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The International Transfer of Prisoners

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Many countries have established schemes for the transfer or repatriation of their citizens who are imprisoned elsewhere in the world. Such schemes are essentially humanitarian, but they may also result in some financial savings as well as lower recidivism. Australia has not as yet entered into any such scheme, even though the possibility was seriously considered a few years ago. This Trends and Issues by the Deputy Director of the Institute reviews the basic facts about Australian prisoners overseas and foreign prisoners in Australia. It concludes that it would be both compassionate and progressive for Australia to facilitate the international transfer of selected prisoners at this time.

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Director

Over 1,000 Australian citizens are arrested overseas each year, and at any time between 150 and 200 are being held in prison. They are either awaiting trial or serving sentences in nearly 40 different countries. Over half have been charged with, or were sentenced for, offences related to drugs. A small number face the possibility of execution.

Table 1 lists the countries, and the numbers in each country, in which Australians were known to have been imprisoned in late 1991. From this table it can be seen that the highest numbers were in Thailand, New Zealand, United Kingdom and the United States, but it can also be seen that Australians are being held in prisons in every geographical region in the world.

The actual numbers of Australians in foreign prisons is likely to be much higher than the figures quoted in Table 1 as many cases may not come to the notice of Australian officials. Consular officials in Australian embassies and high commissions overseas are generally informed when an Australian citizen is detained, and this is most likely to happen if the individual seeks assistance or advice. However, in English speaking countries, and in other places where the individual is familiar with the local language and culture, it is less likely that he or she will seek assistance or advice from an Australian mission and therefore the case may not come to notice. People who have dual citizenship are also unlikely to come to the notice of Australian officials if they are arrested in their other country of citizenship.

For this reason, the figures quoted in this paper are likely to be under-estimates, perhaps very significantly so, in countries such as England, America and New Zealand, but they are likely to be reasonably accurate in non-English speaking countries such

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as Thailand, Indonesia and Malaysia. This difference is fortuitous as a major cause of concern is the well-being of Australian prisoners in countries where the language and culture are alien to the individual.

Whatever the precise numbers, the presence of Australian prisoners in foreign countries raises a number of policy issues, each of which can be seen as potentially controversial. Three such issues are:

- Should the Australian Government give its support to Australian prisoners overseas who are seeking early release or pardon?
- Should the Australian Government intervene, and in which case how, in cases where an Australian citizen has been sentenced to death overseas?
- Should the Australian Government support proposals for the international transfer or repatriation of foreign prisoners so that such prisoners can serve some or all of their sentences in their home countries?

This paper will focus only on the third of these questions.

Transfer Proposals

Over the past decade there have been many proposals for the establishment of schemes, involving either bilateral or multilateral treaties, which would enable Australians sentenced to terms of imprisonment overseas to serve a proportion of their sentences in Australia. Conversely, these proposals would also provide for foreigners sentenced in Australia to be transferred to prisons in their own countries.

None of these proposals has been put into effect in Australia, but there are many such schemes overseas. The most significant multilateral scheme is the Council of Europe Convention which has some 15 signatories: Austria, Belgium, Canada, Cyprus, Finland, France, Germany, Greece, Luxembourg, The Netherlands, Spain, Sweden, Turkey, the United Kingdom and the United States. Australia is also eligible to become a signatory to this convention.

Table 1: Australian Prisoners Overseas, October 1991

	Male	*Female*	*Total*
Thailand	26	3	29
New Zealand	20	0	20
United Kingdom	18	1	19
United States of America	18	1	19
Greece	12	0	12
Lebanon	9	0	9
Hong Kong	6	1	7
Spain	5	2	7
Germany	5	1	6
Indonesia	3	2	5
India	4	1	5
Italy	4	0	4
Papua New Guinea	4	0	4
Canada	2	1	3
Chile	2	1	3
Singapore	2	1	3
Malaysia	2	1	3
Japan	3	0	3
Norway	2	1	3
Austria	2	0	2
Macau	2	0	2
Pakistan	2	0	2
Other*	14	1	15
Total	167	18	185

* One prisoner each in Argentina, Brazil, Cyprus, New Caledonia, Philippines, Poland, Saudi Arabia, South Africa, South Korea, Sweden, Switzerland, Syria, Taiwan, The Netherlands and Yugoslavia.

