



Promoting and protecting the rights of the individual:

The Extradition and Mutual Assistance in Criminal Matters Amendment Bill 2011

Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs

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Who we are

Background

The Australian Lawyers Alliance is the only national association of lawyers and other professionals dedicated to protecting and promoting justice, freedom and the rights of individuals. We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief. The Lawyers Alliance started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

Corporate Structure

APLA Ltd, trading as the Australian Lawyers Alliance, is a company limited by guarantee with branches in every state and territory of Australia. We are governed by a board of directors made up of representatives from around the country. This board is known as the National Council. Our members elect one director per branch. Directors serve a two-year term, with half the branches holding an election each year. The Council meets four times each year to set the policy and strategic direction for the organisation. The members also elect a president-elect, who serves a one-year term in that role and then becomes National President in the following year. The members in each branch elect their own state/territory committees annually. The elected office-bearers are supported by ten paid staff who are based in Sydney.

Funding

Our main source of funds is membership fees, with additional income generated by our events such as conferences and seminars, as well as through sponsorship, advertising, donations, investments, and conference and seminar paper sales. We receive no government funding.

Programs

We take an active role in contributing to the development of policy and legislation that will affect the rights of individuals, especially the injured and those disadvantaged through the negligence of others. The Lawyers Alliance is a leading national provider of Continuing Legal Education/Continuing Professional Development, with some 25 conferences and seminars planned for 2008. We host a variety of Special Interest Groups (SIGs) to promote the development of expertise in particular areas. SIGs also provide a focus for education, exchange of information, development of materials, events and networking. They cover areas such as workers' compensation, public liability, motor vehicle accidents, professional negligence and women's justice. We also maintain a database of expert witnesses and services for the benefit of our members and their clients. Our bi-monthly magazine, *Precedent*, is essential reading for lawyers and other professionals keen to keep up to date with developments in personal injury, medical negligence, public interest and other, related areas of the law.

Introduction

The Australian Lawyers Alliance (“**the ALA**”) welcomes the opportunity to contribute a submission to the *Inquiry into the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011* to the House of Representatives Standing Committee on Social Policy and Legal Affairs.

The amendments contained in the proposed Bill (“**the Bill**”) and explained within the Explanatory Memorandum (“**the Memorandum**”) are extensive. Thus, the ALA will not address all suggested amendments.

The ALA is especially concerned with the practical operation of the proposed amendments surrounding human rights, the application of the death penalty, and exposure to torture and cruel, inhuman and degrading punishment. We will therefore address these areas.

a. The international framework

The ALA is concerned to ensure Australia’s relationships with its neighbours are reflective of its commitments under international human rights law. In particular, this includes the:

- *International Covenant of Civil and Political Rights;*
- *Optional Protocol to the International Covenant of Civil and Political Rights;*
- *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty;*
- *International Covenant of Economic, Social and Cultural Rights;*
- *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”);* and
- *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (signed in 2009; still to be ratified¹).

The ALA submits that many of the suggested amendments to both the *Extradition Act 1988* (“**the Act**”) and the *Mutual Assistance in Criminal Matters Act 1987* (“**the MA Act**”) will bring Australia closer to adherence to its obligations under international human rights law.

The ALA wishes to focus on specific areas of achievement, concern and omission within the proposed Bill, rather than outlining the extensive normative framework of international human rights law. The ALA is confident that other organisations have already previously submitted a comprehensive coverage of the normative framework on these issues.²

¹ See Australian Human Rights Commission, *Optional Protocol to the Convention Against Torture* (2011).

² See, for example, PILCH, *Applying a Human Rights Approach to Extradition and Mutual Assistance: Submission to the Legislation and Policy Section, International Crime Cooperative Division of the Attorney-General’s Department on the Exposure Draft of the Extradition and Mutual Assistance in Criminal Matters Legislation Bill 2009*, August 2009. Accessed 20 July 2011 at [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Public+Interest+Law+Clearing+House+\(VIC\)+Inc.pdf/\\$file/Public+Interest+Law+Clearing+House+\(VIC\)+Inc.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Public+Interest+Law+Clearing+House+(VIC)+Inc.pdf/$file/Public+Interest+Law+Clearing+House+(VIC)+Inc.pdf)

A. The Extradition Act 1988

ALA welcomes the amendments to the *Extradition Act 1988* (“the Act”) specifically in relation to:

- Political offences; and
- Sex and sexual orientation.

