

**CRIMINAL LAWYERS ASSOCIATION OF
THE
NORTHERN TERRITORY**

***Prisoner Transfers Law in
Australia***

by

***Tom Percy QC
Western Australia***

And

***A J Papamatheos
Western Australia***

10th Biennial Conference

Bali Hyatt Hotel, Sanur Beach, Bali
Saturday 2 July – Friday 8 July 2005

Prisoner Transfers Law in Australia*

T F Percy QC[†] and A J Papamatheos^{††}

This paper outlines the law surrounding transfer of prisoners, interstate and internationally, including a number of recent developments. The rationale for transferring prisoners is explained and a number of issues regarding prisoner transfers are canvassed for development in this branch of penology. These include the introduction of uniform prisoner transfer laws and an inherent court power to order transfers.

1. Introduction

Australia is a nation with its origins in prisoner transfers. From the early eighteenth century, the British authorities had to find new places to store the overflow of the heavily burdened English penal system. The colonies provided a perfect solution. Prisoner transfers were conducted as a matter of convenience and as a deterrent punishment for those considering committing an offence in England.

Almost two centuries on the Australian legal system makes specific provision for prisoner transfers and has established an elaborate regime for the transfer of prisoners being held interstate and internationally. Having introduced the subject matter in part 1, this paper will look at the regimes for prisoner transfers in the subsequent part.

Part 3 looks at the rationale for prisoner transfers in modern times. Just as prisoner transfers are less common than in colonial times, the motivation for such have changed. This is followed by a canvassing of special issues related to prisoner transfers in part 4, including the creation of uniform prisoner transfer laws and the inherent powers of courts to order transfers.

2. An overview of Prisoner Transfers in Australia

The Federal Parliament relies on a number of bases of legislative powers contained in Commonwealth Constitution to enact prisoner transfer laws internationally and with respect to offenders against federal law.¹ While the state legislatures are empowered to make such laws by the 'undefined residue of legislative power which remains after full effect is given to the provisions of the Constitution establishing the Commonwealth'.²

* This paper was presented at the 19th Biennial LawAsia Convention (20-24 March 2005) at the forum on Criminal Law and the 10th Biennial Conference of the Criminal Lawyers Association of the Northern Territory, (2-8 July 2005).

[†] Albert Wolff Chambers, Perth, Western Australia.

^{††} Final Year Student-at-law, University of Western Australia.

¹ Commonwealth Constitution, s 120 (federal offenders and their imprisonment), s 51 (xix) (aliens and transfer thereof), s 51 (xxiv) (execution of criminal processes) and s 51 (xxix) (external affairs justifying international transfers).

² *Re Richard Foreman and Sons Pty Ltd; Uther v FCT* (1947) 74 CLR 508 per Dixon J. That is 'residual powers': *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers' Case)* (1920) 28 CLR 129 at 150 per Knox CJ, Isaacs, Rich and Starke JJ.

Inter-state Prisoner Transfers

In the early 1980s, the Federal and State Governments came to an agreement to implement a single system for the handling of prisoners on a national scale. Uniform legislation was enacted.³ In *R v Maiorana* Miles CJ summarised the history of the interstate prisoner transfer system:⁴

Because the criminal justice systems and the penal systems in the individual States and Territories are confined within their territorial borders, it has been held by the Court of Criminal Appeal (NSW) that a New South Wales court could not order a prison sentence to commence at the expiration of a sentence imposed by a court in this Territory: Longford (1970) 71 SR (NSW) 288. Since that time the position has been altered by the Transfer of Prisoners Act 1983 (Cth) and supplementary legislation in the Australian States.

The legislation not only makes provision for transfer of serving prisoners from one State or Territory to another for being tried or sentenced,⁵ but also for their welfare⁶ and national security⁷ purposes. In the process of conducting such transfers, there has always been a concern for not disadvantaging the prisoner. The purpose of the regime was explained by Hope JA:⁸

The obvious purpose of all these Acts, and in particular, of the New South Wales Act, is to make provision for the transfer of prisoners from one participating State to another State, and it does so on terms that they are neither advantaged or disadvantaged by such a transfer...and its clear purpose is that transferred prisoners will stand in the same position after transfer as they stood before transfer in respect of both sentences and minimum term.

It is worthwhile looking at the basic operation of the statutes for some of the more popular bases for transfers of prisoners. The practice (We have used the Western Australian legislation as the basis of our observations, it being broadly similar to the comparative legislation in the other states) for seeking transfer of a prisoner for the purpose of being dealt with by the courts of another state is generally as follows:

³ *Transfer of Prisoners Act 1983 (Cth); Prisoners (Interstate Transfer) Act 1993 (ACT); Prisoners (Interstate Transfer) Act 1982 (NSW); Prisoners (Interstate Transfer) Act 1983 (NT); Prisoners (Interstate Transfer) Act 1982 (Qld); Prisoners (Interstate Transfer) Act 1982 (SA); Prisoners (Interstate Transfer) Act 1983 (Vic); Prisoners (Interstate Transfer) Act 1983 (WA); Prisoners (Interstate Transfer) Act 1982 (Tas).*

⁴ *R v Maiorana* (1986) 27 A Crim R 334 at 336.

⁵ *Transfer of Prisoners Act 1983 (Cth)*, ss 8-9, 12; *Prisoners (Interstate Transfer) Act 1983 (WA)*, Part III. For space purposes, only the Western Australian legislation is cited. But the legislation is largely uniform.

