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Dear Extradition and Mutual Assistance Review Team

**Review of Australia's Mutual Assistance Law and Practice**

Thank you for the opportunity to contribute to the Review of Australia's Mutual Assistance Law and Practice.

**About the Human Rights Law Resource Centre**

The Human Rights Law Resource Centre Ltd ('HRLRC'), a joint initiative of the Public Interest Law Clearing House (Vic) and Liberty Victoria, is an independent community legal centre.

The HRLRC aims to promote the development and implementation of Australian law and policy consistently with international human rights standards, including through casework, litigation, policy analysis, education and advocacy.

Having regard to these aims, this submission considers the relevance of international human rights law to the review of the *Mutual Assistance in Criminal Matters Act 1987* (Cth), the *Foreign Evidence Act 1994* (Cth) and Australia's mutual assistance policy and practice.

## Guiding Principles for the Review

The HRLRC considers that a guiding principle of the Review should be that the principles and processes applicable to mutual assistance must be consistent and comply with Australia's human rights obligations.

These obligations arise from treaties ratified by Australia, including the *International Covenant on Civil and Political Rights* ('ICCPR'),<sup>1</sup> the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR'),<sup>2</sup> the *Convention on the Elimination of All Forms of Discrimination Against Women* ('CEDAW'),<sup>3</sup> the *Convention on the Elimination of All Forms of Racial Discrimination* ('CERD'),<sup>4</sup> the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('CAT')<sup>5</sup> and the *Convention on the Rights of the Child* ('CROC').<sup>6</sup> Human rights obligations also arise from customary international law.

In relation to the substantive rights contained in each of these sources of human rights law, Australia has a range of responsibilities and obligations; namely, obligations to *respect*, *protect* and *fulfil* each human right.<sup>7</sup> The obligation to *respect* requires that Australia refrain from interfering, directly or indirectly, with the enjoyment of human rights. The obligation to *fulfil* requires that Australia take positive steps to promote and support the realisation of human rights and, where necessary, to provide for the realisation of human rights for marginalised or disadvantaged groups. Most relevantly for the purposes of this Review, the obligation to *protect* requires that Australia:

- act to prevent third parties – including other countries, governments, individuals, organisations and enterprises – from violating human rights; and
- refuse to give effect to human rights violations by third parties.

The obligation to *protect* means that Australia will be in breach of its human rights commitments if:

- it provides mutual assistance to a foreign country where there are reasonable grounds to believe that to do so may place a person at risk of his or human rights being violated; or
- it receives mutual assistance from a foreign country where there are reasonable grounds to believe that to do so may 'give effect' to a human rights violation by or in that country (eg, by admitting to evidence material obtained in a foreign country in violation of the right to protection from cruel treatment or punishment).

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<sup>1</sup> Opened for signature 19 December 1966, 999 UNTS 171 (entered into force generally 23 March 1976 and for Australia 13 August 1980).

<sup>2</sup> Opened for signature 16 December 1966, 993 UNTS 2 (entered into force generally 3 January 1976 and for Australia 10 March 1976).

<sup>3</sup> Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981 and for Australia 28 July 1983).

<sup>4</sup> Opened for signature 21 December 1965, 660 UNTS 195 (entered into force generally 4 January 1969 and for Australia 30 September 1975).

<sup>5</sup> Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force generally 26 June 1987 and for Australia 8 July 1989).

<sup>6</sup> Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force generally 2 September 1990 and for Australia 17 December 1990).

<sup>7</sup> See, for example, ICCPR art 2; ICESCR art 2. See also UN Human Rights Committee, *General Comment 31: Nature of the Legal Obligation Imposed on State Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004); UN Committee on Economic, Social and Cultural Rights, *General Comment 15: The Right to Water*, UN Doc E/C.12/2002/11 (2002) [17]-[29].

