

Treaty between Australia and the People's Republic of China concerning the Transfer of Sentenced Persons

Introduction

- 4.1 The proposed *Treaty between Australia and the People's Republic of China concerning the Transfer of Sentenced Persons* (the Treaty with the PRC) will allow Australian nationals imprisoned in China and Chinese nationals imprisoned in Australia to apply to serve the remainder of their sentences in their home country.¹
- 4.2 Under the Treaty, Governments are to exchange information about a prisoner's sentence and imprisonment, determine a prisoner's eligibility for transfer, and come to agreed terms of sentence enforcement following the transfer.²
- 4.3 There are a number of mandatory requirements for the transfer of a prisoner to take place:
- the prisoner, the Chinese Government, the Australian Government and, in certain circumstances, a State or Territory Government, must all consent to the transfer;

1 *National Interest Analysis (NIA)* [2011] ATNIA 8, *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, para. 4.

2 NIA, para. 4.

- following transfer, the sentence must be enforced in accordance with the original custodial sentence (as feasible);
 - the Transferring Party is to retain jurisdiction for the cancellation or modification of the prisoner's conviction and sentence; and
 - the Receiving Party agrees to bear the costs of transferring the prisoner, except those costs incurred exclusively in the territory of the Transferring Party.³
- 4.4 According to the Australian Bureau of Statistics prisoner census, at 30 June 2010 there were 174 people held in Australian prisons identifying as Chinese born. At 25 February 2011, 24 Australians were known to be imprisoned in China, and a further seven had been charged with offences.⁴
- 4.5 The Australian Government supports the ratification of the Treaty with the PRC, which it considers will reduce financial and emotional burdens for Australians with relatives imprisoned outside the country, enhance community protection opportunities for transferred prisoners in the home country, and reduce the requirement for resource intensive consular support in China.⁵

Australia's International Transfer of Prisoners Scheme

- 4.6 Australia has an International Transfer of Prisoners (ITP) Scheme to facilitate the transfer of prisoners between Australia and foreign countries.⁶
- 4.7 Established in 2002, the ITP scheme aims to fulfil humanitarian, rehabilitative and social objectives while ensuring, as far as possible, that the original custodial sentence of a transferred prisoner is enforced.⁷
- 4.8 The Committee was informed that a substantial benefit of prisoner repatriation is to reinstate access to training and educational schemes, and to provide opportunities to enter conditional release schemes, such as

3 NIA, para. 6

4 Ms Maggie Jackson, Attorney-General's Department, *Committee Hansard*, Canberra, 28 February 2011, p. 15.

5 Ms Jackson, Attorney-General's Department, *Committee Hansard*, Canberra, 28 February 2011, pp. 15-16.

6 NIA, para. 8.

7 NIA, para. 8.

parole, licence, weekend, or home detention schemes at the end of a parole period. These are not available to foreign prisoners.⁸

- 4.9 To date some 63 prisoners have been transferred from Australia, and 15 returned to Australia under the ITP scheme. As at 31 January 2011 Australia was processing 45 applications for transfer out of Australia and 39 applications for transfer in.⁹
- 4.10 Australia's *International Transfer of Prisoners Act 1997* (ITP Act), provides the legislative framework for the ITP scheme.¹⁰
- 4.11 The Act is enabled by multilateral or bilateral treaties, such as the agreement with the PRC, as well as agreements of less than treaty status.¹¹ Once an agreement has been brought into force by regulations made under the ITP Act, the Act will apply to Australia's prisoner transfer relationship with the partner country subject to the provisions of the particular agreement.¹²
- 4.12 Most prisoners are sentenced under State and Territory legislation. To facilitate prisoner transfers under these treaties, the ITP Act provides for the setting of administrative protocols to regulate the transfer out of foreign offenders imprisoned in State and Territory institutions, and the transfer in, as Federal prisoners, of Australians imprisoned overseas.¹³
- 4.13 Australia currently has bilateral agreements with Cambodia, Vietnam, Thailand and Hong Kong, and is party to the Council of Europe's *Convention on the Transfer of Sentenced Persons* [2003], which allows for the transfer of prisoners between Australia and 60 other nations. Australia has also concluded arrangements with the United States for transfer of prisoners sentenced by military commissions.¹⁴

8 Ms Jackson, Attorney-General's Department, *Committee Hansard*, Canberra, 28 February 2011, p. 16.

9 Prisoners left Australia for Canada, Greece, the Netherlands, the USA, France, Israel, Spain, Germany, Italy, Switzerland, the United Kingdom, and returned from Thailand, Spain, Hong Kong, the United Kingdom and the USA. NIA, para. 11.

