

1993

LEGISLATIVE ASSEMBLY OF THE AUSTRALIAN CAPITAL TERRITORY

PRISONERS (INTERSTATE TRANSFER) BILL 1993

EXPLANATORY MEMORANDUM

Circulated by the Authority of
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OUTLINE

The Prisoners (Interstate Transfer) Bill 1993 (the Bill) makes provision for the transfer of prisoners to and from the Australian Capital Territory.

Part II of the Bill enables a prisoner to request a transfer to or from the A.C.T. in the interests of his or her welfare. The Bill confers powers to issue an order for a transfer on the Minister responsible for the proposed Act.

Part III of the Bill makes provision for the transfer of prisoners to or from the Territory for the purpose of standing trial in a court.

Part IV of the Bill will provide that, where an interstate prisoner is transferred to the Australian Capital Territory for trial purposes, and the period of sentence he or she becomes liable to serve in the Territory is shorter than the prisoner is to serve outside the Territory, the Minister may return the prisoner to the jurisdiction from where the prisoner was transferred.

Part V of the Bill includes provisions dealing with the effect of an interstate transfer on a prisoner's sentence.

The Bill mirrors the legislation of other jurisdictions dealing with interstate transfer of prisoners and will enable the A.C.T. to participate in the uniform scheme established by that legislation.

FINANCIAL CONSIDERATIONS

There are no financial implications arising from the Bill.

CLAUSE NOTES**PART 1 - PRELIMINARY****Clause 1: Short title**

This clause provides that the proposed Act may be cited as the *Prisoners (Interstate Transfer) Act 1993*.

Clause 2: Commencement

Clause 2 states that the proposed section 1 [clause 1] will commence upon notification in the *Gazette*. However, the remaining provisions will commence on a day or days fixed by the Minister by notice in the *Gazette*. Nevertheless, provisions which are not notified within 6 months of the notification of the proposed Act will commence on the expiration of that period.

Clause 3 Interpretation

This clause defines important terms occurring in the Bill.

Subclause 3(2) provides that where a justice of the peace of a participating State, while not constituting a court, issues a warrant of commitment, the sentence of imprisonment under that warrant is to be taken to have been imposed by a court.

Subclause 3(3) provides that a sentence of imprisonment imposed by, by operation of, any Act or other law of the A.C.T. or a State or a non-participating Territory is to be recognised as a sentence imposed by a court of the A.C.T. or a court of that State or non-participating Territory, as the case may be. ["Non-participating Territory" means an external Territory or the Jervis Bay Territory (subclause 3(1)).

Subclause 3(4) provides that a reference to a person upon whom a sentence of imprisonment has been imposed is not to include a person who has completed serving that sentence.

Subclause 3(5) specifies the types of persons who are to be taken to have completed serving sentences imposed on them.

Clause 4: Sentences being served in NSW under the *Removal of Prisoners (Australian Capital Territory) Act 1968*

This clause provides that a reference to a sentence of imprisonment being served in the Territory includes a reference to a sentence of imprisonment being served in New South Wales under the *Removal of Prisoners (Australian Capital Territory) Act 1968*. This recognises the fact that in practice A.C.T. prisoners are removed to New South Wales prisons under this Act to serve their terms of sentences.

Clause 5: Corresponding courts and interstate laws

This clause empowers the Minister responsible for the proposed Act to declare by Gazette notice, for the purposes of the proposed Act, a law of a State as an interstate law, and a Territory court as a corresponding court in relation to a court of a participating State.

The Minister must not declare a law of a State as an interstate law, unless he or she is satisfied that the law (a) substantially corresponds to the provisions of the proposed Act, and (b) contains provisions that are referred to in the proposed Act as interstate law provisions.

PART II - TRANSFER FOR PRISONER'S WELFARE

Clause 6: Requests for, and orders of, transfer

Clause 6 provides that where the Minister, on receiving a written request from an A.C.T. prisoner for a transfer to another jurisdiction, is satisfied that the transfer would be for the prisoner's welfare, the Minister should request the corresponding Minister of the relevant State to accept the transfer. In the case of a prisoner's request for a transfer to a non-participating Territory, the Minister should request the Commonwealth Attorney-General to consent to the transfer. On receiving the consent of the corresponding Minister or the Commonwealth Attorney-General, as the case may be, the Minister may issue a transfer order.

