



**HUMAN RIGHTS AND EQUAL OPPORTUNITY
COMMISSION**

**Submission to
The Attorney-General's Department
Mutual Assistance Review**

**Human Rights and Equal Opportunity Commission
Level 8, 133 Castlereagh St
GPO Box 5218
Sydney NSW 2001
Ph. (02) 9284 9600**

INTRODUCTION

1. The Human Rights and Equal Opportunity Commission (the Commission) makes this submission in response to the Attorney General's Department (AGD) Discussion Paper on 'A better mutual assistance system – a review of the Australia's mutual assistance law and practice' (the Discussion Paper).
2. The Commission has restricted its comments on the Discussion Paper to the question of whether the current grounds for refusing mutual assistance are appropriate. The fact that the Commission has not discussed the other proposals contained in the Discussion Paper should not be read as opposition or support for those proposals.

SUMMARY OF THE COMMISSION'S RECOMMENDATIONS

3. The Commission's key recommendations are:
 - **Recommendation 1:** Retain the current mandatory and discretionary grounds for refusing mutual assistance.
 - **Recommendation 2:** Introduce a new mandatory ground for refusal which states a request for mutual assistance **must** be refused if, in the Attorney-General's opinion:

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.
 - **Recommendation 3:** Implement the Discussion Paper's proposal to amend the *Mutual Assistance in Criminal Matters Act 1987* (Cth) (the Mutual Assistance Act) to state that the grounds of refusal apply to the investigation stage of the criminal justice process.
 - **Recommendation 4:** Change the grounds of mandatory refusal in death penalty matters to state that a request for mutual assistance **must** be refused if, in the Attorney-General's opinion:

granting a request in relation to the prosecution, punishment or investigation of an offence may result in the death penalty being imposed in a foreign country, unless the country undertakes not to impose or carry out the death penalty.
 - **Recommendation 5:** Implement the Discussion Paper's proposal to provide for mandatory refusal of requests for mutual assistance that relate to an offence for which a person has already been acquitted, pardoned or punished in Australia or another third country.

ARE THE CURRENT GROUNDS FOR REFUSING MUTUAL ASSISTANCE APPROPRIATE?

4. The Discussion Paper asks whether the current grounds for refusing a request for mutual assistance set out in s 8 of the Mutual Assistance Act are appropriate.

The mandatory grounds for refusal

5. Section 8(1) of the Mutual Assistance Act states that a request for mutual assistance **must** be refused if, in the opinion of the Attorney General:
- the request relates to the prosecution or punishment of a person for a political offence;¹ or
 - there are substantial grounds for believing the request has been made with a view to prosecuting or punishing a person for a political offence;² or
 - there are substantial grounds for believing 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;³ or
 - the request relates to the prosecution or punishment of a military offence which is not an offence under Australian criminal law;⁴ or
 - granting the request would prejudice the sovereignty, security or national interests of Australia or the essential interests of a state or territory;⁵ or
 - the request relates to the prosecution of a person for an offence for which the person has already been acquitted, pardoned or convicted for the offence in the foreign country (double jeopardy).⁶
6. The Commission believes that the existing mandatory grounds for refusing a mutual assistance request should be retained as they incorporate important safeguards into the mutual assistance process (see **Recommendation 1**).
7. There is no requirement in the Mutual Assistance Act to consider the human rights record of a country requesting mutual assistance. Concern about a country's human rights record does not, of itself, provide a reason to refuse a request for mutual assistance. However, it is important that the Mutual Assistance Act contains strong safeguards to ensure that a request for mutual assistance is refused if granting the request may result in a violation of a person's human rights in the requesting country.

¹ Mutual Assistance Act, s 8(1)(a).

² Ibid s 8(1)(b).

³ Ibid, s 8(1)(c).

⁴ Ibid s 8(1)(d).

⁵ Ibid s 8(1) (e)

⁶ Ibid s8(1)(f).

8. 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 tortured, subject to arbitrary detention, or denied the right to a fair trial.
9. The Commission recommends that s 8 (1) 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 (see **Recommendation 2**).

10. The Commission believes 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). This could be achieved by amending section 8(1)(c) to mandate the refusal of a request for mutual assistance if, in the opinion of the Attorney-General:

There are substantial grounds for believing 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, national or political opinions, **language, ethnic origin, sexuality or other status**.

The discretionary grounds for refusal

11. Section 8(2) of the Mutual Assistance Act states that a request for mutual assistance **may** be refused if, in the opinion of the Attorney-General:
 - the request relates to the prosecution or punishment of a person for an offence that would not be an offence in Australia (dual criminality);⁷ or
 - the request relates to the prosecution or punishment of a person in respect of an offence that occurred outside the foreign country and a similar offence occurring outside Australia would not be an offence in Australia (extraterritoriality);⁸ or

⁷ Ibid s 8(2)(a).

