

**Submission of the**

NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES

**to the**

**Justice Minister's**

**Review of Australia's**

**Mutual Legal Assistance Law and Practice**

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All references to 'the discussion paper' refer to the Minister's document *A better mutual assistance system: a review of Australia's mutual assistance law and practice* (September 2006), <<http://www.ag.gov.au/extraditionandma>>.

## **executive summary**

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1. The New South Wales Council for Civil Liberties ('CCL') recommends that the Mutual Legal Assistance in Criminal Matters Act ('the Act' or 'MAICMA') should be amended to include a provision covering the voluntary provision of coercively-obtained information. This will broaden the existing request-driven approach and ensure that the Act's human rights safeguards provide protection in these situations.
2. CCL recommends that the Minister complete this review process by undertaking a full public review of agency-to-agency assistance, particularly police-to-police assistance. It is far more imperative that such a review be undertaken than the current reviews into extradition and mutual legal assistance.
3. CCL recommends that all assistance be accompanied by guarantees that it will not be used to execute or torture anyone. This can be done on a case-by-case basis or by inserting a standing guarantee in bilateral mutual legal assistance treaties.
4. CCL recommends that a dispute resolution provision should exist in all mutual legal assistance treaties to provide for referral of intractable disputes to the International Court of Justice.
5. Consistent with Australia's ratification of major international human rights treaties, CCL recommends that the objects provision of the Act include reference to those treaties and the principles espoused therein.
6. CCL agrees that the boundaries of the grounds of refusal should be extended to apply to the investigations stage of the criminal justice process.
7. CCL recommends that the death penalty protection in the Act be re-drafted to remove ministerial discretion, to apply to spontaneous assistance, to cover the investigation stage, to apply to arrest as well as charge and to ensure that guarantees provided by foreign countries are enforceable.
8. CCL recommends that the common law rule against double jeopardy should apply to mutual legal assistance. At the very least, the rules of *autrefois acquit*, *autrefois convict* and abuse of process should apply.
9. CCL recommends that all DNA information should not be provided to a foreign country unless its security, exclusive-use and destruction is guaranteed.
10. CCL recommends that material obtained under a telephone interception warrant should not be provided to overseas agencies until the problems with the Telecommunications Interception Act are fixed by Parliament.

## **general comments**

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### **encompassing voluntary assistance**

11. Many of the comments and recommendations in CCL's submission deal with the boundaries of mutual legal assistance. One of those boundaries, or 'gates', is that the operation of the MAICMA is request-driven. The Act is not engaged until a request is made from or to a foreign government. This restriction means that assistance offered spontaneously, without an initiating request, is not protected by the Act's human rights safeguards.
12. To give an example of how this mechanism works: assume the AFP is investigating a suspected Australian drug trafficker who is currently under arrest in a foreign country, say Indonesia, and the AFP executes a search warrant of the accused person's Australian residence. The search turns up evidence that might be useful to the Indonesian investigation and prosecution of that person. The AFP might form the view that, absent a request from Indonesia, the information should be volunteered to Indonesian police. Such a spontaneous offer of assistance does not currently fall under the MAICMA because there has been no request. The death penalty guarantees of the Act simply do not kick in. This is a gap that needs to be filled by formalising the legal status of spontaneous assistance.

**CCL recommends that the Act be amended to include a provision covering the voluntary provision of coercively-obtained information. This will broaden the existing request-driven approach and ensure that the Act's human rights safeguards provide protection in these situations.**

13. The voluntary provision of coercively-obtained information can take many forms, but it would include the provision of material obtained during the execution of a search warrant in Australia for a domestic investigation. An Australian agency, concluding that such material would aid a foreign investigation or prosecution, might seek to provide that information even though no request has been made for it. Currently such situations fall under the discretion of individual agencies – outside the protection of the MAICMA's human rights safeguards.
14. Such voluntary-assistance provisions are not a new idea. They are commonly inserted in mutual legal assistance frameworks around the world. They even exist in some of the international law-enforcement treaties to which Australia is Party. For example, Article 18 of *United Nations Convention Against Transnational Organized Crime* ('the TOC Convention').<sup>1</sup> Under the heading 'mutual legal assistance', clauses 4 and 5 of Article 18 read:

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<sup>1</sup> [2004] [ATS 12](#) (entered into force 26 June 2004).

4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.

5. The transmission of information pursuant to paragraph 4 of this Article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay

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15. However, CCL commends to the Minister the more elegantly-phrased mechanism in the European mutual legal assistance convention:<sup>2</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.