The ALA submits that these amendments should be retained.

The ALA recognises the progressive nature of the amendments in relation to:

- Torture;
- The death penalty; and
- Practical operation in extradition agreements.

However, the ALA submits further changes need to be made in these areas to fulfil obligations under international human rights law.

a. Political offences

The expansion of the definition of political offences, through repeal of section 5, paragraphs (a) – (d) marks a positive step in providing more international, expansive scope to political offences.

The ALA submits that the amendments regarding political offences to section 5, paragraphs (a) – (d) of the *Extradition Act 1988* should be retained.

b. Sex and sexual orientation

The insertion of the words ‘sex’ and ‘sexual orientation’ into paragraph 7(b) and (c) of the Act is a positive step in recognising the discrimination that can occur on the basis of sex and sexual orientation.

The ALA submits the insertion of the words ‘sex, sexual orientation’ into paragraph 7(b) and (c) of the *Extradition Act 1988* should be retained.

c. Torture

The insertion of s15B(3) provides some positive movement regarding the danger of being subjected to torture, however the ALA submits that further clarification of the section is required to characterise the test as being of mandatory refusal to more appropriately fulfil our obligations under international human rights law.

The new section 15B (3) of the Act provides that:

(3) The Attorney-General ***may only determine that the person be surrendered to the extradition country concerned if:***

(a) ***the Attorney-General does not have substantial grounds for believing that, if the person were surrendered to the extradition country, the person would be in danger of being subjected to torture.***

Firstly, the word 'torture' should be defined under section 5 of the Act. Torture should be defined as outlined in Article 1(1) of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*:

The term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.³

The ALA submits that 'torture' should be defined within section 5 of the *Extradition Act 1998* in accordance with Article 1(1) of CAT.

Secondly, Article 7 of the *International Covenant on Civil and Political Rights* ("ICCPR") provides that:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

While the insertion of s15B(3)(a) does provide an expansion of the protection of the individual, through a specific reference to torture this is incomplete, as it fails to include ensuring that individuals will not be subjected to cruel, inhuman or degrading treatment or punishment.

The ALA submits that the words 'or to cruel, inhuman or degrading treatment or punishment' should be inserted into section 15B (3)(a) of the *Extradition Act 1988*, in keeping with Article 7 of ICCPR.

³ Article 1(1), *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

Thirdly, Article 3 of CAT provides that:

- (1) **No State Party shall expel, return or extradite a person to another State where there are *substantial grounds* for *believing* that he *would be in danger of being subjected to torture*.**
- (2) *For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.*

The new section 15B (3) also still provides ministerial discretion on the issue through the use of the words 'may only'. Instead of ministerial discretion being exercised regarding the surrender of a person, if there were substantial grounds for believing that the person would be in danger of being subjected to torture, the requirement of mandatory refusal would be more consistent with Article 3(1) of CAT.

The ALA submits that section 15B (3)(a) of the *Extradition Act 1988* should provide that:

The Attorney-General must not surrender a person if:

- (a) ***there are substantial grounds for believing that, if the person were surrendered to the extradition country, the person would be in danger of being subjected to torture.***

d. The death penalty

The insertion of s15B (3)(b) does provide explicit reference to the death penalty, and therefore a more explicit protection for individuals, however the ALA are concerned regarding a number of areas within this provision.

Article 6(1) of the ICCPR provides:

*Every human being has the **inherent right to life**. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

Article 1 of the Second Optional Protocol to the International Covenant on Civil and Political Rights, provides:

- (1) **No one within the jurisdiction of a State Party to the present Protocol shall be executed.**
- (2) **Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.**

Australia, as a State Party to both of these agreements, has an obligation to take all necessary measures to protect individuals from the death penalty. However, the ALA submits that, while ministerial discretion has been reduced through the insertion of this new section, this is an area where mandatory refusal would be more appropriate to comply with our obligations under international human rights law.