⁶ *Transfer of Prisoners Act 1983 (Cth)*, s 6; *Prisoners (Interstate Transfer) Act 1983 (WA)*, Part II.

⁷ *Transfer of Prisoners Act 1983 (Cth)*, s 16B. This provision was amended by the *Anti-terrorism Act (No 2) 2004 (Cth)* and attracted some criticism: Senate Constitutional and Legal Affairs Committee, The Australian Senate, *Inquiry into the provisions of the Anti-Terrorism Bill (No 2) 2004* (2004) 3.122-3.145.

⁸ *Birmingham v Corrective Services Commission of New South Wales* (1988) 15 NSWLR 292 at 298; (1988) 38 A Crim R 412. See also *Brincat v McCall, Director General, Ministry of Justice, WA* (1996) 89 A Crim R 445 at 446 per Wallwork J and *Ryan v Attorney-General (Vic)* [1998] 3 VR 670 at 675; (1997) 91 A Crim R 428 per Ormiston JA.

1. A warrant must be issued in accordance with the receiving state's laws⁹ for the arrest of the prisoner held elsewhere. Alternatively, a request can be made by the prisoner for transfer,¹⁰ with a form prescribed in the regulations.¹¹
2. The Attorney General of the transferring state can consent to or refuse the application,¹² and may have regard to a report by the minister relating to the prisoner and a prisoner's submission.¹³
3. An application will be made to an inferior court for issue of the order of transfer.¹⁴
4. The order will¹⁵ be made by an inferior court of the transferring state if it is satisfied of the fulfillment of the statutory consent requirements.¹⁶ The order for transfer will be in the form prescribed by the regulations.¹⁷ But the court will refuse to grant the orders if they are, in the words of the statute, 'harsh or oppressive'.¹⁸

For prisoners to be transferred on welfare grounds, the process can be summarised as:

1. A request is made by the prisoner¹⁹ in the form stipulated by regulations.²⁰
2. The Minister makes a decision that the transfer should occur,²¹ in line with the procedure laid down in the regulations.²²
3. The Minister requests the transfer of the other state, giving necessary evidence.²³
4. Once consent is given by the minister of the receiving state, the Minister may order the transfer of the prisoner,²⁴ in compliance with the regulations.²⁵

The processes above have described the popular methods of transfer to other states. It should be noted that following such extensive procedures, are provisions regarding receipt of prisoners and the receiving jurisdiction's minister's powers and duties with regard to receipt.

⁹ *Prisoners (Interstate Transfer) Act 1983* (WA), s 10(1)(a).

¹⁰ *Prisoners (Interstate Transfer) Act 1983* (WA), s 10(1)(b).

¹¹ *Prisoners (Interstate Transfer) Regulations 1984* (WA), r 13 & Form 3.

¹² *Prisoners (Interstate Transfer) Act 1983* (WA), s 10(1).

¹³ *Prisoners (Interstate Transfer) Regulations 1984* (WA), r 12.

¹⁴ *Prisoners (Interstate Transfer) Regulations 1984* (WA), r 15.

¹⁵ There is no discretion to refuse: *Frugtniet v Attorney-General of New South Wales* (1997) 41 NSWLR 588; (1997) 103 A Crim R 1.

¹⁶ *Prisoners (Interstate Transfer) Act 1983* (WA), s 12(1).

¹⁷ *Prisoners (Interstate Transfer) Regulations 1984* (WA), r 17.

¹⁸ See *Prisoners (Interstate Transfer) Act 1983* (WA), ss 13 & 14.

¹⁹ *Prisoners (Interstate Transfer) Act 1983* (WA), s 5(1)(a).

²⁰ *Prisoners (Interstate Transfer) Regulations 1984* (WA), r 5 & Form 1.

²¹ *Prisoners (Interstate Transfer) Act 1983* (WA), s 5(1)(b).

²² *Prisoners (Interstate Transfer) Regulations 1984* (WA), rr 6-8.

²³ *Prisoners (Interstate Transfer) Act 1983* (WA), s 5(1)(c).

²⁴ *Prisoners (Interstate Transfer) Act 1983* (WA), s 5(2).

²⁵ *Prisoners (Interstate Transfer) Regulations 1984* (WA), r 10 & Form 2.

It should also be noted that similar extensive procedures are in the statutes for transfer of 'joint prisoners'²⁶, Commonwealth prisoners²⁷, transfer back of prisoners after being transferred for some initial purpose²⁸ and transfer on national security grounds by the Commonwealth Attorney General.²⁹

Other than being a prisoner, having one of the statutory bases for the transfer and fulfilling those requirements, there is no other qualifying criterion for prisoners seeking transfer. There are no requirements as to citizenship or residency, payment of transfer costs, family in the receiving jurisdiction or the like. And while applications are normally initiated by attorneys-general and prisoners, one rare occurrence has been the recommendation by a Supreme Court that the prisoner be transferred, if possible, under the legislation at the end of a sentencing appeal.³⁰

Various decisions in the transfer process are made by relevant ministers.³¹ Joint prisoners, being those guilty of Commonwealth and State offences are dealt with by both relevant ministers. Some decisions and conduct can be subjected to judicial review under the prisoner transfer legislation. Decisions for transfer on welfare grounds are not reviewable, but those for transfer for trial are.³² The determination of 'harshness or oppressiveness' of the latter type can be reviewed on appeal.