10 NIA, para. 24.

11 NIA, para. 22.

12 NIA, para. 10.

13 NIA, para. 24.

14 NIA, para. 10.

4.14 The Australian Government has committed to expanding the ITP scheme to include more of Australia's regional partners in law enforcement co-operation.¹⁵

4.15 The Attorney-General's Department representative Ms Maggie Jackson informed the Committee that entering a bilateral treaty with China has been a long term ITP priority for the Government:

At present China is not a party to any other bilateral or multilateral arrangements which would enable prisoner transfers between Australia and China. The proposed agreement with China would strengthen Australia's bilateral relationship with China; it would also be a tangible demonstration of Australia's commitment to law enforcement cooperation in the region.¹⁶

4.16 The Committee received supplementary advice from the Attorney General that China has signed a number of other bilateral agreements for international transfer of prisoners to date, and has ratified a treaty for this purpose with Spain.¹⁷

Key obligations and protections for prisoners

4.17 The obligations proposed under the Treaty with PRC are substantially similar to those provided under the Council of Europe's *Convention on the Transfer of Sentenced Persons*, as reflected in the ITP Act.¹⁸

4.18 Article 2 sets out the General Provisions of the Treaty:

- (1) The Parties undertake to afford each other the widest measure of cooperation in respect of the transfer of sentenced persons in accordance with the provisions of this Treaty.
- (2) The Parties may, in accordance with the provisions of this Treaty, transfer a sentenced person to each other to enforce the sentence imposed against the person in the territory of the Receiving Party.¹⁹

15 Ms Jackson, Attorney-General's Department, *Committee Hansard*, Canberra, 28 February 2011, p. 14.

16 *Committee Hansard*, Canberra, 28 February 2011, p. 15.

17 Attorney-General's Department, *Supplementary Submission 2.2*.

18 Ms Jackson, Attorney-General's Department, *Committee Hansard*, Canberra, 28 February 2011, p. 15.

19 *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, *passim*.

- 4.19 The Treaty with PRC does not oblige Australia to agree to the transfer of any prisoner. Key protections in the treaty are at:
- Article 4(e) – a prisoner’s transferral is conditional on the consent of all the Parties: the prisoner, and both the Australian and Chinese Governments; and
 - Article 9(1) – the prisoner must be fully informed in writing of the full legal consequences of transfer, and make a written statement confirming that their consent is voluntary and made with full knowledge as advised.
- 4.20 Additionally, transfers can only occur for crimes that exist in both jurisdictions. Article 4(a) states:
- A sentenced person may be transferred only if ...the conduct on account of which the sentence was imposed against the sentenced person also constitutes an offence under the laws of the Receiving Party.
- 4.21 Under Article 4(b) 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. The Treaty may also apply to the transfer of a prisoner who is not a national of the Receiving Party in exceptional circumstances, as agreed by both Parties.
- 4.22 Articles 4(c) & (d) confirm, respectively, that prisoners must not be transferred if less than a year of their sentence is left to be served and that their conviction must be final and not subject to appeal.
- 4.23 Under the Treaty, requests to transfer can be initiated by the prisoner (Article 7(1)) or made by either party (Article 7(2)). There are a number of conditions, including:
- the Receiving Party must notify the other party in writing of the application for transfer (Article 7(1));
 - relevant information about the applicant is to be provided to authorities prior to a decision on the transfer being made (Article 8);²⁰ and
 - the Receiving Party has the opportunity to verify that the prisoner’s request complies with Article 9(1) requiring full knowledge of the consequences of transfer (Article 9.(2)).
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20 Article 8 requires that, in addition to the written transfer request, information is to include personal details, nationality, place of detainment, a certified copy of the judgment, sentence termination date and any relevant medical records with treatment plan.

4.24 Articles 11 and 12 require that the sentence be applied in full, as determined by the Transferring Party. However, Article 11(2) provides the Transferring Party jurisdiction to modify or cancel the sentence; and Article 12(2) states that if, subject to certain conditions, the sentence determined by the Transferring Party is 'by its nature or duration incompatible with the law of the Receiving Party':

... the Receiving Party may adapt the sentence in accordance with the sentence prescribed by its own domestic law for a similar offence.

