

## Mutual Assistance Treaty with China

- 3.1 The *Treaty between Australia and the People's Republic of China on Mutual Legal Assistance in Criminal Matters* (Canberra, 3 April 2006) (the Mutual Assistance Treaty with China) creates a formal process enabling Australia and China to assist each other in the investigation and prosecution of serious crimes including terrorism, fraud, money laundering and people trafficking.<sup>1</sup>

### Background

- 3.2 The National Interest Analysis (NIA) states:

Mutual assistance in criminal matters is a formal process whereby the Government of one country requests assistance from the Government of another country in relation to a criminal investigation or prosecution. Assistance may also extend to locating, restraining, forfeiting and repatriating the instruments and proceeds of crime.<sup>2</sup>

- 3.3 Australia has similar mutual assistance treaties with 24 other countries.<sup>3</sup> The Mutual Assistance Treaty with China is based on the

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1 National Interest Analysis (NIA), para. 3.

2 NIA, para. 7.

3 NIA, para. 3; NIA 'Australian bilateral mutual assistance agreements' Annex: Australia has mutual assistance agreements with Argentine Republic, Republic of Austria, Canada, Republic of Ecuador, Finland, French Republic, Greece, Hong Kong, Republic of Hungary, Republic of Indonesia, State of Israel, Republic of Italy, Republic of Korea, Grand Duchy of Luxembourg, United Mexican States, Monaco, Kingdom of the

Australian mutual assistance in criminal matters treaty model which is based on the provisions of Australia's *Mutual Assistance in Criminal Matters Act 1987* (Cth) (the Mutual Assistance Act).<sup>4</sup>

- 3.4 The Mutual Assistance Treaty with China will assist Australian efforts to combat transnational crime in the Asia-Pacific region.<sup>5</sup>

## Obligations

- 3.5 The key obligation of the Mutual Assistance Treaty with China is for both Parties to grant each other the widest measure of mutual assistance in connection with investigations, prosecutions and proceedings related to criminal matters.<sup>6</sup>

- 3.6 Assistance under the Mutual Assistance Treaty with China includes:

- taking of evidence or obtaining statements from persons
- providing documents, records and articles of evidence
- locating and identifying persons
- execution of requests for search and seizure
- measures to locate, restrain and forfeit the instruments and proceeds of crime
- seeking the consent of persons and making arrangements for such persons to give evidence or to assist in criminal investigations in the Requesting Party and, where such persons are in custody, arranging for their temporary transfer to the Requesting Party
- serving documents relating to criminal matters
- obtaining and providing expert evaluations
- conducting inspections or examining sites or objects to the extent that it is not inconsistent with the law of the Requested Party
- notifying results of criminal proceedings and supplying criminal records

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Netherlands, Republic of the Philippines, Republic of Portugal, Spain, Sweden, Switzerland, United Kingdom, United States of America.

4 NIA, para. 6.

5 NIA, para. 4.

6 Article 1 Mutual Assistance Treaty with China; NIA, para. 11.

- exchanging information on law and
  - any other forms of assistance consistent with the objects of the Treaty which is not inconsistent with the laws of the Requested Party.<sup>7</sup>
- 3.7 Assistance under the Mutual Assistance Treaty with China does *not* include extradition, execution of criminal judgements, verdicts or decisions rendered in the Requesting Party except to the extent permitted by the laws of the Requested Party and the Treaty, the transfer of sentenced persons for serving sentences, or the transfer of criminal proceedings.<sup>8</sup>
- 3.8 The Mutual Assistance Treaty with China provides a number of grounds on which the Requested Party must refuse to provide assistance and a number of grounds on which the Requested Party may refuse to provide assistance.<sup>9</sup>
- 3.9 The Requested Party must refuse to provide assistance where:
- the request relates to offences of a political character
  - the request relates to a military offence
  - the request relates to the prosecution of a person for an offence in respect of which the person has been finally convicted, acquitted or pardoned or has served or is serving the sentence imposed by the Requesting Party
  - the prosecution is on account of the person's race, sex, religion, nationality, or political opinion or that the person's position may be prejudiced for any of these reasons and
  - it would prejudice the sovereignty or security of the Requested Party.<sup>10</sup>
- 3.10 The Requested Party may refuse to provide assistance where there is an absence of dual criminality, where the provision of assistance could prejudice an investigation, prosecution or proceeding in the Requested Party, where the request relates to the investigation, prosecution or punishment of a person for an offence in respect of which a penalty may be in conflict with the essential interests of the Requested Party, or where the Requested Party is of the opinion that
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7 Article 1(3) Mutual Assistance Treaty with China; NIA, para. 12.

