Law Council
OF AUSTRALIA

Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011

House Standing Committee on Social Policy and Legal Affairs

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GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

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Introduction

1. The Law Council welcomes the opportunity to make a submission on the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011 (the Bill), introduced into Parliament in July 2011.

2. In September 2009, the Law Council made a submission on an earlier exposure draft. A copy of that submission is available at:

   http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=332195B8-1E4F-17FA-D293-8F56471362D3&siteName=lca

3. In March 2011, the Law Council made a further submission in response to a revised exposure draft of the Bill which was released for comment in January 2011. A copy of that submission is available at:

   http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=F99E554C-D461-C612-839C-615B4D458048&siteName=lca

4. The Law Council considers that the Bill makes significant progress in a number of areas. In particular, it welcomes the following features:

   - Expansion of the existing grounds for refusing an extradition request to include discrimination on the basis of a person's sex or sexual orientation;
   - Expansion of the existing grounds for refusing a mutual assistance request to include discrimination on the basis of a person's sexual orientation;
   - Extension of the availability of bail in extradition proceedings;
   - Expansion of the circumstances in which a person may be prosecuted in Australia in lieu of extradition;
   - Inclusion of an express prohibition on providing mutual assistance where it may expose a person to torture, as well as improvements in how the risk of torture is considered in extradition determinations;
   - Expansion of the death penalty grounds for refusal in mutual assistance requests to cover situations where a suspect has been arrested and detained but not charged; and
   - Expansion of the grounds for refusal to cover mutual assistance requests which relate to all stages of the investigation, prosecution and sentencing of a person.

5. While noting these positive developments, the Law Council's submission is focussed on those provisions of the Bill which it does not support, or about which it holds reservations. The submission also identifies a number of outstanding issues which are not addressed in the Bill.

6. In particular, in relation to the proposed reforms to the *Extradition Act 1988* (the Extradition Act), the Law Council's submission makes the following key arguments:

   (a) The current requirement that special circumstances must be established before a person remanded under the Extradition Act can be granted bail should be repealed, with the usual presumption in favour of bail restored.

(b) While the Law Council does not object in principle to the introduction of reforms which would allow a person to waive extradition, the Law Council is concerned that people may be forced to make the decision to waive their rights in the face of an uncertain and potentially lengthy period of detention. Therefore, before any reforms are introduced which allow a person to waive the protections available to them under the Extradition Act:

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

(c) The Law Council does not support the removal of the obligation on the Attorney-General to satisfy him or herself that dual criminality is established and that no extradition objection exists before issuing a section 16 notice to a magistrate, and thus commencing the Extradition process.

(d) Under the dual criminality principle, it should be necessary to establish that the facts *directly relied upon to establish the extradition offence* (rather than the totality of the facts alleged against a person) would constitute an offence in Australia.

(e) If exceptions to the definition of "political offence" are to be relegated to the regulations, then the Extradition Act should provide more precise guidance on what type of offences may be carved out of the definition.

(f) The grounds of discrimination which may found an extradition objection should also include gender identity, ethnic origin, colour and language.

(g) The Law Council has some reservations about the proposal to confer on Federal Magistrates all the functions currently conferred on State and Territory Magistrates under the Extradition Act, given the greater experience of State and Territory Magistrates in these and related matters. Providing Federal Magistrates with adequate additional training and resources will be important.

(h) The prohibition on leading evidence to contradict an allegation of criminal conduct should be amended to ensure that it does not prevent a person from leading evidence to establish an extradition objection (such as discrimination);

(i) Only formal undertakings, which are provided by an official appropriately authorised to offer a guarantee that the death penalty will not be imposed, should be regarded as sufficient to bring an extradition request within section 22(3)(c). In addition:

(i) if a requesting country has breached an undertaking not to impose the death penalty, no further undertakings should be accepted from that country; and

(ii) there should also be explicit obligations on the Attorney-General to monitor and report on compliance with such undertakings.

(j) The list of extradition objections should be expanded to ensure that Australia does not surrender a person where:

- he or she might be subject to cruel, inhuman or degrading treatment or punishment;

- his or her right to a fair trial will not be observed; and

- he or she is a child under 16 years of age.

7. In relation to the proposed reforms to the *Mutual Assistance in Criminal Matters Act 1987* (the Mutual Assistance Act), the Law Council's submission makes the following key arguments:

   (a) The Law Council does not support the risk of double jeopardy becoming a discretionary, rather than a mandatory ground for the refusal of a mutual assistance request.

   (b) Further changes are required to protect against the risk of a person being exposed to the death penalty in a foreign country as a result of assistance provided by Australia:

      (i) subsection 8(1A) of the Mutual Assistance Act should be expanded to cover all stages of a criminal investigation, including pre-arrest and detention.

      (ii) Subsection 8(1B), which suggests that it may be in the interests of international criminal co-operation for Australia to be complicit in the imposition or execution of the death penalty abroad, should be repealed.

      (iii) The "special circumstances" discretion in subsection 8(1A) should be removed or strictly confined.

