

National Interest Analysis [2011] ATNIA 8

with attachment on consultation

**Treaty between Australia and the People's Republic of China
concerning the Transfer of Sentenced Persons,
done at Sydney on 6 September 2007**

[2007] ATNIF 27

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

**Treaty between Australia and the People's Republic of China
concerning the Transfer of Sentenced Persons,
done at Sydney on 6 September 2007
[2007] ATNIF 27**

Nature and timing of proposed treaty action

1. The proposed treaty action is entry into force of a bilateral agreement, the *Treaty between Australia and the People's Republic of China concerning Transfer of Sentenced Persons* (the Treaty).
2. The Treaty was signed for Australia on 6 September 2007 by the then Attorney-General, the Hon Philip Ruddock MP.
3. Article 20(1) of the Treaty provides that it will enter into force on the thirtieth day after the later written notification by the Parties that their respective domestic requirements for the Treaty's entry into force have been completed. On 13 May 2009, China notified Australia in writing that its domestic requirements for entry into force had been met.

Overview and national interest summary

4. The Treaty will allow Australians imprisoned in China and Chinese nationals imprisoned in Australia to apply to serve the remainder of their sentences in their home country. The Treaty will enable both Governments to exchange information about a prisoner's sentence and imprisonment, determine a prisoner's eligibility for transfer and agree upon terms of sentence enforcement following a prisoner's transfer.
5. The transfer of Australians imprisoned in China will have a number of benefits for Australia. It will:
 - relieve the hardship and burden on the relatives of the prisoner;
 - enhance the prospects of the prisoner being successfully rehabilitated and reintegrated into Australian society;
 - contribute to community safety (by ensuring the effective monitoring and management of the prisoner and by enabling the prisoner's conviction to be recorded in their home country); and
 - reduce the burden on Australian consular officials in China.
6. There are a number of requirements that must be met before a prisoner transfer can take place. Importantly, the prisoner, the Chinese Government, the Australian Government and in some circumstances the State or Territory government must all consent to the transfer. Following transfer, the sentence must be enforced, as far as possible, in accordance with the original custodial sentence, and the transferring country retains jurisdiction for the cancellation or modification of the prisoner's conviction and sentence. The receiving party bears the costs of transferring the prisoner, except those costs incurred exclusively in the territory of the transferring party.

Reasons for Australia to take the proposed treaty action

7. Australia has an International Transfer of Prisoners (ITP) Scheme in place to facilitate the transfer of prisoners between Australia and foreign countries. Australia's ITP framework comprises domestic legislation – described below in paragraphs 22 to 25 – and international agreements and arrangements entered into by Australia.

8. Australia's ITP Scheme reflects the humanitarian, rehabilitative and social objectives of prisoner transfers while ensuring, as far as possible, that the original custodial sentence of a transferred prisoner is enforced. The rehabilitative benefits of transfer for Australian prisoners may include family and social support, access to rehabilitation, education, training and employment programs free of language and cultural barriers, work release, parole monitoring and supervision, and offender registration and supervision. Transfers would also benefit Chinese prisoners, by enabling them to be considered for any rehabilitation or conditional release programs in China that might not be available to non-citizens in Australia, due to language barriers or the risk that they might flee the country.

9. ITP is forming an increasingly important part of international cooperation in the administration of criminal justice. Most developed countries participate in ITP schemes and have done so for some time. These countries include the United Kingdom, the United States of America, Canada and most European countries.

10. Australia has concluded similar bilateral prisoner transfer agreements with Cambodia [2009] ATS 4, Vietnam [2009] ATS 27, Thailand [2002] ATS 22 and Hong Kong [2006] ATS 13, and is a party to the Council of Europe *Convention on the Transfer of Sentenced Persons* [2003] ATS 6 (Council of Europe Convention), which facilitates the transfer of prisoners between Australia and more than 60 other countries. Australia has also concluded an arrangement with the United States for the transfer of prisoners sentenced by military commissions. These agreements have been brought into force in Australia by regulations made under the ITP Act. Once an agreement with another country has been implemented by regulations, the ITP Act applies to Australia's prisoner transfer relationship with that country subject to the provisions of the agreement.

11. From the advent of the ITP scheme in September 2002 to 31 January 2011, there have been 63 prisoners transferred from Australia to countries including Canada, Greece, the Netherlands, the USA, France, Israel, Spain, Germany, Italy, Switzerland and the UK, and 15 prisoners transferred to Australia from countries including Thailand, Spain, Hong Kong, the UK and the USA. As at 31 January 2011 Australia was processing 45 applications for transfer out of Australia and 39 applications for transfer to Australia. These applications have been made under both the Council of Europe Convention and Australia's ITP agreements with Thailand and Hong Kong.

