INTERNATIONAL WAR CRIMES TRIBUNAL BILL 1994

GOVERNMENT RESPONSE

TO
THE ADVISORY REPORT ON THE BILL BY

THE HOUSE OF REPRESENTATIVES
STANDING COMMITTEE
ON LEGAL AND CONSTITUTIONAL AFFAIRS

Report tabled: 30 June 1994

Government Response tabled: 21 September 1994

GOVERNMENT RESPONSE TO THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS ADVISORY REPORT ON THE *INTERNATIONAL WAR CRIMES TRIBUNAL BILL 1994* AND THE *INTERNATIONAL WAR CRIMES TRIBUNAL (CONSEQUENTIAL AMENDMENTS) BILL 1994*

The Government welcomes the Committee's Report. It contains a number of constructive suggestions and recommends several amendments which will improve the proposed legislation in certain respects.

The Government notes that the Committee welcomed and supported the thrust of the proposed legislation and generally believed that it was well drafted. The Committee indicated that, in its opinion, the legislation had largely succeeded, but that there were some issues requiring further consideration.

It is clearly useful to have a body, such as the Committee, examine proposed legislation from a fresh perspective. The Government accepts most, but not all, of the Committee's suggestions. Each specific recommendation is examined below.

Recommendation 1

> *The Committee recommends that the Bills be passed by the House after the incorporation of the amendments suggested in this advisory report.*

Response

The Government urges the House to pass the Bills, amended as outlined below, as soon as possible.

Recommendation 2

> *The Committee recommends that the definitions of 'federal prisoner' and 'State prisoner' be amended, or separate definitions be inserted for 'pending trial' and 'sentence of imprisonment', to ensure that the intended purpose is achieved. (This also applies to clauses 19, 24 and 25 which refer to 'sentence of imprisonment').*

Response

The Government accepts this recommendation and will make appropriate amendments.

Recommendation 3

The Committee recommends that staff member be deleted from the definition of 'police officer'.

Response

The Government accepts this recommendation.

Recommendation 4

The Committee recommends that clause 8 be redrafted to indicate that requests from the Tribunal must be in writing, and be sufficient to identify for the accused and the Australian courts the person or persons to be charged, the nature of the charge and the intended time and place of the hearing.

Response

The Government accepts this recommendation.

As surmised by the Committee, it was intended that all requests would be in writing, and that the failure to provide one of the specific listed pieces of information would not invalidate a request. The Government agrees that all requests should be in writing, and will amend the provision to clarify this intention.

Apart from the requirement for requests to be in writing, the Committee recommended that certain matters should always be required to be indicated by a request, namely the person or persons to be charged, the nature of the charge and the intended time and place of the hearing. It was thought that these matters would be included in requests as a matter of course. They will now be made specific requirements in the legislation.

Recommendation 5

The Committee recommends that clause 9 be redrafted to clarify that the Attorney-General is obliged to issue a notice stating that a request has been received from the Tribunal only if the request complies with the requirements in proposed amended clause 8.

Response

The Government accepts this recommendation and notes that the intention was that the Attorney-General would not have issued a notice unless a valid request (pursuant to clause 8) had been received.

Recommendation 6

The Committee recommends that 'exceptional' be replaced by 'special' in subclause 12(3).

Response

The Government accepts this recommendation.

The Government considers that, in light of the objectives of the Bill, the seriousness of the alleged crimes and the mandatory nature of Australia's international obligations, the circumstances *should* be exceptional for bail to be granted to a person arrested pursuant to the Bill.

The Committee appears to have accepted this concept. The Committee recognised that there is a strong presumption from the Tribunal's Statute, Rules and public statements that persons arrested would be held in custody (paragraphs 3.12.4, 3.12.5, 3.12.14). Furthermore, the Committee indicated that the nature of the crimes involved and the particular circumstances of the legislation would mean that, in practice, it should be a very rare occasion for bail to be actually granted.

The Government agrees that bail should be granted only on very rare occasions, and considers that the circumstances would need to be exceptional.

