

Proposed amendments to the *Mutual Assistance Act 1987*

Current mutual assistance law and practice

- 3.1 Mutual assistance is the formal process by which the Australian Government provides assistance to and requests assistance from foreign Governments in criminal investigations and prosecutions. Mutual assistance is used in situations where evidence or witnesses pertaining to a criminal offence are located in a foreign country. For instance, in a fraud case, mutual assistance processes can be utilised to obtain bank records from a financial institution. In another example, if a witness to a crime resides in a foreign country, mutual assistance processes can assist in obtaining a witness statement or testimony to assist with the investigation or prosecution of that offence.
- 3.2 The Mutual Assistance Act also allows Australian authorities to assist foreign countries in proceeds of crime actions. Under the Mutual Assistance Act, Australia can:
- register and enforce foreign proceeds of crime orders, including foreign forfeiture orders
 - locate, restrain and forfeit the proceeds of crime related to an offence committed overseas where the property and assets are located in Australia, and
 - share the confiscated proceeds of crime with the foreign country.
- 3.3 The Mutual Assistance Act governs government-to-government level assistance and requires a government to make a formal request for

assistance to its foreign counterpart. A formal request for assistance is required in situations where, for instance, a country seeks assistance that requires the use of coercive powers such as a search warrant. Similarly, a formal request would also be required to allow arrangements to be made for a person incarcerated in Australia to give evidence, in Australia or in a foreign country, for the purposes of a foreign investigation or prosecution.

- 3.4 The Mutual Assistance Act does not cover agency-to-agency assistance or police-to-police assistance. Agency-to-agency assistance and police-to-police assistance refers to informal cooperation between Australia and foreign law enforcement agencies and includes the provision of general intelligence information, operational briefings and information obtained from voluntary interviews.
- 3.5 In the 2009-10 financial year Australia made 182 outgoing requests for assistance. In the same year, Australia received 380 formal requests for assistance from foreign countries.¹

Proposed legislative amendments to the *Mutual Assistance Act 1987*

Grounds for refusing a request for assistance

- 3.6 Under the current provisions of the Mutual Assistance Act, the Attorney-General must refuse a request for assistance if:
- the request relates to a political offence
 - the request has been made for the purpose of prosecuting or punishing a person for a political offence
 - the request was made for the purpose of persecuting a person on account of the person's race, sex, religion, nationality or political opinions
 - the request relates to an act or omission that constitutes an offence under Australia's military law but not under Australia's ordinary criminal law
 - the granting of the request would prejudice the sovereignty, security or Australia's national interest

¹ Attorney-General's Department, *Attorney-General's Department Annual Report 09-10*, appendix 12, pp. 348-350.

- the request relates to an offence for which the person has already been acquitted, punished or pardoned, or
- the request concerns the prosecution or punishment of a person charged with, or convicted of, an offence that carries the death penalty, unless the Attorney-General is of the opinion that assistance should be provided considering the 'special circumstances' in the case (double jeopardy).²

3.7 The Attorney-General also has the discretion to refuse a request for assistance if:

- in a case where a person has not yet been charged or convicted, the Attorney-General believes the provision of assistance may result in the death penalty being imposed on a person, and after considering the interests of international crime cooperation, assistance should be refused in the particular circumstances of the case³
- the request relates to the prosecution or punishment of a person in relation to conduct that would not have constituted an offence had it occurred in Australia, or the person could no longer be prosecuted in Australia due to lapse of time or for any other reason
- the Attorney-General is of the opinion that the provision of the assistance could prejudice an Australian investigation or proceeding
- the provision of assistance could prejudice the safety of any person (whether in Australia or outside Australia)
- the provision of assistance would be an excessive burden on the resources of the Commonwealth, State or Territory, or
- it is appropriate, in all the circumstances of the case, for the request for assistance to be refused.

3.8 The Bill proposes amendments to the legislation to make it clear that these grounds for refusing assistance extend to requests made at the investigation stage of a case.

3.9 The Act would also be amended to include additional grounds for refusal by:

- expanding the discrimination ground of refusal to include cases of discrimination on the basis of a person's sexual orientation, and

² *Mutual Assistance in Criminal Matters Act 1987*, ss. 8(1), 8(1A).

