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Joint Standing Committee on Treaties
Parliament House
Canberra ACT 2600

By post and email (jsct@aph.gov.au)

Dear Committee

Treaty on Mutual Assistance in Criminal Matters between Australia and Malaysia

The Law Institute of Victoria (LIV) has been invited to make a submission to the Joint Standing Committee on Treaties (Committee) in relation to its inquiry into the *Treaty between the Government of Australia and the Government of Malaysia on Mutual Assistance in Criminal Matters* (Mutual Assistance Treaty) and *Treaty between the Government of Australia and the Government of Malaysia on Extradition* (Extradition Treaty) and related Exchange of Notes (Notes). The LIV has reviewed the Mutual Assistance Treaty, Extradition Treaty and the Notes and provides the following comments for the Committee's consideration.

1. LIV Policy on the death penalty

The LIV has recently adopted a policy statement on the use of the death penalty (Policy Statement). A copy is attached.

The Policy states that in relation to mutual assistance in criminal matters and extradition:

5. *The LIV is opposed to the Australian Government, through the Australian Federal Police, providing mutual assistance in criminal matters to foreign jurisdictions which have the death penalty where such assistance may lead to the arrest of Australian resident for an offence subject to punishment by death, unless an appropriate undertaking between the Australian and foreign government is given.*
6. *The LIV supports the Australian Government's position that it will not extradite or transfer a non-Australian resident or Australian resident where such a person may face or has been sentenced to the death penalty in a foreign jurisdiction, unless an appropriate undertaking between the Australian and foreign government is given. Such an undertaking should expressly provide that the person the subject of the request will not face or be sentenced to the death penalty in the foreign jurisdiction.*

In its Policy Statement, the LIV also sets out its commitment to lobby the Australian Government to.

7. *... proactively seek extradition treaties and prisoner transfer agreements with those foreign jurisdictions with which treaties and agreements are not currently held. Such extradition treaties and prisoner transfer agreements should expressly provide that the person the subject of an extradition or prisoner transfer request will not face or be sentenced to the death penalty in the foreign jurisdiction.*

2. Mutual Assistance Treaty

The LIV is concerned that the Mutual Assistance Treaty only applies to international assistance the subject of a request and does not impose an obligation, or provide discretion, to limit mutual assistance in the form of ongoing intelligence sharing between foreign law enforcement agencies. The LIV also suggests that Australian Federal Police (AFP) Guidelines are inconsistent with the Mutual Assistance Treaty.

2.1 Assistance provided without a request

The scope of assistance permitted under the Mutual Assistance Treaty is limited by s. 8 of the *Mutual Assistance in Criminal Matters Act 1987* (Mutual Assistance Act) which provides that a request for mutual assistance *must* be refused if it relates to an offence for which the death penalty may be imposed in the foreign jurisdiction.

The object of the Mutual Assistance Act is to regulate the provision by Australia of international assistance in criminal matters when a request is made by a foreign country. Section 6 of the Mutual Assistance Act provides that the Act “does not prevent the provision or obtaining of international assistance in criminal matters other than assistance of a kind that may be provided or obtained under this Act”. However, not all international assistance is provided in relation to a request.

The Australian Federal Police (AFP) works closely on an ongoing basis with a number of foreign law enforcement agencies, particularly through its Law Enforcement Cooperation Program. The sharing of intelligence within this framework could potentially lead to death penalty charges being laid. The “Bali Nine” case provides a practical example. In this case, mutual cooperation involved the passing of intelligence by the AFP to the Indonesian National Police which resulted in the arrest and sentencing of two Australian citizens to the death penalty in Indonesia.

The LIV has reviewed the *Treaty between Australia and the Republic of Indonesia on Mutual Assistance in Criminal Matters* (1999) (Indonesian Treaty) and notes that it does not contain such a limitation as provided in the Mutual Assistance Treaty. While supporting the inclusion of this limitation, the LIV suggests that the Mutual Assistance Treaty does not restrict the provision of mutual assistance in circumstances where no request is provided. Accordingly, the LIV recommends that this type of international assistance should be subject to the limitations under in the Mutual Assistance Act.

2.2 AFP Guidelines

The LIV is concerned that the limitation on providing international assistance under the Mutual Assistance Treaty may be rendered ineffective due to the current *AFP Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations* (Guidelines) which set out the way in which the AFP conducts its operations.

The Guidelines limit action that may be taken where assistance is sought in relation to a matter in which a charge has been laid, but in cases where no charge has been laid the guidelines state that:

Police to police co-operation may continue on the present basis ie, the AFP may provide such assistance as requested, provided it meets existing policy guidelines, irrespective of whether the investigation may later result in charges being laid which may attract the death penalty.

In effect, the AFP can provide assistance without regard to whether a later death penalty charge may be laid. The LIV submits that the Guidelines are inconsistent with the Treaty. In practice, if the AFP adheres to the Guidelines there will be no refusal of assistance rendering the discretion to refuse of no practical use.

The LIV submits that the limited protection the Mutual Assistance Treaty offers in regard to refusing assistance prior to a charge being laid needs to be reflected in

Guidelines to be of any practical assistance. The LIV notes this concern was raised by Finn J in *Rush v Commissioner of Police* [2006] FCA 12 (23 January 2006) who stated:

...There is a 'need for the [Justice Minister] and the Commissioner of Police to address the procedures and protocols followed by members of the Australian Federal Police... 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.

3. Extradition Treaty

The LIV suggests that the Extradition Treaty should expressly provide that the person the subject of an extradition or prisoner transfer request will not face or be sentenced to the death penalty in the foreign jurisdiction and should not permit minors (i.e. persons under 18 years of age) to be extradited from Australia.

3.1 Undertaking

Article 3(2) of the Extradition Treaty provides that where a person could be subject to the death penalty, no request for extradition must be submitted without prior consultation and agreement between the state parties.

In accordance with its Policy Statement, the LIV submits that the Extradition Treaty should expressly provide that the Malaysian Government must provide an undertaking that the person the subject of an extradition or prisoner transfer request will not face or be sentenced to the death penalty in Malaysia.

3.2 Minors

The LIV notes that the Extradition Treaty does not provide an exemption for the extradition of minors.

In March 2006, the LIV made a submission to the review of the *Extradition Act* 1988 (Cth) in which we recommended that minors should not be extradited subject to the best interests of the child, as expressed in the Convention on the Rights of the Child, to which Australia is a signatory.

The LIV restates its view that minors should not be extradited and, where appropriate, should be prosecuted in lieu of extradition. Further, the LIV submits that whether a person is a minor should be determined by the law of the Australian state or territory in which that person is located.

If you would like to discuss any of the matters raised in our submission, please contact Jo Kummrow, Solicitor, Administrative Law & Human Rights Section on 03 9607 9385.

Yours sincerely

Catherine Gale
President
Law Institute of Victoria
Attach.