The other multilateral transfer scheme is that of the Commonwealth of Nations, but to date only a relatively small number of countries has become signatories. Bilateral agreements have been negotiated between the US and eighteen other countries and by Canada with eight other countries.

As far as Australia is concerned the issue has again been raised in the media in recent months. The case of James Savage, an Aboriginal person convicted of murder and rape in the United States, who is currently serving a life sentence in Florida, has prompted many suggestions from Aboriginal organisations that he should be allowed to serve his sentence in an Australian prison so that he can be in closer contact with his relatives.

Also, the New South Wales Minister for Justice, the Hon. Terry Griffiths, has publicly expressed his strong support for the international transfer of prisoners. He has indicated that he is prepared to seek Commonwealth endorsement of the necessary treaties even if New South Wales is the only Australian state bound by the treaty obligations (*see The Corrective Services Bulletin,* Issue 171, 23 April 1992).

Furthermore, a media release in February 1992 by an organisation known as Australians Supporting European Transfer Treaty (ASETT) received wide coverage. A spokesperson for that organisation claimed that the international transfer of foreign prisoners would save Australia a considerable sum of money as there were many times more foreign prisoners in Australia than Australians in foreign prisons.

This claim is undoubtedly correct, but the exact figures cannot be established as information on citizenship is not recorded for all persons in prison in Australia. Nevertheless, the national census of prisoners records the country of birth and these results for 30 June 1990 are shown in Table 2. From this table it can be seen that 2,820 prisoners at that time were born overseas. This is nearly 20 per cent of the total Australian prison population of

14,305. Many of these prisoners may be Australian citizens or may be long-term residents in Australia, but it is probable that a significant proportion were citizens of foreign countries who had not been resident in Australia for long periods of time. For example, a small study of overseas born women in prison in Australia found that 15 out of 56 women had been arrested on tourist visas and were liable to be deported when they had served their sentences (Easteal 1992).

While it would not be valid to make a direct comparison between the numbers in Table 1 and Table 2, to establish whether Australia would be a net gainer or loser of prisoners if there were a comprehensive transfer scheme, the numbers would seem to be clearly in Australia's favour. But not every Australian prisoner overseas or foreign prisoner in Australia would be eligible for transfer, and presumably not every prisoner who was eligible would want to be transferred home.

Eligibility for Transfer

Arrangements for the transfer of prisoners between sovereign nations are only considered if the individual prisoner consents to the proposed transfer and both the sending and receiving nations also consent. Other eligibility requirements generally include:

- a transfer shall be made only in cases where all appeals have been settled;
- the prisoner has at least six months of the sentence to serve, or is serving an indefinite sentence, in the foreign country;
- a minimum proportion, perhaps one-third, of the sentence has been served in the foreign country;
- the offence for which the prisoner was sentenced is a criminal offence in the prisoner's home country, and
- the prisoner is accepted as a citizen of his or her home country and is not a long term resident or settler in the foreign country.

The most important eligibility criterion is the clear three-way agreement between the two relevant governments and the individual prisoner. Without that agreement there is the possibility of confusion between international transfer, which is sought by the prisoner concerned, and coerced deportation or extradition. There may also be confusion between transfer and exchange, as in the exchange of prisoners of war.

The need for a three-way agreement is also particularly important in cases where an offence committed by a foreign visitor or tourist has received considerable media publicity and the local authorities take the view that the offender must be seen to receive an appropriate penalty. In such cases, confidence in the criminal justice system might be diminished if a notorious foreign criminal is apparently 'whisked away' to his home country immediately after trial and if there were little or no understanding by the local public that the prison sentence was still to be served.

The hypothetical case of notorious foreign criminals may well be fanciful, but it leads inexorably to a consideration of the actual sentences to be served in the prisoners' home countries.

The Sentence to be Served

There are two quite different approaches to this issue. Nations which have established agreements or treaties for the international exchange of prisoners have elected to follow either a 'continued enforcement' procedure or a 'conversion of sentence' procedure. Which of these procedures is selected is likely to be a significant consideration in the minds of foreign prisoners in deciding whether to apply for transfer or not.