The new section 15B (3) provides:

- (3) *The Attorney-General **may only determine** that the **person be surrendered** to the extradition country concerned if:*
- (a) *the Attorney-General **does not have substantial grounds** for believing that, if the person were surrendered to the extradition country, the person would be in **danger of being subjected to torture**; and*
 - (b) *the **Attorney-General is satisfied** that, on surrender to the extradition country, **there is no real risk that the death penalty will be carried out upon the person in relation to any offence.***

The ALA welcomes the use of the phrase ‘real risk’ regarding the death penalty, as it is in conformity with international jurisprudence. For example, the UN Human Rights Committee in the case of *Judge v Canada* recognised that:

*For countries that have **abolished the death penalty**, there is **an obligation not to expose a person to the real risk of its application.***

Furthermore, the death penalty has previously been described as cruel, inhuman and degrading punishment⁴. Movements in international law and practice would appear to suggest there is a transition towards the death penalty being considered torture under customary law in the near future. As an International Bar Association report cites: ‘custom is rapidly changing towards a position in favour of worldwide abolition’⁵. 139 countries have now become abolitionist in law or practice – up from 108 countries in 2001.⁶ Amnesty International recorded that only 19 countries reportedly executed prisoners in 2009 - the lowest number ever recorded. In 2010, there were 23.⁷

⁴ See case of South Africa See *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1; 2011 (7) BCLR 651 (CC) (6 June 1995). Accessed 29 July 2011 at <http://www.saflii.org/za/cases/ZACC/1995/3.html>

⁵ International Bar Association (UK), *The Death Penalty Under International Law – A Background Paper to the IBAHRI Resolution on the Abolition of the Death Penalty*, May 2008. Accessed 23 July 2011 at www.ibanet.org

⁶ Amnesty International, *Death Sentences and Executions 2010* (2011) 6. Accessed 19 July 2011 at <http://www.amnesty.org/en/library/asset/ACT50/001/2011/en/ea1b6b25-a62a-4074-927d-ba51e88df2e9/act500012011en.pdf>

⁷ *Ibid.*

It could therefore be argued that Article 3 of CAT applies to the use of the death penalty, and the requirement to apply mandatory refusal, such as for danger of being subjected to torture. Article 3, provides that:

(1) No State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

The Explanatory Memorandum provides that:

*'While this new provision will result in the foreign country not being required to give a speciality assurance, this will not impact on a person's rights. The rule of speciality [assurances] is a standard provision incorporated into the majority of Australia's bilateral extradition treaties. Therefore, if the Attorney-General has **substantial concerns that the person would be in danger of being subjected to torture, or if the Attorney General is satisfied that there is a real risk that the death penalty will be carried out, the Attorney-General will not be able to surrender the person***⁸.

It is also questionable as to what role undertakings will take in the Attorney-General's determination of 'no real risk'.

Human Rights Watch, in a report on torture, expressed views on undertakings:

Because the international ban on torture is absolute and transfers to risk of torture are patently illegal, many sending governments have sought "diplomatic assurances" from the receiving country that the suspects would not be tortured or ill-treated upon return.

In contexts where torture is a serious and persistent problem, or there is otherwise reason to believe that particular individuals will be targeted for torture and ill-treatment, diplomatic assurances do not and cannot prevent torture.

Sending countries that rely on such assurances are either engaging in wishful thinking or using the assurances as a fig leaf to cover their complicity in torture and their role in the erosion of the international norm against torture. The practice should stop.⁹

The ALA is also concerned about the potential for ministerial discretion to be exercised, especially in conjunction with the operation of anti-terrorism laws. That is, that a person wanted in relation to terrorism offences in a country with the death penalty might be extradited by Australia.

