

26 May 2020

Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Committee Secretary,

Question on Notice

This letter responds to the Committee's request for examples of the Mutual Legal Assistance Treaty (MLAT) processes hindering investigations, leading to prosecutions failing and/or charges being withdrawn.

(1) Use carriage service to threaten to kill – withdrawal of prosecution on 16 counts

Between 2013 and 2015, the alleged offender used the on-line social media platform 'Facebook' to threaten to kill and intimidate a victim. The offender created multiple Facebook accounts in false names and sent the victim threats and pictures of the victim's deceased relatives. The offender also created a Facebook account in the victim's own name and sent themselves harassing messages purporting to be the victim. The offender applied for an AVO against the victim, causing the victim considerable expense and hardship. The offender also used Facebook to invite persons to the victim's residence for sexual activity.

Facebook provided I.P. address details that investigators used to identify the offender by linking Facebook accounts to his computer. However, the addresses were provided as 'Intelligence only' and did not provide a statement/evidentiary certificate for production at court.

The accused was charged with 22 offences in 2015. The I.P. logs provided by Facebook linking the offender to the accounts could not be produced in the court proceedings. Investigators submitted an MLAT request for all accounts created by the offender in 2015 and to Google to link the email address used in the creation of the accounts to the offender. The prosecution sought an estimated completion date for the request. A completion date could not be provided.

The MLAT request was ultimately complied with in 2019. As a result of the delay, 16 charges were dropped. The offender was convicted of six out of the 22 offences.

(2) Homicide Investigation – delay potentially hindered investigation

In June 2014, an MLAT was requested for information from a US Mobile Carrier to assist a NSW homicide investigation. The investigator was told it would take six to 12 months to process the request. The information was finally received in February 2017. The information provided new lines of enquiry.

Had the MLAT information been received earlier, investigators would have been able to obtain additional supporting information for the investigation. Some of this information was lost as data retention legislation only requires providers in Australia to hold certain types of data for two years.

If the MLAT information was received sooner, the witnesses who police identified from that information may have been better able to recall information in relation to the incident.

(3) Stalking/Intimidation/Threats – ongoing delay is preventing prosecutorial action

A victim of domestic violence and sexual assault has been stalked, intimidated, harassed and sent sexualised images for about a year and a half using a social media application. The provider is based in America. Police suspect they know the identity of the offender, however, have insufficient evidence to obtain a search warrant or commence a criminal prosecution.

The offender is using accounts in false names to send messages and abusive/sexualised content to the victim. A search warrant was refused as police had insufficient evidence to tie the offender to the social media application. There is an enforceable AVO between the victim and the suspected offender, however, police do not have enough evidence to charge the offender.

In April 2019, an MLAT request for information was submitted to the social media provider. Police are still awaiting a response to this request. Follow up was conducted in May 2019, twice in July 2019, twice in August 2019, September 2019, November 2019, February 2020, March 2020, April 2020 and in May 2020. In May 2020, investigators received correspondence from an Australian MLAT representative to say they are not able to pressure US authorities to expedite this matter. No explanation for the delay was provided, nor has a timeframe been offered

The content the victim is receiving on an ongoing basis is having a significant impact on their mental health. **Police are unable to stop the offending due to the inability to obtain the required evidence from the overseas provider as a result of delays in the MLAT process.**

(4) Homicide Investigation – delay potentially hindered investigation

Since about late 2018, attempts have been made to progress an MLAT request in relation to the deceased victim's social media content. She was heavily engaged in social media use and may have contacted / met her killer through use of it, on the night she was last seen. NSW Police are yet to be supplied anything and have been provided with varying explanations as to what the difficulties are in provisioning the material.

It has not led to the withdrawal of a prosecution, but the real impact is simply unknown at this time. At the very least, the delay in this process may adversely impact on the progress of this murder investigation.

(5) Counter Terrorism Investigation – delay meant all evidence was not available for court trial

The offence involved acts in preparation of a terrorist act which occurred in 2016. The MLAT process commenced in 2017. A trial concluded in April 2020 with conviction – MLAT still not yet completed.

Relevantly, information was sought from authorities overseas regarding the arrest and detention of one of the suspects 10 months prior to the offence occurring in Australia. The MLAT process was not completed by trial.

While this did not result in a failed prosecution, it is an example of serious shortcomings in the MLAT process.

The NSW Police Force is somewhat limited in obtaining information regarding delays experienced with the MLAT process and final outcomes as illustrated above. The process involved in obtaining requested information does not provide certainty of the timely receipt of requested information.

Under the International Production Order regime, we believe that this will change by enhancing our ability to gain timely access to electronic information held overseas to support the investigation and prosecution of serious crime in this State.

Yours faithfully,

Michael Fitzgerald APM
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Commander
Forensic Evidence & Technical Service Command
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