8 Article 1(4) Mutual Assistance Treaty with China

9 Article 4 Mutual Assistance Treaty with China.

10 Article 4(1) Mutual Assistance Treaty with China.

the execution of the request would prejudice its national interest or essential interests.<sup>11</sup>

## Mutual assistance and the death penalty

3.11 The Committee has previously been concerned with the adequacy of safeguards in bilateral mutual assistance treaties where the other Contracting Party retains the death penalty. The NIA notes that China retains the death penalty for a wide range of offences.<sup>12</sup>

3.12 The Committee received a number of submissions concerned that the Mutual Assistance Treaty with China did not specifically address the death penalty.<sup>13</sup>

3.13 The Committee was informed that it is not unusual for a treaty text not to explicitly refer to the death penalty.

A number of countries with whom we have concluded mutual assistance treaties have a preference not to directly reference the death penalty in the text of the treaty. Indeed, the treaty with the United States does not include a reference to the death penalty in the text of the treaty. Similarly, the treaty with Malaysia does not include that. On the other hand, the treaty with Indonesia does include a specific reference to the death penalty. The treaty which is before the committee with China does not include a specific reference.<sup>14</sup>

3.14 Although the Mutual Assistance Treaty with China does not specifically list the death penalty as a ground for refusing a mutual assistance request, the Committee was informed that the treaty provides the same protection against the death penalty as Australia's other mutual assistance treaties through Article 4.<sup>15</sup>

3.15 As mentioned above, Article 4 of the Mutual Assistance Treaty with China provides a number of mandatory and discretionary grounds for refusing a mutual assistance request. Article 4 provides a number of internationally accepted human rights grounds for refusing assistance which reflect the provisions of the Mutual Assistance Act.<sup>16</sup>

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11 Article 4(2) Mutual Assistance Treaty with China

12 NIA, para. 15.

13 New South Wales Council for Civil Liberties, *Submission 3*, Australian Capital Territory Government, *Submission 4* and Civil Liberties Australia, *Submission 5*.

14 Ms Joanne Blackburn, *Transcript of Evidence*, 11 September 2006, p. 31.

15 Ms Joanne Blackburn, *Transcript of Evidence*, 11 September 2006, p. 31.

16 Ms Joanne Blackburn, *Transcript of Evidence*, 11 September 2006, p. 31.

3.16 In particular Article 4(2)(c) allows Australia to refuse a request for assistance if the request relates to the investigation, prosecution or punishment of a person for an offence in respect of which a penalty may be imposed which conflicts with Australia's essential interests. The Attorney-General's Department drew the Committee's attention to the agreed minutes of the Mutual Assistance Treaty with China, which was tabled in Parliament with the treaty text.

The agreed minutes to the treaty set out both parties' acknowledgement that imposition of the death penalty may be in conflict with the essential interests of Australia. These provisions will enable compliance with the requirements of sections 8(1A) and (1B) of the mutual assistance act.<sup>17</sup>

3.17 Section 8(1A) of the Mutual Assistance Act provides that a request for mutual assistance *must* be refused if it relates to the prosecution or punishment of a person where the death penalty may be imposed, unless the Attorney-General, having regard to the special circumstances of the case, is of the opinion that the assistance should be granted.<sup>18</sup>

3.18 Section 8(1B) of the Mutual Assistance Act provides that a request for mutual assistance *may* be refused if the Attorney-General believes that the provision of assistance may result in the death penalty being imposed and, having taken into consideration the interests of international criminal cooperation, is of the opinion that assistance should not be granted.<sup>19</sup>

3.19 The Committee is satisfied that the Mutual Assistance Treaty with China provides adequate safeguards against the imposition of the death penalty.

## Mutual assistance requests

3.20 The Committee was informed that there have been two completed mutual assistance requests with China and that these were requests

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17 Ms Joanne Blackburn, *Transcript of Evidence*, 11 September 2006, p. 31.