⁸ The Parliament of the Commonwealth of Australia, House of Representatives, *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011 - Explanatory Memorandum* (2010-2011), 19 [2.44], [2.45]. Accessed 17 July 2011 at <http://www.aph.gov.au/house/committee/spla/Bill%20Extradition/Explanatory%20Memorandum.pdf>

⁹ Human Rights Watch, *Still At Risk: Diplomatic Assurances No Safeguard Against Torture* (April 2005). Accessed 23 July 2011 at <http://www.hrw.org/en/node/11783/section/3>

The ALA submits that section 15B (3)(a) of the *Extradition Act 1988* should provide that:

(3) The Attorney-General must not surrender a person if:

(b) There is a real risk that the death penalty will be carried out upon the person in relation to any offence.

e. Practical operation in extradition agreements

A 2011 Amnesty International report on death sentencing outlines that the Asia-Pacific region still accounts for the highest number of executions in the world¹⁰. In 2010, the death penalty was applied in 9 countries in the Asia Pacific, and also the USA¹¹. In addition, 11 countries in the Asia Pacific imposed death sentences but continued not to carry out executions in 2010¹².

Australia currently has bilateral agreements to extradite with 59 countries¹³. Three of these countries implemented the death penalty in 2010 – Japan (2); Malaysia (more than 1); USA (46). Nine countries that Australia currently has extradition agreements with imposed new death sentences in 2010: India (more than 105); Indonesia (more than 7); Japan (14); Jordan (9); Lebanon (more than 12); Malaysia (more than 114); South Korea (4); Thailand (more than 7); United Arab Emirates (more than 28) and the United States of America (more than 110).

Many of Australia's extradition agreements provide that extradition will not be granted if the offence carries the death penalty, unless the State gives an undertaking that the death

¹⁰ Amnesty International, above n 6, 17.

¹¹ These countries were: Bangladesh (9); Japan (2); North Korea (at least 60; Malaysia (at least 1); Taiwan (4); China (estimated to be in the thousands); Malaysia (figure unknown); Singapore (figure unknown); Vietnam (figure unknown). See Amnesty International, above n 6, 17. The USA executed 52 people. See Amnesty International, above n 6, 14.

¹² These countries were: Afghanistan, Brunei Darussalam, India, Indonesia, Laos, Maldives, Myanmar, Pakistan, South Korea, Sri Lanka and Thailand. See Amnesty International, above n 6, 18.

¹³ These are Argentina, Austria, Belgium, Bosnia and Herzegovina, Brazil, Canada, Cambodia, Chile, Cook Islands, Croatia, Czech Republic, Ecuador, Estonia, Fiji, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kiribati, Korea, Kyrgyzstan, Latvia, Lebanon, Lithuania, Luxembourg, Macedonia, Malaysia, Marshall Islands, Mexico, Monaco, Montenegro, Nauru, Netherlands, Norway, Papua New Guinea, Paraguay, Philippines, Poland, Portugal, Samoa, Serbia, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Sweden, Switzerland, Thailand, Tonga, Turkey, Tuvalu, United Arab Emirates, United Kingdom, United States of America, Uruguay, Vanuatu and Venezuela. See Attorney General's Department, Australian Government, *Australia's bilateral extradition agreements*. Accessed 19 July 2011 at

http://www.ag.gov.au/www/agd/agd.nsf/Page/Extraditionandmutualassistance_Relationshipwithothercountries_Australianbilateralextraditionagreements & <http://www.comlaw.gov.au/Search/extradition%20regulations>

penalty will not be imposed, or will not be carried out. It is still questionable whether these undertakings are enforceable.

The ALA is concerned about the practical operation of these amendments, especially in the context of the further development of bilateral extradition treaties, as well as new requests for mutual assistance, in the region.

The ALA submits that the Australian government should continue to press for abolition of the death penalty in the Asia-Pacific region and exercise caution in the establishment of extradition treaties with nations currently applying death sentencing.

