THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

ADVISORY REPORT
ON

INTERNATIONAL WAR CRIMES TRIBUNAL BILL 1994
and
INTERNATIONAL WAR CRIMES TRIBUNAL (CONSEQUENTIAL AMENDMENTS) BILL 1994

House of Representatives Standing Committee on
Legal and Constitutional Affairs

JUNE 1994

ISBN 0 642 20374 1

This document was produced from camera-ready copy prepared by the House of Representatives Standing Committee on Legal and Constitutional Affairs Secretariat, and printed by the House of Representatives Printing Unit, Parliament House, Canberra.

FOREWORD

The Committee is pleased to present this advisory report on the International War Crimes Tribunal Bill 1994 and the International War Crimes Tribunal (Consequential Amendments) Bill 1994.

The purpose of the Bills is to allow Australia to fulfil its obligations to the United Nations, to support the Tribunal now being established in The Hague. The Tribunal will try war crimes committed in the former Yugoslavia since 1991.

The Tribunal was established by Resolution 827 of 25 May 1993 of the Security Council. This resolution expressed

> ... grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organised and systematic detention and rape of women, and the continuance of the practice of "ethnic Cleansing", including for the acquisition and the holding of territory.

As a member of the United Nations, Australia is bound to give effect to Resolution 827 and to its annexure, the Statute of the International Tribunal. The Resolution urges all States to "take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute."

The Resolution, the Statute of the International Tribunal, and comments by the President of the Tribunal (Mr Antonio Cassese) combine to urge Member States to surrender persons who are named in warrants issued by the Tribunal without "undue delay" and to adopt a strict interpretation of this requirement. The Tribunal has been established as the court with the responsibility to ensure internationally acceptable standards of justice are upheld.

The Bills before the Committee do not call for the automatic surrender of accused persons to the Tribunal. They provide for a discretion (albeit a very narrow discretion) to be exercised by the Attorney-General, who must surrender the person named in the Tribunal's warrant unless there are "exceptional circumstances." This determination is subject to judicial review only by virtue of section 75(v) of the Constitution and section 39B of the *Judiciary Act*. A court hearing an appeal would be restricted to the same narrow discretion exercised by the Attorney-General in the original decision.

The Committee has studied the comparable legislation of other countries and finds that in most cases, wider safeguards than those encompassed by the Australian legislation are available before citizens are surrendered to the Tribunal. Recognising the binding obligation to support the Tribunal, need not be interpreted as agreeing to the automatic surrender of accused persons to an international tribunal. It appears not to have been so interpreted by Sweden, Italy, the Netherlands, Canada

or the UK. The upholding of legal rights should not be construed as "undue delay" in complying with Resolution 827.

Matters substantive to the charges laid against an accused person are the proper subject of trial before a Trial Chamber of the Tribunal and should not be addressed before surrender. However, before surrendering an accused person the Australian legal system should ensure that surrender does not result in injustice, either in the manner in which the person is treated before surrender or in the fact of surrender.

The Committee urges the Parliament to pass both Bills as soon as possible having allowed sufficient time to consider the amendments contained in this advisory report. Bringing war criminals to account, albeit in only one theatre of war, will act as a deterrent to the commission of further outrages, which is one of the main objectives of the Tribunal. Enacting the legislation as soon as possible will allow Australia to comply with requests for assistance from the Tribunal as soon as they are received.

Daryl Melham MP
Chair

30 June 1994

Membership of the Committee

Mr Daryl Melham MP, Chair
Mr Alan Cadman MP, Deputy Chairman
Hon Michael Duffy MP
Hon Wendy Fatin MP
Hon Clyde Holding MP
Mr Mark Latham MP
Mr Christopher Pyne MP
Rt Hon Ian Sinclair MP
Mr Peter Slipper MP
Hon Peter Staples MP
Mr Lindsay Tanner MP
Mr Daryl Williams AM QC MP

Committee Secretariat

Committee Secretary:	Ms Judy Middlebrook
Research Officers:	Ms Claressa Surtees
	Ms Annette Willing
Executive Assistant:	Ms Gemma Searle

House of Representatives
Parliament House
CANBERRA ACT 2600
Telephone: (06) 277 2358

Contents

Acronyms and abbreviations

ADJR	Administrative Decisions Judicial Review (Act)
AFP	Australian Federal Police
AFPA	Australian Federal Police Association
AG	Attorney-General
DFAT	Department of Foreign Affairs and Trade
DPP	Director of Public Prosecutions
MA	Mutual Assistance (Act)
Tribunal	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.
UN	United Nations

International War Crimes Tribunal Bills 1994

1 Background

1.1 Introduction

1.1.1 The International War Crimes Tribunal Bill 1994 (the main Bill) and the International War Crimes Tribunal (Consequential Amendments) Bill 1994 were introduced to the House of Representatives and read a first time, in May 1994[1]. On 7 June 1994 the Leader of the House, on behalf of the Attorney-General, moved that the Bills, be referred to the Committee for consideration and an advisory report[2]. The Committee was required to report by 28 June 1994, which was extended to 30 June 1994.

1.1.2 The Bills were introduced in the Senate on 10 February 1994 and were passed, with amendments, on 4 May 1994. The second reading debate in the Senate proceeded on the understanding that the Bills would be referred to the Committee[3].

1.1.3 The main Bill provides for Australian assistance for the International Criminal Tribunal for the Former Yugoslavia, established by the United Nations in The Hague, Netherlands. The Consequential Amendments Bill addresses amendments to existing legislation which will be necessary upon passage of the main Bill. The Bills enable Australia to comply with binding international obligations which arose on 25 May 1993 when the United Nations Security Council adopted Resolution 827.

1.2 Resolution 827 and the Statute of the International Tribunal

1.2.1 The text of Resolution 827 of the Security Council is set out in Schedule 1 of the main Bill. The Resolution was a response to violations of international humanitarian law occurring within the territory of the former Yugoslavia. It established the 'International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991', known as the 'International Criminal Tribunal for the Former Yugoslavia'.

1.2.2 Resolution 827 adopted the Statute of the International Tribunal, the text of which is set out in Schedule 2 of the main Bill. The Resolution created an immediately binding obligation on United Nations Member States, including

---

1 The Consequential Amendments Bill was received on 9 May, and the main Bill was received on 30 May.

2 *House of Representatives Daily Hansard 7 June 1994*, p. 1541.

3 For example, *House of Representatives Daily Hansard*, 2 March 1994, p. 1312.

Australia, to take whatever action necessary to implement the Security Council's decision, and to meet the obligations imposed under the Statute of the International Tribunal.

1.3 The Tribunal

1.3.1 The Tribunal's headquarters are in The Hague, but it may sit elsewhere when it considers it necessary for the efficient exercise of its functions.[4] Its sole purpose is to prosecute persons responsible for violations of international humanitarian law occurring within the territory of the former Yugoslavia. The Tribunal is the first international body to try war criminals since the Nuremberg and Tokyo trials of World War Two.

1.3.2 Officials have been arriving in The Hague since early 1994 and the budget for the calendar year was approved by the UN in April. It is claimed that progress has been slow but it is expected that the first trials will be held before the end of the year.[5] An Australian, Mr Graham Blewitt, is the acting Deputy Prosecutor of the Tribunal. The Prosecutor's office has sixty-seven staff and a request has been made to governments to second a further forty to fifty people to assist with the workload. The Tribunal will have its own investigators who will be senior police officers with long track records of complex investigations.[6]

1.3.3 The Tribunal is to have dedicated detention facilities which are currently being built in The Hague under the powers conferred on the Tribunal. The "detention facilities" will house persons on remand awaiting trial or appeal. Rules governing detention in the facilities are attached to submission 7.[7]

1.3.4 As to imprisonment after a Tribunal conviction, the proposed legislation does not provide for the imprisonment within Australia of persons convicted by the Tribunal, although this was originally intended.[8] This was left out because consultations with the States and Territories are continuing on this issue. An amendment is intended when those consultations are concluded.

---

4 Second Reading Speech, *Senate Hansard*, 2 March 1994.

5 James O. Jackson, in a cover article for *Time*, June 20 1994, states that the world community is moving all too slowly to prosecute the war crimes:
"So far, the U.N. and other international organisations have been deliberately dilatory in tackling them. Although a U.N. war-crimes tribunal has been appointed, it lacks the political support and the funding to begin its work". *ibid.* p. 18.

6 Information in this paragraph is based on an interview with Mr Blewitt reported by Reuters, written by Andrew Kelly, dated 13 June 1994.

7 Mr G Blewitt, *Submissions*, p. S62.

8 See Attorney-General's Department, *Submissions*, p. S27.

1.3.5 On 17 September 1993 the U.N. General Assembly elected Sir Ninian Stephen to be one of the eleven members of the war crimes Tribunal for the former Yugoslavia. Other members of the Tribunal were elected from the United States, China, Malaysia, Canada, France, Italy, Costa Rica, Pakistan, Nigeria and Egypt. The members were elected for a term of four years.

1.4 Conflict in the former Yugoslavia

1.4.1 It is impossible to provide a satisfactory (or accurate) summary of the conflict in the former Yugoslavia because of the complexity of the struggles. What follows is provided in order that those considering the war crimes legislation can have some concept of the intransigent and special nature of the conflict.

1.4.2 The Balkans area of central Europe has been in a state of flux, often violent flux, for much of the modern era. It is eighty years (28 June 1914) since the First World War was precipitated by the assassination by a Bosnian Serb nationalist in Sarajevo, of Archduke Franz Ferdinand, heir to the Habsburg throne.

1.4.3 The former Yugoslavia had its birth in the dismemberment of the Ottoman (Turkish) and Austro-Hungarian Empires following their defeat in the war. In July 1917 Serbia and Croatia concluded the Pact of Corfu which led to the establishment of the Kingdom of the Serbs, Croats and Slovenes on 1 December 1918. The name was changed to Yugoslavia in 1929. The new kingdom was dominated by the Serbs at the expense of the Croats. The Slovenes and Bosnian Muslims made some gains as a result of Croatian-Serbian tensions.[9]

1.4.4 The new kingdom brought neither internal peace nor stability to the Balkans. There were major political shifts and re-alliances and constant tensions between rival groups. By the time of the Second World War an uneasy federation had emerged with a Croat dominated area to the north of the River Sava between Zagreb and Vukovar. This area had a sizeable Serb minority. The country came under the domination of Germany and Italy during the war. Both Croats and Serb nationalists formed fascist bodies (the Ustasa and Zbor movements).

1.4.5 A new and enlarged fascist Croatian state emerged with the protection of the Axis powers. The Ustasa regime embarked on a reign of terror against Serbs, Jews and gypsies. Estimates have been made of the 'ethnic cleansing' which took place in Croatia. They range from 350,000 to 750,000 deaths.

1.4.6 Other outbreaks of 'ethnic cleansing' during the World War 2 period resulted in an estimated total of over 1 million deaths. The bitterness of today's struggles owes much to a long and continuous era of conflict and crimes against humanity.

---

9 The information in this section relies on a background paper prepared for the committee by Dr Michael Underdown, Parliamentary Research Service, Foreign Affairs and Defence Group.

1.4.7 In 1944 a socialist state was established under Marshall Tito. Despite the desire of the immediate post-war leadership to make the federation work, nationalist conflicts were ever-present, particularly after Tito's death in 1980. More political turmoil and violence followed. The inevitable outcome was the disintegration of the nation.

1.4.8 In the break up of the former Yugoslavia Slovenia and Croatia declared independence on 25 June 1991. A new stage of the continuing struggle had begun. In the view of the U.N. the struggle is not an internal and isolated one, and invites a world response under Chapter VII of the Charter of the U.N.[10]

1.5 U.N. Response to the Conflict

1.5.1 The U.N.'s role in the conflict arises from its obligation under Chapter VII of its Charter to determine the existence of a threat to international peace and security and to take whatever measures are necessary to restore international peace and security. Article 25 imposes an obligation to support these measures on all Member States:

> The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.[11]

1.5.2 From the beginning of the (new stage of the) conflict the U.N. has closely monitored the situation and has passed several resolutions aimed at ending the "grave breaches of the Geneva Conventions and other violations of international humanitarian law".[12] Resolution 713 (1991) of 25 September 1991 decides

> ... under Chapter VII of the Charter of the United Nations, that all States shall, for the purposes of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia, until the Security Council decides otherwise ...[13]

---

10 Article 39 of Chapter VII of the U.N. Charter states

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Articles 41 and 42 provide details of actions which may be taken to restore international peace and security.

11 See the discussion on the strict obligation to comply with the Resolution in Professor I Shearer's submission, *Submissions*, pp. S128 - S129.

12 Preamble to Resolution 827 (1993).

13 Vol. 14, No. 5-6 *Human Rights Law Journal*, p. 197.

1.5.3 The Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia recommended the establishment of an international tribunal to bring to justice the persons responsible for the "mass killings and the continuance of the practice of 'ethnic cleansing'". It was hoped that such a tribunal would also contribute to the restoration and maintenance of peace.[14]

1.5.4 An impartial Commission of Experts was established by the Secretary-General of the United Nations in October 1992 to examine and analyse information and to provide conclusions on evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia.[15] The Commission of Experts observed that a decision to establish an ad hoc international tribunal in relation to events in the territory of the former Yugoslavia, would be consistent with the direction of its work.

1.5.5 In Resolution 808 of 22 February 1993, the Security Council decided that an international tribunal should be established, and requested the Secretary-General to submit a report on all aspects of the matter.

1.5.6 The Secretary-General reported on 3 May 1993. In Resolution 827[16] of 25 May 1993, the Security Council, acting under Chapter VII of the Charter of the United Nations, approved the report of the Secretary-General and adopted the Statute of the International Tribunal[17] annexed to that report. The Security Council established an ad hoc international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law occurring within the territory of the former Yugoslavia from 1 January 1991.[18]

1.5.7 The Resolution created an immediately binding obligation on UN Member States, including Australia, to take whatever action necessary to implement the Security Council's decision, and to meet the obligations imposed under the Statute of the International Tribunal.

1.5.8 Member States are obliged to cooperate with the International Tribunal in the investigation and prosecution of accused persons, and to comply with a request for

---

14 See preamble to Resolution 808 (1993) and Security Council document S/25221.

15 The establishment of "an impartial Commission of Experts" was requested by resolution 780 (1992) of 6 October 1992. The Secretary-General responded to the request on 14 October 1992 by outlining his decision to establish a five-member Commission of Experts (S/24657). The Chairman and members were appointed on 26 October 1992. Vol. 14 No. 5-6, *Human Rights Law Journal*, p. 199.

16 The text of Resolution 827 is set out in Schedule 1 of the main Bill.
Other relevant documentation includes Resolution 808 of 22 February 1993 which requested the Secretary-General to prepare a report on an international tribunal. This resolution contains reference to other relevant documentation. [*ibid.*, pp 197 – 198.]

17 The text of the Statute of the International Tribunal is set out in Schedule 2 of the main Bill.

18 Article 8 of the Statute of the International Tribunal provides that the temporal jurisdiction of the Tribunal commences on 1 January 1991.

assistance or an order issued by a Trial Chamber of the Tribunal. Such requests and orders may include:

(a) the identification and location of persons;
(b) the taking of testimony and the production of evidence;
(c) the service of documents;
(d) the arrest or detention of persons; and
(e) the surrender or the transfer of accused persons to the Tribunal.[19]

1.6 The legal basis for the establishment of the International Tribunal

1.6.1 Security Council resolution 808 (1993) states that an International Tribunal shall be established to prosecute those responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia since 1991. It does not indicate how the Tribunal is to be established or on what legal basis.

