
Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill

Attorney General's Department

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Acknowledgment

The Law Council acknowledges the assistance of the Criminal Bar Association, the Victorian Bar Association, the Queensland Law Society and NSW Bar Association in the preparation of this submission.

Introduction

1. The Law Council welcomes the opportunity to make a submission on the exposure draft Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill.
2. The Law Council is the peak body for the Australian legal profession representing around 55,000 legal practitioners through State and Territory Law Societies, Bar Associations and the Large Law Firm Group. Further details of the Law Council's activities are outlined in Attachment A.
3. A summary of the Law Council's position on the proposed reforms is set out below. If there are any specific matters in the draft Bill in relation to which it would assist the Department to receive more detailed feedback from the legal profession, the Law Council is happy to provide further information as requested.

Proposed Amendments to the *Extradition Act 1988* ("the Extradition Act")

4. The Law Council supports the following proposals:
 - (a) Conferral of discretion on the courts to defer review proceedings until after the Attorney-General has made a surrender determination under section 22;
 - (b) Removal of state and territory courts review jurisdiction;
 - (c) Allowance for the admission of wrongly excluded evidence as well as further evidence or submissions *directly relating* to the excluded evidence in section 21 review proceedings;
 - (d) Expansion of the grounds of discrimination which may found an extradition objection to include "sex";
 - (e) Expansion of the circumstances in which a person may be prosecuted in Australia, in lieu of extradition.
5. The Law Council does not object to, but has some reservations about, the following proposals:
 - (a) Conferral of discretion on courts to consolidate review proceedings relating to the same extradition request;
 - (b) Inclusion of an expedited procedure allowing for a person to "waive" extradition and fast-track surrender at any point after he or she is remanded under section 15;

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- (c) Replacement of the requirement that Attorney-General must be satisfied that dual criminality is established before issuing a section 16 notice, with a requirement that he or she must be satisfied that it is *likely* that dual criminality is required;
 - (d) Conferral on Federal Magistrates of all the functions currently conferred on State and Territory Magistrates.
6. The Law Council does not support the following proposals:
- (a) Amendment to the definition of political offence;
 - (b) Amendments which would make political offences a discretionary ground for refusing extradition, rather than a mandatory objection;
 - (c) Insertion of a broad and general authorisation to collect, use and disclose personal information.
7. The Law Council submits that the following matters, not currently addressed in the draft Bill, also require attention:
- (a) Change to the way in which dual criminality is considered by the courts so as to require that the facts *directly relied on to establish the extradition offence* must on their own constitute an offence in Australia;
 - (b) Expansion of the grounds of discrimination which may found an extradition objection to include sexuality, ethnicity, colour and language;
 - (c) Introduction of a requirement that a requesting state must establish a *prima facie* case unless that state is specifically designated as not having to meet that requirement;
 - (d) Amendment to the subsection 19(5) prohibition on leading evidence to contradict an allegation of criminal conduct so as to ensure that it does not prevent a person from leading evidence to establish an extradition objection (such as discrimination);
 - (e) Repeal of the presumption against bail in sub-section 15(6);
 - (f) Amendment to the death penalty grounds for refusal to clarify that:
 - (i) only formal undertakings, which are provided by an official appropriately authorised to offer a guarantee that the death penalty *will not be imposed*, will be sufficient to bring a request within the exception to general prohibition; and
 - (ii) if a requesting country has, on a prior occasion, breached an undertaking not to impose the death penalty, no further undertakings will be accepted from that country.
 - (g) Expansion of the list of extradition objections to ensure that Australia does not surrender a person where:
 - (i) he or she might be subject to cruel, inhuman or degrading treatment or punishment; and
 - (ii) his or her right to a fair trial will not be observed;

Proposed Amendments to the *Mutual Assistance in Criminal Matters Act 1987* (Mutual Assistance Act)

8. The Law Council supports the following proposals:
- (a) Inclusion of an express prohibition on providing assistance where it may expose a person to torture;
 - (b) Expansion of the death penalty grounds for refusal to cover situations where a suspect has been detained but not charged;
 - (c) Expansion of the grounds for refusal to cover requests relating to the investigation of a person.
9. The Law Council has reservations about the following proposals:
- (a) Availability of surveillance device warrants and stored communication warrants to assist in foreign investigations in circumstances where the following minimum requirements have not been met:
 - (i) Before issuing a warrant, the issuing officer must be satisfied of precisely the same matters that he or she would be required to be satisfied of if the warrant were sought in the context of a domestic investigation (e.g. seriousness of the offence, necessity, privacy, likely benefit etc);
 - (ii) The reporting requirements in relation to:
 - o the number of warrants applied for and granted;
 - o the type of investigations (i.e. the type of offences) for which warrants were sought; and
 - o the use made of information obtained under the warrantmust be the same as they are for warrants obtained in the context of a domestic investigation; and
 - (iii) The restrictions placed on the use, disclosure, retention and destruction of information obtained under the warrant must mirror those that would be in place if the warrant was sought in the context of a domestic investigation.
10. The Law Council does not support the following proposals:
- (a) Change in the double jeopardy grounds for refusal from a mandatory to discretionary ground;
 - (b) Removal of extra-territoriality and lapse of time as discretionary grounds for refusal;
 - (c) Insertion of a broad and general authorisation to collect, use and disclose personal information.

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11. The Law Council submits that the following matters, not currently addressed in the draft Bill, also require attention:
- (a) Amendment to the death penalty grounds for refusal to cover all stages of the investigation, including pre-arrest and detention;
 - (b) Amendment to the death penalty grounds for refusal to ensure that assistance may only be provided where an appropriate undertaking has been received or where the assistance would aid the defence;
 - (c) Introduction of an appropriate prohibition on the provision of agency to agency assistance in death penalty cases;
 - (d) Inclusion of a new ground for refusal where there are substantial grounds for believing that granting the request may result in a breach of Australia's human rights obligations, including its obligations under the *International Covenant of Civil and Political Rights* (ICCPR), *the Convention Against Torture, Cruel, Inhuman and Degrading Treatment* (CAT) and the *Convention on the Rights of the Child* (CRC), in the requesting country;
 - (e) Expansion of the discrimination grounds for refusal to include language, ethnic origin or sexuality;
 - (f) Inclusion of a discretionary ground for refusal where the requesting country's arrangements for the handling of personal information (whether legislative, contractual or otherwise) do not offer privacy protections substantially similar to those applying in Australia.

Proposed Reforms to the *Extradition Act 1988*

Reforms relating to judicial review

Under the current provisions of the Extradition Act a person can seek judicial review of extradition decisions in both State and Federal courts at a range of different stages in the process. See table below¹:

Section of the Extradition Act	Source of power for review/appeal	Forum	Grounds	Remedies	Time limit
Section 16	Section 39B Judiciary Act	Federal Court, then High Court	Judicial Review Grounds	Mandamus, prohibition, injunction, certiorari.	None
Section 19 (magistrate decides eligibility)	Section 21 Extradition Act	1. Federal Court or Supreme Court, then 2. Full Federal Court, then 3. High Court	Review the order with regard to the material before the magistrate (merits)	1. Confirm or quash 2. Order arrest/ release/ continued custody	Within 15 days of previous forum's order
Section 22	Section 39B Judiciary Act	Federal Court, then High Court	Judicial Review Grounds	Mandamus, prohibition, injunction, certiorari.	None
Section 16 and 22	Section 75(v) Constitution	High Court	Judicial review on constitutional grounds / original jurisdiction	Mandamus, prohibition, injunction ²	None

It is not proposed to remove any of these review rights. However, it is intended to make the following changes to the process.

¹This table is taken from the Discussion Paper – “A new extradition system: A review of Australia's extradition law and practice” - released by the Attorney-General's Department in December 2005.

² Section 75(v) does not specify other judicial review remedies such as certiorari. These are available provided the matter would fall under the High Court's original jurisdiction otherwise – for example if it also falls under section 75(iii).

Deferral of review until after a surrender determination

It is proposed to insert new provisions (see proposed s21A and 27A) which would allow a court to defer hearing a review of a section 19 decision or a section 16 decision until after the Attorney-General has made a determination, under section 22, about surrender.

