

A Submission to the
Federal Attorney General of Australia

Regarding a review of Australia's
Mutual Assistance Law and Practice.

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Foreword

As a part of my studies I have been studying the application and implications of Federal Criminal Law and its place in the broader justice system. In the course of this study we were called on to examine a number of different Federal Acts and to analyse the legislation to a depth that we might not otherwise have done.

Towards the end of semester we were given the opportunity by our lecturer to, as part of assessment, make a submission regarding the review of the Mutual Assistance Act. My attached submission is my considered opinion on the review of the act after researching the matter.

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Introduction

The Mutual Assistance in Criminal Matters Act 1987 (Cth) serves as a valuable benchmark and establishes Australia's national position with regards to mutual assistance in criminal matters with foreign countries. The Act is the cornerstone upon which bilateral and multilateral treaties and agreements can be built. Like a cornerstone in a building, it establishes the foundations, the policies and principles by which Australia holds firm. Its primary purpose should be to facilitate efficient and effective cooperation between nations in the interests of administering justice reference global dimension of crime.

As the foundation of Australia's mutual assistance policy it should be built upon in any subsequent treaty or agreement that Australia enters into. The protections contained in the act should be seen as a minimum acceptable standard and should not be traded away as bargaining pieces.

Australia has a history of reform with regards to human rights values. The death penalty was abolished Federally in 1973¹, (it has also been abolished in all of the States and Territories²), and Australia has subscribed to treaties and protocols on human rights such as the International Covenant on Civil and Political Rights³, in particular the Second Option Protocol to that covenant regarding the abolition of the death penalty⁴. Australia's ongoing commitment to reform is seen in the establishment of the Act in 1987 and in the amendments proposed to the Act in 1996. That ongoing reform can also be seen in the Extradition Act⁵ and the proposed reforms being considered for that Act.

I have reviewed each of the issues and principles suggested by the Attorney General's Department⁶ and have made comment on each. After review of the provisions of the Act there are some areas of concern to me that need further exploration and clarification. Broadly my concerns relate to ensuring that revision of the act continues to provide protection of the rights of the accused in the following areas;

1. Requests for assistance from capital punishment jurisdictions
2. Informal requests for information and intelligence to assist in investigations.

¹ *Death Penalty Abolition Act 1973 (Cth)*

² *Crimes (Capital Offences) Act 1975 (Vic)* ; *Crimes (Amendment) Act 1955 (NSW)*, *Crimes (Death Penalty Abolition) Amendment Act 1985 (NSW)*, *Miscellaneous Acts (Death Penalty Abolition) Amendment Act 1985 (NSW)*. ; *Statutes Amendment (Capital Punishment Abolition) Act 1976 (SA)* ; *Criminal Code Act 1968 (Tas)* ; *Criminal Code Amendment Act 1922 (Qld)*

³ *International Covenant on Civil and Political Rights 1966* (Signed 1972, ratified 1980)

⁴ *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty* <<http://www.ohchr.org/english/law/ccpr-death.htm>> at 01/10/2006 (Ratified 1990)

⁵ *Extradition Act 1988 (Cth)*

⁶ *A Better Mutual Assistance System. A review of Australia's mutual assistance law and practice* <<http://www.ag.gov.au/adg>>

3. Formal requests and the means by which such requests are approved or denied.
4. Requests for information, which relate to information that, had it been gathered in Australia, would not be admissible in court because of the nature of the method of attaining the information.

I will explore each of the above in some detail in the following analysis, as well as individually addressing each of the 27 issues and 13 principles in turn.

Part A - Analysis of Issues:

1: Objects of the Mutual Assistance Act:

In examining the objects of the act it becomes apparent that there is a lack of reciprocity of purpose in these objects. By this I mean that there is a reasonable level of detail given to the nature and method of assistance that will be given to a foreign country, but no detail at all with regard to the types of assistance that may be requested by Australian authorities.

s.5(a)(i) to s.5(a)(v) and s.5(b) describe the objects of the Act in a considered and detailed manner with respect to the way assistance should be given to a foreign country that has made a valid request. These objects cover the activities that Australian authorities will perform and they serve to regulate their performance.

In contrast to this s.5(c) seems to give unfettered licence to request any type of assistance that is available, regardless of whether the gathering of that evidence or collection of documents is performed in a manner that would be considered illegal in Australia. This provision is consistent with the provisions of s.12(2)(a) to (d), which allow for any evidence to be taken, or document to be obtained even though under Australian law the evidence could not be taken or the document or article could not have been obtained. However, in my view this provision is unnecessarily casual and open to misuse.

Undoubtedly the background for this provision is to allow for administrative and bureaucratic differences in evidence taking from country to country, and as such this does provide the necessary latitude to allow for evidence to be adduced without unnecessary delay. It leaves however a loophole which may be exploited.

Further, this provision of the Act does not preclude the access and use of evidence that has been gained as a result of torture or duress⁷. For example, there are at present still in excess of 500 prisoners detained in the United States facility at Guantanamo Bay. These prisoners who may be subject to torture or other forms of mental and physical abuse and deprivation may offer "evidence" in response to this treatment. Evidence gathered in this manner however must be treated as unreliable and unusable because of the method of obtaining it.