1.6.2 The normal approach would have been for an appropriate body (e.g. the General Assembly or a specially convened conference) to draw up a treaty which would then be opened for signature and ratification. The advantage of this approach is that it allows a detailed examination of all the issues relating to the establishment of the Tribunal. "It also would allow the States participating in the negotiation and conclusion of the treaty fully to exercise their sovereign will, in particular whether they wish to become parties to the treaty or not".[20]

1.6.3 The disadvantage of this approach is the considerable time taken to establish a treaty and to achieve the required number of ratifications for it to enter into force. Even then there would be a risk that those States which should ratify the treaty if it is to be effective might not do so. This approach would not satisfy the requirement of "an effective and expeditious implementation of the decision to establish an international tribunal"[21] specified in resolution 808 (1993).

1.6.4 The U.N. Secretary-General urged the establishment of the International Tribunal on the basis of Chapter VII of the Charter of the United Nations. This would require action to maintain or restore international peace and security following the identification of a threat to the peace, breach of the peace or act of aggression. This approach had the twin advantages of being expeditious and of being immediately effective as all States would be under a binding obligation to take whatever action was required to carry out a decision taken as an enforcement measure under Chapter VII. A Tribunal established under Chapter VII would be, in effect, a subsidiary organ within the terms of Article 29 of the U.N. Charter.

---

19 Article 29, Statute of the International Tribunal.

20 Vol. 14, No. 5-6 *Human Rights Law Journal*, p. 200.

21 *ibid.*, p. 201.

Resolution 827 (1993) adopts this approach. The task of the Tribunal is not to create new law but to enforce existing international humanitarian law. [22]

1.7 Responses by Member States

1.7.1 The binding obligation to support the Tribunal falls equally on all U.N. Members. Responses required by the Tribunal include financial support and the enactment of domestic legislation facilitating the surrender of persons to the Tribunal and other technical assistance. The Committee has studied with interest the legislation or draft legislation of other Member States, with a view to analysing the procedures adopted for the surrender of accused persons and the protections available to such persons before surrender.

1.7.2 The Committee had access to the legislation, draft legislation or expressed intentions regarding responses to the Tribunal, by Sweden, Italy, the Netherlands, Canada, the UK and the U.S.A. The Australian Bills appear to have a stricter interpretation of the requirement to "comply without undue delay with any request for assistance or an order issued by a Trial Chamber..."[23] than comparable legislation from other countries.

1.8 Responses by particular countries

1.8.1 The Committee has received advice on the proposed legislation of some other countries.[24] While the Committee has seen some of the legislation, it has relied on the advice of the Department of Foreign Affairs and Trade for information on the legislation or draft legislation of some other countries.

1.8.2 The approaches taken by other countries provide a useful background to the consideration of the Australian Bills. The following sets out what the Committee understands to be the situation in other countries. Where the information is available, there is a focus on the rights of accused persons to be heard in relation to the decision to surrender them to the Tribunal, as this has been seen as a problem in the Australian legislation.

U.S.A. Legislation has been drafted and will shortly be sent to Congress. The U.S. legislation will take the form of an "approval" of an Executive Agreement negotiated between the U.S. and the Tribunal. It will deal with procedures and be short and general. The Agreement specifies that

---

22 The information in the above three paragraphs is from Vol. 14, No. 5-6 *Human Rights Law Journal*, p. 201.

23 Article 29, Statute of the International Tribunal, (Schedule 2 of the International War Crimes Tribunal Bill 1994.)

24 The information has been obtained through the Department of Foreign Affairs and Trade.

"an accused would as a matter of course receive a hearing in the U.S. before being handed over to the Tribunal. This is likely to be before a judge to establish that the person was in fact the one sought by the Tribunal". Neither the draft legislation nor the Agreement addresses how much further a court would go (beyond identity).[25]

Sweden A translation of comparable Swedish legislation has been provided by the Department of Foreign Affairs and Trade. The Swedish response to a request from the Tribunal is less automatic than the proposed Australian response and there is no presumption against bail for an accused person on remand. A request is to be submitted to the Ministry for Foreign Affairs. An accused person "may be surrendered following a decision by the Government". A detention order or a judgment duly pronounced by the Tribunal will be accepted "unless it is clear that the detention order or judgment is manifestly incorrect".

"A request for the surrender of... a person ... shall be forwarded to the Prosecutor-General, who shall deliver a statement of opinion to the Government. As a basis for his opinion, the Prosecutor-General shall commission any necessary investigations in accordance with the provisions concerning preliminary investigations in criminal cases. When the investigation has been concluded, the Prosecutor-General shall submit the matter together with a statement of his opinion to the Government.

Before the Government takes a decision on the matter, it shall obtain a statement of opinion from the Supreme Court, if there are special reasons for so doing."[26]

Canada Canadian proposed legislation will deal with a response to a request for surrender by amending extradition legislation. Some matters may be handled under existing mutual assistance agreements. **The proposed legislation allows for a judicial hearing and court recommendation with a final decision to be made by the Minister. Review of the decision is available under the Constitution or the Charter of Rights and Freedoms.**[27]

United Kingdom The British will not be enacting any new legislation in response to Resolution 827. It will respond by way of secondary legislation (called Orders in Council) equivalent to Australian regulations. The Orders in Council will be attached to the *United Nations Act*, 1946, which provides for the implementation of requirements of U.N. resolutions. The drafting instructions for the Orders are being prepared. The Committee has been advised that the arrangements for surrender to the Tribunal will be a

25 DFAT submission, *Submissions*, p. S96.

26 DFAT submission, *Submissions*, pp. S119–120.

27 DFAT submission, *Submissions*, p. S127.

"backing of warrants' arrangement, which is a simplified form of extradition currently existing between the UK and Ireland.[28]

Italy Italy was one of the first countries to respond to the resolution. Article 11 of the legislation provides for an accused person to be heard before the Court of Appeal. **"The Court of Appeal shall, in accordance with the provisions of Art. 127 of the code of penal procedure, decide without undue delay by means of a judgment. However, appeals to the Supreme Court of Casstion, which can also be made on the merits of the decision, shall have a suspensive effect."**

The Court of Appeal can address "no physical identity between the person requested and the person concerned" and "if the fact for which the surrender is requested does not fall within the temporal and territorial jurisdiction of the International Tribunal". The decision is to be made by the Minister for Justice.

While there is a presumption that the person will be held in custody, Article 11 (4) states "the measure of custody in prison can be substituted on serious medical grounds".[29]

The Netherlands The proposed legislation has been published. It states that **"the district court of the Hague is exclusively competent to deal with requests for surrender by the Tribunal."** Surrender can be refused if the identity of the person cannot be established "or that surrender has been requested for offences over which, under the terms of its Statute, the Tribunal has obviously no jurisdiction."[30]

1.8.3 It is significant that most of the legislation reviewed allows greater court involvement and a role for judicial consideration of the request for surrender. The Australian Bills allow the determination to be made by the Attorney-General. There is no indication of how he or she is to reach this decision. The Committee believes that it would be more in keeping with Australian due process if the sections of the Bills relevant to reaching the decision regarding surrender and the right of appeal from that decision, were to be reviewed in the light of the approaches taken by other countries.

1.8.4 The legislation of these other countries (although few in number) seems to allow greater protection for persons in their countries than the Australian Bills, by providing a greater scope for refusal of Tribunal requests. Professor Shearer noted:

---

28 DFAT submission, *Submissions*, p. S92. The relevant extract from the Act is reproduced at pp. S92–93.

29 The legislation is an exhibit to the inquiry. Copies are available from the Committee secretariat.

30 A paper on the proposed legislation has been accepted as an exhibit to the inquiry. Copies are available from the Committee secretariat.

> 'The foreign legislation implementing the same international obligations seems to allow for ... rights of refusal under national law: "[where] it is clear that the detention order or judgment is manifestly incorrect" (Sweden); "if there is no physical identity between the person requested and the person concerned by the surrender procedure (Italy); "it cannot be established that the person conducted before it is indeed the very person whose surrender has been requested" (Netherlands). These precedents, although admittedly very limited in number ... support the view that it would be proper to include in our own legislation a power to refuse where it is very clear that no purpose would be served in surrendering the person to the Tribunal.[31]

1.8.5 It is clear that Australia would not be alone in complying with the international obligations if the Bills were amended, to allow more scope for refusal,[32] greater court involvement[33] and further review possibilities.[34]

1.9 Purpose of the Bills

1.9.1 The purpose of the Bills is to enable Australia to comply with binding international obligations which arose on 25 May 1993 when the United Nations Security Council adopted Resolution 827.

1.9.2 The main Bill provides for:

- the possibility and form of requests by the Tribunal for assistance (Part 2);
- the arrest and surrender of persons to the Tribunal (Part 3);
- other assistance to the Tribunal, including the taking of evidence and production of documents or other articles; and search and seizure; the giving of evidence at hearings, or other assisting in investigations, in other countries where the Tribunal is sitting; and service of process (Part 4);
- the sitting of the Tribunal in Australia (Part 5);
- the enforcement of forfeiture orders made by the Tribunal (Part 6); and
- search and seizure and arrest provisions for the purposes of the Bill (Part 7).

1.9.3 The Consequential Amendments Bill amends certain Acts consequent upon the enactment of the main Bill.

1.9.4 For the assistance of those considering this report, Table 1 overleaf provides a summary of the major steps in the arrest and surrender process under Part 3 of the present Bill. Aspects to which the Committee has recommended changes are underlined and marked with a reference number.

---

31 *Submissions*, p. S130.

32 See paragraph 3.17.

33 See paragraph 3.17.

34 See paragraphs 3.36 - 3.37.

1.9.5 Table 2 (page 13) picks up the reference numbers and identifies the effect of some of the Committee's recommendations.

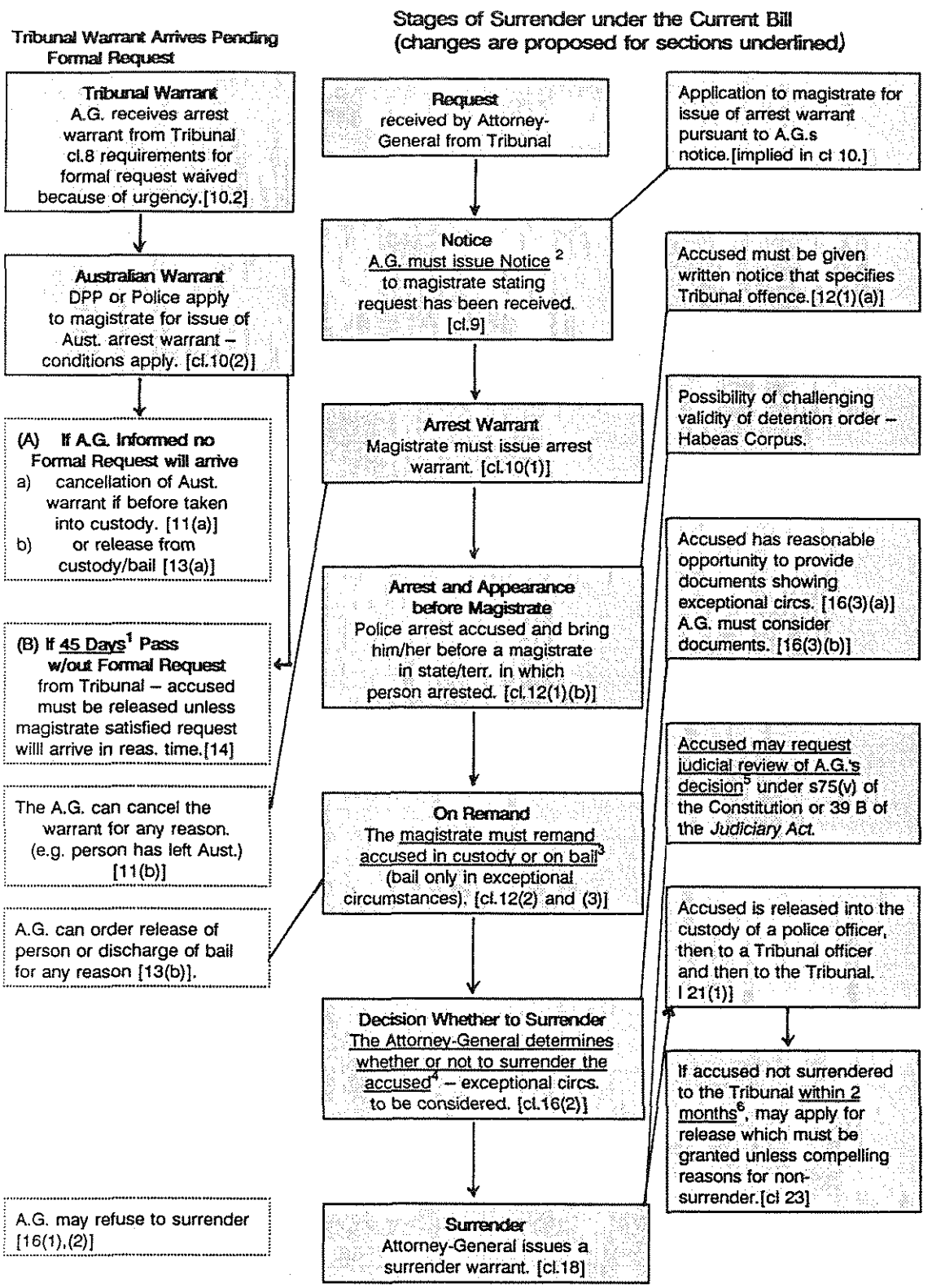
Stages of Surrender under the Current Bill
(changes are proposed for sections underlined)
Tribunal Warrant Arrives Pending Formal Request
Tribunal Warrant
A.G. receives arrest warrant from Tribunal cl.8 requirements for formal request waived because of urgency.[10.2]
Australian Warrant
DPP or Police apply to magistrate for issue of Aust. arrest warrant – conditions apply. [cl.10(2)]
(A) If A.G. informed no Formal Request will arrive
a) cancellation of Aust. warrant if before taken into custody. [11(a)]
b) or release from custody/bail [13(a)]
(B) If 45 Days[1] Pass w/out Formal Request from Tribunal – accused must be released unless magistrate satisfied request willl arrive in reas. time.[14]
The A.G. can cancel the warrant for any reason. (e.g. person has left Aust.) [11(b)]
A.G. can order release of person or discharge of bail for any reason [13(b)].
A.G. may refuse to surrender [16(1),(2)]
Request
received by Attorney-General from Tribunal
Notice
A.G. must issue Notice [2] to magistrate stating request has been received. [cl.9]
Arrest Warrant
Magistrate must issue arrest warrant. [cl.10(1)]
Arrest and Appearance before Magistrate
Police arrest accused and bring him/her before a magistrate in state/terr. in which person arrested. [cl.12(1)(b)]
On Remand
The magistrate must remand accused in custody or on bail[3] (bail only in exceptional circumstances). [cl.12(2) and (3)]
Decision Whether to Surrender
The Attorney-General determines whether or not to surrender the accused[4] – exceptional circs. to be considered. [cl.16(2)]
Surrender
Attorney-General issues a surrender warrant. [cl.18]
Application to magistrate for issue of arrest warrant pursuant to A.G.s notice.[implied in cl 10.]
Accused must be given written notice that specifies Tribunal offence.[12(1)(a)]
Possibility of challenging validity of detention order – Habeas Corpus.
Accused has reasonable opportunity to provide documents showing exceptional circs. [16(3)(a)] A.G. must consider documents. [16(3)(b)]
Accused may request judicial review of A.G.'s decision[5] under s75(v) of the Constitution or 39 B of the Judiciary Act.
Accused is released into the custody of a police officer, then to a Tribunal officer and then to the Tribunal. l 21(1)]
If accused not surrendered to the Tribunal within 2 months[6], may apply for release which must be granted unless compelling reasons for non-surrender.[cl 23]

TABLE 2

1. The forty-five days in which the accused can be remanded in custody (or, on rare occasions, on bail) awaiting the arrival of a formal request from the Tribunal, should be shortened to 14 days. (Recommendation 9)

2. Notice should not be issued unless the essential elements of (amended clause 8 are satisfied. These are that the names of the person or persons being charged, the nature of the charge and the intended time and place of the hearing before the Tribunal. (Recommendations 4 and 5)

3. The magistrate should only place the accused on remand if he or she is satisfied that the person present is the one named in the Australian warrant. (Recommendation 7)

4. The Committee proposes an extra step between remand and the Attorney-General's decision. An accused person should be brought before a magistrate who should determine whether the person is eligible for surrender. In making this determination the magistrate should consider only identification and whether or not the charges laid are within the jurisdiction of the Tribunal. This brings the protection available to persons apprehended in Australia into line with that offered by the USA, Sweden, Canada, Italy and the Netherlands. (Recommendation 10)

5. The Committee recommends that the accused should have the additional avenue of review afforded by the *Administrative Decisions Judicial Review Act.* (Recommendation 21)

6. The Committee recommends that this period be shortened to 21 days. (Recommendation 14)

2 The issues

2.1 Introduction

2.1.1 The main issues addressed in the submissions and during the hearings on the Bills are: general principles of justice and the applicability of Australian legal safeguards; foreign policy issues; protections available to the accused (review, question of identity, possibility of double jeopardy, question of remanding in custody or on bail); the question of undue delay in complying with a request from the Tribunal; whether courts should have a larger role in the surrender process; the meaning of "exceptional circumstances"; the Attorney-General's discretion; the question of resources required to implement the legislation; the question of concurrent sentences; and the return to Australia of persons found innocent by the Tribunal.