Continued enforcement

As the name applies, under the continued enforcement procedure the maximum sentence to be served following transfer would be the portion of the original sentence imposed which remained unserved after deduction of any remissions earned in the foreign country before the date of transfer. Presumably remission, if any, available in the home country could then be earned to reduce further the length of the actual sentence.

(The Council of Europe recommendations (1986, p. 207) go further and suggest that if the sentence imposed was longer than or different in nature from the sentence which could be imposed for the same offence in the home country, it would be adapted to the nearest equivalent

Table 2: Prisoners born Overseas in Australian Prisons, June 1990

	Male	*Female*	*Total*
New Zealand	351	26	377
Papua New Guinea	21	3	24
Oceania	57	4	61
Vietnam	107	2	109
Indochina	9	0	9
Other Asia	256	14	270
United Kingdom, Eire	633	32	665
Greece	73	2	75
Italy	135	8	143
Yugoslavia	170	8	178
Other West Europe	254	15	269
East Europe	152	9	161
United States of America	39	6	45
Canada	7	0	7
Other America	65	9	74
Africa	70	6	76
Lebanon	151	5	156
Turkey	78	1	79
Other Mid-East	42	0	42
Total	2,670	150	2,820

Source: Walker 1991

sentence which was available under the law in the home country without being longer or more severe than the original sentence. This recommendation seems to this author to envisage a hybrid sentence which is part continuation and part conversion.)

Conversion of sentence

Countries which have chosen to use this procedure must arrange for the transferred prisoner to be re-sentenced by an appropriate court in the home country so that the sentence to be served is seen to be equivalent to one that would have been imposed if the offence had been committed in the home country. Two potential difficulties can be seen with this approach. In the first place, the foreign prisoner will not know the length of his or her sentence until transfer and therefore may find it difficult to decide whether or not to apply. Secondly, and perhaps more importantly, it is probable that in some cases the period already served in the foreign country will be equal to or greater than the converted sentence in the home country with the result that the transferred prisoner would be immediately released. While this would no doubt be a happy result for the transferred prisoner it is likely to undermine confidence in the integrity of the transfer scheme and may even be seen as interfering with, or criticising, the criminal justice system of another country.

Both of these procedures raise difficulties of some importance, but the need for a resolution is illustrated by data presented in Table 3. In this table the sentences imposed on a sample of Australian drug offenders in recent years in three neighbouring countries are shown. In most cases the sentences seem to be considerably longer than would be imposed for similar offences in Australia, but the difference in actual time to be served may not be as great in practice due to the wide use of remissions and pardons in some foreign countries. It should also be noted that the maximum penalties available for drug offences under Commonwealth or state law include life and 25 years imprisonment.

Table 3: Some Examples of Sentences Imposed on Australians for Drug Offences in Asia

Nation	*Drug*	*Quantity*	*Sentence Imposed*
Thailand	Heroin	5.4 kilos (50 years)	Death, commuted to life
Thailand	Heroin	190 grams	Life, commuted to 25 years
Thailand	Heroin	350 grams	Life, commuted to 33 yrs 4 mths
Thailand	Heroin	2.7 kilos	Life (50 years)
Malaysia	Heroin	141.9 grams	Death
Indonesia	Heroin	91.25 grams	8 years
Indonesia	Hashish	40 grams	17 years
Indonesia	Hashish	12 kilos	20 years

Source: Department of Foreign Affairs and Trade

Administrative Arrangements

In 1984, the Commonwealth Attorney-General's Department, with the approval of all mainland state correctional authorities, circulated a paper which proposed the establishment of an authority which would administer a scheme for the international transfer of prisoners. The proposed authority, presumably to have been named the International Transfer of Prisoners Authority, was seen as reporting to a committee of representatives of all states and territories, presumably the Conference of Australian Correctional Administrators. (It has been suggested subsequently that this committee include a representative of Australian Police Commissioners because of the law enforcement issues involved in the transfer of prisoners.) It was envisaged that the authority would be created by Commonwealth legislation similar to the *Transfer of Prisoners Act 1983* (Cwlth), which provides for the interstate transfer of prisoners and which is reflected in reciprocal legislation in all Australian jurisdictions holding sentenced prisoners.