The Court would have to give written notice to the Attorney-General that it intends to defer conducting proceedings until after the Attorney-General has made his/her determination (see proposed s21A(2) and s 27A(2)).

The Attorney-General would then be able to proceed to make a surrender determination under section 22 even though there are outstanding section 21 review proceedings (proposed s 22(2A)(d)). Alternatively, the Attorney-General would also be able to give written notice in reply to the court that he/she will defer any surrender determination until after review proceedings are finalised (proposed s 22(2A)(c)).

If, before the review proceedings have been completed, the Attorney-General determines that a person is to be surrendered, the operation of the determination is stayed until the review proceedings are completed (proposed s22(2)(2C)).

The purported benefit of these proposed reforms is that if the Attorney-General ultimately decides that a person should *not* be surrendered under section 22 because the legislative requirements are not met or because the Attorney-General exercises his/her general discretion not to surrender the person – then the court does not need to waste time on irrelevant review processes and the person can be released from detention more expeditiously. Under the current provisions of the Act, the Attorney-General can not make a surrender determination until all section 21 review processes are finalised.

Law Council Response

The Law Council supports this proposal. The Law Council agrees that it may avoid unnecessary review proceedings and allow for the early release of persons who, regardless of the outcome of any court proceedings, the Attorney-General does not intend to surrender.

Consolidation of review proceedings

It is proposed to insert a new provision (section 27B) which would allow for the consolidation of multiple review proceedings relating to the same extradition request. As is apparent from the table above, currently it is possible that multiple review proceedings may be on foot simultaneously. If the amendments discussed immediately above are passed then the situation would only become more complicated, because an application for review of a section 22 decision could also be commenced before a review of a section 16 or section 19 decision has been finalised.

Proposed section 27B provides as follows:

If several proceedings under this Part in respect of a person are pending in a court, the court may, if it considers it reasonable in all the circumstances to do so, do one or more of the following:

- (a) order the proceedings to be consolidated;*
- (b) order the proceedings to be tried at the same time or one immediately after another;*

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- (c) *order the proceedings to be stayed until after the completion of any of them.*

Proposed section 27C makes it clear that 21A, 27A and 27B do not affect the powers of the High Court or the Federal Court under any other law.

Law Council Response

The Law Council does not object to this proposal to the extent that it gives the court the discretion to determine whether and when it is appropriate to consolidate proceedings.

However, the Law Council submits that the decision to consolidate proceedings would have to be exercised with considerable caution.

Different types of material are admissible in the different review proceedings which may be commenced during the course of the extradition process. For example, in section 21 review proceedings, the review court may “*have regard only to the material that was before the magistrate during the section 19 proceedings*”.³ Therefore, consolidating review proceedings introduces the risk that the review court will fall into error by considering or by failing to consider material in one review because the same material was admitted or was excluded in another review.

The resultant complexity of consolidated review proceedings may in itself generate appeals and delays, thus compounding, rather than alleviating, the problem it is intended to address.

Removal of State and Territory Court Jurisdiction

It is proposed to limit jurisdiction to review extradition decisions to the Federal Court.

Currently an application for review of a decision made by a Magistrate under sections 19 or 34 (which deals with NZ arrest warrants) can be made to the Federal Court or a State and Territory Supreme Court.

Law Council Response

The Law Council supports this proposal. Limiting jurisdiction to the Federal Court will make the proposed consolidation powers (section 27B), which are discussed immediately above, more effective. This is because proposed section 27B can only be utilised where multiple review proceedings are on foot in the same court.

Admission of evidence on review or appeal

Currently the Extradition Act provides that where a person or the foreign country applies for review of a magistrate's decision about eligibility for surrender, the review court may “*have regard only to the material that was before the magistrate during the section 19 proceedings*” (see s 21(6)(d)).

³ S 21(6)(d)

Proposed section 21B would make clear that if the review court considers evidence was wrongly excluded, the review court may consider both the wrongly excluded evidence as well as further evidence or submissions *directly relating* to the excluded evidence.

Proposed section 21B also has a further subsection which deals with documents containing deficiencies.

Law Council Response

The Law Council supports the proposal to allow the court, in section 21 review proceedings, to consider both evidence that was wrongly excluded in the section 19 hearing and further evidence or submissions *directly relating* to the excluded evidence. The Law Council is of the view that this would address the deficiency in the Extradition Act, identified by the Full Court of the Federal Court in *Cabal v United Mexican States*.⁴

Reforms relating to waiver of extradition

According to the Attorney General's Department,⁵ in the majority of extradition cases, the person consents to surrender to the requesting country. However, under the current Act a person may only consent to extradition if he or she is on remand, the Minister has issued a notice of acceptance of the extradition request (under section 16) and he or she is then brought before a magistrate.

This can take some time, particularly if the person was arrested under a provisional arrest warrant.

Under current arrangements, even if a person consents to surrender when brought before a magistrate, the Attorney-General must still consider all the matters in section 22 before making a surrender determination.

The proposed amendments would allow a person to elect to waive extradition at any time after the person is remanded under section 15, up until the magistrate advises the Attorney that the person has consented to extradition under section 18, or until the magistrate makes a determination about eligibility for surrender under section 19 (see proposed s15A(3).)

If a person wishes to waive extradition, he or she must waive extradition with respect to all of the offences contained in the provisional arrest request or the extradition request.

Before accepting a waiver of extradition, the magistrate must be satisfied that:

- the person's election is informed and voluntary;
- the person understands certain consequences of electing to waive extradition; and
- the person has had the opportunity to gain legal advice (see proposed s15A(6)).

If satisfied of these matters, the magistrate must notify the Attorney of the person's election to waive extradition.

Where extradition has been waived, the Attorney-General will then make a surrender determination under proposed section 15B, rather than section 22. Under proposed

⁴ (2001) 108 FCR 311 at 348

⁵ "A new extradition system: A review of Australia's extradition law and practice" AGD, December 2005. P32.

section 15B, the only matters the Attorney-General needs to be satisfied of before deciding to surrender a person is that there is no real risk that, following surrender, the person may be subjected to torture, or that the death penalty may be imposed on the person.

Law Council Response

The Law Council does not object to this proposal but notes some reservations.

The proposed provisions may serve to limit the time a person spends in detention awaiting the extradition process to be completed. The provisions may also save time and resources by removing the need for a decision to be made under section 16, 19 and/or 22. However, the proposed provisions will also mean that a person may be surrendered without dual criminality or other extradition objections (e.g. the risk of double jeopardy or the risk of discrimination on the grounds of race, religion, nationality or political opinions) being considered and without a speciality assurance having been given.⁶

The question that arises is whether a person should be able to waive their rights so completely in the interest of expediting the process.

The Law Council notes that the provisions require the Magistrate to be satisfied that the decision is informed and voluntary and that the person has had an opportunity to obtain legal advice.

The Law Council's concern is that under the current provisions of the Extradition Act people will be forced to make this decision in circumstances where, if they do not waive their rights:

- they will be detained throughout the extradition process unless they can overcome a presumption against bail; and
- the potential period of their detention will be unknown and may extend over several years, in part because the Extradition Act imposes few timeframes on Executive conduct/decision making.

These factors may be regarded as adding an element of duress to the decision making process and may impact on the voluntariness of a person's decision to waive their rights.

The Law Council therefore submits that before any reforms are introduced which allow a person to waive the protections available to them under the Extradition Act:

- the presumption against bail in subsection 15(6) should be repealed; and
- subject to the requirements of natural justice and procedural fairness, statutory time limits should be applied to actions undertaken by the Executive under the Act.

Reforms relating to dual criminality

Currently a person may only be extradited from Australia if dual criminality is established.

⁶ The Law Council acknowledges that speciality may already be addressed more generally in a treaty with the requesting country.

The proposed reforms discussed above would mean that this will no longer be the case where a person waives extradition or where a person consents to accessory extradition. However, dual criminality would still need to be established in all other circumstances.

