

Your reference

Our reference TP:TL



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31 July 2006

Mr James Rees  
The Committee Secretary  
Joint Standing Committee on Treaties  
Parliament House  
CANBERRA ACT 2600

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Dear Mr Rees

**Extradition and mutual assistance treaties with Malaysia**

I refer to your letter dated 27 June 2006.

I attach Victoria Legal Aid's comments about the treaties with Malaysia for your consideration.

If you would like further information about our comments, please contact me on 9269 0247 or Tonye Lee Segbedzi (Policy Officer) on 9269 0246.

Yours faithfully

**TONY PARSONS**

Managing Director

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## **1. About Victoria Legal Aid**

Victoria Legal Aid (VLA) is a leading force for social justice. Our mandate is to protect legal rights, with a particular emphasis on the rights of the marginalised and economically disadvantaged.

VLA employs 189 lawyers who provide legal services from our fourteen offices in metropolitan and rural Victoria. This makes us the largest and most accessible criminal law and family law practice in the state. We also practice in the area of human rights and civil law and provide specialist legal services to children and young people.

In 2004-05, VLA provided:

- 25,666 grants of assistance for legal representation by private lawyers
- 12,202 court cases conducted by VLA lawyers
- 57,187 duty lawyer services across a range of courts
- 52,860 legal advice sessions
- 75,917 telephone information sessions, conducted in 14 languages
- 590,825 legal education publications or website downloads
- family law alternative dispute resolution service.

## **2. Executive summary**

VLA suggests the treaties should:

- refuse to extradite where the request is based on any form of discrimination that is protected under Australian law
- refuse to extradite for a death penalty offence unless Malaysia gives the relevant undertaking
- specify the maximum period and conditions in which a person may be detained
- provide the right to apply for bail during detention
- safeguard other rights of the person sought, including the right to legal advice and judicial review
- include safeguards to ensure that a witness' assistance or evidence is freely given.

## **3. Extradition treaty**

### **3.1 Discrimination – article 3(1)(b)**

VLA supports the inclusion of safeguards against discrimination.

We note that the proposed article refers specifically to a number of grounds. We suggest that 'other status' should include all grounds that are currently protected by Commonwealth and State

discrimination legislation in Australia (eg. the *Equal Opportunity Commission Act 1996* (Cth) and the *Equal Opportunity Act 1995* (Vic)). This would include grounds such as:

- age
- disability or impairment
- gender identity
- industrial activity
- lawful sexual activity
- marital status
- parental status
- physical features
- pregnancy
- sexual orientation
- association with someone who has one of these characteristics.

### **3.2 Death penalty offences- article 3 (2) and notes 7 December 2005**

VLA considers that adequate safeguards against the death penalty are essential.

The proposed article states that no request for extradition for a death penalty offence may be submitted 'without prior consultation and agreement'. The notes state that any agreement made is not binding if it there was 'any non-disclosure of relevant facts during the consultation'.

Section 22(3)(c) *Extradition Act 1988* provides that an extradition request from a death penalty country will be refused unless the requesting country gives an undertaking that:

- the person will not be tried for the offence
- if the person is tried for the offence, the death penalty will not be imposed on the person
- if the death penalty is imposed on the person, it will not be carried out.

VLA suggests that as a minimum this policy should be enshrined in the treaty. However, even with that safeguard in place, we have some concerns about how compliance with such undertakings could be monitored and enforced.<sup>1</sup>

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<sup>1</sup> See *Diplomatic Assurances and their use in Europe*, Human Rights Watch, 2004 at <http://hrw.org/reports/2004/un0404/5.htm>

### **3.3 Period of detention – articles 7, 8 and 10**

Several articles in the treaty appear to permit the requested country to detain the person sought indefinitely, eg:

- Article 7 provides that a requested country may seek additional information. If a person has been arrested and the information is not provided within the time limit specified, the person 'may' be discharged from custody.
- Article 8 provides that in urgent cases a country may request the provisional arrest of the person sought for extradition before the formal request for extradition is presented. The person 'may' be discharged after 60 days if the request has not been received.
- Article 10 provides that if a request is granted the countries shall agree on a date for surrender. If the person is not removed within the time prescribed, the person 'may' be discharged.

60 days is a relatively long period of detention. The mean number of days spent on remand in Victoria (for any criminal offence) during the period 2001-2003 was 86 days.<sup>2</sup> VLA suggests that the treaty should specify:

- the maximum period of detention
- minimum conditions in which the person may be detained
- the right to apply for bail.

### **3.4 Other legal rights of the person sought**

The treaty does not appear to contain any provisions to safeguard other legal rights of the person sought. VLA suggests that as a minimum, the treaty should include;

- the right to obtain independent legal advice
- the right to judicial review of decisions concerning extradition.

## **4. Mutual assistance treaty**

### **4.1 Voluntary evidence - articles 12 to 15**

The treaty provides for witnesses to give voluntary assistance, evidence or statements, eg:

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<sup>2</sup> Table A2 *Remand Patterns in Victoria*, draft report to the Department of Justice on Criminology Research Council Research Project by Dr Stuart Ross, Melbourne Centre for Criminological Research and Evaluation, September 2004.

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- Article 12(1) provides that the requested country shall endeavour to obtain voluntary statements from witnesses in relation to criminal matters.
- Article 13(6) provides that a witness may decline to give evidence if the laws of the requested party permit them to decline.
- Article 15(1) provides that the witness may consent to being transferred to the requesting country to assist in investigations or to give evidence in proceedings related to a criminal matter.

However, there appear to be no safeguards to ensure that the witness' assistance or evidence is freely given. VLA suggests that the treaty should specify that the witness

- should be informed they have (or may have) a right to decline
- should be informed of their right to protection from penalty or coercion under article 16(4)
- should be informed of the right to obtain independent legal advice.

## 5. Further information

For further information please contact:

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