

Your reference

Our reference TP:TL



t:03 9269 0246 f: 03 9269 0348

E-mail: tonyel@vla.vic.gov.au

19 October 2006

Ms Margaret Joseph
Acting Director
Extradition and Mutual Assistance Review Team
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600

Melbourne Office

350 Queen St
Melbourne VIC 3000
GPO Box 4380
Melbourne VIC 3001
DX 210646 Melbourne VIC
t: 03 9269 0234
1800 677 402
www.legalaid.vic.gov.au
ABN 42 335 622 126

By e-mail to: reviews@ag.gov.au

Dear Ms Joseph

Review of Australia's mutual assistance law and practice

I refer to the discussion paper *A Better Mutual Assistance System: A Review of Australia's Mutual Assistance Law and Practice* released in September 2006.

I attach Victoria Legal Aid's comments about mutual assistance law and practice for your consideration.

If you would like further information about our comments, please contact me on 03 9269 0247 or Tonye Lee Segbedzi (Policy Officer) on 03 9269 0246.

Yours faithfully

TONY PARSONS
Managing Director

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1. About Victoria Legal Aid

Victoria Legal Aid (VLA) is a leading force for social justice. Our mandate is to protect legal rights, with a particular emphasis on the rights of the marginalised and economically disadvantaged.

VLA employs 189 lawyers who provide legal services from our 14 offices in metropolitan and rural Victoria. This makes us the largest and most accessible criminal law and family law practice in the state. We also practice in the area of human rights and civil law and provide specialist legal services to children and young people.

In 2005-06, VLA provided:

- 26,318 grants of assistance for legal representation by private lawyers
- 12,806 grants of assistance for legal representation by VLA lawyers
- 61,820 duty lawyer services across a range of courts
- 56,448 legal advice sessions
- 73,070 legal information services, conducted in 15 languages
- 672,916 legal education publications (printed and downloaded)
- family law alternative dispute resolution service.

2. Executive summary

VLA supports:

- principles A to M
- extending the current general grounds of refusal to cover all forms of discrimination
- restricting the discretion to provide assistance in death penalty cases
- additional safeguards during take evidence proceedings and transfer of persons to give evidence
- retaining current restrictions about DNA, surveillance material and civil proceeds of crime
- including a mechanism for dealing with delay in processing requests made on behalf of a defendant.

VLA does not support responding to requests for assistance in double jeopardy cases.

3. Objects of the Mutual Assistance Act

3.1 *Issue 1: Objects of the Mutual Assistance Act: What should be included in the objects of the Mutual Assistance Act?*

VLA supports the current objects of the *Mutual Assistance Act* (the Act). We agree that the objects should also note that the Act provides appropriate safeguards for the provision and receipt of assistance.

4. How should Australia co-operate with other countries on incoming requests?

4.1 *Issue 2: Minister's approval of assistance:* *How should the Minister approve requests for assistance? Should the Minister authorise the specific type of assistance (as currently occurs) or should the Minister approve the request in general terms to enable Australian law enforcement agencies to action the request by exercising the powers available in ordinary domestic investigations?*

VLA supports the current system. If the Act is amended to permit the Minister to authorise general provision of assistance rather than a specific type of assistance, then adequate safeguards must be implemented.

4.2 *Issue 3: Grounds of refusal—general:* *Are the current grounds of refusal appropriate? Should any of the grounds be removed? Should any of the mandatory grounds be discretionary? Should other grounds be included?*

VLA supports retaining the current general grounds of refusal. However, we suggest extending the grounds in the Act to cover all forms of discrimination that are currently protected by Commonwealth and State discrimination legislation in Australia (eg. the *Equal Opportunity Commission Act 1996* (Cth) and the *Equal Opportunity Act 1995* (Vic)). This would include grounds such as:

- age
- disability or impairment
- gender identity
- industrial activity
- lawful sexual activity
- marital status
- parental status
- physical features
- pregnancy
- sexual orientation
- association with someone who has one of these characteristics.

See comments at paragraph 4.9 about the death penalty ground.