Although Australian courts retain limited discretion to allow or refuse such evidence and documents⁸, the objects of the Act should be reviewed to specifically exclude the evidence and or documents gathered by methods that

⁷ Andrew Lynch, 'Use of overseas evidence in terrorism offences: The implications of the Commonwealth's new scheme for defendants and the courts' (2006) 27 *Australian Bar Review* 289

⁸ *Foreign Evidence Act 1994 (Cth)*

are prohibited by international conventions as well as by a reasonable comparison of the laws of the foreign country with the laws of Australia.

2: Minister's approval of assistance:

The Act currently calls for the Minister to approve the specific acts of assistance such as a search warrant, rather than a more general approval of actions in respect of a discrete Mutual Assistance request from a foreign country. This bureaucratic overhead is cumbersome and restrictive of efficient operations and should be modified to allow the Minister to issue a single approval with respect to each mutual assistance request, subject to the existing safeguards.

Whilst this more general Ministerial approval provides more access to mutual assistance it is important to retain scope for specific exclusions, for instance a request for assistance may be generally approved allowing provision of information and documents, with the exception of provision of telecommunications intercepts if the particular case warrants that attention.

Further there are some requests that could be dealt with under a delegated authority from the Minister. Where ministerial approval where amounts to little more than a 'rubber stamp' in an administrative process there perhaps needs to be a threshold established for Ministerial or Parliamentary Joint Committee approval, which would allow the more administrative measures requested via formal applications by foreign governments to be handled at an executive level. Such requests could be efficiently and effectively processed by a delegated quorum of senior departmental staff who could assess the request and respond appropriately, reporting determinations to the Minister, rather than automatically passing the determinations upwards for a decision.

The delegation of these decisions must only be where there is no discretionary determination required and where there are clear legislative guidelines, such as an approval for a request relevant to s.8(1)(d) which relates to military offences, or where the request is pursuant to a request made under an existing treaty within similar discretionary boundaries.

Finally with requests that do require discretionary treatment and the attention of the Minister there exists a danger within a unilateral decision making framework that decisions may be biased by political considerations that may outweigh the interests of justice, fairness and perhaps even human rights. Both grounds for approval and grounds for refusal of requests for assistance should be assessed on a more multilateral basis. These requests should be subject to discussion and approval by a representative committee such as a joint standing committee of parliament, keeping in mind the need to maintain secrecy, speed and momentum in processing the applications.

3: Grounds of refusal-general:

Grounds of refusal based on ministerial discretion are an important recognition that not all cases can be treated as equal. Where there is a question of the nature of a mutual assistance request, be it motivated by political, racial, religious, or any other object, Australia's grounds for refusal must be clear and resolute.

There is for example need for clarification of the mandatory and discretionary grounds of refusal. Discretionary grounds for refusal on the basis of the possibility or probability of a death sentence must be made mandatory, in two circumstances, and discretionary in the third.

1. There should be a mandatory refusal if the assistance would lead to or would be used to assist in achievement of a death sentence.
2. There should be mandatory approval where that assistance is exculpatory, as suggested by Daryl Williams in the second reading speech when re-introducing the last amendments to parliament⁹.
3. The grounds for refusal should remain discretionary where the foreign country has made an undertaking that the death penalty will not be imposed or requested during the proceedings. In this circumstance the gravity of the situation and the strength and nature of diplomatic relations between Australia and the foreign country must be evaluated in assessing the reliability of the undertaking.

This same re-classification of mandatory and discretionary approval could then be applied to other grounds for refusal in order to streamline the decision making process. That is, where the provision of assistance in the form of evidence or documents provides exculpatory relief it should be approved without need to refer to the Minister. Where the assistance would unequivocally deliver the accused into a situation as described in s.8 of the Act, the request should be refused. And finally, where the situation is open to interpretation and may be unclear, it should be referred to the Minister, or as described above, to the Joint Parliamentary Committee.

Re-classification of the grounds for approval in this way would then streamline the request process and would allow scope for approval of unofficial requests also, helping to avoid the situation as occurred with the 'Bali Nine', of AFP Officers having to make decisions with such grave consequences¹⁰.

4: Grounds of refusal—proceeds of crime:

Grounds for refusal for proceeds of crime requests do not fit easily into the criteria for refusal. In particular where proceeds of crime are subject to 'in

⁹ Williams D, Second Reading Speech. Second Reading Speech: Mutual Assistance in Criminal Matters Legislation Amendment Bill 1996

¹⁰ AFP Officers were found to have operated within the bounds of operational rules in *Rush v Commissioner of Police* (2006) 165 FCR

rem' forfeiture. This can be the case where a ship used to import drugs can be seized under the Customs Act and is forfeited to the Australian Government¹¹.

Caution should be exercised before proceeding to forfeit property subsequent to a mutual assistance request. In effect this would amount to the imposition by Australia of a penalty on behalf of a foreign country, without the due process of a prosecution. This action may leave Australia liable to claims of damages in the event that the foreign country has been mistaken, or if the Australian authorities acting on the authorised request of the foreign country are mistaken as to the identity of the property. An interim measure would be a safer option. The seizure of suspect property and impounding on behalf of the foreign country subject to the necessary procedural steps by that foreign country would be a more appropriate measure.

