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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

INTERNATIONAL TRANSFER OF PRISONERS BILL 1996

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Daryl Williams AM QC MP)

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INTERNATIONAL TRANSFER OF PRISONERS BILL 1996

OUTLINE

The purpose of this Bill is to enable Australians imprisoned overseas, and foreign nationals imprisoned in Australia, to be returned to their home countries to complete the serving of their sentences. It will also enable persons having a connection with Australia who have been convicted by the international war crimes tribunals of war crimes in former Yugoslavia and Rwanda ("Tribunal prisoners") to be transferred to Australia to serve their sentences.

The Bill has been developed in consultation with the States and Territories through the Standing Committee of Attorneys-General ("SCAG"). States and Territories which have agreed to participate in the international transfer of prisoners will need to enact complementary legislation.

The Bill contains separate schemes for the two different types of prisoners. Parts 3 and 4 deal with general prisoner transfers between Australia and other countries. Part 5 deals with transfers to Australia of Tribunal prisoners. Parts 1, 2, 6 and 7 contain general provisions relating to both types of prisoners.

The Bill provides for all transfers to be considered on a case-by-case basis.

For general prisoner transfers between Australia and other countries, the transfer scheme is able to apply to all offences without exception. It covers persons who have been convicted of a crime and sentenced to imprisonment or other deprivation of liberty, and includes persons confined in connection with criminal conduct by reason of mental disorder, and persons who have been released on parole. Importantly, transfers will be consensual, requiring the consent of the person to be transferred, the Australian Government (Commonwealth and State/Territory where relevant) and the other country. Conditions for transfer include imprisonment under a final order; at least six months of the sentence is remaining to be served (unless the Attorney-General determines that transfer for a shorter period is acceptable); and, for transfers to Australia, the person is an Australian citizen or is permitted to travel to, enter and remain in Australia indefinitely pursuant to the *Migration Act 1958* and has community ties with a State or Territory.

There are some differences in relation to Tribunal prisoners, which take account of the different nature of the transfer of Tribunal prisoners. Prison cells in various countries have to be made available if persons convicted by the two international war crimes

tribunals established by the United Nations Security Council are to serve their sentences. The intention is that a Tribunal prisoner would not be transferred to Australia unless he or she has some connection with Australia and the Australian Government has consented to the transfer. The main differences in relation to Tribunal prisoners are that consent from the Tribunal prisoner is not a mandatory requirement, and there are no explicit citizenship or migration requirements. (However, the Bill (clause 57) provides that decisions affecting a person who is not an Australian citizen cannot be made without the consent of the Minister for Immigration and Multicultural Affairs.)

FINANCIAL IMPACT STATEMENT

The Bill is expected to have little impact on Commonwealth expenditure or revenue in the short term. Expenses in relation to transfers to Australia under Part 4 will generally be borne by the participating States and Territories. In addition, the Bill contains a clause (clause 51) enabling the recovery of the costs and expenses incurred in transferring prisoners.

Pursuant to SCAG agreement, the Commonwealth's costs in relation to general prisoner transfers will include costs of negotiating participation in any appropriate multilateral schemes, bilateral treaties or other transfer arrangements, and the administration of receiving and making requests to other countries. The costs for the States and Territories will include sending escort officers, returning prisoners (including airfares) and the cost of maintaining prisoners during the terms of sentences in Australia. The cost arrangements will be different in relation to transfers of Tribunal prisoners, since that responsibility arises from international relations and Australia's membership of the United Nations. The Commonwealth will be responsible for the costs associated with transfers from the Tribunals.

The cost implications are not expected to be significant in relation to Tribunal prisoners. In relation to general prisoner transfers, there may be significant cost savings to the States and Territories if there is a net outflow of prisoners. The cost implications are unable to be precisely quantified at this stage.

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

1. Part 1 contains a range of formal, definitional and substantive provisions.

Clause 1: Short Title

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

Clause 2: Commencement

3. 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 or days to be fixed by Proclamation. The commencement date will depend upon the time taken for enactment of complementary State/Territory legislation.

Clause 3: Objects of Act

4. This clause sets out the underlying bases of the Act, which are to facilitate the transfer of prisoners between Australia and certain other countries so that prisoners may serve their sentences of imprisonment in their countries of nationality or in countries with which they have community ties, and to facilitate the transfer of prisoners who have been convicted by certain international war crimes tribunals to Australia to serve their sentences.

Clause 4: Definitions

5. This clause sets out the definitions of words and expressions used in the Act and for the purposes of the Act provides how certain matters are to be dealt with. The following definitions are of particular importance:

- ‘appropriate Ministerial consent’: The definition refers to the substantive requirements set out in clause 5.
- ‘community ties’: The requirements for community ties with a transfer country and community ties with a State or Territory are set out in subclauses (4) and (5) respectively. These requirements are specified for the purpose of clauses 5(2), 12 and 13 which deal with the requirements for appropriate Ministerial consent for transfers to Australia and eligibility for transfer from and to Australia of prisoners (other than Tribunal prisoners).

‘prisoner’ and ‘sentence of imprisonment’: These definitions make it clear that the Bill covers all persons who are subject to some form of deprivation of liberty in connection with criminal conduct. Such persons, who may be Federal, State, Territory or joint prisoners, include mentally impaired prisoners and persons who are on parole.

‘State’ and ‘Territory’: The Australian Capital Territory (“ACT”) and the Northern Territory are included in the definition of ‘State’. There are a number of provisions throughout the Bill which reflect the fact that the ACT, unlike the other ‘States’ does not have its own prison system. ‘Territory’ is defined to mean the Jervis Bay Territory, Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands.

