

# **A Better Mutual Assistance System**

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The Hon. Senator Chris Ellison Minister for Justice and  
Customs

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## Introduction

1. The Law Council welcomes the review by the Attorney-General's Department into Australia's Extradition and Mutual Assistance scheme.
2. The Law Council notes that the discussion paper entitled "A Review of Australia's Mutual Assistance Law and Practice", was released on 19 September 2006, with responses required initially by 13 October 2006. The discussion paper raises a number of significant legal and policy issues in what is a complex and technical area. The Law Council considers there has been insufficient time to examine thoroughly the issues raised in the discussion paper.

## Background

3. The International Crime Co-operation Branch of the Attorney General's Department (the review team) is undertaking a review of Australia's extradition and mutual assistance arrangements.
4. On 19 September 2006 the review team released its discussion paper 'A better mutual assistance system: a review of Australia's mutual assistance law and practice' which raises broad issues for discussion in relation to Australia's mutual assistance arrangements.
5. Comments are sought which are directed to improving the operation of safeguards in and the efficiency, responsiveness and accountability of Australia's mutual assistance process.
6. The Mutual Assistance in Criminal Matters Act 1987 (Mutual Assistance Act) currently provides the basis for processing mutual assistance requests to and by Australia. In response to the Joint Standing Committee on Treaties Inquiry into Australia's Extradition Law and Policy (Report 40), the Australian Government announced that it would review existing mutual assistance legislation and practice.
7. In consultations with the review team the Law Council discussed the need for the Government to:
  - (a) Ensure that Human Rights safeguards are strengthened and upheld;
  - (b) Protect the role of judicial review in mutual assistance requests and associated matters;
  - (c) Retain existing broad rights of refusal; and
  - (d) Maintain a high level of ministerial control and accountability.
8. This submission is made in the context of the desirability of responsible and accountable Government, the increasing need for international cooperation in fighting and tracking criminal activity and Australia's international leadership and commitment against capital punishment.

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## Benefits of foreign assistance in criminal matters

9. Preventing criminal activity in Australia has an increasingly international focus. The Australia Government and its agencies have laboured to forge strong political and law enforcement relationships with neighbouring countries to reduce the flow of illicit substances into Australia, track and prevent child-sex tourism, secure Australia's borders, uncover money-laundering operations and more generally to increase the regional profile of Australia.
10. The number of mutual assistance requests made to and by Australia over the past six-years has doubled.<sup>1</sup> In this time Government agencies, in particular the Australian Federal Police (AFP), have expanded the scope and funding of international operations and regional alliances.
11. Foreign assistance in curtailing drugs trafficking has led to substantial seizures within Australia over the last 5-years and more importantly the prevention of illicit substances from ever reaching Australia. Foreign assistance has been critical in investigations into sexual servitude and child sex tourism.
12. In 2005-6 counter-terrorist investigative cooperation between the AFP and Indonesian and Philippines counterparts resulted in 22 arrests. The provision of foreign assistance combined with legislative reforms in relation to proceeds of crime matters has seen a 45% increase in the value of average annual seizures of property since 2002.<sup>2</sup>
13. The number of AFP International Liaison Officers has more than doubled to 86 in 26 countries since 2001 (33 in 21 countries). This has coincided with substantial increases in international, border and counter-terrorism case loads.<sup>3</sup>
14. The current review into mutual assistance is timely in light of the changing nature of international crime and activity, improved communications and the growth of international travel since the passing of the Mutual Assistance Act.

## Scope of the Review

15. The discussion paper confines the scope of the review to considerations of assistance requested on a Government-to-Government basis and explicitly excludes consideration of agency-to-agency assistance.
16. The Law Council welcomes the current review, but believes that such a restriction on the scope of the review conflicts with the terms of reference which include "ensuring that the [Extradition and Mutual Assistance Acts] provide a meaningful legal framework for international law enforcement in the 21<sup>st</sup> century" and consideration of "increasing the efficiency, effectiveness and quality of current...mutual assistance processes including by...examining the interaction of existing legislation with... mutual assistance processes."

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<sup>1</sup> Attorney-General's Department, Appendix 10: Extradition, mutual assistance and criminal justice certificates, Annual Report 2004-05.

<sup>2</sup> AFP Annual Report 2005-06.