Under the current Act, dual criminality is considered at two different stages in the extradition process. The Attorney-General must not issue a section 16 notice to a magistrate advising that an extradition request has been received unless he or she is of the opinion that dual criminality is established. At the next stage, the magistrate is again required to be satisfied that dual criminality is established before determining that a person is eligible for surrender under section 19.

To avoid this duplication it is proposed to amend section 16 to provide that the Attorney-General must not give a section 16 notice unless he or she is of the opinion *that it is likely* that dual criminality is established.

The magistrate would continue to consider the issue of dual criminality in detail in determining if the person is eligible for surrender.

Law Council Position

The Law Council questions whether this proposed amendment will effectively streamline the extradition process. The Law Council anticipates that in order to determine whether it is *likely* that dual criminality is established, the Attorney-General will be required to obtain precisely the same advice from the Commonwealth DPP and will be required to consider precisely the same matters that he or she would be required to consider if he or she needed to be satisfied that dual criminality was *in fact* established.

The Law Council notes that section 16 is intended to act as a gateway provision by ensuring that a person is not detained for an extended period on the basis of an extradition request that is doomed to fail. For that reason, the Law Council would be concerned by any dilution of the safeguards provided by section 16.

Further, the Law Council submits that the reform of the Extradition Act needs to address a more substantive issue relating to dual criminality.

As presently applied, the principle of dual criminality only requires that the totality of the facts alleged against a person would constitute an offence in Australia. It is not necessary to establish that the facts *directly relied upon to establish the extradition offence* would on their own constitute an offence in Australia. The Law Council submits that requesting states should be required to supply a discrete document that clearly sets out the conduct constituting the offence; that is, the conduct relevant to the elements of the offence that has been charged.

In support of this submission an extract is set out below from a paper delivered by Professor Ned Aughterson on 5 September 2008 at the combined NSW Bar/Law Council "Federal Criminal Law Conference".⁷

The principle of double criminality requires the conduct constituting the offence to be criminal in both the requesting and requested state. To that end, pursuant to s 19(3)(c)(ii) of the Act, one of the documents that the requesting state must produce is a statement of 'the conduct constituting the offence'.

At the s 19 extradition hearing, the magistrate must be satisfied that at the time of the extradition request that conduct or 'equivalent conduct' would have constituted

⁷ The full text of the paper is available at: <http://www.nswbar.asn.au/docs/resources/lectures/extradition.pdf>

an offence in the state or territory in Australia where the extradition hearing is held.⁸ That is determined solely by reference to the section 19(3)(c)(ii) statement.⁹

The content of the statement of conduct is obviously important. If it is loosely drafted, so that it includes conduct beyond that necessary to establish the offence in the requesting state, then the more likely it will be that an equivalent Australian offence will be found. That gives rise to the question of what is meant by the 'conduct constituting the offence'. In that regard, s 10(2) provides:

"A reference in this Act to conduct constituting an offence is a reference to the acts or omissions, or both, by virtue of which the offence has, or is alleged to have, been committed."

*The Federal Court has interpreted that provision generously to the requesting state. Rather than focusing on the words 'by virtue of which' the offence has been committed in section 10(2), in *Zoeller v Federal Republic of Germany* the Court placed emphasis on the words 'is alleged to have been committed', concluding that the statement of conduct was not invalid because it alleged facts, "which goes beyond the facts necessarily constituting the offence" in the requesting state and that it did not follow that "the magistrate may have regard only to those facts which are absolutely necessary ingredients of the foreign offence".¹⁰*

It was added that the "magistrate is no expert in foreign law. He is not required to determine what the facts are that are the necessary facts to constitute the foreign crime".¹¹

However, it is suggested that the reference in section 10(2) to the acts by which the offence 'has, or is alleged to have, been committed', simply reflects the fact that extradition may be sought of persons either charged with or convicted of an offence.

The practical effect of the approach adopted by the Federal Court is that the 'conduct constituting the offence' is whatever is specified in the section 19(3)(c)(ii) statement, regardless of whether it bears any relationship to the conduct that will be prosecuted following surrender.¹²

The problem is exacerbated by the further finding of the Federal Court that there is no need for a discrete statement of conduct constituting the offence, so that the statement of conduct may be found by taking into account two or more of the extradition documents.¹³

⁸ See s 19(2)(c) of the Act.

⁹ *Zoeller v Federal Republic of Germany* (1989) 23 FCR 282, 300.

¹⁰ *Zoeller v Federal Republic of Germany* (1989) 23 FCR 282, 300. See, also, *Cabal v United Mexican States* (2001) 108 FCR 311, 341. Compare *De Bruyn v Republic of South Africa* (1999) 96 FCR 290, 292-93, 296-97.

¹¹ *Ibid*

¹² More recently, the term 'acts or omissions by virtue of which an offence is alleged to have been committed' was considered by the High Court of Australia in *Truong v The Queen* (2004) 205 ALR 72, in the context of the operation of the speciality principle under s 42 of the Act. In relation to that decision, see Aughterson, 'The Extradition Process: An Unreviewable Executive Discretion', [2005] AYBIL 13

¹³ See *McDade v United Kingdom* [1999] FCA 1341; [1999] FCA 1868. In that case, the primary statement was a 19 page document of a police officer containing a "summary of the investigation and allegations" made. Other documents were said to be incorporated by reference. See also *Bennett v Government of the United Kingdom* [2000] FCA 916; *Mahew v United States of America* (2004) 142 FCR 59.

In Government of Canada v Aronson,¹⁴ where a similar provision was considered,¹⁵ the House of Lords held that a person could be extradited only if the conduct relevant to the ingredients of the foreign offence constituted a corresponding offence under the United Kingdom law. Lord Bridge gave examples of the “startling results” were the law to be otherwise.¹⁶ For example, double criminality would not depend on whether the acts charged were criminal in both states, but on the manner in which the statement of conduct were drafted.

As noted by Lord Lowry:¹⁷

“The “act or omission constituting the offence” cannot in my opinion mean “the conduct, as proved by the evidence, on which the charge is grounded,” because the evidence of such conduct could prove something more than what has been charged. In such a case the conduct proved would not be the act or omission constituting the offence of which the fugitive is accused ...”

Under the approach adopted by the Federal Court, where a person is charged with an offence that is not a crime in Australia, but, incidentally, the statement of conduct makes reference to acts or omissions that would constitute a crime in this country it seems that double criminality will be established. That will be so even though that additional conduct will have no relevance to the actual offence charged following extradition.

That is the very outcome that the principle of double criminality was intended to avoid.

Reforms relating to political offences

Amendment to the definition of political offence

Under the existing provisions of the *Extradition Act* a person cannot be extradited from Australia for a ‘political offence’. The term ‘political offence’ is defined in section 5 of the *Extradition Act* as ‘an offence against the law of the country that is of a political character (whether because of the circumstances in which it is committed or otherwise and whether or not there are competing political parties in the country)’. However, the definition of ‘political offence’ is subject to a long list of exclusions – some set out in multi-lateral treaties and listed in the Act and others incorporated by regulation.

It is proposed to ‘streamline’ the definition of political offence by moving all exceptions to the definition into the regulations.

The new section would read as follows:

political offence, in relation to a country, means an offence against the law of the country that is of a political character (whether because of the circumstances in which it is committed or otherwise and whether or not there are competing political parties in the country), but does not include:

¹⁴ [1990] 1 AC 579

¹⁵ Under s 3(1)(c) of the Fugitive Offenders Act, a person could be extradited only if ‘the act or omission constituting the offence’ would constitute an offence against the law of the United Kingdom. Compare the consideration of Aronson in Zoeller v Federal Republic of Germany (1989) 23 FCR 282, 296-97.

¹⁶ [1990] 1 AC 579, 589-90

¹⁷ Ibid 609.

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- (a) an offence prescribed by regulations for the purposes of this paragraph to be an extraditable offence in relation to the country or all countries; or
- (b) an offence prescribed by regulations for the purposes of this paragraph not to be a political offence in relation to the country or all countries.

