



INFORMATION, ANALYSIS
AND ADVICE FOR THE PARLIAMENT

INFORMATION AND RESEARCH SERVICES
PARLIAMENTARY LIBRARY

Bills Digest
No. 102 2003–04

International Transfer of Prisoners Amendment Bill 2004

ISSN 1328-8091

© Copyright Commonwealth of Australia 2004

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this publication may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent of the Parliamentary Library, other than by Senators and Members of the Australian Parliament in the course of their official duties.

This paper has been prepared for general distribution to Senators and Members of the Australian Parliament. While great care is taken to ensure that the paper is accurate and balanced, the paper is written using information publicly available at the time of production. The views expressed are those of the author and should not be attributed to the Information and Research Services (IRS). Advice on legislation or legal policy issues contained in this paper is provided for use in parliamentary debate and for related parliamentary purposes. This paper is not professional legal opinion. Readers are reminded that the paper is not an official parliamentary or Australian government document. IRS staff are available to discuss the paper's contents with Senators and Members and their staff but not with members of the public.

Inquiries

Members, Senators and Parliamentary staff can obtain further information from the Information and Research Services on (02) 6277 2646.

Information and Research Services publications are available on the ParlInfo database.
On the Internet the Parliamentary Library can be found at: <http://www.aph.gov.au/library/>

Published by the Information and Research Services, Parliamentary Library,
Department of Parliamentary Services, 2004.

INFORMATION AND RESEARCH SERVICES

Bills Digest
No. 102 2003–04

International Transfer of Prisoners Amendment Bill 2004

Jennifer Norberry
Law and Bills Digest Group
3 March 2004

Contents

Purpose.....	1
Background.....	1
<i>International Transfer of Prisoners Act 1997</i>	1
General.....	1
International treaties and the international transfer of prisoners scheme	2
Some aspects of the present transfer scheme.....	3
Consensual nature of transfers.....	3
Eligibility requirements.....	3
Enforcement of sentences in the receiving country.....	4
Can transferred prisoners have their sentences reviewed or quashed?.....	4
Commencement of transfers under the scheme	5
Guantanamo Bay.....	5
David Hicks and Mamdouh Habib.....	6
The US Military Commissions.....	8
Composition of Military Commissions.....	8
Procedures of Military Commissions	8
Arrangements between the Australian Government and the US Government	10
Comment.....	11
Position of the political parties on the Bill.....	12
Other responses to the proposed legislation.....	12
Main Provisions	13
Concluding Comments.....	14
Endnotes.....	15

International Transfer of Prisoners Amendment Bill 2004

Date Introduced: 19 February 2004

House: House of Representatives

Portfolio: Attorney-General

Commencement: On Royal Assent

Purpose

To amend the *International Transfer of Prisoners Act 1997* (Cwlth) (the Principal Act) so that Australian prisoners convicted by a US Military Commission can be transferred to Australia to serve the remainder of their sentences. The amendments are also designed to ensure that prisoner transfers to and from Australia will extend to the colonies or protectorates of foreign countries.

Background

In part, the Bill is the Government's response to the situation of two Australians, David Hicks and Mamdouh Habib, who are being held at Guantanamo Bay by the United States and who may be tried by a US Military Commission.

Because the Bill will amend the Principal Act, the background to this Digest outlines the international prisoner transfer scheme as it currently exists in Australia. It will also briefly outline the situation of Messrs Hicks and Habib and describe how the US Military Commissions are designed to operate.

International Transfer of Prisoners Act 1997

General

The Principal Act contains the Commonwealth legislative framework for Australian participation in international prisoner transfer schemes.¹ It enables Australians imprisoned overseas to be returned to Australia to serve their sentences and it enables foreign nationals imprisoned in Australia to be returned to their home countries to complete their sentences.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Additionally, it enables prisoners convicted by the international war crimes tribunals for the former Yugoslavia and Rwanda to participate in the scheme.

The States and Territories have also passed legislation to give effect to the transfer scheme, allowing the Commonwealth law to operate in their jurisdictions.

The policy basis for transfer of prisoners schemes is well-described in a report by the WA Legislative Council's Standing Committee on Constitutional Affairs:

The benefits of returning prisoners to their home jurisdictions have been recognised in Australia since 1983 when the interstate transfer of prisoners scheme took effect. Since then, many hundreds of prisoners have been transferred around Australia to benefit from serving their sentences in a location that will better promote their rehabilitation.

Participation in international prisoner transfers is generally justified on humanitarian, rehabilitative and financial bases. Enabling persons to be returned to their country of origin to serve their sentence not only assists the reintegration into the community of prisoners participating in the transfer scheme, but it also has positive benefits for the families of those prisoners. Their re-absorption into the community is likely to be much more difficult if they have served their sentences in a foreign country without the opportunity to obtain skills that may assist them to reintegrate into the community and without contact with their families.