      (iv) The provision of agency to agency assistance should also be strictly confined in death penalty investigations.

   (c) Extraterritoriality and lapse of time should remain as discretionary grounds for refusal of mutual assistance.

   (d) An additional ground of mandatory refusal should be included where there are substantial grounds for believing that granting a mutual assistance request may result in a breach of Australia's human rights obligations.

   (e) The grounds of refusal should be expanded to include discrimination on the basis of language, ethnic origin, gender identity and other status.

   (f) The discretionary grounds of refusal should include where the requesting country's arrangements for handling personal information do not offer privacy protections substantially similar to those applying in Australia.

   (g) In relation to the proposals regarding surveillance device warrants:

      (i) The threshold test for issuing a warrant should refer to the maximum penalties which would apply to the offence in Australia;

      (ii) There should be no dilution of the requirement to consider the likely evidentiary or intelligence value of any evidence or information sought;

(iii) Feedback should be required on the arrests, prosecutions and convictions which occur as a result of information provided to foreign counterparts.

(h) The Law Council queries how undertakings sought from foreign counterparts regarding the retention, use and destruction of forensic material would be monitored or enforced, and why such requirements are not more prescriptive in line with domestic requirements.

Proposed reforms to the Extradition Act

Amendments relating to the availability of bail in extradition proceedings

8. Currently under the Extradition Act, a person may be remanded on bail during the early stages of the extradition process if special circumstances exist. However, once a person is found eligible for surrender, either following a determination of eligibility by a magistrate or where the person consents to extradition, he or she must be committed to prison.

9. It is proposed to amend section 18 and 19 to extend the availability of bail to the later stages of the extradition process. Bail would be made available, if special circumstances exist, to persons who have consented to extradition or have been finally determined eligible for surrender by a magistrate. Bail would be granted by either a magistrate acting persona designata, or a court, depending on the circumstances. It is indicated that extending the availability of bail is intended to ensure that the Extradition Act is sufficiently flexible to accommodate extenuating circumstances that may justify granting a person bail, such as a person's health or family situation.

Law Council Response

10. The Law Council supports this proposed amendment which is designed to avoid the type of arbitrary and unjust outcome recently observed in the Walkowska case.[1]

11. However, the Law Council considers that the current requirement that special circumstances must be established before a person remanded under the Extradition Act can be granted bail (see sub-section 15(6)) should be repealed. The usual presumption in favour of bail should be restored. This is consistent with the position adopted in the United Kingdom following the enactment of section 198 of the Extradition Act 2003.

12. The current provisions can have an unnecessarily harsh effect, particularly given the time (sometimes years) it can take to complete all extradition processes.

13. The Explanatory Memorandum which accompanied the *Extradition Bill 1987* sought to justify the "special circumstances" requirement in s 15(6) as follows:

"Subclause (6) provides that a person shall not be granted bail unless there are special circumstances. Such a provision is considered necessary because

[1] See media coverage of the case at:
http://www.theage.com.au/national/law-denies-bail-to-woman-fighting-extradition-20090922-g0jp.html and
http://www.theage.com.au/national/woman-freed-after-extradition-request-refused-20090929-gb3u.html

experience has shown that there is a very high risk of persons sought for extraditable offences absconding. In many cases the person is in Australia to avoid arrest in the country where he is alleged to have committed the offence, ie the person left the jurisdiction to avoid justice."

14. The risk of flight is matter that the court would already routinely consider when determining whether to grant bail. Evidence that a person had fled a jurisdiction and sought to hide in Australia would no doubt be persuasive in the determination of a bail application.

15. On that basis, there is no reason that the flight risk posed by a person subject to an extradition request requires a reversal of the presumption in favour of bail.

16. Moreover, many people who are subject to extradition requests are Australian citizens and permanent residents. They are in Australia, not to avoid justice, but because Australia is their usual place of abode. They may have strong ties to the community and limited means or desire to leave Australia. Nonetheless, such people are likely to be remanded in custody throughout the extradition process because of the operation of an inflexible rule based on a generalisation about the type of people who are ordinary subject to extradition proceedings.

17. The Court should not be constrained in its ability to reach a decision on bail which is appropriate in the circumstances of each individual case.

Reforms relating to waiver of extradition

18. According to the Attorney General's Department,[2] in the majority of extradition cases, the person consents to surrender to the requesting country. However, under the current Act a person may only consent to extradition if he or she is on remand, the Minister has issued a notice of acceptance of the extradition request (under section 16) and he or she is then brought before a magistrate.

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

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

21. The proposed amendments would allow a person to elect to waive extradition at any time after the person is remanded under section 15, up until the magistrate advises the Attorney that the person has consented to extradition under section 18, or until the Magistrate makes a determination about eligibility for surrender under section 19 (see proposed s15A(2)).

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

23. Before accepting a waiver of extradition, the Magistrate must be satisfied that:

    - the person's election to waive extradition was voluntary;

[2] "A new extradition system: A review of Australia's extradition law and practice" AGD, December 2005. p32.