One attempt has been made to prevent the transfer order on the grounds that there will be an abuse of process as the accused is not 'to stand trial' straight away. The New South Wales Supreme Court, held that 'to stand trial' was a generic term including steps proceeding the trial, including the taking of witness statements, service of indictments and the like.³³ Other similar challenges have been made, but are usually unsuccessful.³⁴ An attempt at a collateral attack on transfer orders by showing the invalidity of the arrest warrant which the other state has issued has also failed.³⁵

At the state and territory level, in the absence of legislative prohibition, the auxiliary and inherent jurisdictions of Australian courts would also permit judicial review of administrative action for prisoner transfer decisions. In *Brincat v McCall, Director General, Ministry of Justice, WA* (1996) 89 A Crim R 445, Wallwork J reviewed a decision of the Ministry of Justice with regard to remissions of a transferred prisoner and did not find himself prohibited by statute from such a review. Later, in *Attorney-General for the*

²⁶ Those convicted of both Federal and State offences are dealt with by state legislation.

²⁷ *Transfer of Prisoners Act 1983* (Cth), Part II (welfare grounds) and Part III (transfer for trial).

²⁸ *Prisoners (Interstate Transfer) Act 1983* (WA), Part IV.

²⁹ *Transfer of Prisoners Act 1983* (Cth), Part IV.

³⁰ *Regina v Shannon* [2002] NSWCCA 115 at [19].

³¹ See legislation above, n 3.

³² With regard to transfer for trial: *Prisoners (Interstate Transfer) Act 1983* (WA), ss 13 & 14. But review of decisions to transfer or not transfer on welfare grounds is not permissible: *Prisoners (Interstate Transfer) Act 1983* (WA), s 5(6).

³³ *David John Muir v Commonwealth Director of Public Prosecutions* [2004] NSWSC 983

³⁴ See *Brincat v R* (1994) 72 A Crim R 549; *Ryan v Attorney-General (Vic)* [1998] 3 VR 670 at 675 per Ormiston JA; *Bailey v Attorney-General* [1998] 4 VR 523; (1998) 101 A Crim R 133.

³⁵ *Frugtniet v Attorney-General of New South Wales* (1997) 41 NSWLR 588.

Australian Capital Territory v Heiss (2002) 116 FCR 128; (2002) 128 A Crim R 78 the Full Federal Court took no issue with the Supreme Court of the ACT applying the *Administrative Decisions (Judicial Review) Act 1989* (ACT) to review the Attorney's decision.

At the Commonwealth level, judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) is expressly excluded.³⁶ This would deny any review of the Commonwealth Attorney General's decisions with regard to federal prisoners or those to be transferred on national security grounds. It would seem also that the review of decisions could not be undertaken by ombudsmen in most jurisdictions as ministers who are exempt from review usually make the transfer decisions.³⁷

What sentencing regime applies to the prisoner transferred interstate?

In transferring a prisoner to an interstate prison, the legislative regime contemplates the transfer of sentences as they stand. The statutes include means by which additional sentences can be appropriately imposed in the event that a prisoner stands to be tried or sentenced for additional crimes in the transferee state or territory. The relevant sections for transfer of sentence are the most litigated aspect of prisoner transfers law, as prisoners attempt to better their position by receiving a net reduction in time to be served.

The legislation deems the sentence and any corresponding orders of the transferring jurisdiction to be imposed by the court of the transferee jurisdiction.³⁸ The sentence transferred is not, by itself, for the judicial interference of the receiving state.³⁹ The transferred sentence can be considered in re-sentencing the prisoner by the receiving state, if the need so arises,⁴⁰ and failure to consider re-sentencing in line with the transfer legislation will ground appellate review.⁴¹

A minimum sentence is a period before which a prisoner is eligible for conditional release.⁴² Such terms are capable of transferal with prisoners under the legislation if imposed by the court of the transferee jurisdiction.⁴³ Minimum terms imposed by courts ordinarily, and by courts following requirements as laid down in penal statutes, will be recognised.⁴⁴ Sentences commuted by operation of law, as an executive adjustment of sentence are also recognised. For example, in *Censori v Holland* [1993] 1 VR 509 a commutation of the death penalty to

³⁶ Section 3, Schedule 1(xb) and (xc).

³⁷ As decisions to transfer are made by the 'minister': *Ombudsman Act 1976* (Cth), s 5(2); *Ombudsman Act 1989* (ACT), s 5(2)(a); *Ombudsman Act 1974* (NSW), s 12(1)(a); *Ombudsman Act 1978* (Tas), s 12(5)(a); *Parliamentary Commissioner Act 1971* (WA), s 14(3).

³⁸ *Prisoners (Interstate Transfer) Act 1983* (WA), s 25. See also *R v Ditroia* (1990) 54 SASR 13 at 14; (1990) 48 A Crim R 204; *Morey v R* (1993) 65 A Crim R 145 at 151-152; *R v Jensen* (1996) 87 A Crim R 241 at 244. This is giving 'full faith and credit' to laws of other states: Commonwealth Constitution, s 118; *Censori v Holland* [1993] 1 VR 509.

³⁹ *Porter v R* [1990] VR 897.

⁴⁰ For example: *Burke v R* [1995] 2 Qd R 171; (1994) 73 A Crim R 443.