The justification for this amendment is set out in the explanatory document as follows:

“Australia is a party to a large number of bilateral and multilateral treaties, many of which require parties to ensure that certain offences are extraditable offences, or are not to be considered political offences. Australia implements its obligations under these treaties by providing that such offences are excluded from the definition of political offence. Such exemptions are currently set out in both the Act and the regulations. Providing for exceptions to the political offence definition to be set out in regulations, rather than the Act, will ensure the extradition regime can be kept up-to-date with Australia’s international obligations without requiring frequent amendments to the Act.”

Law Council Response

The Law Council submits that if the exceptions to the definition of “political offence” are to be relegated to the regulations, then the Extradition Act should provide more precise guidance on what type of offences may be carved out of the definition. In particular, the Extradition Act should set out that an offence may be excluded from the definition only to the extent that it is required to be so excluded by a bi-lateral or multilateral treaty to which Australia is a party. This would conform to the justification for the amendment as set out above.

Mandatory or discretionary grounds for refusal

Under the current Act, a person must not be surrendered pursuant to an extradition request if there is an extradition objection, as defined in section 7 of the Act.

If the offence for which surrender of the person is sought is a political offence, this qualifies as an extradition objection.

It is proposed to amend the Act, so that the fact that an offence is a political offence becomes a discretionary, rather than mandatory grounds, for refusal to surrender.

This would be achieved by:

- removing reference to political offences from the definition of “extradition objection” in section 7;
- Inserting into section 16 a discretion for the Attorney-General to refuse to give a notice that an extradition request has been received if the relevant offence is a political offence; and
- Inserting into section 22, a new subsection which would specify that, in deciding whether to exercise his or her discretion to refuse to surrender a person, the Attorney-General have regard to whether the offence is a political offence.

It is argued in the Explanatory Memorandum that perpetrators of serious crimes should not be able to escape extradition just because their crimes have a political element.

It is pointed out that a mandatory extradition objection would still remain relating to discrimination on the basis of political opinions in paragraph 7(c). Therefore, the Attorney-General would still be required to refuse extradition of a person if on surrender, he or she may be prejudiced at trial, or punished, detained or restricted in his or her personal liberty, *by reason of his or her political opinions.*

Law Council Response

The Law Council does not support this proposed amendment.

The Law Council concurs with the submission of the Human Rights and Equal Opportunities Commission (now the Australian Human Rights Commission) to the 2005 review of the Extradition Act.¹⁸

The Commission noted that the *United Nations Model Treaty on Extradition* provides extradition should not be granted if the offence for which the extradition is requested is regarded by the State as an offence of a political nature. The Commission also observed that the scope of subsection 7(b) is broader than subsection 7(c) and *“that the political offence exception provides valuable safeguard against the prosecution of offences which criminalise conduct of a political character. Such offences could include, but are not limited to, political advocacy, protest, dissent or industrial action not intended to cause serious physical harm, death, the endangerment of life or create a risk to the health and safety of the public or a section of the public.”*

This position is consistent with submissions made to the 2005 review by two of the Law Council’s constituent bodies, the Law Institute of Victoria and the Law Society of South Australia.

The Law Council submits that the proposal to allow greater scope for prosecution in lieu of extradition may address concerns that the political offence objection has or could allow perpetrators of serious crimes to escape justice.

Extradition objection on the grounds of sex

It is proposed to extend the grounds of discrimination which may found an extradition objection under subsection 7(b) and 7(c) to include “sex”.

Law Council Response

The Law Council supports this amendment. However, the Law Council submits that the subsections should be amended more comprehensively so that the potential grounds of discrimination also include sexuality, ethnicity, colour and language.

Reforms relating to prosecution in lieu of extradition

Currently, a person can only be prosecuted in Australia in lieu of extradition in limited circumstances where extradition has been refused because the person is an Australian citizen.

¹⁸ The HREOC submission is available online at <http://www.hreoc.gov.au/legal/submissions/extradition200604.html>

It is proposed to amend section 45 of the Extradition Act to enable a person to be prosecuted where Australia has refused extradition, regardless of the person's nationality.

The amendments would enable a person to be prosecuted for conduct which occurred outside Australia, if the conduct would have constituted an offence against a law of a State or Territory had it occurred in Australia.

As is currently the case, prosecution in lieu could only occur with the consent of the Attorney-General.

It is argued in the Explanatory Memorandum that this amendment would “assist in preventing Australia from becoming an attractive safe haven for fugitives from countries whose criminal justice systems might give rise to grounds for refusal under the Extradition Act—for example, where there are concerns about torture or the death penalty.”

Law Council Response

The Law Council supports this proposal particularly to the extent that it will allow for the investigation and prosecution of perpetrators of serious offences without compromising on human rights protections.

Federal Magistrates

Currently, functions under the Extradition Act are exercised by State and Territory magistrates. The amendments propose to confer on Federal Magistrates all the functions currently conferred on State and Territory magistrates under the Extradition Act.

Law Council Response

The Law Council is aware that this proposal is designed to give partial effect to a recommendation made by the Australian Law Reform Commission in its report: *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation (2001, ALRC 92)*.¹⁹

The Law Council does not object to this proposal but notes some reservations.

The Law Council submits that State and Territory magistrates, unlike Federal Court magistrates, are likely to have significant experience in criminal matters, particularly criminal committal hearings. This experience assists State and Territory magistrates to discharge their duties under the Act, such as determining whether dual criminality is established.

Likewise, State and Territory magistrates courts are better equipped for and are more accustomed to dealing with people in detention.

¹⁹ Recommendation 20.2 provides: “Federal legislation should be amended to provide that original and appellate jurisdiction in matters arising under the Extradition Act 1988 be conferred exclusively on federal courts. In particular, jurisdiction to make orders determining a person's eligibility for surrender should be conferred on the Federal Magistrates Service. Jurisdiction to review such an order should be conferred on the Federal Court, and jurisdiction to hear an appeal from such a review should be conferred on the Full Court of the Federal Court.”

Reforms relating to Privacy Act 1988

It is proposed to insert an ‘information sharing’ provision into the Extradition Act:

54A Collection, use or disclosure of personal information for extradition purposes—the Privacy Act 1988

I. *The collection, use or disclosure of personal information about an individual is taken to be authorised by law for the purposes of the Privacy Act 1988 if the collection, use or disclosure is reasonably necessary for the purposes of, or for purposes relating to, the extradition of one or more persons to or from Australia, including making, or considering whether to make, an extradition request.*

II. *In this section:*

personal information has the same meaning as in the Privacy Act 1988.

Law Council Response

The Law Council’s concerns with the broad and general nature of this proposed provision are discussed below in the context of proposed changes to the *Mutual Assistance Act*.

Reforms not addressed by the Exposure Draft Bill

Beyond the proposals in the draft Bill, the Law Council submits that the following additional amendments should be made to the Extradition Act:

- A requesting state should be required to establish a *prima facie* case unless the state is specifically designated as not having to meet that requirement. Currently under the Extradition Act there is no need to establish a *prima facie* case or any other indicia of guilt. While, by section 11 of the Act, there is potential for the incorporation of this requirement by treaty or regulation applying to a particular country, generally this has not occurred.
- The current prohibition on leading evidence to contradict an allegation that the person has engaged in conduct constituting an extradition offence (sub-section 19(5)) should not be applied in circumstances where a person seeks to lead the evidence to establish an extradition objection (such as discrimination).
- The current requirement that special circumstances must be established before a person remanded under section 15 can be granted bail (sub-section 15(6)) should be repealed. It is unduly restrictive and can seriously impinge on individual liberty, particularly given the time (sometimes years) it can take to complete all extradition processes. The Law Council submits that the usual presumption in favour of bail should be restored. The Law Council understands that this is consistent with the position adopted in the United Kingdom under s 198 of the *Extradition Act 2003*.
- The Death Penalty grounds for refusal in section 22(3)(c) should be more tightly defined. Currently under that section, the Attorney-General may authorise the extradition of a person to a foreign country to face trial for an offence punishable by death if that country has provided an undertaking that:

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- the person will not be tried for the offence;
 - if the person is tried for the offence, the death penalty will not be imposed on the person; or
 - if the death penalty is imposed on the person, it will not be carried out.