³ *Mutual Assistance in Criminal Matters Act 1987*, s. 8(1B).

- inserting an express mandatory ground for refusing a request for assistance when there are substantial grounds for believing the provision of assistance would result in a person being subjected to torture.
- 3.10 Other proposed amendments would also refine the current grounds of refusal to:
- make the double jeopardy ground of refusal a discretionary rather than mandatory ground for refusal, and
 - repeal paragraph 8(2)(c) of the Act which currently gives the Attorney-General a discretionary ground for refusing a request for assistance if a person could no longer be prosecuted in Australia for the alleged conduct because the statute of limitations has expired.
- 3.11 The HLRC and Law Council of Australia both argue that the double jeopardy ground of refusal should be retained as a mandatory ground for refusal. The Law Council of Australia writes:
- 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.
- 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.⁴
- 3.12 The Committee notes that although it is proposed that double jeopardy and lapse of time be removed as explicit grounds of refusal, the Attorney-General may still consider these issues in exercising his or her general discretion to refuse assistance.

Amendments to the 'take evidence' provisions

- 3.13 In recent times, there has been an increase in the number of both incoming and outgoing mutual assistance requests asking for witnesses to give

⁴ LCA, *Submission 2*, p. 17.

evidence directly via live video link technology. Through this technology, a witness can give evidence in a courtroom in the requested country in real time to authorities in the requesting country.

- 3.14 Section 12 of the Mutual Assistance Act makes provision for Australian authorities to make requests to foreign countries for evidence to be taken for an Australian investigation or prosecution. Section 13 of the Mutual Assistance Act details the process for evidence to be taken in Australia at the request of a foreign country for the purposes of a foreign investigation or prosecution. However, the application of sections 12 and 13 of the Act to video link proceedings is not entirely clear.
- 3.15 The Bill would amend section 13 to clearly state that the Attorney-General can authorise evidence to be taken before an Australian magistrate for live transmission by video link back to a court in the foreign country.
- 3.16 The proposed amendments would also clarify the role of the Australian magistrate in conducting the proceedings in cooperation with the foreign court. Under the amendments, if a foreign court requests an Australian magistrate to take some form of action in relation to the proceedings, the Australian magistrate would have a discretion over whether or not to take that action.
- 3.17 Subsection 13(4A) of the Mutual Assistance Act enables a witness giving evidence in a take evidence proceeding in Australia to be examined or cross-examined via video link by a foreign legal representative in the requesting country. However, there is currently no equivalent provision that provides for the in person examination or cross-examination of a witness, by a foreign legal representative. Proposed amendments to the Act would make explicit provision in the legislation for the magistrate to allow foreign legal representatives to examine or cross-examine a witness either in person or by video link.
- 3.18 Further amendments to sections 12 and 13 would also make it clear that Australia can make and receive requests for take evidence proceedings to be recorded in audio or video, or recorded by other electronic means. In some circumstances, this type of recording will be more useful to the requesting country than the written transcript of proceedings that would ordinarily be provided
- 3.19 When there is a request by a foreign country for evidence to be given by a witness in Australia by video link that does not require the involvement of an Australian magistrate, this would continue to be progressed outside of the official mutual assistance framework on an agency-to-agency basis.

Expand the range of law enforcement tools available for foreign law enforcement purposes