5: Double jeopardy:

The concepts of dual criminality and protection against double jeopardy are fundamental to the Act. It is anomalous to remove the protection against double jeopardy whilst there exists a discord between the laws Australia and the foreign country.

Countries such as the United Kingdom have reformed their laws with regard to double jeopardy, and the ability to re-prosecute in certain specific circumstances. However, unless and until Australian criminal legislation is amended (State and Federal), perhaps in line with the recommendations Standing Committee of Attorneys-General report on reform of the double jeopardy rule¹², Australia cannot entertain the notion of amending the Act in a manner that would erode the existing protections.

6: Extraterritoriality:

Current provisions within the Act for refusal on the basis of extraterritoriality must be maintained. Provisions for extraterritoriality exist to investigate, prosecute, and punish the likes of 'child sex tourism' offenders who travel to foreign countries in order to exploit children in an environment where the controls over such activities are not as rigorous as Australia.

Appropriately the Act provides for no protection for offences that, if they occurred in Australia would also be against Australian law. Conversely Australia can provide no assistance for prosecution of offences that are not considered criminal under Australian law.

Further, where the offence occurs outside of the borders of the foreign country requesting assistance there is a question of extraterritorial jurisdiction.

¹¹ Arie Freiberg and Richard Fox, 'Forfeiture, Confiscation and Sentencing' in B Fisse, D Fraser and G Coss (eds), *The Money Trail, confiscation of proceeds of crime, money laundering and cash transaction reporting* (Law Book Company, Sydney, 1992)

¹² *Double Jeopardy: Model Criminal Code Officers' Committee Report - March 2004*,

Australia should provide no assistance to investigations of third party nations who seek to prosecute for alleged offences that occurred outside their territorial boundaries.

Such is the situation with David Hicks, who has committed no offence against Australian law, as confirmed by Prime Minister Howard¹³. Yet was taken prisoner in Afghanistan by personnel of the United States and has been charged by the United States with offences that allegedly occurred in Afghanistan. Under the terms of the Act the Minister must refuse any request for assistance in prosecuting Mr Hicks.

7: Lapse of time:

As with other grounds for refusal that relate to the non criminality of the offence in Australia, this ground for refusal should be maintained, relative to the criminality of the offence against Australian federal and state laws.

8: Take evidence proceedings:

The taking of evidence or production order proceedings at the investigation stage of proceedings may be premature and not in the interests of justice. Inquiries that are required to be taken in front of a magistrate are by their nature intrusive and invasive of privacy, and it is appropriate that such inquiries should only be conducted after formal proceedings have commenced.

9: Magistrate's discretion:

Judicial discretion in the taking of evidence in mutual assistance matters is one of the necessary safeguards in the process. It is vital that the courts be allowed to satisfy themselves that the evidence being given is both credible and voluntary, and that the evidence is relevant to the matter at hand.

Present provisions under the Act allow for an optional independent observer to be present at the taking of evidence where this involves a video-link to facilitate to taking of evidence from witnesses in foreign countries. Magistrate's discretion in this regard however is inconsistent with the aims of ensuring procedural fairness whilst ensuring that the safety of the witness is preserved.

10: Transfer of persons to give evidence:

The transfer of persons to give evidence is an extremely expensive and resource-draining process. The legislative framework for video-link evidence should be expanded the use of such as system promoted to reduce the need

¹³ ABC774, "John Howard calls for US to find another way to try David Hicks" (quoting comments on Southern Cross Radio) at 30th June 2006

for witness transfer. However, there will be situations where either the technology is not available, or the foreign country's laws are not compatible with the taking of evidence in this manner. In these situations the Act provides adequate safeguards to ensure that the witness is treated fairly and returned without delay.

11: Transfer of prisoners to give evidence:

Similar to the transfer of persons, the transfer of prisoners to give evidence is also expensive and resource-draining process, especially when considering the additional cost of providing custodial officers to accompany the prisoner in transit. Although the requesting foreign country essentially covers these costs, the system must bear the additional drain on resources whilst those officers are absent from their normal duties. Again, the use of video-linked evidence should be expanded and promoted to reduce the need for prisoner transfer. The Act provides adequate safeguards to ensure that the witness is treated fairly and returned without delay.

Situations calling for the transfer of a prisoner to a foreign country to give evidence should be the extreme exception and must be reviewed by the Minister or Joint Parliamentary Committee to assess the following;

1. The importance of the evidence to be given relative to the matter in question.
2. The possibility of alternative methods of evidence such as
 - a. A take evidence proceeding conducted by a Magistrate in Australia
 - b. A video-link
3. The strength of diplomatic relations between Australia and the foreign country in determining the value of the undertakings given with respect of the prisoner whilst in the foreign country to give evidence.

12: DNA from persons without consent:

The current restriction on the acquisition of DNA evidence from a person who does not consent should be maintained, unless that person is the subject of a formal warrant for arrest and request for extradition to face charges in a foreign country. This stipulation automatically protects those who fall under the safeguards of s.8 of the Act, as a warrant for arrest and extradition cannot be issued without these same safeguards being satisfied.