As already noted, it seems that the Committee does not have any problems with the concept of granting bail only in exceptional circumstances. The Committee's prime concern was instead based on the apparent inconsistency between this provision and the equivalent provision in the *Extradition Act 1988* (subsection 15(6)), which uses the term 'special circumstances'.

The Committee considered that the advantage of using the word 'special' instead of 'exceptional' would be that 'special circumstances' is a recognised term in the extradition field, and there is a body of case-law on its meaning.

However, as the Committee noted (paragraph 3.12.18), the extradition case-law shows that there has been a tendency to interpret 'special' to mean 'exceptional'. The courts have construed 'special circumstances' very narrowly, and said that the circumstances really need to be exceptional before bail will be granted (eg Forrest v Kelly & AG, No. SG99 of 1991, 20 December 1991). As a result, the use of 'special circumstances' or 'exceptional circumstances' will probably have the same practical effect (as courts have tended to interpret special to mean exceptional).

The Government is therefore prepared to amend subclause 12(3) so that the terminology is consistent with that used in the *Extradition Act 1988*.

Recommendation 7

The Committee recommends that subclause 12(2) be amended to require a magistrate to be satisfied that the person before him or her is the person named in the arrest warrant (issued pursuant to clause 10) prior to remanding that person.

Response

The Government accepts this recommendation.

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. Although it is not strictly necessary to specify this requirement in the Bill, there is no harm in doing so, and the Government will amend the provision as recommended by the Committee.

Recommendation 8

> *The Committee recommends that subclause 12(4) be amended to specifically provide that further bail applications may be made where there is evidence of a material change in circumstances such as might warrant the grant of bail.*

Response

The Government accepts this recommendation.

As noted by the Committee, the Attorney-General's Department agreed in a supplementary submission that the provision should be redrafted in a manner that will achieve its intention (to prevent "bail-shopping") but not prevent a person applying again at all if the particular magistrate dies or retires, etc, or if the applicant experiences a substantial change in relevant circumstances.

The provision will therefore be amended to make it clear that if a person makes an application for bail and fails on the merits, a further application cannot be made unless there is a change in circumstances such as might warrant the grant of bail.

The Government notes the Committee's observation that the provision in the *Extradition Act 1988* on which this subclause is based should also be considered for amendment.

Recommendation 9

> *The Committee recommends that clause 14 be amended, such that '45 days' in paragraph (1)(b) be replaced with '14 days'.*

Response

The Government accepts this recommendation.

There was significant criticism of the 45 day time period in clause 14. As the Attorney-General's Department explained to the Committee, the clause is based on a

provision in the *Extradition Act 1988*, and its purpose is to allow a time period for receipt of the Tribunal's formal request after a person has been provisionally arrested pursuant to the Tribunal warrant, but prior to receipt of the Tribunal's formal request.

As noted by the Committee, the Department did concede that the 45 day period may not be appropriate, and that normal extradition cases required much more documentary material and therefore the situations were not directly analogous.

After the issue was raised by the Committee, the Department consulted with the Acting Deputy Prosecutor of the Tribunal who advised that the Tribunal would not need a period of 45 days, and that the Tribunal could have its formal request to the Attorney-General within a substantially shorter period - he suggested that a period of 30 days would be adequate. In a supplementary submission, the Department advised that it was prepared to adopt a 21 day period.

Upon reconsidering this matter, the Government agrees that 14 days would be an appropriate time period. In reaching this conclusion, the Government notes that persons will generally be remanded in custody and 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.

Recommendation 10

> *The Committee recommends that a provision be inserted into the Bill requiring an additional step between the initial remanding of a person and the Attorney-General's surrender decision. It should require a person to be brought before a magistrate who must determine whether a person is 'eligible for surrender'. The criteria should be that the magistrate is satisfied that the person is the person named in the Tribunal warrant, and that the alleged offence for which surrender is sought falls within the jurisdiction of the Tribunal.*

Response

The Government accepts the thrust of part of this recommendation.