- the person has confirmed this wish following the Magistrate informing him or her of certain information (see proposed s.15A(5)(b) below); and

- the person has had the opportunity to gain legal advice (see proposed s15A(4).

24. The Magistrate must also inform the person of certain consequences of electing to waive extradition. These include the inability to have an order that they be committed to prison, once made, revoked; that the country to which they will be extradited may try or punish them for other offences than those for which extradition was sought; and that certain requirements in the Extradition Act which would otherwise apply to them, such as requirements relating to extradition objections, will not apply (see proposed s15A(5)(b)).

25. If the Magistrate is satisfied of these matters and has informed the person as mentioned in proposed s15A(5)(b), the Magistrate must notify the Attorney-General of the person's election to waive extradition.

26. Where extradition has been waived, the Attorney-General will then make a surrender determination under proposed section 15B, rather than section 22. Under proposed section 15B, the only matters the Attorney-General needs to be satisfied of before deciding to surrender a person is that there is no real risk that, following surrender, the person may be subjected to torture, or that the death penalty may be imposed on the person.

Law Council Response

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

28. The proposed provisions may serve to limit the time a person spends in detention awaiting the extradition process to be completed. The provisions may also save time and resources by removing the need for a decision to be made under section 16, 19 and/or 22. However, the proposed provisions will also mean that a person may be surrendered without dual criminality or other extradition objections (e.g. the risk of double jeopardy or the risk of discrimination on the grounds of race, religion, nationality or political opinions) being considered and without a speciality assurance having been given.[3]

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

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

31. The Law Council notes that these provisions have been amended slightly so that the Magistrate must "inform" the person of the matters outlined in proposed s15A(5)(b)). The January 2011 draft Bill required that the Magistrate must ensure that the person "understood" these matters. The Law Council considers that there is value in ensuring that both conditions are met: that is, that the person is not only informed, but fully understands the implications of his or her decision.

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

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

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

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

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

- the presumption against bail in subsection 15(6) should be repealed; and
- subject to the requirements of natural justice and procedural fairness, statutory time limits should be applied to actions undertaken by the Executive under the Act. There are currently no significant amendments in the Bill which impose such time limits.

Dual Criminality

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

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

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

38. It is proposed to amend section 16 of the Extradition Act to remove the obligation on the Attorney-General to satisfy him or herself that dual criminality is established and that no extradition objection exists, before issuing a notice acknowledging receipt of an extradition request and commencing extradition proceedings in the Magistrate's Court.

39. Under the proposed reforms the Attorney-General would, at his or her discretion, still be able to decline to issue a section 16 notice where satisfied, even at this early stage of the process, that dual criminality will not be established or that an extradition objection exists.

40. Dual criminality and extradition objections would continue to be assessed by the Magistrate when determining eligibility for surrender (s19). And, as is currently the case, the Attorney-General would continue to consider any extradition objection at

the end of the process when determining whether to actually surrender a person (s22).)

Law Council Response

41. In removing any express requirement to consider either dual criminality or extradition objections, the proposed amendments to section 16 may assist in streamlining the decision making process.

42. However, the desire to reduce decision timeframes and reduce duplication in the extradition process must be balanced against other considerations. Section 16 is intended to act as a type of gatekeeper provision which ensures that a person is not detained for an extended period and subjected to protracted proceedings on the basis of an extradition request that is doomed to fail.

43. For that reason, the Law Council does not support the proposed dilution of the safeguard provided by section 16.

44. The Law Council submits that if the Attorney-General is not *required* by the Extradition Act to consider dual criminality or the possibility of an extradition objection prior to issuing a notice under section 16, then he or she will not, as a matter of course, be provided with detailed briefing and advice on these matters before exercising his or her discretion under section 16. The decision to issue a notice under section 16 will become a formality. The opportunity to dispose expeditiously and early with all or part of a questionable extradition request will be lost.

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

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

47. In support of this submission an extract is set out below from a paper delivered by Professor Ned Aughterson on 5 September 2008 at the combined NSW Bar/Law Council "Federal Criminal Law Conference".[4]

> *The principle of double criminality requires the conduct constituting the offence to be criminal in both the requesting and requested state. To that end, pursuant to s 19(3)(c)(ii) of the Act, one of the documents that the requesting state must produce is a statement of 'the conduct constituting the offence'.*
>
> *At the s 19 extradition hearing, the magistrate must be satisfied that at the time of the extradition request that conduct or 'equivalent conduct' would have constituted an offence in the state or territory in Australia where the extradition hearing is held.[5] That is determined solely by reference to the section 19(3)(c)(ii) statement.[6]*

[4] The full text of the paper is available at: http://www.nswbar.asn.au/docs/resources/lectures/extradition.pdf
[5] See s 19(2)(c) of the Act.
[6] Zoeller v Federal Republic of Germany (1989) 23 FCR 282, 300.