13: Providing information from the DNA database:

Consolidation of DNA Database Information

Presently DNA data is held both by the National Criminal Investigation DNA Database (NCIDD), and by individual State and Territory databases. This

duplication of resources is unnecessary and provides scope for conflict and error. Legislation should be immediately amended to allow the inclusion of all DNA profiles and information held in the State and Territory databases. There should be only one national DNA data repository, which would be accessible by all law state, territorial and national law enforcement and investigation agencies. The centralisation of this resource will reduce the duplication of efforts and will enhance the efficiency of the process.

The DNA evidence held within the National Criminal Investigation DNA Database (NCIDD), which has been validly collect, either from volunteers or from those subject to investigation and or charges of criminal offences. There needs to be a review of the relevant evidentiary statutes of the states and the federal crimes act to ensure that the collection and management of the NCIDD is consistent with the laws of each jurisdiction¹⁴.

Provision of Information and Evidence on Mutual Assistance Request

Under a valid mutual assistance request then information should be supplied from this database, providing the requirements of s.8 of the Act are met. Both United Nations Office on Drugs and Crime in their Model Treaty on Mutual Assistance in Criminal Matters¹⁵ and the members of the G8¹⁶ support the sharing of DNA information and evidence subsequent to a mutual assistance request or treaty.

Caution should be exercised in allowing the provision of and the reliance upon DNA evidence, it has been shown to be in some circumstances unreliable¹⁷. In particular there are marked differences in the way that DNA evidence is collected, stored, and analysed.

14: DNA matching:

DNA matching is primarily a tool for establishing a link between the crime scene and the accused. It should be noted that DNA evidence alone is insufficient to inculcate a suspect and it should only be used to support other evidentiary submissions¹⁸. This said however, DNA matching against the NCIDD database should be allowed under a valid mutual assistance request in order to either exonerate the accused, or to support other evidence in an

¹⁴ Owen Bradfield, 'The National DNA Database: A Base for Data or Simply Base Data?' (2003) 22(2) *University of Tasmania Law Review* 149-163

¹⁵ *Model Treaty on Mutual Assistance in Criminal Matters*, United Nations General Assembly (1990)

¹⁶ The G8 ("Group of Eight") is a multilateral group consisting of Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, and the United States. The E.U. is not a member of the G8, E.U. representatives attend G8 meetings as "observers".

¹⁷ David Whiley and Barbara Hocking, 'DNA: crime, law and public policy' 5(December 2003) *University of Notre Dame Australia Law Review* 37-53

ongoing investigation or prosecution, subject to the safeguards that exist in s.8 of the Act.

15: Telecommunications interception material already in the possession of an enforcement agency:

Where material has already been gathered and analysed it is appropriate for it to be catalogued and shared subject to the provisions contained in the Act and in the relevant evidence acts of the Commonwealth, States and Territories. This information forms a large part of the body of intelligence that is held by the Australian intelligence community, and the sharing of that material must be sensitive to national security requirements, as well as the individual protections under s.8

16: Interception of telecommunications and use of surveillance devices without a domestic investigation:

The model Mutual Assistance in Criminal Matters Treaty¹⁹ calls for the ability to intercept, record and provide this information and evidence in respect of a mutual assistance request. These requests should be treated as any other request for information or assistance and should be subject to the same requirements and safeguards as do domestic telecommunications surveillance operations.

Transnational crimes by their very nature require international assistance to investigate. Australia has limited resources to investigate transnational crimes, and the ability to respond to these requests would be a valuable tool in detecting, investigating and prosecuting those involved. It would allow the Australian authorities to utilise the investigations already underway without launching their own parallel inquiry in order to work cooperatively to combat transnational crimes.

Naturally, telecommunications monitoring and surveillance undertaken on behalf of a foreign country should only be performed subject to the provisions of s.8 of the Act.

17: Registration of civil proceeds of crime orders:

Registration and enforcement of civil orders, imposed after a conviction in a foreign country should be allowed under the Act. The imposition of penalties in this regard on behalf of the foreign country after due process has been satisfied prevents transnational criminals from transferring their assets overseas to avoid penalty.

¹⁹ *Model Treaty on Mutual Assistance in Criminal Matters*, United Nations General Assembly (1990)

18: Interaction between the Mutual Assistance Act and the Proceeds of Crime Act:

Interaction between these two acts should be streamlined so that there is only one path to proceed upon. It would be more efficient to remove proceeds of crime actions from the Act and to reference the Proceeds of Crime Act²⁰, thus ensuring that there are no procedural differences.

19: Service of documents:

It is appropriate that the service of documents on behalf of foreign countries should remain under the control of the Act, and the officers empowered to oversee this process.

20: Content of Mutual Assistance Requests:

Assisting foreign countries to prepare and submit mutual assistance requests should be allowed provided that assistance does not in any way unduly influence the request. This should be seen as a purely administrative task that will prevent unnecessary time wasting for bureaucratic compliance that can easily be avoided.

21: Transfer of persons to give evidence in Australia:

The transfer of persons to Australia to give evidence is also expensive and resource draining process. Cost of passage and accommodation for this transfer is born by the Australian Government. Expanded use of video-link evidence framework should be promoted to reduce the need for transfer of persons to give evidence. The Act provides adequate safeguards to ensure that the witness is treated well and returned without delay.