12. Over recent years there has been growing public expectation that Australia will capitalise on its well-established ITP scheme by concluding bilateral ITP agreements with more of its regional neighbours. This pressure has come from a wide range of individuals and groups, including parliamentarians, media commentators, senior academics, human rights organisations, prisoner support groups, friends and families of prisoners, and prisoners themselves.

13. The proposed Treaty with China would further strengthen the ITP relationship between Australia and China. In December 2008, regulations were made declaring China a ‘transfer country’ under the *International Transfer of Prisoners Act 1997* (ITP Act). The regulations were made prior to the Treaty entering into force in order to facilitate the potential return of a seriously ill Australian citizen imprisoned in China. If JSCOT approves taking binding treaty action, new Regulations will be made to implement the Treaty. China will remain a transfer country under the ITP Act, but prisoner transfers will be conducted in accordance with the Treaty.

14. The Australian Government is not aware of any multilateral or bilateral agreement to which China is a party, other than the proposed Treaty, that may enable Australia to facilitate prisoner transfers with China.

15. The number of prisoners likely to benefit from the Treaty, if it enters into force, will depend on the number of Australians sentenced in China (and the number of Chinese sentenced in Australia) from time to time, as well as prisoners’ personal interest in transfers. The transfer of prisoners under the Treaty is likely to lead to an overall reduction in the number of Australians serving prison sentences in China. In addition to humanitarian and rehabilitative benefits, this would reduce the resource burdens placed on Australia’s consular staff in China. Consular staff from the Department of Foreign Affairs and Trade visit Australian prisoners incarcerated overseas on a regular basis and provide a range of resource-intensive consular services. There would also be cost savings for Australia in the likely reduction of Chinese nationals serving prison sentences in Australia, although this would be mitigated by costs associated with the maintenance of prisoners transferred to Australia under the Treaty.

Obligations

16. The Treaty would not oblige Australia to agree to the transfer of a prisoner, and provides considerable flexibility in determining prisoner transfers. Under Article 4(b) of the Treaty, prisoners are eligible to apply to transfer from China to Australia provided that they are Australian nationals (and from Australia to China provided that they are Chinese nationals). Article 4(b) provides that the Treaty may apply to the transfer of a prisoner who is not a national of the Receiving Party in exceptional circumstances as agreed by both Parties. Requests for transfer can be initiated by the prisoner (Article 7(1)) and made by either Party (Article 7(2)).

17. The prisoner’s conviction must be final and not subject to appeal (Article 4(d)). Unless otherwise agreed between China and Australia in exceptional cases, there must be at least one year of the prisoner’s sentence remaining to be served when the transfer request is made (Article 4(c)), and conduct giving rise to the offence for which the person is imprisoned must be a criminal offence in both countries (Article 4(a)).

18. A prisoner transfer can only take place with the consent of the Australian Government, the Chinese Government, and the prisoner (Article 4(e)). Australia would be obliged to ensure that any prisoner or his or her legal representative voluntarily consents to the transfer with full knowledge of the legal consequences; and makes a written declaration confirming this (Article 9(1)), including any terms relating to the recovery of costs for the physical transfer of the prisoner (Article 4(e)). Under Article 9(2), Australia would have to afford

China an opportunity, prior to a transfer, to verify that the prisoner has provided informed consent to the transfer.

19. Australia must endeavour to inform prisoners of the substance of the Treaty (Article 6(1)), and to inform Chinese authorities of any request for transfer (Article 7(1)). Australia would also be obliged to provide relevant information to China, upon request, before requesting a transfer or deciding whether or not to agree to a transfer (Article 8(4)).

20. The receiving country must continue to enforce the sentence as originally imposed (Article 12(1)), and must provide information to the transferring country concerning the enforcement of the sentence (Article 14). However, if the sentence is by its nature or duration incompatible with the receiving country's domestic law, it may be adapted in accordance with the sentence prescribed under that country's domestic law for a similar offence (Article 12(2)). In all cases the transferring country retains jurisdiction for the modification or cancellation of the conviction and sentence (Article 11(1)). Either country may, in accordance with its domestic laws, grant a pardon to the transferred person (Article 13(4)). If the transferring country makes a decision which affects the prisoner's conviction or sentence, the receiving country would be obliged to modify the sentence accordingly (Article 11(2)).

Implementation

21. Regulations will be required to be made under section 8 of the ITP Act to enable Australia to give effect to the Treaty.

22. The ITP Act provides the legislative framework for Australia's ITP scheme, and was developed through extensive consultation and co-operation with State and Territory authorities. The provisions in the ITP Act can be enabled by either multilateral treaties, bilateral treaties, or an arrangement of less than treaty status.