<sup>3</sup> *Ibid.*

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17. In Part 3.3 of the discussion paper it is stated that “Mutual Assistance and agency-agency assistance are separate tools although they are closely linked.” Part 5 of the discussion paper discusses the many ways in which agency-agency assistance can be used as an alternative to formal mutual assistance.
  18. Given the many overlaps and inter-changeability between mutual assistance and agency-agency assistance the Law Council believes that Australia’s mutual assistance scheme should be evaluated contemporaneously with agency-agency assistance schemes, in particular with operational schemes of the AFP.
  19. The Law Council recommends that the Government review the full spectrum of regulations, memoranda of understanding (MOU), operational guidelines and treaties which govern the provision of assistance by Australia to other countries and their agencies in criminal matters.

## **Operation of the Mutual Assistance Process**

20. The Law Council has met with the review team and expressed its position in relation to a number of the issues raised in the discussion paper concerning the operation of the mutual assistance process. In addition to the opinions raised the Law Council raises the following matters and concerns:
  - (a) The maintenance of ministerial accountability and judicially reviewable administrative decision making;
  - (b) Retention of safeguards and broad grounds of refusal;
  - (c) Central Taskforce.

## **Transparency and Accountability**

21. Transparency and accountability in administrative decision-making are two key features of a democratic society. However, the Law Council recognises the conflict between open and transparent decision-making and the need to protect the confidentiality of ongoing law enforcement investigations.
22. Mutual assistance requests are typically made in relation to sensitive information. The Law Council submits that the Government should ensure that its handling of personal information complies with the *Privacy Act 1988* (Cth), particularly where it is disclosed to overseas jurisdictions,.
23. Under the Mutual Assistance Act the Minister is accountable for all mutual assistance decisions. The Law Council notes that maintaining appropriate accountability mechanisms and protecting the confidentiality of ongoing law enforcement investigations are two of the guiding principles for the review. The Law Council supports these broad principles and awaits the final report of the review team.

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## Safeguards: Grounds of refusal

24. The provision of mutual assistance in criminal matters must be given in the context of maintaining criminal justice standards. The Law Council believes that while it is in the best interests of Australia to offer (and receive) the broadest range of assistance, this must be balanced with the needs to retain broad rights of refusal to provide assistance in various circumstances. Grounds of refusal should be retained where a request for mutual assistance is made in circumstances or in respect of a matter where the provision of assistance would be contrary to our own standards of criminal justice.

### Double Jeopardy

25. The 'double jeopardy rule' provides that 'no person shall be troubled twice for the same offence.'<sup>4</sup> That is, a person cannot be prosecuted in respect of an offence for which they have already been pardoned, acquitted of, or punished for. The expression and application of the double jeopardy rule in the criminal law and in equity has remained largely unchanged for over 800 years.<sup>5</sup>
26. Extensive double jeopardy protections have developed with the growth of modern criminal law and modern legal institutions and procedures. These protections are found in both the common law and in the criminal codes (or equivalent legislation) of every jurisdiction in Australia.
27. The Law Council opposes any changes to the obligation to refuse a mutual assistance request where double jeopardy would apply to prevent a prosecution under section 8(1)(f) of the Mutual Assistance Act.
28. One of the principal functions of double jeopardy is to prevent speculative prosecutions. Double jeopardy encourages efficient and thorough investigation. As articulated by the Supreme Court of the United States:
- "the underlying idea... is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty".<sup>6</sup>
29. A poorly prepared prosecution or one which is speculative and not founded on strong evidence may lead to the acquittal of a guilty defendant who chooses to remain silent. However, this is the price of justice. The presumption of innocence is one of the cornerstones of our criminal justice system. To successfully refute this presumption the prosecution (the State) must prove beyond all reasonable doubt the guilt of the accused. If convictions were upheld based on prosecutions which established the guilt of the accused to a lower standard than 'beyond all reasonable doubt', then the chance of an innocent person being convicted would unacceptably be increased.

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<sup>4</sup> *O'Sullivan v Rout* [1950] SASR 4 per Napier CJ at 5-6.

<sup>5</sup> Speech given by Queensland Supreme Court Justice Atkinson, Australian Law Students' Association Double Jeopardy Forum, 9 July 2003, Brisbane.

<sup>6</sup> *Green v United States* (1957) 355 US 185 at 187-88.