As discussed earlier, technological developments have made it easier and less expensive to install video-link facilities. These facilities could be installed in Australian consular offices in foreign countries, and could be utilised for giving evidence and may reduce the number of persons who need to be transferred in order to give evidence.

22: Use of foreign evidence

Under the current legislative framework it is unclear what protection is afforded to the accused/ investigated. For instance, under s.12 (2)(a) through (d) there are insufficient guidelines with regards to methods of information and evidence gathering. Indeed the legislation allows for any evidence to be taken and any document to be obtained, regardless of the illegality of obtaining that same information or using the same methods in Australia. Whilst the courts maintain discretion to admit or refuse evidence²¹, it has been

²⁰ *Proceeds of Crime Act 1987 (Cth)*

²¹ *Foreign Evidence Act 1994 (Cth)*

observed that there is a perceived bias towards allowing evidence for the prosecution in trials, particularly those related to the government's Anti-Terrorism laws²²

Although s.15YW the Act calls for independent observers to be present at evidence given by video-link, this is an optional and not a mandatory requirement, and leaves open the possibility of duress and undue influence being placed upon the person giving the evidence.

Further, there is a danger that information and or evidence that has been gathered by means which would be considered unacceptable in Australia may be admitted in trials. Andrew Lynch points out that there is a dichotomy in the Foreign Evidence Act s.25²³ in which on the one hand video evidence for the prosecution may be refused if it would have a substantial adverse effect on the right of a defendant to receive a fair hearing', whilst on the other hand evidence for the defendant may be refused if it was 'inconsistent with the interests of justice'.

Lynch also points out that there is a very real possibility that evidence may be adduced at trial that has been procured by means such as torture. The Foreign Evidence Act does not require that the evidence be taken in respect of the Australian proceedings, but could come about as a result of testimony to a foreign court or indeed any 'suitably sworn and certified' proceedings.²⁴

Mandatory provisions should be enacted to ensure that where foreign evidence is given by video-link an independent observer oversees this process. Currently this is an optional provision.

23: Request on behalf of a defendant:

The current system provides access to Mutual Assistance for defendants and makes use of the provisions that allow video-link evidence. Assistance of this nature was provided in the recent trial of Lodhi²⁵. It provides adequate facilities for the accused to make a request of mutual assistance to ensure procedural fairness is maintained.

24: Confidentiality of outgoing mutual assistance requests:

It is necessary and appropriate that the confidentiality of outgoing requests be maintained in the National interest. Publicity of the nature or subject of outgoing mutual assistance requests might be detrimental to ongoing

²² Andrew Lynch, 'Use of overseas evidence in terrorism offences: The implications of the Commonwealth's new scheme for defendants and the courts' (2006) 27 *Australian Bar Review*

²³ Andrew Lynch, 'Use of overseas evidence in terrorism offences: The implications of the Commonwealth's new scheme for defendants and the courts' (2006) 27 *Australian Bar Review* 296

²⁴ *ibid* at 306

²⁵ *R v Lodhi* (2006) BC200604956

investigations and might also prejudice national security interests. This prohibition should also be extended to Commonwealth officers.

25: Privacy:

Personal information gathered and shared subject to a mutual assistance application should be subject to the general principles outlined in the Privacy Act²⁶, in particular where the information falls within the scope of necessary required or authorised by or under the law. Requests that apply to the required or authorised should also fall under the regulation of s.8 of the Act, which should be amended to include Ministerial or Joint Parliamentary Committee approval for requests that may involve the sharing of information which may breach or interfere with general rights of privacy.

26: Central Taskforce:

Mutual Assistance case officers should be available to be part of task force operations and meeting, but should maintain independence from law enforcement agencies.

27: Overseas liaison officers:

Overseas liaison officers are already in place in a number of foreign countries. The AFP currently has 86 officers at 31 posts in 26 countries²⁷. This deployment is key to improving relations and building strong international agency-to-agency co-operation with a view to combating transnational crime. The liaison should be encouraged to continue working through both formal and informal arrangements and should be guided by the overarching provisions of the Act. It would seem to be unnecessary to install other federal representatives when the existing liaison officer arrangements are already established.

²⁶ *Privacy Act 1988 (Cth)*

²⁷ *Australian Federal Police - International Liaison* <http://www.afp.gov.au/international/liaison>>

Part B - Analysis of the Underlying Principles

Principle A: Safeguards:

Safeguards that exist within the Act are prima facie sufficient to preserve both the rights of the accused/investigated and to serve procedural fairness and efficiency. Detailed examination however reveals that there may be insufficient controls in place.

Principle B: Grounds of refusal–investigation stage:

Request for assistance at investigative stage should be permitted in limited circumstances;

- 1) Where the provisions of s.8 of the Act have been satisfied.
- 2) Where the investigations or proceedings are being conducted in the knowledge that no prosecution will follow. For instance Australia could provide assistance and information to a foreign country conducting a coronial inquiry, or Royal Commission, or other similar inquiry. Justice is not served by preventing the thorough investigation of a crime by a foreign country.
- 3) Where there is a concurrent investigation underway in Australia that was not aware of the particular circumstances requested by the foreign country and that evidence gathered will contribute to a prosecution in Australia. Of course then the provisions above will guide any information subsequently provided to the foreign country.