2.1.2 These issues will be described in this section. A more detailed analysis and recommendations for remedying problems follow in Section 3 of this advisory report. Certain other minor issues are addressed in Section 3 including some drafting difficulties.

2.1.3 The Committee recognises that the legislation was drafted before the Tribunal had prepared its own Rules of Procedure and Evidence. There were therefore consequential problems in trying to ascertain exactly what the Tribunal would be requesting, and how it would go about making its requests.

2.2 The applicability of Australian legal protections

2.2.1 In considering the main Bill it is important to realise that it does not create any new offences (other than for non-compliance) under Australian or international law. The Bill merely enables Australia to facilitate the Tribunal's response to alleged war crimes committed outside Australia. The rules of the Tribunal[35] provide similar legal safeguards to those Australia extends to accused people. The "Rules of Detention" for the detention facility being built in The Hague also make it clear that the standards of justice available to accused people would be considered fair in Australia:

> The primary principles on which these Rules of Detention rest reflect the overriding requirements of humanity, respect for human dignity and the presumption of innocence.[36]

---

35 International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, 7 March 1994, Division Four "Investigations and Rights of Suspects".

36 Mr G Blewitt, *Submissions*, p. S64.

2.2.2 While acceptable standards of justice appear to be protected by the Tribunal's own rules, the question remains of the rights of accused persons while they remain in Australia and before they are surrendered to the Tribunal.

2.2.3 The requirement to comply 'without undue delay' with any request for assistance or an order of a Trial Chamber[37], has been interpreted very strictly in the Australian Bills. The result has been a "short circuit" of some of the traditional safeguards afforded to accused persons in Australia.

2.2.4 A person named in a warrant from the Tribunal is to be (almost) automatically surrendered to the Tribunal. The Attorney-General **must** determine that the person is to be surrendered to the Tribunal unless he or she is satisfied there are exceptional circumstances.[38] This discretion is very narrow. In the context of binding international obligations imposed on Australia as a Member State of the United Nations, this is presented as an acceptable balance between protecting the rights of the accused and fulfilling Australia's obligations.

2.2.5 The Committee is wary of accepting this balance. While recognising that there are various ways of complying with international obligations, the Committee considers that no weighting of Australia's international obligations at the expense of fundamental legal principles should be approved by the Australian Parliament which is the framer of Australian statute law.

2.2.6 This is the most important of the issues of concern raised by witnesses in submissions and public hearings. The analysis of particular clauses in the next section of this report focuses on particular concerns which relate to the granting of bail to an accused person, and the right of an accused person to seek judicial review of decisions.

2.2.7 Ms Beverley Schurr is a strong supporter of the Bill and the principles underlying it, but stated that the Bill in its current form would not comply with articles of the International Covenant on Civil and Political Rights.[39]

2.2.8 The Australian Government can find authority for the legislation in section 51(xxix) of the Constitution, the external affairs power. That permits the Commonwealth to legislate to enable Australia to comply with its obligations under international treaties or as a Member State of the United Nations. Australia values its role as an active player in the international community.

---

37 Article 29, Statute of the International Tribunal.

38 Subclause 16(2).

39 Ms B Schurr, *Transcript*, pp. 108 – 109.

2.3 Foreign policy issues

2.3.1 The Department of Foreign Affairs and Trade stressed the importance of the legislation in the context of Australia's reputation as a responsible member of the international community.[40]

2.3.2 Senator the Hon Gareth Evans QC, Minister for Foreign Affairs, has spoken of the decision to establish this ad hoc international tribunal as a 'positive and practical response' to deliberate and systematic breaches of international humanitarian law in the territory of the former Yugoslavia.[41] Senator Evans further states that the Australian Government supports the establishment of one single international criminal court over the creation of a multiplicity of such ad hoc tribunals – to deal with crimes against humanity occurring in all places, not just in the territory of the former Yugoslavia.

2.4 Protections available to the accused (review, question of identity, possibility of double jeopardy, question of remanding in custody or on bail)

2.4.1 One of the major criticisms of the Bills is that they seem to have been drafted with an emphasis on foreign policy issues rather than domestic concerns. Australia's international obligations are regarded as paramount rather than Australia's responsibility to its citizens and residents.

2.4.2 The Department of Foreign Affairs and Trade took:

> 'a very affirmative view of the need for Australia to abide strictly by its international obligations.'[42]

2.4.3 However, Senator Spindler expressed the view of a number of witnesses by saying that he strongly supported the legislation and he was concerned that its essential purpose should not be frustrated, but:

> 'a balance must be struck between expediting a process of that type and ensuring that basic legal rights of individuals are not trampled underfoot under the guise of administrative expediency and speed.'[43]

---

40 Mr C Lamb, *Transcript*, p. 60.

41 *International humanitarian law: A time for action*, opening address by Senator the Hon Gareth Evans QC, Minister for Foreign Affairs, at the Australian Defence Force Academy and University College, University of NSW, Conference "Prisoners Of War, Prisoners Of History: Captivity and Internment in Recent Conflicts 1939 to the Present", Canberra, 12 May 1994, pp. 3&4.

42 *Transcript*, p. 59.

43 *Senate Daily Hansard*, 4 May 1994, p. 163.

2.4.4 The view of Mr Lamb is also relevant:

> 'I do not think that citizenship is an important factor for exempting someone from trial for war crimes and crimes against humanity.'[44]

2.4.5 The Committee recognises the difficulties in striking an appropriate balance, particularly in light of the fact that obligations were imposed on UN Member States without an opportunity for consultation and negotiation. However the Committee agrees with Senator Spindler[45] that neither the involvement of the United Nations, nor the emotive nature of the alleged crimes, nor the controversy that will inevitably surround the use of the legislation can justify the abolition of important legal and procedural safeguards within Australia.

2.4.6 As a result, much of the focus of the hearings and submissions was on the adequacy of the protections available to the accused.

2.4.7 One of the major issues was the possibility of reviewing decisions made under the legislation. There appeared to be very little scope for review, particularly since the Consequential Amendments Bill purports to exempt the Bill from the *Administrative Decisions (Judicial Review) Act 1977*. The major decisions on this point are the magistrate's decision whether to remand in custody or on bail, and the Attorney-General's decision whether or not to surrender a person to the Tribunal. Both the granting of bail and the refusal of surrender are to be done only in exceptional circumstances.

2.4.8 A number of witnesses suggested that there should be more scope for review, and many different solutions were proposed.[46] These included a specific appeal and review mechanism within the legislation (with the possibility of the imposition of strict time limits), the availability of review pursuant to the ADJR Act, and the use of the Ombudsman.

2.4.9 While acknowledging the different possibilities, the Committee considered that the Bill should be subject to ADJR review. [See paragraphs 3.36 - 3.37, and Recommendation 21.] In making this decision, the Committee accepts the availability of existing judicial review rights pursuant to the Constitution and the *Judiciary Act*, and recognises that the Bills do not abrogate all rights to review. However, the Committee is of the view that decisions under the proposed Act should be subject to ADJR review.[47]

---

44 *Transcript*, p. 67.

45 *Submissions*, p. S5.

46 See paragraphs 3.14, 3.19 - 3.24 and 3.36 - 3.37.

47 See paragraphs 3.36 - 3.37.

2.4.10 Another concern raised during the hearings was the question of identity,[48] and whether a person arrested in Australia had an opportunity to claim, and show, that he or she was 'not the right person'. Once again, one side of the scales was the limited objective of the legislation (to facilitate the trying of cases by the Tribunal and not to determine guilt or innocence in Australia), while the other side was the maintenance of adequate protections in Australia. The Attorney-General's Department claimed that, except in very clear-cut cases, issues of identity were matters for the Tribunal and should not be tested in Australia.[49]

2.4.11 However, the Committee regards it as fundamentally important that a magistrate should not remand a person unless satisfied that it is the person named in the arrest warrant. [See paragraph 3.13 and Recommendation 7.] Furthermore, the Committee considers that questions of identity should be considered by the magistrate when deciding whether to grant bail, and by the Attorney-General when determining whether to surrender a person.

2.4.12 Another matter which the Committee regards should be specifically considered in the Attorney-General's surrender determination is the possibility of double jeopardy, or double punishment. Two witnesses commented that double jeopardy could arise under the proposed legislation.[50] They noted that the Statute of the Tribunal[51] provides that there can be no national proceedings if the person has been dealt with by the Tribunal. The Article, however, does allow the Tribunal to try persons even though they may have already been dealt with in Australia, but only in limited circumstances (eg the national proceedings were not impartial or were designed to shield the accused from international criminal responsibility).

2.4.13 The Committee therefore considers that it should be clear that if a person has already been adequately dealt with, they should not then be surrendered to the Tribunal in relation to the same conduct. [See paragraphs 3.18.11 - 3.18.15.]

2.4.14 A recurring theme in the hearings and submissions was the limited scope for remand on bail.[52] It was said that the current provisions may contravene the spirit of the International Covenant on Civil and Political Rights, by providing that persons will be generally held in custody.[53]

2.4.15 It was argued to the contrary that there is some scope for bail, and that has been deliberately limited in line with the perceived obligation to hold persons in custody, and the seriousness of the alleged crimes. This also accords with the

---

48 See paragraph 3.13.

49 Eg. *Transcript*, pp. 16, 30; *Submissions*, pp. S108 - S109.

50 Mr G James QC, *Transcript*, p. 81; Mr M Adams, *Transcript*, p. 41.

51 Article 10.

52 A magistrate must only grant bail if there are exceptional circumstances - subclause 12(3).

53 Ms B Schurr, *Transcript*, p. 105.

principal objective of the legislation,[54] that of arresting persons and surrendering them quickly and effectively to the Tribunal on the basis that the Tribunal is the proper forum in which war crimes allegations against a person should be considered.[55] The Committee acknowledges the problem of reaching an acceptable compromise in these circumstances and, after extensive consideration of the issue, considers that the current provisions are acceptable. [See paragraph 3.12.]

2.5 The concept of undue delay

2.5.1 Article 29(2) of the Statute of the International Tribunal requires States to comply 'without undue delay' with any request by the Tribunal.

2.5.2 A substantial amount of hearing time was devoted to considering the concept of 'undue delay', and just how many procedural safeguards and avenues for review Australia could recognise while still complying with the obligation.

2.5.3 It was agreed that due processes within Australia would not be seen as constituting undue delay.[56] It was also recognised that Tribunal requests should be complied with as quickly as possible, subject to the exercise of adequate processes within Australia.

2.5.4 The Committee concluded that review by way of the ADJR Act would be one method of ensuring that due processes take place within Australia, and that this would not be seen as constituting undue delay. [See paragraphs 3.36 - 3.37 and Recommendation 21.]

2.6 Should the court have a greater role in the surrender process?

2.6.1 As currently drafted, the court has a very limited role in the process of surrender. This contrasts with the legislation of some other countries[57], which requires, at least, that courts be satisfied on the issues of identity (that the person is the person named in the Tribunal warrant) and jurisdiction (that the alleged offence for which surrender is sought falls within the Tribunal's jurisdiction).

2.6.2 The Committee believes that courts in Australia should have a similar role. The Committee considers that the insertion of such a provision in the Bill would not result in undue delay, and that Australia would still be complying with its international obligations. [See paragraph 3.17 and Recommendation 10.]

---

54 See comment by Mr D Williams AM QC MP, *Transcript*, p. 50.

55 See paragraph 3.12 for further discussion on this issue.

56 Eg. Dr S Kenny, *Transcript*, p. 55; Mr G Dabb, *Transcript*, p. 126.

57 Eg. Italy, Netherlands.

2.7 Definition of "exceptional circumstances"

2.7.1 The term 'exceptional circumstances' is used in two places in the Bill. The first is to the effect that a magistrate must not grant bail unless there are exceptional circumstances.[58] The second is in the context of the Attorney-General's decision on whether or not to surrender a person to the Tribunal.[59] The Attorney-General must surrender unless there are exceptional circumstances.

2.7.2 Despite using the term 'exceptional circumstances' it is nowhere defined in the Bill. There was some debate as to whether it would even be possible to adequately define the term, and whether such a definition would in fact be of any real use.

2.7.3 If an adequate definition is achievable, it would be of assistance not only to the decision-makers (the magistrate and the Attorney-General), but also for the purpose of clarifying the ambit of the legislation. In addition, it would markedly assist a person in making submissions to the magistrate or the Attorney-General on the issue of 'exceptional circumstances'.

2.7.4 The Committee accepts that such a definition could be inclusive only. A magistrate will always have a judicial discretion in any event and will consider all the circumstances of a particular case. In addition, it is clear that a whole range of combinations of facts could be regarded as constituting 'exceptional circumstances' depending on the particular situation of the applicant and the specific circumstances of the case. As a result, unintended consequences may arise by attempting to define 'exceptional circumstances', and it may actually work against the person who is the subject of the Tribunal request.

2.7.5 The Committee concluded that 'exceptional circumstances' should not be defined in the Bill. [See paragraphs 3.12.16 and 3.18.9.] It is the Committee's view that those circumstances which are appropriately categorised as 'exceptional' will be readily recognised in particular circumstances even though, as a matter of principle, they cannot be identified in advance. The extent of 'exceptional circumstances' should be determined by the decision-maker on the facts of particular cases.

2.8 Appropriateness of the term "exceptional circumstances"

2.8.1 For purposes of consistency with the *Extradition Act 1988*, the Committee considered that the term 'special circumstances' would be preferable to 'exceptional circumstances'. [See paragraphs 3.12.17 - 3.12.19, Recommendation 6 and 3.18.10, Recommendation 11.] The advantage is that 'special circumstances' is a recognised term in the extradition field, and there is a body of case-law on its meaning.

---

58 Subclause 12(3).

59 Subclause 16(2).

2.9 The Attorney-General's discretion

2.9.1 The Attorney-General's discretion on whether to surrender persons[60] is one situation where the Bill departs from strict compliance with international obligations and instead provides a concession in favour of the protection of persons subject to Australian law. The Attorney-General's Department explained:

> 'The legislation seeks to find the appropriate balance between adhering to our international obligations and providing safeguards to Australian citizens. Although exercise of this discretion may possibly cause some embarrassment internationally, it does provide discretionary protection for Australian residents which may not be available under the Tribunal's safeguards.'[61]

2.9.2 Although the discretion was generally regarded as a welcome inclusion in the legislation, there were some questions as to how it would be exercised, what matters should be taken into account, whether the discretion should in fact be vested in the Attorney-General, and whether it should be reviewable by a court. [See paragraphs 3.18 - 3.24 for further discussion on these issues.]

