

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

INTERNATIONAL WAR CRIMES TRIBUNAL BILL 1994

SUPPLEMENTARY EXPLANATORY MEMORANDUM

THIS SUPPLEMENTARY EXPLANATORY MEMORANDUM COVERS
THE AMENDMENTS AGREED TO IN THE HOUSE OF
REPRESENTATIVES

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



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GENERAL OUTLINE

The amendments are in response to recommendations by the House of Representatives Standing Committee on Legal and Constitutional Affairs ('the Committee').

Most of the amendments are of a drafting nature. The primary purposes of the amendments are to clarify the legislation, overcome deficiencies in present provisions and improve the legislation in terms of procedural fairness.

FINANCIAL IMPACT

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

NOTES ON CLAUSES OF AMENDMENTS

Amendment 1

1. This amendment replaces the definition of 'federal prisoner' in proposed section 4 to make it clear that the term covers persons who are being lawfully held in custody for any reason (including pending trial, committal or summary hearing, and persons in juvenile detention centres or in mental health institutions).
2. The amendment arises from a concern expressed by the Committee that the present definitions of 'federal prisoner' and 'State prisoner' may be too narrow by failing to adequately cover persons who are being lawfully held in custody for any reason.
3. The amendment ensures coverage of persons being lawfully held in custody, bail refused, or serving a term of imprisonment, however that term might be expressed.
4. There are a number of consequential and related amendments (see Amendments 3, 13, 14, 15, 18, 20, 22, 23 and 25).

Amendment 2

5. This amendment deletes staff members of the Australian Federal Police from the definition of 'police officer'. The reason is that staff members have a support role for investigations, and do not have training nor expertise in actual policing matters, and staff members could therefore be placed in an invidious position if they were included in the definition.

Amendment 3

6. The purpose of this amendment is the same as for Amendment 1.

Amendment 4

7. This amendment redrafts proposed section 8 to indicate that requests from the Tribunal must be in writing, and be sufficient to identify the person or persons to be charged, the nature of the charge and the intended time and place of the hearing. While these matters would be expected to be included in Tribunal requests as a matter of course, the amendment will make them specific mandatory requirements.

Amendment 5

8. This amendment clarifies that the Attorney-General is only obliged to issue a notice under proposed section 9 (specifying that a Tribunal request has been received) if the Tribunal request complies with the mandatory requirements in proposed section 8.

Amendment 6

9. This amendment requires a copy of the Tribunal arrest warrant to be attached to the Attorney-General's notice under proposed section 9. The purpose is to ensure that the magistrate is provided with a copy of the Tribunal's warrant for the purposes of Amendment 7.

Amendment 7

10. This amendment requires a magistrate to be satisfied that

- the person before him or her is the person specified in the (Australian) arrest warrant (issued pursuant to proposed section 10); and
- the person before him or her is also the person specified in the Tribunal arrest warrant

prior to remanding the person.

11. If a person who has been arrested pursuant to an arrest warrant is brought before a magistrate, it could be expected that a magistrate would always, as a matter of practice, satisfy himself or herself that the person is the person named in the warrant prior to any subsequent steps (such as remand) being taken in relation to the person. While it is not necessary to specifically include this provision, it will have the effect of clarifying the legislation.

Amendment 8

12. This amendment proposes that a magistrate should be required to remand a person in custody unless there are 'special' (as opposed to 'exceptional') circumstances justifying remand on bail. The amendment is based on consistency with an equivalent provision in the *Extradition Act 1988*.

Amendment 9

13. This amendment clarifies that if a person makes one application for bail on the merits and fails, the person cannot make a further application unless there is evidence of a change of circumstances that might warrant the grant of bail.

14. The purpose of the amendment is to ensure that the provision does not go beyond its intended restriction of 'forum-shopping' if/when a magistrate dies, resigns or retires.

Amendment 10

15. This amendment reduces (from 45 to 14 days) the period within which a person may be on remand prior to receipt of the Attorney-General's notice specifying that a Tribunal request has been received.

16. The proposed period of 14 days is based on the fact that the only additional document (in addition to the copy of the Tribunal warrant) which the Tribunal would have to send within this period is a formal request.

Amendments 11 and 12

17. These amendments substitute the term 'special circumstances' for 'exceptional circumstances' in the context of the Attorney-General's surrender determination. The reason for the amendments is for purposes of consistency in terminology (refer to Amendment 7).

Amendments 13, 14 and 15

18. These amendments are related to, and have the same purpose as, Amendment 1.

Amendment 16

19. This amendment clarifies that a surrender warrant does not always have to be executed according to its tenor. There may be circumstances (as envisaged in proposed section 23) where surrender warrants will not be executed (for example, where to do so would be dangerous to a person's life or prejudicial to a person's health).

Amendment 17

20. This amendment redrafts and replaces proposed section 23 in order to clarify the intent of the provision. The proposed section is intended to permit the release of a person who has been in custody 21 days after a surrender warrant was first liable to be executed. However, if the court is satisfied that the warrant has not been executed (the person has not been delivered into the custody of the Tribunal) because, for example, the person is ill, or his or her health or life is in danger, then the court is not to order release from custody simply because time has passed.

21. The amendment reduces the period of custody from 2 months to 21 days on the understanding that the Tribunal would be in a position to take delivery of a person within a much shorter timeframe than 2 months.

Amendments 18, 20, 22 and 23

22. These amendments flow from Amendment 1.

Amendments 19 and 21

23. These amendments clarify that Tribunal sentences cannot be served concurrently with Australian sentences (however described). This is based on the fact that the offences are likely to be of quite different character and severity, and the undesirability of a person being able to gain the benefit of a domestic sentence or detention being reduced just because the person has also been convicted of a Tribunal offence.

24. The amendments make it clear that any time (where the person is acquitted by the Tribunal), or any time until the Tribunal hands down its verdict (where the person is convicted by the Tribunal) spent in custody in connection with the Tribunal will count as time served under the Australian sentence or period of detention.

Amendment 24

25. The purpose of this amendment is to make it clear that forms of assistance other than those provided for in the Bill may be provided to the Tribunal outside the proposed Act.

26. Note that a Government Amendment (which will achieve the same purpose) is proposed to be moved in substitution for this amendment. (See the Further Supplementary Explanatory Memorandum).

Amendment 25

27. This amendment flows from Amendment 1.

Amendment 26

28. This amendment requires a person to be brought before a magistrate as soon as practicable after the person has been arrested, without warrant, by a police officer who has reasonable grounds to believe that the person has escaped from custody authorised by the proposed Act. This improves the previous situation whereby such a person could be simply returned to custody without the police officer's belief being tested before a magistrate.

Amendment 27

29. This amendment inserts a legal assistance provision in the Bill. It is a general provision covering any of the purposes in the Bill, including situations where evidence is being taken in Australia and for the purposes of applications to the court for release from custody.

30. The provision enables an application for assistance to be made to the Attorney-General who may determine whether legal assistance is to be granted (taking into account whether it would involve hardship to the person to refuse the application and whether, in all the circumstances, it is reasonable that the application be granted). Legal or financial assistance may be granted unconditionally or subject to such conditions as the Attorney-General determines.