The proposed authority would have administered the legislation and encouraged the negotiation of treaties, either on a bilateral or multilateral basis, and would have been required to work closely with state and territory correctional authorities as well as with the consular services of the Department of Foreign Affairs and Trade. The authority would also have been responsible for preparing written material that could be used to ensure that, as far as possible, all eligible prisoners, both in Australia and overseas, were made aware of the existence of the scheme and were informed of how to apply for consideration. In the case of Australian prisoners in foreign countries seeking transfer back to Australia, both the potential receiving state or territory as well as the authority which represented the Commonwealth, would have to have been in agreement before a transfer could be effected. Prisoners transferred back to Australia would have been regarded as Federal prisoners and therefore subject to the *Commonwealth Prisoners Act 1967* (Cwlth).

This proposal was not accepted largely because it was suggested in some quarters that it could be seen as 'going soft on drug offenders', the

largest single group of Australian prisoners overseas. Also at that time, the much more limited scheme of interstate transfer of prisoners was in its infancy and the idea of international transfer might have been seen as far too radical. As indicated earlier there is currently increasing support for the idea of international transfer to be further considered.

The Cost of Transfers

The 1984 proposal envisaged that the actual cost of the transfers back to Australia, of prisoners and escorts, would be met by the Commonwealth through the proposed authority and that the cost of maintaining the transferred prisoners would be met by the relevant state or territory in the same way that those costs are met for the maintenance of other Federal prisoners. (It is relevant to note that currently state and territory correctional authorities house over 500 Federal prisoners. As indicated above, a transfer scheme is unlikely to bring more than an additional 20 or 30 prisoners per year across the nation and is likely to facilitate the transfer out of a larger number.) In practice the state or territory which was to receive a prisoner from overseas would provide an escort, presumably two prison officers, who would travel to the overseas country at the expense of the authority to bring the prisoner home. The authority would also provide the necessary legal warrants for the escorting officers.

Such an arrangement would make international transfer equivalent to the now routine interstate transfer of prisoners, but there is one interesting difference. With interstate transfers it is the sending rather than the receiving jurisdiction which pays for the escort on the ground that it will save the costs of supporting the prisoner. Significantly, a three-way agreement is also required before any interstate transfer can be effected.

The Arguments for Transfer Schemes

The major argument in favour of Australia exploring the possibility of introducing a scheme for the international transfer of prisoners is based on humanitarian grounds. While there is no question that individuals who break the law in other countries should be liable to be punished according to the laws of those countries, there is also strong evidence to suggest that in many cases the penalties imposed are by Australian standards unduly harsh in practice. This is not because the authorities seek to make an example of foreign visitors who commit offences but simply because of differences in culture, language and lifestyle.

There have been many documented cases where Australian prisoners held in South East Asian countries have been required to accept standards of hygiene and sanitation well below their normal expectations. Dietary provision and health care have frequently been unsatisfactory and have required supplementation, paid for either by the prisoners' families or friends. Also in many cases, significant funds have been required to provide legal representation for court hearings and for appeals.

Foreign prisoners, both overseas and in Australia, are also frequently extremely isolated as they do not always speak the local language and may not have any fellow citizens in prison with them. Language isolation, exacerbated by an unfamiliar legal system and poor living conditions, is likely to cause acute psychological stress, perhaps leading to serious mental illness. Furthermore, a significant proportion of the Australian prisoners in foreign countries is female. (Approximately 10 per cent of Australian prisoners overseas are female compared with approximately 5 per cent of all prisoners in Australia.)

Even if no sympathy were felt for Australian prisoners overseas, on the grounds that they committed the offences and must accept the consequences, it would be heartless to ignore the plight of their families. As indicated above, in many cases the families of Australian prisoners overseas are expected to provide a continuous flow of cash for food, health care and legal representation. Family members also often feel that it is necessary for them to visit their sons, daughters or spouses in order to provide psychological or material comfort, and they often feel compelled to make repeated pleas for assistance and relief to government authorities and welfare organisations, both in Australia and overseas. A compassionate nation would surely not deny assistance and sympathy to these people who have not themselves done anything wrong.

