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The Parliament of the Commonwealth of Australia

# Report 71

**Treaty tabled on 29 November 2005**

Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China concerning Transfer of Sentenced Persons

February 2006  
Canberra

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## Resolution of appointment

The Resolution of Appointment of the Joint Standing Committee on Treaties allows it to inquire into and report upon:

- a) matters arising from treaties and related National Interest Analyses and proposed treaty actions presented or deemed to be presented to the Parliament;
- b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
  - (i) either House of the Parliament, or
  - (ii) a Minister; and
- c) such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.



## List of abbreviations

Cth	Commonwealth
ITP	International Transfer of Prisoners
NIA	National Interest Analysis



## List of recommendations

- 2 Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China concerning Transfer of Sentenced Persons

### Recommendation 1

The Committee supports the *Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China concerning Transfer of Sentenced Persons* and recommends that binding treaty action be taken.



## Introduction

### **Purpose of the report**

- 1.1 This Report contains advice to Parliament on the review by the Joint Standing Committee on the *Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China concerning Transfer of Sentenced Persons, done at Hong Kong on 25 November 2005*. The treaty action was tabled in Parliament on 29 November 2005.<sup>1</sup>

### **Briefing documents**

- 1.2 The advice in this Report refers to the National Interest Analysis (NIA) prepared for the proposed treaty action. This document is prepared by the Government agency (or agencies) responsible for the administration of Australia's responsibilities under this treaty. Copies of the NIA may be obtained from the Committee Secretariat or accessed through the Committee's website at:

[www.aph.gov.au/house/committee/jsct/29november2005/tor.htm](http://www.aph.gov.au/house/committee/jsct/29november2005/tor.htm)

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<sup>1</sup> Australia, House of Representatives 2004-05, *Votes and Proceedings*, No. 72, p. 802; Australia, Senate 2004-05, *Journals*, No. 60, p. 1437.

- 1.3 Copies of the treaty action and NIA may also be obtained from the Australian Treaties Library maintained on the internet by the Department of Foreign Affairs and Trade. The Australian Treaties Library is accessible through the Committee's website or directly at:  
[www.austlii.edu.au/au/other/dfat/](http://www.austlii.edu.au/au/other/dfat/)

## **Conduct of the Committee's review**

- 1.4 The review contained in this report was advertised in the national press and on the Committee's website.<sup>2</sup> Letters were also sent inviting comment from all State Premiers, Chief Ministers, Presiding Members of Parliament and from individuals who have expressed an interest in being kept informed of proposed treaty actions such as this. A list of submissions and their authors is at Appendix A.
- 1.5 The Committee also received evidence at a public hearing held on 5 December 2005. A list of witnesses who appeared before the Committee at this public hearing is at Appendix B. A transcript of evidence from the public hearing may be obtained from the Committee Secretariat or accessed through the Committee's website at:  
[www.aph.gov.au/house/committee/jsct/29november2005/hearings.htm](http://www.aph.gov.au/house/committee/jsct/29november2005/hearings.htm)

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<sup>2</sup> The Committee's review of the proposed treaty action was advertised in *The Australian* on 30 November 2005. Members of the public were advised on how to obtain relevant information and invited to submit their views to the Committee, both in the advertisement and via the Committee's website.

# Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China concerning Transfer of Sentenced Persons

## Introduction

- 2.1 The *Agreement between the Government of Australia and the Government of Hong Kong Special Administrative Region of the People's Republic of China concerning Transfer of Sentenced Persons (the Agreement)*, done at Hong Kong on 25 November 2005, allows Australian nationals and people who have community ties with Australia serving prison sentences in Hong Kong, and Hong Kong nationals and people who have community ties with Hong Kong serving prison sentences in Australia, to be repatriated to their home country to serve out the remainder of their sentences.<sup>1</sup>
- 2.2 The Committee was informed that:

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<sup>1</sup> See subsection 4(5) of the *International Transfer of Prisoners Act 1997* (Cth) for the definition of 'community ties' with Australia and see subsection 4(4) for the definition of 'community ties' with a foreign country.

Cooperation between countries to repatriate prisoners to their home countries is designed to assist prisoners to reintegrate successfully into society. The aim of the scheme is to allow prisoners to serve out their sentences without language and cultural barriers, which may reduce their prospects for rehabilitation.<sup>2</sup>

- 2.3 Allowing for the international transfer of prisoners is seen as having humanitarian, rehabilitative and social benefits while ensuring as far as possible that the original custodial sentence of a transferred prisoner is carried out.<sup>3</sup>
- 2.4 It is difficult to estimate the precise number of prisoners who, over the lifetime of the Agreement, would be eligible for transfer. However, the Department of Foreign Affairs and Trade reports that there are currently five Australians sentenced to imprisonment in Hong Kong, another four who are in gaol awaiting trial or sentence and a further nine who have been arrested and are currently on bail.<sup>4</sup>

## The Agreement

- 2.5 The Agreement obliges Australia to facilitate the transfer of Australian prisoners in Hong Kong and Hong Kong prisoners in Australia within the framework provided for by the Agreement and domestic implementing legislation.<sup>5</sup>
- 2.6 Article 5(1) of the Agreement obliges Australia to endeavour to inform prisoners of the substance of the Agreement.
- 2.7 Transfer between the two Parties is voluntary and requires the consent of the prisoner to the terms of the transfer.<sup>6</sup> This is important as the terms of the transfer are negotiated by Australia and Hong Kong and will include agreement upon the sentence to be enforced.<sup>7</sup> Where a request for transfer is made, the receiving Party is obliged to

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2 Article 6 of the Agreement; Ms Joanne Blackburn, *Transcript of Evidence*, 5 December 2005, p. 2.