Clause 5: Appropriate Ministerial consent to transfer

6. This clause establishes the requirements for Ministerial consent in relation to the transfer of prisoners under the Act.
7. Subclause (1) provides for the Ministerial consent requirements in the case of the transfer of a prisoner from Australia to a transfer country. The terms ‘prisoner’ and ‘transfer country’ are defined in subclause 4(1). The subclause lists the consent requirements for separate classes of prisoners. The separate classes are also defined in subclause 4(1). In relation to all classes of prisoner it should be noted that the consent of the Attorney-General is required.
8. In the case of federal prisoners, only the Attorney-General is required to consent. In the case of State prisoners, both the State Minister and the Attorney-General are required to consent. This will mean that for prisoners convicted under ACT law (“ACT prisoners”), and who are detained in New South Wales prisons, consent is required only from the ACT Minister and the Attorney-General. (The terms ‘State Minister’ and ‘ACT Minister’ are defined in subclause 4(1)). In the case of Territory prisoners, consent is required from the Attorney-General and the Territory Minister (as defined in subclause 4(1)). This may be the relevant executive member in relation to Norfolk Island and the Commonwealth Minister for Territories in relation to the other Territories. In the case of joint prisoners, consent is required from the Attorney-General and all State Ministers or Territory Ministers concerned. (Consent by more than one State or Territory Minister may be required depending upon the prisoner’s status.)

9. Subclause (2) provides for the Ministerial consent requirements in the case of the transfer of a prisoner from a transfer country to Australia. As with subclause (1), the consent of the Attorney-General is required in all cases.

10. However, the other requirements are quite different. Incoming prisoners will have been convicted and detained in another country pursuant to that country's laws. They will not be classified as 'Federal', 'State', 'Territory' or 'joint' prisoners.

Appropriate Ministerial consent in this case depends upon:

- (a) the State or Territory in which the prisoner is to be imprisoned in Australia following transfer; and
- (b) the State or Territory to which the prisoner has community ties (if different from (a)).

11. In practice, this will mean that for prisoners with community ties to a State other than the ACT, the relevant State Minister would have to consent as well as the Attorney-General. For prisoners who are to begin to complete serving a sentence of imprisonment in New South Wales but who have community ties to the ACT, the Jervis Bay Territory or Norfolk Island, the consent of the ACT Minister or Territory Minister as appropriate and the New South Wales Minister, as well as that of the Attorney-General, would be required. For prisoners who are to begin to complete serving a sentence of imprisonment in Western Australia but who have community ties with the Territory of Christmas Island or the Territory of Cocos (Keeling) Islands, consent would be required from the relevant Territory Minister, as well as the Western Australian Minister and the Attorney-General.

12. Subclause (3) outlines the Ministerial consent requirements in relation to the transfer of a Tribunal prisoner from a Tribunal country to Australia. The terms 'Tribunal prisoner' and 'Tribunal country' are defined in subclause 4(1). As with the situations dealt with in subclauses (1) and (2), the consent of the Attorney-General is required for the transfer of a Tribunal prisoner, as well as the consent of the State Minister or Territory Minister of the State or Territory in which the prisoner is to begin to complete serving the sentence of imprisonment following transfer.

Clause 6: Prisoner's and prisoner's representative's consent to transfer

13. This clause sets out certain conditions and requirements in relation to the consent of a prisoner, or the prisoner's representative, to transfer (as required by clauses 10(c) and 11(b)).

14. Subclause (1) specifies the conditions that have to be satisfied for the purposes of a prisoner consenting to transfer.
15. Subclause (2) allows a prisoner's representative (parent, guardian or legal representative) to consent to transfer where the prisoner is a child or incapable of giving consent.
16. Subclause (3) requires the prisoner or prisoner's representative to be informed, in a language in which they have reasonable fluency, of the legal consequences of transfer before consent is given.
17. Subclause (4) requires consent to be accompanied by certification that the requirements of subclause (3) have been met.
18. Subclause (5) deals with the circumstances in which an adult prisoner is to be regarded as incapable of consenting to transfer.
19. Subclause (6) provides that consent cannot be withdrawn after the prisoner departs from the country from which he or she is being transferred.
20. Subclause (7) defines the words 'adult' and 'child'.

Clause 7: Extension to external Territories

21. This clause provides that the Act applies to external Territories.

Clause 8: Application of Act to transfer countries

22. This clause establishes the mechanism by which the Act is to be applied to transfer countries. Prisoners (other than Tribunal prisoners) can only be transferred between Australia and transfer countries. 'Transfer country' is defined in subclause 4(1) by reference to clause 8.
23. Subclause (1) specifies that the mechanism is to be regulations providing that the Act applies to a foreign country declared by those regulations to be a transfer country.
24. Subclause (2) provides that the regulations may declare that the Act is applied to a foreign country subject to limitations, conditions, exceptions or qualifications referred to in the regulations.
25. Subclause (3) specifies the types of limitations, conditions, exceptions or qualifications which may be referred to in the regulations. Paragraph (a) deals with the

case of limitations, conditions, exceptions or qualifications necessary to give effect to a bilateral treaty. Paragraph (b) concerns the case of a multilateral treaty, and would include the Council of Europe Convention on the Transfer of Sentenced Persons. Paragraph (c) deals with limitations, conditions, exceptions or qualifications (other than limitations, conditions, exceptions or qualifications that are necessary to give effect to a treaty) for the transfer of prisoners that are set out, or identified in any other way, in the regulations. This would include the Commonwealth Scheme for the Transfer of Convicted Offenders, and, for example, a one-off or bilateral non-treaty arrangement in a particular case.

26. Subclause (4) is designed to facilitate the drafting of concise regulations. It allows the limitations, conditions, exceptions or qualifications necessary to give effect to a treaty (whether bilateral or multilateral) in relation to a transfer country to be expressed in the form that the Act applies to that country subject to the treaty.

27. Subclause (5) elaborates on the definition of the term 'transfer country'.

Clause 9: Act to bind Crown

28. This clause provides that the Act binds the Crown in each of its capacities.

Part 2 – Transfers generally

29. Part 2 contains provisions governing when a prisoner may be transferred, a prisoner's eligibility for transfer and conditions relating to transfers.

Clause 10: When may a prisoner (other than a Tribunal prisoner) be transferred?

