

Part 2: Your guide to this discussion paper

2.1 The structure of this paper

Part 2 sets out the structure of this paper and issues for discussion and seeks your comments on these issues. The issues are examined in detail in Parts 6 and 7.

Part 3 explains Australia's key international crime cooperation tools and discusses how they complement each other. Mutual assistance is one of these tools.

Part 4 describes how the current mutual assistance system works.

Part 5 explains agency-to-agency assistance and how it differs from mutual assistance. This Part also demonstrates how agency-to-agency assistance can be an alternative to mutual assistance.

Part 6 discusses the key considerations for mutual assistance reform. This Part of the paper examines what we should do in mutual assistance and how we should do it.

Part 7 considers how people in the mutual assistance process can do their jobs best. This Part discusses how we can improve our domestic and international capacity in mutual assistance.

Part 8 discusses how we can maintain and increase public awareness of mutual assistance and the possible reforms to mutual assistance.

2.2 Issues and principles considered by this paper

In light of the dramatic increase in mutual assistance, this paper considers how Australia's mutual assistance arrangements can be improved.

Throughout the paper there are green issue boxes which raise possible proposals to improve Australia's mutual assistance arrangements. These issue boxes are intended to promote further discussion and do not represent the final policy position that will be presented to Government. There are also yellow principle boxes which represent the Australian Government's policy position or intention on a particular topic.

A full list of the issues and principles considered by this paper follows. We invite your comments and submissions on the issues. Each of the issues and principles are discussed in detail in Parts 6 and 7.

Issue 1: Objects of the Mutual Assistance Act: What should be included in the objects of the Mutual Assistance Act?

Issue 2: Minister's approval of assistance: How should the Minister approve requests for assistance? Should the Minister authorise the specific type of assistance (as currently occurs) or should the Minister approve the request in general terms to enable Australian

law enforcement agencies to action the request by exercising the powers available in ordinary domestic investigations?

Issue 3: Grounds of refusal–general: Are the current grounds of refusal appropriate? Should any of the grounds be removed? Should any of the mandatory grounds be discretionary? Should other grounds be included?

Principle A: Safeguards: Australia will retain a broad range of safeguards in the mutual assistance process.

Principle B: Grounds of refusal–investigation stage: The grounds of refusal should state that they apply to the investigation stage of the criminal justice process.

Issue 4: Grounds of refusal–proceeds of crime: Some of the grounds of refusal are not applicable to proceeds of crime action. Should the Mutual Assistance Act be amended to clarify that the Minister does not need to consider such grounds in making a decision on providing proceeds of crime assistance to a foreign country?

Issue 5: Double jeopardy: Australia must refuse a mutual assistance request where the request relates to the prosecution of a person for an offence for which the person has been acquitted, pardoned or has undergone the relevant punishment in the requesting country. Should Australia also refuse requests for mutual assistance that relate to an offence for which a person has already been acquitted, pardoned or punished in Australia or another country (other than the requesting country)? Should Australia be able to respond to mutual assistance requests where a person has already been acquitted, pardoned or punished for the offence, if special circumstances exist?

Issue 6: Extraterritoriality: Currently, Australia can refuse a request for assistance where the request relates to conduct that occurred outside the foreign country (ie the foreign country has criminalised that conduct extraterritorially) and Australia does not criminalise that same conduct where it takes place outside Australia. Should Australia retain the extraterritoriality ground of refusal for mutual assistance requests?

Issue 7: Lapse of time: Currently, Australia can refuse a request for assistance where the request relates to conduct that could no longer be prosecuted in Australia because of the length of time since the conduct was committed. Should Australia continue to refuse mutual assistance requests on the grounds of lapse of time?

Principle C: Grounds of refusal in death penalty matters: Australia will retain the grounds of refusal in death penalty matters.

Issue 8: Take evidence proceedings: Under the Mutual Assistance Act, the Minister can authorise a magistrate to take evidence on oath from witnesses and undertake production order proceedings for use in foreign proceedings. This can only be done when the foreign country has commenced proceedings. Are any reforms needed to improve take evidence proceedings?

Issue 9: Magistrate’s discretion: Should the magistrate’s discretion in take evidence or production order proceedings on whether to permit examination or cross-examination by video link be removed or restricted?

Issue 10: Transfer of persons to give evidence: Under the Mutual Assistance Act, the Minister can make arrangements for a person to travel to a foreign country to give evidence or assist an investigation. How should Australia deal with requests for persons to give evidence or assist investigations in a foreign country? Are the undertakings contained in the Mutual Assistance Act appropriate?

Issue 11: Transfer of prisoners to give evidence: Under the Mutual Assistance Act, the Minister can make arrangements for federal or State prisoners to travel to a foreign country to give evidence or assist an investigation. How should Australia deal with requests for prisoners to give evidence or assist investigations in a foreign country? Are the undertakings contained in the Mutual Assistance Act appropriate?

Issue 12: DNA from persons without consent: Currently, Australia can only obtain DNA material from a person for a foreign country where that person consents to that process. Should Australia allow DNA material to be obtained from a person without the person's consent under mutual assistance in the same way as it can be obtained for a domestic investigation? What safeguards should apply?

Issue 13: Providing information from the DNA database: Currently, Australia can provide DNA information stored on the National Criminal Investigation DNA Database (NCIDD) to foreign countries by using the take evidence or production order proceedings in the Mutual Assistance Act or executing a mutual assistance search warrant for specifically identified DNA. DNA information can also be provided where it is in the possession of an enforcement agency. Are the current mechanisms for providing this DNA information appropriate? Are there better mechanisms for doing this?

