



TREATY BETWEEN AUSTRALIA AND THE PEOPLE'S REPUBLIC OF CHINA ON MUTUAL LEGAL ASSISTANCE ON CRIMINAL MATTERS

Canberra, 3 April 2006

Introduction

Civil Liberties Australia (CLA) supports the need for a formal treaty between Australia and the People's Republic of China on Mutual Legal Assistance in Criminal Matters. The treaty should comprise a partnership based on the highest achievable mutual standards of rights and liberties.

Any treaty should not effectively diminish Australia's standards and values, and discount our law and our policies.

CLA believes that any Australian treaty with China should represent 'best practice' in terms of both Australian – and world – treaty regimes.

We cannot dictate to a superpower, but nor can we hide our colours without diminishing our nation and ourselves as individuals.

In formulating a treaty with China, it is important that Australia includes the best-possible clauses that ensure we can maintain our integrity – our national values, if you like – in dealings with a country which is:

- about 50 times larger in population;
- based on a different cultural and language heritage; and
- legally, possessing a quite different tradition and way of operating.

Death Penalty

While we make the above comments in general on the draft treaty, we particularly oppose the adoption and ratification of the treaty as drafted (3 April 2006) in relation to exchange of intelligence and data where the death penalty is, or may become, applicable.

CLA believes the Joint Standing Committee is the final safeguard against an approach which would effectively substitute China's standards for Australia's. Whatever treaty is agreed should not diminish Australia's national, cultural and

human rights values, particularly when they are represented legally, as they are in the 1973 Federal legislation to remove the death penalty from Australia.

We believe the proposed treaty need not offend China by arguing that China should itself remove the death penalty – that, of course, would be our preferred option, and once which we believe should have been the starting point for negotiations.

However, the sticking point of negotiations must be that no intelligence or data exchanged with China would be capable of leading to an outcome where an Australia citizen – or a citizen of any other country, China included – could potentially face the death penalty, based on Australian-generated and/or supplied information.

CLA believes that the Joint Standing Committee must insist that the treaty be amended to include provisions that:

- information provided by Australia shall not be used by Chinese police and security authorities to seek the death penalty ; and
- if there is any doubt at all, Australia will not provide any detail which could lead to the death penalty being imposed on an Australian citizen or a citizen of any other country.

In the NIA accompanying the Treaty, the Attorney-General's Department essentially argues (Paragraphs 15 -16) there is no need to include specific references to provision of information which may lead to the death penalty. The bureaucratic language on which they base this is that because in the Agreed Minutes it was noted the death penalty **may** (sic) be in conflict with Australia's essential interests, and that these minutes can be used to interpret the treaty, that is all that is needed. CLA does not agree. Our proposals for Treaty and NIA changes are at Attachment A to this submission.

National Interest Analysis

CLA considers the NIA provided with this treaty is of poor quality, and is particularly deficient in its examination of China's justice system over all, and the death penalty in particular. To say as it does 'our approach to human rights in China is constructive and based on dialogue rather than public confrontation' is a diplomatically-worded admission that Australia does not stand up for its own principles in terms of dealing with China. The NIA is a dereliction of the requirement to bring the best possible information before this Committee and the Parliament so it may make decisions based on all relevant data.

For some reason the drafters of the NIA decided to ignore flagrant and continuous human rights abuse in China and an appalling justice system.

Quite frankly, we wonder why Australia would deliver any Australian or other citizen into its maw. CLA addresses that deficiency in Attachment B to this submission.

The Committee - and the Parliament - has a responsibility to ensure that, in any international dealings, Australia's standards are the minimum.

...not to sign up to a system that imposes China's standards, so that people will be executed because of data and intelligence supplied by Australia.

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10 October 2006

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ATTACHMENT A to CLA submission dated 10 October 2006

1. CLA notes the following, from the 'AGREED MINUTES' of draft treaty negotiations:

AGREED MINUTES

(Negotiation of the Treaty between Australia and the People's Republic of China on Mutual Legal Assistance in Criminal Matters were held from 6 to 10 March 2006, in Canberra, Australia.)

'The Australian side, reinforcing its wish to undertake effective mutual legal assistance in accordance with the Treaty on Mutual Legal Assistance in Criminal Matters, notes that the imposition of the death penalty may be in conflict with the essential interests of Australia. The Chinese side acknowledges the above position of the Australian side.

Both the Australian side and the Chinese side agree 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.'

2. CLA comments that the words "may be in conflict" in the following sentence in the above agreed minutes are weasel words.

The Australian side ..., notes that the imposition of the death penalty **may be** in conflict with the essential interests of Australia. (*emphasis added*)

This sentence should read:

The Australian side ..., notes that the imposition of the death penalty **IS** in conflict with the essential interests of Australia.

Because the agreed minutes include such weasel words, it will be necessary for the Parliament to amend the draft Treaty so that no-one – Australian or otherwise – can be executed by the Chinese state as a direct or indirect result of Australian-supplied data or intelligence.

3. We reiterate:

- Australia is against the death penalty, and has ratified international protocols to that effect.
- Australian federal law forbids the death penalty.

- The policies of the two major political parties oppose the death penalty.

4. In these circumstances, the imposition of the death penalty in China on Australian-supplied information will always be “in conflict with the essential interests of Australia.” We believe the endorsed treaty must reflect that fact.

5. So that the treaty reflects Australia’s international obligations, the law of Australia, and the promulgated policy of the two major Australian political parties, we ask the Joint Standing Committee to insist that the Parliament insert an additional clause into the treaty, as follows:

1. (Assistance shall be refused if...)

