

BACKGROUND

Mutual Assistance is the formal Government to Government process countries use to assist one another in the investigation and prosecution of criminal offences. Mutual assistance can also be used to locate, restrain, forfeit and share the proceeds of crime.

On 12 October 2005, the Minister for Justice and Customs announced the review of Australia's international extradition and mutual assistance in criminal matters arrangements. The policy objective of the Mutual Assistance Review is to develop a responsive, streamlined mutual assistance system that effectively supports the investigation and prosecution of criminal offences, helps to ensure that criminals are denied the proceeds of their crimes, and which incorporates appropriate safeguards.

On 15 September 2006, the Minister for Justice and Customs released a discussion paper on Australia's mutual assistance arrangements for public comment. The Attorney-General's Department developed the paper in consultation with key Australian Government agencies. The Department consulted with State and Territory governments on 28 September 2006 regarding the specific mutual assistance issues relevant to the States and Territories.

The comments and recommendations stated below reflect the Queensland Police Service's position relating to those issues in the discussion paper that are likely to impact on the Service.

DNA- INTERNATIONAL REQUEST FOR FORENSIC MATERIAL

Australian law enforcement agencies can currently use a range of procedures to obtain forensic material in the investigation and prosecution of domestic crimes. However, where a foreign country makes a mutual assistance request for such material, there are some limitations on the assistance Australia can provide. Commonwealth consideration has been given to

obtaining DNA information in mutual assistance matters. Specifically three questions have been posed for consideration by the Service including obtaining DNA material from persons from a foreign country without consent; providing DNA information stored on the National Criminal Investigation DNA Database to foreign jurisdictions; and matching the DNA from a foreign country with NCIDD. Each issue will be addressed in turn.

Issue 1- DNA from Persons without Consent

Presently Australia obtains DNA material from a person for a foreign country where that person consents to the process. Proposed amendments to the mutual assistance legislation will consider whether Australia should allow DNA material to be obtained from a person without their consent in the same way as it can be obtained for a domestic investigation.

a) What Safeguards should Apply

It is agreed that currently Australia can not compulsorily conduct a forensic procedure on a suspect for the purposes of a mutual assistance request from a foreign country unless the person voluntarily commits their DNA by informed consent. Existing forensic procedure orders available under the *Crimes Act 1914 (Commonwealth)* and the *Police Powers and Responsibilities Act 2000 (QLD)* only apply to offences within their relevant jurisdictions.

Conceptually the Queensland Police Service has no issues with what is proposed. However as a matter of practicality, the mechanism by which this is to occur may be an issue particularly as regards appropriate safeguards.

The QPS recommends that the *Mutual Assistance in Criminal Matters Act 1987 Commonwealth* be amended by inserting a new part for requests by foreign countries for a forensic procedure order. The Act could adopt provisions similar to s.15 of the Act. Proposed wording could include where a proceeding or investigation relating to a criminal matter involving a serious

offence commenced in a foreign country and there are reasonable grounds that;

- The person on whom the procedure is proposed to be carried out is a suspect for a serious offence;
- There are reasonable grounds to believe that the suspect is located in Australia;
- There are reasonable grounds to believe that the forensic procedure is likely to provide evidence tending to confirm or disprove that the suspect committed a serious offence;
- The carrying out of the forensic procedure is justified in all the circumstances; and
- The foreign country requests the Commonwealth Attorney-General to arrange for the forensic procedure to be performed.

As a consequence, the Commonwealth Attorney-General at his or her discretion may authorise a police officer in writing to apply to a Magistrate for a forensic procedure order under s.23WS or s.23XA of the *Crimes Act*.

The forensic procedure order then becomes a Commonwealth forensic procedure order and may then be recognised as a corresponding forensic procedure order under part 9, Chapter 17 *Police Powers and Responsibilities Act 2000 (PPRA)*.

The PPRA allows a forensic procedure order to be taken out in a Commonwealth jurisdiction and for that order to be registered in Queensland. Safeguards already exist under the *PPRA* and will not interfere with the State's jurisdiction in aspects of enforcing the order.

A ministerial arrangement could be entered into with the Commonwealth/AFP to enable corresponding forensic procedure orders to be actioned accordingly. It would be useful for such a ministerial arrangement to include provision for a sample and a profile to be obtained simply because other foreign jurisdictions

may have profiling systems that are incompatible with those adopted in Queensland.

Pursuant to s.523 *PPRA*, the Commonwealth (AFP) may enter into an arrangement for the registration of forensic procedure orders made under their authority. S.524 *PPRA* allows an appropriate person to apply to the Commissioner for registration of the corresponding forensic procedure order.