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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16. Including a provision like this will ensure that future cases like the Bali Nine will be handled very differently. In a case like the Bali Nine, the AFP would inform the Indonesian police that “we have some intelligence 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 or tortured as a result of it – you can take it or leave it”. The Indonesians 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 capital punishment or torture.

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<sup>2</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>>.

## urgent need for a review of agency-to-agency assistance

17. CCL notes with disappointment that this review process does not incorporate a public review of agency-to-agency assistance. The recent Bali Nine case has demonstrated that police-to-police assistance is in desperate need of a full public review. The need for such a review is far more urgent than any need to review mutual legal assistance or extradition laws.

**CCL recommends that the Minister complete this review process by undertaking a full public review of agency-to-agency assistance.**

## form of MLAT treaties

### *human rights guarantees: case-by-case or treaty-based?*

18. The discussion paper notes that the number of requests for mutual legal assistance has increased in recent years and is expected to increase further. This increased number of requests leads to an increased need to be more vigilant in the use to which the information will be put. This is especially so when considering the need to implement the human rights safeguards of the MAICMA.
19. It is important to recognise that it is fundamental to the nature of information (and intelligence generally) that once it is handed over to someone else, then all control over that information is lost. Once shared with a foreign authority, information cannot be retrieved nor can control be exercised over its use.<sup>3</sup> This is why it is important to secure guarantees that *all* assistance provided will not be used to execute or torture anyone *before* the information is handed over.

**CCL recommends that all assistance be accompanied by guarantees that it will not be used to execute or torture anyone. This can be done on a case-by-case basis or by inserting a standing guarantee in bilateral mutual legal assistance treaties.**

20. It is very important that Australia's bilateral MLAT with countries which retain the death penalty also include an *explicit* reference to Australia's right to refuse assistance if the death penalty or torture might result. The existing MLAT with Indonesia has such a clause and it should be used as a 'best practice' model:<sup>4</sup>

Assistance may be refused if...the request relates to the prosecution or punishment of a person for an offence in respect of which the death penalty may be imposed or carried out.

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<sup>3</sup> see Kenneth G. Robertson, 'Practical Police Cooperation in Europe: the intelligence dimension', *Policing Across National Boundaries*, ed. Malcolm Anderson & Monica Den Boer, 1994, 108-111.

<sup>4</sup> *Treaty between Australia and the Republic of Indonesia on Mutual Assistance in Criminal Matters* [1999] ATS 10, article 4(2)(d).

21. All new mutual legal assistance treaties should include such a clause. All existing mutual legal assistance treaties with retentionist nations should be revised to include such a clause. CCL notes that the MLAT with the USA and the proposed MLAT with Malaysia and China fail to mention explicitly Australia's sovereign right to refuse assistance in these circumstances.
22. CCL notes that *sovereignty* it is a 'guiding principle' of this review, ensuring that "the mutual assistance process should operate to support Australia's national interests". Australia's sovereignty and principled opposition to capital punishment and torture are enshrined in our ratification of the *Convention Against Torture* and the *Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty*. Any nation that is serious about investigating and prosecuting serious transnational crime will respect Australia's sovereign right to have its international legal obligations referred to in mutual legal assistance treaties.

### ***need for ICJ dispute resolution***

23. treaties must have ICJ dispute resolution mechanism, i.e. objective & judicial.
24. Given the potential for disputes to arise in mutual legal assistance 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>5</sup>
25. 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>6</sup> Nations that have not yet done this can recognise the jurisdiction of the ICJ on a treaty-by-treaty basis.
26. CCL recommends that a 'compromissory clause' be placed in all mutual legal assistance treaties. Such a clause could preserve diplomatic consultations as the primary mechanism for dispute resolution, but permitting a treaty party to remove the dispute to the ICJ if an intractable problem arises.

**CCL recommends that a 'compromissory clause' be added to dispute resolution provisions in all mutual legal assistance treaties to provide for referral of intractable disputes to the International Court of Justice.**

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<sup>5</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>6</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).

## **comments on issues and principles in the paper**

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### **issue 1: object of the MAICMA**

27. Australia has ratified several significant international human rights treaties, including:

- *International Covenant on Civil and Political Rights*;<sup>7</sup>
- *Second Optional Protocol to the ICCPR*;<sup>8</sup>
- *Convention on the Rights of the Child*;<sup>9</sup>
- *Convention Against Torture*;<sup>10</sup> and,
- the Refugee Convention and Protocol.<sup>11</sup>

**Consistent with Australia's ratification of major international human rights treaties, CCL recommends that the objects provision of the Act include reference to those treaties and the principles espoused therein.**

### **issue 3: grounds of refusal**

28. The grounds for refusal should include reference to Australia's obligations under international human rights law.

29. There should be express reference to the refusal of assistance if such assistance might be used to torture someone or is to be used against someone who has been tortured by the requesting country.