2.10 Resources

2.10.1 The Minister's Second Reading Speech in the Senate noted that

> ... there are possible implications for Commonwealth agencies which may be affected by the legislation. For example, there may be resource implications for the Australian Federal Police, and cost and resource implications might arise if the Tribunal decides to sit in Australia.
>
> These costs cannot be quantified at all at this stage, as they will depend upon the extent to which the legislation is used in Australia. However, the legislation will be reviewed after it has been in place for a period of 12 months to determine the extent to which it has been utilised and to assess the resource implications.[62].

2.10.2 The representatives from both the Australian Federal Police Association and the Australian Federal Police (AFP) told the Committee that the AFP would need additional resources to support the legislation.

2.10.3 Their principal concern was that, without dedicated resources, the necessary prioritisation of work might mean that work would be performed for Tribunal purposes at the expense of other AFP work. Mr Eaton said:

> 'If the new enforcement functions comprehended by this legislation are to be efficiently and effectively undertaken to their maximum, then ... dedicated resources

60 Pursuant to subclause 16(2).

61 *Submissions*, p. S30.

62 *Senate Daily Hansard*, 10 February 1994, p. 667.

> are necessary ... if significant additional work accrues from this legislation, then other, more than likely equally important, work will have to be left undone.[63]

2.10.4 Both the AFP and the AFP Association agreed that one of the problems in allocating resources was the uncertainty about the types of requests to be received from the Tribunal, the involvement required from the AFP, and the extent to which the legislation will be used.

2.10.5 On this basis, the Committee considers that the possibility of significant resource implications should be acknowledged at this stage, and that the method suggested in the Second Reading Speech (review after 12 months) is the most appropriate means of assessing the resource implications.

2.11 Concurrent sentences

2.11.1 An issue which was raised during the hearings was whether sentences imposed by the Tribunal should be able to be served concurrently with any sentence a person was serving in Australia prior to surrender to the Tribunal.[64]

2.11.2 The issue arose in the context of clause 24, which was inserted by way of a Democrat amendment in the Senate. The clause may need to be reconsidered to ensure that it achieves its intended purpose. It could be interpreted to mean that all time spent in the custody of the Tribunal, both before and after conviction or acquittal, can be counted as time towards the Australian sentence.

2.11.3 The Committee considers that only time in custody until acquittal or conviction by the Tribunal should be counted. Otherwise, sentences (one imposed by the Tribunal and the other by an Australian court) for totally different offences could be served concurrently. The Committee agrees with Mr Adams QC[65] that this would not be a proper way of handling the matter of concurrent sentences. [See paragraph 3.29.]

2.12 Return to Australia of persons found innocent by the Tribunal

2.12.1 It transpired from the hearings and submissions that a major omission of the Bills is their failure to adequately provide for the return to Australia of persons acquitted or discharged by the Tribunal.[66]

---

63 *Transcript*, p. 98.

64 See *Transcript*, pp. 51 - 52.

65 *Transcript*, pp. 51 - 52.

66 See paragraph 3.26.

2.12.2 While specific provision is made for the return of persons to complete the serving of their Australian sentences, there are no requirements relating to the return of non-prisoners if they are surrendered to the Tribunal and subsequently acquitted.

2.12.3 The issue is really two-pronged. First there is the issue of the cost of return, and secondly there are questions on the means of entry into Australia (particularly if, when arrested, the person was not in possession of his or her passport, or the person had no valid passport[67]).

2.12.4 In the Committee's view, this is a significant omission which needs to be addressed, on both considerations of cost and rights of re-entry. Consultation with the Department of Immigration and Ethnic Affairs will be necessary on this matter. [See paragraph 3.26 for further discussion.]

2.13 Minor drafting errors

2.13.1 A number of minor drafting problems were identified in the course of examining the Bills.

2.13.2 All such problems can be rectified by relatively simple drafting amendments.

2.13.3 These issues are discussed in the next section dealing with the analysis of particular clauses.

Recommendation 1

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

67 Raised by Mr M Sides QC, *Submissions*, p. S43.

3 Analysis of particular clauses

3.1 Introduction

3.1.1 The Committee welcomes and supports the thrust of the Bill, and recognises that there is broad support for its objectives. The Committee agrees with Mr Michael Adams QC that:

> 'this is excellent legislation ... it has been very carefully drafted, and it has largely succeeded.'[68]

The word 'largely' is used because the Committee believes that there are some issues which require further consideration in order to meet the underlying objective of 'getting the legislation right'.[69]

3.1.2 The Committee recognises that the Bills represent exceptional legislation to deal with an exceptional international situation.[70] However, Senator Spindler encapsulated the view of a number of witnesses:

> '[I]t [still] behoves us not to ignore the normal safeguards that a civilised nation would expect to have in its judicial process ... a balance has to be struck ... it is a weighty step to take to diminish these rights, even in these circumstances and it should be carefully considered.'[71]

The Committee supports this view and has therefore carefully considered the Bills in the context of striking a balance between the mandatory character of international obligations and the necessity of ensuring procedural fairness within Australia.

3.1.3 With these considerations in mind, the Committee has proposed a number of changes to the Bill.

Part 1 — Preliminary

3.2 Definitions of 'federal prisoner' and 'State prisoner'

3.2.1 Mr Martin Sides QC pointed out in his written submission that the definitions of 'federal prisoner' and 'State prisoner' in clause 4 may be too narrow in that they

---

68 Mr M Adams QC, *Transcript*, p. 39.

69 See comment by Mr G James, *Transcript*, p. 86.

70 Attorney-General's Department, *Submissions*, p. S33.

71 Senator Sid Spindler, *Senate Daily Hansard*, 2 March 1994, p. 1311.

fail to adequately cover persons who are being lawfully held in custody for any reason.[72]

3.2.2 Mr Sides QC noted that the phrase "pending trial" may not cover "pending summary hearing" or "pending committal hearing", and that the term "sentence of imprisonment" may not cover the case where persons are sentenced to penal servitude.[73] In addition, Mr Sides QC noted that the definitions do not pick up people in juvenile detention centres, nor people in strict custody in mental health institutions.

3.2.3 The Committee considers that these definitions should pick up these sorts of matters. However, there is some question as to whether they actually do. The Attorney-General's Department has advised that it will reconsider the definitions.[74]

3.2.4 The Committee considers that a possible solution may be to have more general definitions of 'federal prisoner' and 'State prisoner', or alternatively insert definitions of 'pending trial' and 'sentence of imprisonment' to ensure that all intended situations are covered.

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').

3.3 Definition of 'police officer'

3.3.1 One witness suggested that there may be a drafting error in the definition of 'police officer'.[75] The current definition extends to 'staff member of the Australian Federal Police'. Mr Law commented that staff members have a support role for investigations, and do not have training nor expertise in actual policing matters. The concern was that staff members could be placed in an invidious position as a result.

3.3.2 In view of the duties and responsibilities delegated to police officers in the proposed legislation, the Committee considers that 'staff members' should not be

72 *Submissions*, p. S41.

73 See also paragraphs 3.25 and 3.29.2 (Clauses 19 and 24).

74 *Submissions*, p. S99.

75 Mr Patrick Law, *Transcript*, p. 102.

included in the definition of 'police officer'. The Attorney-General's Department has responded along the same line, and said that this is a drafting error.[76]

Recommendation 3

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

3.4 Definition of 'recently used conveyance'

3.4.1 The definition of 'recently used conveyance' was criticised for being too broad, and failing to enhance certainty in relation to search warrants.[77] It is currently defined, in relation to a search of a person, as:

> 'a conveyance that the person had operated or occupied at any time within 24 hours before the search commenced.'[78]

3.4.2 The Committee notes that this definition is identical to that used in the Crimes (Search Warrants and Powers of Arrest) Amendment Bill 1994, and that the definition is precise in its terms.

3.4.3 The Committee agrees with the view of the Attorney-General's Department[79] that the law relating to search and seizure should be consistent as far as possible, and accordingly considers that no changes to this definition are necessary.

Part 2 — Requests by the Tribunal for assistance

3.5 Channels through which requests are to be made

3.5.1 One witness expressed concern as to the manner in which the Tribunal would make requests to Australia, and strongly argued that such requests should be by way of the Attorney-General (or the Attorney-General's Department), and no other way.[80]

3.5.2 The response of the Attorney-General's Department was that it did:

---

76 *Submissions*, p. S99.

77 Mr M Sides QC, *Submissions*, p. S42.

78 Clause 4.

79 *Submissions*, p. S100.

80 Professor D Greig, *Transcript*, pp. 94 - 96.

> 'not agree that it is not clear from the face of either subsection 7(1) or subsection 9(1) that requests are to be made by the Tribunal to the Attorney ... The legislation makes it sufficiently clear that the Attorney-General is to receive the request.'[81]

3.5.3 The Committee considers that clauses 7 and 9 clearly specify that requests by the Tribunal must be made to the Attorney-General, or a person authorised by the Attorney-General (who would presumably be a member of the Attorney-General's Department). Accordingly, the Committee considers that amendments to clause 7 are not necessary on this point.

3.6 Form of Requests

3.6.1 Clause 8 requires a request from the Tribunal to be in writing and to indicate certain matters (such as the nature of the investigation or prosecution, the nature of the assistance sought, etc.). Mr Sides QC noted that the effect of subclause 8(2) is that requests do not always have to be in writing. He commented that there is no justification for such a provision in light of modern communications such as facsimile machines.[82]

3.6.2 The Attorney-General's Department advised that it will reconsider the form of clause 8 in light of Mr Sides' comments.[83]

3.6.3 It appears to the Committee that clause 8 was modelled on section 11 of the *Mutual Assistance in Criminal Matters Act 1987* (MA Act). It seems that it was probably intended that all requests would be in writing, but that the failure to provide one of the specific listed pieces of information would not invalidate a request.

3.6.4 The Committee considers that all requests should be in writing, and accordingly that the clause should be redrafted so that it more closely reflects the structure of section 11 of the MA Act. For example, subclause (1) could specify that requests must be in writing and must indicate certain (mandatory) matters, subclause (2) could list the specific matters which may be indicated by a request (but which do not have to be disclosed in every case), and subclause (3) could provide that failure to comply with (2) would not invalidate a request. The Committee considers that there are three specific matters which should be required to be disclosed in every Tribunal request, namely the person or persons to be charged, the nature of the charge and the intended time and place of the hearing.

---

81 *Submissions*, p. S100.

82 *Submissions*, p. S42.

83 *Submissions*, p. S100.

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.

Part 3 — Surrender of Persons to the Tribunal

3.7 Differences from normal extradition procedures

3.7.1 Part 3 of the Bill provides for the 'surrender part' of Australia's obligations. The Committee notes the explanation of the Attorney-General's Department that, although the *Extradition Act 1988* was used as a general model, the Bill departs from that Act in a number of ways.[84] (For example, there are no equivalent proceedings to those under section 19 of the *Extradition Act* (where a magistrate determines whether a person is an 'extraditable person') and there are less grounds for refusal).

3.7.2 There has been some criticism of this general approach, in that it provides for a 'short form' extradition process whereby Australian residents may be effectively extradited without the protection of the *Extradition Act 1988*.[85]

3.7.3 The Attorney-General's Department responded to this criticism by claiming that this is a different situation from general extraditions:

> 'The reason for this different approach stems from the unique nature of our international obligations. One way in which this case differs from usual extradition situations is that the obligation to transfer accused persons to the Tribunal is derived not from a treaty-based obligation but from the duty of UN Member States to implement the decisions of the Security Council. In addition, persons would be surrendered to an international body ... [and] any persons surrendered to the Tribunal will have the benefit of internationally recognised procedural and legal *safeguards*.'[86]

3.7.4 This accords with a statement by the President of the International Tribunal that:

---

84 *Submissions*, p. S29.

85 The Law Society of New South Wales, *Submissions*, p. S3.

86 *Submissions*, pp. S29 - S30.

> It is the view of the Tribunal (and the clear intent of the Security Council ...) that the surrender or transfer of persons by States to the Tribunal is a totally different and separate procedure from that of extradition ... it would be inappropriate for States to apply extradition law ... The Tribunal's requests for surrender are binding upon States pursuant to the Statute and Chapter VII of the United Nations Charter and override national legislation.[87]

In making this observation, reference was made to Article 29(2) of the Statute of the Tribunal and Rules 56, 57 and 58[88] of the Tribunal's Rules of Procedure and Evidence.

3.7.5 The Committee recognises the unique nature of this legislation and that Australia's role in facilitating the operations of the Tribunal is limited.[89] The Committee regards it as an enormous step for these arguments to be translated into the taking away of protections normally accorded to people within Australia. With these thoughts in mind, the Committee has been extremely careful in its examination of provisions in Part 3 of the Bill.

Division 1 — Arrest of persons

3.8 Lack of discretion in performing functions under the Bill

3.8.1 A number of witnesses and submissions criticised the proposed legislation on the basis that persons performing functions under it have very little, and often no, discretion.[90] For example, the Attorney-General must issue a notice under clause 9 upon receipt of the Tribunal request and copy of Tribunal warrant; the magistrate must issue an arrest warrant upon receipt of the notice; the magistrate must remand an arrested person in custody except in exceptional circumstances; and the Attorney-General must surrender the person except in exceptional circumstances.

3.8.2 Ms Schurr said that when making decisions under the Bill, the magistrate should be exercising a judicial power and not merely following an executive direction, and that the Bill should give the magistrate, particularly in the decision about bail, a proper discretion.[91]

3.8.3 The Attorney-General's Department explained that the approach adopted in the Bill stems from the very limited role for national courts envisaged by the

---

87 Mr Antonio Cassese, *Submissions*, p. S78.

88 The President referred to Rules 56, 57 & 58, but these are numbered 60, 61 and 62 in the version of Rules exhibited - see Exhibit 2(ii).

89 Eg. See comment by Mr B Bannerman, *Transcript*, p. 23.

90 See, for example, Mr M Sides QC, *Submissions*, p. S42.

91 Ms B Schurr, *Transcript*, p. 108.

International Tribunal.[92] The Department referred to a letter from the President of the Tribunal,[93] saying that the Tribunal supports:

> 'the position of the Department with respect to the mandatory and automatic nature of the surrender process and justifies certain departures from the bilateral extradition process. The letter suggests that proposals that would have the effect of making the process less mandatory or automatic should be treated with caution.'[94]

3.8.4 Notwithstanding these comments, the Committee considers that concerns on lack of discretion have considerable merit, and has therefore looked very carefully at the clauses in question. In conducting this examination, the Committee has borne in mind the unique nature of the obligations, and the subsequent justifications in some cases for variations from normal procedures within Australia. The Committee's conclusions on particular clauses are discussed below.

3.9 Lack of discretion in the issue of a notice under clause 9

3.9.1 Mr Sides QC noted that the Attorney-General does not have a discretion as to whether or not to issue a notice under clause 9.[95]

3.9.2 The Committee accepts that a number of steps will have been taken before the Tribunal makes a request to Australia. As set out in the Statute of the International Tribunal[96], the Prosecutor will first determine that a prima facie case exists, the Prosecutor will then prepare an indictment and forward it to a Judge who will review the indictment and, if satisfied that a prima facie case exists, the Judge will confirm it and issue an arrest warrant. It is only at this stage that Australia would become involved.

3.9.3 The Committee considers that, provided there is a valid request in accordance with proposed amended clause 8,[97] the Attorney-General should be obliged to issue a notice in such circumstances.

---

92 *Submissions*, p. S110.

93 Letter of 20 June 1994, *Submissions*, pp. S113 - S114.

94 *Submissions*, p. S111.

95 *Submissions*, p. S42; Also noted by Law Society of New South Wales, *Submissions*, p. S2.

96 Articles 18 & 19, Text of Statute is in Schedule 2 of the Bill.

97 See paragraph 3.6 and Recommendation 4 - The request 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.

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.