S.525 *PPRA* provides that the forensic procedure order upon registration has the same force and effect as if it was a forensic procedure order made under the Police Powers and Responsibilities Chapter.

By virtue of s.464 *PPRA*, powers for forensic procedure orders include the power to detain a person, to direct a person to attend by way of notice; to stay for the provision of a sample and for a qualified person to perform the procedures required under the order.

Accordingly, the QPS could then analyse and send the profile or provide it to the jurisdiction from which the order emanated, namely the Commonwealth.

The QPS is entitled to receive forensic material (eg a sample), but the question arises as to whether the Service is authorised to release the sample itself rather than a profile. S.489 (2) *PPRA* requires that DNA samples be kept in a safe place. It is possible however under s.533 *PPRA*, that such arrangement can include access to DNA material, being a sample and a profile. Therefore, any agreement with the Commonwealth (AFP) should also include reference to or have the scope to cover receiving and sending samples, as well as profiles.

From a QPS perspective, it would be entitled to analyse a sample and to retain it. The QPS ability to add such samples to the appropriate suspect database would not be compromised.

b) Recommendation

The QPS recommends that the *Mutual Assistance Act* be amended if it is considered appropriate to do so in the terms outlined above. By way of best practice and appropriate safeguards, the Service recommends that if that amendment is included, the Commonwealth forensic procedure order could be registered as a corresponding order in Queensland under its *PPRA*. By virtue of a ministerial arrangement with the AFP, the QPS would be in a position to analyse a sample, obtain a profile and return a sample and/or profile to the AFP for their lawful functions.

It becomes a matter for the Commonwealth to decide whether to send the profile to a comparative jurisdiction overseas.

Realistically the only issue for the QPS would be a resourcing one, arising from the taking of the sample and any potential analysis. The QPS has a funding agreement with QLD Health that may need to be renegotiated to include any such requests. There are inherent safeguards in the State and Commonwealth legislation already which would guarantee protection to Australian interests. Queensland would be required to comply with its own legislation in dealing with the forensic procedure order rather than that of the Commonwealth.

The alternative consideration is that of a mutual assistance warrant under part 7A of the Act. However in the QPS view, it is unlikely that that warrant will enable a person to be detained and forcibly have a sample taken. It appears warrants under part 7A are limited to pre-existing items on premises.

However if the mutual assistance legislation is amended to expand the scope of warrants, no resourcing issues would arise for the QPS if access was sought to a DNA profile. The QPS would prefer that the AFP be empowered to investigate and assist under a ministerial arrangement and the QPS could lawfully release the profile to the AFP in those circumstances. It then becomes a matter for the AFP as to its use.

Issue 2- Providing Information from the DNA Database

The Commonwealth asserts that Australia can provide DNA information stored on the NCIDD database to foreign countries pursuant to the *Mutual Assistance Act* or by executing a mutual assistance search warrant for specifically identified DNA. Such information may also be provided where it is in possession of the law enforcement agency. The question arises as to whether the current mechanisms for providing this DNA information are appropriate and if there are any better mechanisms for doing this.

The Commonwealth asserts that at present Australia can not access the NCIDD or State or Territory databases to match a DNA sample provided by a foreign country unless the request from the foreign country meets the requirements of the search warrant provisions of the *Mutual Assistance Act*.

a) QPS Position

The QPS position is that these assertions may not accurately reflect the true status of NCIDD and QPS databases. It is the QPS understanding that NCIDD owns no data in and of itself. NCIDD is in fact a matching tool utilised by CrimTrac (an executive agency on behalf of the Commonwealth). NCIDD is in fact a grouping of nine separate databases comprising databases of the States and Territories and simply operates as a brokerage or interface for the communal access of information. The information held is de-identified information, so that execution of a warrant without more, will be of little use.

It will not be effective, in the QPS view, for a search warrant to be executed upon NCIDD as NCIDD is not a legal entity nor has it standing regarding execution of the warrant.

In reality, the QPS database sits on NCIDD together with all other State and Territory databases. Power remains with the individual States and Territories regarding control of those databases and access to identified profile information. A search warrant under the *Mutual Assistance Act* would only allow access to the AFP or Commonwealth databases on NCIDD and not to any other State databases.

On that basis, it appears that the warrant system may not be workable. However, such a warrant may be directed at each individual State or Territory rather than CrimTrac for access to each individual database. The QPS view would be that execution of any warrant should occur through liaison with the offices of the AFP.