B. *Mutual Assistance in Criminal Matters Act 1987*

ALA welcomes the amendments to the MA Act specifically in relation to:

- Expansion of protection for political offences;
- Sexual orientation;
- Torture; and
- The death penalty.

a. Expansion of protection for political offence

The ALA welcomes the expansion of the Attorney-General's mandatory refusal to a request for assistance regarding a request made for the purpose of prosecuting, punishing or otherwise prejudicing a person on account of their race, sex, religion, nationality or political opinions.

The expansion of the mandatory refusal to also include 'investigating' stages, in paragraph 8(1)(c) of the MA Act will provide greater protections to individuals.

The ALA submits that the amendment to paragraph 8(1)(c) of the *Mutual Assistance in Criminal Matters Act 1987*, inserting the word 'investigating', should be retained.

b. Sexual orientation

The ALA welcomes the insertion of the words 'sexual orientation' into paragraph 8(1)(c) of the MA Act.

This amendment acknowledges the persecution and discrimination that individuals may face on the basis of sexual orientation, and provides greater scope for individuals' protection from discrimination.

The ALA submits that the amendment to paragraph 8(1)(c) of the *Mutual Assistance in Criminal Matters Act 1987*, inserting the words 'sexual orientation' should be retained.

c. Torture

The ALA welcomes the establishment of a mandatory refusal for requests for assistance if there are substantial grounds for believing that, if the request was granted, the person would be in danger of being subjected to torture. The insertion of paragraph 8(1) (ca), has the effect that the legislation would read:

(1) A request by a foreign country for assistance under this Act ***shall be refused*** if, in the opinion of the Attorney-General:

(ca) there are ***substantial grounds for believing that, if the request was granted, the person would be in danger of being subjected to torture.***

The insertion of this paragraph aligns the legislation far more closely with international human rights law, in particular, Article 7 of ICCPR; the CAT, and marks a distinct improvement from the previous section, wherein ministerial discretion, rather than human rights obligations, played a larger role.

The ALA submits that the insertion of subsection (ca) to section 8(1) should be preserved as it encourages stronger adherence to international human rights obligations.

However, to ensure integrity of construction, the ALA submits, as noted in relation to the *Extradition Act 1988*, that a definition of 'torture' should be provided within section 3 of the MA Act as per its definition within Article 1(1) of CAT.

The ALA submits that 'torture' should be defined within section 3 of the *Mutual Assistance in Criminal Matters Act 1987* as per its definition in Article 1(1) of CAT.

Article 7 of the ICCPR provides that:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

While the MA Act also provides a discretionary ground for refusing assistance if the provision of the assistance would, or would be likely to, prejudice the safety of the person¹⁴, there is currently no explicit provision in the MA Act regarding ‘cruel, inhuman or degrading treatment or punishment’.

The ALA submits that the safety of the individual, as a lower threshold, should remain under ministerial discretion. However, the issue of ‘cruel, inhuman or degrading treatment or punishment’ should fall under the category for mandatory refusal, as it is represented on par with torture in international human rights law. Therefore, the ALA submits it should be inserted into section 8(1)(ca) of the MA Act.

The ALA submits that ‘cruel, inhuman or degrading treatment or punishment’ should be inserted into section 8(1)(ca) of the *Mutual Assistance in Criminal Matters Act 1987*.

d. Death penalty

The ALA welcomes the expansion of the mandatory refusal for requests for assistance in relation to offences that carry the death penalty.

Previously, section 8(1A) of the Act provided that:

*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.***

The repeal of this section, and its replacement with the following section, does expand the mandatory refusal for requests for assistance at an earlier stage:

A request by a foreign country for assistance under this Act must be refused if:

- (a) the request relates to the **investigation, prosecution or punishment of:***
 - (i) a person **arrested or detained on suspicion of having committed an offence; or***
 - (ii) a **person charged with, or convicted of, an offence; and***
- (b) the offence is one 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.

In particular, the insertion of the word ‘investigation’ in section 8 (1A)(a) is significant in that it expands the stages at which mutual assistance may be refused.

¹⁴ See *Mutual Assistance in Criminal Matters Act 1987*, s 8(2)(e).