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

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

The Federal Court has interpreted that provision generously to the requesting state. Rather than focusing on the words 'by virtue of which' the offence has been committed in section 10(2), in Zoeller v Federal Republic of Germany the Court placed emphasis on the words 'is alleged to have been committed', concluding that the statement of conduct was not invalid because it alleged facts, "which goes beyond the facts necessarily constituting the offence" in the requesting state and that it did not follow that "the magistrate may have regard only to those facts which are absolutely necessary ingredients of the foreign offence".[7]

It was added that the "magistrate is no expert in foreign law. He is not required to determine what the facts are that are the necessary facts to constitute the foreign crime".[8]

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

The practical effect of the approach adopted by the Federal Court is that the 'conduct constituting the offence' is whatever is specified in the section 19(3)(c)(ii) statement, regardless of whether it bears any relationship to the conduct that will be prosecuted following surrender.[9]

The problem is exacerbated by the further finding of the Federal Court that there is no need for a discrete statement of conduct constituting the offence, so that the statement of conduct may be found by taking into account two or more of the extradition documents.[10]

In Government of Canada v Aronson,[11] *where a similar provision was considered,*[12] *the House of Lords held that a person could be extradited only if the conduct relevant to the ingredients of the foreign offence constituted a*

[7] Zoeller v Federal Republic of Germany (1989) 23 FCR 282, 300. See, also, Cabal v United Mexican States (2001) 108 FCR 311, 341. Compare De Bruyn v Republic of South Africa (1999) 96 FCR 290, 292-93, 296-97.
[8] Ibid
[9] More recently, the term 'acts or omissions by virtue of which an offence is alleged to have been committed' was considered by the High Court of Australia in Truong v The Queen (2004) 205 ALR 72, in the context of the operation of the speciality principle under s 42 of the Act. In relation to that decision, see Aughterson, 'The Extradition Process: An Unreviewable Executive Discretion', [2005] AYBIL 13
[10] See McDade v United Kingdom [1999] FCA 1341; [1999] FCA 1868. In that case, the primary statement was a 19 page document of a police officer containing a "summary of the investigation and allegations" made. Other documents were said to be incorporated by reference. See also Bennett v Government of the United Kingdom [2000] FCA 916; Mahew v United States of America (2004) 142 FCR 59.
[11] [1990] 1 AC 579
[12] Under s 3(1)(c) of the Fugitive Offenders Act, a person could be extradited only if 'the act or omission constituting the offence' would constitute an offence against the law of the United Kingdom. Compare the consideration of Aronson in Zoeller v Federal Republic of Germany (1989) 23 FCR 282, 296-97.

corresponding offence under the United Kingdom law. Lord Bridge gave examples of the "startling results" were the law to be otherwise.[13] *For example, double criminality would not depend on whether the acts charged were criminal in both states, but on the manner in which the statement of conduct were drafted.*

As noted by Lord Lowry:[14]

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

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

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

Reforms relating to political offences

Amendment to the definition of political offence

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

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

50. The new section would read as follows:

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

(a) an offence that involves an act of violence against a person's life or liberty; or
(b) an offence prescribed by regulations for the purposes of this paragraph to be an extraditable offence in relation to the country or all countries; or
(c) an offence prescribed by regulations for the purposes of this paragraph not to be a political offence in relation to the country or all countries.

[13] [1990] 1 AC 579, 589-90
[14] Ibid 609.

51. The justification for this amendment is set out in the Explanatory Memorandum as follows:

> *"The amendments are consistent with the United Nations Model Extradition Treaty, which states that countries may wish to exclude from the definition of 'political offence' certain conduct, for example, serious offences involving an act of violence against the life, physical integrity or liberty of a person.*
>
> *Australia is party to a large number of bilateral and multilateral treaties, many of which require parties to ensure that certain offences are extraditable offences, or are not to be considered political offences for the purposes of extradition. Australia implements its obligations under these treaties by providing that such offences are excluded from the definition of political offence in the Extradition Act. Exemptions are currently set out in both the Extradition Act and the Regulations. Providing for exceptions to the political offence definition to be set out in Regulations, rather than the Extradition Act, will ensure the extradition regime can be kept up-to-date with Australia's international obligations without requiring frequent amendments to the Extradition Act.*
>
> *It is intended that the Regulations will also expressly exclude from the definition of political offence other conduct which, if the conduct occurred in Australia, would constitute a terrorism, genocide or war crimes offence or a crime against humanity. The Regulations will also make clear that an offence constituted by the murder, kidnapping or other attack on a head of state or head of government, or his or her family, is not considered a political offence for the purposes of Australia's extradition law."*[15]

Law Council Response

52. The Law Council submits that paragraph (a) of the new section should refer to a "serious" offence that involves an act of violence against a person's life or liberty. This would ensure that it better corresponds with the terms of the United Nations Model Extradition Treaty.

53. In addition, the Law Council submits that if the additional exceptions to the definition of "political offence" are to be relegated to the regulations, then the Extradition Act should provide more precise guidance on what type of offences may be carved out of the definition.