It has been held by the Federal Court of Australia that the Extradition Act does not require that the undertaking relied on by the Attorney-General “*be effective to prevent the execution of the fugitive offender*”, only that such an undertaking is made.²⁰ Once an undertaking is given, and that undertaking conforms to the provisions of the Act, the court has no role in examining whether that undertaking will in fact be honoured.

Thus, the effectiveness of the provisions of the Extradition Act in meeting Australia’s obligations under Article 6 of the International Covenant on Civil and Political Rights (right to life) and the Second Optional Protocol to ICCPR Aiming at the Abolition of the Death Penalty depends on the strength and nature of the undertakings that the Attorney-General insists on receiving from foreign jurisdictions prior to extradition.

The Law Council submits that only formal undertakings, which are provided by an official appropriately authorised to offer a guarantee that the death penalty *will not be imposed*, should be regarded as sufficient to bring a request within this exception.

If a requesting country has, on a prior occasion, breached an undertaking not to impose the death penalty, then no further undertakings should be accepted from that country.

- Consistent with the recommendations made by the Human Rights and Equal Opportunities Commission (now the Australian Human Rights Commission) to the 2005 review of the Extradition Act:²¹
 - Subsection 22(3) should be expanded to provide that a person may only be surrendered if the Attorney-General is satisfied that on surrender the person will not be subject to cruel inhuman or degrading treatment or punishment in the requesting country.
 - The Act should be expanded to include an extradition objection that an extradition request must be refused in circumstances where (a) the extraditable person has suffered a violation of the right to a fair trial or (b) it is reasonably foreseeable that the extraditable person will suffer a violation of the right to a fair trial upon extradition. Alternatively, subsection 22(3) should be expanded to provide that the Attorney-General should not surrender a person for extradition unless the Attorney-General is satisfied that the person will have or has had the right to fair trial.
 - The list of extradition objections should be expanded to include a prohibition on the extradition of a child under 16 years of age. Such a provision would ensure Australia’s compliance with Article 3(b) of *Convention on the Rights of the Child (CRC)*.
 - The Extradition Act should be amended to include a general obligation to take into account the best interests of children as a primary consideration in all decisions which affect them (as required by article 3 of the *CRC*).

²⁰ *McCrea v Minister for Customs & Justice* [2004] FCA 1273 [17] (North J).

²¹ The HREOC submission is available online at <http://www.hreoc.gov.au/legal/submissions/extradition200604.html>

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- The surrender of a child for extradition should only be made in exceptional circumstances and subject to the requesting country providing an undertaking that:

- (a) the child's rights under CRC will be protected, regardless of whether or not the requesting state is a signatory to CRC; and

- (b) the child's trial for the extradition offence will be consistent with standards in Australia's domestic criminal law as they relate to children.

Proposed Reforms to the *Mutual Assistance in Criminal Matters Act 1987*

Grounds for Refusal

Torture

Currently under the Mutual Assistance Act there is no express prohibition on providing assistance where it may result in a person being subjected to torture.

It is proposed to address this deficiency by introducing sub-paragraph 8(1)(ca). This subparagraph would require the Attorney-General to refuse a request by a foreign country for assistance under the Act if he or she is of the opinion that "*there are substantial grounds for believing that the granting of the request would result in a person being subjected to torture.*"

Law Council Response

The Law Council supports any amendment to the Act which would make the real risk of torture a mandatory ground for the refusal of a mutual assistance request. However, the Law Council submits that the drafting of proposed sub-paragraph 8(1)(ca) requires refinement.

The Act should require the Minister to refuse a request where "*there are substantial grounds for believing that the granting of the request would result in a person being in danger of being subjected to torture.*" This would reflect the language used in the Convention against Torture. It would highlight the fact that, because of the opprobrium with which torture is regarded, states are required to adopt a highly cautious approach. If the Attorney-General is satisfied that a person may be exposed to the real risk of torture, this should be sufficient to warrant refusal.

The Law Council notes that under sub-paragraph 22(3)(b) of the Extradition Act, the Attorney-General may only surrender a person if he or she is positively satisfied that on surrender to the extradition country the person will not be subjected to torture.

Double Jeopardy

Currently under the Mutual Assistance Act, the Attorney-General must refuse a request where it 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.” (s8(1)(f))

It is proposed to repeal this prohibition on providing assistance where there is a risk of double jeopardy and replace it with a discretionary ground for refusal (see item 11 proposed section 8(2)(c)).

Law Council Response

The Law Council does not support this proposed amendment.

The Law Council has opposed the steps taken to modify the rule against double jeopardy in a number of domestic jurisdictions.

The rule against double jeopardy is a long standing principle specifically designed to protect individuals from potential state oppression and harassment. The Law Council does not accept that a case has been established for why reform of the rule against double jeopardy is necessary.

The Law Council submits that any dilution of the rule against double jeopardy:

- may encourage, or fail to punish, poor investigative or prosecutorial work;
- would introduce intolerable uncertainty for defendants and undermine the concept of the finality of proceedings; and
- would place an unfair cost burden on accused persons forced to fund a second trial.

For those reasons, the Law Council submits that Australia should never cooperate in exposing a person to double jeopardy.

The risk of double jeopardy should remain a mandatory, rather than discretionary ground for the refusal of a mutual assistance request.

The Law Council does support the proposal to amend the double jeopardy grounds for refusal to make clear that a request for assistance must be refused where the person has previously been acquitted, pardoned or punished in respect of the offence or conduct, not only in the requesting country, but also in Australia or a third country.

Death Penalty

Pursuant to subsection 8(1A) of the Mutual Assistance Act:

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.

Subsection 8(1B) further 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 co-operation, is of the opinion that in the circumstances of the case the request should not be granted.

It is proposed to amend subsection 8(1A) so that it would extend this ground of refusal to apply to circumstances in which 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.

It is not proposed to amend subsection 8(1B).

The Explanatory Memorandum provides:

This proposed amendment recognises that under some legal systems a suspect may be formally charged later in the legal process than in Australia. In such a situation the suspect may be held under arrest or detained for longer periods of time without being formally charged. It is appropriate that the protections contained in the Mutual Assistance Act in relation to the death penalty apply irrespective of differences in criminal procedure in foreign countries.²²

Law Council Response

The Law Council supports the proposal to extend the death penalty grounds for refusal so that it applies to the pre-charge part of an investigation.

However, the Law Council submits that further changes are required to protect against the risk of a person being exposed to the death penalty in a foreign country as a result of assistance provided by Australia.

The further amendments required are as follows:

- *AG should be required to refuse assistance in death penalty cases regardless of what stage the investigation has reached*

Even with the proposed amendments, section 8(1A) will not apply unless a suspect had already been arrested or detained. Prior to the arrest and/or detention of a suspect, subsection 8(1B) will still apply to mutual assistance requests which relate to the investigation of an offence that potentially carries the death penalty.

The Law Council objects to subsection 8(1B) and submits that it should be repealed. The subsection suggests that Australia's position on the death penalty is equivocal and that sometimes it will be in the "interests of international criminal co-operation" for Australia to be complicit in the imposition or execution of the death penalty abroad.

²² Explanatory Memorandum p. 16.

The Law Council submits that this is inconsistent with Australia's avowed absolute opposition to the death penalty and its commitment to work towards its abolition worldwide.²³

The Law Council submits that the risk that the provision of Australian assistance may lead to the imposition of the death penalty is, like the risk of torture, not a matter which can be weighed against other considerations.

For this reason, the Law Council submits that subsection 8(1B) should be repealed and that subsection 8(1A) should be expanded to cover all stages of a criminal investigation.

The exposure draft Bill proposes to extend other discretionary and mandatory grounds for refusal to cover the *investigation* as well as the prosecution and punishment of certain offences. The Law Council supports this proposed change and submits that the death penalty ground for refusal should be extended in the same way.

- *The 'special circumstances' discretion should be removed or strictly confined*

Even under subsection 8(1A), the risk that the death penalty might be imposed is not a mandatory ground for refusing a mutual assistance request. Subsection 8(1A) permits the Attorney-General to provide assistance in death penalty cases where he or she is satisfied that "special circumstances" exist.