⁴¹ *MacDonald v R* (1990) 52 A Crim R 349.

⁴² See generally *Leeth v Commonwealth of Australia* (1992) 174 CLR 455; (1992) 61 A Crim R 85.

⁴³ *Prisoners (Interstate Transfer) Act 1983* (WA), s 25(1).

⁴⁴ *Abdi v Release on Licence Board* (1987) 10 NSWLR 294; (1987) 31 A Crim R 436.

life imprisonment, by operation of a statute, was still deemed to be a sentence imposed by a court.

Without going into detail, prisoners transferred are (where applicable) entitled to remissions of sentence.⁴⁵ A remission is the reduction of a sentence by administrative action after the sentence has been imposed by a court. A regime exists for the calculation of remissions and the transferability of such when prisoners are moved.⁴⁶ As Smart J commented, with regards to recognising remissions, in *Coyne v Acting Director-General of Corrective Services* (1988) 37 A Crim R 279 at 282:

It would hardly be in the interests of the welfare of the prisoner for him to have to spend longer in gaol as a result of the transfer. Amongst other things, it may make him bitter and harder to rehabilitate.

In the event that a prisoner does not take the benefit of remissions and has been subject to a non-parole period and is transferred, the court of a transferee state in imposing additional sentence, can take such losses into account.⁴⁷ The time spent in custody prior to the transfer of the prisoner for trial for further offences can often be considered in the latter sentencing hearing. It comes within the realm of current sentences being considered as mitigating circumstances for sentencing of offences committed earlier.⁴⁸

There is extensive provision made for the security arrangements surrounding prisoner transfers.⁴⁹ The prisoner will also be accompanied by information about him and his sentence for the benefit of the receiving state.⁵⁰ The effect of an escape from custody on sentence is also dealt with by statute.⁵¹

But an escape can be quite problematic for a prisoner in New South Wales. In two cases,⁵² the prisoner escaped from New South Wales, fled to the another state where he committed other crimes, was arrested and tried and convicted for those offences. He has been imprisoned in the other state and transferred back to New South Wales to serve out all sentences. In both cases, they have argued that the time he spent in the other state's prison could be used to show he had been 'recaptured' for the purposes of the New South Wales penal laws. This would lower his total sentence to be served. The argument failed as the statute was not presumed to have extraterritorial effect and 'recaptured' in the specific context pertained to New South Wales offences, not completely separate offences from the other state.

⁴⁵ *Brincat v McCall, Director General, Ministry of Justice, WA* (1996) 89 A Crim R 445 at 447-449 per Wallwork J.

⁴⁶ *Prisoners (Interstate Transfer) Act 1983* (WA), s 26.

⁴⁷ *R v Maiorana* (1986) 27 A Crim R 334; *Cook v R* [1996] 2 VR 658; (1996) 86 A Crim R 36.

⁴⁸ *Mill v R* (1988) 166 CLR 59 at 64; (1988) 36 A Crim R 468.

⁴⁹ *Prisoners (Interstate Transfer) Act 1983* (WA), ss 29-33.

⁵⁰ *Prisoners (Interstate Transfer) Act 1983* (WA), s 24.

⁵¹ *Prisoners (Interstate Transfer) Act 1983* (WA), ss 30, 31.

⁵² *Langford v Commissioner of Corrective Services* (1993) 31 NSWLR 662; (1993) 68 A Crim R 113 and *Carrion v R* (1993) 69 A Crim R 230.

International Prisoner Transfers

The desire for the repatriation of Australians serving foreign prison sentences had existed for some time. In 1992, the Australian Institute of Criminology issued a paper about the number of Australians serving foreign sentences, the need to have them repatriated, how other nations conduct such repatriations and a recommendation for further investigation.⁵³

A complementary system of uniform Federal⁵⁴, State⁵⁵ and Territory⁵⁶ legislation has recently been set up for the transfer of prisoners internationally.⁵⁷ The need for complementary State and Territory legislation arises from the non-existence of Commonwealth prisons, the requirement of housing incoming prisoners in State and Territory prisons and the requirement outgoing prisoners will need to be released from State and Territory prisons.⁵⁸ That is, to permit the sending abroad those prisoners held domestically and to repatriate Australians held in foreign custody.

It has been labeled a 'consent based system', in that consent is required of all parties involved prior to the making of a transfer order. The prisoner, the transferee nation and the receiving nation all must consent before a transfer will be made.⁵⁹ An agreement must exist between Australia and the receiving or transferring nation before a transfer can be conducted.

Those nations with which Australia has agreements to transfer prisoners are listed in the regulations.⁶⁰ Additionally, Part V of the Commonwealth legislation permits transfer of persons convicted of offences in the War Tribunals for Rwanda and Yugoslavia may also be transferred to Australia under the new legislation. But it does not seem that prisoners of the new International Criminal Court can be transferred to Australia.⁶¹

Under the *International Transfer Of Prisoners Act 1997* (Cth), for a transfer from Australia the procedure is essentially as follows:

⁵³ Australian Institute of Criminology, *The International Transfer of Prisoners*, Trends & Issues in Crime and Criminal Justice Paper No. 38 (July 1992).

⁵⁴ *International Transfer Of Prisoners Act 1997* (Cth).