Lawfully obtained telecommunications material

- 3.20 Under the current legislation, telecommunications interception (TI) product and covertly accessed stored communications information (such as email and phone records) that is obtained through lawful means can only be provided to a foreign country through take evidence or production order proceedings conducted before a magistrate under section 13 of the Mutual Assistance Act.
- 3.21 Proposed amendments to section 13A of the Act set out a more streamlined procedure for providing certain material to a foreign country. It allows Australia, with approval from the Attorney-General, to provide directly to a foreign country material that was lawfully obtained by, and is lawfully in the possession of, a domestic law enforcement agency. Under section 13A the material is not required to be produced before a magistrate before it can be provided to a foreign country as is currently required under the processes in sections 12 and 13. However, TI product and covertly accesses stored communications material cannot currently be provided to a foreign country under section 13A.
- 3.22 The Bill would make amendments to the Mutual Assistance Act and the *Telecommunications (Interception and Access) Act 1979* to allow the streamlined section 13A process to be used to share lawfully obtained TI product or covertly accessed stored communication material with foreign countries.
- 3.23 The proposals would also allow information in relation to the warrant used by Australian authorities used to obtain the information to be provided to foreign countries under the amended section 13A. This could include information contained in the application for the warrant, the person or telecommunications service to which the warrant relates and persons specified in the warrant as using the telecommunications service.
- 3.24 A range of safeguards will also be included in the legislation to ensure information is only provided to foreign countries in appropriate circumstances:
- all of the safeguards in the Mutual Assistance Act in relation to when a request must be refused would apply and the approval of the Attorney-General will be required before any TI product or covertly accessed stored communications material can be provided to a foreign country.

- TI product and covertly accessed stored communications material can only be provided if the penalty for the relevant foreign offence mirrors the penalties in an Australian law for an equivalent offence, and
- an annual report will be produced that details the instances of when this type of information has been provided to a foreign country.

Surveillance devices

3.25 The current legislation in relation to surveillance device warrants provides that these warrants can only be obtained for the investigation of a domestic offence that is punishable by at least three years imprisonment.⁵ The Bill will make amendments to allow a surveillance device warrant to be obtained in Australia to assist in a foreign investigation or prosecution. It would also allow Australian authorities to make requests to foreign countries for assistance that includes the use of surveillance devices.

3.26 A range of safeguards would also apply to this expansion of police power. Under the amendments:

- the Attorney-General will need to consider the mandatory and discretionary grounds for refusing a request for assistance and give approval before a warrant can be sought
- a warrant can only be obtained if the relevant foreign offence meets the same criteria as required for the granting of a warrant for domestic offences, and
- Australian agencies will be required to report on the use of surveillance devices for foreign law enforcement purposes.

3.27 Further, under the new section 15F, the Attorney-General in authorising an eligible law enforcement officer to apply for a surveillance devices warrant, pursuant to a foreign request, must be satisfied that:

- a request has been received from a foreign country
- an investigation relating to a criminal matters has commenced in the requesting country
- the relevant offence is punishable by a maximum penalty for three or more years imprisonment, life in prison or death, and
- the requesting country has provided appropriate undertakings in relation to the use and destruction of information obtained as a result of

⁵ *Mutual Assistance in Criminal Matters Act 1987*, s. 13A(2).

the surveillance device and any other matters the Attorney-General considers relevant.

Forensic procedures

- 3.28 Currently, Australia cannot conduct a compulsory forensic procedure on a suspect, such as collecting fingerprints or DNA samples, in relation to a foreign serious offence pursuant to a request for assistance from a foreign country.
- 3.29 Currently, a forensic procedure can be carried out on a volunteer, following a request from a foreign country, if the person consents to the procedure. In the case of a child or incapable person, a forensic procedure can also be carried out if their parent or guardian provides informed consent to the procedure. However, the application of the *Crimes Act 1914* to forensic procedures carried out in these cases is unclear.
- 3.30 The Bill proposes to make a number of amendments that would enable the provisions relating to forensic procedures in the *Crimes Act 1914* to be used to assist a foreign country with a criminal investigation or prosecution. The proposals would allow a forensic procedure to be carried out on suspects and volunteers, including children and incapable persons, in certain circumstances. The procedures would be carried out under the same conditions and in the same circumstances and manner as for the investigation of a domestic offence. Importantly, the amendments would also allow Australian authorities to seek approval to conduct a compulsory forensic procedure if the person does not provide consent for the procedure to be carried out.
- 3.31 Under the proposed measures, a person would first be asked if they consent to the forensic procedure being carried out. If a person does not consent, authorities would need to seek both the approval of the Attorney-General and an order from a magistrate before the forensic procedure can be carried out.
- 3.32 Safeguards would apply to the process and a magistrate would only be able to authorise the carrying out of a forensic procedure after taking into account a wide range of circumstances, including whether the carrying out of the forensic procedure is justified in all the circumstances of the case.
- 3.33 Finally, despite any order by the magistrate relating to the carrying out of a forensic procedure, the procedure would not be able to be carried out if a child or an incapable person objects to, or resists the carrying out of the procedure.