The insertion of the words 'a person arrested or detained on suspicion of having committed an offence' is significant as it reduces considerably the provision of information at a stage that could be prejudicial to an individual who may be exposed to the death penalty.

The effect of the amendment in repealing subsection 8(1A) from when the person is 'charged with, or convicted of', to instead being applicable when a person has been 'arrested or detained on suspicion of committing an offence', provides enlarged protection to individuals at a stage closer to investigation of the offence.

The ALA submits that the amendments to s8(1A) of the *Mutual Assistance in Criminal Matters Act 1987*, via inserting 'investigation' and 'arrested or detained on suspicion of having committed an offence' provides greater protections to individuals and should be retained.

The ALA is concerned about the lack of amendments to the MA Act regarding:

- Special circumstances;
- Double jeopardy; and
- Practical operation, intersection with other laws and the Bali Nine.

e. Special circumstances

The ALA is concerned about the discretionary power continuing to be granted to the Attorney-General regarding requests where the offence may carry the death penalty. The new section 8(1A) provides that:

A **request** by a foreign country for assistance under this Act **must be refused** if:

- (a) the request relates to the investigation, prosecution or punishment of:
 - (i) a person arrested or detained on suspicion of having committed an offence; or
 - (ii) a person charged with, or convicted of, an offence; and
- (b) the offence is one 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.**

The Explanatory Memorandum states that: 'special circumstances' are cited to include 'but are not limited to, circumstances where the assistance is **exculpatory** in nature or where the requesting country has **provided an undertaking that the death penalty will not be imposed**, or if it is imposed, will not be carried out'¹⁵.

¹⁵ The Parliament of the Commonwealth of Australia, House of Representatives, above n 8, 65.

The ALA submits that the exception of assistance that is exculpatory in nature should be retained. However, the ALA is concerned regarding the power of ministerial discretion where a country has provided an undertaking that the death penalty will not be imposed, or if it is imposed, will not be carried out.

Principally, the ALA is concerned with relying on undertakings of other countries, as there is no mechanism for enforceability of such undertakings.

Returning to the basics, the Attorney General's Department website it provides:

*Under Australian law, Australia can request mutual assistance from **any country** and receive a request from **any country**. This is different from extradition. **A country must be declared in Regulations to be an extradition country for Australia to be able to receive an extradition request from that country.**¹⁶*

Even if a country were to make an undertaking that the death penalty would not be imposed or carried out, if the Australian government were to refuse to mutually assist in such matters, this would send a much stronger and clearer message about Australia's commitment to abolishing the death penalty.

The ALA is also concerned about the practical operation of s8 (1A) in conjunction with the discretionary power in regards to double jeopardy.

f. Double jeopardy

The ALA is concerned with the repeal of the mandatory refusal for requests for assistance regarding the principle of 'double jeopardy'.

Currently, the law provides under section 8(1)(f) that:

- (1) A request by a foreign country for assistance under this Act **shall be refused** if, in the opinion of the Attorney-General:*
- (f) 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.*

The proposed amendments will provide under section 8(2)(c) instead that:

- (2) A request by a foreign country for assistance under this Act **may be refused** if, in the opinion of the Attorney-General:*
- (c) the request relates to the **investigation, prosecution or punishment** of a person for an offence in a case where:*

¹⁶ Australian Government, Attorney General's Department, *Mutual Assistance*, Last modified 22 March 2011. Accessed 27 July 2011 at http://www.ag.gov.au/www/agd/agd.nsf/Page/Extradition_and_mutual_assistanceMutual_assistance

(i) the person has been **acquitted or pardoned** by a competent tribunal or authority in the foreign country, or in Australia or another country; or

(ii) the **person has undergone the punishment provided by the law of the foreign country**, or of Australia or another country;

in respect of that offence or of another offence constituted by the same act or omission as that offence;

The Explanatory Memorandum provides that:

*Cases in which it **might be appropriate to provide mutual assistance despite a double jeopardy issue include** where there is **fresh evidence** that was **not available** at the original trial, or where there are **other circumstances** accepted in Australia as being **exceptions** to the double jeopardy principle.¹⁷*

The lack of clarity surrounding what ‘other circumstances accepted in Australia’ is particularly troubling. The ALA is particularly concerned about the potential for misuse of this section in regards to terrorism investigations.