### Issue 1: Objects of the *Mutual Assistance Act*

For the reasons discussed above, the HRLRC considers that the objects of the *Mutual Assistance Act* should include compliance with Australia's obligations under international human rights law.

### Issue 3: Grounds of Refusal

Before rendering mutual assistance to a foreign country, the Minister must consider the grounds for refusing requests provided for under s 8 of the *Mutual Assistance Act*. Some of these considerations are mandatory grounds for refusal (such as the request relating to the prosecution or punishment of a person for a political offence), while others are discretionary (such as that the request could prejudice an Australian criminal investigation or proceeding).

The HRLRC considers that, consistent with its obligations under international human rights law, Australia should retain and ensure a broad and effective range of safeguards in the mutual assistance process.

In particular, the HRLRC considers that the following mandatory grounds for refusal should be added to s 8 of the Act:

1. **The request relates to the investigation, prosecution or punishment of an offence in respect of which the death penalty may be imposed.** Article 6 of the *ICCPR* provides that every person has the inherent right to life. It is strongly arguable that this right imposes a non-derogable obligation to refuse to provide mutual assistance to a foreign country in circumstances where it is foreseeable that the person may be subject to the death penalty if assistance was provided.<sup>8</sup> This is discussed in more detail below.
2. **The provision of assistance may result in a person being subject to cruel, inhuman or degrading treatment or punishment.** Article 7 of the *ICCPR* enshrines the right to be free from torture or cruel, inhuman or degrading treatment or punishment. In *General Comment 20*, the UN Human Rights Committee stated that this right imposes a non-derogable obligation not to extradite a person to a country in circumstances in which it is foreseeable that the person may be subject to cruel, inhuman or degrading treatment or punishment.<sup>9</sup> This jurisprudence was further developed by the Committee in *General Comment 31* in which it was stated that:

The article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative

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<sup>8</sup> See, eg, *Judge v Canada* (HRC 829/98) which confirmed this obligation in respect of extradition.

<sup>9</sup> UN Human Rights Committee, *General Comment No 20, Replaces General Comment 7 Concerning the Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment* (1992) [9].

authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.<sup>10</sup>

The obligation arising under art 7 of the *ICCPR* is in addition to the obligation arising under art 3 of the *CAT*, which specifically refers to the prohibition on a State Party extraditing a person to another State 'where there are substantial grounds for believing that he would be in danger of being subjected to torture'.<sup>11</sup> Again, this is a non-derogable obligation.

The HRLRC considers that the international human rights obligations relating to extradition may be analogized and apply to the provision of mutual assistance.

3. **The provision of assistance may result in the person being detained in conditions which violate the inherent dignity of the human person.** Article 10 of the *ICCPR* provides that all persons deprived of their liberty shall be treated with humanity and respect for their inherent dignity. Read in conjunction with art 2, this provision imposes an obligation on Australia not to provide mutual assistance to a country in circumstances in which it is foreseeable that the person will be deprived of their liberty and that the conditions of detention will violate that person's humanity and inherent dignity. In a series of determinations, the UN Human Rights Committee has held that, in order to satisfy the requirements of art 10, conditions of detention should, at the very least, be consistent with the *United Nations Standard Minimum Rules for the Treatment of Prisoners*.<sup>12</sup> This means that Australia is under an obligation not to provide mutual assistance unless it is satisfied that the conditions of the person's detention will comply with the *Standard Minimum Rules*.
4. **The provision of assistance may result in the person being charged or convicted in relation to an offence which is incompatible with international human rights norms** (eg, prosecution for the offence of engaging in consensual homosexual activity).

In respect of all of the existing and proposed grounds of refusal, the HRLRC considers that the Act should clearly state that they apply to the investigation, prosecution and punishment of an offence.

## Issue 5: Double Jeopardy

Section 8(1)(f) of the *Mutual Assistance Act* provides that a request for mutual assistance must be refused if 'the request 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.' This provision reflects the norm against 'double jeopardy'.

