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The Second Sentence: Australians Imprisoned Abroad

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Introduction

Individuals detained in foreign prisons raise human rights issues of considerable importance, especially given what seems to be an apparent increase in cases involving Australian citizens arrested or imprisoned overseas. The case that generated most interest in this topic was that of Schapelle Corby, a beauty student from the Gold Coast, caught with 4.1kg of marijuana in her possession in Indonesia in 2004. Soon after, international drug enforcement efforts linked nine Australians to the alleged smuggling of 10.9kg of heroin out of Indonesia. Drug-related arrests of Australians continued and Tuong Van Nguyen, a young Australian, was executed in Singapore for trafficking heroin. More recently, was the case of Peter Lloyd, a foreign correspondent with the Australian Broadcasting Corporation, who spent six months in prison in Singapore for possession of drugs. In Thailand, Australian author and teacher, Harry Nicolaides was imprisoned for five months for offending the royal family under *lèse majesté* provisions in the Thai criminal code. And another case this year involved Annice Smoel, a mother of four, who spent four nights in a Thai gaol for stealing a bar mat and allegedly insulting local police.

Such cases comprise only a small proportion of those where Australian citizens, wittingly or unwittingly, offend in other nations. The most recent annual report from the Department of Foreign Affairs and Trade states that their 'consular staff provided intensive support to 1249 Australians arrested or imprisoned overseas' in 2007-08. The report claims that there were 970 Australians arrested internationally and 211 who were in prison during the reporting period. It also notes that 'as at 30 June 2008, we had provided strong support to five Australians sentenced to death in Indonesia and Vietnam and made repeated representations - which are ongoing – supporting clemency in each case'.[1]

Many human rights issues confront those incarcerated in countries other than their own. While some of these issues overlap with those experienced by individuals imprisoned in their home countries, there are specific additional hardships for foreign prisoners. Their first sentence, the prison term, brings with it a second. The prisoner is utterly immersed within an unfamiliar environment, culture and language and is separated from their family and social support.

This article discusses some of those additional problems faced by Australians imprisoned abroad. It specifically focuses on the International Transfer of Prisoners scheme (ITP). The foundation and purpose of the ITP is outlined and a case study of the first Australian to be repatriated under the scheme is presented. This is followed by a detailed examination of the transfer process as well as an overview of statistical information about Australian prisoners. Finally, the ITP's benefits and deficiencies are explained and future improvements are suggested.

Problems faced by foreign prisoners

When Australians are imprisoned abroad, they may endure 'a second sentence' of having not only to adjust to prison life but also to adapt to a new and different culture.[2] Such foreign prisoners will be immersed in a criminal justice system that they are unaccustomed to, they may be confused by cultural differences and they are often not familiar or adept at the local language.[3] It is often said that they are living in a 'prison within a prison',[4] for, if prisoners cannot communicate their needs, then they may not be able to stay in contact with their family and friends, nor even access legal assistance.[5] As a result, foreign prisoners may become social outcasts further isolating themselves and losing touch with the outside world.

Some prisoners may not receive sufficient food and nourishment to sustain adequate health.[6] Many will be disadvantaged because they are without financial support and so are unable to afford phone calls, sending letters, or to purchase clothing and other daily requirements.[7] And, even though the United Nations (UN) has enacted the Standard Minimum Rules for the Treatment of Prisoners specifying guidelines to ensure equal human rights,[8] not every country and prison abides by these. Thus, many prisons are overcrowded, which can lead to rebellions, protests and incidents of violence, along with the spread of diseases such as dysentery, tuberculosis and HIV/AIDS.

So there is a raft of specific and additional difficulties that those detained in a foreign country may endure. These include problems with:

1. family visits and communication
2. interpreters and language difficulties
3. legal advice
4. financial support
5. food and dietary requirements
6. religious observance issues
7. health issues and general hygiene
8. personal safety issues such as violence and sexual assault
9. prisoner exchange agreements
10. access to programs or employment
11. access to works release or parole
12. higher classification because of escape risk

The introduction of the ITP scheme

The ITP was launched in an effort to address some of the above issues. The scheme was established in 1997 by the Strategic Policy Coordination Branch at the Council of the

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European Convention, to provide prisoners with standard human rights and equal justice. The legislative framework commenced in Australia at this time; however, it was not until 1 January 2003 that Australia officially joined this multi-lateral ITP scheme.[9]

The case of John Doran

It was the case of John Doran that pushed Australia into establishing the first ITP treaty. Not only was he the first Australian prisoner to be transferred, he was in fact the catalyst for the signing of the ITP treaty between Australia and Thailand. As such, Doran was the first Australian to be allowed to serve out his sentence at home. His case offers an appreciation of the problems associated with being imprisoned overseas as well as the repatriation process.