Article 14(7) of the ICCPR 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.

The ALA submits that the new amendments be rejected and the current s 8(1)(f) be retained.

g. Practical operation, intersection with other laws and the Bali Nine

The ALA is also concerned regarding the intersection between the amendments and other laws, especially in relation to police-to-police, and agency-to-agency assistance. There is a distinct lack of clarity as to how these amendments will dovetail with other laws and regulations, for example, the *Australian Federal Police Act 1978*, the operation of the *AFP Practical Guidelines on International Police to Police Assistance in Death Penalty Charge Situations* (“**the Guidelines**”) and Australia’s many bilateral agreements and regulations with individual countries.

The operation of these laws came to the foreground in relation to the Bali Nine. The Bali Nine have also cast a spotlight on the gaps within the *Extradition Act 1988* and the *Mutual Assistance in Criminal Matters Act 1987*.

¹⁷ The Parliament of the Commonwealth of Australia, House of Representatives, above n 8, 65.

The Guidelines, which were amended as a direct result of the Bali Nine situation, have no legal enforceability.

The Guidelines should be amended to conform to international human rights law, and incorporated into legislation, potentially as an annexure or amendment to the *Australian Federal Police Act 1978*.

The ALA submits that the *AFP Practical Guidelines on International Police to Police Assistance in Death Penalty Charge Situations* should conform to standards of international human rights law, and be incorporated into legislation.

The proposed amendments also do not impact on voluntary offers of information, which is what occurred in the instance of the Bali Nine.

As Lorraine Finlay writes, in her article 'Exporting the Death Penalty? Reconciling International Police Cooperation and the Abolition of the Death Penalty in Australia':

*To prevent or restrict the sharing of information in these circumstances, the relevant legislation would need to extend beyond requests for information to also cover the voluntary provision of information.*¹⁸

Within the situation of the Bali Nine, the AFP stated that it was 'acting pursuant to the Memorandum of Understanding between the Government of the Republic of Indonesia and the Government of Australia on Combating transnational Crime and Developing Police Cooperation'¹⁹. This Memorandum of Understanding is not publicly available²⁰.

The ALA submits that there needs to be greater consistency between Australia's bilateral agreements with countries, and international human rights law.

The ALA submits that Australia's bilateral regulations on combating transnational crime should be reviewed to ensure compliance with international human rights law.

¹⁸ Lorraine Finlay, 'Exporting the Death Penalty? Reconciling International Police Cooperation and the Abolition of the Death Penalty in Australia' (2011) 33 *Sydney Law Review* 114.

¹⁹ *Rush v Commissioner of Police* (2006) 150 FCR 165 [25], [43] (Finn J). Cited in Finlay, above n 19, 99.

²⁰ Finlay, above n 19, 99.

C. Conclusion

Ultimately, while the proposed amendments recognise Australia's obligations under international human right law the amendments are still incomplete in terms of the protections that they can afford to both Australian citizens and non-citizens.

This may be remedied in part through implementing the changes suggested in this submission, which are provided in summary, as an annexure.

However, while the interest in this report and this inquiry has arguably been fuelled by the public furore surrounding the 'Bali Nine', it can be seen that the proposed amendments may not be sufficient to prevent a similar situation happening again.

Such legislative change needs to be dovetailed with influencing our neighbours in the Asia-Pacific ton an abolitionist policy on the death penalty. Ultimately, moving towards a stronger commitment to human rights needs to be shared by nations around us, and directly influencing their national policies may have greater impact than creating legal restrictions to avoid the death penalty.

Similarly, Australia's bilateral agreements and regulations with nations must enshrine principles of human rights law, such as avoiding the death penalty and the imposition of cruel, inhuman or degrading punishment.

Ultimately, human rights must be the basic operating foundational principle in our relationships with other countries, and this will be the best way to support individuals in our region.