The QPS has concerns that a warrant may compel it to act outside existing ministerial arrangements with agencies or outside its own matching rules imposed by legislation.

The preferred option for the QPS is that there are lawful mechanisms in place to enable information to be provided to the AFP by ministerial arrangements relying on s.533 of *PPRA*. Such an arrangement may cover the provision of material from QPS to AFP and the AFP will have appropriate powers under any necessary amendments to the *Mutual Assistance Act* to deal with it through those procedures.

Mechanisms and safeguards are already in place in relation to ministerial arrangements and there would be no need for court intervention by the issue of warrants.

b) Recommendation

The QPS recommends that the position in relation to NCIDD be clarified with the Commonwealth. The QPS further recommends that consideration be given to utilising the existing ministerial arrangement provisions under Queensland legislation and in corresponding legislation in the States and

Territories so that such arrangements may be made with AFP to enable such provision of information to occur.

Issue 3- Matching DNA from a Foreign Country with NCIDD

The Commonwealth asserts that Australia cannot access NCIDD or State or Territory databases to match a DNA sample provided by a foreign country unless the request from the foreign country meets the requirements of the search warrant provisions of the *Mutual Assistance Act*. The Commonwealth has asked whether Australia should allow controlled access to NCIDD under mutual assistance for the purpose of DNA matching.

a) QPS Position

Similarly to the comments in relation to No. 2 above, providing information from the DNA database, the QPS position regarding the status of NCIDD should be noted here. Each State and Territory database sits on NCIDD and power remains with each State in relation to that information. Any warrant issued upon NCIDD (or CrimTrac) will only relate to Commonwealth or AFP databases and not cover the State or Territories.

Conceptually there seems to be no difficulties with what is proposed but there may be practical difficulties in its application. For example, profiling systems in international jurisdictions may be different and therefore the profiling matching rules will not necessarily correspond. It may be necessary for samples to be sent rather than profiles for matching.

The best position for the QPS again would be for ministerial arrangements to be utilised with the AFP in Queensland to facilitate such requests and then it becomes a resourcing issue. If a sample is sent from a foreign jurisdiction, the AFP could analyse it and request the QPS to compare the profile to its database in the usual course. There would be a need to include references to

sending and receiving samples in the ministerial arrangement if that is the case.

The Commonwealth Crimes Act would need to be amended to enable the profile to be checked on NCIDD. Once a match is identified the transfer of the DNA profile would need to be arranged between the relevant State or Territory and the law enforcement agency in the Commonwealth.

b) Recommendation

The QPS recommends that existing safeguards and legislative provisions exist by way of s.533 ministerial arrangements. It is recommended that the AFP utilise such provisions to enable profiles and or samples to be sent and/or received for analysis. Resourcing issues may arise where the State is asked to perform the analysis of the sample rather than the Commonwealth. However Queensland could utilise that sample for its own databases as required and be placed on the suspect indices.

The Commonwealth Crimes Act would need to be amended to enable the AFP to proceed down this path.

TRANSFER OF PRISONERS

Under the Mutual Assistance Act, the Minister can make arrangements for a person to travel to a foreign country to give evidence or assist an investigation. This can include Federal or State prisoners (whether or not they are remanded on bail or are in custody). The Minister can only make these arrangements if the person consents. The following questions are questions the States were asked to provide comment on were:

- Is the current system for holding foreign prisoners in custody in State or Territory prisons appropriate?

- Is the current system for releasing State or Territory prisoners to be transferred to a foreign country appropriate?
- Is the current system for holding foreign prisoners in custody in State or Territory prisons appropriate?

QPS Position

The Service has no issues with the current system and arrangements relevant to the transfer of prisoners under the *Mutual Assistance Act*.

CONCLUSION

Conceptually, the proposed amendments to the *Mutual Assistance Act* discussed above may be workable from a Queensland perspective. It is the questions relating to the expansion of mutual assistance to incorporate the sharing of DNA information between foreign jurisdictions that has the most relevance to the Service. Consultation with the relevant areas on this issue has been extensive, with the above detailed comments reflecting the complexity of the arrangements that currently exist and those proposed.

More specifically, the Service believes that its existing protocols, legislative provisions and arrangements can be utilised to adequately safeguard and facilitate the provision of material and assistance as required. The QPS could assist by entering into a separate ministerial arrangement with the Australian Federal Police under s.533 PPRA to facilitate all three matters. It then becomes a question of checks and balances for the Commonwealth in assessing whether the request it receives is appropriate as a means of assistance to be provided by Australia.