There are also sound social and practical reasons for facilitating close contact between prisoners and their families, especially by way of visits. The available evidence indicates that prisoners who have strong and supportive relationships with their families are less likely to become recidivists than are prisoners without such relationships. It is therefore in the interests of crime prevention that transfer schemes and family reunions be encouraged.

The convenience of correctional administrators is not normally given high priority in government decision-making, but the running of prison systems both in Australia and overseas would be made just a little less demanding if the numbers of foreign prisoners, especially those who do not speak the local language and have special needs in terms of diet, health care and social support, were reduced.

A further major argument in favour of the international transfer of prisoners is that a well developed scheme would almost certainly save money as far as Australia is concerned. It is widely accepted that it costs approximately A$50,000 per year to keep a person in prison in Australia. If a transfer scheme resulted in more prisoners going out of the country than coming in, the net financial saving could be significant. As indicated earlier, it is impossible to

make accurate predictions, but a close scrutiny of the numbers in Tables 1 and 2 would seem to suggest a saving rather than a loss, even when the actual costs of the transfers are taken into account. As approximately one half of the Australian prisoners overseas at any time are either awaiting trial or the outcome of appeals, and as those under sentence include a proportion with less than six months to serve, as well as a number who would not choose to apply for transfer, it is considered highly unlikely that more than 20 or 30 Australian prisoners per year would actually return to serve some of their sentences in Australia. If a mere 10 per cent of the New Zealand prisoners in Australia went home each year, the overall numbers would be in Australia's favour and therefore there would be some financial saving. (A check with the Department of Justice in New Zealand has shown that the number of Australian prisoners in New Zealand prisons is relatively small, between 20 and 30, and therefore there would not be a high number returning to Australia).

Finally, the consular services of Australian missions overseas would experience a small degree of relief in their workload if the number of Australian prisoners overseas were reduced. Consular officers currently spend a considerable proportion of their time providing advice to their fellow citizens who are incarcerated and to their relatives. Some of this pressure would be removed by an effective transfer scheme.

The Arguments against Transfer Schemes

The most powerful argument against any international transfer of prisoners, as far as Australia is concerned, is that it would be seen to be condoning or expressing sympathy for serious drug offenders, as they constitute the majority of Australian prisoners overseas. If the international transfer of prisoners really did indicate a lessening of the resolve of all Australian governments to take every reasonable step to reduce serious drug offending then transfer proposals would not deserve support. But such is not the case. None of the countries that are currently parties to transfer treaties would accept that they have gone soft on drugs. It would clearly be wrong to suggest that this were the case with the United States, the nation which has given extremely strong support to numerous transfer treaties.

Secondly, it might be argued that the international transfer of prisoners could be interpreted as a lack of respect for the criminal justice systems, especially the sentencing systems, of foreign countries. Provided that there is both a clear understanding of the transfer arrangements and no unjustifiable reduction in the sentences to be served, this argument has no validity. On the contrary, for one to facilitate the serving in its own prisons of sentences that were imposed in other countries could be seen as a mark of significant trust and respect. To achieve this end, it is essential that all transfer agreements be firmly based on the premise that a sentence imposed elsewhere is nevertheless fully enforceable and valid, and is served according to the agreed principles of either continued enforcement or sentence conversion. Thus the authority of the law and of the judges can be seen as having much broader effect than their own national boundaries.

Finally, and perhaps churlishly, it might be argued that the international transfer of prisoners is not worth supporting because the actual number of cases that would be involved is too small to justify the effort and expense required. The question of expense has been discussed earlier, but as far as the effort is concerned it would be indefensible if it were argued that the effort would not be made unless the numbers were greater. Compassion, humanity and justice do not become relevant only if a particular quantum of need is identified.

International Interest

As indicated by the list of nations that have become signatories to the Council of Europe Convention on the Transfer of Sentenced Persons, and also as indicated by the existence of an equivalent Commonwealth of Nations scheme as well as numerous bilateral agreements between nations, there is no shortage of international interest in this subject. Furthermore, the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders in Milan in 1985 agreed upon the wording of a draft protocol that could be used for other transfer agreements.