The same procedure is to be followed in respect of a request by a joint prisoner for a transfer to a participating State [subclauses 6(3) and 6(4)]. However, where the joint prisoner requests for a transfer to a non-participating Territory, the Minister may, on being satisfied that the transfer is for the prisoner's welfare, issue directly (ie. without seeking the Commonwealth Attorney-General's consent) an order for the transfer of the prisoner to that Territory [subclause 6(5)]. [A joint prisoner is a person upon whom both (a) an A.C.T. sentence of imprisonment or an interstate sentence of imprisonment, and (b) a Commonwealth sentence of imprisonment, have been imposed (subclause 3(1)).

Clause 7: Effect of orders under this Part on joint prisoners

This clause limits the operation of the Minister's order under this Part on a joint prisoner in his or her capacity as a Commonwealth prisoner. The order is not to have effect for authorising or requiring to do any act or thing in relation to such a prisoner in his or her capacity as a Commonwealth prisoner, unless and until (a) a corresponding transfer order is made under the *Transfer of Prisoners Act 1983 (Cth)*, or (b) the transfer is otherwise authorised under that Act.

Clause 8: Repeated requests for transfer

This clause provides that the Minister is not obliged to entertain a prisoner's request for transfer within one year after the prisoner made a similar request.

Clause 9: Receipt of request for transfer to the Territory

Clause 9 requires the Minister to consent, or refuse to consent, to a written request for a welfare transfer that he or she may receive under an interstate or the Commonwealth prisoners transfer law, and to notify his or her decision to the corresponding Minister of the relevant participating State or the Commonwealth Attorney-General, as the case may be.

Clause 10: Reports

Clause 10 enables the Minister to inform himself or herself as he or she thinks fit for the purpose of forming an opinion or exercising a discretion in relation to a prisoner's request for a welfare transfer. The Minister may have regard to any report of a parole or prison authority of the Territory or a participating State.

PART III - TRANSFER FOR TRIAL**Clause 11: Request for transfer of prisoner to a participating State**

Clause 11 deals with requests for transfer of an A.C.T. prisoner who is the subject of an arrest warrant issued by a court of another jurisdiction. This request may be made to the A.C.T. Attorney-General by the relevant Attorney-General. A request for transfer may also be made by a prisoner serving a sentence in the A.C.T., who is the subject of such an arrest warrant. Where the Minister receives a transfer request from such a prisoner, the Minister must refer that request to the A.C.T. Attorney-General [subclause 11(3)]. The Minister need not refer to the Attorney-General a request for transfer within one year after a similar request was made. The A.C.T. Attorney-General may consent or refuse to consent to the transfer. The A.C.T. Attorney-General must notify

in writing the relevant Attorney-General or the Minister, as the case may be, of his or her decision [subclause 11(2)].

Clause 12: Necessary consents

This clause specifies that an order for the transfer of a prisoner to stand trial in another jurisdiction is to be issued only if (a) the A.C.T. Attorney-General has consented to the transfer, and (b) the Attorney-General of the relevant jurisdiction has consented to or requested the transfer. A certificate signed by a person holding a prescribed office or position in regard to such a consent or request, is to be the proof of the consent or request, where there is no contrary evidence [subclause 12(2)].

Clause 13: Order for prisoner to be brought before Magistrates Court

Clause 13 empowers the Magistrates Court to issue an order to the gaoler of the prison where a prisoner who is to be transferred is held, to bring the prisoner before the court at the place, date and time specified in the order.

A notice of the order is to be served on the A.C.T. Attorney-General and on the prisoner [subclause 13(2)]. The prisoner may be represented by a legal practitioner, and the Attorney-General may appear or be represented, at the hearing pursuant to the order.

Clause 14: Order of transfer

This clause requires the Magistrates Court to issue an order for a transfer of a prisoner to stand trial in the jurisdiction specified in the certificate under subclause 12(2). However, the court is to refuse to issue such order where it is satisfied that (a) the transfer would be harsh, oppressive or not in the interests of justice to do so; or (b) the charge or complaint against the prisoner in relation to which the prisoner is sought to be transferred is trivial and does not warrant the transfer.

Clause 15: Review of decision of Magistrates Court

Clause 15 enables the prisoner, the A.C.T. Attorney-General; or any other person who has requested or consented to the transfer, to apply to the Supreme Court, within 14 days of the court decision under clause 14, for a review of the decision. They are to be entitled to be present at the review. The prisoner may be represented by a legal practitioner. The Supreme Court may by order direct the gaoler of the relevant prison to bring the prisoner to the place of review. A review is to be by way of rehearing on the evidence given before the Magistrates Court and on any additional evidence [subclause 15(6)]. The Supreme Court may confirm the Magistrates Court decision or quash that decision and substitute a new decision [subclause 15(7)]. In substituting its decision, the Supreme Court may order the prisoner to be transferred to a specified jurisdiction.