In June 1997 John Doran made a simple mistake. Broke, between jobs and with a pregnant girlfriend to support, he bought two forged travellers cheques in a Bangkok bar. When he tried to use the cheques, which had a value of approximately $600 (AU), he was arrested. Although Doran was aware of Thailand's reputation for harsh sentencing, he claims he was not concerned. In Australia his crime would have incurred a non-custodial sentence so he thought he would be facing a few months imprisonment at most. It is not surprising that Doran was shocked when a 30-year sentence was passed.

Subsequent appeals saw this sentence reduced to 10 years and then again to eight. While Doran felt that this sentence was overly severe, he never denied his guilt. He was, in fact, so ashamed of his actions that he allowed 10 months to pass before informing his family of his situation. Doran was visited monthly by consular staff and biannually by his sister. Family members are not permitted to visit Klong Prem prison any more than twice a year.

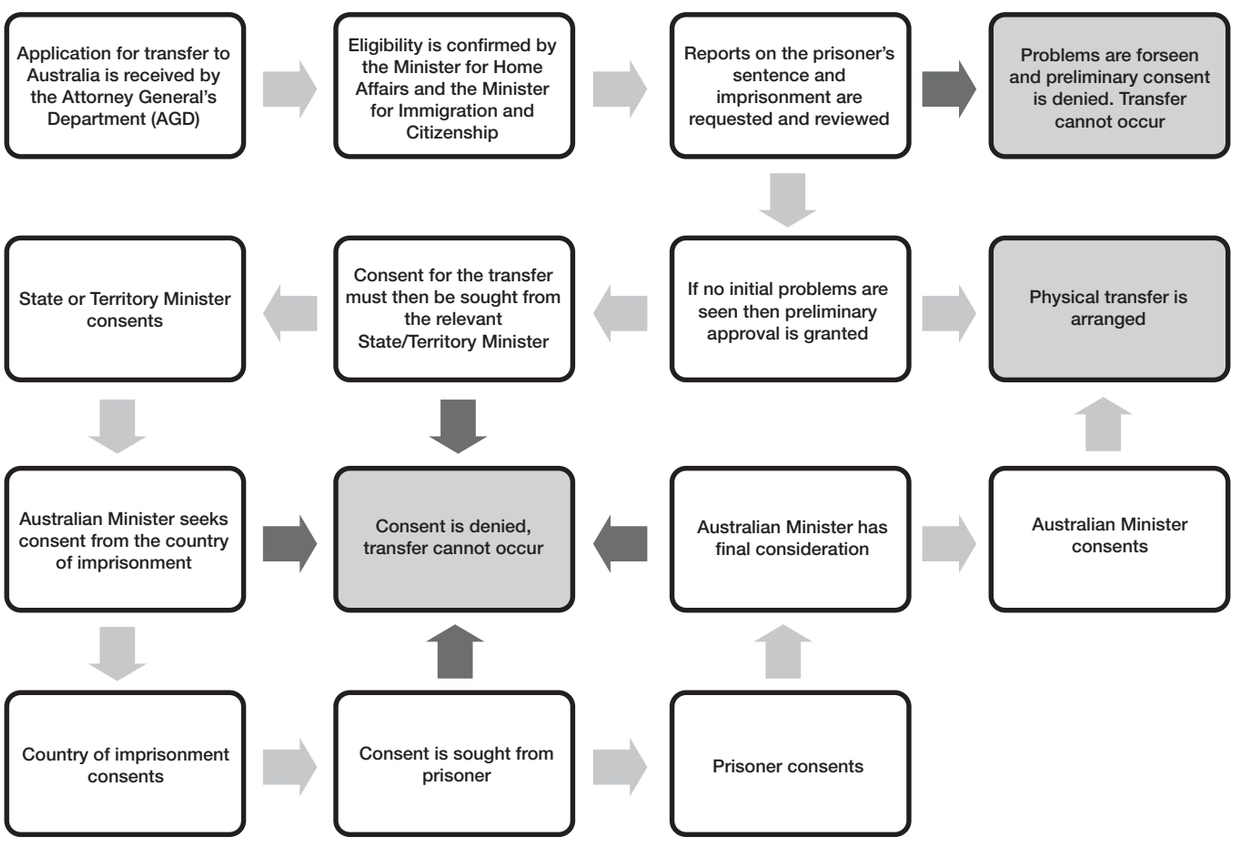
While in Klong Prem prison, commonly referred to as the 'Bangkok Hilton', Doran shared a 15m by 4m cell with up to 60 other men at times. During his term he contracted non-contagious tuberculosis and lost a number of teeth to decay. He suffered from hay fever and severe depression and, during the worst stages, his weight declined to 47kg. His memory and cognitive function also deteriorated as evidenced by the fact that he struggled to remember his age.

