



**Australian
Human Rights
Commission**

everyone, everywhere, everyday

President

Human Rights Commissioner

The Hon Catherine Branson QC

26 August 2009

The Hon Brendan O'Connor MP
Legislation and Policy Section
International Crime Cooperation Division
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

By email: reviews@ag.gov.au

Dear Minister

**Exposure draft of the Extradition and Mutual Assistance in Criminal Matters
Legislation Amendment Bill**

Thank you for the invitation to make a submission on the exposure draft of the *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2009*.

The Commission does not have the capacity to prepare detailed submissions on the exposure draft. However, human rights are obviously an important consideration in extradition and mutual assistance decisions and we hope the following brief comments will be of assistance.

**1. Evidence which has been obtained by torture or cruel inhuman or degrading
treatment**

The Commission recommends that initiatives to streamline the requirements for adducing foreign evidence in court (sch 1, pt 3) be accompanied by a requirement for proper scrutiny to ensure that evidence which has been obtained by torture or cruel, inhuman or degrading treatment is not admitted into Australian courts.

The prohibition on torture is an absolute, non-derogable right recognised under both the *International Covenant on Civil and Political Rights* (ICCPR) (art 7) and the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT). The CAT explicitly requires that State Parties 'ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made' (art 15).

2. Refusal of extradition where extradition may result in discrimination on the basis of sexual orientation

The Commission welcomes the proposal in item 50 of sch 2 to extend the scope of extradition objections to include sex as a protected ground. The effect of this will be to prevent extradition if a person may be persecuted by reason of their sex upon surrender to an extradition country.

However, the Commission recommends that the government take this opportunity to extend the protected grounds to cover all of the grounds of discrimination prohibited by art 26 of the ICCPR.

Article 26 states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as **race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.** (emphasis added).

The term 'other status' has been interpreted by the United Nations Human Rights Committee to include sexual orientation and age.¹ Discrimination on the grounds of sexual orientation is still a feature of the laws of many countries and in some countries homosexuality is punishable by death. In this context, it is particularly important that the grounds of discrimination are extended to cover discrimination on the grounds of sexual orientation.

3. Refusal of mutual assistance where assistance may result in torture

The Commission welcomes the decision to expand the grounds on which the Attorney-General must refuse a request for mutual assistance to include circumstances where there are substantial grounds to believe the person may be subject to torture (sch 3, item 3). This is consistent with the obligation of 'non-refoulement' contained in art 3(1) of the CAT.

4. Refusal of mutual assistance where the request relates to arrest or detention on suspicion of committing an offence carrying the death penalty

The Commission also welcomes the proposal to extend the grounds on which the Attorney-General must refuse a request for mutual assistance to include circumstances where a person has been *arrested* or *detained* on suspicion of committing an offence which carries the death penalty, regardless of whether formal charges have been laid (sch 3, pt 1).

Australia has committed itself to opposing the death penalty by becoming a party to the *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty* (the Second Optional Protocol). Article 1 of the Second Optional Protocol prohibits re-instatement of the death penalty by States and

¹ See S Joseph, M Castan and J Schultz, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, (2nd ed 2004), 690-691, [23.24] and the cases cited therein.

obliges them to ensure no one with their jurisdiction is executed.² In addition, the United Nations Human Rights Committee has held that 'countries that have abolished the death penalty, [have] ... an obligation not to expose a person to the real risk of its application'.³

The Commission believes, however, that this enhanced commitment to abolishing the death penalty is currently undermined by police-to-police assistance arrangements in death penalty charge situations. Under the *Australia Federal Police (AFP) Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations*, the AFP can assist foreign countries on a police-to-police basis where no charges have been laid, whether or not the requesting country is investigating offences that attract the death penalty.⁴

The decision in *Rush v Commissioner of Police*⁵ confirms that the AFP can lawfully provide police-to-police assistance even when the overseas investigation may result in the imposition of the death penalty. However, in delivering his judgment, Finn J observed (at [1]):

[T]here is need for the Minister administering the *Australian Federal Police Act 1979* (Cth) ... and the Commissioner of Police to address the procedures and protocols followed by members of the [AFP] when providing information to the police forces of another country in circumstances which predictably could result in the charging of a person with an offence that would expose that person to the risk of the death penalty in that country.

The Commission believes that Australia's approach to international cooperation in criminal justice matters should always reflect Australia's commitment to the abolition of the death penalty.

We therefore recommend that a comprehensive review be conducted of Australia's mutual assistance practices and 'agency to agency assistance' arrangements to ensure these practices are consistent in the way they address situations which may involve the death penalty.

Yours sincerely



Catherine Branson
President and Human Rights Commissioner

T +61 2 9284 9766
F +61 2 9284 9794
E associate@humanrights.gov.au

² Article 1, *Second Option Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*.

³ In *Judge v Canada* 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003), [10/4].

⁴ Attorney General's Department, 'Fact Sheet 3, How does Mutual Assistance work in Death Penalty matters' <<http://www.ag.gov.au/>> at 20 August 2009.

⁵ *Rush v Commissioner of Police* [2006] FCA 12.