The Government is prepared to accept the part of the recommendation requiring a magistrate to be satisfied that the person before him or her is the person named in the Tribunal warrant. However, the Government does not consider that an additional step is necessary. The Government proposes to implement that part of the recommendation by including the additional requirement in clause 12 (the present provision dealing with the initial remanding of persons in custody).

It is proposed to amend clause 12 to make it clear that a magistrate can only remand a person to await a surrender decision by the Attorney-General if satisfied that:

- the person is the person named in the Australian arrest warrant (issued under clause 10) [see response to Recommendation 7]; and

- the person is the person named in the Tribunal warrant.

The Government considers that such an amendment will take account of the Committee's concerns about identity without the need for an additional step between the initial remanding of a person and the Attorney-General's surrender decision. The amendments will bring Australia's proposed legislation more into line with that in other countries on this issue.

The Government has thoroughly examined the possibility of also requiring the magistrate to be satisfied that the alleged offence for which surrender is sought falls within the jurisdiction of the Tribunal. After much consideration, the Government has decided not to accept this part of the recommendation. This is based on the view that Australia should be careful not to trespass on the Tribunal's jurisdiction. The Tribunal is an international body which has been established with a limited mandate, and the Government considers that no questions going to the Tribunal's jurisdiction should be considered in Australia.

The Government notes that Senator Spindler agreed with this approach (see Transcript pages 9 - 10). He said that "the jurisdictional matter should be argued before the tribunal that claims jurisdiction." The Government agrees with Senator Spindler that if a decision has been made to surrender a person to the Tribunal pursuant to the proposed Act, then the person should be surrendered and any questions of jurisdiction could be determined before the Tribunal. Indeed, Rule 73 of the Tribunal's Rules of Procedure and Evidence provides for 'preliminary motions by accused'. The Rule specifies that such preliminary motions shall include objections based on lack of jurisdiction.

The Rules of the Tribunal clearly contemplate that questions of jurisdiction should be dealt with by the Tribunal. If they were also able to be dealt with in Australia, there would be the possibility of duplicate proceedings (one before the Australian courts and one before the Tribunal) on the same issue. The Government considers this to be inappropriate.

It is important to note that the legislation on which the Committee relied in making this recommendation (the Italian and Netherlands legislation) was enacted *before* the Tribunal established its Rules of Procedure and Evidence.

Given that those Rules explicitly state that jurisdictional matters can be tested before the Tribunal, the Government considers that it would be clearly inappropriate to enable them to also be tested in Australia. The Government has therefore concluded that the question of whether the alleged offence for which surrender is sought falls within the jurisdiction of the Tribunal is not a question which should be considered by a magistrate in Australia.

Recommendation 11

> *The Committee recommends that 'exceptional' be replaced by 'special' in subclause 16(2).*

Response

The Government accepts this recommendation.

The term 'exceptional circumstances' was used because it was thought to be justified in the context of this legislation. Australia has strict international obligations and it can be argued (as did at least one witness appearing before the Committee - see paragraph 3.18.2) that the very existence of such a provision could be seen as flouting Australia's strict international obligations. It is therefore the intention that the Attorney-General's discretion to refuse surrender should only be exercised if there are *exceptional* circumstances warranting such refusal.

The Committee recommended that the term 'special circumstances' should be used for purposes of consistency, and referred to Recommendation 6 which recommended that the term 'special circumstances' be used instead of 'exceptional circumstances' in the context of the magistrate's decision to grant bail.

Given that the Government accepts Recommendation 6, consistency purposes identified by the Committee would mean that Recommendation 11 should also be accepted. As noted above, there has been a tendency to interpret 'special' to mean 'exceptional' in the context of the magistrate's bail decision. The Government envisages that the same interpretation would apply in the context of subclause 16(2).

Recommendation 12

> *The Committee recommends that consideration be given to the insertion of provisions enabling the subsequent return to Australia of persons who have been required to leave Australia for Tribunal purposes, and that any necessary consequential amendments be made to the Migration Act 1958.*

Response

The Government has considered this issue, but has decided not to accept this recommendation.

