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MEMBER FOR MOLONGLO

Senator the Hon Christopher Ellison
Minister for Justice and Customs
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for your letter of 19 September 2006 regarding the progress of the extradition review in which you also sought my views on the mutual assistance review discussion paper. I thank you for the opportunity to comment.

While the ACT has limited experience in the mutual assistance process I view it as an important law enforcement tool. I agree that Australia must have effective arrangements in place for mutual assistance in criminal matters. This is particularly important to combat terrorism and the changing nature and extent of transnational and domestic crime. However these arrangements must be reviewed and improved in accordance with international human rights obligations. In particular, arrangements must adhere to the values reflected in, and the rights and freedoms guaranteed by, the International Covenant on Civil and Political Rights (ICCPR).

This submission focuses on those issues of significant interest to the ACT, in particular, the grounds of refusal for mutual assistance.

Issue 3: Grounds of refusal-general

In my view the current grounds of refusal do not fully reflect the ICCPR to which Australia is a party. The grounds for refusal should be extended to include those rights enshrined in the ICCPR. In particular, a request by a foreign country for assistance should be refused if there are substantial grounds to believe the assistance would be contrary to:

- the right to life (Art 6)
- the right to protection from torture and cruel, inhuman or degrading treatment (Art 7)
- the right to humane treatment when deprived of liberty (Art 10 (1) and (2) (a))
- the right to a fair trial (article 14 (1)), and
- rights in relation to children in the criminal process (Art 10 (2) (b), 10 (3) and 14 (4)).

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Further, I am concerned with the current lack of formal consultative requirements with States and Territories who are in possession of relevant evidence and I strongly believe that this must be addressed in the legislation.

For instance, under the current system the relevant federal minister approves or refuses a request for mutual assistance by a foreign country. In making this decision the relevant minister takes into consideration the mandatory and discretionary grounds of refusal in section 8 of the *Mutual Assistance in Criminal Matters Act 1987* (the MA Act) and any additional requirements in a treaty. In some circumstances these grounds may not be consistent with Australia's international obligations and they may not be consistent with the local laws in states and territories who possess the evidence that is being sought.

For example, the current ground of refusal on the basis of the death penalty is discretionary. Under sections 8 (1A) and (1B) of the MA Act the federal minister may agree to the provision of assistance in death penalty matters where special circumstances exist or where it is in the interests of international criminal cooperation.

In theory, the federal minister would be able to approve a request for assistance that was inconsistent with Australia's international obligations (see discussion under Principle C). In addition, he or she would be able to seek the cooperation of local law enforcement agencies in executing the request where to do so would offend local laws. I refer, for instance, to the *Human Rights Act 2004* (ACT).

Having regard to these considerations, I could not, for example, agree to ACT Policing providing assistance through the mutual assistance process in executing requests in circumstances where the death penalty may apply or where a formal waiver of the death penalty has not been provided by the requesting country. I believe the legislation must be amended to ensure requests are refused where the provision would be contrary to international obligations or to the laws of a state or territory involved in the execution of a request.

Issue 5: Double jeopardy

The mandatory refusal of mutual assistance on the grounds of double jeopardy where a person has already been acquitted, pardoned or punished in the requesting foreign country must be retained. This mandatory ground for refusal must also be extended to cover cases where a person has already been acquitted, pardoned or punished for the offence to which the request relates either in Australia or in a third country.

In my view Australia is not yet in a position to be able to agree to provide mutual assistance in 'special circumstances' including those set out in page 43 of the discussion paper.

In the recent past, the ACT has indicated at a number of levels, including the Standing Committee of Attorneys-General (SCAG), and the Model Criminal Code Officers' Committee (MCCOC), that it did not propose to make reforms to double jeopardy within the Territory. More recently, the ACT has been a signatory to the July 2006 Council of Australian Governments communiqué that agreed that "reform of the rule against double jeopardy is an important criminal law policy reform that merits a nationally consistent approach". The ACT is participating with other jurisdictions in a working group to propose a model to both SCAG and COAG by the end of 2006.

But at this stage it is too early to pre-empt the outcome of the working group or the final recommendations of SCAG or COAG.

The ACT is obligated to consider any proposed reform in light of section 24 of the ACT *Human Rights Act 2004* which encapsulates Article 14(7) of the ICCPR:

No one shall be liable to be tried and punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

While this prohibition only applies with regard to an offence adjudicated in a given State (*AP v Italy* (Case No. 204/1986)), it is clearly desirable to apply the prohibition equally to offences of universal jurisdiction and to offences that are adjudicated in different States. The *non bis in idem* rule has already gained significant international status and will only assume more significance with the growth in international regulation of transnational crime. This is reflected in a range of instruments touching on mutual assistance in the European Union and is exemplified in the current stated practice of the United Kingdom Home Office:

The UK will ... decline to execute requests where a trial in the requesting country would involve double jeopardy (*non bis in idem*). If the subject of a request has been convicted or acquitted in the UK or a third country of an offence arising from the conduct described in the request, the UK will not assist the gathering of evidence for another trial of the same person for the same conduct.