Clause 16: Effect of orders under this Part on joint prisoners

This clause limits the operation of the order of the Magistrates Court or the Supreme Court under this Part on a joint prisoner in his or her capacity as a Commonwealth prisoner. The order is not to have effect for authorising or requiring to do any act or thing in relation to such a prisoner in his or her capacity as a Commonwealth prisoner, unless and until (a) a corresponding transfer order is made under the *Transfer of Prisoners Act 1983(Cth)*, or (b) the transfer is otherwise authorised under that Act.

Clause 17: Execution of orders for prisoners to be brought before courts

Clause 17 applies where the Magistrates Court [under subclause 13(1)] or the Supreme Court [under subclause 15(5)] makes an order directing the relevant gaoler to bring the prisoner to a specified place, on a specified date and at a specified time. The gaoler is required to execute the order or cause it to be executed by a prison officer or police officer. The person executing the order is to keep the custody of the prisoner and to return him or her in due course to the original custody.

Clause 18: Request by Attorney-General for transfer of imprisoned person to the Territory

Clause 18 applies where an arrest warrant is issued under the Territory law to arrest a prisoner in a participating State. The A.C.T. Attorney-General is enabled to request the Attorney-General of the relevant participating State in writing for the transfer of the prisoner to the Territory to be dealt with according to law.

Clause 19: Request by imprisoned person for transfer to the Territory

This clause deals with the request made by an interstate prisoner who is the subject of a Territory arrest warrant. The relevant Attorney-General's written consent to the transfer is also required. The A.C.T. Attorney-General may consent or refuse to consent to the transfer and must notify his or her decision to the relevant Attorney-General.

PART IV - TRANSFER BACK TO ORIGINAL STATE OR TERRITORY**Clause 20: Return of prisoner to participating State**

This clause deals with the circumstances in which the Minister is required to transfer back to the original State or non-participating Territory, a prisoner who was transferred to the A.C.T. to stand trial in the A.C.T. Such a prisoner must be transferred to the State or non-participating Territory from which he or she came, in the following circumstances:

- (a) where the prisoner did not become liable to serve any sentence of imprisonment in the Territory; or
- (b) Where the total period of imprisonment which the prisoner is liable to serve in the Territory is shorter than the total period of imprisonment still remaining to be served under a sentence imposed on the prisoner under the law of another jurisdiction.

Clause 21 - Prisoner's request to serve sentence in the Territory

This clause provides that clause 20 (which requires a prisoner to be transferred back to the jurisdiction from which he or she was transferred to the Territory for trial purposes) is not to apply to a prisoner who is permitted by the Minister to serve the prisoner's sentence in the Territory. The Minister is to agree to such a request after the Minister and the relevant Minister of the participating State or the Commonwealth Attorney-General, as the case may be, agree that such a course of action would be in the interests of the welfare of the prisoner.

Clause 22 - Effect of orders under this Part on joint prisoners

This clause limits the operation of the transfer order under this Part on a joint prisoner in his or her capacity as a Commonwealth prisoner. The order is not to have effect for authorising or requiring to do any act or thing in relation to such a prisoner in his or her capacity as a Commonwealth prisoner, unless and until (a) a corresponding transfer order is made under the Commonwealth *Transfer of Prisoners Act 1983*, or (b) the transfer is otherwise authorised under that Act.

PART V - EFFECT OF TRANSFER ORDERS

Clause 23 - Transfer in custody

Clause 23 provides that an order of transfer is to (a) direct the gaoler of the prison where the prisoner is held to deliver the prisoner into an escort's custody, (b) authorise the gaoler to follow that direction, and (c) authorise the escort to have custody of the prisoner for the purpose of conveying the prisoner to the specified prison and into the custody of the gaoler of that prison. An order of transfer under an interstate law, or under the Commonwealth *Transfer of Prisoners Act 1983*, or both, would also be of similar effect. For the purpose of this clause, an escort may be a prison officer, a police officer, or a person appointed by the Minister to be an escort.

Clause 24 - Transfer of sentence with prisoner

Clause 24 states the effect of an A.C.T. sentence of imprisonment when the prisoner is transferred to another jurisdiction. That sentence is to cease to have effect in the A.C.T. However, it is to have effect in the A.C.T. for the following purposes: (a) for the purpose of an appeal against, or review of, a conviction, judgment or sentence of a Territory court; (b) as regards any period of imprisonment the prisoner served in the Territory; or (c) for payment to discharge (or partially discharge) a sentence of default imprisonment imposed by a Territory court.