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30. Finality is vital in the criminal justice system. Without it any person acquitted of a crime would live in the uncertainty that they could one day be retried for the same crime. It is suggested that the families of victims also require the closure that finality offers.<sup>7</sup>
  31. The principal argument in favour of abandoning the double jeopardy rule is that by abandoning the rule in limited circumstances where there exists 'fresh and compelling evidence' we will be able to distinguish between acquittals where the defendant was innocent and those where the defendant was guilty. After all where there is 'fresh and compelling evidence' that a convicted person was in fact innocent they should be released from gaol immediately.
  32. However, no matter how fresh or compelling, no evidence is infallible. To justify a re-trial in the interests of justice a prosecution must be able to demonstrate with certainty that the fresh evidence obtained is incontrovertible.
  33. At a meeting in July 2006 the Council of Australian Governments (COAG) established a working group to review double jeopardy laws with a view to nationally consistent reforms. A report is expected to be published in late 2006. The Law Council welcomes the review of the COAG working group and looks forward to its report.
  34. The Law Council notes that the United Kingdom (UK) recently passed reforms which alter the way double jeopardy operates. In the UK it is now permissible to re-try persons after they have been acquitted where there exists 'fresh and compelling evidence' of their guilt: for example, where highly probative DNA evidence is obtained. The Law Council understands that the UK laws operate to treat a prosecution based on the 'fresh' evidence as a first prosecution, in effect voiding an acquittal and committing the accused to trial for the 'first' time.
  35. This raises the question whether Australia should execute the mutual assistance request based on our own laws concerning double jeopardy or on the basis of the UK's laws.
  36. Section 8(1)(f) of the Mutual Assistance Act requires a request for mutual assistance to be refused where:

The request relates to the prosecution of a person for an offence in a case where the person has been acquitted or pardoned by a competent tribunal or authority **in the foreign country**, or has undergone the punishment **provided by the law of that country**, in respect of that offence or of another offence constituted by the same act or omission as that offence. (*Emphasis added*).
  37. If UK law has the effect of rendering the first trial and acquittal a nullity, then there has been no acquittal according to the law of the UK. Accordingly it is likely that the Minister's obligation to refuse assistance under section 8(1)(f) would not be attracted in relation to a second 'first' trial under UK law because legally the acquittal of the relevant person by a 'competent authority' in the UK never happened.

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<sup>7</sup> Justice Atkinson (2003).

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## Death Penalty Offences

38. The Law Council's policy on the death penalty states:

the Law Council of Australia:

- (a) opposes imposition or execution of the death penalty;
- (b) opposes all forms of torture, or cruel, inhumane or degrading treatment or punishment.

39. Australia has ratified the Second Optional Protocol to the International Convention on Civil and Political Rights and has complied with its obligation to abolish the death penalty within its own jurisdiction. Australia has made an ongoing commitment against the death penalty through lobbying efforts at the United Nations Commission on Human Rights.

40. In Australia's *National Framework for Human Rights: National Action Plan* released in December 2004 the Government stated that the death penalty 'is an unacceptable method to punish criminal offenders' and that 'a fundamental difficulty of the death penalty is that, being a final remedy, an innocent person has no chance for corrective action once the sentence is carried out'.

41. The Law Council agrees with principle C of the discussion paper which states that "*Australia will retain the grounds of refusal in death penalty matters.*"

42. Section 8(1A) of the Mutual Assistance Act currently states that:

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.

43. 'Special circumstances' is not defined within the Mutual Assistance Act. However in the Second Reading Speech for the *Mutual Assistance in Criminal Matters Legislation Amendment Bill 1996*, which introduced changes to the death penalty ground of refusal, the then Commonwealth Attorney General and Minister for Justice stated that:

The discretion for the Attorney-General to take into account special circumstances of the case would allow, for example, assistance to be granted where the assistance may be of an exculpatory nature and may assist the defendant in the foreign country to meet the charges.

44. Special circumstances also include where a foreign country has provided an undertaking that the death penalty will not be imposed or carried out.

45. The Law Council nevertheless expresses grave concerns over the broad discretionary nature of the 'special circumstances' exception in section 8(1A).

46. The Law Council submits that the decision about whether to give assistance to a foreign power, where the death penalty may be imposed, cannot be open to influence. The Law Council is concerned that inclusion of such a broad exception to Australia's absolute policy against assistance in death penalty cases will open the Australian Government to the charge that Australia's policy in this area is not absolute, and is therefore open to negotiation.

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47. Any weakening of Australia's policy position in this area is likely to galvanise the position of foreign governments, in countries which observe a mandatory (or maximum) penalty of death for certain offences, in dealing with pleas by the Australian Government for clemency for Australians arrested and convicted in those jurisdictions.
  48. If section 8(1A) is intended to operate such that assistance will only be provided where the assistance provided benefits the defendant, or where an undertaking has been given as a 'condition' pursuant to section 9 of the Mutual Assistance Act then those specific operations should be expressly stated in the Act.
  49. If section 8(1A) is intended to operate more broadly then the Law Council submits that Government should develop a set of objective criteria or indicia which more precisely articulate when 'special circumstances' may arise.

