Off the Cuff

*By guest columnist George Zdenkowski**

Last year there was considerable public sympathy for the plight of two children who were effectively orphaned when their father died because their mother, Jane McKenzie, was serving a 50-year prison sentence in Thailand for drug-related offences. Some years earlier, the case of James Savage, an Australian convicted of murder in the United States, attracted significant publicity through the (unsuccessful) efforts of his mother to have him repatriated to an Australian prison. No doubt there are many stories to be told about foreign nationals in Australian prisons who are desperate to be closer to their original community ties.

When can people imprisoned in a foreign nation serve their prison term in their own country? It may not get the political pulse racing, but it's a national, indeed international, issue of great significance to prisoners and their families around the world. Currently there are two transfer arrangements: the Council of Europe scheme involving 27 nations and the Commonwealth scheme, which has six members. Australia has not signed up to either.

However, the prospect of foreign nationals in Australian prisons and Australians in overseas prisons being repatriated to serve their terms has been nudged somewhat closer by the *International Transfer of Prisoners (New South Wales) Act 1997*.

One of the difficulties of establishing a fully-fledged scheme in Australia is the need for federal cooperation: complementary legislation by the Commonwealth, State and Territory governments. The reasons for this are that the federal government must enter into the relevant international treaty arrangements and that there are no federal prisons. Any Australian prisoners transferred from overseas would be required to serve the balance of their term in a State or Territory prison.

In 1992, at a meeting of the Standing Committee of Attorneys-General (SCAG), all States and Territories (other than the Northern Territory) agreed on such a scheme. The Commonwealth government has, following a detailed inquiry by the House of Representatives Standing Committee on Legal and Constitutional Affairs, enacted legislation which provides the framework for Australia to participate in international prisoner transfers. So far, only Queensland, and most recently NSW, have enacted complementary laws.

The principal arguments in favour of such a scheme are humanitarian and cost-benefit. Attorney-General Daryl Williams, in introducing the federal law, commented: "There are sound humanitarian and rehabilitative grounds for international prisoner transfers ... (such) transfers may also result in financial savings for some participating States and Territories if there is a net outflow of prisoners." These sentiments were echoed in the NSW parliament by State Corrective Services Minister Bob Debus.

The humanitarian arguments are unimpeachable and should, in my view, constitute the basic rationale for the scheme, irrespective of the cost-benefit issue. The evidence as to financial benefit is equivocal. For example, in NSW, which has the majority of overseas prisoners, there would appear to be a potential net benefit, on paper. There are, according to Department of Corrective Services data, 899 foreign nationals in NSW prisons (the largest groups being from New Zealand (176), the UK (162) and Vietnam (79)). However, only about 495 are likely to want to leave, presumably because of prison conditions in their country of origin.

There are, according to Department of Foreign Affairs and Trade figures, approximately 182 Australian

nationals in overseas prisons (mainly in NZ, US, Greece and the UK), of whom 156 probably want to return. But these figures are issued with the caveat that they represent Australian prisoners known to consular authorities and do not include those who have chosen not to inform authorities of their detention.

The ultimate flow of prisoners is difficult to predict because of the conditions (which are eminently sensible) attached to the scheme and include: the offence in question must be a crime in both countries; the consents of the prisoner and of the transferring and receiving country are essential; there must be at least six months of the sentence to run; and there must be a relevant transfer treaty between Australia and the other country.

Moreover, the calculations cannot be simply based on actual prisoners transferred. It is the length of the balance of sentence to be served which matters, in terms of cost. Overseas sentences are likely, in some cases, to be substantially longer than Australian prison terms.

So far, no such treaties have been negotiated by Australia. The most straight-forward path would be to join the existing multilateral schemes mentioned earlier.

If this is not possible, it may be necessary to negotiate bilateral treaties with relevant non-member nations such as Thailand.

There are two proposed methods of enforcing sentences. In general, under the 'continued enforcement' option, an Australian sentenced to imprisonment overseas will continue to serve his or her sentence in an Australian prison with only such modifications as are required by Australian law. Less frequently, under the 'converted sentence' option, a different sentence can be substituted provided it is no harsher than the original penalty. In each case, the person transferred will be treated as a federal prisoner, to ensure uniformity of treatment and to avoid forum-shopping for the best benefits in terms of remission entitlements etc.

Until recently, the transfer scheme had bipartisan support. In NSW, former coalition Attorneys-General John Dowd and John Hannaford were strong backers. However, the NSW coalition has curiously changed tack and opposed the law during the recent parliamentary debate, attempting simultaneously to espouse its humanitarian objectives, but to reject the scheme because the financial gains for NSW were not convincing.

Nevertheless, the government prevailed and now Attorney-General Jeff Shaw has urged the federal government to act to allow international prisoners to return to those States which have passed the law. It is a sensible suggestion, involving a relatively simple process of lodging a declaration with the Council of Europe Convention Secretariat, which will benefit some prisoners here and overseas immediately.

Unfortunately, for prisoners in Thailand such as Jane McKenzie (or prisoners in other countries not covered by the existing multilateral schemes), the slower and more cumbersome process of bilateral treaty negotiation appears to be the only hope.

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