

**Submission of the**  
  
NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES  
  
**to the**  
  
**Joint Standing Committee on Treaties’**  
  
**Inquiry into the**  
**Extradition and Mutual Assistance Treaties**  
**between Australia and Malaysia**

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All references to the ‘proposed extradition treaty with Malaysia’ refer to *Treaty between the Government of Australia and the Government of Malaysia on Extradition* [2005] ATNIF 32.

All reference to the ‘proposed mutual assistance treaty with Malaysia’ refer to *Treaty between the Government of Australia and the Government of Malaysia on Mutual Assistance in Criminal Matters* [[2005] ATNIF 33.

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## 1. Executive Summary

1. The New South Wales Council for Civil Liberties ('CCL') believes that the recent cases of the Bali Nine in Indonesia and Trinh Huu in Vietnam have demonstrated a desperate need for reform of Australia's mutual assistance laws.<sup>1</sup> Given that Malaysia has similarly harsh drug laws to both Indonesia and Vietnam, it is very important to avoid similar problems in these proposed treaties with Malaysia.
2. CCL recommends that a European-style clause governing the provision of *voluntary* mutual assistance, as opposed to *requests* for assistance, be inserted into the proposed mutual assistance treaty with Malaysia. This will provide Australia with a mechanism to preserve its sovereign right to ensure that its resources are not used to execute or torture anyone.
3. CCL also recommends that the proposed treaties with Malaysia should be modified to allow for the referral of intractable disputes to the International Court of Justice ('ICJ'). This would provide to both parties an impartial way to solve disputes that cannot be resolved diplomatically.
4. CCL also recommends that the definition of an extraditable offence not be watered down to include offences that attract twelve months imprisonment. Currently extraditable offences between Australia and Malaysia are those offences that attract imprisonment for two years or more. The proposed extradition treaty with Malaysia should adopt the current definition, not attempt to redefine it without justification.
5. Finally, CCL notes with disapproval that the National Interest Analyses attached to the proposed treaties fail to assess Malaysia's human rights record. Specifically, there is no assessment of the use of capital punishment, the fairness of criminal trials, the use of torture and compliance with other international human rights standards in Malaysia.
6. CCL encourages the Committee to recommend that these treaties **not** be ratified until:
  - a) an Article governing the spontaneous provision of information is inserted into the mutual assistance treaty;
  - b) an Article providing for the referral of intractable disputes to the ICJ is inserted into both proposed treaties;
  - c) the current definition of an extraditable offence as an offence attracting two years or more imprisonment is adopted in the proposed mutual assistance treaty; and,
  - d) the Committee has had an opportunity to be briefed on Malaysia's human rights record, especially in relation to capital punishment, torture and the provision of fair trials.

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<sup>1</sup> see NSW Council for Civil Liberties, *Australians on Death Row*, <[http://www.nswccl.org.au/issues/death\\_penalty/death\\_row.php](http://www.nswccl.org.au/issues/death_penalty/death_row.php)>.

## 2. provision for spontaneous information sharing

7. One of the lessons of the so-called 'Bali Nine' incident is that there are serious gaps in Australia's mutual legal assistance in criminal matters framework. The proposed mutual assistance treaty with Malaysia also has these gaps, which means that another 'Bali Nine' case could arise with Malaysia.
8. Australia's mutual assistance framework deals with *coercive* powers, such as the execution of search warrants to obtain evidence. But this framework only applies if the foreign government *requests* the exercise of those coercive powers. If Australia voluntarily executes a search warrant and hands over evidence to the foreign government, then the mutual assistance laws do not apply and the safeguards are by-passed.
9. This in fact occurred in the Bali Nine case. The Bali Nine were arrested on 17 April 2005 and charged on 27 September 2005 – spending over five months in detention without charge. During that intervening five months, the AFP continued to cooperate lawfully with Indonesian police. But media reports suggest that evidence obtained from *coercive* procedures, such as the execution of a search warrant on Myuran Sukumaran's Sydney home on 26 April 2005, were handed to Indonesian officials voluntarily.<sup>2</sup> Because the Indonesians did not *request* the evidence, the mutual assistance laws did not apply.
10. These allegations contradict the evidence of Ms Joanne Blackburn from the Criminal Justice Division of the Attorney-General's Department before the Committee, which emphatically stated that the AFP 'cannot provide assistance which requires the exercise of coercive powers'.<sup>3</sup>
11. This gap needs to be filled. CCL commends to the Committee the European solution to this problem of the voluntary provision of such assistance:<sup>4</sup>

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### Article 11 – Spontaneous information

1 Without prejudice to their own investigations or proceedings, the competent authorities of a Party may, without prior request, forward to the competent authorities of another Party information obtained within the framework of their own investigations, when they consider that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings, or might lead to a request by that Party under the Convention or its Protocols.

2 The providing Party may, pursuant to its national law, impose conditions on the use of such information by the receiving Party.

3 The receiving Party shall be bound by those conditions.

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<sup>2</sup> Simon Kearney and Sian Powell, "Police raid home of Bali's kingpin", *The Australian* (Sydney), 27 April 2005, 1.