3.10 Lack of discretion in issue of arrest warrants

3.10.1 Ms Schurr commented that:

> 'magistrates should have a duty to act judicially in their decisions, including under clause 10 regarding the issue of an arrest warrant.'[98]

3.10.2 Ms Schurr also noted that the *Crimes Act 1914* provides for the exercise of judicial discretion in the issue of an arrest warrant (in that the issuing officer must be satisfied that there are reasonable grounds for issue of the warrant), whereas clause 10 provides that the magistrate **must** issue the arrest warrant.[99]

3.10.3 For the reasons outlined at 3.9.2, the Committee considers that there would be very little scope for the magistrate to decide that there were not reasonable grounds for issuing a warrant. Accordingly, the Committee's view is that the provision is acceptable as drafted.

3.11 Clause 10 - Procedure by way of arrest rather than summons

3.11.1 Two witnesses commented that the Bill does not have any requirement to consider the issuing of a summons, rather than proceeding by way of arrest, and queried the assumption that arrest is always essential.[100]

3.11.2 The Committee recognises that this assumption derives from the Statute of the International Tribunal[101], and accepts the comments of the Attorney-General's Department that requests to Australia will only be made after the Tribunal has issued an arrest warrant.[102] The Committee therefore considers that clause 10 is acceptable on this point.

---

98 *Transcript*, p. 109.

99 *Transcript*, p. 110; *Submissions*, p. S56.

100 Ms B Schurr, *Transcript*, p. 110, *Submission*, p. S56; Mr M Adams QC, *Transcript*, p. 44.

101 See particularly Article 29(2)(d).

102 Mr B Bannerman, *Transcript*, p. 45.

3.12 Clause 12 - Remand and bail provisions

3.12.1 Clause 12 provides that a person who has been arrested and brought before a magistrate must be remanded in custody or on bail to enable the Attorney-General to make a decision on surrender, and for further remand if the Attorney-General decides to issue a surrender warrant. Subclause 12(3) provides that the magistrate must remand the person in custody unless there are exceptional circumstances justifying remand on bail.

3.12.2 A number of witnesses strongly criticised the custody and bail provisions in clause 12.[103] The principal argument was that the clause as presently drafted imports an effective presumption against bail, despite the fact that this is not specifically required by the Statute or Rules of the Tribunal. In addition, it was said that the clause contravenes the spirit of the International Covenant on Civil and Political Rights.[104] Article 9, paragraph 3 of the Covenant provides, amongst other things, that:

> 'It shall not be the general rule that persons awaiting trial shall be detained in custody.'

3.12.3 The Committee queried whether a possible reading of the Statute and Rules of the Tribunal was that they do not impose a specific requirement for detention in custody after arrest,[105] and whether it was conceivable that the objectives of the legislation may in fact be met in some cases where persons are remanded on bail.

3.12.4 The Attorney-General's Department argued that there was clearly a strong presumption from the Tribunal's Statute, Rules and public statements that persons arrested would be held in custody.[106] For example, Mr Bannerman referred to Article 20(2) of the Statute, which states:

> 'A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal.'

He concludes that:

---

103 Mr M Adams QC, *Transcript*, pp. 45 - 48; Mr M Sides QC, *Submissions*, pp. S42 - S43; Mr G James QC, *Transcript*, pp. 78, 82; Ms B Schurr, *Transcript*, p. 109; Law Council of Australia, *Submissions*, p. S91; The Law Society of NSW, *Submissions*, p. S3.

104 Ms B Schurr, *Transcript*, p. 105; *Submissions*, p. S55.

105 Eg. *Transcript*, p. 21.

106 Eg. *Submissions*, p. S103.

> 'The Statute is fairly clear on the point, and we are trying by our legislation to facilitate transfer to the Tribunal in accordance with our obligations.'[107]

3.12.5 The Committee accepts these comments, and recognises that they are clearly supported by the statement of Mr Blewitt on the meaning of the phrase 'the arrest or detention of persons':

> 'from the Tribunal's point of view the term detention means detention in custody and not some form of conditional release ...'[108]

3.12.6 Notwithstanding these comments, the Committee is of the strong view that the liberty of persons subject to Australian law cannot be taken lightly. In line with the spirit of the International Covenant on Civil and Political Rights, the Committee considers that a person should not be automatically remanded in custody without a proper consideration of all the relevant circumstances.

3.12.7 Ms Schurr suggested that subclause 12(3) should be deleted and that it should be replaced with a provision similar to section 32 of the *Bail Act (NSW)*.[109] That section specifies particular criteria which must be taken into account when deciding whether or not to grant bail (including such matters as the probability of the person absconding, the interests of the person, etc.).

3.12.8 In response to the view that the Bill should provide similar rights to bail as exist in usual criminal proceedings, the Attorney-General's Department noted that:

> 'Australia's primary responsibility and the reason for enacting this legislation is to give effect to the UN Resolution and the UN Statute. Apart from that responsibility, different considerations apply where a person is arrested for surrender to a foreign country from the situation where a domestic matter is involved.'[110]

3.12.9 The Committee notes that the New South Wales *Bail Act* provides for degrees of presumption of bail depending on the nature of the alleged offences. For example, section 8A provides for a presumption against bail for certain drug offences. It has been held that in relation to matters to which that section applies, bail would normally or ordinarily be refused.[111]

3.12.10 In light of the nature of the crimes involved and the particular circumstances of this legislation, the Committee recognises that in practice it should be a very rare occasion for bail to be actually granted. It is clear that the legislation

---

107 *Transcript*, p. 112.

108 *Submissions*, p. S61.

109 *Transcript*, pp. 104 - 105.

110 *Submissions*, p. S102.

111 Eg, *R v Masters (1992) 26 NSWLR 450.*

deals with extremely serious subject matter. As stated by the President of the International Tribunal, the legislation is designed to deal with:

> 'some of the most heinous crimes known to man ... The persons appearing before us will be charged with genocide, torture, murder, sexual assault, wanton destruction, persecution and other inhumane acts.'[112]

3.12.11 Senator Spindler said:

> 'Bearing in mind the somewhat extreme offences that the person would have been alleged to have committed, I would suggest that there is a case for having the person in detention, except in exceptional circumstances.'[113]

3.12.12 Another view was put by Mr Adams QC that, even for the most serious crimes, it is very normal for bail to be granted in Australia, and the real question should be one of absconding.[114] Mr James QC thought there should be a presumption against bail unless the court was convinced that the person would not abscond.[115]

3.12.13 The Attorney-General's Department noted that there would be:

> 'a very great temptation and motivation to abscond on bail ... given the horrific nature of the crimes for which their prosecution is sought and the widespread international condemnation of the alleged crimes.'[116]

3.12.14 After considering the conflicting views, the Committee believes that clause 12 is acceptable on these issues, that is, that the magistrate should remand a person in custody unless there are exceptional circumstances justifying remand on bail. The Committee notes that this accords with the current situation in general extradition law.[117] The provision does not simply provide for automatic custody, and therefore can be said not to contravene a strict interpretation of Article 9(3) of the Covenant on Civil and Political Rights. It does allow some scope for bail, albeit very limited. The Committee accepts that the limited scope for bail accords with the

---

112 Statement by the President made at a briefing to Members of Diplomatic Missions, 11 February 1994, pp. 4 - 5.

113 *Transcript*, p. 10.

114 *Transcript*, p. 48.

115 *Transcript*, p. 78.

116 *Submissions*, p. S103.

117 *Extradition Act 1988*, section 15.

objectives of the Bill[118], the seriousness of the alleged crimes, and the nature of Australia's mandatory international obligations.[119]

3.12.15 The Committee notes that the person will have an opportunity to bring the magistrate's attention to any matter which might go to showing that there are exceptional circumstances (for example, there is an identity question, strong evidence of family ties or obligations in Australia, material negating the possibility of absconding, etc.).

3.12.16 The Committee accepts the explanation by the Attorney-General's Department that it would not be of much assistance to specifically define '**exceptional circumstances**' for the purpose of subclause 12(3), as a magistrate will always have a judicial discretion in this matter.[120] The Committee notes that, in practice, the magistrate will consider all the circumstances of the case in order to determine whether there are exceptional circumstances. The Committee also recognises the point made by the Attorney-General's Department[121] that inserting an inclusive list of types of circumstances which could constitute 'exceptional circumstances' may in fact work against the person whose surrender is sought by the Tribunal.

3.12.17 The Committee has considered whether the term '**special circumstances**' should be used instead of 'exceptional circumstances'. This would be consistent with subsection 15(6) of the *Extradition Act 1988*, which provides that a magistrate must not remand a person on bail unless there are special circumstances justifying such remand.

3.12.18 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. The case-law shows that there has been a tendency to interpret 'special' to mean 'exceptional'.[122]

---

118 See *Transcript*, p. 50.

119 See letter by President of Tribunal, *Submissions*, p. S78, implying that the Tribunal envisages that surrender (and compliance with other Tribunal requests) will be virtually an automatic and mandatory process.

120 *Submissions*, p. S103.

121 *Submissions*, p. S103.

122 Eg. *Zoeller v FRG (1989) 90 ALR 161* - Mason CJ used the terms interchangeably; *Schoenmakers v DPP unreported, 21 June 1991 No. WAG 53 of 1991* - French J granted bail ('special circumstances' existed because there was no evidence to show that Schoenmakers had come to Australia to avoid arrest, he had strong family ties in Australia, and had spent a substantial amount of time in custody), Schoenmakers fled Australia before he could be extradited. The Full Court subsequently noted that the allowance of bail was an "unusual step", and that Schoenmaker's conduct is such as "not to encourage the Court to take a similar step in other cases, which may indeed be more deserving cases.";
Since then, the courts have construed 'special circumstances' very narrowly, and said that the circumstances really need to be exceptional before bail will be granted (*Forrest v Kelly & AG, No. SG99 of 1991, 20 Dec 1991*).

3.12.19 Therefore, while the practical effect may be the same as in ordinary extradition situations, there could be an argument that because a different term has been used it must mean something different, and it must be narrower than 'special circumstances'. For purposes of consistency, and to avoid this argument, the Committee considers that it would be preferable to use the term 'special circumstances' rather than 'exceptional circumstances' in subclause 12(3).[123]

Recommendation 6

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

3.13 Question of identity

3.13.1 Having said this, the Committee considers that there is one particular issue to which a magistrate should be specifically required to direct his or her attention when a person is brought before him or her following arrest. That is the question of identity, where for example a person claims not to be the person named in the Australian arrest warrant.[124]

3.13.2 The Attorney-General's Department acknowledges that this limited question could appropriately be dealt with in Australia, but that any question of identity going to the substantive merits of the case (eg the person claims not to be the person wanted by the Tribunal, ie that the person is innocent) should not be a matter for Australian authorities. Such issues would be properly tested before the Tribunal.[125]

3.13.3 The Committee agrees with the Attorney-General's Department that where a person claims not to be the person named in the Australian warrant, a remedy could be sought by way of a writ of habeas corpus, as there would be no lawful detention of that particular person pursuant to Australian law.[126] However, the Committee believes that this matter should be specifically referred to in clause 12.

3.13.4 It appears that this objective could be achieved by replacing the current subclause 12(2) with something like:

---

123 See discussion at paragraph 3.18.10 on use of term 'exceptional circumstances' in subclause 16(2).

124 See paragraph 3.17 on identity in terms of the Tribunal warrant.

125 Mr B Bannerman, *Transcript*, p. 30; *Submissions*, p. S109.

126 Mr G Dabb, *Transcript*, p. 124.

> If satisfied that the person before him is the person named in the warrant, a magistrate must remand ... '

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.

3.14 Review of magistrate's decision to grant bail

3.14.1 Clause 12 does not include any specific mechanism by which the magistrate's decision on remand can be reviewed, and this was criticised.[127]

3.14.2 Ms Schurr commented that the clause may contravene the spirit of Article 9(4) of the Covenant on Civil and Political Rights, which provides that:

> 'Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention ...'[128]

3.14.3 The Committee notes that the scope for review under clause 12 is extremely limited. State bail laws would probably be inapplicable,[129] consistent with extradition case law.[130] There is also the question as to whether prerogative writ actions would be available, as it is very unlikely that a magistrate performing functions under the Act would be considered an "officer of the Commonwealth" for the purposes of section 75(v) of the Constitution or section 39B of the *Judiciary Act*.[131]

3.14.4 The Committee recognises that writs of habeas corpus would be available as at least one means of testing the lawfulness of detention.

---

127 Ms B Schurr, *Transcript*, pp. 105, 109.

128 *Submissions*, p. S55.

129 The Law Society of New South Wales, *Submissions*, p. S3.

130 Yeldham J held in *R v Rademeyer (1985) 1 NSWLR 285 at 287* that the Commonwealth had effectively "legislated generally to cover the whole field in relation to the surrender of fugitive offenders" and that the *Bail Act 1978 (NSW)* did not apply to the fugitive. Yeldham J also held that the Supreme Court had no inherent power to grant bail.

131 It was held in *Trimbole v Dugan (1984) 3 FCR 324* that a magistrate performing functions under the *Extradition Act 1988* was not an "officer of the Commonwealth" for that purpose.

3.14.5 There was a proposal that a mechanism of review of the magistrate's decision be inserted.[132] It seems that if a decision was made to include such review, the most appropriate means would be by way of a one-step level of review to a superior court, in order to ensure that procedures are not drawn out excessively, as suggested by Ms Schurr.[133]

3.14.6 However the Committee notes that current clause 12 accords with normal extradition practice,[134] and sees no compelling reason for a different approach in this particular case.

3.14.7 Clearly a person will have an opportunity to put all the relevant information before a magistrate on the question of bail, including information on questions of identity. In addition, subclause 12(4) (subject to the comments in paragraph 3.15) enables a person to appear before a magistrate on the question of bail where there are fresh circumstances. Furthermore, it is anticipated that the Attorney-General would make the subsequent surrender determination within a relatively quick period. The person will also have an opportunity to submit information to the Attorney-General on the question of surrender.

3.14.8 The Committee accepts the view of the Attorney-General's Department that the nature of the provisions would mean that there would be very little scope for review in any event.[135]

3.14.9 In these circumstances, the Committee considers that there would be little benefit or utility in specifically providing for the review of magistrates' decisions under clause 12.

3.15 *Subclause 12(4) – Subsequent bail applications*

3.15.1 Mr James QC identified some problems with the current drafting of subclause 12(4).[136] It presently provides:

> 'If a magistrate remands the person in custody after the person has made an application for bail, the person cannot apply to any other magistrate for release on bail during that remand.'

3.15.2 Mr James QC noted that there would be problems with the 'coming and going' of magistrates, and commented:

---

132 Ms B Schurr, *Submissions*, p. S54.

133 *Transcript*, pp. 105, 109 - 110.

134 The decision by a magistrate to remand under section 15 is not reviewable by the specific appeal mechanism - section 21 - in the *Extradition Act 1988*.

135 *Submissions*, p. S109.

136 *Transcript*, p. 82.

> 'The sense of it appears to be ... that, if you make one application for bail on the merits and fail, you shall make no further application unless there is evidence of a material change in circumstances such as might warrant the grant of bail. If so, there is no reason not to say so.'[137]

3.15.3 Ms Schurr agreed that the subclause should be amended to allow further bail applications where there are additional circumstances.[138]

3.15.4 The Attorney-General's Department agreed that the provision should be redrafted to achieve its intention (to prevent 'bail shopping') but not prevent the person from applying again if the particular magistrate dies or retires, or the applicant experiences a substantial change in relevant circumstances.[139]

3.15.5 The Committee considers that subclause 12(4) should be amended in this manner. The Committee also notes that as this clause is based on subsection 15(3) of the *Extradition Act 1988*, an amendment to that subsection should also be considered.

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.