54. In particular, the Law Council submits that the section should provide that an offence may be excluded from the definition only to the extent that it is required to be so excluded by a bilateral or multilateral treaty to which Australia is a party. This would conform to the justification for the amendment as set out above.

Extradition objection on the grounds of discrimination

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

[15] Explanatory Memorandum , p23

Law Council Response

56. The Law Council supports this amendment. However, the Law Council submits that the subsections should be amended more comprehensively so that the potential grounds of discrimination also include gender identity, ethnicity, colour and language. The Law Council notes in particular that the Australian Government has committed to introducing federal legislation to protect against discrimination on the basis of a person's sexual orientation or gender status.[16]

Federal Magistrates

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

Law Council Response

58. The Law Council is aware that this proposal is designed to give partial effect to a recommendation made by the Australian Law Reform Commission in its report: *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation (2001, ALRC 92*).[17]

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

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

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

62. In this context, it is particularly important that Federal Court magistrates are provided with adequate levels of training and resources to ensure that they can respond to the additional workload which results from these proposed amendments.

Further reforms not addressed by the Bill

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

- Leading evidence - The current prohibition on leading evidence to contradict an allegation that the person has engaged in conduct constituting an extradition offence (sub-section19(5)) should not be applied in circumstances where a person seeks to lead the evidence to establish an extradition objection (such as discrimination).

[16] Australian Government, *Universal Periodic Review Final National Report – Australia*, released 4 November 2010, available at http://www.ag.gov.au/upr.

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

- Death penalty - Under section 22(3)(c) of the Extradition Act, the Attorney-General may authorise the extradition of a person to a foreign country to face trial for an offence punishable by death if that country has provided an undertaking that:

    - the person will not be tried for the offence;

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

    - if the death penalty is imposed on the person, it will not be carried out.

64. There is some ongoing controversy about the nature of the undertaking that the Extradition Act requires the Attorney-General to secure.

65. In *McCrea v Minister for Customs & Justice*, Justice North of the Federal Court held that the Extradition Act does not require that the undertaking relied on by the Attorney-General "*be effective to prevent the execution of the fugitive offender*", only that such an undertaking is made.[18] Justice North held that once an undertaking is given, and that undertaking conforms to the provisions of the Act, the court has no role in examining whether that undertaking will in fact be honoured.

66. On Appeal, the Full Federal Court confirmed that there is no requirement that the undertaking received be legally enforceable. However, the Judges of the Full Court indicated in *obiter* that they did "*not presently accept as necessarily correct*" Justice North's broader findings about the nature of the undertaking required by s.22(3)(c). Specifically, the Full Federal Court observed as follows:

    It does not follow from the conclusion that a legally enforceable undertaking is not needed that the requirements of s 22(3)(c) will be satisfied merely by the giving of an undertaking that follows the language of the provision and which has been made by a person with appropriate authority. An evident object of s 22(3)(c) is to provide a safeguard against the carrying out of the death penalty upon a person extradited from Australia under the Act. Whilst the object of the provision can be variously stated, the seriousness of the subject matter suggests that it is very unlikely that nothing more than compliance with a verbal formula was intended. Consistently with the object of the provision, there is much to be said for the view that the expression "by virtue of an undertaking" requires that the decision-maker consider whether the undertaking is one that, in the context of the system of law and government of the country seeking surrender, has the character of an undertaking by virtue of which the penalty of death would not be carried out. [19]

67. The tentative observations of the Full Court in this regard were not only contrary to the decision of the Judge at first instance, but also contrary to the construction of the legislation argued for by the Solicitor-General appearing for the Minister.

68. The Law Council submits that the s.22(3)(c) should be amended to clarify that the construction preferred by the Full Federal Court in *McCrae* is correct.

69. Specifically, the Law Council submits that only formal undertakings, which are provided by an official appropriately authorised to offer a guarantee that the death penalty *will not be imposed*, should be regarded as sufficient to bring a request within this exception. Further, if a requesting country has, on a prior occasion,

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

[19] *McCrea v Minister for Customs and Justice [2005] FCAFC 180 (30 August 2005) at [25]*

breached an undertaking not to impose the death penalty, then no further undertakings should be accepted from that country.

70. The Law Council acknowledges that the Minister for Home Affairs and Minister for Justice, the Hon Brendan O'Connor MP (the Minister) has indicated his view that:

- the current provisions of the Extradition Act are consistent with Australia's obligations under the *Second Optional Protocol to the International Covenant on Civil and Political Rights*, and

- there is no discretion in the legislation that would allow a person to be surrendered in the absence of an undertaking from the requesting country that the death penalty will not be imposed.

71. However, this response does not address the existing ambiguity about the required strength and nature of the undertaking that must be provided by the requesting country, nor the consequences that should follow if it is breached. The Law Council considers that these factors may undermine the strong stance taken by Australia on death penalty issues.