- 3.34 The retention of the evidence collected will be governed by the laws of the foreign country and any undertaking given by the foreign law enforcement agency in relation to the retention, use and destruction of forensic evidence.

Extending the proceeds of crime scheme

- 3.35 The Bill proposes to make a number of amendments to the proceeds of crime scheme in Part IV of the Mutual Assistance Act. The amendments would improve the operation of the proceeds of crime provisions in relation to non-conviction based proceeds of crime orders.
- 3.36 Obtaining a criminal conviction can be a lengthy and time consuming process. Non-conviction based proceeds of crime orders can be made regardless of whether a person has been convicted of an offence and are a tool designed to prevent the dispersal of assets before a conviction can be secured.
- 3.37 Under current legislation, Australian authorities can only register a non-conviction based proceeds of crime order issued by certain countries listed in regulations to the Act. The amendments in the Bill would allow Australia to register non-conviction based proceeds of crime orders from any country or seek a temporary non-conviction based restraining order on behalf of any country.
- 3.38 The Bill would also make a number of minor amendments to streamline the process by which the relevant minister can authorise the use of the proceeds of crime investigative tools in the Mutual Assistance Act.

Miscellaneous amendments

- 3.39 The Bill also proposes a number of other miscellaneous amendments to the Mutual Assistance Act to improve the operation of the legislation.
- 3.40 For instance, the definition of 'serious offence' in the Mutual Assistance Act would be changed to align with the definition of an 'indictable offence' contained in the *Crimes Act 1914* to allow the expanded range of assistance (like forensic procedures) that are currently only available for the investigation of domestic offences to be used for foreign law enforcement purposes..
- 3.41 Currently, a serious offence is defined as one that carries a maximum penalty of death, or imprisonment for not less than 12 months. This definition in subsection 3(1) of the Mutual Assistance Act would be

amended to provide that a 'serious offence' would now be defined as an offence that carries a maximum penalty 'exceeding 12 months'.

Other issues raised in consultation

Expanding the grounds for refusing assistance

- 3.42 A number of submissions received by the Committee suggested that grounds for refusing assistance should be expanded to include situations where:
- there is a risk a person could be subject to cruel, inhuman, or degrading treatment or punishment⁶
 - a person may be subject to arbitrary detention, or denied the right to a fair trial⁷
 - there are substantial grounds for believing that accepting the request may result in a breach of Australia's human rights obligations under the *International Covenant on Civil and Political Rights*, the *Convention against Torture, Cruel, Inhuman and Degrading Treatment* and the *Convention on the Rights of the Child*⁸,
 - there are grounds for believing a person is, or will be, discriminated against on the basis of their gender identity, language, ethnic origin, sexuality or other status (for example, membership of a particular social group)⁹.

Assistance in death penalty cases

- 3.43 Subsection 8(1A) of the Mutual Assistance Act states that the Attorney-General must refuse a request for assistance if a person has been charged with, or convicted of, an offence that carries the death penalty unless there are 'special circumstances' that justify the granting of the request.
- 3.44 The Explanatory Memorandum that accompanied the original amendment provision in 1996, states that 'special circumstances' could include:

6 LCA, *Submission 2*, p. 23; AHRC, *Submission 4*, p. 7; ALA, *Submission 5*, pp. 12-13; HRLC, *Submission 6*, p. 13.

7 LCA, *Submission 2*, p. 23; HRLC, *Submission 6*, p. 3.

8 LCA, *Submission 2*, p. 23.

9 LCA, *Submission 2*, p. 23; HRLC, *Submission 6*, p. 15.

situations where the assistance being sought relates to exculpatory evidence or information; or, situations where the requesting country has provided an undertaking that the death penalty will not be imposed, or if it is imposed, will not be carried out.¹⁰