18 NIA, para. 15.

19 NIA, para. 15.

from Australia to China.<sup>20</sup> Australia has received one mutual assistance request from China which is public knowledge.<sup>21</sup>

- 3.21 In the absence of a treaty, mutual assistance requests can be dealt with through the Mutual Assistance Act.

Under the terms of the Mutual Assistance in Criminal Matters Act, Australia can make a request and receive a request from any country without the need for a treaty. In those cases, if a request is received from a country with whom we do not have a treaty relationship, then the request is processed in accordance with the mutual assistance act.<sup>22</sup>

## Consultation

- 3.22 No public consultation occurred as negotiations with China on the Mutual Assistance Treaty were not in the public domain.<sup>23</sup> However, information was forwarded to the Australian Federal Police and the Commonwealth Department of Public Prosecutions for comment.<sup>24</sup>
- 3.23 The Mutual Assistance Treaty with China was scheduled for the Commonwealth-State/Territory Standing Committee on Treaties (SCOT) meeting on 27 September 2006. The Attorney-General's Department provided some information to SCOT in July 2006 and wrote again to SCOT on 23 August specifically seeking their comment on the Mutual Assistance Treaty with China.<sup>25</sup>

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20 Ms Joanne Blackburn, *Transcript of Evidence*, 11 September 2006, p. 32.

21 Attorney-General's Department, unpublished correspondence, 21 September 2006. This request relates to Zhang Long, a Chinese national who is being held in custody in China over the murder of Zhang Hong Jie in Canberra in 2004; see Ben Doherty and David McLennan, 'Murder probe stand-off - ACT to defy Feds, Chinese', *The Canberra Times*, 30 June 2005. The Attorney-General's Department informed the Committee in relation to the *Treaty between Australia and Malaysia on Mutual Assistance in Criminal Matters and Exchange of Notes* that it does not disclose information relating to incomplete extradition or mutual assistance requests. Ms Joanne Blackburn, *Transcript of Evidence*, 19 June 2006, p. 30.

22 Ms Joanne Blackburn, *Transcript of Evidence*, 11 September 2006, p. 32.

23 NIA, Consultation Annex, para. 2.

24 NIA, Consultation Annex, para. 1.

25 NIA, Consultation Annex, para. 2; Ms Joanne Blackburn, *Transcript of Evidence*, 11 September 2006, p. 32.

## Costs

- 3.24 The Mutual Assistance Treaty with China provides that all ordinary costs of fulfilling a request for assistance will be borne by the Requested Party.<sup>26</sup>
- 3.25 Australia and China are to consult if, during the course of executing a request, it becomes apparent that expenses of an extraordinary nature will be necessary to fulfil the request and subject to such consultation, the Requesting Party shall bear the expenses of an extraordinary nature.<sup>27</sup>
- 3.26 The Attorney-General's Department is the designated Central Authority for making and receiving requests under Article 3 of the Mutual Assistance Treaty with China. The costs incurred by Australia will be met from the existing budget of the Attorney-General's Department.<sup>28</sup>

## Implementation

- 3.27 The terms of the Mutual Assistance Treaty with China will be implemented through regulations made under the Mutual Assistance Act.<sup>29</sup> The Mutual Assistance Act and regulations implement the terms of Australia's 24 other bilateral mutual assistance treaties and the terms of the Mutual Assistance Treaty with China are consistent with the terms of the Mutual Assistance Act.<sup>30</sup>

## Conclusion and recommendation

- 3.28 The Committee recognises the importance of international cooperation in combating transnational crime and supports the establishment of a framework which will ensure Australia and China can provide and receive timely assistance in accordance with clearly defined and mutually agreed terms.

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26 Article 24(2) Mutual Assistance Treaty with China; NIA, para. 21.

27 Article 24(2)(c) Mutual Assistance Treaty with China; NIA, para. 21.

28 NIA, para. 22.

29 NIA, para. 23.

30 NIA, para. 23.

**Recommendation 3**

**The Committee supports the *Treaty between Australia and the People's Republic of China on Mutual Legal Assistance in Criminal Matters* (Canberra, 3 April 2006) and recommends that binding treaty action be taken.**

**Dr Andrew Southcott MP**

**Committee Chair**