If this amendment is adopted as part of the review provision must be included to ensure the relevant Commonwealth minister take into account the local laws of states and territories when making a decision to grant or review the provision of assistance (as discussed above under issue 3).

Principle C: Grounds of refusal in death penalty matters.

In principle, I am pleased that the discussion paper clearly states that Australia will retain the grounds of refusal in death penalty matters. However, the paper states that the 'provisions accord with Australia's *strong* commitment to the abolition of the death penalty'. In my view, Australia's commitment to the abolition of the death penalty must be unequivocal.

I am not satisfied that the relevant provision, as currently drafted, accords with an unequivocal commitment to the abolition of the death penalty. Section 8 (1A) of the MA Act deals with the refusal of assistance in death penalty matters and provides:

A request by a foreign country for assistance under this Act must be refused if it relates to the prosecution or punishment of a person charged with, or convicted of, an offence in respect of which the death penalty may be imposed in the foreign country, unless the Attorney-General is of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted.

I understand 'special circumstances' have been interpreted to include where the provision of assistance would assist the defence, or where the foreign country undertakes not to impose or carry out the death penalty. My strong view is that these special circumstances must be provided for expressly in the legislation. In all other circumstances provision of assistance in death penalty matters must be refused.

Further Section 8 (1B) of the MA Act also contains an additional ground of refusal in death penalty matters. This ground for refusal is also discretionary and provides:

- A request by a foreign country for assistance under this Act may be refused if the Attorney-General:
- (a) believes that the provision of the assistance may result in the death penalty being imposed on a person; and
 - (b) after taking into consideration the interests of international criminal cooperation, is of the opinion that in the circumstances of the case the request should not be granted.

In my view the grounds of refusal provisions in death penalty matters must be mandatory.

This approach is consistent with Australia's obligations under international law. The right to life and the prohibition on cruel or degrading punishment is sourced in the *Universal Declaration on Human Rights 1948*, the *International Covenant on Civil and Political Rights 1966* and the *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty* adopted by the Economic and Social Council on 25 May 1984.

The *Second Optional Protocol to the ICCPR* requires state parties to take all necessary measures to abolish the death penalty within its jurisdiction (Art 1 (2)). Australia was in the forefront of countries that ratified the protocol in 1991. It makes it a fundamental human right not to be executed and recognises that the abolition of the death penalty 'contributes to [the] enhancement of human dignity and progressive development of human rights'

In *Judge v Canada* (Case No. 829/1998), the Human Rights Committee determined that, for countries that had abolished the death penalty, 'there is an obligation not to expose a person to the real risk of its application'. It followed, said the Human Rights Committee, that States Parties 'may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death' unless they could ensure that the death sentence would not be carried out (at [10.4]).

I suggest it would also follow that States cannot give assistance in these circumstances. That is, the duty 'not to expose a person to the real risk [of the death penalty]' would seem to preclude the provision of assistance where the penalty may be 'reasonably anticipated'.

In theory, the federal minister would be able to approve a request for assistance that was inconsistent with Australia's international obligations. In addition, he or she could seek the cooperation of local law enforcement agencies in circumstances where their assistance would offend local laws. I refer, for instance, to the *Human Rights Act 2004* (ACT).

In my view, similar issues apply in relation to all forms of mutual assistance, whether or not they are mediated through ministerial process. In this respect, I am disappointed that the review of mutual assistance expressly excludes a review of international police to police assistance. However, I do acknowledge that the Australian Federal Police has reviewed its policies on police to police assistance in relation to the death penalty and that the outcomes of the review have been endorsed by the Commonwealth Government.

The timing of the review is pertinent to recent debates surrounding the provision of agency-to-agency assistance in death penalty matters. It should have been used as an opportunity to stimulate healthy debate among Australians on this very important matter. In line with the Senate Legal and Constitutional Legislation Committee's recommendation in its *Report on Provisions of the Law and Justice Legislation Amendment (Serious Drug*

Offences and Other Measures) Bill 2005 (August 2005), I encourage the Australian Government and the Australian Federal Police to review its policy and procedures on international police to police assistance. In particular, the Australian Government should ensure appropriate ministerial supervision of assistance provided to overseas jurisdictions by Australian law enforcement agencies, where that assistance may expose Australians overseas to cruel, harsh or inhumane treatment or punishment, including the death penalty.

Issue 26: Central taskforce

As noted above, the ACT has limited experience in the mutual assistance process. I understand the ACT is involved in about one request every two years. The ACT does not have a dedicated resource to service the function and for this reason I would not support the co-location of any territory staff in a central taskforce to manage requests. I understand, with the exception of NSW, the number of mutual assistance requests dealt with in other jurisdictions is also relatively low and would not warrant a central taskforce.

Thank you for the opportunity to contribute to the review.

Yours sincerely

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Attorney General