The principle against 'double jeopardy' is also enshrined in art 14(7) of the *ICCPR*, which provides that '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 the law and penal procedure of each country.' In *General Comment 13*, the UN Human Rights Committee stated that the norm against double jeopardy prohibits re-trials pursuant to the principle of *ne bis in idem* (ie, a person may not be prosecuted twice

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<sup>10</sup> UN Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev 1/Add.13 (2004) [12].

<sup>11</sup> See also *BS v Canada* (CAT 166/00).

<sup>12</sup> See, eg, *Mukong v Cameroon* (HRC 458/91); *Potter v New Zealand* (HRC 632/95).

for the same offence), but may permit the resumption of a trial in exceptional circumstances.<sup>13</sup> Although the Committee has held that art 14(7) only prohibits double jeopardy with regard to an offence adjudicated in a given state and does not prohibit prosecution in a state other than the first-prosecuting state,<sup>14</sup> the more recent *Rome Statute of the International Criminal Court* provides that, pursuant to arts 17(1)(c) and 20, a person must not be tried for conduct which formed the basis of crimes for which the person has been convicted or acquitted by another court or tribunal (subject to limited exceptions). Australia has ratified the *Rome Statute*.

In the HRLRC's view, the norm against 'double jeopardy' should be:

1. Retained as a mandatory ground of refusal where the request relates to the prosecution of a person for an offence for which the person has been acquitted, pardoned or punished in the requesting country; and
2. Added as a mandatory ground of refusal where the request relates to the prosecution of a person for an offence for which the person has been acquitted, pardoned or punished in a country other than the requesting country.

### **Principle C: Grounds of Refusal in Death Penalty Matters**

The *Mutual Assistance Act* currently provides, at s 8(1A), that a request for assistance must be refused if it relates to the prosecution or punishment of a person for an offence which may carry the death penalty, unless the Attorney-General is of the opinion that special circumstances exist justifying the provision of assistance. Section 8(1B) of the Act provides that the provision of assistance may be refused if the Attorney-General believes that it may result in the imposition of the death penalty and the circumstances of the case warrant refusal, having regard to the interests of international criminal co-operation.

As discussed above, art 6 of the *ICCPR* provides that every person has the inherent right to life, which has been held by the UN Human Rights Committee to impose a non-derogable obligation not to extradite a person to a foreign country in circumstances where it is foreseeable that the person may be subject to the death penalty.<sup>15</sup> In the HRLRC's view, this prohibition extends to the provision of mutual assistance, with the Committee stating that 'States parties that have abolished the death penalty have an obligation [under art 6(1)] to so protect in all circumstances... For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application.'<sup>16</sup>

In addition to being a State party to the *ICCPR*, Australia has ratified the *Second Optional Protocol to the ICCPR Aiming at the Abolition of the Death Penalty*, which contains a preambular recognition that 'all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life'. The *Second Optional Protocol* requires Australia to take 'all necessary measures to abolish the death penalty within its jurisdiction', which arguably extends to taking all necessary measures within its control (including the refusal of mutual assistance in death penalty matters) to prevent the imposition of the death penalty by a foreign country.

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<sup>13</sup> UN Human Rights Committee, *General Comment 13: Equality before the Courts and the Rights to a Fair and Public Hearing by an Independent Court Established by Law* (1984) [19].

<sup>14</sup> See, eg, *AP v Italy* (HRC, 204/86) [7.3] and *ARJ v Australia* (HRC, 692/96) [6.4].

<sup>15</sup> See, eg, *Judge v Canada* (HRC 829/98).

<sup>16</sup> *Judge v Canada* (HRC 829/98) [10.4].