4.25 Article 13(4) provides that either Party may choose to grant a pardon to the transferred person, subject to domestic laws.

4.26 Ms Jackson advised that the precise sentence to be served would normally be negotiated between the two governments prior to transfer so that the prisoner can give informed consent and the Receiving Party verify that consent. Only on a rare occasion would sentences be varied, or a pardon be granted, after transfer.²¹

4.27 The Committee notes that a possible area for negotiation under the Treaty with PRC could occur if sentences of excessive length were set. Ms Jackson cited occasions where Australia had negotiated non-parole periods for returning prisoners from Thailand equivalent to the term to be served for a similar crime in Australia.²²

4.28 A potential concern under the Treaty was the lack of avenue for appeal should the transfers not be applied in agreed terms.

4.29 Under Article 4(d) negotiations under this agreement are final and hence not subject to appeal. The Committee was assured that any variations to the terms or conditions of the agreements would constitute a breach of the treaty and could be pursued through diplomatic channels.²³

21 *Committee Hansard*, Canberra, 28 February 2011, pp. 16, 17.

22 *Committee Hansard*, Canberra, 28 February 2011, p. 19.

23 Ms Jackson, Attorney-General's Department, *Committee Hansard*, Canberra, 28 February 2011, p. 20.

Implementation

- 4.30 The Treaty with PRC will enter force on the 30th day after notification from the Parties that domestic requirements have been met. On 13 May 2009 China notified Australia that it has such arrangements in place.²⁴
- 4.31 As previously noted, in order to effect transfer of prisoners under bilateral agreements, regulations must be made under the ITP Act.²⁵
- 4.32 In December 2008, required regulations were introduced declaring China a 'transfer country' under that Act.²⁶ These regulations were made prior to the Treaty entering into force to arrange the return of a seriously ill Australian citizen imprisoned in China. New regulations will be made to implement the Treaty under Section 8 of the ITP Act, on receiving Committee support for ratification.²⁷
- 4.33 Once the Treaty enters into force, China will remain a transfer country under the ITP Act, but prisoner transfers will be conducted in accordance with the bilateral agreement.²⁸
- 4.34 The required complementary State or Territory legislation has been passed to facilitate the treaty.²⁹ State or Territory Governments receiving sentenced persons from China, or sending them to China if sentenced under the laws of the State or Territory, must consent to any transfer.³⁰
- 4.35 Under this Treaty, the Receiving Party is to pay the costs of the transfer.³¹ The costs to Australia will thus be dependent on the numbers of prisoners. Transferral to China may result in annual savings per person of \$100 000 a year. Incoming prisoners' costs will be shared between State and Federal Governments.³²

24 NIA, para. 3.

25 NIA, para. 21.

26 International Transfer of Prisoners (China) Regulations 2008, Select Legislative Instrument 2008 No. 260, Royal Assent, 12 December 2008.

27 NIA, para. 21.

28 NIA, para. 13.

29 NIA, para. 23.

30 This requirement is not covered under the treaty being considered an internal matter. NIA, para. 25.

31 Under administrative arrangements with the States and Territories, prisoners may be required to pay some or all of the costs providing the prisoner accepts the transfer on that basis. Ms Jackson, Attorney-General's Department, *Committee Hansard*, Canberra, 28 February 2011, p. 15.

32 NIA, paras 27, 28.

Conclusion

- 4.36 The Committee considers the proposed *Treaty between Australia and the People's Republic of China concerning the Transfer of Sentenced Persons* will formalise and enhance rights and protections for transferring prisoners between Australia and the PRC.
- 4.37 The Committee notes that this agreement is the culmination of some effort on the part of the Australian Government and also that the Chinese Government had notified Australia of its readiness to implement the treaty some two years ago.
- 4.38 The long delay between China's notification and the tabling of this important treaty in the Australian Parliament is therefore of concern. While transfers between Australian and PRC prisons could be conducted under prior arrangements, the lack of a formal agreement may have resulted in unnecessary hardship for Australians held in China and their families.
- 4.39 The Committee supports the ratification of the Treaty with PRC and its prompt implementation.
- 4.40 The Committee also recommends the Attorney General should report on the delays in the internal processing of this and similar agreements with considerations for the future streamlining of that process.

Recommendation 3

The Committee supports the *Treaty between Australia and the People's Republic of China concerning the Transfer of Sentenced Persons* and recommends that binding treaty action be taken.