4.3 *Principle A: Safeguards:* *Australia will retain a broad range of safeguards in the mutual assistance process.*

VLA strongly supports this principle.

We understand that this review does not address the issue of agency-to-agency assistance. However, we note that a 2001 United Nations report suggested that wherever possible agency-to-agency assistance should be used instead of mutual assistance because it is faster, cheaper and more flexible.¹ There is little point having appropriate safeguards in the mutual assistance system if they can be avoided simply by using the agency-to-agency system.

For example, Australian Federal Police co-operation with the Indonesian Police led to the arrest of the Bali 9. Six of those young Australians have now been sentenced to death. If there had been equivalent safeguards in place, perhaps that co-operation would have been conditional upon an undertaking that Indonesia would not impose the death penalty.

We submit that appropriate safeguards are equally necessary in agency-to agency assistance. .

4.4 *Principle B: Grounds of refusal–investigation stage: The grounds of refusal should state that they apply to the investigation stage of the criminal justice process.*

VLA supports this principle.

4.5 *Issue 4: Grounds of refusal–proceeds of crime: Some of the grounds of refusal are not applicable to proceeds of crime action. Should the Mutual Assistance Act be amended to clarify that the Minister does not need to consider such grounds in making a decision on providing proceeds of crime assistance to a foreign country?*

VLA supports clarifying the grounds of refusal that are inapplicable to proceeds of crime action. However, we are unable to comment further without the proposed list of inapplicable grounds.

4.6 *Issue 5: Double jeopardy: Australia must refuse a mutual assistance request where the request relates to the prosecution of a person for an offence for which the person has been acquitted, pardoned or has undergone the relevant punishment in the requesting country. Should Australia also refuse requests for mutual assistance that relate to an offence for which a person has already been acquitted, pardoned or punished in Australia or another country (other than the requesting country)? Should Australia be able to respond to mutual assistance requests where a person has already been acquitted, pardoned or punished for the offence, if special circumstances exist?*

VLA does not support permitting Australia to respond to a mutual assistance request where a person has already been acquitted, pardoned or punished for the offence in another country.

¹ United Nations Office on Drugs and Crime Expert Working Groups' Report on Mutual Assistance Casework Best Practice in 2001, page 9.

We note that the Council of Australian Governments is reviewing Australia's double jeopardy laws. VLA strongly opposes any change to the current laws. If Australian (federal) double jeopardy laws are amended to cover certain circumstances, then it may be appropriate to provide mutual assistance in the same circumstances. However, adequate safeguards must be implemented.

4.7 Issue 6: Extraterritoriality: *Currently, Australia can refuse a request for assistance where the request relates to conduct that occurred outside the foreign country (ie the foreign country has criminalised that conduct extraterritorially) and Australia does not criminalise that same conduct where it takes place outside Australia. Should Australia retain the extraterritoriality ground of refusal for mutual assistance requests?*

VLA supports retaining the current extraterritoriality ground of refusal.

4.8 Issue 7: Lapse of time: *Currently, Australia can refuse a request for assistance where the request relates to conduct that could no longer be prosecuted in Australia because of the length of time since the conduct was committed. Should Australia continue to refuse mutual assistance requests on the grounds of lapse of time?*

VLA supports continuing to refuse requests on the grounds of lapse of time.

4.9 Principle C: Grounds of refusal in death penalty matters: *Australia will retain the grounds of refusal in death penalty matters.*

VLA supports this principle. However, we suggest that the current formulation of the grounds should be tightened by:

- removing the general discretion where there are special circumstances
- including a specific discretion where the evidence would assist the defence
- including a specific discretion where the foreign country undertakes not to impose or carry out the death penalty. However, we are concerned about how compliance with such undertakings could be monitored and enforced.²

4.10 Issue 8: Take evidence proceedings: *Under the Mutual Assistance Act, the Minister can authorise a magistrate to take evidence on oath from witnesses and undertake production order proceedings for use in foreign proceedings. This can only be done when the foreign country has commenced proceedings. Are any reforms needed to improve take evidence proceedings?*

² See *Diplomatic Assurances and their use in Europe*, Human Rights Watch, 2004

<http://hrw.org/reports/2004/un0404/5.htm>

VLA suggests that standard Australian safeguards for a fair hearing should apply during take evidence or production order proceedings. For example, the magistrate should be obliged to permit persons with standing to:

- be legally represented
- examine or cross-examine witnesses
- judicial review.