Debbie Singh, Doran's sister, campaigned consistently for her brother's release over the six years that he was incarcerated. She stated that, '[i]f he had committed a drug offence, he might have got more media attention'.[10] It was her efforts that paved the way for Doran and, subsequently, a number of other Australian prisoners to be repatriated.

The main focus was on the ratification of a bilateral prisoner transfer scheme between Thailand and Australia. This scheme would allow detainees to serve out their sentences in their home countries, thus removing language and cultural barriers and improving their prospects of effective rehabilitation. For Doran, being transferred to Perth would also allow regular visits from family and better medical treatment. As things were, his sister was forced to sell her home and her business to pay for the biannual visits to Thailand and also for fortnightly food parcels and deposits into his prison bank account. The food provided in Klong Prem is not enough to subsist on and prisoners rely on their families to provide such basic needs.

The process of getting Doran home was a long and difficult

Figure 1 Process for application for transfer to Australia[11]



one. His numerous appeals for a royal pardon were rejected and his rapidly deteriorating mental and physical state had his family worried that he would die before the completion of his sentence. It was the ratification of the bilateral prisoner exchange treaty between Australia and Thailand that marked the beginning of his transition back to Australia. With all the conditions met, Doran was finally approved for transfer by both the Australian and Thai governments in April 2003. It took a further three weeks for approval to be gained from the Western Australian Attorney General. Doran's earliest release date in Thailand would have been 18 July 2005. However, under WA sentencing laws it was commuted to September 2004. A further six months were cut from his sentence by Thai authorities for good behaviour, leaving him with only nine months to serve. He was escorted home by prison officials on 24 April 2003 and served the remainder of his sentence at Wooroloo Prison farm.

With access to good food, hygienic facilities and medical treatment, Doran emerged from prison healthy and well. His sister gained considerable public recognition with a national award and, as well as writing a book, she has continued to campaign for Australians overseas. The legislation that is in place as a result of her campaign has allowed for the transition of many prisoners both in and out of Australia.