30. This clause sets out the requirements that have to be satisfied for a prisoner (other than a Tribunal prisoner) to be transferred between Australia and a transfer country.

Clause 11: When may a Tribunal prisoner be transferred?

31. This clause sets out the requirements that have to be satisfied for a Tribunal prisoner to be transferred to Australia. Paragraph (b) of this clause allows the Attorney-General to determine that it is not necessary in a particular case for the prisoner or prisoner's representative to have consented to transfer (as referred to in the Outline).

Clause 12: Eligibility for transfer from Australia of prisoners (other than Tribunal prisoners)

32. This clause establishes the criterion of eligibility to be satisfied for a prisoner (other than a Tribunal prisoner) to be transferred from Australia to a transfer country. Where a prisoner is not a national of the transfer country as provided for in paragraph (a), paragraph (b) requires him or her to have community ties with that country. The expression 'community ties' in relation to a transfer country is defined in subclause 4(4).

Clause 13: Eligibility for transfer to Australia of prisoners (other than Tribunal prisoners)

33. This clause establishes the criterion of eligibility to be satisfied for a prisoner (other than a Tribunal prisoner) to be transferred from a transfer country to Australia. Where the person is not an Australian citizen as provided for in paragraph (a), paragraph (b) requires him or her to be permitted to travel to, enter and remain in Australia indefinitely pursuant to the *Migration Act 1958* and to have community ties with a State or Territory. The expression 'community ties' in relation to a State or Territory is defined in subclause 4(5).

Clause 14: Transfer conditions – transfer from Australia

34. This clause deals with transfer conditions in relation to the transfer of prisoners from Australia.

35. Subclause (1) provides that the conditions for transfer from Australia of a prisoner (other than a mentally impaired prisoner) are satisfied if the listed requirements are met. Paragraph (a) requires the prisoner to have been imprisoned under a final order. Paragraph (b) deals with dual criminality. It provides, subject to subsection (3), that one condition for transfer is that the acts or omissions constituting the offence for which the prisoner is serving the sentence in Australia would, if the acts or omissions had occurred in the transfer country, have constituted an offence in that country. When the paragraph is read in conjunction with subclause (3), dual criminality is not a mandatory requirement. (Subclause (3) enables the Attorney-General to determine that dual criminality need not be satisfied in a particular prisoner's case.) Paragraph (c) requires there to be at least six months of the sentence remaining to be served, unless the Attorney-General has determined that transfer for a shorter period is acceptable.

36. Subclause (2) provides that the conditions for transfer from Australia of a mentally impaired prisoner are satisfied if the listed requirements are met. These requirements are substantively the same as those set out in subclause (1). They are expressed differently to take account of the particular circumstances of mentally impaired prisoners. The term 'mentally impaired prisoner' is defined in subclause 4(1).

37. Subclause (3) provides that the Attorney-General may determine that the dual criminality requirements provided for in paragraph (b) of subclause (1) or paragraph (b) of subclause (2) do not have to be satisfied in a particular prisoner's case.

Clause 15: Transfer conditions – transfer to Australia

38. This clause deals with transfer conditions in relation to the transfer of prisoners to Australia.

39. Subclause (1) provides that the conditions for transfer to Australia of a prisoner (other than a mentally impaired prisoner or Tribunal prisoner) are satisfied if the listed requirements are met. These requirements are the same as those set out in subclause 14(1) in relation to transfers from Australia.

40. Subclause (2) provides that the conditions for the transfer to Australia of a mentally impaired prisoner are satisfied if the listed requirements are met. These

requirements are the same as those set out in subclause 14(2) in relation to transfers to Australia.

41. Subclause (3) provides that the Attorney-General may determine that the dual criminality requirements provided for in paragraph (b) of subclause (1) or paragraph (b) of subclause (2) do not have to be satisfied in a particular prisoner's case.

42. Subclause (4) provides that the conditions for the transfer to Australia of a Tribunal prisoner are satisfied if the listed requirements are met. These requirements are that the conviction and sentence of imprisonment must be final, and that there must be at least six months of the sentence remaining to be served (unless the Attorney-General determines that transfer for a shorter period would be acceptable).

Part 3 – Transfers from Australia

43. Part 3 contains provisions relating to the making and handling of requests for transfers from Australia and provisions relating to warrants for transfer from Australia.

Clause 16: Applications for transfer from Australia

44. This clause provides that a prisoner or prisoner's representative may apply to the Attorney-General, in the manner prescribed by the regulations, for transfer to a transfer country.

Clause 17: Preliminary consideration of application for transfer

45. This clause sets out the preliminary steps to be taken in the handling of an application for transfer made under clause 16.

46. Subclause (1) requires the Attorney-General to forward a copy of the application to the relevant State or Territory Ministers. The relevant Ministers are the Minister of the State or Territory in which the prisoner is located, and any other State or Territory Minister whose consent to the transfer is required. For example, if an ACT prisoner is serving a sentence of imprisonment in New South Wales, the Attorney-General would forward a copy to the New South Wales Minister, as well as to the ACT Minister.

47. Subclause (2) allows a Minister to whom an application is forwarded to inform the Attorney-General of matters he or she considers relevant to the application

48. Subclause (3) also allows a Minister to request the Attorney-General to seek information from a transfer country which is relevant to his or her assessment of the application. This may include information on how the other country proposes to enforce the sentence of imprisonment if the transfer takes place.

49. Subclause (4) provides that the Attorney-General is to notify a transfer country of any application for transfer to that country. The Attorney-General has the discretion to request the transfer country to indicate its provisional views on the application.

50. Subclause (5) states that the Attorney-General may provide certain information to the transfer country.

Clause 18: Formal request for transfer

51. This clause deals with the making of a formal request for transfer to a transfer country.
52. Subclause (1) gives the authority to the Attorney-General to make a formal request in writing for transfer of a prisoner to a transfer country.
53. Subclause (2) deals with matters which the Attorney-General may take into account in deciding whether to make a formal request.
54. Subclause (3) provides that the Attorney-General is not to make a formal request for transfer unless satisfied (if the consents referred to in subclause 20(2) are given) that the transfer will be able to be made in compliance with clause 10. As noted, clause 10 sets out the requirements that have to be satisfied for a prisoner (other than a Tribunal prisoner) to be transferred between Australia and a transfer country.