"Special circumstances" is not defined in the Mutual Assistance Act.

The Law Council understands that, in practice, the 'special circumstance' discretion is generally utilised:

- to allow assistance to be granted where the assistance may be of an exculpatory nature and may assist a defendant to meet the charges he or she faces; or
- to allow assistance to be granted where a foreign country has provided an undertaking that the death penalty will not be imposed or carried out.

However, regardless of how it is used in practice, the Law Council submits that the Attorney-General should not have an unfettered discretion to accede to a mutual assistance request in a death penalty case.

The retention of such discretion implies that Australia's opposition to the death may be contingent on the circumstances and open to negotiation.

If section 8(1A) is intended to operate such that assistance will only be provided for the benefit of a defendant, or where an appropriate undertaking has been given, then these circumstances should be set out as express exceptions to an otherwise mandatory requirement to refuse a request for assistance in a death penalty case.

²³ In this regard it is important to note that Australia has signed and ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty. In December 2007 Australia also sponsored and voted in support of a UN General Assembly Resolution calling for a global moratorium on executions as a first step towards the universal abolition of the death penalty.

The Law Council further submits that only formal undertakings, which are provided by an official appropriately authorised to offer a guarantee that the death penalty *will not be imposed*, should be regarded as sufficient to bring a request within this exception.

If a requesting country has, on a prior occasion, breached an undertaking not to impose the death penalty, then no further undertakings should be accepted from that country.

- *The provision of agency to agency assistance should also be prohibited in death penalty investigations*

The limitation of the Mutual Assistance Act is that it only applies to formal requests for government to government assistance in criminal investigations and prosecutions. It does not cover requests for information and assistance made directly to an Australian agency, like the Australian Federal Police (AFP), from an agency in another jurisdiction or vice versa.

Arrangements for agency-to-agency cooperation are included in bilateral agreements, including treaties and Memorandums of Understanding (often classified) or are set out in broader policy documents. One relevant policy document is the *Australia Federal Police Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations* (Death Penalty Charge Guide).

The 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.”

*“Where charges have been laid in the foreign country, and the offences carry the death penalty, the AFP cannot provide assistance on a police-to-police basis unless the Attorney-General or the Minister for Home Affairs approves the provision of the assistance..”*²⁴

The Guide is silent about the terms upon which the AFP may provide unsolicited assistance, such as criminal intelligence, to foreign countries, including in circumstances where the provision of that assistance may expose a person to the risk of the death penalty.²⁵

The effect of the Death Penalty Charge Guide is that the AFP are able, without restraint, to work with foreign police to gather evidence and build a case against a suspect right up until the point that a charge is laid, even where it is known that the offences for which the suspect is being investigated attract the death penalty. In many legal systems, charges are not laid until a very advanced stage of the investigation. The Death Penalty Charge Guide therefore potentially allows the AFP to play an instrumental role in securing the conviction and death sentence of a person abroad – notwithstanding Australia’s opposition to the death penalty and purported committed to its international abolition.

²⁴ Attorney-General’s Department, *Fact Sheet on Mutual Assistance in Death Penalty Matters*, available at http://www.ag.gov.au/www/agd/agd.nsf/page/Extradition_and_mutual_assistance.

²⁵ *Rush v Commissioner of Police* [2006] FCA 12 at [73].

Any protection provided by the Mutual Assistance Act is seriously undermined by the absence of parallel safeguards in arrangements governing the provision of agency to agency assistance.

The Law Council submits that this significant protection gap must be addressed as a matter of priority.

While the Law Council acknowledges that this particular reform process is directed specifically at the Extradition Act and Mutual Assistance Act, the Law Council submits that a more comprehensive approach is required. If agency to agency cooperation requirements are not reviewed and reformed, then any changes made to the Mutual Assistance Act are unlikely to be effective in ensuring that Australia is not complicit in the imposition of the death penalty abroad.

In this context it is relevant to set out observations recently made by the United Nations Human Rights Committee on Australia's implementation and compliance with the International Covenant on Civil and Political Rights:

The Committee notes with concern the residual power of the Attorney-General, in ill-defined circumstances, to allow the extradition of a person to a state where he or she may face the death penalty, as well as the lack of a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state, in violation of the State party's obligation under the Second Optional Protocol.

The State party should take the necessary legislative and other steps to ensure that no person is extradited to a state where he or she may face the death penalty, as well as whereby it does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another state, and revoke the residual power of the Attorney-General in this regard.²⁶

Extraterritoriality and Lapse of time

It is proposed to repeal two of the existing discretionary grounds for refusal – extraterritoriality and lapse of time on the basis that they are now rarely used.

Law Council Response

The Law Council does not support this proposal.

Extraterritoriality and lapse of time are both only discretionary ground for refusal and should remain. They may be rarely used and may be less relevant as approaches to extraterritoriality evolve, however, there will always be cases where they continue to be relevant considerations. Therefore, these grounds of refusal should remain in subsection 8(2) in order to ensure that the Minister at least turns his attention to these issues in every case.

²⁶ UN Human Rights Committee, 'Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, *Concluding Observations of the Human Rights Committee*, CCPR/C/AUS/CO/5, 2 April 2009, Advanced Unedited Version

Grounds for refusal should apply to the investigation stage

It is proposed to amend the relevant grounds for refusing a mutual assistance request so that they also expressly apply to requests that relate to the investigation of a person and not just the prosecution and punishment of a person.

Law Council Response

The Law Council supports this proposal and submits that it will help address a protection gap that exists in the current Mutual Assistance Act. However, as discussed above in the context of the death penalty grounds for refusal, the Law Council is of the view that unless agency to agency co-operation arrangements are brought into line with the requirements of the Mutual Assistance Act, any human rights safeguards contained in the Act will continue to be undermined.

Other grounds to refusal not included in the draft Bill

When the Department conducted a review of the Mutual Assistance Act in 2006²⁷, a number of recommendations were received regarding the grounds for refusal listed in section 8. The Law Council is aware of, and believes there is significant merit in, three particular recommendations to extend the grounds for refusal. Those recommendations are as follows:

- *HREOC recommendation re human rights safeguards*

The Human Rights and Equal Opportunities Commission (HREOC) (now the Australian Human Rights Commission) noted in its 2006 submission to the Department²⁸ that the current grounds for refusal in s 8 do not impose a mandatory obligation on Australia to refuse a request for mutual assistance in circumstances where granting the request may result in a breach of person's rights under the *International Covenant of Civil and Political Rights* (ICCPR), *the Convention on the Rights of the Child* (CRC) or *the Convention Against Torture, Inhuman and Degrading Treatment* (CAT) in the requesting country. For example, it is not mandatory to refuse a request for mutual assistance where granting the request may result in a person being subject to cruel, inhuman and degrading treatment or punishment, subject to arbitrary detention, or denied the right to a fair trial.

HREOC recommended that s 8 (1) of the Mutual Assistance Act be amended to include an additional ground for mandatory refusal which states a request for mutual assistance must be refused if, in the opinion of the Attorney-General, there are substantial grounds for believing that granting the request may result in a breach of Australia's human rights obligations, including its obligations under the *International Covenant of Civil and Political Rights* (ICCPR), *the Convention*

²⁷ "A better mutual assistance system : A review of Australia's mutual assistance law and practice" AGD Canberra 2006 available online at http://www.ag.gov.au/www/agd/agd.nsf/Page/Extraditionandmutualassistance_Mutualassistance_Mutualassistancereviewpaper

²⁸ The HREOC submission to the Attorney-General's Department Mutual Assistance Review is available online at: http://www.hreoc.gov.au/legal/submissions/mutual_assistance_review.html

Against Torture, Cruel, Inhuman and Degrading Treatment (CAT) and the Convention on the Rights of the Child (CRC), in the requesting country;

- *HREOC recommendation re grounds for discrimination*

Sub-paragraph 8(1)(c) of the Mutual Assistance Act provides that a request for assistance should be refused where there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of the person's race, sex, religion, nationality or political opinions. HREOC submitted that s 8(1)(c) should also protect people from being prosecuted, punished or otherwise prejudiced as a result of their language, ethnic origin, sexuality or other status (for example, membership of a particular social group).