4.11 Issue 9: Magistrate's discretion: *Should the magistrate's discretion in take evidence or production order proceedings on whether to permit examination or cross-examination by video link be removed or restricted?*

No, see comments at issue 8.

4.12 Issue 10: Transfer of persons to give evidence: *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. How should Australia deal with requests for persons to give evidence or assist investigations in a foreign country? Are the undertakings contained in the Mutual Assistance Act appropriate?*

VLA supports the current undertakings (see also comments at paragraph 4.9). We suggest that the Act should also contain safeguards to ensure that the witness' consent is freely given. For example, it should specify that the witness should be informed:

- that they have (or may have) a right to decline to give evidence or assistance
- of the right to protection from detention, prosecution, penalty or any other forms of coercion
- of the right to obtain independent legal advice.

4.13 Issue 11: Transfer of prisoners to give evidence: *Under the Mutual Assistance Act, the Minister can make arrangements for federal or State prisoners to travel to a foreign country to give evidence or assist an investigation. How should Australia deal with requests for prisoners to give evidence or assist investigations in a foreign country? Are the undertakings contained in the Mutual Assistance Act appropriate?*

VLA supports the current undertakings. We suggest that the Act should also contain safeguards specifying:

- access to independent legal advice
- the maximum period the person may be detained in the foreign country
- minimum conditions in which the person may be detained
- the right to apply for bail or parole (where relevant).

4.14 Issue 12: DNA from persons without consent: *Currently, Australia can only obtain DNA material from a person for a foreign country where that person consents to that process. Should Australia allow DNA material to be obtained from a person without the person's consent under mutual assistance in the same way as it can be obtained for a domestic investigation? What safeguards should apply?*

VLA supports retaining the current restrictions on obtaining DNA material.

4.15 Issue 13: Providing information from the DNA database: *Currently, Australia can provide DNA information stored on the National Criminal Investigation DNA Database (NCIDD) to foreign countries by using the take evidence or production order proceedings in the Mutual Assistance Act or executing a mutual assistance search warrant for specifically identified DNA. DNA information can also be provided where it is in the possession of an enforcement agency. Are the current mechanisms for providing this DNA information appropriate? Are there better mechanisms for doing this?*

VLA is unable to comment on this issue.

4.16 Issue 14: DNA matching: *Currently, Australia cannot 'match' a DNA sample from a foreign country against the NCIDD unless the mutual assistance search warrant criteria are met. Should Australia allow controlled access to the NCIDD under mutual assistance for the purpose of DNA matching?*

VLA supports retaining the current restrictions on DNA matching.

4.17 Issue 15: Telecommunications interception material already in the possession of an enforcement agency: *Currently, Australia can only provide telecommunications material through take evidence or production order proceedings under section 13 of the Mutual Assistance Act. Should Australia be able to provide telecommunications interception material and other telecommunications data such as stored communications, under section 13A of the Mutual Assistance Act in the same way that Australia can currently provide surveillance device material under this section?*

VLA is unable to comment on this issue.

4.18 Issue 16: Interception of telecommunications and use of surveillance devices without a domestic investigation: *Currently, Australia cannot intercept telecommunications, access stored communications, or use most surveillance devices solely at the request of a foreign country. Where resources are available, should Australia be able to intercept telecommunications and use surveillance devices at the request of a foreign country without the need for a domestic investigation?*

VLA supports retaining the current restrictions on telephone intercepts and surveillance devices.

4.19 Issue 17: Registration of civil proceeds of crime orders: *Should Australia make the registration of civil based proceeds of crime orders available to all countries?*

VLA supports retaining the current restrictions on registration of civil proceeds of crime orders. Australia must be certain that the country imposing the order has appropriate safeguards in place—because the order can be obtained prior to conviction.