3.16 Clause 14 – Release from remand after certain periods

3.16.1 A number of witnesses criticised clause 14, the effect of which is that a person arrested under subclause 10(2) [arrest in urgent circumstances] may be in custody for 45 days before being brought before a magistrate on the question of release. Mr Adams QC encapsulated the views of Mr James QC[140] and Ms Schurr[141] with the comment:

> 'I just find it stunning that one could remain, as it were, in limbo for 45 days.'[142]

---

137 *Transcript*, p. 82.

138 *Transcript*, p. 105.

139 *Submissions*, p. S104.

140 *Transcript*, p. 82.

141 *Transcript*, p. 113.

142 *Transcript*, p. 51.

3.16.2 The Attorney-General's Department explained that this provision was based on section 17 of the *Extradition Act 1988*, and that 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.[143]

3.16.3 The Committee accepts that 45 days is the maximum period, and recognises that a person would have other avenues by which to challenge the detention (for example, habeas corpus). However, the Committee's view is that the time period should be significantly reduced.

3.16.4 The Attorney-General's Department conceded that the 45 day period may not be appropriate. It explained that it was based on the *Extradition Act 1988*, but that the situations were not directly analogous because much more documentary material is required in normal extradition cases, thereby justifying a longer time period.[144] The Department undertook to consult with the Acting Deputy Prosecutor of the Tribunal in order to ascertain the time period within which the Tribunal would anticipate forwarding its requests, and consequently to determine an appropriate time period for the purpose of clause 14.

3.16.5 The Attorney-General's Department subsequently advised that the Acting Deputy Prosecutor considered that 30 days would be most adequate, but that it was prepared to amend clause 14 to reduce the period to 21 days.

3.16.6 In light of the competing arguments concerning individual liberties, and allowing the Tribunal to forward formal requests within a reasonable time, the Committee considers that a period of 14 days would be appropriate. This takes account of 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.

Recommendation 9

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

Division 2 — Surrender of persons

3.17 Court hearing to determine eligibility for surrender

143 Mr B Bannerman, *Transcript*, p. 50.

144 *Submissions*, p. S101.

3.17.1 The Bill as currently drafted provides no substantive role for the court. The Attorney-General makes the decision on whether to surrender, and the courts perform purely administrative functions of issuing arrest warrants and remanding persons.

3.17.2 This contrasts with the legislation of other countries whereby courts have a greater involvement on the question of surrender. (See paragraph 1.8 for comments on legislation of USA, Sweden, Canada, Italy, Netherlands and the UK). For example, the Italian and draft Netherlands legislation requires a court to be satisfied that:

(a) the person is the person named in the Tribunal warrant; and

(b) the alleged offence for which surrender is sought falls within the jurisdiction of the International Tribunal.

3.17.3 The Committee believes that Australian courts should have a larger role in the surrender process. In line with other countries' legislation, the Committee considers that there should be an additional step inserted into the Bill. This would require a hearing similar to that in section 19 of the *Extradition Act 1988*.[145] The hearing would be on very limited grounds, namely that the person is the person named in the Tribunal warrant, and the alleged offence for which surrender is sought is within the jurisdiction of the Tribunal.

3.17.4 If the magistrate finds the person eligible for surrender, the person should then be remanded in custody or on bail for the purpose of the Attorney-General making the final decision on surrender under clause 16.

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.

3.18 Clause 16 – Surrender determination by Attorney-General

145 A magistrate is required to determine whether a person is 'eligible for surrender'.

3.18.1 Clause 16 provides that the Attorney-General must determine that a person is to be surrendered to the Tribunal, unless satisfied that there are exceptional circumstances.

3.18.2 The provision has been criticised for a variety of reasons. For example, Professor Don Greig indicated that the very existence of such a provision could be seen as flouting Australia's strict international obligations.[146] This same point was raised by Senator Vanstone during debate in the Senate.[147] The Attorney-General's Department admitted that:

> 'exercise of this discretion may cause some embarrassment internationally. However, the mere presence of a discretion does not of itself mean that Australia's obligations will not be adhered to. There may well be exceptional circumstances, such as humanitarian grounds, that would warrant refusing surrender - for example, a case where a defendant was suffering from a terminal illness with only a few months to live.'[148]

3.18.3 It was also said that the primary purpose of including the provision was to provide at least some form of discretionary protection to Australian residents.[149]

3.18.4 The Committee fully accepts and supports this objective, but queries whether it could be better reflected in the legislation.

3.18.5 The major criticism centred on the uncertainty of the term 'exceptional circumstances' and queried whether the term should be specifically defined for purposes of clarity.[150] Mr James QC, for example, noted that the phrase 'exceptional circumstances' could:

> 'be seen to cover a multitude of circumstances, some of which might well be listed even though not confining the definition.'[151]

3.18.6 Mr Adams QC said that it may be:

> 'desirable perhaps to spell out, though possibly not in the Bill, guidelines so it is clear what is meant by 'exceptional circumstances' in clause 16.'[152]

3.18.7 The view was expressed that it is important to keep the Attorney-General's discretion as narrow as possible, and that this could be achieved by specifying

---

146 *Transcript*, pp. 92 - 93.

147 *Senate Daily Hansard*, 2 March 1994, p. 1302.

148 *Submissions*, p. S30.

149 *Submissions*, p. S30.

150 Eg. Mr G James QC, *Transcript*, p. 83; Professor D Greig, *Transcript*, pp. 92 - 93.

151 *Transcript*, p. 76.

152 *Transcript*, p. 44.

certain matters to be considered in the question of what constitutes 'exceptional circumstances', such as whether the trial would be oppressive, or an abuse of process.[153] On the other hand, the Attorney-General's Department advised that the words 'exceptional circumstances' were intended to narrow as much as possible the Attorney-General's discretion.[154] The Law Council of Australia also commented that, as currently drafted, the discretion vested in the Attorney-General to determine whether a person should not be surrendered is very narrow.[155]

3.18.8 The Attorney-General's Department also noted the extreme difficulties in attempting to define the term 'exceptional circumstances', and the fact that that process could result in unintended consequences.[156] It was the Department's view that this is a difficult policy issue, and it is not desirable that:

> 'the grounds for exercise of the discretion be spelled out in the Act or that guidelines be issued as to their intended field of operation.'[157]

3.18.9 The Committee appreciates the conundrum presented by these circumstances. The Committee considers that it is not necessary to define 'exceptional circumstances' in the legislation, nor prepare guidelines for the exercise of the discretion. It is clear that a whole range of combinations of facts could be regarded as constituting 'exceptional circumstances' depending on the particular situation of the applicant and the specific circumstances of the case. The Committee considers that those circumstances which are appropriately categorised as 'exceptional' will be readily recognised by the Attorney-General in particular circumstances. It is the Committee's view that little would be achieved by attempting to define the term 'exceptional circumstances'.

3.18.10 However, for purposes of consistency, the Committee considers that the term 'special circumstances' should be used instead of 'exceptional circumstances'. [See paragraphs 3.12.17 - 3.12.19 and Recommendation 6 on the term 'exceptional circumstances' in the context of the magistrate's decision to remand on bail.]

Recommendation 11

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

153 Mr G James QC, *Transcript*, p. 83.

154 Mr B Bannerman, *Transcript*, p. 89.

155 *Submissions*, p. S91.

156 *Submissions*, p. S103.

157 *Submissions*, p. S104.

3.18.11 One matter the Attorney-General should consider in determining whether 'exceptional/special circumstances' exist is the question of **double jeopardy**. Two witnesses referred to the possibility of double jeopardy arising under the proposed legislation.[158] They cited Article 10 of the Statute of the International Tribunal, which effectively provides that there will be no trial before a national court if the person has been dealt with by the Tribunal, and that if a person has been tried by a national court, there will be no trial in the Tribunal unless certain criteria are met (the act was characterised as an ordinary crime in the national proceedings, or those proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted).

3.18.12 Mr Adams QC expressed the concern that Article 10 may not save a person, for example, who had been dealt with by Australian military law for an offence.[159]

3.18.13 The Attorney-General's Department considered that such a matter should not be a basis for refusal of surrender because it:

> 'is an issue which clearly goes to jurisdiction of the Tribunal and in relation to which the Statute clearly envisages the Tribunal should have competence. Indeed Article 10 clearly envisages that the Tribunal may undertake a trial notwithstanding that a person has been convicted by a national court.'[160]

3.18.14 Notwithstanding this point, it is the Committee's view that if a person has already been adequately dealt with, whether it be by national court, military tribunal or otherwise, then that should be specifically considered by the Attorney-General in determining whether there are 'exceptional/special circumstances' by which surrender to the Tribunal should be refused.[161]

3.18.15 A person has an opportunity to put submissions to the Attorney-General on the question of 'exceptional/special circumstances',[162] and the possibility of double jeopardy could be raised in that context. The Attorney-General would then be obliged to consider[163] the double jeopardy issue in determining whether there are 'exceptional/special circumstances' justifying refusal to surrender.

3.19 Review of Attorney-General's surrender determination

158 Mr G James QC, *Transcript*, p. 81; Mr M Adams QC, *Transcript*, p. 41.

159 *Transcript*, p. 41.

160 *Submissions*, p. S107; See particularly Article 10(3) of the Statute which provides that the Tribunal '...shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.'

161 Mr M Adams QC, *Transcript*, pp. 41, 45.

162 Subclause 16(3).

163 Paragraph 16(3)(b).

3.19.1 There is currently no specific mechanism in the Bill allowing for review of the Attorney-General's surrender determination. In addition, the Consequential Amendments Bill currently provides that decisions under the Bill will not be subject to review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act).[164]

3.19.2 This approach was criticised by a number of witnesses because it was seen to be denying normal procedural rights to persons subject to Australian law. Senator Spindler expressed the view of a number of witnesses by saying:

> '...it is necessary to have such a weighty decision not simply left in the hands of the Attorney-General, ... but to allow the person who is to be surrendered the right of judicial review.'[165]

3.19.3 The witnesses who criticised this approach proposed different solutions.

3.20 Specific review mechanism in the Bill

3.20.1 Senator Spindler emphasised that he did not:

> 'wish to see the basic objective of the Bill thwarted, but I believe it is necessary to maintain our essential safeguards.'[166]

Senator Spindler proposed the inclusion of a specific review mechanism in the Bill itself, modelled on section 21 of the *Extradition Act 1988*.[167] The proposed amendment enabled application to the Federal Court for review of the Attorney-General's determination, subsequent appeal to the Full Court of the Federal Court, and application for special leave to appeal to the High Court. Recognising the:

> 'need to ensure that the appeal rights are exercised expeditiously so that the surrender process is not unduly drawn out',[168]

Senator Spindler imposed a strict time limit of 7 days on the lodging of the application.[169]

3.20.2 The Committee considers that, if review is necessary, this would not be the most appropriate form, because of the strong possibility of delay by having three

---

164 See discussion on exclusion of Bill from ADJR review at paragraph 3.35.

165 *Transcript*, p. 5.

166 *Transcript*, p. 5.

167 *Senate Daily Hansard*, 4 May 1994, pp. 161 - 163; *Submissions*, p. S5.

168 *Senate Daily Hansard*, 4 May 1994, p. 161.

169 The Law Council of Australia also suggested the imposition of strict time limits to guard against the prospect of undue delay, *Submissions*, p. S91.

possible levels of appeal,[170] and the fact that time limits would not be of much practical use because they can only be imposed on the lodging, not the actual hearing, of applications.[171]

3.21 Review by way of *Administrative Decisions (Judicial Review) Act 1977*

3.21.1 The Administrative Review Council strongly suggested that there should be review of the Attorney-General's surrender determination by way of the ADJR Act.[172]

3.21.2 The arguments for and against ADJR review in the context of this legislation are discussed at paragraphs 3.36 and 3.37. For the reasons discussed there, it is the Committee's view that it is appropriate for decisions under the Bills to be reviewable by way of the ADJR Act.

3.22 Review by Ombudsman

3.22.1 Mr James QC suggested that neither Senator Spindler's proposal, nor that of ADJR review, was appropriate in these circumstances. He said:

> 'the ADJR Act and the potential to go from a single judge to the Full Court to the High Court is too cumbersome.'[173]

3.22.2 Mr James QC also noted that:

> 'The courts have deprecated the conferring on them of jurisdiction which would interrupt the normal flow of criminal processes',

but he went on to say that in:

> 'a matter of such importance when one looks at civil liberties ... we cannot be content ... to have a simple administrative decision incapable of being examined.'[174]

3.22.3 Mr James QC proposed that 'a fast, one-stop shop administrative review by the Ombudsman' would be appropriate, whereby the Ombudsman would review the relevant material and make public if, in his view, the decision of the Attorney-General could not reasonably be justified on the material that was before him.[175]

---

170 See comments by Ms B Schurr, *Transcript*, p. 110.

171 Mr B Bannerman, *Transcript*, p. 71.

172 *Transcript*, pp. 53 - 57.

173 *Transcript*, p. 77.

174 *Transcript*, p. 77.

175 *Transcript*, p. 77.

Mr James QC argued that such a scheme would have the advantage of the deterrent aspect of public exposure if a decision was made incorrectly, and it would avoid the delays occasioned by the court system.[176]

3.22.4 While acknowledging this possibility, the Committee queries the appropriateness of such a scheme, and whether in fact a separate review mechanism is necessary or appropriate.

3.23 Is a separate scheme of review necessary or appropriate?

3.23.1 The Attorney-General's Department strongly argued that a separate scheme of review of the Attorney-General's surrender determination was simply not necessary or desirable, particularly in light of Australia's binding international obligations.[177]

3.23.2 Mr Adams QC also said:

> 'I am not concerned with judicial review because there are other ways of judicial review.'[178]

3.23.3 The Attorney-General's Department also submitted that the Bill is not denying all rights of review. Mr Dabb said:

> 'We are not taking away any judicial review. All this takes place against the background of the availability of prerogative writs, habeas corpus and section 39B [of the *Judiciary Act*.]'[179]

3.23.4 The possibility of delay in complying with Tribunal requests was argued to be a strong justification for not including a separate scheme of review.[180] This was based on the obligation under Article 29(2) of the Statute of the Tribunal to comply, without undue delay, with requests by the Tribunal. While conceding that due processes could take place in Australia without constituting 'undue' delay, and that delay could amount to a number of months before it was seen as undue,[181] the Attorney-General's Department's underlying argument was that Australian residents already have access to due processes (by way of the Constitution and

---

176 *Transcript*, p. 78.

177 See, for example, *Submissions*, pp. S32 - S33.

178 *Transcript*, p. 51.

179 *Transcript*, p. 126.

180 See, for example, comments by Mr B Bannerman, *Transcript*, pp 18 - 19; *Submissions*, pp. S32 - S33, S37 - S40.

181 Mr G Dabb, *Transcript*, p. 126. This was qualified in a later submission which said: "An acceptable period would probably be no more than a month or two", *Submissions*, p. S108.

section 39B *Judiciary Act*), so there is no justification to make the potential delays any longer than they need to be.

3.24 Committee's view on review of Attorney's surrender determination

3.24.1 The Committee is concerned that due processes take place within Australia. The Committee believes that due processes within Australia would not be seen as constituting undue delay. The Committee also recognises that persons surrendered to the Tribunal will have the benefit of internationally recognised legal and procedural safeguards.

3.24.2 The Committee acknowledges that review by way of section 75(v) of the Constitution and section 39B of the *Judiciary Act* constitutes one avenue by which the Attorney-General's surrender determination can be reviewed. However, for the reasons discussed in paragraphs 3.36 and 3.37, the Committee considers that the Attorney-General's surrender decision should also be subject to ADJR review.

3.25 Persons imprisoned under Australian law

3.25.1 Mr Sides QC queried whether the term 'sentence of imprisonment' in proposed paragraph 19(1)(a) is broad enough to cover 'penal servitude'.[182]

3.25.2 This issue was raised in the context of the adequacy of the definitions of 'federal prisoner' and 'State prisoner', and the concern is covered by Recommendation 2.[183]

3.26 Return of Australians surrendered to the Tribunal

3.26.1 Clause 19 enables the Attorney-General to require undertakings from the Tribunal concerning the return of prisoners to Australia to serve the balance of their Australian sentences.