⁵⁵ *International Transfer Of Prisoners (New South Wales) Act 1997* (NSW); *Prisoners International Transfer (Queensland) Act 1997* (Qld); *International Transfer Of Prisoners (South Australia) Act 1998* (SA); *International Transfer Of Prisoners (Tasmania) Act 1997* (Tas); *International Transfer Of Prisoners (Victoria) Act 1998* (Vic); *Prisoners (International Transfer) Act 2000* (WA).

⁵⁶ *Prisoners (International Transfer) Act 1999* (ACT); *International Transfer Of Prisoners (Northern Territory) Act 2000* (NT).

⁵⁷ The first prisoner was recently returned: Senator The Hon Chris Ellison, Minister for Justice and Customs & The Hon Jim McGinty MLA, Attorney-General (WA), 'First Australian Prisoner Returning Home to Serve out Sentence' (Joint Press Release, 24 April 2003).

⁵⁸ Queensland, *Explanatory Notes to Prisoners International Transfer (Queensland) Bill 1997*, Parliamentary Paper (1997) page 1.

⁵⁹ This is considered to be standard practice for prisoner transfer regimes in Commonwealth nations: Commonwealth Secretariat, *London Scheme transfer of convicted offenders*, Commonwealth Secretary-General <<http://www.thecommonwealth.org/Templates/Internal.asp?NodeID=38061>> at 21 February 2005.

⁶⁰ *International Transfer Of Prisoners (Transfer Of Sentenced Persons Convention) Regulations 2002* (Cth).

⁶¹ The definition of 'Tribunal' is limited: *International Transfer Of Prisoners Act 1997* (Cth), s 4.

1. The initiation of the process for transfer is by application of the prisoner,⁶² by use of specific forms contained in the regulations.⁶³
2. There will be preliminary consideration of the application. The Commonwealth and State Attorneys general will consult on the matter and have regard to anything they consider relevant and provisional opinions may be sought on the transfer.⁶⁴
3. A decision is then made by the Attorney General to make a formal request and the consent of all parties must be obtained.⁶⁵
4. The Attorney General must give the prisoner notice of the transfer and proposals as to the sentence.⁶⁶
5. The prisoner can consult with the Attorney General as to whether they accept the terms proposed for the transfer.⁶⁷ The Attorney General will decide, additionally, whether to consent on the terms.⁶⁸
6. Once the terms of transfer have been consented to by all parties, a warrant for transfer is issued,⁶⁹ in compliance with the forms in the regulations.⁷⁰

For a transfer to Australia from a foreign place the following processes are observed:

1. A request is made by the transfer country.⁷¹
2. The Attorney General will request the transfer country to provide information about extradition details of the prisoner or any other information deemed relevant by the Attorney.⁷²
3. The Attorney General will determine, in accordance with the statute, how the foreign sentence is to be transferred and advise the transferring nation of such methods to seek their consent.⁷³
4. The minister of the state or territory to receive the prisoner must be advised as to the incoming prisoner and must consent to such a transfer to their state.⁷⁴

⁶² *International Transfer Of Prisoners Act 1997 (Cth)*, s 16.

⁶³ *International Transfer of Prisoners Regulations 2002 (Cth)*, r 5 and Forms 1 & 3.

⁶⁴ *International Transfer Of Prisoners Act 1997 (Cth)*, s 17.

⁶⁵ *International Transfer Of Prisoners Act 1997 (Cth)*, s 18.

⁶⁶ *International Transfer Of Prisoners Act 1997 (Cth)*, s 20(1).

⁶⁷ *International Transfer Of Prisoners Act 1997 (Cth)*, s 20(2).

⁶⁸ *International Transfer Of Prisoners Act 1997 (Cth)*, s 20(3).

⁶⁹ *International Transfer Of Prisoners Act 1997 (Cth)*, s 21.

⁷⁰ *International Transfer of Prisoners Regulations 2002 (Cth)*, r 7 and Forms 5 & 6.

⁷¹ *International Transfer Of Prisoners Act 1997 (Cth)*, s 24.

⁷² *International Transfer Of Prisoners Act 1997 (Cth)*, s 25.

⁷³ *International Transfer Of Prisoners Act 1997 (Cth)*, s 26.

⁷⁴ *International Transfer Of Prisoners Act 1997 (Cth)*, s 27.

5. The Attorney General will notify the transferring nation of all necessary consents and the terms of the transfer.⁷⁵ The Attorney General can consent to the request if requirements in section 10 are fulfilled.⁷⁶
6. A warrant will be issued, in accordance with regulations,⁷⁷ by the Attorney General for the transfer to Australia.⁷⁸

There are some criteria a prisoner must fulfill to be eligible for transfer to or from Australia. Those seeking to be transferred overseas from Australia need to show they are a national of the receiving country or have community ties with that country,⁷⁹ while those seeking to be transferred to Australia must be Australian citizens or be permitted under the *Migration Act 1958* (Cth) to be received and have community ties with Australia.⁸⁰

As the legislation is fairly new, it has not been litigated. Another reason may be that no appeal lies against a foreign sentence in Australia and there is no statutory provision to review the Attorney General's decision to enforce or alter such a sentence on receipt of the prisoner in Australia.⁸¹ This seems to be an oppressive element of the legislation, although review by way of a prerogative writ is always a possibility.