### Uniform Death Penalty Foreign Policy

50. The Law Council agrees with Principle B of the discussion paper that "*the grounds of refusal should state that they apply to the investigation stage of the criminal justice process*". However, the Law Council is concerned that Australia's international leadership against the death penalty is undermined by the provision of foreign assistance (incorporating all forms of agency-agency assistance) in situations where the death penalty will be, or is likely to be, imposed.
51. Government policy to refuse a request for mutual assistance in death penalty cases unless special circumstances apply contrasts with the silence of the *AFP Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations* (AFP Death Penalty Charge Guide) on the provision of foreign assistance prior to charges being laid, in circumstances which could predictably result in the charging of a person with an offence which carries a maximum penalty of death.
52. The AFP Death Penalty Charge Guide provides that the AFP can assist foreign countries on a police-to-police basis where no charges have been laid, regardless of whether the foreign country may be investigating offences that attract the death penalty.
53. Of particular note is section 8(1B) of the Mutual Assistance act which is worded more broadly than section 8(1A) and covers cases where a person has not yet been charged or convicted. It gives the Minister a discretion to refuse a request for assistance if the Minister:
  - (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 co-operation, is of the opinion that in the circumstances of the case the request should not be granted.
54. The Law Council is alarmed that a Government Agency is not bound by the same policy in relation to capital punishment as that which binds the Executive. The Law Council submits that the AFP must be bound by the same safeguards which seek to preserve the sanctity of human life as those which bind the Attorney-General.

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55. Additionally, the Law Council strongly believes that maintaining seemingly contradictory policies which distinguish between two often 'inter-changeable' or substitutable processes for providing foreign assistance conveys the undesirable message that Australia is prepared to ignore the practice of capital punishment when it is convenient for it to do so.
  56. By strongly opposing the death penalty on one hand, yet clearly tolerating its practice on the other, Australia may be seen as a less credible opponent of the death penalty despite Australia's well documented commitment against capital punishment. Problems resulting from this may be manifested in cases where Australia has made a request for clemency in relation to an Australian citizen who is facing the death penalty in a foreign country. The Law Council is concerned that requests for clemency may be undermined if Australia is viewed as having a mercurial death penalty policy.

## Central Taskforce

57. The discussion paper raises for discussion the adoption of a Central Taskforce model for mutual assistance. Principles G, H and I of the discussion paper express the Government's commitment to improving the knowledge, cooperation and operational roles of participants in the mutual assistance process.
58. Currently the mutual assistance process in Australia is overseen by case officers in the Attorney-General's Department who liaise with relevant agencies including the AFP, the Commonwealth Director of Public Prosecutions, and State and Territory law enforcement and prosecution agencies.
59. The Law Council is not opposed to a Central Taskforce in principle. However the Law Council would welcome further information in relation to such a proposal and briefly notes the following concerns.

### Need for change

60. The Law Council notes that the review team has not discussed whether there is a need to change the current structure of the mutual assistance process.
61. Under the current mutual assistance scheme an Attorney-General's Department case officer interacts with liaison officers from relevant law enforcement and prosecution agencies to process mutual assistance requests to and by Australia. The Law Council is unaware whether the significant increase in the use of mutual assistance over the past six-years has been met by a comparable increase in case officers and officers in relevant agencies. However, if the present process has functioned effectively since the inception of the Mutual Assistance Act it may be difficult to justify the need for a complete overhaul.

### Objectivity

62. It has long been recognised that the first duty of a public servant is to provide ministerial advice that is honest, impartial and comprehensive.<sup>8</sup> In consultations

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<sup>8</sup> See for reference <http://www.apsc.gov.au/values/>

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with the review team the Law Council expressed reservations over the potential for the objectivity of ministerial advice to be tainted in a Taskforce model.

63. The discussion paper suggests that a Taskforce could consist of officers from the AGD, the AFP, and from prosecuting agencies. The Law Council believes that combining investigators, prosecutors and ministerial advisors in such a system would give rise to serious questions over the objectivity of ministerial advice produced. However, it may be possible to establish operational measures to ensure the integrity of ministerial advice, such as clear division between liaison and ministerial advice teams.
64. The review team should consider what measures would be necessary to guarantee objectivity and the operational practicality of such measures.

## **Further Consultation**

65. The Law Council of Australia would welcome the opportunity to make further comments and submissions in relation to the issues raised in the discussion paper should the opportunity arise.

## **Attachment A**

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### Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.