3.26.2 Mr Sides QC commented that persons being returned to Australia pursuant to such undertakings would presumably have the cost of that return met by the Tribunal (or possibly the Australian government).[184] He goes on to say:

> 'What, however, is to be the plight of those persons [surrendered to] the Tribunal ... who were not prisoners in Australia at the time the warrant was executed ...? Who is to meet the cost of these persons to return to Australia if, for example, they are found not guilty by the Tribunal? How are they to gain entry to Australia if, when

182 *Submissions*, p. S43.

183 See paragraph 3.2.

184 *Submissions*, p. S43.

> arrested, in execution of the warrant, they were not able to obtain their passports to take with them or do not then have a valid passport?'[185]

3.26.3 Mr James QC also addressed the question of bringing back Australians who are taken to the Tribunal and acquitted. He commented that:

> 'Surely such a person is entitled to be returned to Australia rather than abandoned in The Hague.'[186]

3.26.4 Mr James QC noted that there may need to be consequential amendments to the *Migration Act 1958* in order to permit the return of persons to Australia.[187]

3.26.5 It was also noted that there is currently some uncertainty about the situation of a person who was serving an Australian sentence at the time of surrender, but whose sentence expires while the person is in custody for Tribunal purposes. In such a case, it appears that an undertaking under clause 19 to return the person to Australia would cease to have effect (pursuant to clause 25), and the question then is how those persons would return to Australia.[188]

3.26.6 The Committee recognises that it is very unlikely that Australians would be simply abandoned in practice. However, these matters are not specifically covered in the Bills.

3.26.7 The Attorney-General's Department agreed that acquitted persons should be able to return to Australia, and advised that the issue will have to be approached on both considerations of costs and rights of re-entry.[189]

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*.

3.27 Execution of surrender warrants

185 *Submissions*, p. S43.

186 *Transcript*, p. 80.

187 *Transcript*, pp. 80, 81.

188 Mr M Sides QC, *Submissions*, p. S43.

189 *Submissions*, p. S107.

3.27.1 Clause 22 provides that a surrender warrant must be executed according to its tenor. However, as noted by Mr James QC[190], clause 23 recognises that there may be circumstances 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).

3.27.2 The Committee considers that possible exceptions should be recognised in clause 22 by, for example, stating that 'subject to this Division, a surrender warrant must be executed according to its tenor.'

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.

3.28 Clause 23 - Release from remand if surrender warrant not executed

3.28.1 Clause 23 permits a court to release a person who is still in custody in Australia 2 months after a surrender warrant was liable to be executed. However, where the court is satisfied that the warrant has not been executed (the person has not been delivered into the custody of the Tribunal) because of danger to life or prejudice to health, or for any other reasonable cause, it shall not order release.

3.28.2 The same criticism was applied to this provision as to clause 14,[191] to the effect that the specified time period (2 months) is excessive.[192]

3.28.3 The Attorney-General's Department subsequently consulted with the Acting Deputy Prosecutor of the Tribunal to ascertain his views on the length of time it might take for the Tribunal to be a position to take delivery of the person. The Department advised that the Acting Deputy Prosecutor considered 30 days would be very adequate, and the Department suggested that a period of 21 days may be appropriate.[193]

3.28.4 The Committee considers that a period of 21 days is appropriate in this case.

---

190 *Transcript*, p. 84.

191 See paragraph 3.16.

192 Mr M Adams QC, *Transcript*, p. 70.

193 *Submissions*, p. S104.

Recommendation 14

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

3.28.5 The Committee notes that there appears to have been some misunderstanding about the precise effect of clause 23, particularly subclause 23(3).[194] The Committee accordingly believes that it would be worthwhile to consider redrafting this provision so that it more clearly states its purpose. On this point, the Committee agrees with Mr James QC who commented:

> 'On a proper construction, proposed section 23(3) is apparently meant to mean that, if a person is in custody but has not been surrendered because he is ill or his health is in danger, the court shall not order his release from custody simply because time has passed. The language is unfortunately infelicitous to make sure all people understand what the provision means. It could be clarified ... the explanatory memorandum details this but drafting of the Bill could help.'[195]

Recommendation 15

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

3.29 Clause 24 - Effect of surrender on person's terms of imprisonment

3.29.1 Clause 24 was inserted by a Democrat amendment in the Senate. Senator Spindler said the purpose was to:

> 'recognise, in respect of people serving terms of imprisonment in Australia, that time spent in custody following arrest on a surrender warrant and time spent in the custody of the Tribunal as time served toward the sentence of imprisonment.'[196]

3.29.2 There were three issues raised in relation to clause 24. The first concerned the true intent of the provision, and the second queried whether persons who were not serving sentences of imprisonment for crimes should also have the advantage of

---

194 Eg. Initial concerns of Mr M Sides QC (*Submissions*, p. S44) were based on a misconstruction of the provision.

195 *Transcript*, p. 84.

196 *Submissions*, p. S5.

the provision. Mr Sides QC also raised the potential problem of the term 'sentence of imprisonment'.[197] That issue is covered by Recommendation 2.[198]

3.29.3 Mr Adams QC queried whether the provision intended that **all** sentences (Australian and Tribunal) would be concurrent, regardless of whether they were in relation to totally different crimes. He acknowledged that the amendment is to the effect that the time served pursuant to the Tribunal proceedings is time served under the sentence originally imposed in Australia, and said:

> 'One could have no objection to that provided that it is limited to those cases where the person is in custody until acquittal. However, assume the person is convicted [by the Tribunal] of a crime of an altogether different kind ... I do not see why that sentence should in the slightest degree affect the sentence that that person has to serve already for a breach of Australian law - assuming it is for a different matter ... It does not strike me as being a proper way of handling it.'[199]

3.29.4 The Committee notes that clause 24 is based on subsection 24(5) of the *Extradition Act 1988*. However, the provision in that Act deals with a different circumstance, that of temporary surrender whereby an Australian prisoner is surrendered to another country purely for the purpose of being tried. The person is then returned to Australia to complete the Australian sentence, after which the person may be finally surrendered to the other country to serve any sentence imposed when he or she was temporarily surrendered. It is appropriate in such cases for time spent in custody as a result of temporary surrender to be counted towards any Australian sentence of imprisonment. However, the Bill could be read as going further, and providing that time spent in custody both before and after the Tribunal trial is counted towards Australian sentences.

3.29.5 The Committee considers that Tribunal sentences should not be able to be served concurrently with Australian sentences relating to totally different offences. The result would be that:

> 'if the person is imprisoned in Australia for a different crime, he does the time for nothing.'[200]

3.29.6 The Committee agrees with Mr Adams QC that it was probably the intention that the provision would be limited to those cases where the person is in custody until the Tribunal hands down its verdict, but that the provision should be redrafted to clarify this point.[201]

---

197 *Submissions*, p. S44.

198 See paragraph 3.2.

199 *Transcript*, pp. 51 - 52.

200 Mr M Adams QC, *Transcript*, p. 70.

201 *Transcript*, p. 70.

3.29.7 The Attorney-General's Department has advised that it agrees with the point raised by Mr Adams QC, and that it will consider an amendment.

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.

3.29.8 The second issue was whether persons who were not serving sentences of imprisonment for crimes should also have the advantage of the provision. Mr Sides QC suggested that persons serving periodic detention and community service orders should get credit for time spent in custody as a result of surrender[202], and Mr James QC noted that there is no reason why clause 24 should extend only to people who are serving sentences for crimes.[203]

3.29.9 The Committee notes these comments but acknowledges that there would be practical difficulties in implementing the proposals. The Committee considers that, subject to Recommendation 16, the provision is acceptable as drafted.

Part 4 — Other Forms of Assistance to the Tribunal

Division 1 — Taking evidence, etc.

3.30 Taking of evidence under clauses 26 and 27

3.30.1 Clauses 26 and 27 deal with the taking of evidence in Australia pursuant to a Tribunal request to do so. One witness said that it should be made very clear that the modes of taking evidence should not be restricted to the method referred to in clause 27.[204] It was noted that:

> 'Any of the modes acceptable to the Tribunal, including those acceptable under the Commonwealth Evidence Act or those now available under the various State Evidence Acts, should be provided for. That includes video link, video taping of evidence and a number of ways in which evidence can be given.'[205]

202 *Submissions*, p. S44.

203 *Transcript*, p. 84.

204 Mr G James QC, *Transcript*, p. 85.

205 Mr G James QC, *Transcript*, p. 85.

3.30.2 The Committee accepts the explanation by the Attorney-General's Department[206] that 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 Department advised:

> 'Section 27 is intended to 'cover the field' in relation to requests by the Tribunal to the Attorney for evidence to be taken (ie requests that would require the exercise of compulsory powers). This would not exclude the Tribunal making a 'court to court' request under the Commonwealth Evidence Act so long as that had been contemplated by that Act.'[207]

The Department said it would consider whether there needs to be any amendments on this point.

3.30.3 The Committee agrees with Mr James QC that it may be preferable that it be made:

> 'specific to avoid any lack of clarity.'[208]

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.

3.31 Legal representation

3.31.1 Clause 29 permits the person to whom the Tribunal proceeding or investigation relates to be present or represented when evidence is taken under Division 1. It also permits that person, any other person giving evidence or the Tribunal to have legal representation at the proceeding before the magistrate.

3.31.2 It was suggested that this provision allowed the taking of evidence in the absence of the accused and was therefore a breach of the International Covenant on Civil and Political Rights.[209] (That Covenant provides, amongst other things, that in the determination of a criminal charge against a person, that person will be

206 Mr B Bannerman, *Transcript*, p. 85; *Submissions*, p. S105.

207 *Submissions*, p. S105.

208 *Transcript*, p. 85.

209 Mr M Sides QC, *Submissions*, p. S44.

entitled to be tried in his presence, to defend himself, and to examine the witnesses against him[210]).

3.31.3 Mr Sides QC suggested that the provision should be amended so that evidence could not be taken in the absence of the accused without his or her consent, and that such consent might be given conditional upon the presence of the legal representative of the accused.[211]

3.31.4 The Committee considers that clause 29 does not breach the Covenant. As noted by Mr James QC[212], the taking of evidence under Division 1 of Part 4 is merely a preliminary step, and it will not in fact be evidence at the Tribunal until it is tendered. The accused does have the right to face his accuser and has the right to be present at the tender of the evidence, but that takes place at the trial before the Tribunal. For the purpose of the Division in the Bill, therefore, Mr James QC noted that:

> 'the accused can be there in person, by his representative or not at all.'[213]

3.31.5 The Committee agrees with Mr James QC that:

> 'Obviously, it is much better for the accused person to be present and have representation if not disrupting the process'

and, indeed, if the physical presence of the accused is possible. However, the Committee recognises that if there was a provision that evidence could not be taken in the person's absence unless the person consented, then the person would probably never consent (as it would not be in his or her interests), which would frustrate the purpose of the legislation. The Committee agrees with the view that:

> 'if that consent is not forthcoming, the process should not break down.'[214]

3.31.6 The Committee notes subclause 29(2), which enables the magistrate to permit the accused to have legal representation, and clause 30, whereby the magistrate is required to state whether the person was present or represented in the certificate that is sent to the Tribunal with the evidence.

3.31.7 The Committee considers that clause 29 is acceptable as drafted.

---

210 See particularly Articles 14 3 (d) and (e).

211 *Submissions*, p. S44.

212 *Transcript*, p. 80.

213 *Transcript*, p. 80.

214 Mr G James QC, *Transcript*, p. 80.

3.32 Legal aid issues

3.32.1 A number of witnesses referred to legal aid and commented that it should be readily available for the purposes of this legislation.[215] Mr James QC noted that the Statute of the International Tribunal[216] provides for legal aid at every step, and that that should be reflected in the Bill.[217] This would involve the availability of legal aid (with an appropriate means test) for any of the purposes in the Bill, including situations where evidence is being taken in Australia (clause 29), and for the purposes of applications to the court for release from custody (pursuant to subclause 23(3)).

3.32.2 The Attorney-General's Department pointed out that although the Bill does not expressly cover legal aid, it was certainly envisaged that there would be normal administrative legal assistance schemes available through the Department for the purpose of the legislation.[218] The Department therefore advised that:

> 'A statutory guarantee is considered unnecessary and inappropriate.'[219]

3.32.3 However, the Committee considers that, in light of Article 21 of the Tribunal's Statute (which provides that the accused should have access to legal assistance, subject to a means test), the Bill should specifically cover legal aid and guarantee legal representation.

Recommendation 18

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

215 Eg. Senator S Spindler, *Transcript*, p. 11; Mr G James QC, *Transcript*, pp. 80 - 81.

216 See particularly Article 21.

217 *Transcript*, p. 80.

218 Mr B Bannerman, *Transcript*, pp. 96 - 97.

219 *Submissions*, p. S105.

Part 7 — Search, Seizure and Powers of Arrest

3.33 Search and Seizure Issues

3.33.1 Some concerns were expressed on some of the search and seizure provisions of the Bill.[220] The Committee notes the advice of the Attorney-General's Department that the provisions in Part 7 of the Bill are based (with minor amendments to terminology, etc.) on those in the Crimes (Search Warrants and Powers of Arrest) Amendment Bill 1994[221] (the SWAP Bill). The Committee understands that that Bill has passed through Parliament, but has not yet received Royal Assent.

3.33.2 The matters raised by Mr Sides QC[222] were raised in the consideration of the SWAP Bill. They are dealt with in the Report by the Senate Standing Committee on Legal and Constitutional Affairs on the SWAP Bill (February 1994). The Minister for Justice responded to these issues to the satisfaction of that Committee.

3.33.3 The Committee considers that it is important to have consistency as far as possible within the area of search and seizure. Therefore the Committee is of the view that these issues should not be reopened in the context of the International War Crimes Tribunal Bill.

Part 8 — Miscellaneous

3.34 Clause 78 - Arrest of persons escaping from custody

3.34.1 Clause 78 permits the re-arrest of persons who have escaped from any custody authorised by the Bill and permits the return of such persons to the originally authorised custody. It enables a police officer to arrest, without warrant, a person, if the police officer has reasonable grounds to believe that the person has escaped from custody authorised by the Bill. Subclause (2) provides that a person so arrested must be returned to custody.

3.34.2 Ms Schurr commented that the appropriate step after arrest would be to take the person before an independent person for the police officer's belief to be

---

220 Senator S Spindler, *Transcript*, pp. 5 - 6, Mr M Sides, *Submissions*, pp. S45 - S46.

221 *Submissions*, p. S35.

222 *Submissions*, pp. S45 - S46.

tested,[223] and that this could be achieved by an amendment based on section 3X of the Crimes (Search Warrants and Powers of Arrest) Amendment Bill 1994.

3.34.3 The Committee agrees that an amendment should be inserted to this effect. The Committee notes that clause 78 is based on section 49 of the *Extradition Act 1988*, the drafting of which may also need to be reconsidered. The Attorney-General's Department has agreed to amend clause 78.[224]

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.

3.35 Sunset clause

3.35.1 The idea of including a 'sunset clause' in the legislation was raised by a Committee member[225], and supported by Mr James QC[226]. The Tribunal has clearly been established for one purpose, and will eventually achieve that purpose, after which time there would be no justification for the legislation.

3.35.2 The Committee accepts the comment by the Attorney-General's Department on the difficulties in determining an appropriate sunset clause.[227] These stem from the uncertainties about the time period under which the Tribunal will be operating, and the fact that it is envisaged that there will be enormous difficulties in collecting evidence and bringing matters to prosecution. As Mr Bannerman noted:

> 'Any sunset clause would run the risk of being far too short, and the matter would have to come back and be addressed again ...'[228]

3.35.3 In addition, the Attorney-General's Department stated:

> '... the legislation will need to be in force for quite a substantial period of time anyway given that imprisonment sentences handed down by the Tribunal upon conviction are

223 *Transcript*, p. 106.