72. The Law Council further submits that in order to ensure that undertaking received under section 22(3)(c) are effective, it should be a requirement under the legislation that the Attorney-General monitor and report on compliance with such undertakings following surrender. Again, the Law Council acknowledges the Minister's advice that:

- the Government has agreed to include certain information on persons extradited from Australia in the Annual Reports of the Attorney-General's Department, including any breaches of substantial obligations under bilateral extradition agreements; and

- the Department of Foreign Affairs and Trade monitors all extradited Australian citizens and permanent residents through its consular network, to the extent that this is practically and legally possible.

73. However, the Law Council considers that the effectiveness of reporting mechanisms would be significantly enhanced by a positive obligation on the Minister to monitor and report to Parliament as proposed above.

- Safeguards/ extradition objections - Consistent with the recommendations made by the former Human Rights and Equal Opportunities Commission (now the Australian Human Rights Commission) to the 2005 review of the Extradition Act:[20]

  - Subsection 22(3) should be expanded to provide that a person may only be surrendered if the Attorney-General is satisfied that on surrender the person will not be subject to cruel inhuman or degrading treatment or punishment in the requesting country.

  - The Act should be expanded to include an extradition objection that an extradition request must be refused in circumstances where (a) the extraditable person has suffered a violation of the right to a fair trial or (b) it is reasonably foreseeable that the extraditable person will suffer a violation of the right to a fair trial upon extradition. Alternatively, subsection 22(3) should

[20] The HREOC submission is available online at http://www.hreoc.gov.au/legal/submissions/extradition200604.html

be expanded to provide that the Attorney-General should not surrender a person for extradition unless the Attorney-General is satisfied that the person will have or has had the right to fair trial.

- The list of extradition objections should be expanded to include a prohibition on the extradition of a child under 16 years of age. Such a provision would ensure Australia's compliance with Article 3(b) of *Convention on the Rights of the Child (CRC).*

- The Extradition Act should be amended to include a general obligation to take into account the best interests of children as a primary consideration in all decisions which affect them (as required by article 3 of the *CRC*).

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

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

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

Proposed Reforms to the *Mutual Assistance Act*

Grounds for Refusal

Double Jeopardy

74. Currently under the Mutual Assistance Act, the Attorney-General must refuse a request where it relates to "*the prosecution of a person for an offence in a case where the person has been acquitted or pardoned by a competent tribunal or authority in the foreign country, or has undergone the punishment provided by the law of that country, in respect of that offence or of another offence constituted by the same act or omission as that offence."* (s8(1)(f))

75. It is proposed to repeal this prohibition on providing assistance where there is a risk of double jeopardy and replace it with a discretionary ground for refusal (see item 14 proposed section 8(2)(c)).

Law Council Response

76. The Law Council does not support the risk of double jeopardy becoming a discretionary, rather than a mandatory ground for the refusal of a mutual assistance request.

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

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

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

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

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

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

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

Death Penalty

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

> *A request by a foreign country for assistance under this Act must be refused if it relates to the prosecution or punishment of a person charged with, or convicted of, an offence in respect of which the death penalty may be imposed in the foreign country, unless the Attorney General is of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted.*

84. Subsection 8(1B) further provides:

> *A request by a foreign country for assistance under this Act may be refused if the Attorney-General:*
>
> *(a) believes that the provision of the assistance may result in the death penalty being imposed on a person; and*
>
> *(b) after taking into consideration the interests of international criminal co-operation, is of the opinion that in the circumstances of the case the request should not be granted.*

85. It is proposed to amend subsection 8(1A) so that it would extend this ground of refusal to apply to circumstances in which a person has been arrested or detained on suspicion of committing an offence which carries the death penalty, regardless of whether formal changes have been laid.

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

87. The Explanatory Memorandum provides that:

> *This recognises that under some legal systems, a suspect may be formally charged with an offence later in the criminal justice process than in Australia.*

As a consequence, the suspect may be arrested or detained for a longer period of time before being formally charged.[21]

Law Council Response

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

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

90. The further amendments required are as follows:

- *AG should be required to refuse assistance in death penalty cases regardless of what stage the investigation has reached and subsection 8(1B) should be repealed*

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

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

  The Law Council submits that this is inconsistent with Australia's avowed absolute opposition to the death penalty and its commitment to work towards its abolition worldwide. [22]

  The Law Council submits that the risk that the provision of Australian assistance may lead to the imposition of the death penalty is, like the risk of torture, not a matter which can be weighed against other considerations. For this reason, it does not agree with the Minister's assessment that the existing grounds for refusing mutual assistance in death penalty cases strike the appropriate balance between upholding Australia's opposition to the death penalty, and providing a workable framework for Australia to cooperate with regional partners in combating transnational crime.

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

  The Bill proposes to extend other discretionary and mandatory grounds for refusal to cover the *investigation* as well as the prosecution and punishment of certain

[21] Explanatory Memorandum, p. 65

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

offences. The Law Council supports this proposed change and submits that the death penalty ground for refusal should be extended in the same way.