30. There should be express reference to refusal of assistance if any of the principles protecting children under the *Convention on the Rights of the Child* might be breached.

31. The existing discrimination clause in the Act is too narrow. It currently only mentions 'race, sex, religion, nationality or political opinions'. Adapting from the non-discrimination clause of the ICCPR,<sup>12</sup> discrimination on the grounds of language, birth and 'other status' should be inserted into the Act. It is important that the open-ended 'other status' category be included, affording flexibility to the interpreters of the Act as community standards change over time.

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<sup>7</sup> [1980] ATS 23 (entered into force 13 November 1980).

<sup>8</sup> [1991] ATS 19 (entered into force 11 July 1991).

<sup>9</sup> [1991] ATS 4 (entered into force 16 January 1991).

<sup>10</sup> [1989] ATS 21 (entered into force 7 September 1989).

<sup>11</sup> [1954] ATS 5 (entered into force 22 April 1954); and, [1973] ATS 37 (entered into force 13 December 1973).

<sup>12</sup> Article 26.

## **principle B: including investigations**

**CCL agrees that the boundaries of the grounds of refusal should be extended to apply to the investigations stage of the criminal justice process.**

32. This will correct an imbalance and internal inconsistency within the Act. It will also reflect the provisions of many of the international law enforcement treaties to which Australia is Party, for example article 18(1) of the *United Nations Convention Against Transnational Organized Crime*:

States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings...

## **Death penalty: re-drafting section 8(1A)**

**Adopting Principle B from the discussion paper and CCL's recommendations in this submission, section 8(1A) of the Act should be re-drafted to read:**

### **section 8(1A)**

- (i) this subsection applies to a request by a foreign country for assistance under this Act, as well as the spontaneous provision of assistance to a foreign country;**
- (ii) assistance must not be provided if it relates to the investigation, prosecution or punishment of a person arrested for, charged with, or convicted of, an offence in respect of which the death penalty may be imposed in the foreign country, unless an enforceable guarantee that no one will be executed as a consequence of this assistance is provided by the foreign country;**
- (iii) in determining whether such a guarantee is enforceable the Court shall have regard to the likelihood that the guarantee will be honoured and to the power of the guarantor to enforce the undertaking.**

### ***charge and arrest***

33. Another boundary issue that CCL is concerned about is the use of the phrase “charged with” under the Act’s death penalty protections:
- (1A) 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.
34. While the MAICMA was not engaged in the recent Bali Nine case, if it had been then this human rights protection would not have kicked in until five months after the Bali Nine were arrested. This is because in Indonesia it is possible to arrest and detain someone for months before charging them. In order to extend the protection of this provision at the earliest possible stage in the criminal justice process, the phrase “charged with” should be replaced with “arrested or charged with”.
35. CCL submits that, when section 8(1A) was drafted, it was assumed that foreign criminal procedure accords with domestic procedure. In Australia, a suspect is arrested, charged and brought before a magistrate without delay.<sup>13</sup> Outside of the rarefied world of lawyers who practice criminal law, the words “charge” and “arrest” are synonymous in Australia. CCL submits that Parliament intended section 8(1A) to be engaged as soon as a suspect was arrested or charged.

### ***removing ministerial discretion***

36. CCL also believes that the Ministerial discretion in section 8(1A) should be removed. It would reflect Australia’s international obligations better if this were decided by an open and impartial court. The DPP could provide evidence to satisfy the court that an enforceable guarantee has been obtained from the foreign country in the terms that no one will be executed as a result of the assistance.

### ***guarantees must be enforceable***

37. All guarantees made under this section should be enforceable. This means that the person giving the guarantee should have the constitutional power to ensure that the guarantee will be enforced. For example, a guarantee from a deputy District Attorney from a county in the United States is inadequate. For more abundant caution, in such a case, the guarantee must carry the seal of a State Governor (for state crimes) or the President (for federal crimes).

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<sup>13</sup> e.g. *Michaels v The Queen*: (1995) 184 CLR 117, 124 (Brennan, Deane, Toohey & McHugh JJ).

38. Such a guarantee should *always* be obtained even if the information being provided is exculpatory. This is because information that appears to be exculpatory might, at some later point in time, take on an inculpatory aspect. Providing such information without an enforceable guarantee is dangerous indeed.