- *Office of the Privacy Commissioner recommendation re privacy protection*

In its 2006 submission to the Department the Office of the Privacy Commissioner suggested:

“that the discretionary grounds for refusal under section 8(2) of the Mutual Assistance Act be expanded to include where the requesting country's arrangements for handling personal information (whether legislative, contractual or otherwise) do not offer privacy protections substantially similar to those applying in Australia.”

The Law Council supports this recommendation, particular in view of the changes proposed to the Mutual Assistance Act. If the Act is amended as envisaged in the exposure draft Bill, a number of the current barriers to providing telephone interception material and DNA material to overseas agencies will be removed. Further, the AFP will be authorized to apply for and execute surveillance device warrants and a stored communication warrant to assist in purely foreign criminal investigations and to pass on the information obtained to overseas agencies accordingly.

The Law Council is aware that there is already a general discretion under the Act to refuse a request for assistance where “it is appropriate in the circumstance of the case”. However, the inclusion of specific grounds for refusal in the terms proposed, would ensure that the Attorney-General is required to give specific consideration to privacy issues in each case.

Reforms relating to Privacy Act 1988

As part of the reform of the Extradition Act and Mutual Assistance Act, it is proposed to insert an ‘information sharing’ provision into each Act.

Section 54A will be inserted into the Extradition Act as follows:

54A Collection, use or disclosure of personal information for extradition purposes—the Privacy Act 1988

- 1. The collection, use or disclosure of personal information about an individual is taken to be authorised by law for the purposes of the Privacy Act 1988 if*

the collection, use or disclosure is reasonably necessary for the purposes of, or for purposes relating to, the extradition of one or more persons to or from Australia, including making, or considering whether to make, an extradition request.

II. In this section:

personal information has the same meaning as in the Privacy Act 1988.

Section 43D will be inserted into the Mutual Assistance Act as follows:

43D Collection, use or disclosure of personal information for international assistance purposes—the Privacy Act 1988

I. The collection, use or disclosure of personal information about an individual is taken to be authorised by law for the purposes of the Privacy Act 1988 if the collection, use or disclosure is reasonably necessary for the purposes of, or for purposes relating to:

(a) the provision, or proposed provision, by Australia to a foreign country of international assistance in criminal matters; or

(b) the obtaining, or proposed obtaining, by Australia from a foreign country of international assistance in criminal matters.

II. In this section:

personal information has the same meaning as in the Privacy Act 1988.

The proposed insertion of these provisions is designed to overcome apparent uncertainty about how the Privacy Act applies to information collected and disclosed under both the Extradition Act and Mutual Assistance Act.

The Information Privacy Principles provide that personal information cannot be used or disclosed except for the purpose for which it was collected. Exceptions to this principle include where:

- disclosure is reasonably necessary for the enforcement of the criminal law, or
- disclosure is required or authorised by or under law.

In the Privacy Act, the definition of ‘criminal law’ is limited to Commonwealth, State, or Territory criminal law. However, where the Commonwealth discloses personal information in accordance with the Extradition Act or Mutual Assistance Act, it is generally for the purposes of enforcing the ‘criminal law’ of non-Australian jurisdictions.

As a result, the disclosure of personal information in extradition or mutual assistance matters must fall within the “required or authorised by or under law” exception to the Information Privacy Principles rather than the general ‘enforcement of the criminal law’ exception.

Hence the proposed insertion of the specific authorisation sections above.

Law Council Response

The Law Council is concerned that these sections are not drafted with sufficient specificity.

When the Attorney-General's Department first proposed the insertion of a provision into the Mutual Assistance Act to deal more specifically and transparently with information flows under the Act, something much more detailed was foreshadowed. In particular, it was suggested that:

"The Mutual Assistance Act could be amended to expressly identify and authorise personal information flows in the mutual assistance process to make it clearly fall within the 'required or authorised by or under law' exception in the Privacy Act. This approach would provide a degree of transparency and certainty in the mutual assistance process.

These provisions would be specific and not simply authorise information sharing generally. Such provisions would identify:

- *the type of personal information that could be shared*
- *the agencies which could share the information*
- *the agencies which could receive the information, and*
- *the purpose for which the information could be shared.*

*For example, a provision may authorise the Australian Government Attorney-General's Department to provide the AFP with a person's name, date of birth and bank account number for the purpose of executing a search warrant on that bank account in compliance with a mutual assistance request received from a foreign country.*²⁹

This proposal was supported by the Office of the Privacy Commissioner. In its submission in response to the Department's Review, the Office stated:

*"The Office welcomes this proposal [to expressly identify and authorise the personal information flows in the mutual assistance process] ...In particular, the Office welcomes the discussion paper's statement that the amending provisions be specific, and would not authorise information sharing generally."*³⁰

It appears to the Law Council that what is now proposed is a general authorisation provision, of the type it was originally sought to avoid.

The approach adopted appears to be inconsistent with the approach favoured by the Australian Law Reform Commission in its 2008 Report – *"For Your Information: Australian Privacy Law and Practice"* (ALRC 108). In the context of reviewing the scope and operation of the "required or authorised by law" exception to the Privacy Principles, the ALRC recommended in that Report that:

"Legislation should set out clearly whether it is intended to require or authorize an act or practice for the purpose of the Privacy Act. In the interest of clarity and transparency, such provisions should set out the type of information to be

²⁹ "A better mutual assistance system : A review of Australia's mutual assistance law and practice" AGD Canberra 2006 at

³⁰ The Office of the Privacy Commissioner's submission to the 2006 Review is available on line at <http://www.privacy.gov.au/materials/types/submissions/view/6662>

*included, the scope of the requirement or authorization and the extent to which the Privacy Act applies to the handling of that information.*³¹

The Law Council appreciates that it may be impractical, given the variety of information flows which occur under the Extradition Act and Mutual Assistance Act, to draft these information sharing provisions with the level of detail that was originally foreshadowed.

However, the Law Council submits that a greater degree of clarity and specificity is required than is currently offered by the proposed provisions.

The proposed provisions permit the collection, use and disclosure of personal information:

- for the purpose of extraditing a person or providing assistance to a foreign country in a criminal matter (whether that assistance is provided pursuant to the Mutual Assistance Act or not); and
- *for purposes relating to* the performance of one of those functions.

In this context, the Law Council is particularly concerned about the potential breadth of the phrase "for purposes relating to".

Requests for covert access to stored communications and surveillance devices

Currently there is no available mechanism to enable a warrant to be obtained to covertly access stored communications or to use a surveillance device to assist a foreign criminal investigation.

It is proposed to amend the Mutual Assistance Act so that, following a request from a foreign country, the Attorney-General may authorise the AFP or State/Territory police to apply for such a warrant.

Law Council Response

The Law Council submits that, if covert and intrusive police powers such as these are to be made available to assist in the investigation of foreign offences, then the following minimum requirements should apply:

- Before issuing a warrant, the issuing officer must be satisfied of precisely the same matters that he or she would be required to be satisfied of if the warrant were sought in the context of a domestic investigation (e.g. seriousness of the offence, necessity, privacy, likely benefit etc);
- The reporting requirements in relation to:
 - the number of warrants applied for and granted;
 - the type of investigations (i.e. the type of offences) for which warrants were sought; and
 - the use made of information obtained under the warrant

³¹ ALRC 108 at paragraph 16.86

must be the same as they are for warrants obtained in the context of a domestic investigation; and

- The restrictions placed on the use, disclosure, retention and destruction of information obtained under the warrant must mirror those that would be in place if the warrant was sought in the context of a domestic investigation.

As currently drafted, the proposed provisions relating to surveillance device warrants and stored communication warrants do not fully comply with these requirements.

Threshold test for obtaining a warrant

The Law Council has three primary concerns with the threshold tests for obtaining a warrant to assist in the investigation of a foreign offence.

- The proposed provisions state that a surveillance device warrant or a stored communication device warrant may only be applied for in the context of a foreign investigation which relates to an offence carrying a maximum penalty of at least three years (for surveillance devices)³² and a maximum penalty of at least three years or a minimum fine equivalent to 900 penalty units (for stored communication warrants).³³ These limitations on the availability of both types of warrants closely mirror the limitations imposed on their availability in the context of domestic investigations.