In its supplementary submission, the Attorney-General's Department agreed that it is desirable that a person who, immediately before arrest pursuant to the Tribunal request, was *otherwise entitled to remain* in Australia should be entitled to return if acquitted by the Tribunal.

However, the Government does not believe that the insertion of specific provisions and amendments to the *Migration Act 1958* are necessary. An Australian citizen or permanent resident would be entitled to return to Australia, and persons who had been in Australia temporarily would have his or her right of entry considered on its merits. Some discretion would obviously be required as the circumstances of different individuals will vary (eg prohibited immigrants, short-term (special purpose) entrants, etc). The Government considers that this situation is appropriate, and no amendments are warranted.

The Government also notes that the provisions recommended by the Committee (to enable the subsequent return to Australia of persons who have been required to leave for Tribunal purposes) do not currently exist for extradition purposes. The Government considers that there is no reason why the war crimes legislation should be any different in this respect.

The Committee referred to the fact that the Attorney-General may require undertakings from the Tribunal as to the return of prisoners (clause 19), and implied that undertakings concerning return should also apply to persons surrendered from Australia who were not prisoners at the time of surrender.

The Government does not accept this argument as clause 19 is designed to cover a specific situation, that of surrender of a *person who is serving a sentence of imprisonment (however defined) in Australia.* The undertakings relate to return for the purpose of completing the sentence and custody while travelling. The Government is concerned about such persons not simply because they are Australian residents, citizens, etc, but because they are wanted to complete the serving of a sentence of imprisonment which raises custody concerns. As noted above, the Government considers that persons not serving a sentence of imprisonment at the time of surrender will be appropriately covered by existing arrangements.

Recommendation 13

> *The Committee recommends that clause 22 be redrafted to clarify that surrender warrants do not always have to be executed according to their tenor.*

Response

The Government accepts this recommendation. There may be circumstances (as envisaged in clause 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).

Recommendation 14

> *The Committee recommends that '2 months' in clause 23 be replaced with '21 days'.*

Response

The Government accepts this recommendation. After consulting with the Acting Deputy Prosecutor of the Tribunal, a period of 21 days appears to be acceptable.

Recommendation 15

> *The Committee recommends that clause 23 be redrafted in a clearer fashion.*

Response

The Government accepts this recommendation in light of the misunderstandings which appear to have arisen about its effect.

The intention of the clause is to permit the release of a person who has been in custody in Australia 2 months (will be amended to 21 days in accordance with Recommendation 14) 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.

Despite the fact that this intention is explained in the Explanatory Memorandum, there have clearly been some misunderstandings about the effect of the provision. The Government will therefore consult with the drafter with a view to clarifying the provision.

Recommendation 16

> *The Committee recommends that clause 24 be redrafted to clarify that time served pursuant to a Tribunal conviction is not time served under the sentence originally imposed in Australia.*

Response

The Government accepts this recommendation.

The Government agrees that the provision as drafted could be read as providing that all sentences (Australian and Tribunal) are to be concurrent, regardless of whether they were in relation to totally different crimes. The clause was inserted as a result of a Democrat amendment in the Senate, and it is not clear as to whether this result was the real intention of the Democrat amendment.

The Government agrees with the Committee that Tribunal sentences should not be able to be served concurrently with Australian sentences relating to totally different offences. The offences are likely to be of quite different character and severity (given the jurisdiction of the Tribunal) and accordingly it is not appropriate that a person should gain the benefit of having a domestic sentence reduced just because he or she has also been convicted of a much more serious unrelated offence which may be altogether of quite a different character.

However, the Government agrees that if the person is acquitted by the Tribunal then the time spent in custody in connection with the alleged Tribunal offence should count towards service of the term of the Australian imprisonment.

The provision will therefore be redrafted so that this intention is clear. The intended result is 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.

Recommendation 17

The Committee recommends that consideration be given to whether any amendments are necessary to clarify that the mode in clause 27 is not the only method by which evidence could be taken for Tribunal purposes.

Response

The Government accepts this recommendation.