A large number of countries, including the United States of America, Canada and the United Kingdom are very supportive of international prisoner transfers and have been participating in such schemes for a number of years. There is growing international pressure for Australia to participate.²

The substantive provisions of the Principal Act commenced on 5 June 2002. However, the international transfer scheme did not commence for Australia until the States and the Territories (which, except for the ACT, operate Australia's prisons) commenced their complementary legislation and until after Australia had entered into two international agreements—a [bilateral agreement with Thailand](#) and the [Council of Europe Convention on the Transfer of Sentenced Persons](#). Commonwealth regulations and administrative arrangements with the States and Territories also needed to be finalised before the scheme could operate in Australia.

International treaties and the international transfer of prisoners scheme

The treaties referred to above were considered by the Joint Standing Committee on Treaties. The Committee recommended that Australia become a party to both treaties.³ Evidence provided to the Committee was that once Australia acceded to the Council of Europe Convention, 134 of the 211 Australians imprisoned overseas would be eligible to apply for a transfer to Australia. Similarly, a 'considerable' number of foreign nationals imprisoned in Australia could apply for a transfer to their home country.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

More than 50 countries are parties to the Council of Europe Convention, including the United Kingdom, Canada, the United States and most European countries. The International Transfer of Prisoners (Transfer of Sentenced Persons Convention) Regulations 2002 declares that the *International Transfer of Prisoners Act 1997* applies to the countries listed in Schedule 2 of the Regulations. These countries include the United States.⁴ Thailand is declared as a transfer country under the International Transfer of Prisoners (Thailand) Regulations 2002.

Australia's bilateral agreement with Thailand came into force on 26 September 2002. The Council of Europe Convention came into force for Australia on 1 January 2003.

The Government has signalled that it will enter into a bilateral agreement with the United States to deal with the transfer of Australian citizens held at Guantanamo Bay who have been convicted and sentenced by a US Military Commission.⁵

Some aspects of the present transfer scheme

Consensual nature of transfers

Under the Principal Act, transfer is a consensual matter⁶ involving the 'transfer country', the Commonwealth, the relevant State or Territory⁷ and the prisoner or the prisoner's representative⁸ (if the prisoner is a child or 'incapable' person).

Eligibility requirements

In order to be transferred back to Australia, a prisoner must satisfy the eligibility requirements contained in the Principal Act.⁹ For instance:

- the person wanting to be transferred back to Australia must be an Australian citizen or a permanent resident with 'community ties' in Australia¹⁰
- neither the sentence nor the conviction can be subject to appeal under the law of the transfer country¹¹
- there is, in general, a dual criminality requirement. Thus, the offence for which the person has been sentenced in the transfer country must have been an offence under Australian law.¹² However, the Commonwealth Attorney-General is given a discretion to determine that the dual criminality requirement need not be satisfied in a particular prisoner's case¹³
- if the sentence is for a fixed length, there must be at least 6 months of the sentence still to be served.¹⁴ However, this requirement can also be waived by the Attorney-General.

Further requirements for transfer to Australia are set out in Part 4 of the Principal Act.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Enforcement of sentences in the receiving country

Provisions relating to the enforcement of sentences are found in Part 6 of the Principal Act. There are two methods of sentence enforcement:

- continued enforcement—without any adaptation of the sentence of imprisonment or with ‘only such adaptations to the duration of the sentence or its legal nature as the Attorney-General considers are necessary to ensure that enforcement of the sentence is consistent with Australian law’,¹⁵
- converted enforcement—substituting a different sentence of imprisonment.¹⁶

The Attorney-General can give limited directions in ordering a sentence to be served under either method.¹⁷

In his Second Reading Speech for the International Transfer of Prisoners Bill 1996, then Attorney-General Williams said that continued enforcement was likely to be the method used by Australia:

This would involve being bound so far as possible by the legal nature and duration of the sentence determined by the other country such that a prisoner would bring with him, or her, the sentence from the sending country minus any time served or remissions earned in the sending country, up to the date of the transfer.¹⁸

Can transferred prisoners have their sentences reviewed or quashed?

A transferred prisoner cannot appeal against either the sentence handed down by the court of the transfer country or against a decision of the Attorney-General concerning the enforcement of the sentence.¹⁹

Under section 49 of the Principal Act, there is provision for pardons, amnesties and commutation of sentences when a prisoner is transferred to Australia. Subsection 49(1) reads, ‘the prisoner may be pardoned or granted any amnesty or commutation of sentence of imprisonment that could be granted under Australian law if the sentence of imprisonment had been imposed for an offence against Australian law.’²⁰

If the prisoner is pardoned under Australian law, then the Attorney-General must direct that the prisoner cannot be further detained in Australia.²¹ If the transfer country advises the Commonwealth Attorney-General that the prisoner’s conviction has been quashed or that the prisoner has been pardoned, then the Attorney-General must direct that the prisoner is released.²²

There is no express provision in the Principal Act for the review of convictions if fresh evidence emerges or bias is shown to have affected the sentencing court.²³ However, as indicated above, there are provisions for pardons and amnesties.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Commencement of transfers under the scheme

