Supplementary Submission 14.1
TT 10 May 2006

Dr Andrew Southcott, MP
Chair
Joint Standing Committee on treaties
Parliament House
CANBERRA ACT 2600

Dear Dr Southcott

I refer to the comments I provided to the Committee on 8 August 2006 on the Treaty between the Government of Australia and the Government of Malaysia on Mutual Assistance in Criminal Matters and the Treaty between the Government of Australia and the Government of Malaysia on Extradition which are the subject of the current inquiry by the Committee. My comments are published as Submission No 14 to the Committee.

Following the submission of my comments I have made further inquiries and given further consideration to those comments. I understand that the Treaties have been signed by the Government of Australia and the Government of Malaysia and that, accordingly, my comments, many of which were in the nature of drafting suggestions, are not appropriate at this stage of the process.

I am also now comfortable that the specific issues I have raised are properly addressed, through the text of the treaties or through the operation of domestic Australian laws. I provide further detail below by reference to the numbered paragraphs of my comments.

1. My concern here was about the ability of the defence in a prosecution to access mutual assistance processes in appropriate circumstances. I am advised that section 39A of the Australian *Mutual Assistance in Criminal Matters Act* provides a specific process under which the Australian Government may make a request for mutual assistance to a foreign country to obtain assistance for a defendant in proceedings relating to a criminal matter.

2. My suggestion for amendment to Article 9(4) (my comments inadvertently referred to Article 10(4)) was concerned to ensure the process was available when a completely new charge is added. It was a suggestion for more abundant caution. On reflection, I believe the word "altered" is sufficient to allow this to occur.

3. On reconsidering Article 13(7) I understand that the request will be made by the Government of the Requested Party. The Treaty, and Australian Law, provide a clear authority to direct communication between Central Authorities in the context of a system which works only on the basis of requests made to and by the Government of the respective parties.

4. I have long considered that there is real doubt about the correctness of *re Tracey ex parte Ryan*. However, it did not concern the operation of the Mutual Assistance Act. I believe the risk of any constitutional problem arising in the context of Article 16(1), and the immunities granted in Section 19 of the

Australian Act, to be minimal. It is clear that mutual assistance is conducted in collaboration with the States and Territories and indeed many requests are made on behalf of State and Territory authorities. There has been no instance of this arising as an issue between State and Territory authorities in the history of the long operation as the Act.

5. This comment did not concern this Treaty but expressed a concern about Thailand and Singapore. I now understand that the lawfulness of the detention of a person in transit while being extradited is a matter which is determined on a case-by-case basis by reference to the laws and practices of the particular countries through which transit is required. The logistics of effecting an extradition include making arrangements with all transit countries to ensure that any detention while in that country is lawful.

6. I am advised that, while the words of Article 18 are open-ended, both parties clearly understand that this is an obligation which only arises on request and that there is no expectation that either party will provide this information except in response to a specific request.

7. In relation to the Extradition Treaty, I note that the exception in Article 3(3)(d) is a discretionary ground of refusal and one which is required in circumstances where the requested country has made a proper determination not to prosecute an offence and may therefore consider it appropriate that the person be prosecuted in another country.

I further note that Articles 4 and 8 relates to the minimum information which a party is to include in a request for extradition or provisional arrest. It would not be appropriate for the treaty to include any mandatory requirement to provide DNA samples at this stage.

Finally, I note that the provision in Article 14(3)(b) which allows the state to re-extradite or resurrender a person who has been extradited to a third state either with the consent of the State from which he or she was originally extradited or after the person has had 45 days to leave the jurisdiction is a facilitative provision and one for which 45 days provides a reasonable time for the person to make an informed decision on whether to remain in or depart from the jurisdiction.

On the basis of my comments above, I fully support the ratification of these treaties.

Thank you the opportunity to expand on my original comments.

David Bennett
Solicitor-General
1 September 2006