4.20 Issue 18: Interaction between the Mutual Assistance Act and the Proceeds of Crime Act: *Is the interaction between the Mutual Assistance Act and the Proceeds of Crime Act appropriate and effective? How can the interaction be streamlined or improved?*

VLA is unable to comment on this issue.

4.21 Issue 19: Service of documents: *Should Australia continue to deal with requests for service of documents through the mutual assistance process? What alternatives to this process could be used?*

There may be political, financial and pragmatic considerations that affect the selection of the process for serving documents.

4.22 Issue 20: Content of Mutual Assistance Requests: *Should mutual assistance requests from foreign countries be required to contain any additional information? Should the Mutual Assistance Act reflect the practice of liaising with foreign countries to ensure their requests meet the requirements in the Act?*

VLA supports broadening the requirements to include providing the contact details of a liaison person in the foreign country. We also support including a specific provision that empowers Australia to require additional information before progressing the mutual assistance request.

5. How can Australia co-operate with other countries on outgoing requests?

5.1 Issue 21: Transfer of persons to give evidence in Australia: *Under the Mutual Assistance Act, the Minister can make arrangements for a person, including a prisoner, to travel to Australia from a foreign country to give evidence or assist an investigation. How should Australia make arrangements for persons to give evidence or assist investigations in a foreign country? Are the arrangements contained in the Mutual Assistance Act appropriate?*

VLA supports retaining the current arrangements.

5.2 Issue 22: Use of foreign evidence: *Where Australia receives evidence from a foreign country for use in domestic proceedings, the Foreign Evidence Act 1994 (Foreign Evidence*

Act) applies. Are the current mechanisms in the Foreign Evidence Act the most appropriate mechanisms for allowing the use of foreign evidence in domestic proceedings? Are Australian courts' current discretions under the Foreign Evidence Act to refuse to allow the use of foreign evidence in domestic proceedings appropriate?

VLA submits that the safeguards in the *Foreign Evidence Act* should be strengthened. We note that currently the Act prima facie permits testimony in writing or on audio/video tape that:

- was taken under such caution or admonition as would be accepted by courts in the foreign country (regardless of the fairness of that country's justice system)
- merely 'purports' to be signed by or certified by a judge, magistrate or 'officer' (not defined) in or of the foreign country.³

The court has a discretion to direct that the testimony not be adduced if:

- having regard to the interest of the parties, justice would be better served if the material were not adduced (general cases)
- it would have a substantial adverse effect on the right of the defendant to receive a fair hearing (designated offences).

Australian rules of evidence have developed over many years to ensure that parties receive a fair hearing. In particular, our criminal case law and common law robustly protects the fundamental principle that confessional statements made by the accused are not admissible unless they were voluntarily made. Our courts have consistently held that admitting involuntary statements is against the interests of justice. VLA is concerned that the *Foreign Evidence Act*, applies a lower standard to statements made overseas. We suggest that the Act should apply domestic rules of admissibility.

As discussed at paragraph 4.3, it is important that consistent safeguards apply to both the mutual assistance system and the agency-to-agency system.

For example, in the case of Jack Thomas, members of the AFP interviewed Thomas in Pakistan with the co-operation of the Pakistani officials. Thomas made inculpatory statements during the interview. However, prior to the interview Thomas had been subjected to inappropriate treatment by Pakistani intelligence officers, including being:

- kept in solitary confinement
- deprived of food and water
- threatened with electrocution and execution.

³ Sections 22 and 23 *Foreign Evidence Act* 1994

Thomas' inculpatory statements were initially admitted by the Victorian Supreme Court and Thomas was convicted. However, the Court of Appeal later overturned the conviction on the basis that the statements were not voluntary. Interestingly, the court also stated (obiter dicta) that even if the statements had been voluntary, they should have been excluded on the grounds of unfairness because Thomas had not been given the opportunity to seek legal advice in accordance with Australian law.⁴

5.3 Issue 23: Request on behalf of a defendant: Is the current system the most appropriate system for providing a defendant with an opportunity to seek mutual assistance?