Notwithstanding the penalty issue, the investigation of a criminal matter is key not only to the prosecution of the offence, but also to the prevention of further crimes and to legislative amendment as a result of what has been discovered.

Principle C: Grounds of refusal in death penalty matters:

Provision against assistance to jurisdictions that impose capital punishment.

Although this review relates to the Mutual Assistance Act there is a need to establish an unequivocal basis to Australia's opposition to capital punishment. The Act was amended in 1997 to clarify the discretion given to the Attorney General with regards to requests from death penalty jurisdictions.²⁸ This provision calls for the Attorney General to have consideration to special circumstances that may exist. In his second reading speech, the Attorney General at the time, Daryl Williams gave an example of those special

²⁸ *Mutual Assistance in Criminal Matters Legislation Amendment Act 1996 (Cth)*

circumstances as being where the assistance may be of an exculpatory nature²⁹. The amendment however falls short in that it does not explicitly detail those situations where discretion can be exercised and assistance can be given, and therefore does not adequately regulate the provision of assistance and information to foreign countries.

In 1990 Australia acceded to the Second Protocol to the International Covenant on Civil and Political Rights³⁰. Amongst other things this protocol calls for an "international commitment to the abolition of the death penalty"³¹. Foreign Minister, Alexander Downer subsequently has issued a media release stating; "The Australian Government is universally and consistently opposed to the use of capital punishment in any circumstances."³²

Contrasting this, when the Bali bombers (Amrosi, Muklas et al) were convicted and sentenced to death the Prime Minister, John Howard said that he would not oppose the imposition of the death penalty, as it was not Australia's position to interfere in the sovereign domestic affairs of Indonesia³³. Further, both the Prime Minister and Foreign Minister have both been vocal supporters of the death penalty for Osama Bin Laden³⁴, should he ever be captured. This duplicity of political ideology is difficult if not impossible to support.

The Australian Government has been at best ambivalent in its approach to the death penalty issue. They have maintained a stated opposition to the death penalty and have objected through diplomatic channels to the imposition of the death penalty where it relates to Australians. Last year the execution of Van Nguyen in Singapore for drug trafficking offences showed the Australian Government's reluctance to become involved beyond the surface layer of diplomatic protest, citing respect for sovereignty as mitigation for the failure to create significant outspoken protest.

Australian Federal Police were instrumental in assisting to gain the arrests through the provision of specific intelligence³⁵ to the Indonesian authorities the and as such Australian Government should be seen to be duty bound to increase levels of protest. Alternatives to capital punishment such as prisoner transfer scheme³⁶ exist, but are bogged down in the diplomatic and bureaucratic mire. Such a scheme could be used to ensure that the death penalty is not imposed upon Australian citizens.

²⁹ Second Reading Speech: Mutual Assistance in Criminal Matters Legislation Amendment Bill 1996 ; Shannon Cuthbertson, 'Mutual Assistance Matters: Beyond 2000' (2001) 75 *The Australian Law Journal* at 329

³⁰ *Second Optional Protocol to the International Covenant on Civil and Political Rights 1989*

³¹ Michael Walton, *Australia's Policy on the Death Penalty*

<http://www.nswccl.org.au/issues/death_penalty/aust_policy.php#fn1> at 8/09/2006

³² Alexander Downer, *Nigerian Death Sentence is Inhumane*

<http://www.foreignminister.gov.au/releases/2002/fa114a_02.html>

³³ ATV7, *Interview with John Howard (Part 2)* at 16th February, 2003

³⁴ Ross Peake, 'PM - bin Laden's death welcome', *Canberra times* (Canberra), 8th March 2003,

³⁵ *Rush v Commissioner of Police* (2006) 165 FCR

³⁶ *International Transfer of Prisoners Act 1997 (Cth)*

This then raises another issue; so far I have examined only situations where information might be provided which would lead to the arrest and conviction of Australians abroad who are involved in illegal activities. The second issue that then arises is whether Australia should provide information either on a formal or informal basis that may result in the conviction and subsequent death sentence for persons who are not Australian citizens. Certainly the information and assistance that was given in the investigations into the Bali bombings by the Australian authorities was instrumental in gaining arrests and almost certainly helped in obtaining the conviction of the perpetrators³⁷.

Australia, as a signatory to the Second Protocol to the International Covenant on Civil and Political Rights³⁸ cannot remain silent in these cases. Australia as a nation holds that capital punishment is unnecessarily cruel punishment that cannot be justified. Therefore we cannot knowingly provide the “bullets for the gun” just because these people are not Australian citizens.

Death Penalty Provisions and Mutual Assistance Treaties

In making the above comments regarding Australia’s commitment against capital punishment it is recognised that the very existence of this provision within the Act has been detrimental to the adoption of bilateral mutual assistance treaties. Death penalty states in our region have refused to enter into formal bilateral treaty arrangements because of the existence of this fundamental term. It would be fair to say that states such as Malaysia and Singapore feel as strongly about the imposition of the death penalty as a general deterrent as Australia and other nations who have signed the Second Optional Protocol to the International Covenant on Civil and Political Rights feel about the abolition of this particular form of punishment.