Clause 27 enables a magistrate to take evidence on oath from witnesses appearing before the magistrate. The Committee indicated that it should be made very clear that the modes of taking evidence should not be restricted to the method referred to in that clause.

As the Attorney-General's Department stated to the Committee, clause 83 (which provides that provision of assistance to the Tribunal otherwise than under the Bill is not prevented) was intended to make it clear that other forms of assistance would still be available. The Government will consult with the drafter with a view to making the existence and effect of this provision clearer.

Recommendation 18

The Committee recommends that a specific statutory scheme for legal aid be included in the Bill.

Response

The Government accepts this recommendation on the basis that what is proposed is a provision along the lines of section 69 of the *Administrative Appeals Tribunal Act 1975*. That section provides for an application for assistance to the Attorney-General who may determine whether legal aid is to be granted.

It was intended that a non-statutory financial assistance scheme would be available for purposes under the proposed Act. If a provision similar to the above section is included in the Bill itself, it would have the same effect, and therefore the Government is prepared to amend the Bill accordingly.

Recommendation 19

The Committee recommends that clause 78 be amended to require that a person arrested under it be brought before a magistrate, who must be satisfied that the person has escaped from lawful custody under the Act.

Response

The Government accepts this recommendation.

The Government agrees that where a person is arrested because a police officer considers that the person has escaped from custody under the Act, then that person should be brought before a magistrate for the police officer's belief to be tested, rather than simply being returned to custody.

The Government will also consider redrafting section 49 of the *Extradition Act* in due course, as clause 78 is based on that provision.

Recommendation 20

The Committee recommends that further consideration be given to developing an appropriate sunset clause.

Response

The Government understands that the purpose of this recommendation is in fact to provide an opportunity for review of the legislation (see comments by The Hon Mr Sinclair MP, Transcript, page 34). The Government accepts the need for review but does not believe that inserting a sunset clause is the best way to achieve that result.

There are difficulties in developing an appropriate sunset clause. The Committee appeared to accept the comments by the Attorney-General's Department about those difficulties (paragraph 3.35.2). The primary concern is the uncertainty about the time period for which the Tribunal will be operating. It is presently in the initial stages of commencing operations and it is envisaged that there will be enormous difficulties in collecting evidence and bringing matters to prosecution.

If Australia subsequently agrees to house Tribunal prisoners in Australia then the legislation would need to be in force for at least the life of any such sentences (and it is anticipated that the prison sentences handed down by the Tribunal will be for very substantial periods). The Committee recognised that if the Bill is amended to include provisions for the imprisonment in Australia of persons convicted by the Tribunal, those provisions would have to be excluded from any sunset clause.

It is clear that any sunset period would need to be very long (say 20 years) if it were not to cause the Act to lapse while it was still needed.

Instead of including a sunset clause, the Government will undertake to co-operate with Parliament in conducting a review of the legislation (including the continued need for it) five years after commencement. The Government considers that this will take account of the Committee's concerns and avoid the difficulties in developing an appropriate sunset clause.

Recommendation 21

The Committee recommends that the Consequential Amendments Bill be amended to allow for review under the Administrative Decisions (Judicial Review) Act 1977.

Response

After careful consideration, the Government has decided to accept this recommendation.

The Committee regarded the lack of review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR review) as inappropriately giving greater weight to the issue of compliance with international obligations rather than matters of procedural fairness and individual rights. The Committee recognised the difficulties in reaching an appropriate balance between these matters.

Considerable thought was given to the ADJR issue when the Bills were drafted. After reconsidering the issue, the Government agrees with the Committee that while ADJR review could add some delay to the processes under the proposed Act, any such delay would be minimal and would not in any event be regarded as 'undue delay' within the meaning of the Statute of the Tribunal. On this basis, Australia would be in a position both to provide ample protection to persons within Australia, and to comply with international obligations in a timely way.

The Government is therefore prepared to amend the legislation so that, in addition to the existing safeguards of the Constitution and the *Judiciary Act*, decisions under the proposed International War Crimes Tribunal Act will be subject to review under the ADJR Act.

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