3 National Interest Analysis (NIA), para. 16.

4 NIA, para. 10.

5 Article 2 of the Agreement.

6 Ms Joanne Blackburn, *Transcript of Evidence*, 5 December 2005, p. 3.

7 Ms Joanne Blackburn, *Transcript of Evidence*, 5 December 2005, p. 6.

ensure that the transfer is voluntary and the prisoner has full knowledge of the legal consequences.<sup>8</sup>

- 2.8 Article 5 of the Agreement obliges Australia and Hong Kong to provide specific information to facilitate the consideration of a prisoner transfer request.<sup>9</sup> Following the transfer of a prisoner, Article 9 obliges the receiving Party to provide the transferring Party with information concerning the enforcement of the sentence.<sup>10</sup>
- 2.9 The transferring Party retains jurisdiction for the revision, modification or cancellation of convictions and sentences imposed by its courts.<sup>11</sup>
- 2.10 Article 8 of the Agreement provides for the continued enforcement of a transferred prisoner's sentence. As a general rule, the sentence imposed by the transferring country will not change.<sup>12</sup> However, where the sentence is incompatible with the law of the receiving Party either by its nature or duration, the receiving Party may adapt the sentence in accordance with its domestic law.<sup>13</sup> Where this occurs, the receiving country is not able to impose a sentence that is more severe than the sentence imposed by the transferring Party in terms of nature or duration.<sup>14</sup>
- 2.11 The receiving party generally bears the cost of the transfer; however:<sup>15</sup>

That country may seek to recover some or all of the costs of transfer from the prisoner, provided that the prisoner is informed in advance and consents to the transfer on the basis that there will be specified cost recovery. In practice, the receiving state or territory in Australia meets the costs of transfer.<sup>16</sup>

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8 Article 6(1) and (2) of the Agreement; NIA, para. 20.

9 NIA, para. 21.

10 NIA, para. 21.

11 Article 7 of the Agreement.

12 Attorney-General's Department website, accessed at 17 January 2006:  
<[http://www.ag.gov.au/agd/WWW/criminaljusticeHome.nsf/Page/International\\_Transfer\\_of\\_Prisoners\\_Scheme](http://www.ag.gov.au/agd/WWW/criminaljusticeHome.nsf/Page/International_Transfer_of_Prisoners_Scheme)>

13 Article 8(3) of the Agreement.

14 Article 8(3) of the Agreement.

15 Article 12 of the Agreement.

16 Ms Joanne Blackburn, *Transcript of Evidence*, 5 December 2005, p. 4.

- 2.12 Article 10 obliges both Parties to cooperate in facilitating the transit of prisoners to or from third States through its territory.

## International Transfer of Prisoners (ITP) Scheme

- 2.13 The Agreement is one of three international agreements entered into by Australia to facilitate the international transfer of prisoners between Australia and, following the entry into force of the current Agreement, 58 other countries.
- 2.14 Australia is a party to the Council of Europe *Convention on the Transfer of Sentenced Persons* (Council of Europe Convention) which facilitates the transfer of prisoners between Australia and 56 other countries.<sup>17</sup> Under the Council of Europe Convention, 16 prisoners have been transferred from Australia to 5 other jurisdictions.<sup>18</sup>
- 2.15 Australia has only one other bilateral prisoner exchange agreement and that is with Thailand, the *Agreement with Thailand on the Transfer of Offenders and Cooperation in the Enforcement of Penal Sentences*.<sup>19</sup> Under this Agreement, three prisoners have been transferred to Thailand.<sup>20</sup>
- 2.16 The Committee was informed that Australia is currently negotiating a transfer of prisoner agreement with China, although the details of those negotiations are not publicly available.<sup>21</sup>

## Cooperation with the States and Territories

- 2.17 Implementation of the Agreement requires extensive cooperation with the States and Territories. Often, prisoners to be transferred out of Australia will have been sentenced for State and/or Territory offences. In addition, only the States and the Northern Territory currently have prisons and so State and Territory consent is required before prisoners can be received or transferred.
- 2.18 Administrative arrangements, concluded by the Federal Government, exist with all States and Territories except South Australia where they

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17 Ms Joanne Blackburn, *Transcript of Evidence*, 5 December 2005, p. 3; NIA, para. 8; Attorney-General's Department, *Submission 1*, p. 2; see also JSCOT Report 43, p. 19.