Clause 25 - Information sent to participating State

This clause lists the documents and information that the Minister is to send to the corresponding Minister of a participating State when a prisoner is transferred to that State. They are: the transfer order, the warrant of commitment or any other authority in relation to the Territory sentence, a report on the prisoner, and details of any variations to the information in the report together with relevant orders or documents.

Subclause 25(2) provides that the report relating to a prisoner is to contain all relevant information and be accompanied by relevant documents, which are likely to assist any court, authority or officer in the relevant State. The report is also to contain details of the prisoner's convictions, sentences and their minimum terms, the period of imprisonment served, entitlement to remissions, and release on probation or parole. The order and documents for the purpose of this clause are to be either originals or certified copies.

Clause 26 - Translated sentences

This clause defines a translated sentence for the purpose of the Bill. The two categories of sentences that are to be treated as translated sentences in the Territory are: an interstate sentence of imprisonment, and a sentence of imprisonment imposed by a court of a participating State and taken to be a translated sentence under an interstate law of another State. Where a sentence is treated as a translated sentence in a State, that sentence is deemed to have been imposed by a court of that State. When a prisoner is transferred to the Territory in terms of an order under an interstate law, both these types of sentences will be taken as translated sentences in the Territory. The translated sentence is to be deemed to have been imposed by a Territory court and a direction or order given by a court of the participating State in relation to when such a sentence should commence is to be given effect to as if it was given by a corresponding Territory court.

Clause 27 - Provisions relating to translated sentences

Clause 27 deals with certain aspects of translated sentences. In relation to such a sentence, the minimum non parole period set by a court of the relevant participating State is to be given effect to in the A.C.T. as if that minimum term was fixed by a Territory court.

Subclause 27(2) provides that any order by a court of the relevant participating State to vary or quash the translated sentence or the minimum term of imprisonment will be treated as if the order was made by a Territory court. Also, it provides that any action by a person or authority in that State, by reason of which the minimum term or sentence is varied or ceases to have effect, will be treated as an action by an appropriate person or authority in the Territory.

Subclause 27(3) provides that the Act does not permit in the Territory any appeal against or review of any conviction or related orders imposed or made by a court of a participating State.

Subclause 27(4) provides that where a translated sentence is an indeterminate sentence, which requires a prisoner to be detained during the pleasure of the Queen or of the Governor of a participating State, the prisoner must be detained during the pleasure of the Governor-General.

Subclause 27(5) provides that the Executive may grant pardon to a person subject to a translated sentence, or the Governor-General may exercise the royal prerogative of mercy in favour of that person, as if the person was convicted in a Territory court or convicted within the Territory before a judge or magistrate of the Territory. The Executive grants pardon under section 557 of the *Crimes Act 1900*.

In exercising their powers under subclause 27(5), the Executive or the Governor-General, as the case may be, will give effect to any indication the Governor of the participating State has given as to what he or she may have done had the person not been transferred to the Territory [subclause 27(6)].

In relation to the conviction of a person for an offence against a law of a non-participating Territory, the Executive or the Governor-General must not exercise the powers under subclause 27(5), but may exercise similar powers pursuant to subsection 24(2) of the *Transfer of Prisoners Act 1983 (Cth)* [subclause 27(7)].

Subclause 27(8) provides that the period served in a participating State under a translated sentence is to be deemed to have been served in the Territory. Any period of that sentence deemed by a similar interstate provision to have been served in a participating State, and the period spent in custody while being transferred to a Territory prison, are also to be taken to have been included in the period that is to be deemed to have been served in the Territory.

A person subject to a translated sentence is to be deemed to be entitled under a remission instrument to any remission he or she is eligible for in a participating State up to the time he or she is transferred to the Territory, and to any remission deemed by an interstate law to have been earned by the person [subclause 27(9)].

However, the eligibility for remission related to a part of the sentence not served or not to be served in the participating State is not to be taken into account [subclause 27(10)].

Subclause 27(11) provides that, except the remission referred to in subclause 27(9), any remission of a translated sentence under a remission instrument is to be calculated from the time the person subject to that sentence has come to the Territory.

Clause 28 - Translated sentences - default imprisonment

Clause 28 applies to a translated sentence relating to an order of imprisonment in default (a) of any payment ordered to be made, or (b) of entering into any recognizance

under the law. Where any portion of the default amount is paid to the relevant gaoler, the term of imprisonment is to be proportionately reduced and at the expiry of such reduced period, the prisoner will be released if there are no other sentence of imprisonment to be served by him or her. The gaoler is required to remit the payment so made to the relevant Minister of the participating State where the translated sentence was originally imposed.