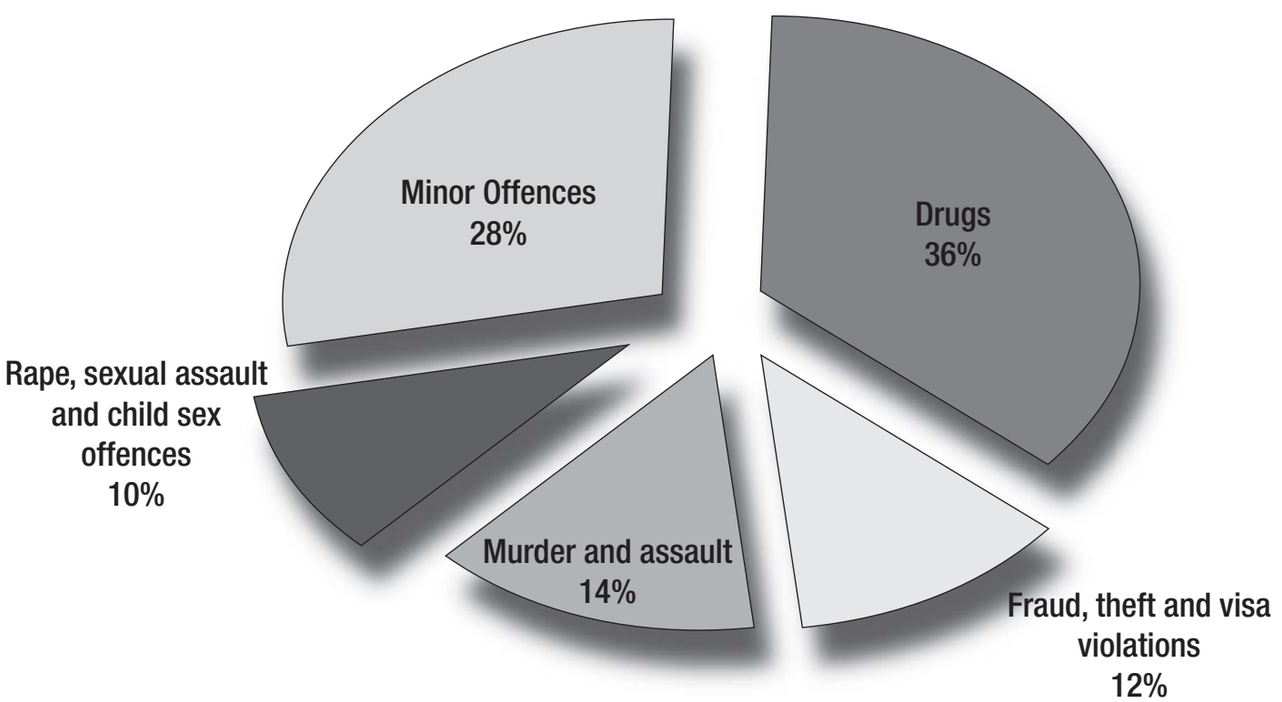
The processes of the ITP

There are many steps involved in the ITP. The applications and paperwork take months to review and process. It is a complex system, with talks beginning with the Embassy or High Commission of the country of detainment before moving to the Attorney General of the destination country. The Australian government must propose the terms of the treaty and these must be consented to by the relevant state government, the prisoner and the authorities in the detaining country. Approval must also be sought from the Australian Minister for Home Affairs who considers such factors as the prisoner's prospects for rehabilitation and reintegration, their age and health, whether they pose a threat to the community upon return and whether there is approval of the transfer from the Australian Federal Police. Figure 1 outlines in detail the process for transfer to Australia.

There are also a number of set conditions which must be met for a prisoner to be transferred. The prisoner must be able to prove either citizenship or strong community ties to Australia. They must have already served either four years or a third of their sentence, whichever is greater. They must also have at least one year remaining on their sentence and there can be no other legal proceedings pending. Their sentence cannot be subject to appeal and the offence has to be recognised as a crime by their home country. In addition, each foreign country that Australia has agreements with has particular stipulations that must be met. For example, in Thailand, the prisoner must have admitted their guilt and an official apology to the King must be provided. The amount of processing time for each transfer varies and the prisoner often has to pay for the transfer costs.

At the present time there are 65 countries that have operational ITP treaties with Australia (see Figure 3 for a list of the countries that have active ITP treaties with Australia). These treaties are overseen by the Strategic Policy Coordination Branch. The biggest step forward came in 1997 with the establishment of the Council of the European Convention on the Transfer of Sentenced Persons. This convention has a large number of member states and is therefore more far reaching than the bilateral treaties, which only involve two countries. That is not to undermine the importance of the bilateral treaties that represent essential progress in the right direction. Some of the most recent bilateral agreements entered into by Australia were with Thailand on 26 September 2002, Hong Kong on 23 April

Figure 2 Offences committed[16]



2006 and the USA on 30 March 2007. Although the treaty with Cambodia was in effect by 14 April 2007, it is not yet operational. There are no agreements with New Zealand or Indonesia.[12] However, talks are currently underway with Indonesia and it is hoped that, if a treaty can be finalised, convicted drug smuggler Schapelle Corby and three of the Bali Nine may be able to serve out the remainder of their sentences in Australia.[13]

Scope of the problem

The most recent comprehensive statistics available on the numbers of Australians imprisoned overseas are from the Australian Department of Foreign Affairs and Trade 2003-2004 annual report. At that time there were 214 Australians in foreign prisons. Figure 2 details the offences for which they were imprisoned. In figure 3 the numbers beside the relevant countries indicate where those 214 were imprisoned.