- 3.45 In the course of public consultation, the retention of the Attorney-General's discretion to provide assistance in cases where the death penalty could be imposed upon a person was questioned. Submissions from the Australian Human Rights Commission, HRLC, Australian Lawyers Alliance and the Law Council of Australia all suggested that the Attorney-General's discretion to grant assistance in 'special circumstances' should be revoked or limited to the provision of assistance in cases where the assistance is exculpatory in nature.
- 3.46 The Australian Lawyers Alliance comments that:
- Even if a country were to make an undertaking that the death penalty would not be imposed, or carried out, if the Australian government were to refuse to mutually assist in such matters, this would send a much stronger and clearer message about Australia's commitment to abolishing the death penalty.¹¹
- 3.47 There were also calls for the Mutual Assistance Act to be expanded to regulate the provision of police-to-police assistance. Currently, assistance provided outside of the Mutual Assistance Act is not subject to the safeguards included in the Act. By including informal forms of assistance within the scope of the Mutual Assistance Act, it is hoped that the formal processes and human rights protections afforded by the Act will work to prevent a repeat of a situation where Australian police provide assistance that assists in the imposition of the death penalty on Australians by a foreign country.
- 3.48 The Australian Lawyers Alliance highlighted the case of the Bali 9 and voiced concerns that the current legislative arrangements would not prevent a repeat of the case.¹² They suggested that stringent legislative requirements be introduced to ensure that Australia's regulation of police-to-police assistance was consistent with Australia's obligations under international law and with safeguards in the Mutual Assistance Act through amendments to the *Australian Federal Police Act 1979*.

10 Explanatory Memorandum to the Mutual Assistance in Criminal Matters Legislation Amendment Bill 1996, p. 15.

11 ALA, *Submission 5*, p. 15.

12 ALA, *Submission 5*, p. 16-18.

Undertakings

- 3.49 Just as modern extradition processes attempt to strike the appropriate balance between an effective and efficient extradition system and protecting the rights of the individual, the mutual assistance system attempts to strike a balance between ensuring law enforcement authorities have the appropriate tools at their disposal to bring criminals to justice while protecting human rights and individual rights to privacy and due process.
- 3.50 The measures in the Bill which propose to expand the range of law enforcement tools available to assist in foreign investigations and prosecutions are supported by safeguards. These safeguards include the provision that certain undertakings will be given by the foreign country in relation to the retention, use and destruction of personal information before such information is provided to the foreign country.
- 3.51 In death penalty cases, the undertakings predominantly provided by a foreign country for extradition and mutual assistance processes are that the death sentence will not be imposed, or if imposed, will not be carried out.
- 3.52 The growing reliance on undertakings and other assurances from foreign countries to facilitate extradition and mutual assistance processes raises questions about the monitoring and enforcement schemes in place in relation to undertakings. The Attorney-General's Department has informed the Committee, that as far as the Department is aware, there have been no breaches of any undertakings given to Australia by a foreign country.¹³ Generally though, undertakings are not legally enforceable and there is no formal mechanism available to monitor a foreign country's compliance with an undertaking it gives to the Australian Government.
- 3.53 In its response to JSCOT Report 91, the Government undertook to report on 'any breaches of substantive obligations under bilateral extradition agreements noted by Australian authorities' in the annual reports of the Attorney-General's Department. Given the expanded role of undertakings set out in the amendments proposed in this Bill, the Committee considers that the current reporting scheme should be expanded to include breaches of undertakings received under the Mutual Assistance Act.
- 3.54 Any breach of an undertaking by a foreign country is a matter of concern that has wide ranging implications for the bilateral relationship between Australia and the foreign country in question. Should a serious breach of

13 Attorney-General's Department, *Submission 7*, pp. 5-6.

an undertaking occur, the Committees does not consider it appropriate for the annual report of the Attorney-General's Department to be the only reporting mechanism of this breach.

- 3.55 Accordingly, the Committee recommends that if the Minister for Justice or the Attorney-General becomes aware of a serious breach of an undertaking, this breach should immediately be reported to the Parliament.