⁸ Ibid s 8(2)(b).

- the request relates to the prosecution or punishment of a person in relation to an offence that, if it had occurred in Australia, could no longer be prosecuted because of lapse of time or any other reason;⁹ or
 - providing assistance could prejudice a criminal investigation or proceeding in Australia;¹⁰ or
 - providing assistance would, or would be likely to prejudice a person's safety;¹¹ or
 - providing assistance would impose an excessive burden on Commonwealth, state or territory resources;¹² or
 - It is appropriate, in all the circumstances of the case, that the request for assistance not be granted.¹³
12. The Commission believes the current discretionary grounds for refusal provide important safeguards and should be retained (see **Recommendation 1**).

The grounds of refusal should state that they apply to the investigation stage of proceedings

13. The Discussion Paper observes that currently the majority of the grounds of refusal state that they apply to the 'prosecution and punishment' of a person.
14. The Commission strongly supports the Discussion Paper's proposal that 'the grounds of refusal should state that they apply to the investigation stage of the criminal justice process' (see **Recommendation 3**).¹⁴

The grounds for refusal in death penalty matters

15. While the Commission notes that the Discussion Paper states that the current grounds of refusal in death penalty matters will be retained, the Commission urges the Government to strengthen the grounds of refusal in death penalty matters to better reflect Australia's commitment to the abolition of the death penalty.
16. Australia has committed itself to opposing the death penalty by becoming a party to the *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty* (the Second Optional Protocol).

⁹ Ibid s8(2)(c).

¹⁰ Ibid s 8 (2)(d).

¹¹ Ibid 8(2)(e).

¹² Ibid s8(2)(f).

¹³ Ibid s 8(2)(g).

¹⁴ See the Discussion Paper [6.2.4]. It is noted that, as outlined in paragraphs 15-18 of this submission, the Commission believes it should be mandatory to refuse a request for mutual assistance in relation to the prosecution, punishment or investigation of an offence that may result in the imposition of the death penalty.

17. Article 1 of the Second Optional Protocol prohibits re-instating the death penalty and obliges States parties to ensure no one with their jurisdiction is executed.¹⁵ In addition, the United Nations Human Rights Committee (UNHRC) has held that ‘countries that have abolished the death penalty, [have] ... an obligation not to expose a person to the real risk of its application’.¹⁶
18. Currently, s 8(1A) of the Mutual Assistance Act provides that a request for mutual assistance **must** be refused if the request relates to the prosecution or punishment of an offence where the death penalty may be imposed unless the Attorney-General believes there are ‘special circumstances’ which mean that assistance should be granted.¹⁷ Section 8(1B) provides for the discretionary refusal of a mutual assistance request if the Attorney-General believes that granting the request may result in the death penalty and, after considering the interests of international criminal co-operation, is of the opinion that in the circumstances, the request should not be granted.
19. The Commission is concerned that ss 8(1A) and 8(1B) of the Mutual Assistance Act do not provide adequate protection against the risk of a person being exposed to the death penalty in a third country as a result of assistance provided by Australia. This is because the Mutual Assistance Act:
- does not define the ‘special circumstances’ in which the Attorney-General can grant a request for mutual assistance in death penalty matters;
 - does not provide for the mandatory refusal of a request for mutual assistance in relation to an investigation which may expose a person to the risk of the death penalty; and
 - does not prevent the Australian Federal Police (AFP) from lawfully providing police to police assistance to a requesting country which may expose a person to the risk of the death penalty.
20. The Commission believes that, consistent with Australia’s international obligations and bipartisan opposition to the death penalty a request for mutual assistance must be refused if, in the opinion of the Attorney-General:
- granting a request in relation to the investigation, prosecution, or punishment of an offence may result in the death penalty being imposed in a foreign country unless the country undertakes not to impose or carry out the death penalty (**see Recommendation 4**).

¹⁵ See Article 1, 2nd Option Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty

¹⁶ In *Judge v. Canada*, the UNHRC decided that Canada had breached its obligations under article 6(1) of the ICCPR by deporting Mr Judge “without ensuring that the death penalty would not be carried out”. The HRC stated: For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence will not be carried out. Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003) at [10/4].

¹⁷ The term ‘special circumstances’ is not defined in the Mutual Assistance Act. See further para.19.