Although Australia has not yet entered into any such agreement, not even with New Zealand, a number of foreign countries have made approaches to Australia with a view to rectifying this deficiency. The Department of Foreign Affairs and Trade has indicated that no fewer than three such approaches were received in the past 12 months. There is therefore no doubt that if and when the Australian Government believes that it is ready to open negotiations in relation to the international transfer of prisoners there will be support from significant sections of the international community.

Issues to be Resolved

There are a number of issues that need to be resolved before any international transfer can take place as far as Australian prisoners are concerned or before any treaties can be settled. One such issue is whether or not juveniles in any form of custody and persons who are confined in connection with criminal conduct by reason of mental disorder should be included in the scheme. It is likely that the majority of commentators would support the inclusion of these two special categories of detained people, but such an inclusion may have consequences for the eligibility criteria.

The first issue to be resolved, however, is to recognise the realities

of Australia's constitutional structure and to ensure that any proposal for international transfer has the full support of the state and territory authorities who are responsible for the operation of prison systems. Any proposed administrative arrangements must also ensure that those authorities are fully involved in the development of appropriate procedures and policies. This would most readily be achieved by inviting the biannual meetings of the Australian Conference of Correctional Administrators to monitor any international transfer scheme in much the same way as they did for the first few years of the interstate transfer scheme.

A matter of fundamental importance is the decision as to whether an Australian scheme would be based on continuous enforcement or sentence conversion. There are arguments to be made for either option, some of which have been canvassed earlier. At this stage in the development of the concept, the author is inclined to support the continuous enforcement procedure, but that raises some other issues. For example, should any remissions to be granted on the remaining portion of the sentence be based on a remission system, if any, in the relevant Australian jurisdiction, or should they be based on the remissions that would have been granted if the prisoner had stayed in the foreign country? This is an important question as Australian jurisdictions are increasingly moving towards 'truth in sentencing' and no remissions, while the remission systems in some foreign countries are particularly generous.

One of the advantages of classifying Australian prisoners transferred from overseas as Federal prisoners would be that the discretion to order release on licence by the Governor General could be used to correct anomalies that might arise. Before that can be done, however, it is essential that the underlying principles be clearly enunciated, and one of those principles must relate to respecting the integrity and purpose of the original sentence.

One matter that has been raised in many of the papers discussing international transfer is the question of whether or not specific classes of offenders should be excluded from consideration. Specifically in the Australian context, it has been suggested that serious drug offenders be excluded. No other nation that supports international transfer, so far as is known, has made such a blanket exclusion. If this were done in Australian treaties, the numbers available for repatriation would be very small indeed. The fundamental issue to be resolved is whether or not the deterrent effect of prison sentences imposed in foreign countries is weakened if provision is made for some part of those sentences to be served in the prisoner's home country. Deterrence is always extremely difficult to measure, but it can be confidently asserted that reliable evidence showing a reduction in deterrent effect is not available. Notwithstanding the difficulties, research and monitoring of deterrence, both specific and general, is to be encouraged.

As there is by now a very extensive body of knowledge developed in many countries in different parts of the world on the operation of prison transfer schemes, it is assumed that any other issues of significance that need to be resolved can be settled by reference to international experience. Australia will not be blazing a new trail when it enters this field.

Conclusion

It would be appropriate at this time for further debate to take place on the subject of Australian prisoners overseas. Specifically, the debate should focus on the desirability or otherwise of establishing a scheme for the international transfer of foreign prisoners. Even though a wide divergence of views is to be expected in any debate on this subject, it is suggested that sound humanitarian, economic and crime prevention reasons can be found for supporting the international transfer of prisoners.

Australia had an opportunity seven or eight years ago to be among the first group of nations to support this notion, but that opportunity was lost. Increased local and overseas interest has created another opportunity at this time. It would be regrettable if this opportunity were also lost on the spurious and unsupported argument that Australia by so doing would be seen to be softening its attitude to drug offenders. In reality, by encouraging and facilitating the international transfer of prisoners, Australia would show itself to be both compassionate and progressive, and it may even bring about a slight reduction in crime by encouraging the rehabilitation of those who commit offences overseas.

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