The first repatriation of an Australian held in a foreign prison occurred in late April 2003 and involved a transfer from Thailand to Western Australia. A press release issued on 24 April 2003 stated that:

Applications are being considered for the transfer of 34 foreign nationals imprisoned in Australia who wish to serve the remainder of their sentences in their homelands. Applications for the transfer of 11 Australians from countries including the United Kingdom, the United States and Thailand are also being considered.²⁴

Guantanamo Bay

Two Australians, David Hicks and Mamdouh Habib are being detained by the United States at Guantanamo Bay. This section provides some information about Guantanamo Bay and the detainees being held at Camp Delta. The following section contains information about David Hicks and Mamdouh Habib.

The US Naval Base at Guantanamo Bay is leased to US and only mutual agreement or US abandonment of the area can terminate the lease.²⁵ The US has occupied the area since 1898, leasing it from Cuba for some \$4,000 per year. Cuban President Fidel Castro refuses to cash the rent cheques, calling the 116 sq. km base ‘a dagger pointed at Cuba's heart.’²⁶

Detainees held by the United States during and after the war in Afghanistan as Taliban fighters or members of al-Qaeda were first housed at Guantanamo Bay in a temporary detention centre called Camp X-Ray (constructed in January 2002). A new detention facility called Camp Delta was later built.²⁷

Recent reports are that there are around 640-650 people detained in Guantanamo Bay under the US President's Military Order. The detainees come from over 40 countries, are being held on suspicion of links to the Taliban regime or al-Qaeda terror network and, at least at one stage, included three boys ages 13 to 15.²⁸ At least 160 of the detainees are said to come from Saudi Arabia, 85 from Yemen, 82 from Pakistan, 30 each from Jordan and Egypt and 80 from Afghanistan.²⁹

Two detainees have now been charged—each with a single count of conspiracy to commit war crimes—and will face a US Military Commission. The two have been described by the Pentagon as personal bodyguards to Osama bin Laden.³⁰

Some countries have negotiated or are in the process of negotiating the release of their nationals from Guantanamo Bay. According to a Reuters report published on 1 March 2004:

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

... 100 ... prisoners ... have been moved out of the Guantanamo Bay facility since it opened in January 2002, with 88 sent back to their home countries for release and 12 transferred for continued detention in Saudi Arabia, Spain and Russia ...³¹

Other prisoners who are about to be released include five Britons who are expected to be returned from Guantanamo Bay in the near future. Their cases are being 'fast tracked' by police and prosecution authorities in Britain according to British Foreign Minister Jack Straw.³² The *Independent* reported on 25 February 2004 that, 'Mr Straw had said at all times the Government had insisted that the Americans should either try the detainees in accordance with international standards or send them to the UK.'³³

One Dane has been released following 'assurances provided by the government of Denmark that it will accept responsibility for its national and will take appropriate and specific steps to ensure that he will not pose a continued threat to the United States or the international community.'³⁴

David Hicks and Mamdouh Habib

David Hicks was captured by coalition forces in Afghanistan in early December 2001. He apparently has no known criminal record and has not previously come to notice 'in a security context.'³⁵ He appears to have travelled to Europe in mid-1999 to join the Kosovo Liberation Army³⁶, then returned to Australia after a couple of months and commenced studying Islam.³⁷ He last left Australia in November 1999.³⁸ In January 2002, Australia was advised that he had been transferred to the US military facility at Guantanamo Bay in Cuba.³⁹

Mr Habib was reportedly arrested by Pakistani authorities on 5 October 2001 (before the US aerial bombing campaign of Afghanistan commenced on 7 October 2001).⁴⁰ Later that year he was transferred to Egypt but by April 2002 he was in the custody of coalition forces in Afghanistan. In May 2002 Australia was advised that Mr Habib had been transferred to Guantanamo Bay.⁴¹

Various allegations have been made about the activities of Messrs Hicks and Habib. For instance, in November 2003, Foreign Minister Downer said:

Our intelligence services have advised us that both these people, Hicks and Habib, participated in training with al-Qaeda. Al Qaeda is the world's most egregious terrorist organisation. We are at war with al Qaeda, and these people have been detained in that manner that you would detain prisoners, you would detain combatants in a war.⁴²

The Government also says that Mr Hicks trained with the Pakistan-based Islamic group, Lashkar-e-Taiba.⁴³

However, according to David Hicks' Australian lawyer, Stephen Kenny:

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

... in early-2001 after pursuing his interest in the Islamic Religion at an Islamic College in Pakistan, David entered Afghanistan and his family believes associated with the Taliban Army.

...

