from a foreign country through Australia to another foreign country for the purpose of giving evidence or assistance to the Tribunal. However, it is clear that a person may also be transported through Australia for the purpose of being surrendered to the Tribunal.

#### Amendments 4 and 5

6. These amendments omit the previous clauses dealing with escaping from custody while in transit and arrest of persons in transit. They are consequential on Amendment 15.

#### Amendment 6

7. This amendment proposes that new subsection 48(4A) be inserted. The purpose of the proposed subsection is to curtail the opportunity for forum shopping in applying for search warrants in relation to persons or premises. It 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 and/or premises.

#### Amendment 7

8. This amendment to subclause 58(3) makes it clear that when anything is taken from premises to be examined or processed the occupier must, if practicable, be informed of the address, time and place of the examination and be allowed to attend the examination. Previously this provision was to only apply to 'electronically stored information'.

#### Amendment 8

9. This amendment proposes that new sections 61A and 61B be inserted.

10. Proposed section 61A provides that occupiers or their representatives may choose to observe the searching of the premises providing they do not impede the conduct of the search in any way. This has been included to minimise, as far as possible, the potential for actual or alleged planting of material on the premises by the police.

11. For practical reasons, the right to observe the search should not preclude the police from searching 2 or more areas of the premises at the same time. In those circumstances the person can 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.

12. Proposed section 61B provides that receipts are to be issued to occupiers for things seized. Under this provision it will be possible for the items to be listed on the same receipt. It is not envisaged that police would be required to identify absolutely every item individually where those items can be adequately identified by a class description.

### Amendment 9

13. This amendment is consequential on Amendments 5 and 15.

### Amendment 10

14. Proposed subparagraph 71(1)(f)(ii) is amended to ensure that the rights of children and incapable persons are adequately protected and provides that a strip search must only be conducted in the presence of a parent or guardian or personal representative if their presence is acceptable to the person. Previously it provided that the search be conducted in the presence of a parent or guardian or a personal representative but only dealt with the question of acceptability in relation to the personal representative.

### Amendments 11 to 14

15. These are amendments designed to improve the drafting of the Bill. They relate to clause 73 (Announcement before entry). By removing "responsible officer" and inserting "police officer" instead, the amendment will make the provision more concise and precise (given that it applies to arrest and the execution of warrants).

### Amendment 15

16. This amendment proposes the insertion of new sections 76A, 76B and 76C, dealing with escape issues.

17. Previously, the Bill's only escape provision was clause 39, which dealt with escape from custody only in the context of transit. However, a person may be in custody for other reasons pursuant to the Act. For example, a person may escape after having been arrested in Australia but prior to surrender to the Tribunal.

18. The amendment will insert general escape and arrest provisions covering all possible situations. It should be read in conjunction with Amendments 4, 5 and 9, which delete the previous provisions relating to escaping and arrest of persons in transit, and make consequential amendments.

19. Proposed sections 76A and 76B will allow any police officer to arrest, without warrant:

- (a) a person if the officer has reasonable grounds to believe that the person has escaped from custody authorised by the Act;
- (b) a person who has been released on bail under the Act if the officer has reasonable grounds for believing that the person has contravened,

or is about to contravene, a term or condition of a recognisance on which bail was granted to the person.

20. The amendment does not create an offence of escaping from custody. This is because local charges and subsequent imprisonment would delay the surrender process. It is far preferable to simply be able to arrest a person if they have escaped from lawful custody pursuant to the Act (so that the person can then be surrendered to the Tribunal, or continue with transit, etc).

21. Proposed section 76C picks up the relevant offences in the Crimes Act 1914 relating to aiding and assisting a person to 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 International War Crimes Tribunal Act.