Clause 19: Information to accompany a formal request

55. This clause specifies the information which is to accompany a formal request, namely any information required to be provided in accordance with arrangements made with the transfer country (whether those arrangements are pursuant to a bilateral treaty, multilateral treaty or other arrangement), and any other available information that the Attorney-General considers relevant and that may appropriately be provided.

Clause 20: Governmental consent to transfer from Australia

56. This clause deals with governmental consent to transfer from Australia.
57. Subclause (1) provides for the Attorney-General to notify both the prisoner (or prisoner's representative) and any State or Territory Minister or Ministers whose consent to transfer is necessary, of the transfer country's decision and the proposed terms of transfer.
58. Subclause (2) states that the persons so notified are to advise the Attorney-General as to whether they consent to the transfer on the terms proposed.
59. Subclause (3) provides that the Attorney-General is to determine whether or not consent should be given to the transfer on the terms proposed and is to notify the transfer country accordingly. The subclause also recognises that the Attorney-General may inform the transfer country that consent will be given if that country agrees to a variation of the terms.

Clause 21: Issue of warrant for transfer from Australia

60. This clause permits the Attorney-General, subject to Part 2, to issue a warrant, in the form prescribed by the regulations, for the transfer of the prisoner to the transfer country, if the requirements set out in the clause are met.

Clause 22: Warrants for transfer from Australia

61. This clause deals with the content and effect of warrants for transfer from Australia.

62. Subclause (1) provides that a warrant for transfer authorises the transfer of a prisoner to the transfer country to complete serving his or her sentence of imprisonment in accordance with the terms agreed under the Act.

63. Subclause (2) specifies information which must be included in a warrant for transfer.

64. Subclause (3) addresses the case of a warrant concerning a prisoner other than a prisoner who has been released on parole, and sets down what the warrant should require and authorise. It covers the release of the prisoner from his or her custody in Australia, transport to a departure point in Australia, and transport in the custody of an escort officer to the transfer country and surrender to an appointed person in that country. The term 'escort officer' is defined in subclause 4(1), and may be a person either from Australia or another country.

65. Subclause (4) addresses the case of a warrant concerning a prisoner who has been released on parole. It requires the warrant to specify any approvals, authorities, permissions or variations for the purpose of releasing the prisoner from his or her parole obligations in Australia, and to specify any agreed procedures for transfer and give any necessary authorisations and directions. This enables some flexibility in relation to transfers of prisoners on parole, and would enable, for example, transfer of such a prisoner without being in the custody of an escort officer if that was agreed.

66. Subclause (5) provides that the Attorney-General may give any direction or approval that is necessary to ensure the warrant is executed in accordance with its tenor.

Clause 23: Cancellation of warrant for transfer from Australia

67. This clause allows the Attorney-General to cancel a warrant for transfer from Australia.

68. Subclause (1) provides that the warrant may be cancelled at any time before the prisoner leaves Australia.

69. Without limiting the grounds on which the Attorney-General may cancel a warrant, subclause (2) requires the Attorney-General to cancel a warrant if the Attorney-General, a State or Territory Minister, the prisoner or prisoner's representative or the transfer country withdraws consent to transfer.

Part 4 - Transfers to Australia of prisoners from transfer countries

70. Part 4 contains provisions dealing with the handling of requests for transfers to Australia of prisoners from transfer countries and provisions relating to warrants for transfer to Australia.

Clause 24: Transfer request from outside Australia

71. This clause provides that the Attorney-General may consent to a request from a transfer country for the transfer of a prisoner (other than a Tribunal prisoner) to Australia to complete serving his or her sentence on terms agreed under the Act if the Attorney-General is satisfied that the transfer can be made in compliance with clause 10.

Clause 25: Information to accompany request

72. This clause provides that before consenting to a transfer the Attorney-General may request the transfer country to provide:

- (a) details of any requests for extradition or countries that may have expressed interest in extraditing the prisoner or are likely to request extradition of the prisoner; and
- (b) any other information that the Attorney-General considers relevant to giving consent.

Clause 26: Enforcement of foreign sentence

73. This clause provides that before consenting to a transfer to Australia the Attorney-General must determine, in accordance with Part 6, how the sentence of imprisonment will be enforced in Australia and must advise the transfer country of this and any other conditions to which consent is subject.

Clause 27: Governmental consent to transfer to Australia

74. This clause deals with governmental consent to transfer to Australia and provides for mandatory consultations by the Attorney-General with relevant State or Territory Ministers.

75. Subclause (1) requires the Attorney-General to notify the State or Territory Minister of the place in Australia, in which the prisoner wishes to begin to complete serving the sentence of imprisonment, of the receipt of a request for transfer.

76. Subclause (2) covers the case of prisoners who wish to begin to complete serving their sentence of imprisonment in New South Wales or Western Australia but who have community ties with the ACT or a Territory. In this case, the Attorney-General is also required to notify the ACT Minister or Territory Minister of receipt of a request for transfer. The reason is that consent of the ACT Minister or Territory Minister as appropriate would be required for transfer (as noted in paragraph 11).

77. It should be noted that it is possible that an incoming prisoner with community ties to the ACT or a Territory may in fact begin to complete serving his or her sentence of imprisonment in the ACT or a Territory (rather than in New South Wales or Western Australia). This may occur, for example, if the prisoner has been released on parole. In this case, the Attorney-General would only need to notify the ACT Minister or Territory Minister under subclause (1).

78. Subclause (3) requires the Attorney-General to provide each Minister concerned with certain information.

79. Subclause (4) requires each Minister concerned to advise the Attorney-General in writing whether the Minister consents to the transfer on the terms proposed.