According to newspaper reports, David was detained at a northern alliance roadblock in northern Afghanistan on 9 December 2001. He was not armed at the time and nor was he captured on a battlefield. None of the approximately 9 people travelling with him at that time were detained.⁴⁴

An *AM* interview in 2002 reported that the family of Mamdouh Habib said he had gone to Pakistan to search for a school for his two teenage sons.⁴⁵ In that interview, Mr Habib's lawyer, Stephen Hopper, said 'The family wanted to give their kids an experience for a year or two in an Islamic environment.'⁴⁶

The fate of the two men is unresolved. They remain in custody at Guantanamo Bay without yet being charged, brought to trial or convicted. The Government's advice is that neither man has committed an offence against Australian law and so neither can be returned to Australia to be tried here.⁴⁷ In coming to this conclusion, the Government's legal advisers considered a number of Commonwealth statutes including the *Geneva Conventions Act 1957*, the *Anti-personnel Mines Convention Act 1998*, the *Crimes (Biological Weapons) Act 1976*, the *Chemical Weapons (Prohibition) Act 1994*, the *Crimes (Torture) Act 1988* and the *Crimes (Foreign Incursions and Recruitment) Act 1978*.⁴⁸ Recently enacted Commonwealth terrorism offences did not commence until after Messrs Hicks and Habib were detained. Nor had al-Qaeda nor Lashkar-e-Taiba then been listed as terrorist organisations for the purposes of Commonwealth criminal law.

Various suggestions have been canvassed for dealing with the two men including the passage of retrospective Commonwealth criminal laws.⁴⁹

In the United States, the Center for Constitutional Rights⁵⁰ has filed two habeas corpus petitions which challenge the indefinite detention of foreign nationals at Guantanamo Bay by the US Government without due legal process as unconstitutional and a violation of international law. The cases are *Rasul v. Bush* (which includes David Hicks) and *Habib v. Bush*. A number of lower court decisions rejected the petitioners arguments on the basis that habeas corpus is not available for non-US citizens detained outside the United States. However, in September 2003, the Center for Constitutional Rights asked the United States Supreme Court to review these decisions. In November 2003, the Supreme Court granted certiorari in *Rasul v. Bush*, which means that it has agreed to a review.⁵¹

David Hicks military lawyer, Major Michael Mori, together with other military attorneys assigned to represent the Guantanamo Bay detainees, have filed an amicus brief in the case of *Odah v. United States* in which they challenge the 'attempt by the Executive to oust Article III courts of jurisdiction over the military prosecution of individuals whom the President deems "enemy combatants"'.⁵²

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

David Hicks has been declared eligible for trial by a US Military Commission but no date has been set. As yet, Mamdouh Habib has not been listed as eligible for trial.⁵³

The US Military Commissions

Under the US [President's Military Order of November 13, 2001](#), those tried by military commission may include:

- members of al Qaeda
- people involved in acts of international terrorism against the United States
- people who knowingly harboured such terrorists.

Only non-US citizens can be subject to these orders.

Further information about the Military Commissions established to try Guantanamo detainees appears below. Note, however, that the Australian Government has negotiated some changes in relation to David Hicks and Mamdouh Habib (should Mr Habib be listed for trial).

Composition of Military Commissions

A Military Commission for the Guantanamo Bay detainees:

- is appointed by the Secretary of Defense or a designee (the Appointing Authority)
- is comprised of between 3 and 7 members who are commissioned officers of the US armed forces (this can include retired personnel recalled to active duty)
- must include a Presiding Officer among its members. The Presiding Officer must be a military officer and must also be a judge advocate of the United States armed forces.

Procedures of Military Commissions

Procedures that govern the conduct of trial by military commission are set out in *Military Commission Order No. 1* (MCO No. 1) and its accompanying *Military Commission Instructions* (1-8).⁵⁴

Provisions in MCO No. 1 and the *Military Commission Instructions* include the following:

- the defendant must be supplied 'sufficiently in advance of trial' a copy of the charges in English and 'if appropriate' in another language that he understands
- the accused person is presumed innocent until proven guilty

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- in order to enter a guilty vote, a Commission member must be convinced beyond reasonable doubt on the admitted evidence that the accused is guilty
- the accused person is assigned at least one Detailed Defense Counsel. The accused person can retain a civilian lawyer. However, the US Government will not pay for a civilian lawyer, the lawyer must be a US citizen and, amongst other things, must be cleared to 'secret' and pay the costs of such a security clearance if not already cleared. Further, a civilian lawyer can be excluded from proceedings. Any discussions between an accused person and their lawyers are not guaranteed to be or remain confidential.
- no adverse inference can be drawn from the accused's refusal to testify at his own trial
- the accused person can obtain documents and witnesses (subject to protected information prohibitions)
- defense counsel can present evidence at trial and examine and cross-examine prosecution witnesses
- the prosecution must ensure that the substance of the charges, the proceedings and any documentary evidence are provided in English to the accused or, 'if appropriate', in another language that the accused person understands. Interpreters may be appointed to assist the Defense
- the accused may be present during the trial unless he engages in disruptive behaviour or the trial or part of it is closed and a decision is made to exclude him
- proceedings are open but can be closed
- the accused person can make a statement during sentencing proceedings and also have his defence counsel submit evidence
- the accused person cannot be tried twice on a charge once the Commission's finding on that charge becomes final
- evidence can be admitted if it would have 'probative value to a reasonable person.' In other words the ordinary rules of evidence do not apply
- a two-thirds majority of Commission members is needed for a guilty verdict. A two-thirds majority is needed to determine sentence (except in the case of a death sentence where a unanimous verdict must be reached). A Commission of seven members is needed to impose a death penalty
- once convicted, the Commission imposes a sentence 'that is appropriate to the offense or offenses for which there was a finding of Guilty.' Sentences may include 'death, imprisonment for life or any lesser term, payment of a fine or restitution, or such other