Reference List

Acts

Extradition Act 1988

Mutual Assistance in Criminal Matters Act 1987

Bills

Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011

International law

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

International Covenant of Civil and Political Rights

Second Optional Protocol to the International Covenant on Civil and Political Rights

Journal articles

Lorraine Finlay, 'Exporting the Death Penalty? Reconciling International Police Cooperation and the Abolition of the Death Penalty in Australia' (2011) 33 *Sydney Law Review* 95 – 117.

Memorandum

The Parliament of the Commonwealth of Australia, House of Representatives, *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011 - Explanatory Memorandum* (2010-2011), 19 [2.44], [2.45]. Accessed 17 July 2011 at <http://www.aph.gov.au/house/committee/spla/Bill%20Extradition/Explanatory%20Memorandum.pdf>

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Australian Government, Attorney General's Department, *Mutual Assistance*, Last modified 22 March 2011. Accessed 27 July 2011 at

http://www.ag.gov.au/www/agd/agd.nsf/Page/Extradition_and_mutual_assistanceMutual_assistance

Australian Human Rights Commission, *Optional Protocol to the Convention Against Torture* (2011). Accessed 25 July 2011 at http://www.hreoc.gov.au/human_rights/opcat/index.html

Summary of Recommendations

The ALA submits that the amendments regarding political offences to section 5, paragraphs (a) – (d) of the *Extradition Act 1988* should be retained.

The ALA submits the insertion of the words ‘sex, sexual orientation’ into paragraph 7(b) and (c) of the *Extradition Act 1988* should be retained.

The ALA submits that ‘torture’ should be defined within section 5 of the *Extradition Act 1998* in accordance with Article 1(1) of CAT.

The ALA submits that the words ‘or to cruel, inhuman or degrading treatment or punishment’ should be inserted into section 15B (3)(a) of the *Extradition Act 1988*, in keeping with Article 7 of ICCPR.

The ALA submits that section 15B (3)(a) of the *Extradition Act 1988* should provide that:

The Attorney-General must not surrender a person if:

- (c) *there are substantial grounds for believing that, if the person were surrendered to the extradition country, the person would be in danger of being subjected to torture.*

The ALA submits that section 15B (3)(a) of the *Extradition Act 1988* should provide that:

(3) *The Attorney-General must not surrender a person if:*

- (d) *There is a real risk that the death penalty will be carried out upon the person in relation to any offence.*

The ALA submits that the Australian government should continue to press for abolition of the death penalty in the Asia-Pacific region and exercise caution in the establishment of extradition treaties with nations currently applying death sentencing

The ALA submits that the amendment to paragraph 8(1)(c) of the *Mutual Assistance in Criminal Matters Act 1987*, inserting the word 'investigating', should be retained.

The ALA submits that the amendment to paragraph 8(1)(c) of the *Mutual Assistance in Criminal Matters Act 1987*, inserting the words 'sexual orientation' should be retained.

The ALA submits that the insertion of subsection (ca) to section 8(1) should be preserved as it encourages stronger adherence to international human rights obligations.

The ALA submits that 'torture' should be defined within section 3 of the *Mutual Assistance in Criminal Matters Act 1987* as per its definition in Article 1(1) of CAT.

The ALA submits that 'cruel, inhuman or degrading treatment or punishment' should be inserted into section 8(1)(ca) of the *Mutual Assistance in Criminal Matters Act 1987*.

The ALA submits that the amendments to s8(1A) of the *Mutual Assistance in Criminal Matters Act 1987*, via inserting 'investigation' and 'arrested or detained on suspicion of having committed an offence' provides greater protections to individuals and should be retained.

The ALA submits that the new amendments be rejected and the current s 8(1)(f) be retained.

The ALA submits that the *AFP Practical Guidelines on International Police to Police Assistance in Death Penalty Charge Situations* should conform to standards of international human rights law, and be incorporated into legislation.

The ALA submits that Australia's bilateral regulations on combating transnational crime should be reviewed to ensure compliance with international human rights law.