18 Ms Joanne Blackburn, *Transcript of Evidence*, 5 December 2005, p. 3.

19 Ms Joanne Blackburn, *Transcript of Evidence*, 5 December 2005, p. 3; See also JSCOT Report 43, p. 19.

20 Ms Joanne Blackburn, *Transcript of Evidence*, 5 December 2005, p. 3; NIA, para. 14.

21 Attorney-General's Department, *Submission 1*, p. 2; Ms Joanne Blackburn, *Transcript of Evidence*, 5 December 2005, p. 7.

are currently being negotiated.<sup>22</sup> Administrative arrangements facilitate the international transfer of prisoners but the Committee was informed that:

The absence of an administrative arrangement with South Australia does not prevent the transfer of prisoners to South Australia.<sup>23</sup>

## Implementation

- 2.19 The *International Transfer of Prisoner Act 1997* (Cth) provides the legislative framework for the transfer of prisoners between Australia and other countries.<sup>24</sup> Complementary legislation exists in all States and Territories.<sup>25</sup>
- 2.20 In 2004, amendments to the *International Transfer of Prisoner Act 1997* (Cth) allowed semi-autonomous regions, such as Hong Kong, to be declared a transfer country with which Australia can enter into an agreement for the transfer of prisoners.<sup>26</sup>

## Costs

- 2.21 The National Interest Analysis (NIA) provides that the approximate cost of maintaining a prisoner in Australia is A\$50 000 per year.<sup>27</sup>
- 2.22 However subsequent evidence from the Attorney-General's Department advised the Committee that approximately \$59 203 was spent per year to keep an adult prisoner in custody.<sup>28</sup>
- 2.23 However, the Committee was informed that there is 'considerable dispute between jurisdictions as to what it costs to house a prisoner'.<sup>29</sup> Following the entry into force of the Agreement, Australia would

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22 NIA, para. 27.

23 Ms Joanne Blackburn, *Transcript of Evidence*, 5 December 2005, p. 9.

24 NIA, para. 24.

25 NIA, para. 26.

26 NIA, para. 23.

27 NIA, para. 28.

28 Attorney-General's Department, *Submission 1.1*, p. 2.

29 Ms Joanne Blackburn, *Transcript of Evidence*, 5 December 2005, p. 6.

save approximately this amount of money each year a transferred prisoner would have otherwise spent in an Australian prison.<sup>30</sup>

- 2.24 The Commonwealth, State and Territory governments have agreed that the costs for received prisoners will be shared, with the Commonwealth bearing the administrative costs of the transfer and the State or Territory government to which the prisoner is being returned bearing the transport and maintenance costs.<sup>31</sup> As mentioned previously, the State or Territory government may seek to recover such costs from the prisoner.<sup>32</sup>

## Conclusion and recommendation

- 2.25 The Committee recognises the humanitarian, rehabilitative and social benefits of international transfer of prisoner agreements. In particular, the Committee recognises the value of an agreement with Hong Kong where there is a relatively high number of Australian nationals in Hong Kong prisons.

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### Recommendation 1

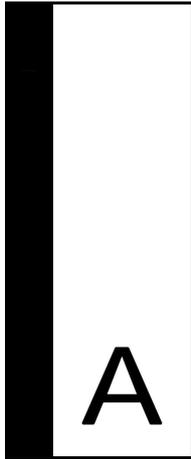
**The Committee supports the *Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China concerning Transfer of Sentenced Persons* and recommends that binding treaty action be taken.**

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30 NIA, para. 28.

31 NIA, para. 29.

32 NIA, para. 29; Article 12 of the Agreement; Ms Joanne Blackburn, *Transcript of Evidence*, 5 December 2005, p. 4.

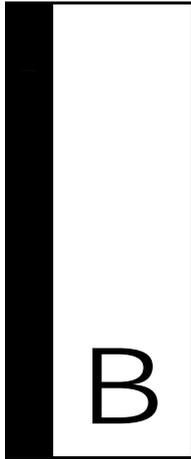


## Appendix A - Submissions

### Treaties tabled on 29 November 2005

- 1 Attorney-General's Department
- 1.1 Attorney-General's Department
- 3 Australian Patriot Movement
- 4 Government of Western Australia
- 6 ACT Government





## Appendix B - Witnesses

Monday, 5 December 2005 – Canberra

### Attorney-General's Department

Ms Sally Aplin, Acting Senior Legal Officer, Offender Justice and Management Section

Ms Joanne Blackburn, First Assistant Secretary, Criminal Justice Division

Mr Mark Zanker, Assistant Secretary, International Trade and Environment Law Branch, Office of International Law

### Department of Foreign Affairs and Trade

Mr John Courtney, Director, Hong Kong Macau Taiwan Section, East Asia Branch, North Asia Division

Mr Nicholas Purtell, International Law and Transnational Crime Section, Legal Branch

Mr Michael Jonathan Thwaites, Executive Director, Treaties Secretariat