(e) Where Australia is the Requested Party, the information requested would or could lead to the imposition of the death penalty.

(ends Attachment A)

ATTACHMENT B to CLA submission dated 10 October 2006

Given the fact that there are currently six Australians on death row in Indonesia due to information provided to Indonesian police by the Australian Federal Police, we consider the possibility of something similar happening in China highly likely unless formal safeguards are in place.

The Australian Parliament should not place the AFP in the position of having to make life and death decisions on Australian and other citizens of the world.

As Australia is against the death penalty – by statute, and by endorsed policy of the two major political parties – it is an invidious position for AFP officers to have to hand over intelligence and data which could lead to the state killing of the people in question.

The draft Treaty appears to have been negotiated by people within Australia's Department of Foreign Affairs and Trade who are unaware of these facts.

The reasons we oppose the non inclusion of death penalty safeguards in this Treaty are:

- It is not mentioned that provision of information by Australia may lead to the death penalty. Silence on this issue is a calculated insult to the law of Australia, the policy of the major political parties, and to the AFP officers who will be faced with decisions that will lead to killing
- China is numerically the world's largest executioner of people. China acknowledges executing 1770 people in 2005 (the actual number is estimated by various civil rights organizations, such as Amnesty International, to be over 8000, based on information from local sources). The actual numbers will never be known exactly as statistics in China on the numbers of people executed are a state secret.
- In China, the death penalty targets poor and marginalized groups including ethnic minorities, migrant communities, political dissidents, and so called "separatists". Since the "war on terrorism" began, Muslims in the Xinjiang Uighur Autonomous Region have been the target of intense crackdowns. It is common for political dissidents to be labeled as 'terrorists' and sentenced to death, regardless of whether they have used or advocated violence, and regardless of whether they have been implicated in any crime.
- There are few consistencies in the application of the death penalty in China and sentences often depend greatly on the political climate and timing. For example, crimes which would ordinarily bring a lesser sentence

are often punished by death during a so called "Strike Hard" campaign. White collar criminal cases may be given the death sentence to make an example or highlight anti-corruption efforts. Executions also tend to cluster around national holidays, including National Day or the Chinese New Year. Chinese officials have even commemorated International Children's Day by holding rallies around the execution of several prisoners.

NOTE: Australian businessmen and women wishing to become partners with China in the economic boom of that country are highly likely to be caught in situations where they could be accused of white collar crime. It is almost inevitable, in such circumstances, that an Australian will face execution in China for a "crime" which would attract only several years' jail in Australia.

- So called "Strike Hard" campaigns are periodically launched by local leaders in China as a means of cracking down on drug-related crimes or corruption. During the campaigns, sweeps net thousands of arrests, and prisoners may meet much harsher punishments than would otherwise be given under normal circumstances. Executions skyrocket during these campaigns; the most recent national Strike Hard was launched on April 11, 2001 with 89 executions in a single day. By the end of 2001, more than 2,468 executions had taken place.
- Many of those executed during "Strike Hard" campaigns were sentenced at public 'execution rallies' where thousands of spectators watch the sentencing of criminals who are then led out of the arena and directly to the execution ground. Eager to demonstrate campaign success, officials push to increase the number of guilty verdicts and executions during these campaigns, resulting in rushed trials and verdicts. The right to a thorough and fair trial and to an appeals process is even more at risk during "Strike Hard" campaigns. It seems inevitable that innocent people have been and will continue to be executed under these conditions. In Australian terms, it is like executing people for "double demerit" points on particular weekends.
- CLA has grave concerns over the state of the Chinese criminal justice system. Trials are routinely carried out behind closed doors; courtrooms are plagued with corruption. Some judges are poorly trained and some may even have little or no legal training at all. Defence lawyers suffer limited access to their clients, and torture is widespread during custody and questioning stages. Verdicts are often decided secretly prior to the trial proceedings. As in Indonesia, convicted persons may even get a harsher sentence as a result of an appeal.
- We are concerned about reports of the sale of organs harvested from executed prisoners without permission. While officials deny the practice, there have been accusations that organ sale will occur in the Chinese

media before the trial begins. Reports say prisoners are given blood thinners, and executed in a manner to preserve the organs, which are reportedly harvested right away and taken directly to hospitals. These reports are disturbing, and would constitute major human rights violations in their own right.

- Information provided by Amnesty International shows :
 1. In the 1990s, China executed 18,194 people (an average of 1,802 per year), and issued 27,599 death sentences.
 2. In 2001 alone, Amnesty International documented at least 4,015 death sentences issued and 2,468 executions carried out. These estimates are compiled based on published accounts and reports, and are thought to be an underestimation of the actual number of sentences and executions carried out.
 3. On January 3, 2003, the Chinese government executed 7 prisoners after a public sentencing rally in Sanya City, on Hainan Island, in order to prepare for the Chinese New Year.
 4. On April 11, 2001 a total of 89 people were executed in a single day to launch a national “Strike Hard” on crime campaign. In the following three months alone, 1781 were executed, 50 of whom were condemned at a mass rally in June 2001.
 5. Provinces in China have begun to use mobile execution vans – converted passenger vans that have been equipped with space for the victim, a medical doctor, the executioner and a courtroom official in the back, where the execution can take place. In the front seat, the vans feature monitors to allow witnessing and recording of the execution.
 6. Chinese courts hand down the death sentence for an ever-expanding range of crimes including non-violent and political crimes, plus a number of vaguely defined crimes that are subject to broad interpretation.

(ends Attachment B)

(ends CLA submission)



Submission of Civil Liberties Australia

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