224 *Submissions*, p. S106.

225 Mr I Sinclair MP, *Transcript*, p. 34.

226 *Transcript*, pp. 86 - 87.

227 Mr B Bannerman, *Transcript*, p. 34.

228 *Transcript*, p. 34.

> likely to be for very substantial periods. If Australia subsequently agrees to house Tribunal prisoners in Australia then the legislation clearly needs to be in force for at least the life of any such sentences. It is agreed that the legislation will need to be reviewed as experience is gained in operation and administration of the legislation. Indeed regulations will need to be made ... and amendment may be necessary ... So the opportunities for review are there whether or not a formal clause is included in the legislation. It is the Departmental view that this legislation should be reviewed at some future time but that a formal sunset/review clause would create difficulty with no real benefits.[229]

3.35.4 While acknowledging the difficulties in determining a reasonable period, the Committee has strong reservations about this type of legislation continuing indefinitely, and believes that further consideration should be given to developing an appropriate sunset clause. The Committee believes that a clause simply providing that the legislation ceases to have effect if and when the Tribunal ceases could be sufficient. However, the Committee recognises 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 such a sunset clause.

Recommendation 20

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

Consequential Amendments Bill

3.36 Review under the *Administrative Decisions (Judicial Review) Act 1977*

3.36.1 A number of witnesses criticised the Consequential Amendments Bill on the basis that it inappropriately excludes decisions under the proposed International War Crimes Tribunal Act from ADJR review.[230]

3.36.2 The Administrative Review Council strongly argued that this part of the Consequential Amendments Bill should be deleted.[231]

3.36.3 The response to the suggestion that ADJR review would cause delay was that there are existing review rights (section 75(v) Constitution, section 39B *Judiciary Act*), and therefore it is inappropriate and unnecessary to exclude ADJR review.[232]

---

229 *Submissions*, p. S106.

230 Eg. The Law Society of New South Wales, *Submissions*, p. S3.

231 *Transcript*, pp. 53 - 57.

232 Dr S Kenny, *Transcript*, p. 54.

3.36.4 Dr Kenny acknowledged the concern that delays be reduced and that there be no undue delay in complying with Australia's obligations. However, she argued that the exclusion of ADJR review would not necessarily accomplish that. She said:

> 'On the contrary, there remain constitutional mechanisms to do precisely the same thing. Those mechanisms may indeed slightly prolong the process and in any event not make it any shorter.[233]

3.36.5 Dr Kenny commented that ADJR review was intended to simplify and codify the area of judicial review, and the application of the ADJR Act could have the result that things could be dealt with more expeditiously.[234]

3.36.6 On this point, the Committee notes the motivation for persons charged with serious offences to delay proceedings as much as possible (particularly with war crimes cases, as witnesses may die, etc.). It is clear that accused persons with a motivation to delay the substantive proceedings in the Tribunal would tend to utilise those procedures involving the most delay, which could involve prerogative writ actions and then an application for ADJR review. On this basis, allowing for ADJR review may result in some delay, but the Committee believes any such delay would not be 'undue' within the meaning of the Statute of the Tribunal. As Dr Kenny pointed out:

> '... the notion is one of there being no undue delay. One would think the notion of undue delay would be delay outside the constitution. If the constitution permits someone to have a right, then the right should be observed. That would, one would have thought, not necessarily constitute undue delay.'[235]

3.36.7 The concern of the Attorney-General's Department was that if ADJR review was reinstated, then persons would have an option (since the constitutional rights cannot, and should not, be excluded). There was then the potential that persons (particularly the well-funded) would go from one to the other for the pure purpose of delaying the proceedings, and frustrating the objectives of the legislation.[236]

3.36.8 Dr Kenny's response was that:

> 'As a general doctrine, a court would not entertain a subsequent application ... normally a court in exercising its jurisdiction would decline to entertain another

---

233 *Transcript*, p. 54.

234 *Transcript*, p. 55.

235 *Transcript*, p. 55.

236 Mr B Bannerman, *Transcript*, p. 20.

> proceeding which raised exactly the same matter seeking precisely the same relief.'[237]

3.36.9 The Attorney-General's Department responded that although a court would not generally entertain a subsequent application, there is no way of preventing the actual applications, which would themselves involve some delay potential.[238]

3.36.10 The possibility of imposing restrictions on the exercise of ADJR rights was also raised. The Attorney-General's Department considered:

> 'that really only addresses part of the problem. The delay comes after the lodgment of the application.'[239]

3.36.11 It was also suggested that ADJR actions are usually run concurrently with prerogative writ actions, and therefore it would not be expected that ADJR proceedings would add significant delays to those already existing. The Attorney-General's Department accepted that there is one level of delay, but:

> 'you cannot necessarily say that by building in a second delay that would be totally encompassed by the same period of time envisaged in [the prerogative writ actions.]'[240]

3.36.12 The thrust of the views of the Attorney-General's Department is that the exclusion of ADJR review would not be taking away individual rights of review. Such rights already exist by way of the Constitution and the *Judiciary Act*. In view of the unique nature of the legislation and Australia's binding international obligations, it was argued that additional mechanisms of review, desirable as they might seem in other circumstances, are simply not warranted in this case.[241]

3.36.13 Mr Sides QC also suggested that the absence of ADJR review was not objectionable, so long as prerogative writ actions were maintained.[242] Mr James QC expressed the view that ADJR actions would be too cumbersome in the context of this legislation.[243] Mr Adams QC noted that he was not concerned with the absence of ADJR review, because there were other ways of judicial review.[244]

---

237 *Transcript*, p. 55.

238 Mr B Bannerman, *Transcript*, p. 71.

239 Mr B Bannerman, *Transcript*, p. 71.

240 Mr B Bannerman, *Transcript*, p. 20.

241 Mr B Bannerman, *Transcript*, p. 71.

242 *Submissions*, p. S43.

243 *Transcript*, p. 77.

244 *Transcript*, p. 51.

3.37 Committee's view on ADJR review

3.37.1 The Committee acknowledges the unique nature of this legislation and the need for Australia to comply with binding international obligations. However, an adequate balance has to be struck between compliance with these obligations on the one hand, and the maintenance of procedural fairness and individual rights within Australia on the other.

3.37.2 The Committee recognises the difficulties in reaching an appropriate balance.

3.37.3 The Committee does not consider that imposing time limits and conditions for seeking ADJR review would be practically feasible in these circumstances.

3.37.4 The Committee envisages that ADJR review could add some delay to the processes. The Committee considers that any such delay would be minimal, and would not in any event be regarded as undue delay.

3.37.5 The Committee appreciates the submission of the Attorney-General's Department on the issue of ADJR review. In addition to setting out the arguments in favour of the Department's position, the submission also informed the Committee about the conflicting views on the matter within the Department.[245]

3.37.6 After much discussion, the Committee has formed the view that, in addition to the existing safeguards of the Constitution and the *Judiciary Act*, decisions under the proposed *International War Crimes Tribunal Act* should be subject to review under the ADJR Act.

3.37.7 The Committee therefore considers that the Consequential Amendments Bill should be amended to allow ADJR review. This would be achieved by deleting the first consequential amendment in the Schedule to the Consequential Amendments Bill.

Recommendation 21

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

245 *Submissions*, pp. S36 - S40, see particularly p. S38.

4 Conclusions

4.1 There is clearly broad support for this legislation. The Committee agrees with the Law Council of Australia that:

> 'no person could seriously dispute the aims of the proposed International War Crimes Tribunal Act, which are to ensure that those committing atrocities in the former territory of Yugoslavia since 1991 are caught and tried.'[246]

4.2 The Committee accepts that this is exceptional legislation to deal with an exceptional international situation. However, this does not mean that normal safeguards which we consider essential in our legal system can be simply disregarded.

4.3 The principal criticisms of the Bill focused on the policy question of the appropriate balance between mandatory international obligations on the one hand, and ensuring procedural fairness within Australia on the other.

4.4 This issue has been complicated by the examination of the proposed legislation of other countries. It has been clear from that examination that other countries have tended not to interpret the international obligations in such a strict and mandatory fashion as Australia seems to have done in the drafting of these Bills.

4.5 Although the Tribunal's intentions on this matter are patently clear,[247] it is obviously up to each individual country to interpret the extent of the obligations and their domestic implementation. The Acting Deputy Prosecutor of the Tribunal, Mr Blewitt, has made this point:

> 'Whilst all States are under a strict obligation to cooperate with the Tribunal and to comply with its requests and orders, it is nevertheless a question for each State to enact implementing legislation designed to bring their municipal legal system in line with the requirements of the Statute. It is a matter for States to comply without undue delay with any request for assistance from the Tribunal and the Tribunal will not seek to interfere with the way in which this occurs.'[248]

4.6 In deciding on an appropriate balance, the Committee recognises that the proposed legislation is not strictly analogous to domestic proceedings, but is more akin to extradition law. Furthermore, the Tribunal has an Appeals Chamber, and its own Rules of Procedure and Evidence which guarantee accused persons internationally recognised legal and procedural safeguards.

---

246 *Submissions*, p. S90.

247 As set out in President Cassese's letter of 20 June 1994, *Submissions*, pp. S116 - S117.

248 *Submissions*, p. S60.

4.7 After detailed consideration and discussion of the Bills, the Committee considers that the balance struck by the Bills should be slightly recast. The Committee is aware of the unique nature of the legislation and the fact that due processes are retained within Australia by way of review rights outside the proposed legislation itself. However, the Committee considers that the court should have more involvement in the surrender process, and that decisions under the proposed Act should be subject to ADJR review.

4.8 The Committee has identified a number of matters which should be rectified before the Bills pass through the Parliament.

4.9 The necessary amendments should be made as soon as possible. The Committee is aware that the Tribunal has commenced operations. The Committee agrees with the Attorney-General's Department that it is important to have the requisite legislation enacted as soon as possible, so that Australia can comply with requests by the Tribunal as soon as they are received.

4.10 For this reason, and in accordance with Recommendation 1, the Committee considers that the Bills should be passed by the House after the incorporation of the amendments suggested in this advisory report.

5 Recommendations

5.1 For the convenience of those considering this report the recommendations are consolidated 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. (p. 24)

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'.) (p. 26)

Recommendation 3

The Committee recommends that staff member be deleted from the definition of 'police officer'. (p. 27)

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. (p. 29)

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. (p. 32)

Recommendation 6

The Committee recommends that 'exceptional' be replaced by 'special' in subclause 12(3). (p. 37)

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. (p. 38)

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. (p. 40)

Recommendation 9

The Committee recommends that clause 14 be amended, such that '45 days' in paragraph (1)(b) be replaced with '14 days'. (p. 41)

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. (p. 42)

Recommendation 11

The Committee recommends that 'exceptional' be replaced by 'special' in subclause 16(2). (p. 44)

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*. (p. 50)

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. (p. 51)

Recommendation 14

The Committee recommends that '2 months' in clause 23 be replaced with '21 days'. (p. 51)

Recommendation 15

The Committee recommends that clause 23 be redrafted in a clearer fashion. (p. 52)

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. (p. 54)

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. (p. 55)

Recommendation 18

The Committee recommends that a specific statutory scheme for legal aid be included in the Bill. (p. 57)

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. (p. 59)

Recommendation 20

The Committee recommends that further consideration be given to developing an appropriate sunset clause. (p. 60)

Recommendation 21

The Committee recommends that the Consequential Amendments Bill be amended to allow for review under the *Administrative Decisions (Judicial Review) Act 1977.* (p. 63)

Daryl Melham MP
Chair

Appendix 1

Details of Public Hearings

Canberra, 16 June 1994

Australian Democrats
Senator Sid Spindler, Spokesperson on law and justice matters – Senator for Victoria

Attorney-General's Department
Mr Bruce Bannerman, Principal Government Lawyer, International Branch, Criminal Law Division
Mr Mark Jennings, Principal Government Lawyer, International Branch, Criminal Law Division

New South Wales Bar Association
Mr Michael Adams QC

Administrative Review Council
Dr Susan Kenny, President
Ms Mary Durkin, Legal Officer

Department of Foreign Affairs and Trade
Mr Christopher Lamb, Legal Adviser
Mr Steven McIntosh, Acting Director, International Organisations Law and International Litigation Group
Mr Timothy Reilly, International Organisations Law and International Litigation Group
Mr Michael Thwaites, Deputy Legal Adviser

Canberra, 20 June 1994

Appeared in a personal capacity
Mr Greg James QC
Professor Don Greig

Australian Federal Police Association
Mr Christopher Eaton, Special Representative
Mr Patrick Law, National Secretary

Law Society of New South Wales
Ms Beverley Schurr

Australian Federal Police
Mr Arthur Brown, Commander and officer in charge, Headquarters, Fraud and General Crime Division
Mr Alan Mills, Assistant Commissioner and officer in charge, Investigation Department

Attorney-General's Department
Mr Bruce Bannerman, Principal Government Lawyer, International Branch, Criminal Law Division
Mr Geoffrey Dabb, First Assistant Secretary, Criminal Law Division
Mr Mark Jennings, Principal Government Lawyer, International Branch, Criminal Law Division

Appendix 2

List of submissions

Submission number	Individual/Organisation	Date of submission	Page number
1	Law Society of New South Wales	3/6/94	S 1
2	Senator Sid Spindler	14/6/94	S 4
3	Attorney-General's Department	15/5/94	S 25
4	Mr Martin Sides QC	17/6/94	S 41
5	Ms Beverley Schurr Law Society of New South Wales	20/6/94	S 54
6	Australian Federal Police	20/6/94	S 58
7	Mr Graham Blewitt Acting Deputy Prosecutor International Criminal Tribunal for the Former Yugoslavia	21/6/94	S 60
8	Mr Peter Levy Secretary General Law Council of Australia	22/6/94	S 90
9	Department of Foreign Affairs and Trade	22/6/94	S 92
10	Attorney-General's Department	23/6/94	S 96
11	Attorney-General's Department	24/6/94	S 111
12	Department of Foreign Affairs and Trade	24/6/94	S 115
13	Department of Foreign Affairs and Trade	24/6/94	S 127
14	Professor I Shearer Challis Professor of International Law, Sydney University	27/6/94	S 128
15	Department of Foreign Affairs and Trade	27/6/94	S 131

Appendix 3

List of exhibits

Exhibit Number	Exhibit
1	*Crimes (Search Warrants and Powers of Arrest) Amendment Bill 1993.* (Amendments to be moved by Senator Spindler, for the Australian Democrats, in committee of the whole). **Presented by Senator Spindler.**
2 (i)	Italian and Netherlands Legislation. **Presented by Mr Daryl Melham MP.**
(ii)	International Criminal Tribunal for the Former Yugoslavia. Rules of Procedure and Evidence, 7 March 1994. **Presented by Mr Daryl Melham MP.**
3	Letter from Administrative Review Council re International War Crimes Tribunal legislation: proposed exemption from Administrative Decisions (Judicial Review) Act 1977. **Presented by Dr Susan Kenny, President, Administrative Review Council.**
4 (i)	United Nations Security Council, Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993). **Presented by Department of Foreign Affairs and Trade.**
(ii)	United Nations Security Council, Addendum to Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993). **Presented by Department of Foreign Affairs and Trade.**
(iii)	United Nations Security Council, Letter dated 9 February 1993 from the Secretary-General addressed to the President of the Security Council. **Presented by Department of Foreign Affairs and Trade.**
(iv)	United Nations Security Council, Report of the Secretary-General on the activities of the International Conference on the Former Yugoslavia. **Presented by Department of Foreign Affairs and Trade.**
5	International Covenant on Civil and Political rights.

Presented by Mr Daryl Melham MP.

6 High Court of Australia, *Re Bolton and Another; Ex parte Beane.*
Presented by Ms Bev Schurr.