80. Subclause (5) requires the Minister of the State or Territory in which the prisoner is to begin to complete serving his or her sentence of imprisonment, if that Minister consents to the transfer, to advise the Attorney-General of where the prisoner will begin to complete serving the sentence, and any recommended terms or conditions if the prisoner has been released on parole, and any other matters the Minister considers relevant to the enforcement of the sentence.

Clause 28: Formal consent to transfer

81. This clause provides that the Attorney-General is to notify the transfer country when all appropriate Ministerial consents have been given and is to then ask the transfer country to consent formally to transfer and to advise of the prisoner's formal consent.

Clause 29: Issue of warrant for transfer to Australia

82. This clause provides that the Attorney-General may issue a warrant, in the form prescribed by the regulations, for the transfer of a prisoner from a transfer country to Australia if all the relevant consents have been given in writing.

Clause 30: Warrants for transfer to Australia

83. This clause deals with the content and effect of warrants for transfer to Australia.

84. Subclause (1) provides that a warrant for transfer authorises the transfer of a prisoner from a transfer country to Australia to complete serving his or her sentence in accordance with the terms agreed under the Act.

85. Subclause (2) specifies information that must be set out in the warrant.

86. Subclause (3) addresses the case of a warrant concerning a prisoner other than a prisoner who has been released on parole, and sets down what the warrant should authorise and require. The warrant is to authorise an escort officer (as defined in subclause 4(1)) to collect the named prisoner from a specified place which may be in Australia or the transfer country. The warrant is to then authorise transportation in custody of the prisoner to an appointed person or particular place as appropriate. The warrant is also to require the superintendent of the prison to take the prisoner into custody, or to authorise the detention of the prisoner in a hospital or other place, as the case may be, in accordance with the terms agreed under the Act.

87. Subclause (4) deals with a warrant concerning a prisoner who has been released on parole, and requires the warrant to specify any procedures for transfer that have been agreed with the transfer country and to give any necessary authorisations and directions. As for warrants for transfer from Australia (see paragraph 65), this enables some flexibility in relation to transfers of prisoners on parole, and would enable, for example, transfer of such a prisoner without being in the custody of an escort officer if that was agreed.

88. Subclause (5) provides that the Attorney-General may give any direction or approval that is necessary to ensure the warrant is executed in accordance with its tenor.

Clause 31: Cancellation of warrant

89. Subclause (1) provides that the Attorney-General may cancel a warrant for transfer to Australia at any time before the prisoner it concerns leaves the transfer country.

90. Subclause (2) provides that, without limiting the grounds on which the Attorney-General may cancel a transfer warrant, it must be cancelled if the

Attorney-General, a State or Territory Minister, the prisoner or prisoner's representative or the transfer country withdraws consent to transfer.

Clause 32: Effect of warrant on prisoner's sentence

91. This clause provides that the prisoner to whom the warrant relates is to be released when the prisoner has completed the sentence of imprisonment in accordance with the Act unless any other law authorises the prisoner's detention in respect of an offence other than that on account of which the sentence of imprisonment was imposed.

Part 5 – Transfer to Australia of Tribunal prisoners

92. Part 5 deals with the handling of requests for transfers to Australia of Tribunal prisoners and contains provisions relating to warrants for transfer to Australia of Tribunal prisoners.

Clause 33: Transfer request from a Tribunal

93. This clause provides that the Attorney-General may consent to a request from a Tribunal for the transfer of a Tribunal prisoner to Australia to complete serving his or her sentence on terms agreed under the Act if the Attorney-General is satisfied that the transfer can be made in compliance with clause 11.

Clause 34: Information to accompany request

94. This clause provides that before consenting to a transfer the Attorney-General may request the appropriate Tribunal to provide any relevant information that the Attorney-General considers relevant to giving consent.

Clause 35: Enforcement of Tribunal sentence of imprisonment

95. This clause provides that before consenting to a transfer to Australia of a Tribunal prisoner the Attorney-General must determine, in accordance with Part 6, how the sentence of imprisonment will be enforced in Australia and must advise the Tribunal of this and any other conditions to which consent is subject.

Clause 36: Governmental consent to transfer to Australia

96. This clause deals with governmental consent to transfer to Australia of Tribunal prisoners and provides for mandatory consultations by the Attorney-General with the State or Territory Minister or Ministers concerned. The provision differs from clause 27 (which deals with governmental consent to transfer to Australia of prisoners other than Tribunal prisoners) because it is possible that Tribunal prisoners may be transferred without consent, and therefore there may be no State or Territory in which the Tribunal prisoner wishes to complete serving the sentence. In addition, it is intended that the financial responsibilities will be different. In the case of non-Tribunal prisoners, it is intended that the State or Territory to which the prisoner has community ties will generally pay, whereas the Commonwealth will bear the costs associated with Tribunal prisoners. As a result, there will only be one Minister (plus the

Attorney-General) required to give consent in relation to Tribunal prisoners (the relevant Minister being the Minister of the State or Territory in which the Tribunal prisoner will begin to complete serving the sentence).

97. Subclause (1) requires the Attorney-General to determine the most appropriate State or Territory to which the Tribunal prisoner should be transferred, and to seek the consent of the State or Territory Minister concerned.

98. Subclause (2) requires the Attorney-General to provide the Minister with certain information.

99. Subclause (3) requires the Minister to advise the Attorney-General in writing whether the Minister consents to the transfer on the terms proposed.

100. Subclause (4) provides that if the Minister refuses to consent to the transfer, the Attorney-General may approach the Minister of another State or Territory, and request consent to transfer from that Minister.

101. Subclause (5) requires a State Minister or Territory Minister who consents to the transfer to advise the Attorney-General of where the prisoner will begin to complete serving the sentence, and any recommended terms or conditions if the prisoner has been released on parole, and any other matters the Minister considers relevant to the enforcement of the sentence.