<sup>3</sup> Joint Standing Committee on Treaties, *Committee Hansard* (19 June 2006) 35.

<sup>4</sup> *Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters* (2001) ETS No. 182, <<http://conventions.coe.int/Treaty/EN/Treaties/Html/182.htm>>.

4 However, any Contracting State may, at any time, by means of a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to be bound by the conditions imposed by the providing Party under paragraph 2 above, unless it receives prior notice of the nature of the information to be provided and agrees to its transmission.

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12. Such a provision would mean that future 'Bali Nine' cases would be handled very differently. The voluntary provision of assistance would permit conditions to be placed on it. In a case like the Bali Nine, Australia would inform Malaysian authorities that "we have some information of a serious nature that we believe will interest you, but we will only hand it over if you guarantee that no one will be executed as a result of it – you can take it or leave it". The Malaysians maintain their sovereignty – and Australia does not trade away its sovereign right to insist that, as a matter of principle, it will not assist in the barbaric practice of capital punishment. Importantly, this takes the decision to assist out of the hands of police and places it back in the hands of the Minister.

### **3. settlement of disputes should be by reference to ICJ**

13. The extradition and mutual assistance treaties adopt an identical provision for the settlement of disputes:<sup>5</sup>

Any difference or dispute between the Parties arising from the interpretation or implementation of the provisions of this Treaty shall be settled amicably through consultation or negotiation between the Parties through diplomatic channels without reference to any third party or international tribunal.

14. Given the potential for disputes to arise in these matters, CCL recommends that intractable disputes should be made referable to the International Court of Justice for resolution. All members of the United Nations are automatically parties to the *Statute of the International Court of Justice* ('ICJ Statute').<sup>6</sup> Both Australia and Malaysia are members of the United Nations. Furthermore, Australia has made a declaration under the ICJ Statute to the effect that it recognises the compulsory jurisdiction of the ICJ in all disputes including the interpretation of treaties.<sup>7</sup>
15. CCL recommends that a 'compromissory clause' replace the existing clause. Such a clause could preserve the spirit of the existing clause by preserving amicable diplomatic settlement as the primary mechanism for dispute resolution, but permitting a treaty party to remove the dispute to the ICJ if an intractable problem arises.

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<sup>5</sup> Article 19 of extradition treaty; article 25 of mutual assistance treaty.

<sup>6</sup> [Charter of the United Nations](#) [1945] ATS 1, Article 93(1). See also: [Statute of the International Court of Justice](#) [1975] ATS 50.

<sup>7</sup> [Declaration under the Statute of the International Court of Justice concerning Australia's acceptance of the jurisdiction of the International Court of Justice](#) [2002] ATS 5 (22 March 2002).

16. Recognising the jurisdiction of the International Court of Justice in these treaties would help to preserve the rule of law and provide a fair and impartial safety-valve in the case of dispute.

**CCL recommends that a 'compromissory clause' be added to the dispute resolution provision to provide for referral of intractable disputes to the International Court of Justice.**

#### **4. extraditable offences**

17. CCL notes that, under the *London Scheme* which currently governs extradition between Australia and Malaysia,<sup>8</sup> only offences that attract a penalty of two years or more are extraditable offences.<sup>9</sup> Whereas under the proposed extradition treaty with Malaysia, offences attracting twelve months or more are extraditable.<sup>10</sup>
18. Individuals must not be subjected to the hardship of extradition unless they are at least accused of serious wrongdoing. The extradition process can involve lengthy incarceration and deportation to foreign country. In the case of minor offences, the period spent in detention awaiting extradition and eventual trial may easily be longer than the actual sentence to be served (assuming the suspect is even found guilty).
19. CCL also notes that, after reviewing its extradition procedures in 1999, Canada now requires a two-year minimum sentence before extradition will be granted.

**CCL recommends that the Committee reject this unjustified reduction in the seriousness of extraditable offences.**

#### **5. poor quality of NIAs**

20. CCL notes with disapproval the poor quality of the National Interest Analyses ('NIA') accompanying the extradition and mutual assistance treaties.<sup>11</sup> Both the political brief and country fact sheet attachments fail to assess the human rights record of Malaysia. Specifically, there is no assessment of the use of capital punishment, the fairness of criminal trials, the use of torture and compliance with other international human rights standards. This lack of analysis means that both NIA are seriously flawed. CCL recommends that the Committee requests and reviews such information before endorsing these treaties.

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<sup>8</sup> Commonwealth, *London Scheme for Extradition Within the Commonwealth* (1966), <[http://www.thecommonwealth.org/shared\\_asp\\_files/uploadedfiles/{56F55E5D-1882-4421-9CC1-71634DF17331}\\_London\\_Scheme.pdf](http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/{56F55E5D-1882-4421-9CC1-71634DF17331}_London_Scheme.pdf)>.

<sup>9</sup> *London Scheme*, n 8, Article 2(2).

<sup>10</sup> Article 2(1).

<sup>11</sup> *NIA Consultation and Background documents for the Extradition treaty* [2006] ATNIA 21; and, *NIA Consultation and Background documents for the Mutual Assistance in Criminal Matters treaty* [2006] ATNIA 22.