Having regard to the non-derogable nature of the right to life, the desirability of abolishing the death penalty in all jurisdictions, and Australia's obligation to take all measures necessary to achieve such abolition, the HRLRC considers that s 8 of the *Mutual Assistance Act* should be amended to provide that a request by a foreign country for assistance in respect of an investigation of, or prosecution or punishment for, an offence in relation to which the death penalty may be imposed must be refused unless the provision of assistance would assist the defence. That is, it should be mandatory to refuse assistance in any circumstances where such assistance may contribute to or result in the death penalty being imposed against a person.

## **Issue 22: Use of Foreign Evidence**

Where Australia receives evidence from a foreign country for use in domestic proceedings, the *Foreign Evidence Act 1994* (Cth) applies.

Broadly, the *Foreign Evidence Act* permits the adduction of foreign evidence in domestic proceedings if the evidence would have been admissible if it had been adduced from the person at the proceeding (s 24(2)(b)) and justice would be served by the admission of the evidence (s 25(1)). Section 25(2) of the Act then sets out a range of considerations to which a court should have regard in determining whether justice would be better served by the admission or exclusion of the foreign evidence.

Section 26 of the Act limits the court's discretion to exclude evidence in proceedings relating to a range of terrorism and security-related offences. Foreign evidence may only be excluded in such proceedings where 'the court is satisfied that adducing the foreign material would have a substantial adverse effect on the right of a defendant in the proceeding to receive a fair hearing'.

In the HRLRC's view, the *Foreign Evidence Act* should be amended such that the exclusion of any evidence obtained pursuant to or in the context of a serious human rights violation is mandatory and not subject to limitation or exception.

The exclusion from judicial proceedings of evidence obtained as a result of torture is required by art 15 of the CAT. The rule of exclusion applies equally whether the forum State or another State was responsible for the torture.<sup>17</sup> Customary international law also requires the exclusion from judicial proceedings of evidence obtained as a result of torture.<sup>18</sup>

International law and jurisprudence also requires the exclusion of evidence that, although not obtained as a result of torture, was obtained in the context of cruel, inhuman or degrading treatment or punishment. The *United Nations Declaration against Torture* declares in art 12 that any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment may not be invoked as evidence against the person concerned.<sup>19</sup> The UN Human Rights Committee holds the view that evidence obtained as a result of cruel, inhuman or degrading treatment should be excluded from judicial proceedings in order to discourage violations of art 7 of the ICCPR (prohibition on torture and

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<sup>17</sup> *A v Secretary of State for the Home Department* (No. 2) [2006] 1 All ER 575; Tobias Thienel, 'The Admissibility of Evidence Obtained by Torture under International Law' (2006) 17 *European Journal of International Law* 349, 360.

<sup>18</sup> See the authorities collected in Nicholas Grief, 'The Exclusion of Foreign Torture Evidence: A Qualified Victory for the Rule of Law' (2006) 2 *European Human Rights Law Review*, 201, 214-215; and Tobias Thienel, 'The Admissibility of Evidence Obtained by Torture under International Law' (2006) 17 *European Journal of International Law* 349, 364-5.

<sup>19</sup> *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, General Assembly Resolution 3452, Annex, 9 December 1975.

other cruel, inhuman or degrading treatment) and article 14(3)(g) of the *ICCPR* (no compulsion to confess guilt).<sup>20</sup> The International Commission of Jurists has declared that evidence which is obtained by means which constitute a serious violation of human rights is never admissible.<sup>21</sup>

## **Conclusion**

In the HRLRC's view, it is imperative that Australia's mutual assistance law and practice contain mechanisms and safeguards to ensure that each of the human rights obligations referred to above is respected, protected and fulfilled.

Please contact me on (03) 9225 6695 if you would like to discuss this submission further.

Yours sincerely

Philip Lynch  
Director

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<sup>20</sup> UN Human Rights Committee, *General Comment No 20, Replaces General Comment 7 Concerning the Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment* (1992) [12]; UN Human Rights Committee, *General Comment No 13: Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law* (1984) [14].

<sup>21</sup> International Commission of Jurists, *Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism* (28 August 2004) [7].