Clause 37: Formal consent to transfer

102. This clause provides that the Attorney-General is to notify the Tribunal when all appropriate Ministerial consents have been given and is to then ask the Tribunal to consent formally to the transfer on the terms proposed by Australia and to advise of the prisoner's formal consent (if the Tribunal has determined that it is appropriate to obtain the prisoner's consent).

Clause 38: Issue of warrant for transfer to Australia

103. This clause provides that the Attorney-General may issue a warrant, in the form prescribed by the regulations, for the transfer of a Tribunal prisoner from a Tribunal country to Australia if all the relevant consents have been given in writing.

Clause 39: Warrants for transfer to Australia

104. This clause deals with the content and effect of warrants for transfer to Australia of Tribunal prisoners.

105. Subclause (1) provides that a warrant for transfer authorises the transfer of a Tribunal prisoner from a Tribunal country to Australia to complete serving his or her sentence of imprisonment imposed by the Tribunal in accordance with the terms agreed under the Act.

106. Subclause (2) specifies information that must be set out in the warrant.

107. Subclause (3) provides that a warrant for a Tribunal prisoner other than a Tribunal prisoner who has been released on parole is to authorise an escort officer (as defined in subclause 4(1)) to collect the named prisoner from a specified place which may be in Australia or the Tribunal country. The warrant is to then authorise transportation in custody of the Tribunal prisoner to an appointed person or particular place as appropriate. The warrant is also to require the superintendent of the prison to take the Tribunal prisoner into custody, or to authorise the detention of the Tribunal prisoner in a hospital or other place, as the case may be, in accordance with the terms agreed under the Act.

108. Subclause (4) provides that if the Tribunal prisoner has been released on parole then the warrant must specify any procedures for transfer that have been agreed with the Tribunal and must give any necessary authorisations and directions. As for warrants for transfer from Australia (see paragraph 65) and warrants for transfer to Australia of prisoners other than Tribunal prisoners (see paragraph 87), this enables some flexibility in relation to transfers of Tribunal prisoners on parole, and would enable, for example, transfer of such a prisoner without being in the custody of an escort officer if that was agreed.

109. Subclause (5) provides that the Attorney-General may give any direction or approval that is necessary to ensure the warrant is executed in accordance with its tenor.

Clause 40: Cancellation of warrant

110. Subclause (1) provides that the Attorney-General may cancel a warrant for transfer to Australia at any time before the Tribunal prisoner it concerns leaves the Tribunal country.

111. Subclause (2) provides that, without limiting the grounds on which the Attorney-General may cancel a transfer warrant, it must be cancelled if any of the relevant consents are withdrawn.

Clause 41: Effect of warrant on Tribunal prisoner's sentence

112. This clause provides that the Tribunal prisoner to whom the warrant relates is to be released when the Tribunal prisoner has completed the sentence of imprisonment in accordance with the Act unless any other law authorises the prisoner's detention in respect of an offence other than that on account of which the sentence of imprisonment was imposed.

Part 6 – Enforcement of sentences

113. Part 6 contains provisions dealing with the enforcement of sentences.

Clause 42: Sentence enforcement in Australia

114. This clause sets out two different methods for enforcement in Australia of a sentence of imprisonment imposed on a prisoner or Tribunal prisoner by a court or tribunal of a transfer country or by a Tribunal. These methods are consistent with those set out in the Council of Europe Convention on the Transfer of Sentenced Persons.

115. The clause provides that the Attorney-General may direct that the sentence of imprisonment be enforced on the transfer of the prisoner to Australia under the Act without any adaptation or with only such adaptation as is considered necessary to ensure consistency with Australian law (the continued enforcement method) or by substituting a different sentence (the converted enforcement method).

116. Although the clause enables two different forms of sentence enforcement, the method actually adopted in particular cases may depend on a particular agreement with another 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.

Clause 43: Duration and nature of enforced sentence

117. This provision specifies limitations on the sentence to be enforced.

118. Subclause (1) provides that the sentence of imprisonment to be enforced under either the continued enforcement method or converted enforcement method must not be harsher than the sentence originally imposed.

119. Without limiting subclause (1), subclause (2) provides further guidance to the meaning of subclause (1).

Clause 44: Directions concerning enforcement of sentence

120. This provision deals with the directions the Attorney-General is able to give in relation to enforcement of sentences.

121. Subclause (1) provides that the Attorney-General may, subject to the limitations set out in clause 43, give directions as to the duration and legal nature of the sentence of imprisonment as it is to be enforced under the Act.

122. Without limiting subclause (1), subclause (2) provides that such directions may relate to entitlement as to release on parole and, if the prisoner or Tribunal prisoner is mentally impaired, any review of his or her mental condition or treatment .

123. Subclause (3) provides that the Attorney-General may inform himself or herself of any matters that may be relevant to exercising a discretion under this clause and specifies certain matters in particular that the Attorney-General may take into account.

Clause 45: Appeal and review of sentences of imprisonment imposed by transfer country or Tribunal and sentence enforcement decisions of Attorney-General

124. Subclause (1) provides that no appeal or review is possible in Australia of the sentence of imprisonment imposed in the transfer country or by the Tribunal.

125. Subclause (2) provides that there is no appeal against a decision of the Attorney-General relating to the enforcement in Australia of a sentence of imprisonment imposed in the transfer country or by the Tribunal.

Clause 46: Prisoner transferred to Australia taken to be federal prisoner

126. This clause deems a sentence to be enforced in Australia under the Act to be a federal sentence of imprisonment, and a prisoner or Tribunal prisoner serving a sentence in Australia under the Act to be a federal prisoner who is to be treated accordingly. The clause spells out a series of circumstances in which the prisoner or Tribunal prisoner will be treated, or will gain an entitlement, as if he or she were a federal prisoner including in relation to detention of prisoners, hospitalisation, parole, removal of prisoners, participation in prison programs and remission.

127. Subclause (7) provides that nothing in the clause prevents the transfer country or Tribunal as appropriate from pardoning or granting amnesty to, or quashing or otherwise nullifying the conviction of, a prisoner following transfer to Australia, or from commuting the sentence.