The Act however allows for the existence of treaties which may have a ‘watered down’ version of the anti death penalty provisions. In a treaty signed with Indonesia in 1999, the discretionary powers provide that a request may be refused if “the request relates to the prosecution or punishment of a person for an offence in respect of which the death penalty may be imposed or carried out”³⁹. This conflicts with the Act, which states that the request must be refused in the same circumstances, however the act allows this conflict at s.7(2)(a), which permits that the regulations of the act apply subject to any mutual assistance treaty between that country and Australia. Although this may further frustrate efforts to achieve bilateral mutual assistance treaty arrangements it seems anomalous to allow Australia to enter into treaties which are in direct conflict with the stated aims of the Act as passed by parliament.

³⁷ *The Investigation - Operation Alliance*

<http://www.afp.gov.au/international/operations/previous_operations/bali_bombings_2002> at 01 October 2006

³⁸ *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty* <<http://www.ohchr.org/english/law/ccpr-death.htm>> at 01/10/2006

³⁹ *Treaty between Australia and the Republic of Indonesia on Mutual Assistance in Criminal Matters 1999 s.8(2)(d)*

Principle D: Confidentiality of incoming mutual assistance requests:

Confidentiality of incoming requests should and must be maintained at the investigation stage only of proceedings. It is necessary that these requests remain confidential because relaxation would result in failed investigation and unnecessarily informing the accused/investigated that they are under investigation and perhaps surveillance, causing them to take action to prevent arrest etc.

Principle E: Application of the Freedom of Information Act to mutual assistance documents:

As previously discussed with relation to privacy and confidentiality it is appropriate that the Freedom of Information Act⁴⁰ and applicable exemptions apply to mutual assistance decisions. Disclosure of this information might undermine national security and criminal investigation standings.

Principle F: Judicial review of mutual assistance decisions:

Judicial review of mutual assistance decisions ensures that procedural fairness is applied to decisions. It is vital that all decisions remain open to judicial review.

Principle G: Enhancing skills and knowledge:

Ongoing skills development of officers involved in mutual assistance applications is necessary and as such represents best practice in maintaining a high level of competency and professionalism

Principle H: Working Cooperatively:

Working cooperatively should continue to be a goal of all Federal, State and Territory agencies. The Australian Crime Commission has made substantial progress towards enhancing inter agency and inter State and Territory cooperation and this should be encouraged to continue.

Principle I: Clarifying roles and responsibilities:

Mutual assistance responsibilities, where they involve assistance requests from foreign countries should become the sole responsibility of federal officers. Further, it will enhance criminal investigation if State and Territory assistance is similarly funnelled through the centralised authority by reducing duplication of effort and consolidating investigative and intelligence resources. A review of the overlaps and shortcomings of existing mutual assistance

⁴⁰ *Freedom of Information Act 1982 (Cth)*

relationships between the Commonwealth, States and Territories is required to ensure that there is adequate coverage to satisfy the needs of both Australian based and international requests.

Principle J: Building international relationships:

Ongoing development of international relationships with regards to criminal activities, intelligence and investigation is a key tool in fighting transnational crime in Australia and in our region generally. To date the Australian Federal Police and the Australian Crime Commission have been very active in developing these relationships and such cooperative efforts should be fostered and encouraged.

Principle K: Building regional relationships and capacity:

Continued capacity in mutual assistance requests will serve to make the provision of and request of information much more efficient and effective. As previously mentioned enhancement and expansion of video-link evidence framework, for instance at Australian foreign missions and embassies, along with staff resources to effectively apply these technologies and capabilities will enhance Australia's ability to deliver better results.

Principle L: Sharing information:

The focus for Australian government agencies should be upon not only the most efficient but also the most appropriate information to share, and the circumstances under which the information is made available, subject to the guidelines that are in place within the Act. The continued sharing of appropriate information should be encouraged.

Principle M: Communication of reforms:

The Australian public is largely unaware of the existence or the functions of the Mutual Assistance Act. The subject is complex and difficult to explain to the 'man in the street'. However, the operations, insofar as the type of information that will be exchanged and the circumstances under which the information can be exchanged should be made as transparent as possible and available through the most accessible means. Communications of the reforms and goals of mutual assistance should be made accessible via the internet, and should be linked to other Federal government web sites, such as the Australian Federal Police, ASIO, ACC, ASIC, AUSTRAC etc.

Other Recommended Reforms

Informal Requests for Assistance

The Australian Federal Police, indeed the entire Australian Intelligence Community prides itself, justifiably, on the nature and quality of the relationships that it maintains with the intelligence and law enforcement communities of other countries. This strong relationship has been the basis for many successful interventions and arrests with relation to multinational and transnational crimes such as drug trafficking and people smuggling.

Assistance was sought and was given after a number of tragic incidents in our region such as the bombings in Bali in September 2002 that resulted in the deaths of 202 people, 88 of these were Australian citizens. The assistance of the Australian Federal Police and related agencies was instrumental in positively identifying the victims, and in the investigation into the bombings through the provision of forensic evidence and analysis. Subsequently members of Jema'ah Islamia were brought to justice and tried for these crimes.