Figure 3 ITP participating countries[14] with numbers of Australians imprisoned[15]

Albania	Andorra	Armenia
Austria	Azerbaijan	Bahamas
Belgium	Bolivia	Bosnia and Herzegovina
Bulgaria	Cambodia 4	Canada 1
Chile	Costa Rica 1	Croatia 2
Cyprus 1	Czech Republic 1	Denmark 2
Ecuador	Estonia	Finland
France 1	Georgia	Germany 5
Greece 13	Hong Kong 3	Hungary
Iceland	Ireland 2	Israel
Italy 11	Japan 7	South Korea 4
Latvia	Liechtenstein	Lithuania
Luxembourg	Malta	Mauritius
Mexico	Moldova	Montenegro
Netherlands 3	Norway 6	Panama
Poland 1	Portugal	Romania 1
Russia	San Marino	Serbia
Slovakia	Slovenia	Spain 5
Sweden 1	Switzerland 1	Thailand 18
Former Republic Yugoslavia 2	Tonga	Trinidad and Tobago 1
Turkey 2	Ukraine	United Kingdom 16
United States 34	Venezuela	TOTAL = 149*

* Of the 214 Australians imprisoned overseas, as at 31 December 2003, 65 were in countries that do not have ITP treaties with Australia. There were 27 in New Zealand; nine each in China and Vietnam; two each in Indonesia, Lebanon, Argentina, The United Arab Emirates, El Salvador, Singapore and Fiji; one each in the Philippines, Western Samoa, Brazil, French Dependencies, Uruguay and India.

Conclusions and recommendations

Apart from the obvious humanitarian benefits, the enactment of these treaties may also result in reducing the costs for Australia in housing foreign prisoners and in providing consular assistance to Australians detained overseas, improving criminal justice records and increasing awareness by recording prisoner's convictions in their home country, lowering rates of recidivism and improving prospects for rehabilitation and reintegration.

Nevertheless, Australian consulates have difficulty assisting Australians imprisoned abroad because penalties often vary significantly between countries. Overall, the consulate is supposed to visit and assist prisoners with family, health, financial, legal and court issues as soon as they are detained.[17] More specifically, the consulate is supposed to keep the prisoner and their family well-informed about the foreign criminal justice system, prisoner rights and prison rules. Part of this role is to provide prisoners with competent, capable, English-speaking attorneys, as well as financial assistance, which can be provided through the Prisoner Loan Scheme if the prisoner is in need.

The Department of Foreign Affairs and Trade is responsible for collecting information about Australians imprisoned abroad and informing the relevant consulate. However, the amount of time between being arrested, detained and awaiting assistance and trial can be lengthy. Even though Australia accepted the terms of the Vienna Convention on Consular Relations (1963), the system and process is far from perfect and is in need of improvement.

It is likely that the issues surrounding foreign prisoners will be exacerbated in the future for several reasons. One is that in recent decades prison populations have increased exponentially around the world in most countries. Secondly, the pressures of globalisation, more frequent travel and communications, guest worker arrangements and so on, all result in greater opportunity for the imprisonment of non-nationals outside their countries of residence. Thirdly, the numbers of foreign prisoners are rising but it is not clear whether there has been a disproportionate increase or whether it is more in keeping with the general expansion in prisoner numbers worldwide.

In conclusion, considering the future of international affairs in relation to foreign prisoners, it is hoped that more countries will sign agreements supporting the ITP. In 1955 the UN mandated the Standard Minimum Rules for the Treatment of Prisoners, requiring every country recognised by the UN to provide their prisoners with a sentence that will lead to successful rehabilitation and reintegration. If this means that the sentence is carried out in the prisoner's country of origin then that must be facilitated. The lessons, both positive and negative, from the experience of John Doran and his family exemplify the need for continued surveillance on the rights of foreign prisoners and for the establishment of more international treaty arrangements.

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[15] Department of Foreign Affairs and Trade, *Annual Report 2003-2004* (2003) <http://www.dfat.gov.au/dept/annual_reports/03_04/downloads/DFAT_AR_03-04.pdf> at 19 August 2009.
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[17] Ibid.

Questions:

** What do you think could be done to improve the workability of the ITP treaties?*
** Should there be more consular involvement in the affairs of foreign prisoners?*
** Australia provides loans for foreign prisoners who are forced to buy their own food and provisions in prison. Do you agree that these loans should be made available or would you suggest alternative arrangements?*
** At the moment, the Australian Government is powerless to intervene when an Australian citizen is legitimately sentenced to death overseas. What do you think should be done about this?*