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

lawful punishment or condition of punishment as the Commission shall determine to be proper'. There is no specific penalty for each of the offences set out in *Military Commission Instruction No. 2* (see below for a description of some of the offences)

- a finding as to charge and sentence does not become final until the President or the Secretary of Defense makes a final decision. Prior to this there is a review by a review panel consisting of three military officers (civilians can be included). The panel may consider written submissions from the prosecution and defence. Then, in general, a recommendation goes from the review panel to the Secretary of Defense and then a recommendation goes from the Secretary of Defense to the President. An exception is if the Secretary of Defense is designated by the President as the person who performs the final review.

Possible offences and the elements of crimes are set out in *Military Commission Instruction No. 2*. They include wilful killing of protected persons, attacking civilians, attacking protected property, pillaging, denying quarter, taking hostages, employing poison or analogous weapons, using protected persons as shields, torture, causing serious injury, mutilation, treachery, improper use of a flag of truce, degrading treatment of a dead body, rape, hijacking, terrorism, murder by an unprivileged belligerent, destruction of property by an unprivileged belligerent, aiding the enemy, spying, perjury, obstruction of justice related to military commissions. These are primary offences. Ancillary offences, like aiding or abetting, are also provided for in *Military Commission Instruction No. 2*. However, the crimes specified in the instruction are not an exhaustive list—in other words, a Guantanamo Bay detainee could be charged with other crimes.

Arrangements between the Australian Government and the US Government

On 24 July 2003, the Minister for Foreign Affairs and the Attorney-General announced that as a result of negotiations with the United States, Australia had obtained the following assurances about David Hicks:

- the death penalty would not be sought
- David Hicks would be able to retain an Australian lawyer with appropriate security clearances as a consultant
- conversations between Mr Hicks and his lawyers would not be monitored by the US
- the prosecution does not intend to rely on evidence that would require Mr Hicks to be excluded from proceedings
- subject to security requirements, Mr Hicks' trial would be open, the media allowed to attend and Australian officials can observe proceedings

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- additional contact may be allowed between Mr Hicks and his family once charges are decided.
- Australia and the United States also said they would work towards arrangements that would allow Mr Hicks to serve any sentence in Australia.⁵⁵

On 25 November 2003, the Government issued another press release in which it said:

- key commitments (undefined) about Mr Hicks would also apply to Mr Habib should he be listed as eligible for trial
- the Australian Government will be able to make submissions to the review panel which will review either man's military trial
- if an Australian lawyer is retained by either man that person will be allowed face-to-face contact with their client
- Mr Hicks and Mr Habib (if listed as eligible for trial) will be able to talk to their families via telephone and two family members will be able to attend their trial
- an independent legal expert sanctioned by the Australian Government will be able to observe the trial/s.⁵⁶

Comment

A Human Rights Watch [Briefing Paper on US Military Commissions](#), published in June 2003, recognises that some due process safeguards are included in the Military Commission orders and instructions:

... including the presumption of innocence, proceedings open to the public, and the presentation of evidence and cross-examination of witnesses. [However] important as they are, these provisions cannot overcome the cumulative effect of other provisions that militate against fairness. They provide a patina of due process to proceedings that are otherwise deeply flawed.

To summarise, the Human Rights Watch brief says that military commissions will:

- Deprive defendants of a trial by an independent court
- Improperly subject criminal suspects to military justice
- Try prisoners of war (POWs) in a manner that violates the 1949 Geneva Conventions
- Provide lower due process standards for non-citizens
- Restrict the right to choose one's defense counsel
- Deprive defense counsel the means to make an effective defense

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Impose a gag order on defense counsel.⁵⁷

It can also be argued that the Military Commission rules conflict with some of the requirements of articles 14 and 15 of the International Covenant on Civil and Political Rights. For instance, it might be said that they do not provide the accused with access to a fair and public hearing by a competent, independent and impartial tribunal established by law, with appropriate appeal rights. Nor have their cases been determined ‘without undue delay’.