The sentence to be served by a prisoner transferred overseas

Unlike interstate transfers, international transfers are not always concerned with giving full recognition to a foreign sentence. Part 6 of the legislation deals with sentence transfers from overseas. Section 42 permits the Attorney General to direct either a 'continued enforcement method' or 'converted enforcement method' for a sentence, and pursuant to section 46 a prisoner received becomes a federal prisoner for the purposes of Australian law. Sections 43 and 44 provide a system to receive and alter the sentence from the transferring nation, while an additional power is granted to the Attorney General under section 49 to grant amnesties, commutations or pardons available in Australia for the same offence.

Lastly, Bongiorno J has recently observed that while there may exist a strong case in favour of transferring a prisoner internationally, such a consideration has no impact on the length of a sentence when being imposed.⁸² This is consistent with the principle that the possibility of executive action does not affect current sentencing.⁸³

⁷⁵ *International Transfer Of Prisoners Act 1997* (Cth), s 28.

⁷⁶ *International Transfer Of Prisoners Act 1997* (Cth), s 24.

⁷⁷ *International Transfer of Prisoners Regulations 2002* (Cth), r 9 and Forms 8 & 9.

⁷⁸ *International Transfer Of Prisoners Act 1997* (Cth), ss 29, 30.

⁷⁹ *International Transfer Of Prisoners Act 1997* (Cth), s 12.

⁸⁰ *International Transfer Of Prisoners Act 1997* (Cth), s 13.

⁸¹ *International Transfer Of Prisoners Act 1997* (Cth), s 45.

⁸² *R v Dorothy Marie Skura* [2003] VSC 290 at [25] (Reversed on other grounds: *R v Skura* [2004] VSCA 53).

⁸³ *Biner v R* [1990] VR 563 at 570; (1989) 42 A Crim R 22; *R v Shrestha* (1991) 173 CLR 48; (1991) 54 A Crim R 217; *Kogelbauer v R* (1992) 65 A Crim R 357.

4. The rationale for prison transfers

The statutory reasons: Welfare and Convenience

Prisoners will be transferred on a number of grounds already encompassed in the relevant statutes. The reasons for transfer are essentially common sense.

Security

Internal security has played some part in the development of interstate transfers laws recently. The amendments to the *Transfer of Prisoners Act 1983* (Cth), Part IV effected by the *Anti-terrorism Act (No 2) 2004* (Cth) were said to be necessary on such grounds. They permit the Commonwealth Attorney General to move any prisoners around state and territory prisons on security grounds.

Rehabilitation and Welfare

It would seem that welfare of prisoners is something different from rehabilitation. Rehabilitation is an objective of restoration of some former state of positive being. In legal terms it has been defined as 'the renunciation of wrong doing by an offender and the re-establishment of him as a law abiding citizen'.⁸⁴ Welfare on the other hand is a concern for the health and general wellbeing of the prisoner, irrespective of the crimes they have committed.

How the transfer of a prisoner from one jail to another, be it an interstate or overseas transfer, can rehabilitate a prisoner would seem uncertain. A simple movement between places of incarceration is unlikely to bring about rehabilitation by itself. Without more, rehabilitation does not seem to be a reason for every prisoner transfer. That said, there are circumstances where rehabilitation is recognised as a serious objective of transferal.

In cases where the prisoner is away from his or her family, the law has recognised that a transfer bridging this distance apart would assist rehabilitation. In the Western Australian Court of Criminal Appeal, Malcolm CJ said of one accused:⁸⁵

In my opinion, given that the applicant has no family support available to him in Western Australia, but such support is available to him in New South Wales, it would be highly desirable in the interests of his welfare and rehabilitation if arrangements could be made, as soon as possible, for the applicant to make an application to the Attorney General in his capacity as Minister for Justice for transfer to New South Wales.

The idea that a prisoner should if possible be closer to family and friends during incarceration is reflected in some of the statutory instruments.⁸⁶ This was certainly a factor

⁸⁴ *Vartzokas v Zanker* (1989) 51 SASR 277 at 279; (1989) 44 A Crim R 243 per King CJ.

⁸⁵ *Castagna v The Queen* [2001] WASCA 142 at [18] per Malcolm CJ (Murray and Anderson JJ agreeing).

⁸⁶ For example, in the *Prisoners (Interstate Transfer) Regulations 1984* (WA), regulation 6 requires the prisoner to include information about the location of his family upon requesting a transfer.

recognised by the Federal Parliament in debate for the *International Transfer Of Prisoners Bill 1997 (Cth)*:⁸⁷

It also recognises that the best way to rehabilitate these prisoners is to return them to culturally appropriate and supportive environments, and as far as the general community is concerned surely this is one of the prime considerations we should be concerned about to minimise the prospect that criminals will offend again and that other innocent people will suffer from their actions.

Additionally, there is some evidence from the inquiries into Aboriginal deaths in custody that prisoners closer to their families are less likely to be recidivist offenders. The Royal Commission into the Aboriginal Deaths in Custody made some mention of prisoner transfers. It seems some evidence has emerged of a Western Australian community where the transfer of indigenous prisoners to a detention centre near to their family home lowered recidivism.⁸⁹ Accordingly, recommendation 168 of the Inquiries' findings spoke of all indigenous prisoners being transferred to a centre closest to the home of their family and a right of appeal if a decision is made to transfer an indigenous person away from the home of their family.