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

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

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

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

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

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

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

  If section 8(1A) is intended to operate such that assistance will only be provided for the benefit of a defendant, or where an appropriate undertaking has been given, then these circumstances should be set out as express exceptions to an otherwise mandatory requirement to refuse a request for assistance in a death penalty case. The Law Council further submits that only formal undertakings, which are provided by an official appropriately authorised to offer a guarantee that the death penalty *will not be imposed*, should be regarded as sufficient to bring a request within this exception.

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

- *The provision of agency to agency assistance should also be restricted to cases where the assistance provided will assist a suspect/defendant to meet the charges or allegations he or she faces; or where a formal undertaking has been provided that the death penalty will not be imposed or carried out.*

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

  Arrangements for agency-to-agency cooperation are included in bilateral agreements, including treaties and Memorandums of Understanding (often

classified) or are set out in broader policy documents. One relevant policy document is the "*AFP Practical Guide on international police-to-police assistance in potential death penalty situations*" (the Guide). This Guide was released in December 2009, and while it is an improvement on the *Death Penalty Charge Guide* which preceded it, problems still persist.

91. The new Guide:

- requires Ministerial approval to be given before information or assistance can be provided in a death penalty case from the time a suspect is detained rather than only from the time a charge has been laid (as was previously the case); and

- sets out publicly available criteria and an internal approval process for providing information and assistance in death penalty cases which must be applied even at the early stages of an investigation where no suspect has been detained or charged.

92. The Law Council acknowledges the Minister's advice that the Guide requires careful consideration of a variety of factors, including whether the assistance could lead to exculpatory evidence, the seriousness of the offence and the potential risks to persons if the assistance is not provided, before any assistance or information can be given to foreign authorities.

93. However, in the Law Council's view problems remain with the Guide. The criteria it establishes demonstrate that Australia's opposition to the death penalty is equivocal and it continues to allow the AFP to be complicit in the imposition and execution of the death penalty abroad. For example:

- The Guide sets out the matters to be taken into account by the AFP in deciding whether to provide assistance in death penalty cases. The Guide does not contain an overriding prohibition on sharing information in death penalty cases unless strict criteria are met (such as the receipt of an undertaking not to impose the death penalty). The Guide does not even set out as an overriding principle that information and assistance should only be given in death penalty cases in exceptional circumstances. In short, whether information and assistance is provided is left to a balancing exercise that is neither weighted in favour nor against the provision of information in death penalty cases.

- Some of the factors which the Guide states should be taken into account in determining whether to provide assistance include: the age, nationality and circumstances of the suspect. Such considerations are inconsistent with genuine and absolute opposition to the death penalty – which would dictate that the identity of the suspect is irrelevant. These considerations highlight how compromised the Guide is and raise the question - on what basis will the AFP determine which suspects, of which nationality, may reasonably be put at risk of execution?

- Under the Guide, a further matter to be taken into consideration in determining whether to provide information and assistance is Australia's interest in promoting and securing international law enforcement cooperation. Again, this consideration suggests that

Australia's opposition to the death penalty is not absolute – it is open to negotiation or can be put aside where it is expedient for other purposes.

- Outside the Guide, there are no criteria to guide the Minister in making a decision about when information or assistance should be provided post arrest/charge.

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

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

> *The Committee notes with concern the residual power of the Attorney-General, in ill-defined circumstances, to allow the extradition of a person to a state where he or she may face the death penalty, as well as the lack of a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state, in violation of the State party's obligation under the Second Optional Protocol.*
>
> *The State party should take the necessary legislative and other steps to ensure that no person is extradited to a state where he or she may face the death penalty, as well as whereby it does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another state, and revoke the residual power of the Attorney-General in this regard.*[23]

Extraterritoriality and Lapse of time

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

Law Council Response

97. The Law Council does not support this proposal. Extraterritoriality and lapse of time are both only discretionary grounds for refusal and should remain. They may be rarely used and may be less relevant as approaches to extraterritoriality evolve, however, there will always be cases where they continue to be relevant considerations. Therefore, these grounds of refusal should remain in subsection 8(2) in order to ensure that the Minister at least turns his or her attention to these issues in every case.

Other grounds of refusal not included in the Bill

98. When the Department conducted a review of the Mutual Assistance Act in 2006[24], a number of recommendations were received regarding the grounds for refusal listed in section 8. The Law Council is aware of, and believes there is significant merit in,

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

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

three particular recommendations to extend the grounds for refusal. Those recommendations are as follows:

- *HREOC recommendation re human rights safeguards*

  The Human Rights and Equal Opportunities Commission (HREOC) (now the Australian Human Rights Commission) noted in its 2006 submission to the Department[25] that the current grounds for refusal in s 8 do not impose a mandatory obligation on Australia to refuse a request for mutual assistance in circumstances where granting the request may result in a breach of person's rights under the *International Covenant of Civil and Political Rights* (ICCPR)*, the Convention on the Rights of the Child* (CRC) or *the Convention Against Torture, Inhuman and Degrading Treatment* (CAT) in the requesting country. For example, it is not mandatory to refuse a request for mutual assistance where granting the request may result in a person being subject to cruel, inhuman and degrading treatment or punishment, subject to arbitrary detention, or denied the right to a fair trial.