On the other hand, the Australian Government has pointed to the concessions it has obtained in relation to the Australian detainees and said that:

... the rules governing the military commission trials provide fundamental guarantees for the accused. These guarantees are found in our own criminal justice procedures. In fact, they are the basis on which our criminal justice system is founded. The guarantees include the rights to representation by a defence counsel, a presumption of innocence, a standard of proof beyond reasonable doubt, the right to obtain witnesses and documents to be used in their defence, the right to cross-examine prosecution witnesses and the right to remain silent with no adverse inference being drawn from the exercise of that right.⁵⁸

The Government also takes the view that:

Military commissions are a recognised way of trying persons who have committed offences against the laws of war.⁵⁹

Position of the political parties on the Bill

On 18 February 2004, the *Canberra Times* carried the following report:

Shadow attorney-general Nicola Roxon said the Opposition would consider the detail of the changes [to the International Transfer of Prisoners Act] but thought it likely Labor would let them pass as the changes seemed at first instance to be non-controversial.

“We’re pretty wary of what the Government tells us these changes will mean,” she said. Ms Roxon said the Government should also seek to ensure any trials went ahead only with “proper standards”.⁶⁰

Other responses to the proposed legislation

On 19 February 2004, Law Council of Australia President, Bob Gotterson QC, said:

We support the intention to allow Australian detainees David Hicks and Mamdouh Habib to return home if they are sentenced to a term of imprisonment by US authorities.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

However, the Law Council is concerned that the mooted law changes would recognise the legitimacy of military commission trials and may have other unexpected consequences.⁶¹

Mr Gotterson also said:

... the Law Council agrees that it is preferable for Mr Hicks and Mr Habib to serve any military commission-imposed prison sentence in Australia, and does not oppose moves to achieve this. Indeed, we are heartened that this legislation may offer some hope to the families of the two men.⁶²

Main Provisions

The Principal Act enables international prisoner transfers to take place from ‘transfer countries’—a term defined to mean ‘foreign countries’. The amendments to be inserted by **items 1, 3 and 4** of the Schedule are designed to ensure that transfer countries will include regions as well as ‘foreign countries’. The result, explains the Explanatory Memorandum is that the amendments provide for:

... circumstances where a country is in control of a region that may not form part of the landmass that constitutes the mainland of a foreign country.⁶³

One example given of such a ‘region’ is Guantanamo Bay. Hong Kong is another example provided in the Explanatory Memorandum.⁶⁴

The Principal Act applies to prisoners sentenced to imprisonment by a transfer country’s courts or tribunals. It is not clear that a US Military Commission is a court or tribunal. The purpose of **item 2** is to provide that prisoners sentenced by a US Military Commission are taken to be sentenced by a court or tribunal.

Item 5 applies the scheduled amendments retrospectively ie to sentences imposed before as well as after the Schedule commences (on Royal Assent⁶⁵). However, the Explanatory Memorandum states:

The amendments in the Bill, whilst technically taking effect from Royal Assent, would ... have no practical application until ... a bilateral agreement [with the United States on the transfer of the Australian Guantanamo Bay detainees] commences operation.⁶⁶

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Concluding Comments

The Bill ensures international transfer of prisoner arrangements can be executed in relation to colonies and protectorates of foreign countries—such as Hong Kong.

It also enables prisoners convicted and sentenced by a US Military Commission to be transferred to Australia. In particular, it may facilitate the transfer of David Hicks and Mamdouh Habib, if they are convicted and if they consent, from Guantanamo Bay to serve their sentences in Australia. The purposes are rehabilitative and humanitarian ones.⁶⁷

The Bill also raises some questions. Section 49 of the Principal Act says that a transferred prisoner:

... may be pardoned or granted any amnesty or commutation of sentence of imprisonment that could be granted under Australian law if the sentence of imprisonment had been imposed for an offence against an Australian law.

The Government takes the view that neither Mr Hicks nor Mr Habib has committed an offence against Australian law. For this reason, one matter Parliament may wish to look at is whether section 49 of the Principal Act would prevent Messrs Hicks or Habib, unlike other transferred prisoners, from being pardoned and released and, if so, whether an appropriate amendment should be made.

Some interesting constitutional questions may be raised where prisoners are transferred to Australia for incarceration following their conviction and sentence by a US Military Commission.

With exceptions, the High Court has said that involuntary detention in Australia must be ordered by a court making a determination according to traditional judicial process.⁶⁸ Does detention in Australia which is not ordered by an Australian court or which is ordered by an overseas body which does not answer the description of a court raise any constitutional issues? Is a military commission or tribunal another exception to the general rule requiring detention to be ordered by a court? Does the fact that the Attorney-General will be able to enforce sentences ordered by a military commission lead to any problems? The High Court has said that executive detention is permissible in certain circumstances—for instance, for quarantine purposes, for mental health reasons or to secure the attendance of a person at trial. If any potential constitutional issues exist in this regard, are they resolved by the fact that the Principal Act requires the prisoner to consent to their transfer⁶⁹ and stipulates that he or she must be informed ‘of the legal consequences of transfer of the prisoner under this Act before consenting to the transfer’?⁷⁰ On the other hand, does the fact that dual criminality may not be required in particular cases⁷¹ or the statutory limitations on having a case re-opened⁷² or the fact that some transferred prisoners may not have access to pardons or amnesties complicate the issue?⁷³ These questions raise unresolved legal issues that may be tested in the High Court in the event that the Bill’s provisions are relied upon.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Lastly, in considering the Bill, it is a matter for Parliament to decide whether the humanitarian and other benefits that may result from any transfer of Messrs Hicks and Habib to Australia are outweighed by expressly giving effect to the US Military Commission process.