128. Subclause (8) makes it clear that incoming prisoners are to be treated as federal prisoners for administrative reasons only, and that that arrangement is not intended to affect the agreed financial obligations as between the Commonwealth and the States

and Territories. The subclause specifies that the Commonwealth is under no financial responsibility for transfers pursuant to Part 4 of the Act unless the prisoners have community ties with certain specified Territories.

Clause 47: Prisoner transferred from Australia taken to be prisoner of transfer country

129. In order to avoid a person serving a sentence for the same conduct more than once, this clause provides that, where a prisoner is transferred from Australia, the sentence of imprisonment imposed by the Australian court ceases to have effect in Australia, and the sentence of imprisonment is to be taken to be a sentence imposed by a court or tribunal of the transfer country and enforced accordingly, except as provided in clause 48.

Clause 48: Pardon, amnesty or commutation of sentences of imprisonment – prisoners transferred from Australia

130. Subclause (1) provides that, where a prisoner is serving a sentence in a transfer country following transfer from Australia, the prisoner's conviction may be quashed or otherwise nullified and the prisoner may still be pardoned or granted amnesty or commutation of sentence as if he or she were still in Australia.

131. Subclause (2) provides that in such cases the Attorney-General is to notify the transfer country immediately of the decision and that the sentence should no longer be enforced.

Clause 49: Pardon, amnesty or commutation of sentences of imprisonment – prisoners transferred to Australia

132. Subclause (1) provides that, where a transferred prisoner is serving a sentence in Australia, the prisoner may be pardoned or granted amnesty or commutation of sentence as if the sentence had been imposed for an offence against Australian law.

133. Subclause (2) provides that, where a prisoner is pardoned or granted amnesty or commutation of sentence (either under Australian law or under the law of the transfer country) or a prisoner's conviction is quashed or otherwise nullified under the law of the transfer country, then the Attorney-General must direct that the person be released.

134. Subclause (3) provides a scheme similar to that in subclause (2) in relation to Tribunal prisoners.

Part 7 – Miscellaneous

135. Part 7 contains a range of miscellaneous provisions.

Clause 50: Arrangements with States and Territories

136. The clause provides that the Governor-General may make appropriate arrangements with the Governor of a State, the Chief Minister of the ACT or the Administrator of a Territory with respect to the administration of the Act, including arrangements relating to the exercise by officials of functions under the Act. The arrangements may be varied or terminated at any time and must be published in the *Gazette*.

Clause 51: Recovery of costs and expenses of transfer

137. Subclause (1) provides that the terms agreed under this Act for transfer of a prisoner or Tribunal prisoner may, if the Attorney-General considers it appropriate, include terms relating to cost recovery.

138. Subclause (2) provides that, if any costs or expenses in respect of money recovered in accordance with such terms were incurred by a State or Territory, then the State or Territory concerned is to be reimbursed.

Clause 52: Prisoner and prisoner's representative to be kept informed

139. This clause provides that the Attorney-General is to arrange for any prisoner or prisoner's representative who makes a request for transfer under this Act to be kept informed as to progress of the request.

Clause 53: Delegation

140. This clause provides for a power of delegation.

Clause 54: Notification of countries as transfer countries

141. This clause provides that the Attorney-General is keep the State and Territory Ministers informed whenever a country is declared to be a transfer country and they in turn are to use their best endeavours to notify any prisoner who may be eligible for transfer.

Clause 55: Transit of prisoners

142. This clause provides for a regime in relation to the transfer of prisoners, from a transfer country or Tribunal country to another transfer country or Tribunal country, in custody while they are in Australian territory and provides a legal basis for keeping them in custody.

Clause 56: Arrest of persons escaping from custody

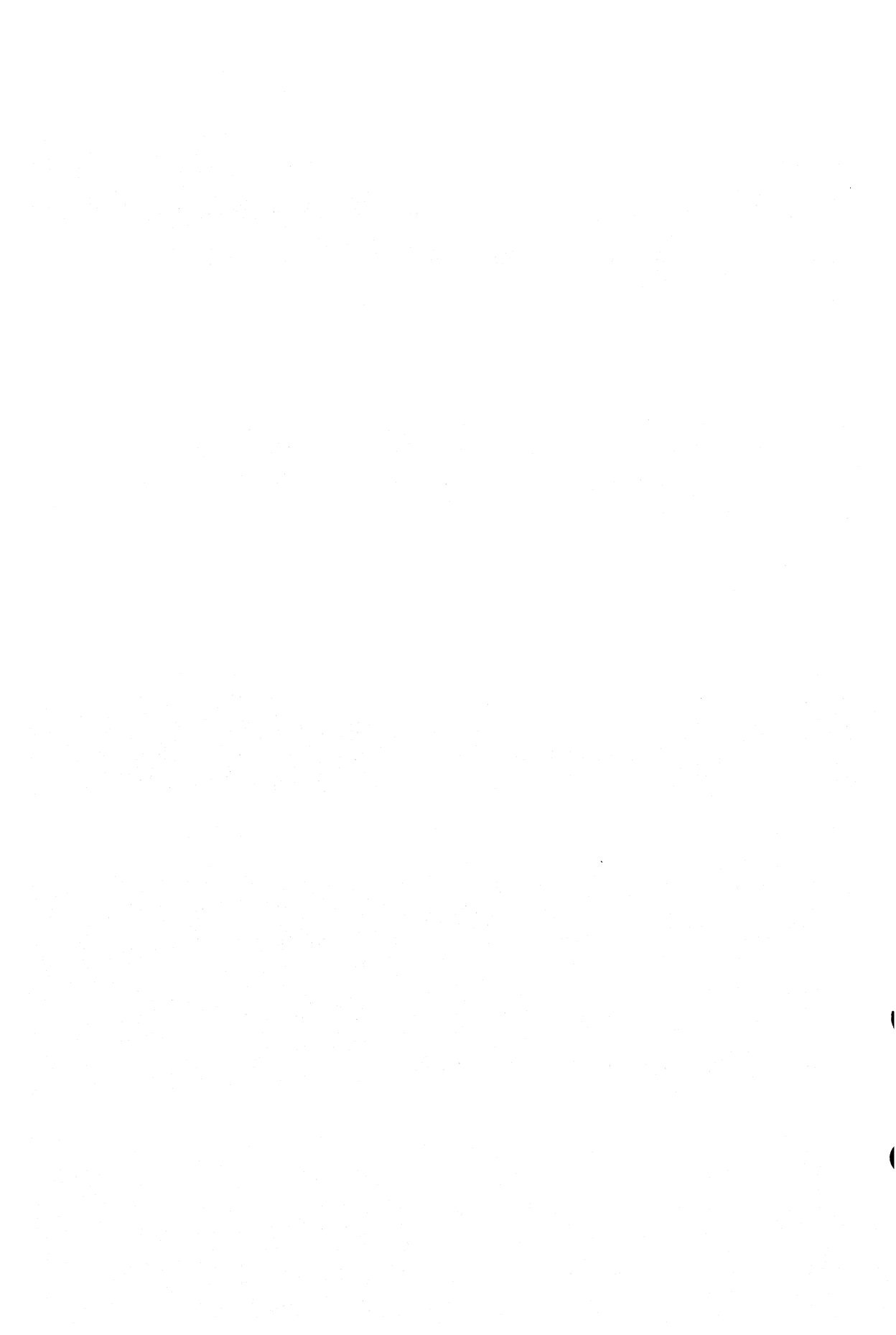
143. This clause provides a basis for arresting a person who has escaped from custody authorised by the Act.