Studies from the United States⁹⁰ and the United Kingdom⁹¹ are said to have yielded similar conclusions supporting prisoner transfers ability to rehabilitate inmates.

As has been mentioned above in discussing the recognition of remissions in interstate prisoner transfers, permitting such remissions encourages rehabilitation. Smart J would seem quite correct in asserting that any prisoner transferring interstate that suffers an increase in his sentence would become bitter and harder to rehabilitate. In this sense, an aspect of the prisoner transfer regime does not inhibit rehabilitation.

Lastly, it has been said that access to superior rehabilitation programs is a product of prisoner transfers, in a cross-national sense.⁹² Nations who can not afford to place the resources Australian governments place at the disposal of its penal systems would, for the most part, have rehabilitation programs of lesser quality and effect. The prisoner transfer regime can shift this imbalance.

National Sovereignty & Human Rights

It may be said that international prisoner transfers are largely based on grounds of national sovereignty. Until now, none have asserted that prisoner transfers, especially those

⁸⁷ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 20 March, 1997, 2684 (The Hon Daryl Melham MP).

⁸⁹ Commonwealth of Australia, *Royal Commission Into the Aboriginal Deaths in Custody* (1991) [25.3.3]-[25.3.7].

⁹⁰ Alan Ellis "An Introduction To International Prisoner Transfers Going Home" (1999) 23 *Champion* 32.

⁹¹ Keith Best "The Problems of Prisoner Transfer" (1992) 18(1) *Commonwealth Law Bulletin* 333 at 334 and 337.

⁹² *Ibid.*

repatriating Australians from foreign prisons, have been based on some motivation of 'looking after our own'. It seems to be a hidden reason underlying international prisoner transfers, in the absence of any judicial or legislative comment.

The reform of international prisoner transfer laws has been partly prompted by the concern over two Australians, David Hicks and Mamdouh Habib,⁹³ held in United States' foreign custody following that Nation's campaign in Afghanistan.⁹⁴ This is made particularly evident by the reference to US Military Commissions in the Australian legislation.⁹⁵ The new international transfer regime also permits the repatriation of those indicted in foreign countries for terrorism offences and can be attributed as a response to recent national security issues.

When one reviews the comments of members of the Australian Parliament at the second reading speech for recent amendments to the *International Transfer Of Prisoners Act 1997* (Cth), it is clear to see that national sovereignty issues were an underlying consideration. While condemning the Government of the day for its handling of the two Australian prisoners, some Members of Parliament supported recent amendments to the legislation as at least some kind of measure to remedy the problem of two Australian citizens unable to access a system of criminal justice according to law like that in Australia or the Continental United States:⁹⁶

The need for this bill comes about because a military commission is not a court or tribunal and Guantanamo Bay does not fit easily within the definition of a foreign country. The fact that we need this bill highlights the legal no-man's-land for prisoners at Guantanamo Bay, and it highlights the shameful fact that they will not be tried through any ordinary court process.

In this way, it can be said that the prisoner transfer legislation, alongside a grounding in national sovereignty may safeguard fundamental human rights for Australian citizens.⁹⁷ Not only does international law require the observance of fundamental human rights in a substantive and procedural sense in criminal courts, it also provides, through various treaty obligations, that incarceration of persons is to be conducted according to uniform standards.

⁹³ See AAP, 'Hicks could serve sentence in Australia under new law', *The Age* (Sydney, Australia), February 20 2004, <http://www.theage.com.au/articles/2004/02/19/1077072784627.html>.

⁹⁴ Commonwealth of Australia, *Information, Analysis and Advice for the Parliament: International Transfer of Prisoners Amendment Bill 2004*, Parliamentary Paper Bills Digest No. 102 2003-04 (3 March 2004), pages 5-11. The United States has also been forced to develop its prisoner transfer laws in recent times: John Yoo "Transferring Terrorists" (2004) 79 *Notre Dame L Rev* 1183.

⁹⁵ The US Military Commissions are deemed ordinary domestic courts of the United States of America *International Transfer Of Prisoners Act 1997* (Cth), s 4A.

⁹⁶ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 03 March, 2004, 25717 (The Hon Nicola Roxon MP). But see also similar comments in the Senate: Commonwealth of Australia, *Parliamentary Debates*, Senate, 08 March, 2004, 20932 (Senator Brian Greig); Commonwealth of Australia, *Parliamentary Debates*, Senate, 08 March, 2004, 20936 (Senator Bob Brown).

⁹⁷ The second reading speech for the *International Transfer Of Prisoners Bill 1997* (Cth) involved recognising that there are humanitarian grounds for such transfers, with out elaborating on them: Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 21 November, 1996, 7173 (The Hon Darryl Williams QC, MP).

Transfer between a jurisdiction in breach of these standards and one that is not, provides a human rights basis for the prisoner transfer.

Lesser Reasons: Deterrence, Assistance for Smaller Nations & Costs

In knowing that an accused person may be transferred to another jurisdiction so that they will face punishment for crimes committed in those transferee jurisdictions, there may be some deterrent factor. In a sense, the prisoner transfer legislation would supplement extradition laws in that particular groups of people and the community at large come to realise that they can be made accountable for criminal acts in other jurisdictions even if imprisoned already.