VLA supports the current system. However, we suggest that it should include a mechanism for dealing with delay by the foreign country. For example, the defendant should be entitled to an adjournment or stay until the foreign country has dealt with the request.

6. Other issues

6.1 Principle D: Confidentiality of incoming mutual assistance requests: Australia will retain strict confidentiality requirements for incoming mutual assistance requests.

VLA supports this issue.

6.2 Issue 24: Confidentiality of outgoing mutual assistance requests: It is currently an offence for a person to disclose information about a request from a foreign country for mutual assistance where they have obtained that information as part of their employment. Should there be a similar requirement for Commonwealth officers only to keep confidential any mutual assistance requests from Australia to a foreign country?

VLA supports prohibiting disclosure of a mutual assistance request from Australia to a foreign country, unless the disclosure is necessary in the performance of the person's duties or the Minister has approved such disclosure. We are not persuaded that State and Territory governments and law enforcement authorities should be exempt from confidentiality requirements.

6.3 Issue 25: Privacy: Mutual assistance can involve personal information flows between a range of agencies in Australia and between Australia and foreign countries for law enforcement purposes. Should the Mutual Assistance Act expressly identify and authorise the personal information flows in the mutual assistance process?

VLA supports clarifying the circumstances in which personal information may be provided.

⁴ *R v Joseph Terrence Thomas* [2006] VSCA 165 (18 August 2006) at paragraphs 94 and 109

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- 6.4 Principle E: Application of the Freedom of Information Act to mutual assistance documents:** *The Freedom of Information Act and applicable exemptions will continue to apply to mutual assistance decisions.*

VLA supports this principle.

- 6.5 Principle F: Judicial review of mutual assistance decisions:** *Avenues for judicial review on mutual assistance decisions will continue to be available.*

VLA supports this principle.

7. How will the right people do their jobs best?

- 7.1 Principle G: Enhancing skills and knowledge:** *The Australian Government will continue to implement strategies to ensure that participants in the mutual assistance process have the necessary skills and knowledge to make and action requests.*

VLA supports this principle.

- 7.2 Principle H: Working Cooperatively:** *The Australian Government will explore the most effective ways to work cooperatively on mutual assistance with the States and Territories.*

VLA supports this principle.

- 7.3 Principle I: Clarifying roles and responsibilities:** *The Australian Government will review existing arrangements with States and Territories to clarify the roles and responsibilities of agencies in the mutual assistance process.*

VLA supports this principle.

- 7.4 Issue 26: Central Taskforce:** *The Australian Government Attorney-General's Department is Australia's Central Authority for mutual assistance and is staffed by mutual assistance case officers. Should Australia adopt a Taskforce model for mutual assistance by co-locating mutual assistance case officers with prosecutors and law enforcement officers? Which agencies should be included in the taskforce? Should the taskforce be located in the Australian Government Attorney-General's Department?*

VLA is unable to comment on this issue.

- 7.5 Principle J: Building international relationships:** *The Australian Government will continue to focus on developing international mutual assistance relationships through*

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bilateral and multilateral treaties and active engagement with the United Nations Office on Drugs and Crime.

VLA supports this principle.

7.6 Issue 27: Overseas liaison officers: *Should the Australian Government post international crime cooperation liaison officers in our Embassies accredited to our key international crime cooperation partners or the Central Authorities of our key international crime cooperation partners?*

VLA is unable to comment on this issue.

7.7 Principle K: Building regional relationships and capacity: *The Australian Government will continue to explore opportunities to build capacity in the Asia-Pacific region in mutual assistance.*

VLA supports this principle.

7.8 Principle L: Sharing information: *The Australian Government will continue to explore the most effective ways of sharing information with other countries on our mutual assistance arrangements.*

VLA supports this principle.

8. Communication and awareness

8.1 Principle M: Communication of reforms: *The Australian Government will implement a comprehensive communication strategy to inform the general public about the mutual assistance process and mutual assistance reforms.*

VLA supports this principle.

9. Further information

For further information please contact:

Tonye Lee Segbedzi (Policy Officer)

Phone: 03 9269 0246

E-mail: tonyel@vla.vic.gov.au