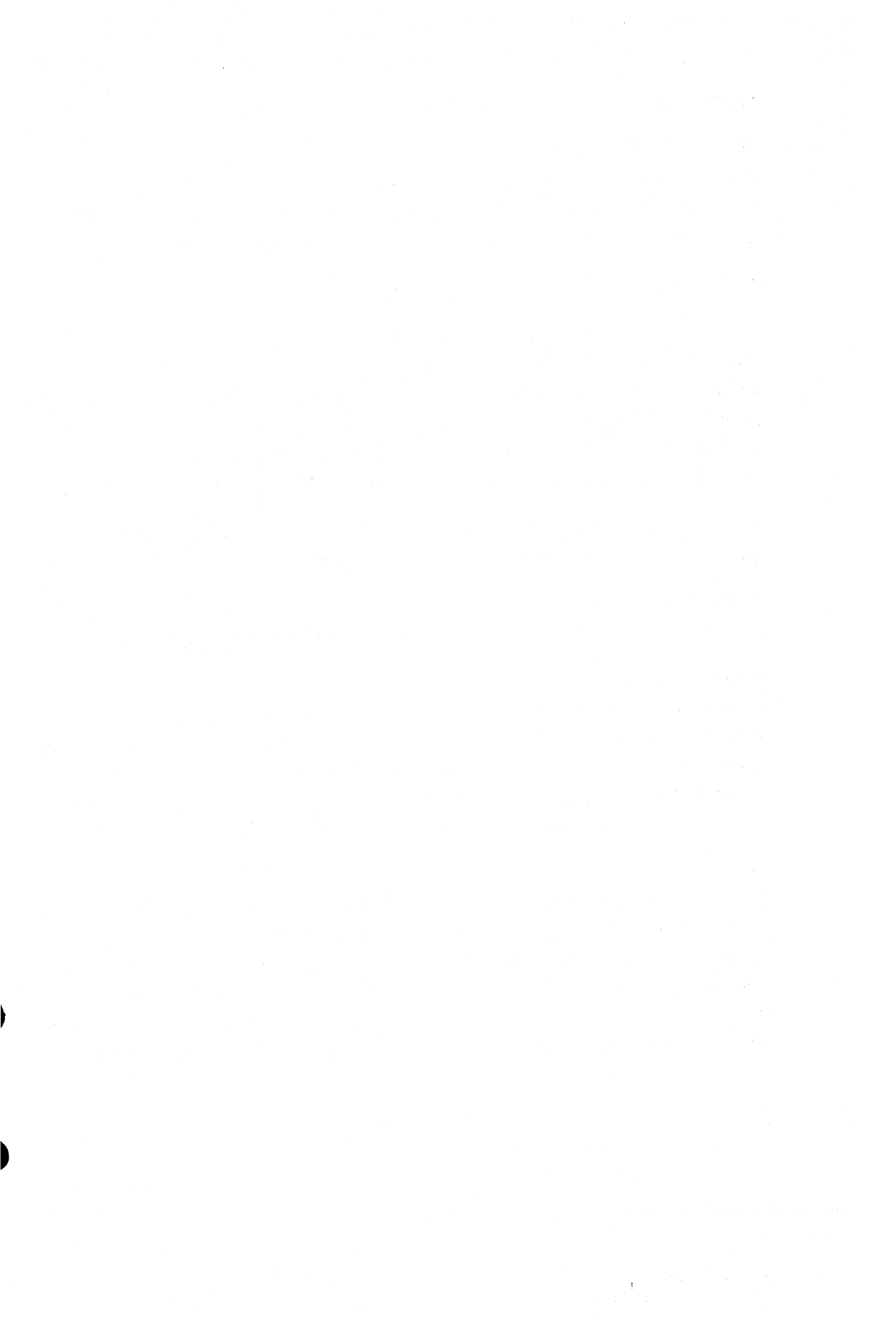
**Clause 57: Consultation with Minister for Immigration and
Multicultural Affairs**

144. This clause provides that the Attorney-General must not make any decision under the Act affecting a prisoner who is not an Australian citizen without the consent of the Minister for Immigration and Multicultural Affairs.

Clause 58: Regulations

145. The clause provides that the Governor-General may make regulations under the Act, including regulations dealing with the provision of information relating to the international transfer of prisoners.







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