There has also been some concern in the past for smaller nations, which can not afford the expense of an influx of their own citizens currently, incarcerated overseas. Such nations rely on the *non-transfer* of prisoners. In one Commonwealth forum, smaller nations from the Caribbean and Asia-Pacific region saw this concern.⁹⁸ Particularly those on 'drug routes', which would find themselves imprisoning large numbers of foreign nationals caught drug trafficking. But a consent based system of prisoner transfers permits these nations to reject consent for the transfer back of their citizens in foreign jails, but permits them to 'export' prisoners who are wanted in other jurisdictions for separate offences.

The former Federal Attorney General, The Hon Daryl Williams QC, when introducing the *International Transfer Of Prisoners Bill 1997 (Cth)* identified possible savings for Australian states and territories:⁹⁹

It is possible that Australian participation in international prisoner transfers may also result in financial savings for some participating states and territories if there is a net outflow of prisoners.

These savings are also said to exist in lessening the burdens on Australian embassies consulting with prisoners, putting families in contact and generally committing themselves to tedious in consular activities.¹⁰⁰

5. Current issues and Reform Proposals

Inherent powers of Australian Courts to order transfers

It may not be necessary to seek an order for transfer under the relevant legislation. In a recent High Court decision, questions were raised as to whether a court may have an inherent power to compel the delivery of a prisoner. Without the ability to compel the prisoner's attendance, the court's jurisdiction is ousted. This would seem to circumvent the need for any interstate prisoner transfer legislation.

⁹⁸ "Prisoner Repatriation: The Concept Of The Commonwealth Exchange Of Prisoners" (1988) 69(4) *Parliamentarian* 280.

⁹⁹ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 21 November, 1996, 7173 (The Hon Darryl Williams QC, MP).

¹⁰⁰ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 25 March, 1997, 2989 (The Hon Robert McClelland, MP).

McHugh J, in rejecting the applicant's petition to be released from prison and transferred to the High Court to present oral submissions supplementary to his written submissions in *Milat v R* (2004) 205 ALR 338 at [11]:

If the Court has power to make an order bringing a serving prisoner to the Court to present oral argument, it can only arise by necessity when the circumstances are such that to deny the power to do so would thwart the exercise of the jurisdiction of this Court.

Other reasons justified the rejection of the applicant's petition for transfer. But this point stands to be tested further. The decision of Gray J in *Eastman v Minister for Corrective Services* (2004) 181 FLR 447 at 452-3, recognising the *Milat* dictum, highlights a cautious approach to the use of such a power.

A uniform system of prisoner transfers?

With the interstate and international transfer of prisoner regimes currently in place, Australia almost has a completely uniform system of prisoner transfers. The important objective for the national government is to now conclude as many agreements as possible with other nations for the transfer of prisoners internationally. Without the reciprocal transfer agreements, the legislative regime is of little use and so more signatories should be pursued.

Since the inception of the interstate transfer of prisoners regime, some 'grey areas' have arisen. The States and Territories have passed additional legislation to make provision for other sentencing matters like the transfer of parole¹⁰¹. But on the topic of interstate transfer of child offenders, only New South Wales and the ACT have a legislative response.¹⁰² The same can be said of New South Wales recent and stand-alone enactment of laws for the interstate transfer of community based sentences.¹⁰³ In the future, it may be worthwhile for other State and Territory governments to look at adopting such measures themselves.

7. Conclusion

The prisoner transfer regimes in place in Australian law are comprehensive, and for the most part, uniform in effect and application. The system is effective and demonstrates a high degree of cooperation between Commonwealth, State and Territory governments.¹⁰⁴

It has been shown that the basis for prisoner transfers differs as between interstate and international levels. Motivations include welfare, convenience (preparation for trial),

¹⁰¹ *Parole Orders (Transfer) Act 1983* (ACT); *Parole Orders (Transfer) Act 1983* (NSW); *Parole Orders (Transfer) Act 1981* (NT); *Parole Orders (Transfer) Act 1984* (Qld); *Parole Orders (Transfer) Act 1983* (SA); *Parole Orders (Transfer) Act 1983* (Tas); *Parole Orders (Transfer) Act 1983* (Vic); *Parole Orders (Transfer) Act 1984* (WA).

¹⁰² *Children (Interstate Transfer of Offenders) Act 1988* (NSW).

¹⁰³ *Crimes (Interstate Transfer of Community Based Sentences) Act 2004* (NSW). See also *Community Based Sentences (Transfer) Act 2003* (ACT).

¹⁰⁴ At the time of publication, the Australian Law Reform Commission is considering whether there are any problems with the current regime and how they can be addressed: Australian Law Reform Commission, *Sentencing of Federal Offences* (2005) Chapter 4. 'Location of Crime and Punishment'.

national security, rehabilitation, national sovereignty, human rights and lesser motivations of deterrence and the cost to smaller nations. These differing underlying reasons for prisoner transfers are reflected in the grounds upon which prisoners will be transferred.

There is however some work still to be done in the prisoner transfer law. The effect of the legislation enacted over the past decade has been largely beneficial to the interest of the community. The adoption also of statutory instruments servicing child offenders and those with community based sentences is recommended for the states and territories currently without such measures. It may also come time to clarify the precise nature of Australian courts' inherent power to order the transfer of prisoners in particular circumstances.

More than two hundred years after the start of prison transfers, the system is enjoying a resurgence albeit on a somewhat different basis. The volume of traffic from England has slowed somewhat. The prospect, however, of being able to return the favour to the mother country is, even for non Republicans, a tantalizing one indeed.