Where the default amount is reduced or the obligation to pay that amount is quashed (a) by a court of the participating State on appeal or review, or (b) by any other action taken by any person or authority in that State, subclause 28(3) provides for the following:

- (i) Where the default amount is reduced - the term of imprisonment is to be proportionately reduced and the prisoner will be released on the expiry of the reduced period of imprisonment; and
- (ii) Where the obligation to pay the default amount is quashed - the prisoner will be released immediately if there are no other sentences to be served by him or her.

PART VI - MISCELLANEOUS

Clause 29 - Notification to prisoners of decisions

This clause provides that the Attorney-General must advise a prisoner of any decision made under the proposed Act in relation to that prisoner.

Clause 30 - Lawful custody for transit through the Territory

Clause 30 deals with the situation where a person is brought under a lawful custody to the Territory on his or her being taken by an escort from one jurisdiction to another, in terms of a transfer order made under either an interstate law or the *Transfer of Prisoners Act 1983 (Cth)*, or both.

Subclause 30(2) recognises as valid in the Territory the escort's custody of the prisoner. Also, a gaoler is to be authorised to detain the prisoner in custody at the request of the escort as if the prisoner is an A.C.T. prisoner. For this purpose, the gaoler must receive from the escort a certified copy of the transfer order and may detain the prisoner for such time as the escort requests or for such shorter or longer time as is reasonable to execute the transfer order. The gaoler is to deliver the prisoner to the custody of the escort when the escort requests for the delivery of the prisoner and produces the transfer order.

Clause 31 - Escape from custody of person being transferred

This clause provides for the arrest without warrant of a prisoner who, while being transferred through the Territory, escapes from the custody of an escort. The arrest may be made by the escort, a police officer or any other person.

Where a person in custody escaped or attempted to escape and was apprehended, the justice of the peace before whom the person was taken may by warrant order the person to be returned to the participating State in which the transfer order was made, irrespective of the terms of that order. For that purpose, the justice may order the delivery of the person to the escort. The warrant is to be valid only for 7 days. Therefore, the person may be detained in custody as an A.C.T. prisoner for not more than 7 days until he or she is delivered to the escort.

The escort to whom the justice by warrant orders the custody of the person is to be given may be one or more of the following: the escort under whose custody the person was being transferred; or a prison officer or a police officer of the participating State; or a person appointed by the relevant Minister of the participating State to escort the person.

Subclause 31(6) provides that this clause is not to apply to a person to whom section 47 of the *Crimes Act 1914 (Cth)* applies because of subsection 26(2) of the *Transfer of Prisoners Act 1983 (Cth)*. For the purposes of the *Transfer of Prisoners Act*, a prisoner may be transferred in custody from a State to another State in terms of a transfer order made under that Act (whether or not the prisoner is also in lawful custody under a State transfer order). Where such a prisoner escaped from lawful custody when that prisoner was in a Territory or being transferred through a Territory, he or she would be taken to have committed an offence against a law of the Commonwealth, or of a State or of a Territory and is liable to be punished under section 47 of the *Commonwealth Crimes Act*.

Clause 32 - Escape from custody - Penalty

This clause prescribes a maximum penalty of 7 years imprisonment for an offence of a prisoner escaping or attempting to escape from lawful custody when he or she is being transferred. A sentence imposed on a prisoner for this offence is to be served by him or her after the expiration of any other sentence the prisoner was serving at that time. The prisoner is not to be taken to be serving his or her sentence while he or she is unlawfully at large [subclause 32(3)].

Clause 32 will not apply to a prisoner to whom section 47 of the *Crimes Act 1914 (Cth)* applies by virtue of subsection 26(2) of the *Transfer of Prisoners Act 1983(Cth)*. [Section 47 of that Commonwealth Act prescribes a maximum penalty of 5 years imprisonment for the offence of escaping from lawful arrest, custody or detention].

Clause 33 - Revocation of order of transfer on escape from custody

Clause 33 authorises the Magistrates Court to revoke a transfer order where a prisoner who is being transferred under that order has escaped or attempted to escape; or committed any other offence against the law of the Territory, the Commonwealth, a participating State or a non-participating Territory. A person holding a prescribed office or position is to be eligible to apply to the Magistrates Court for this purpose, and that Court may revoke the transfer order irrespective of whether the prisoner was charged for or convicted of the offence for which the revocation is sought.

Clause 34 - Regulations

This clause authorises the Executive to make necessary regulations not inconsistent with the Act.