Endnotes

- 1 Further information about the scheme and application forms can be found at: <http://www.law.gov.au/www/criminaljusticeHome.nsf/HeadingPagesDisplay/International+Transfer+of+Prisoners+Scheme?OpenDocument>
2. Western Australia, Legislative Council, *Report of the Standing Committee on Constitutional Affairs in Relation to Prisoners (International Transfer) Bill 1999, Report 42*, pp. 3-4.
- 3 Joint Standing Committee on Treaties, *Report 43: Thirteen Treaties Tabled in August 2001*, September 2001.
- 4 <http://scaleplus.law.gov.au/html/pastereg/3/1771/top.htm>
- 5 Explanatory Memorandum, p. 2.
- 6 Except in the case of war crimes tribunal prisoners.
- 7 Section 5, Principal Act.
- 8 Section 6, Principal Act.
- 9 The Attorney-General's Department website states, 'The requirements for each case will depend on the terms and conditions set out in the international transfer agreement between Australia and the foreign country and the domestic legislation of the foreign country and Australia'.
- 10 Subsection 13(1), Principal Act.
- 11 Paragraph 15(1)(a), Principal Act.
- 12 Paragraph 15(1)(b), Principal Act.
- 13 Subsection 15(3), Principal Act. The issue of whether the Attorney-General should have such a discretion or whether dual criminality should be required was the subject of divergent opinions prior to the drafting of the 1996 Bill and in evidence given to the House of Representatives Standing Committee on Legal and Constitutional Affairs when it considered the 1996 Bill. This issue was further complicated by the fact that some international treaties, including the Council of Europe Convention on the Transfer of Sentenced Prisoners, require dual criminality as a condition of transfer. The Committee said:

The Committee recognises that the main object of the Bill is humanitarian. The aim is to facilitate contact with families and friends, to encourage rehabilitation and to enable prisoners to serve their terms in more culturally familiar surroundings. To achieve these objects the Committee acknowledges that there may be circumstances

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

where a person will be required to serve a term in an Australian prison for conduct which would not constitute an offence in Australia. However, repugnant this may seem, the alternative – namely that a person in those circumstances would not be able to take advantage of the transfer scheme – is also undesirable (House of Representatives Standing Committee on Legal and Constitutional, *Advisory Report on the International Transfer of Prisoners Bill 1996*, February 1997 (Parliamentary Paper No. 23 of 1997), p. 28).