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

  The Bill makes some progress towards ensuring that Australia's human rights obligations are upheld. For example, it strengthens the death penalty ground of refusal and inserts an express mandatory ground for refusal where there are substantial grounds to believe that the provision of the assistance would result in a person being subjected to torture. However, the Law Council supports the further amendment proposed above as a demonstration of Australia's unambiguous commitment to its human rights obligations.

- *HREOC recommendation re grounds for discrimination*

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

  The Bill does make progress on these points by expanding the discrimination grounds of refusal to include discrimination on the basis of "sexual orientation." However, the other grounds identified in the above recommendation are not included. In addition, the Law Council notes that the Bill should be further expanded to include discrimination on the basis of gender identity. This would

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

complement the Australian Government's commitment to introducing federal laws to address discrimination on the basis of both sexual orientation and gender identity.[26]

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

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

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

  The Law Council supports this recommendation, particular in view of the changes proposed to the Mutual Assistance Act in both the current Bill and the Cybercrime Legislation Amendment Bill 2011. If the Act is amended as envisaged in these Bills, a number of the current barriers to providing telecommunications data, information about stored communications and DNA material to overseas agencies will be removed. Further, the AFP will be authorized to apply for and execute surveillance device warrants and stored communications warrants to assist in purely foreign criminal investigations and to pass on the information obtained to overseas agencies accordingly.

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

Requests for surveillance device warrants

99. Currently there is no available mechanism to enable a warrant to be obtained to use a surveillance device to assist a foreign criminal investigation.

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

Law Council Response

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

- Before issuing a warrant, the issuing officer must be satisfied of precisely the same matters that he or she would be required to be satisfied of if the warrant were sought in the context of a domestic investigation (e.g. seriousness of the offence, necessity, privacy, likely benefit etc);

- The reporting requirements in relation to:

  - the number of warrants applied for and granted;

[26] Above at n16

- the type of investigations (i.e. the type of offences) for which warrants were sought; and

- the use made of information obtained under the warrant

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

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

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

Threshold test for obtaining a warrant

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

- The proposed provisions state that a surveillance device warrant may only be applied for in the context of a foreign investigation which relates to an offence carrying a maximum penalty of at least three years[27]. This limitation on the availability of this type of warrant closely mirrors the limitation imposed on its availability in the context of domestic investigations.

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

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

- In the context of a domestic investigation, one of the matters that an issuing officer is required to consider before issuing a surveillance device warrant is "*the likely evidentiary or intelligence value of any evidence or information sought to be obtained*".[28]

  It is proposed that when this warrant is sought in the context of a foreign investigation, the likely value of the information sought to be obtained by the warrant will only be required to be assessed to the extent that the information provided by the requesting country allows for such an evaluation.[29]

  The Law Council submits that there is no justification for the dilution of this important threshold test. If foreign agencies want to employ intrusive police

[27] See proposed section 15F
[28] Surveillance Devices Act 2004, s16(2)(e).
[29] See item 59 of the Bill

powers, which impact so directly on the privacy of those targeted, in the context of their investigations, they ought to be required to provide sufficient information to allow the merits of their request to be properly tested. Such information should clearly include well supported claims about the likely value of the evidence or information sought to be obtained.

Reporting requirements

104. The Law Council has one primary reservation with the proposed reporting requirements for warrants issued in the context of a foreign investigation. The Law Council is concerned that there is no requirement for feedback to be given about the number and type of arrests, prosecutions and convictions obtained as a result of the information obtained under the warrant. This type of information is required to be captured and reported where a warrant is issued in the context of a domestic investigation.[30] This information is very useful in allowing review and scrutiny of whether the information provided and claims made, in warrant applications were actually borne out by the results obtained.

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

106. As submitted above, if foreign agencies want to have domestic access to intrusive investigative powers, they ought to be willing and required to provide feedback data on how they have used the information obtained. Only in this way can Australian authorities satisfy themselves, on an ongoing basis, about the reliability, necessity and likely utility of future warrant requests.

Restrictions on use, disclosure, retention and destruction of information

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

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

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

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

[30] Surveillance Devices Act 2004, s 50 and [30]

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

Carrying out forensic procedures at the request of a foreign country

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

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

- carry out a forensic procedure on a suspect of a foreign offence with his or her informed consent; and

- carry out a forensic procedure on a volunteer in relation to a foreign criminal matter.

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

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

- appropriate undertakings in relation to the retention, use and destruction of forensic material, or of information obtained from analysis of that forensic material; and

- any other undertakings that the Attorney General considers necessary.

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

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

116. Proposed section 23YQD provides that:

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

117. As above, the Law Council queries how such an undertaking would be monitored or enforced – particular when it is only given at a police to police level. The Law

Council also queries why the proposed section is not more prescriptive about the content of any undertaking, in line with domestic requirements such as those contained in section 23YD, 23YDAA and 23YDAB of the Crime Act.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.