It is important to note that not all of the assistance given by the AFP and other agencies relates to criminal matters. In the aftermath of the Tsunami that killed hundreds of thousands of people, AFP was heavily involved in assisting local authorities in Indonesia and Thailand to positively identify the remains of the victims. There is nothing in particular to be gained from unduly restricting the ability of what the Attorney General's department calls "Agency to Agency Cooperation". However there is perhaps the need for an underlying framework that allows for the provision of assistance in accordance with the objects and purposes of the Act.

The aspect of "Agency to Agency" cooperation comes where the provision of information, intelligence, or evidence is used by agencies of foreign governments for the arrest of persons who, if convicted may face the imposition of the death penalty. Such is the case with the 'Bali Nine' who were arrested in Indonesia following information provided by the Australian Federal Police to the Indonesian Police.

The information that lead to the arrests and subsequent convictions was provided not as a result of a formal request by the Indonesian Government, which by necessity would have invoked s.8 (1)(A) of the Act, but as a result of informal co-operation activities that routinely take place between the crime prevention agencies of friendly neighbouring countries. Had the request been a formal one, the Act would have required either an undertaking by the Government of Indonesia that the death penalty would not be invoked in the event of successful prosecution, or that the evidence in question could only be given in exculpation of the offence.

Broadly, the objects of the Act detailed in s.5 are to regulate the provision by Australia of international assistance in criminal matters when a request is

made, and to facilitate the request by Australia for international assistance in criminal matters. These objects relate only to assistance given in response to a formal request for assistance. Requests must therefore consider the consequences of assistance given, in particular those consequences as laid out by s.8 of the Act.

Conversely, s.6 of the Act states categorically that the Act does not prevent informal information sharing from taking place. Indeed such a bureaucratic overhead might be seen to be preventing the law enforcement agencies from the efficient and effective process of their duties.

There is a need for consideration with regards to the consequences of assistance that is given on an informal cooperative basis to law enforcement agencies of foreign countries. Ideally, the same provisions of the Act should govern the formal and informal provision of assistance to agencies of foreign governments in the fight against transnational crime.

In both of the above examples of assistance, that being the informal assistance given with relation to the drug trafficking 'Bali Nine' and the assistance which helped to apprehend and ultimately convict Amrosi, Muklas, et al of the Bali Bombings, the provision of assistance was given in the knowledge that successful conviction would result in the likely imposition of the death penalty.

It is unreasonable to ask executive agency members to make such politically charged determinations in deciding whether to give assistance, or even to pass on intelligence that they know will likely lead to a successful intervention. The investigation agencies should not have to make this determination, there should be a hard and fast rule with regards to these situations. The role of the executive branch of Government is to apply the rules as laid down by the Parliament, not to make value judgements on the ethics of whether a drug "mule" is deserving of the death penalty or not.

It is not feasible to wait for ministerial or parliamentary approval before providing information and intelligence. Such delays will render the law enforcement duties impracticable and inefficient. The focus then will pass from prevention to recovery. The aim of most law enforcement agencies now is to prevent the crime, especially where that relates to the importation of drugs and other illicit materials. The aim must surely be to prevent these substances from entering Australia rather than to pursue them once they have arrived and begun distribution.

Australia has existing Mutual Assistance Agreements in Criminal Matters agreements with 129 countries⁴¹. These agreements should be amended to remove uncertainty for the Australian Law Enforcement and Intelligence community. There must be an undertaking given in these agreements that information provided on an informal basis cannot be used to achieve a death

⁴¹ *Fact Sheet 10 - Extradition and Mutual Assistance relationships with other countries*
<<http://www.ag.gov.au>>

penalty, or at the very least that the sentence will be commuted and allowed to be served in Australian prisons under the existing International Transfer of Prisoners Scheme⁴².

There is a clear need for resolute guidelines to be laid down regulating the sharing of information and intelligence where that can lead to a death sentence. Where an Australian Law Enforcement or Intelligence agency has information which can help to apprehend and prosecute the suspects, that information should only be given where there are existing information sharing agreements which detail undertakings given by the Government of the foreign nation involved that the death penalty will not be imposed as a result of a conviction achieved on the basis of intelligence or evidence provided by the Australian authorities.

If such undertakings do not exist then the assistance should only be given subject to a formal "Government to Government" request, which then invokes all of the existing safeguards of s.8 of the Act.

Conclusion

Changes that were made at the last review of the Act in 1996 were effective in further strengthening the position and safeguards for the accused. The introduction of a narrower discretion for the Attorney General to approve requests where the death penalty is involved was a positive and necessary step. There remain, as I have pointed out, further gaps in the legislation that need to be addressed in order to safeguard the rights of the accused in line with the concept of a procedural fairness. In particular provisions relating to the informal sharing of intelligence and information must be reviewed and strengthened.

The underlying aims of the Act are and should be to facilitate the most effective and efficient transfer of information for the purposes of investigating, preventing and prosecuting both serious and transnational crimes. The goal is to achieve this end without prejudicing the rights of the accused or affecting the sovereign rights of Australia. It is desirable that the legislation be reviewed in areas I have referred to support and enhance the utility of the Act.