21. The Commission believes it is desirable to remove the undefined discretion for the Attorney-General to grant mutual assistance in death penalty matters in ‘special circumstances’.¹⁸ The Commission notes that a provision such as the one in the above paragraph would still allow mutual assistance to be granted in circumstances:
- where the foreign country gave an undertaking that the death penalty would not be imposed or carried out; or
 - granting assistance would help a defendant avoid the imposition of the death penalty.
22. The Commission believes that the commitment to the abolition of the death penalty reflected in s 8(1A) and, to a lesser extent, s 8(1B) of the Mutual Assistance Act is undermined by police to police assistance arrangements in death penalty charge situations. This is because, in accordance with the *Australian Federal Police (AFP) Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations*, the AFP can assist foreign countries on a police-to police basis where no charges have been laid, regardless of whether or not the requesting country is investigating offences that attract the death penalty.¹⁹
23. The decision in *Rush v Commissioner of Police* confirms that the AFP can lawfully provide police to police assistance regardless of whether or not the overseas investigation may result in the imposition of the death penalty.²⁰ However, in delivering his judgment, Finn J observed:

[T]here is need for the Minister administering the *Australian Federal Police Act 1979* (Cth) (‘the AFP Act’) and the Commissioner of Police to address the procedures and protocols followed by members of the Australian Federal Police (‘AFP’) when providing information to the police forces of another country in circumstances which predictably could result in the charging of a person with an offence that would expose that person to the risk of the death penalty in that country.²¹

¹⁸ While the Mutual Assistance Act does not define ‘special circumstances’, the AGD have stated that examples ‘special circumstances’ are granting a request if the foreign country gave an undertaking that the death penalty would not be imposed or carried out or granting a request that would assist a defendant to prove their innocence (see Attorney General’s Department, ‘Fact Sheet 3, How does Mutual Assistance work in Death Penalty matters’ available at <http://www.ag.gov.au/>). However, because the term ‘special circumstances’ is not defined there is no legal impediment to the discretion being used to grant mutual assistance in circumstances which may still result in the imposition of the death penalty.

¹⁹ Attorney General’s Department, ‘Fact Sheet 3, How does Mutual Assistance work in Death Penalty matters’ available at <http://www.ag.gov.au/>.

²⁰ In this case Finn J rejected an application of four members of the so-called ‘Bali 9’ for a preliminary discovery order against the AFP on the basis that the applicants had failed to identify a potential cause of action against the AFP for exposing them to the death penalty that was not speculative or devoid of prospects of success. Finn J rejected, inter alia, the applicants’ argument that the powers provided by the AFP Act should be construed restrictively in the context of the *Death Penalty Abolition Act 1973*, the Mutual Assistance Act, Australian government policy opposing the death penalty and Australia’s signing of the Second Optional Protocol of the ICCPR. See *Rush v Commissioner of Police* [2006] FCA 12.

²¹ *Rush v Commissioner of Police* [2006] FCA 12 at [1].

24. The Commission believes Australia's approach to international cooperation in criminal justice matters should always reflect Australia's commitment to the abolition of the death penalty.
25. Currently there is a clear inconsistency between the way Australia's mutual assistance arrangements and agency to agency assistance²² arrangements address death penalty charge situations.
26. While the Commission recognises the Mutual Assistance Review is not a review of agency to agency assistance, the Commission believes the Review should identify the need to ensure that the provision of agency to agency assistance does not undermine the safeguards contained in s 8 of the Mutual Assistance Act.

HOW SHOULD AUSTRALIA CONSIDER DOUBLE JEOPARDY?

27. The principle of double jeopardy is a fundamental human right and an enduring feature of our criminal justice system. Article 14(7) of the ICCPR states:

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with law and penal procedure in each country.

28. The Commission believes double jeopardy should always be a mandatory ground for refusing a mutual assistance request. However, currently Australia is only required to refuse a mutual assistance request where the request relates to the prosecution of an offence for which a person has been acquitted, pardoned or punished in the requesting country.²³
29. In the Commission's view the double jeopardy principle should protect a person who is subject to a mutual assistance request in relation to the investigation or prosecution of an offence for which the person has already been finally convicted or acquitted in accordance with law and penal procedure in the requesting country, Australia or any other third country.
30. The Commission strongly supports the Discussion Paper's proposal to provide for mandatory refusal of requests for mutual assistance that relate to an offence for which a person has already been acquitted, pardoned or punished in Australia or another third country (**see Recommendation 5**).
31. The Commission notes that the Discussion Paper considers whether Australia should be able to provide mutual assistance in 'special circumstances'. The Commission is currently considering the issue of reforming the rule of double jeopardy and does not yet have a concluded view on this subject.
32. However, the Commission would like to emphasise that the principle of double jeopardy is a fundamental human right which reflects the need for finality in the provision of justice and concern that 'without safeguards, the power to prosecute

²²The term agency to agency assistance incorporates police to police assistance.

²³ The Mutual Assistance Act s 8(1)(f).

could readily be used by the executive as an instrument of oppression'²⁴. Any proposals to dilute this principle should be treated with extreme caution.

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²⁴ *R v Carroll* (2002) 213 CLR 635, 643 (Gleeson CJ and Hayne J).