23. Many prisoners eligible to apply for transfer to China will have been sentenced for State and Territory offences. The States and the Northern Territory have passed complementary ITP legislation, and all States and Territories in which there are active ITP cases currently assist the Australian Government in processing applications.

24. The ITP Act provides for the Commonwealth to conclude Administrative Arrangements with the States and Territories setting out the administrative protocols for the transfer out of foreign prisoners held as State or Federal offenders, and the transfer in (as federal prisoners) of Australians imprisoned overseas. Administrative Arrangements have been concluded with all States and Territories.

25. In Australia, the ITP Act requires that States and Territories are involved in any transfers affecting them. No provisions requiring consent of an Australian State or Territory Government were included in the Treaty on the basis that this is an internal consideration for Australia. If a sentenced person being transferred to China was sentenced under the laws of a State or Territory, the State or Territory Government enforcing the sentence must consent to the transfer. As there are no federal prisons, the relevant State or Territory Government receiving sentenced persons from China must also consent to the transfer.

26. In the case of outward transfers of federal prisoners, the approval of the State or Territory Government enforcing the sentence is not required. However, each State or Territory will assist in processing transfers of federal offenders, by providing reports on the prisoner's behaviour and progress through the prison system. The Australian Government works closely with States and Territories to process all applications under the ITP scheme.

Costs

27. The cost of the continued enforcement of the sentence after transfer is to be borne by the receiving party (Article 17(b)). Each prisoner transferred from Australia to China will represent a cost saving of over A\$100,000 for each year the prisoner would otherwise have spent in an Australian State or Territory prison. This figure is the approximate annual cost of maintaining a person in prison in Australia according to the Productivity Commission's 2011 Report on Government Services.

28. In relation to incoming prisoners, it has been agreed between the Commonwealth, the States and the Territories that:

- the Commonwealth will meet all general administrative costs involved in the processing of transfers;
- the State or Territory to which a prisoner wishes to return will be responsible for meeting the costs of transporting the prisoner to Australia from the international point of departure, and for maintaining the prisoner in prison; and
- if the State or Territory Minister considers that an incoming prisoner is in a position to pay the costs associated with their transfer to Australia, they may seek reimbursement by the prisoner of such costs as a condition of the transfer.

29. In relation to outgoing prisoners from Australia, China will bear the expenses of the transfer, except those expenses incurred exclusively in Australian territory (Article 17(a)). The States and Territories have agreed that the costs of moving a prisoner within Australia to the international point of departure will be borne by the State or Territory in which the prisoner is held before transfer.

Regulation Impact Statement

30. A self assessment of the regulatory impact of the Treaty has been conducted. The Office of Best Practice Regulation (Productivity Commission) has confirmed that a Regulation Impact Statement is not required.

Future treaty action

31. The Treaty is silent as to amendment. In the absence of an amendment provision, Article 39 of the *Vienna Convention on the Law of Treaties 1969* [1974] ATS 2 would apply to allow amendment by agreement between the Parties. Any amendment to the Treaty would be effected in accordance with Australia's domestic treaty process requirements.

Withdrawal or denunciation

32. Either party may terminate the Treaty by written notice at any time. The Treaty will cease to have effect on the one hundred and eightieth day after notice is given (Article 20(3)). Termination of the Treaty will not affect the sentence enforcement of any prisoners who have already transferred under the Treaty. Any withdrawal from the Treaty by the Australian Government would be effected in accordance with Australia's domestic treaty process requirements.

Contact details

Treaties, International Arrangements and Corruption Section
International Crime Cooperation Division
Attorney-General's Department.

ATTACHMENT ON CONSULTATION

**Treaty between Australia and the People's Republic of China
concerning the Transfer of Sentenced Persons,
done at Sydney on 6 September 2007
[2007] ATNIF 27**

CONSULTATION

33. On 22 July 2005, Senator the Hon Christopher Ellison (then Minister for Justice and Customs) wrote to all State and Territory ministers with portfolio responsibility for implementation of the ITP scheme to consult them on the Government's intention to commence negotiations with China on a bilateral ITP treaty.

34. State and Territory Governments were also advised of this proposed treaty action through the Commonwealth-State Standing Committee on Treaties' Schedules of Treaty Action from 2005-2010. State and Territory Officials requested briefing on all International Transfer of Prisoners treaties, and specifically on the Transfer of Sentenced Persons treaty with the People's Republic of China, in advance of its October 2010 meeting. However, there was no comment from State or Territory officials at the October meeting, nor have there been any comments since.