- 14 Paragraph 15(1)(c), Principal Act.
- 15 Section 42, Principal Act.
- 16 Section 42, Principal Act.
- 17 Section 44, Principal Act.
- 18 House of Representatives, *Debates*, 21 November 1996, p. 7173.
- 19 Section 45, Principal Act.
- 20 See also paragraph 49(2)(a), Principal Act.
- 21 Paragraph 49(2)(a), Principal Act.
- 22 Paragraph 49(2)(b), Principal Act.
- 23 See *Advisory Report*, op.cit,
- 24 Senator the Hon Christopher Ellison & the Hon Jim McGinty, ‘First Australian prisoner returning home to serve out sentence’, *Joint Media Release*, 24 April 2003.
- 25 *CIA World Factbook*, 2002. There has been ongoing legal controversy about whether US courts have jurisdiction over a military base leased from another country and said to be outside the jurisdiction of US courts. This has been the view taken in a series of US lower court decisions.
- 26 CBC News Indepth, ‘Guantanamo Bay’, March 2003.
- 27 ‘Revealed: the nationalities of Guantanamo’, *UPI*, 4 February 2004.
- 28 See, for example, *AAP*, ‘U.S. setting up tribunals amid criticism two years after first prisoners reached Guantanamo’, 11 January 2004.
- 29 ‘Revealed: the nationalities of Guantanamo’, *UPI*, 4 February 2004.
- 30 ‘US charges first Guantanamo captives’, *Independent*, 25 February 2004.
- 31 ‘US transfers 7 Russian detainees’, *Reuters*, 1 March 2004.
- 32 ‘Guantanamo detainees’ evidence may be unusable’ *Independent*, 29 February 2004.
- 33 ‘US charges first Guantanamo captives’, *Independent*, 25 February 2004.
- 34 ‘US transfers Guantanamo prisoner to Denmark’, *Reuters*, 25 February 2004.
- 35 Attorney-General, *Press Release*, ‘Capture of Australian by Northern Alliance’, 12 December 2001.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- 36 *ibid.*
- 37 Trudy Dunn, 'Interview with Terry Hicks', 5 February 2002 at: <http://www.fairgofordavid.org/htmlfiles/documents/interview.htm>
- 38 Attorney-General, *Press Release*, 'Capture of Australian by Northern Alliance', 12 December 2001.
- 39 Senate Foreign Affairs, Defence and Trade Legislation Committee, Answers to Questions on Notice, Department of Foreign Affairs and Trade, Budget Estimates 2002-2003; June 2002.
- 40 Center for Constitutional Rights, 'Habib v. Bush', Synopsis.
- 41 *ibid.*
- 42 Minister for Foreign Affairs, *Press Release*, 'Question and answer session following address to the National Press Club', 26 November 2003; Attorney-General, *Press Release*, 'Transcript of doorstep interview', 16 January 2004.
- 43 Attorney-General, *Press Release*, 'Capture of Australian by Northern Alliance', 12 December 2001.
- 44 Stephen Kenny, 'The Hicks trial', paper delivered at the National Forum on the War on Terrorism and the Rule of Law, NSW Parliament House, 10 November 2003, p. 1.
- 45 'Australian man accused of al-Qaeda training', *AM*, 19 April 2002.
- 46 *ibid.*
- 47 Attorney-General, *Press Release*, 'Labor still wrong over terrorism suspects', 24 February 2004; Attorney-General, *Press Release*, 'Transcript of doorstep interview', 16 January 2004.
- 48 *ibid.*
- 49 See, for example, Nicola Roxon MP, 'Transcript of interview, ABC television. Hicks and Habib', *Press Release*, 22 February 2004. However, the Greens have said they would oppose retrospective criminal laws and the Government appears to have dismissed the suggestion. See, for example, Senator Bob Brown, 'Greens will oppose retrospective laws for Hicks and Habib', *Media Release*, 21 February 2004. The Democrats said that retrospective laws would need careful consideration—see Senator Brian Grieg, 'Precedent set for Hicks' and Habib's return', *Media Release*, 20 February 2004.
- 50 The Center for Constitutional Rights 'is a non-profit legal and educational organization dedicated to protecting and advancing the rights guaranteed by the U.S. Constitution and the Universal Declaration of Human Rights.' See: http://www.ccr-ny.org/v2/about/mission_vision.asp
- 51 For more details see: http://www.ccr-ny.org/v2/legal/september_11th/september_11th.asp
- 52 *Odah v. United States*, Brief of the Military Attorneys Assigned to the Defense in the Office of Military Commissions as Amicus Curiae in Support of Neither Party, 14 January 2004. Major Mori has been generally critical of the Military Commission process. However, the Commonwealth Attorney-General has remarked, '... [Major Mori] is giving Mr Hicks the best defence that he can, and one of the ways in which defence lawyers often put their case on behalf of their client is to advocate about the nature of the system which is dealing with them.'

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- I mean, I wouldn't be surprised about that. He is Mr Hicks' lawyer, he's been appointed to give him a vigorous defence'. See *AM*, 'Attorney-General rejects criticisms of Major Michael Mori, the military defence lawyer for Guantanamo Bay detainee, David Hicks', 22 January 2004.
- 53 Attorney-General, Second Reading Speech, International Transfer of Prisoners Amendment Bill 2004, House of Representatives, *Debates*, 19 February 2004, p. 24851.
- 54 Copies of these instruments can be found at:
<http://www.dtic.mil/whs/directives/corres/mco.htm>
- 55 Minister for Foreign Affairs & Attorney-General, 'Delegation concludes successful talks on David Hicks', *Joint News Release*, 24 July 2003.
- 56 Attorney-General & Minister for Foreign Affairs, 'Government accepts military commissions for Guantanamo detainees', *Joint News Release*, 27 November 2003.
- 57 Human Rights Watch [Briefing Paper on US Military Commissions](#).
- 58 Attorney-General, House of Representatives, *Debates*, 25 November 2003, p. 22629.
- 59 *ibid.*
- 60 'Changes to bring terror pair home', *Canberra Times*, 18 February 2004.
- 61 'Law Council supports changes to bring Hicks and Habib home', *Media Release*, 19 February 2004.
- 62 *ibid.*
- 63 Explanatory Memorandum, p. 2.
- 64 *ibid.*
- 65 See clause 2.
- 66 Explanatory Memorandum, p. 2.
- 67 Attorney-General, Second Reading Speech, International Transfer of Prisoners Amendment Bill 2004, House of Representatives, *Debates*, 19 February 2004, p. 24851.
- 68 Tony Blackshield & George Williams, *Australian Constitutional Law and Theory: Materials and Commentary*, 3rd ed, 2002, p. 1296.
- 69 That is, the resulting detention is not involuntary.
- 70 Section 6, Principal Act.
- 71 See subsection 15(3), Principal Act.
- 72 Section 45, Principal Act.
- 73 See section 49, Principal Act in the context of there being no dual criminality in a particular case.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.