



A REVIEW OF AUSTRALIA'S MUTUAL ASSISTANCE LAW AND PRACTICE

**Submission of the Victorian Bar in
response to the September 2006
Discussion Paper released by the
Attorney-General's Department**

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Response by the Victorian Bar to the Review of Australia's Mutual Assistance Law and Practice

Introduction

The Victorian Bar notes that the Discussion Paper entitled "A Review of Australia's Mutual Assistance Law and Practice", was released on 19 September 2006, received on 26 September 2006, with responses required initially by 13 October 2006. The area of mutual assistance is complex and the Discussion Paper raises some significant policy issues. The Bar considers there has been insufficient time to undertake an appropriate and thorough examination of the 80 page Discussion Paper.

In framing this response, the Bar has been assisted by the Criminal Bar Association of Victoria. Given the timeframe for responses, the Bar is able only to make limited comments, focussing on the *Foreign Evidence Act 1994*. The Bar is a constituent member of the Law Council and it is understood that body will be responding to the Discussion Paper.

Admission of Evidence obtained by Mutual Assistance

The provisions of the *Foreign Evidence Act 1994* permit testimony obtained via a mutual assistance procedure to be admitted in evidence at trial. This is a criminal justice issue. It is raised in question 22 of the Discussion Paper at page 61.

The Bar takes the view that there are aspects of the present system that require further and more comprehensive consideration than is afforded in the Discussion Paper. Arguably, some of the provisions in the *Foreign Evidence Act 1992* should be reviewed as they are unsatisfactory, and drawn in a wide and unhelpful fashion.

Early Use of the Procedure

At a time well in advance of a committal proceeding or trial, the provisions enable the prosecution to use the mutual assistance procedure for any witness – whether of

central or peripheral importance – to be examined. The accused has an opportunity to cross examine such witnesses, if he or she wishes to. Later, the prosecution may seek to admit the testimony at a subsequent trial. This has the potential for considerable unfairness to an accused. For instance:

1. At committal or trial, and even prior to the prosecution opening its case to the jury, the effect of the provisions can be to place the person charged in a position of having to cross-examine a witness, and effectively “put the defence case”. This enables the Crown in advance of the trial, and possibly in advance of a prosecution opening outlining the details of how the case is put, to negate the matters put in cross-examination. This circumstance is capable of undermining the onus of proof and the presumption of innocence.

2. A dilemma exists for the person charged in that the choice at an early stage has to be taken to decline cross examination because of the inherent or perceived unfairness, or some other good reason. The person charged may then be faced with the prospect of the evidence being admitted at trial, in an untested form.

3. Whilst some witnesses may be of little importance in a case, others may be critical to the prosecution’s prospects of success.

4. Evidence that is taken is inevitably taken before a different tribunal – or perhaps no tribunal at all - and is likely taken pursuant to different rules of evidence.

5. Issues that arise in the subsequent trial – perhaps as the result of further police investigation and late service of Notices of Additional Evidence - will not have been raised with the witness who has been the subject of an earlier mutual assistance hearing.

The Exercise of Discretion

Sections 23 and 24 of the *Foreign Evidence Act* 1994 provide the court with the discretion to admit or not admit foreign material into evidence. The discretion to admit evidence is very broad, and lacks specificity. One criterion is that the witness is not in the jurisdiction. Another is that the evidence would not have been admissible had it been adduced from the person at the hearing. The latter should not be a matter of

discretion. If the evidence could never have been admissible in an Australian court, it should be inadmissible. The fact that the evidence forms foreign material should not in some way make it then admissible, its actual admission being then subject to the exercise of a discretion.

In the Bar's view, the criteria for exercising the discretion are inadequate and should be reviewed. Thereby, more specific guidance can be given to the parties, and to the person asked to exercise the discretion to admit the evidence, or not to admit it. For example, it should also be a factor in the exercise of the discretion that the witness is not prepared to give evidence in the proceedings via a video link. Every option to secure the giving of the evidence in the course of the trial should be exhausted.

A further consideration is that if the witness is a critical witness in the sense that it is upon his/her testimony that the case ultimately depends, then the evidence should be given in the course of the trial – not in advance of it.

In the view of the Bar, the mutual assistance process should be used as an adjunct to a criminal trial – where it facilitates its progress. The mutual assistance process should not become a substitute for a trial.

Attendance of Witnesses

Cases have emerged where witnesses who have provided statements and exhibits in the course of a police investigation, pursuant to appropriate and lawful requests made by Australian authorities, have declined to travel to Australia to give their evidence in an Australian court. Further, such witnesses can decline to give evidence in a proceeding by video-link. There is no recourse if the witness fails to co-operate.

Such circumstances of non-cooperation can affect adversely the defence, as well as the prosecution. The failure of such a witness to continue to co-operate can leave the person charged with no recourse if the person declines to travel to Australia to give evidence or the defence. Such a failure can also leave the prosecution without important evidence to complete the Crown case.

Presently, there is no means by which to compel a person who has provided assistance, to travel to Australia. An Australian subpoena has no effect outside Australian boundaries. In circumstances where trans-national crime is increasing, where Australian police forces have an increasingly international scope, and where increasing co-operation is sought from overseas sources, the Australian Government should explore possibilities for mutual treaties between countries which could provide a compulsive effect similar to that of a properly issued subpoena within the Australian jurisdiction.

Further Consultation

The Bar, through the Criminal Bar Association, would appreciate the opportunity to make further comments and submissions about the above issues, should the opportunity arise at some future point.

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