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BY:

MEMBER FOR GINNINDERRA

Dr Andrew Southcott MP
Committee Chair
Joint Standing Committee on Treaties
Parliament House
CANBERRA ACT 2600

Submission 4
TT 5 & 6 September 2006

Dear Dr Southcott

Thank you for your letter of 6 September 2006 regarding the proposed international agreements that are being reviewed by the Joint Standing Committee on Treaties.

Your letter invited comment on the following international agreements tabled in Parliament on 5 and 6 September 2006:

- *Convention between the Government of Australia and the Government of the French Republic for the Avoidance of Double Taxation with respect to Taxes on Income and the Prevention of Fiscal Evasion and Protocol (Paris, 20 June 2006)*
- *Convention between the Government of Australia and the Government of the Kingdom of Norway for the Avoidance of Double Taxation with respect to Taxes on Income and the Prevention of Fiscal Evasion (Canberra, 8 August 2006)*
- *Amendments, agreed in Shanghai on 26 May 2006, to the Annex to the Agreement between the Government of Australia and the Government of the People's Republic of China for the Protection of Migratory Birds and their Environment, done at Canberra on 20 October 1986*
- *Amendments, agreed in Shanghai on 25 May 2006, to the Annex to the Agreement between the Government of Australia and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment, done at Tokyo on 6 February 1974*
- *Agreement between the Government of Australia and the Government of the People's Republic of China relating to Air Services (Canberra, 23 March 2004)*
- *Agreement between the Government of Australia and the Government of India relating to Air Services (New Delhi, 6 March 2006)*
- *Protocol on Explosive Remnants of War (Protocol V) to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be excessively injurious or to have indiscriminate effects (Geneva, 28 November 2003)*
- *Treaty between the Government of Australia and the People's Republic of China on Mutual Legal Assistance in Criminal Matters (Canberra, 3 April 2006)*
- *Exchange of Notes constituting an Agreement between the Government of Australia and the Government of the United States of America to amend Annex 2-B (Tariff Schedule of Australia), Annex 4-A and Annex 5-A of the Australia-United States Free Trade Agreement (AUSFTA) to ensure compliance with changes to the Harmonized Commodity Description and Coding System*

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The ACT Government is generally supportive of the *Treaty between the Government of Australia and the People's Republic of China on Mutual Legal Assistance in Criminal Matters* (Canberra, 3 April 2006). I am hopeful that the treaty will assist in producing a just and human rights compatible outcome in the case of Mr Zhang Long who is currently incarcerated in China.

Article 4 of the treaty outlines circumstances where assistance shall or may be refused. I am concerned that the treaty does not specifically cover the refusal of requests for assistance where it may result in the imposition of the death penalty. The United Nations Economic and Social Council, Crime Prevention and Criminal Justice Substantive Session of 2005 agenda item: *Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty* reported that the largest number of recorded executions has been carried out in China. During 1994-1998 China recorded 12 338 executions. The remaining 26 countries in the world that impose the death penalty reported 3023 executions during this same period. During 1999-2003 China carried out 6 687 whereas the remaining countries recorded 2 991 executions. I find the statistics startling. According to these figures China carries out over 75 percent of the world's reported executions.

I understand the intention of Article 4 (2) may be to cover refusal on the ground of imposition of the death penalty in general terms. Article 4 (2) provides that a request for assistance may be refused if the requested party is of the opinion that the execution of the request would prejudice its national interest or other essential interests. The agreed minutes of the negotiations state that the imposition of the death penalty may be in conflict with the essential interests of Australia and that the Chinese side acknowledge this. Further, both the Australian side and the Chinese side agreed that if either country wishes to consider refusal of a request on the grounds of conflict with its essential interests, consultation will be undertaken to enable cooperation to take place on terms and conditions which would not be inconsistent with those essential interests.

While I am pleased that this would allow negotiations for an undertaking from China that the death penalty will not be imposed in Mr Zhang's case, and I encourage this to occur, I am concerned that the matter is not dealt with explicitly in the agreement. I understand a number of mutual assistance treaties agreed by Australia and foreign countries that retain the death penalty expressly provide for grounds of refusal in death penalty matters. See for example, the treaty with Indonesia done at Jakarta on 27 October 1995. I also understand that a number of treaties expressly deal with the death penalty even where the relevant foreign country has abolished, or largely abolished, the death penalty. See for example, the treaty with Greece done at Athens on 4 July 2002. While other treaties have dropped reference to the death penalty, I understand that this has, at least in some cases, been done to reflect the common legal position of both countries. See for example, the treaty with Sweden, done at Stockholm on 18 December 1998. I note the Federal Government acknowledged this approach in the National Interest Analysis to the treaty with Sweden:

Unlike other recently concluded Australian mutual assistance in criminal matters treaties, this Treaty includes no express provision for refusal of assistance in relation to an offence which carries the death penalty but Sweden abolished the death penalty in 1972 and last carried out a death sentence in 1910

Moreover, the approach is consistent with Australia's obligations under international law.

The right to life and the prohibition on cruel or degrading punishment is sourced in the *Universal Declaration on Human Rights* 1948, the *International Covenant on Civil and Political Rights* 1966 (ratified by Australia on 13 November 1980) and *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty* (ECOSOC, adopted by the General Assembly) 1984.

The *Second Optional Protocol to the ICCPR* requires state parties to take all necessary measures to abolish the death penalty within its jurisdiction (Article 1 (2)). Australia was in the forefront of countries that ratified the protocol on 11 July 1991. The protocol makes it a fundamental human right not to be executed and recognises that the abolition of the death penalty 'contributes to [the] enhancement of human dignity and progressive development of human rights'.

I am interested as to why the treaty with China, the world's leading nation in carrying out the death penalty, does not include an express provision for refusal of assistance in relation to an offence that carries the death penalty.

I believe that this is a weakness of the treaty. In my view it is important that express provision for refusal be included in the terms of the treaty, in particular:

- that assistance will be refused where the provision of assistance may result in the death penalty being imposed;
- that if Australian refuses a request on the grounds that the assistance may result in the death penalty being imposed, consultation will be undertaken to enable cooperation to take place on terms and conditions which would not be inconsistent with this essential national interest; and
- that assistance will be granted in death penalty matters only where the provision of assistance would assist the defence or where the foreign country undertakes not to impose or carry out the death penalty.

I understand these terms are consistent with the *Mutual Assistance in Criminal Matters Act 1987* (Cth) and Australia's commitment to the abolition of the death penalty.

The ACT Government has no comments on the remaining treaties.

Thank you for the opportunity to comment on the international agreements under inquiry.

Yours sincerely



Jon Stanhope MLA
Chief Minister
10 OCT 2006