Issue 14: DNA matching: Currently, Australia cannot 'match' a DNA sample from a foreign country against the NCIDD unless the mutual assistance search warrant criteria are met. Should Australia allow controlled access to the NCIDD under mutual assistance for the purpose of DNA matching?

Issue 15: Telecommunications interception material already in the possession of an enforcement agency: Currently, Australia can only provide telecommunications material through take evidence or production order proceedings under section 13 of the Mutual Assistance Act. Should Australia be able to provide telecommunications interception material and other telecommunications data such as stored communications, under section 13A of the Mutual Assistance Act in the same way that Australia can currently provide surveillance device material under this section?

Issue 16: Interception of telecommunications and use of surveillance devices without a domestic investigation: Currently, Australia cannot intercept telecommunications, access stored communications, or use most surveillance devices solely at the request of a foreign country. Where resources are available, should Australia be able to intercept telecommunications and use surveillance devices at the request of a foreign country without the need for a domestic investigation?

Issue 17: Registration of civil proceeds of crime orders: Should Australia make the registration of civil based proceeds of crime orders available to all countries?

Issue 18: Interaction between the Mutual Assistance Act and the Proceeds of Crime Act: Is the interaction between the Mutual Assistance Act and the Proceeds of Crime Act appropriate and effective? How can the interaction be streamlined or improved?

Issue 19: Service of documents: Should Australia continue to deal with requests for service of documents through the mutual assistance process? What alternatives to this process could be used?

Issue 20: Content of Mutual Assistance Requests: Should mutual assistance requests from foreign countries be required to contain any additional information? Should the Mutual Assistance Act reflect the practice of liaising with foreign countries to ensure their requests meet the requirements in the Act?

Issue 21: Transfer of persons to give evidence in Australia: Under the Mutual Assistance Act, the Minister can make arrangements for a person, including a prisoner, to travel to Australia from a foreign country to give evidence or assist an investigation. How should Australia make arrangements for persons to give evidence or assist investigations in a foreign country? Are the arrangements contained in the Mutual Assistance Act appropriate?

Issue 22: Use of foreign evidence: Where Australia receives evidence from a foreign country for use in domestic proceedings, the *Foreign Evidence Act 1994* (Foreign Evidence Act) applies. Are the current mechanisms in the Foreign Evidence Act the most appropriate mechanisms for allowing the use of foreign evidence in domestic proceedings? Are Australian courts' current discretions under the Foreign Evidence Act to refuse to allow the use of foreign evidence in domestic proceedings appropriate?

Issue 23: Request on behalf of a defendant: Is the current system the most appropriate system for providing a defendant with an opportunity to seek mutual assistance?

Principle D: Confidentiality of incoming mutual assistance requests: Australia will retain strict confidentiality requirements for incoming mutual assistance requests.

Issue 24: Confidentiality of outgoing mutual assistance requests: It is currently an offence for a person to disclose information about a request from a foreign country for mutual assistance where they have obtained that information as part of their employment. Should there be a similar requirement for Commonwealth officers only to keep confidential any mutual assistance requests from Australia to a foreign country?

Issue 25: Privacy: Mutual assistance can involve personal information flows between a range of agencies in Australia and between Australia and foreign countries for law enforcement purposes. Should the Mutual Assistance Act expressly identify and authorise the personal information flows in the mutual assistance process?

Principle E: Application of the Freedom of Information Act to mutual assistance documents: The Freedom of Information Act and applicable exemptions will continue to apply to mutual assistance decisions.

Principle F: Judicial review of mutual assistance decisions: Avenues for judicial review on mutual assistance decisions will continue to be available.

Principle G: Enhancing skills and knowledge: The Australian Government will continue to implement strategies to ensure that participants in the mutual assistance process have the necessary skills and knowledge to make and action requests.

Principle H: Working Cooperatively: The Australian Government will explore the most effective ways to work cooperatively on mutual assistance with the States and Territories.

Principle I: Clarifying roles and responsibilities: The Australian Government will review existing arrangements with States and Territories to clarify the roles and responsibilities of agencies in the mutual assistance process.

Issue 26: Central Taskforce: The Australian Government Attorney-General's Department is Australia's Central Authority for mutual assistance and is staffed by mutual assistance case officers. Should Australia adopt a Taskforce model for mutual assistance by co-locating mutual assistance case officers with prosecutors and law enforcement officers? Which agencies should be included in the taskforce? Should the taskforce be located in the Australian Government Attorney-General's Department?

Principle J: Building international relationships: The Australian Government will continue to focus on developing international mutual assistance relationships through bilateral and multilateral treaties and active engagement with the United Nations Office on Drugs and Crime.

Issue 27: Overseas liaison officers: Should the Australian Government post international crime cooperation liaison officers in our Embassies accredited to our key international crime cooperation partners or the Central Authorities of our key international crime cooperation partners?

Principle K: Building regional relationships and capacity: The Australian Government will continue to explore opportunities to build capacity in the Asia-Pacific region in mutual assistance.

Principle L: Sharing information: The Australian Government will continue to explore the most effective ways of sharing information with other countries on our mutual assistance arrangements.

Principle M: Communication of reforms: The Australian Government will implement a comprehensive communication strategy to inform the general public about the mutual assistance process and mutual assistance reforms.