The Law Council's concern is that in both cases the seriousness of the offence being investigated and whether it meets the required threshold test is measured by reference to the maximum penalty imposed for the offence in the requesting country. Such penalties may be quite out of sync with, and much more severe than, the penalties imposed in Australian jurisdictions for like conduct.

The Law Council therefore submits that the relevant provisions should require the Attorney-General to be satisfied that the offence under investigation would attract the requisite threshold penalty had it been committed in Australia. The Law Council concedes that this proposal may present some challenges because of the difficulty associated with precisely identifying a comparable Australian offence and the possibility that that offence may carry different maximum penalties in different Australian Jurisdictions

- In the context of a domestic investigation, one of the matters that an issuing officer is required to consider before issuing a surveillance device warrant is "*the likely evidentiary or intelligence value of any evidence or information sought to be obtained*".³⁴

In relation to a stored communications warrant, the issuing officer is required to consider "*how much the information [sought to be obtained] would be likely to assist in connection with the investigation.*"³⁵

It is proposed that when these warrants are sought in the context of a foreign investigation, the likely value of the information sought to be obtained by the

³² See proposed section 15B(1)(a)

³³ See proposed section 15A(b)

³⁴ Surveillance Devices Act 2004, s16(2)(e).

³⁵ Telecommunications (Interception and Access) Act 1979, s116(2)(c)

warrant will only be required to be assessed to the extent that the information provided by the requesting country allows for such an evaluation.³⁶

The Law Council submits that there is no justification for the dilution of this important threshold test. If foreign agencies want to employ intrusive police powers, which impact so directly on the privacy of those targeted, in the context of their investigations, they ought to be required to provide sufficient information to allow the merits of their request to be properly tested. Such information should clearly include well supported claims about the likely value of the evidence or information sought to be obtained.

- In the context of a domestic investigation, an issuing officer is required to consider the following matters before issuing a stored communications warrant:
 - to what extent methods of investigating the [relevant offence] that do not involve the use of a stored communications warrant in relation to the person have been used by, or are available to, the agency seeking the warrant; and
 - how much the use of such methods would be likely to assist in connection with the investigation by the agency of the [relevant offence]; and
 - how much the use of such methods would be likely to prejudice the investigation by the agency of the serious contravention, whether because of delay or for any other reason.³⁷

These threshold considerations are intended to underscore the fact that covert access to stored communications should only be authorised when more conventional and less intrusive investigative techniques have proven, or are likely to prove, ineffective or impractical.

In the context of a foreign investigation, the issuing officer is not required to consider any of these matters. The Law Council submits there is no justification for exempting warrant applications which relate to foreign investigations from this important necessity test.

Reporting requirements

The Law Council has one primary reservation with the proposed reporting requirements for warrants issued in the context of a foreign investigation. The Law Council is concerned that there is no requirement for feedback to be given about the number and type of arrests, prosecutions and convictions obtained as a result of the information obtained under the warrant. This type of information is required to be captured and reported where a warrant is issued in the context of a domestic investigation.³⁸ This information is very useful in allowing review and scrutiny of whether the information provided and claims made, in warrant applications were actually borne out by the results obtained.

The Law Council submits that there is no justification for this proposed gap in reporting.

As submitted above, if foreign agencies want to have domestic access to intrusive investigative powers, they ought to be willing and required to provide feedback data on how they have used the information obtained. Only in this way can Australian authorities

³⁶ See items 53 and 70 of the draft Bill

³⁷ Telecommunications (Interception and Access) Act 1979, s116(2)(d) – (f)

³⁸ Surveillance Devices Act 2004, s 50 and ³⁸ Telecommunications (Interception and Access) Act 1979, s 163

satisfy themselves, on an ongoing basis, about the reliability, necessity and likely utility of future warrant requests.

Restrictions on use, disclosure, retention and destruction of information

Proposed Section 15B provides that, pursuant to a request from a foreign country, the Attorney-General may only authorise a law enforcement officer to apply for a surveillance device warrant if the requesting country has given appropriate undertakings in relation to:

- ensuring that the information obtained as a result of the use of the surveillance device will only be used for the purpose for which it is communicated to the requesting country; and
- the destruction of a document or other thing containing information obtained as a result of the use of the surveillance device; and
- any other matter the Attorney-General considers appropriate.

The Law Council supports the proposal to require the Attorney-General to seek undertakings of this kind. However, the Law Council queries how such undertaking can be monitored or enforced. In the absence of any mechanism to enforce or even review compliance, the Law Council is concerned that the protection provided by undertakings such as these may be illusory.

With respect to stored communication warrants there is no requirement for the requesting country to give an undertaking of the type proposed above. Instead, proposed section 142A provides that:

- a person may only communicate information, obtained through the execution of a warrant issued as a result of a mutual assistance application, to the foreign country to which the application relates, subject to the following conditions:
 - that the information will only be used for the purposes for which the foreign country requested the information;
 - that any document or other thing containing the information will be destroyed when it is no longer required for those purposes;
 - any other condition determined, in writing, by the Attorney General.

The Law Council supports the proposal to impose condition of this type on the transfer of information. However, the Law Council queries how, in the absence of an undertaking, these conditions would be communicated, imposed, accepted and enforced. The Law Council queries who, in the receiving country, might be regarded as sufficiently authorised to agree to such conditions and then to oversee their observance.

As a result of the uncertainty about the effectiveness of these privacy protection arrangements in practice, the Law Council supports the insertion of a discretionary grounds for refusal under section 8(2) of the Mutual Assistance Act, which would encourage the Attorney-General to decline a request for assistance where the requesting country's arrangements for handling personal information (whether legislative, contractual

or otherwise) do not offer privacy protections substantially similar to those applying in Australia.

Carrying out forensic procedures at the request of a foreign country

It is proposed to amend the Mutual Assistance Act and the Crimes Act 1914 so that where a request has been received from a foreign country, application may be made to a magistrate for a forensic procedure to be carried out on a suspect of a foreign offence. (This procedure would be followed where the suspect has previously refused consent to the procedure.)

It is also proposed to amend Part 1D of the Crimes Act to allow police (in the absence of a formal mutual assistance request) to:

- carry out a forensic procedure on a suspect of a foreign offence with his or her informed consent; and
- carry out a forensic procedure on a volunteer in relation to a foreign criminal matter.

All the safeguards contained in the Crimes Act would apply – except in relation to the use, disclosure, retention and destruction of the forensic material after its release to the foreign jurisdiction.

Under proposed section 28B(2)(d) of the Mutual Assistance Act, the Attorney-General would only be able to authorise a constable to apply to a magistrate for a forensic procedure to be carried out if the foreign country has given:

- appropriate undertakings in relation to the retention, use and destruction of forensic material, or of information obtained from analysis of that forensic material; and
- any other undertakings that the Attorney General considers necessary.

Where the forensic procedure is carried out by police on a volunteer or on a consenting suspect on the basis of a direct request from a foreign agency (that is, an agency to agency request rather than a formal request under the Mutual Assistance Act) then proposed section 28B(2)(d) would not apply.

However, it is proposed to insert a new section 23YQD into the Crimes Act to cover such situations.

Proposed section 23YQD provides that:

1. The Commissioner may provide forensic evidence to a foreign law enforcement agency if the Commissioner is satisfied that:
 - (a) the foreign law enforcement agency has given appropriate undertakings in relation to the retention, use and destruction of the forensic evidence; and
 - (b) it is appropriate, in all the circumstances of the case, to do so.

As above, the Law Council queries how such an undertaking would be monitored or enforced – particular when it is only given at a police to police level. The Law Council also queries why the proposed section is not more prescriptive about the content of any undertaking, in line with domestic requirements such as those contained in section 23YD, 23YDAA and 23YDAB of the Crime Act.

Attachment A: Profile of the 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

Tasmanian Bar Association

The Victorian Bar Inc

Western Australian Bar Association

LLFG Limited (a corporation with large law firm members)

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.