### **issue 5: double jeopardy**

**The common law rule against double jeopardy should apply to mutual legal assistance. At the very least, the rules of *autrefois acquit*, *autrefois convict* and abuse of process should apply.**

39. CCL notes that the discussion paper refers to the recommendations of the Model Criminal Code Officer's Committee ('MCCOC') with respect to double jeopardy 'reform'. CCL also notes that the MCCOC's recommendations were contrary to every submission made to them, from organisations as diverse as CCL and the NSW Director of Public Prosecutions.
40. CCL notes that the protection against double jeopardy was abolished by the NSW Parliament on 17 October 2006 and assented on 19 October 2006.<sup>14</sup>

### **issues 12 & 13: DNA**

41. DNA should never be obtained from persons without consent. Such information is highly personal and should be protected at all costs. This is a principle of both human dignity and privacy. There should be statutory prohibition on the provision of DNA information, unless waived by the individual. No adverse inference should be drawn from refusing to exercise the waiver.
42. DNA information should only be provided to a foreign country under the strict condition that all copies of the information will be destroyed once the investigation or prosecution is over. A guarantee should also be sought and provided that the DNA information will only be used for the purposes of this particular investigation and prosecution.
43. Under no circumstances, for example, should the DNA provided to a foreign country end up on a centralised DNA-database operated by a foreign government. In other words, any DNA information provided to a foreign country must be stored separately from that country's own DNA database. This will ensure that inadvertent copies are not made on, for example, database backup tapes.
44. A guarantee should also be sought and obtained from the foreign country that the storage of the DNA information is secure.

**DNA information should not be provided to a foreign country unless its security, exclusive-use and destruction is guaranteed.**

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<sup>14</sup> *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (NSW).

## issues 15 & 16: telecommunications interception material

45. Telecommunications Interception ('TI') material should not be provided to foreign agencies until the desperate existing problems with the federal *Telecommunications (Interception) Act 1979* (Cth) are fixed. For example in 2004/2005, 93% of all warrants were issued by non-judicial officers on government contracts.<sup>15</sup>
46. Under no circumstances should a procedure be introduced to permit TI warrants to be issued at the request of a foreign agency. However, this question could be revisited once the serious existing problems with the TI Act are addressed by Parliament.

## issue 20: information provided with a request

47. Unless a treaty-based guarantee has been provided, all requests for assistance from a foreign government should be accompanied by a guarantee that any assistance provided will not be used to execute or torture anyone.<sup>16</sup>
48. If the request relates to a juvenile, then the request should guarantee that the juvenile will not be prosecuted as an adult and will be afforded all the protections of the *Convention on the Rights of the Child*.

## issue 27: overseas liaison officers

49. If a network of international crime cooperation liaison officers is to be established, then such officers must work under strict guidelines that they must adhere to the safeguards in the MAICMA, and to Australia's obligations under the international human rights treaties to which Australia is party, such as the *Convention on the Rights of the Child*, the *Convention Against Torture* and the International Bill of Rights.
50. Such guidelines are necessary because the police-to-police assistance framework currently operates an international network of liaison officers. These officers operate under guidelines such as the *AFP Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations*.<sup>17</sup> It appears that AFP liaison officers routinely (lawfully) disregard Australia's human rights obligations with respect to the death penalty.<sup>18</sup> When asked whether international human rights treaties bind AFP officers under the guidelines, the answer was 'no' because the international treaties have not been adopted into domestic law.<sup>19</sup>

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<sup>15</sup> see NSWCCCL, 'Australian phones 24-times more likely to be bugged than an American phone' (21 May 2006),

[http://www.nswccl.org.au/news/show\\_pr.php?relNum=4&relYear=2006](http://www.nswccl.org.au/news/show_pr.php?relNum=4&relYear=2006).

<sup>16</sup> see also above [18] ff.

<sup>17</sup> copy available on AFP website at:

[http://www.afp.gov.au/\\_data/assets/pdf\\_file/21096/Guideline\\_for\\_international\\_death\\_penalty\\_situation.pdf](http://www.afp.gov.au/_data/assets/pdf_file/21096/Guideline_for_international_death_penalty_situation.pdf).

<sup>18</sup> Hansard, *Joint Standing Committee on Treaties*, 4 September 2006, 7.

<sup>19</sup> Hansard, *Joint Standing Committee on Treaties*, 4 September 2006, 13.

51. Finally, when building regional relationships and capacity, CCL believes that it is important that Australian officers encourage in foreign countries an understanding and respect of Australia's international human rights obligations.