

Treaty between Australia and Malaysia on Mutual Assistance in Criminal Matters and an Exchange of Notes between Malaysia and Australia on the Treaty on Mutual Assistance in Criminal Matters

- 3.1 *The Treaty between the Government of Australia and the Government of Malaysia on Mutual Assistance in Criminal Matters (Putrajaya, 15 November 2005) and an Exchange of Notes between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters (Kuala Lumpur, 7 December 2005) (the Mutual Assistance Treaty with Malaysia) creates a formal process enabling Australia and Malaysia to assist each other in investigations, prosecutions and proceedings related to criminal matters, including terrorism, drug trafficking, fraud, money laundering and people trafficking.¹*

Background

- 3.2 The National Interest Analysis (NIA) states:

Mutual assistance in criminal matters is a formal process whereby the Government of one country requests assistance from the Government of another country in relation to a

1 National Interest Analysis (NIA), para. 3.

criminal investigation or prosecution of a serious crime. Assistance may also extend to locating, restraining and forfeiting the proceeds of criminal activity in the Requested Party's jurisdiction in relation to criminal activity that took place in the Requesting Party.²

- 3.3 Australia has similar mutual assistance treaties with 24 other countries.³ The Mutual Assistance Treaty with Malaysia is based on Australia's mutual assistance in criminal matters treaty model which is based on the provisions of Australia's *Mutual Assistance in Criminal Matters Act 1987* (Cth) (the Mutual Assistance Act).⁴
- 3.4 The Mutual Assistance Treaty with Malaysia will assist Australian efforts to combat transnational crime in the Asia-Pacific region.⁵

Obligations

- 3.5 The key obligation of the Mutual Assistance Treaty with Malaysia is for both Parties to grant each other the widest measure of mutual assistance in connection with investigations, prosecutions and proceedings related to criminal matters over which the Requesting Party has jurisdiction at the time the assistance is requested.⁶
- 3.6 Assistance under the Mutual Assistance Treaty with Malaysia includes:
- taking of evidence, including testimony, documents, records and things, by way of judicial process;
 - taking of voluntary statements of persons;
 - providing relevant documents and records, including bank, financial, corporate or business records;

2 NIA, para. 6.

3 NIA, para. 3; Ms Joanne Blackburn, *Transcript of Evidence*, 19 June 2006, p. 24; NIA 'Australian bilateral mutual assistance agreements' Annex: Australia has mutual assistance agreements with Argentine Republic, Republic of Austria, Canada, Republic of Ecuador, Finland, French Republic, Greece, Hong Kong, Republic of Hungary, Republic of Indonesia, State of Israel, Republic of Italy, Republic of Korea, Grand Duchy of Luxembourg, United Mexican States, Monaco, Kingdom of the Netherlands, Republic of the Philippines, Republic of Portugal, Spain, Sweden, Switzerland, United Kingdom, United States of America.

4 NIA, para.5

5 NIA, para. 9.

6 Article 1(1) Mutual Assistance Treaty with Malaysia.

- locating and identifying persons;
- executing search and seizure;
- identifying, locating, restraining dealings in and forfeiting the instruments derived from or used in the commission of an offence and proceeds of crime;
- recovering pecuniary penalties in respect of an offence;
- seeking the consent of persons and making arrangements for such persons to give evidence or to assist in criminal investigations in the Requesting Party and, where such persons are in custody, arranging for their temporary transfer to the Requesting Party;
- effecting service of judicial and related documents;
- examining objects and sites, to the extent that it is not inconsistent with the laws of the Requested Party; and
- other assistance consistent with the objects of this Treaty which is not inconsistent with the laws of the Requested Party.⁷

3.7 Assistance under the Mutual Assistance Treaty with Malaysia does not include the arrest or detention of any person with a view to the extradition of that person or the extradition of any person; the enforcement in the Requested Party of criminal judgments imposed in the Requesting Party except to the extent permitted by the laws of the Requested Party and this Treaty; the transfer of persons in custody to serve sentences; and the transfer of proceedings in criminal matters.⁸

3.8 The Mutual Assistance Treaty with Malaysia provides a number of mandatory and discretionary grounds on which the Requested Party can refuse to provide assistance.⁹

3.9 The Requested Party must refuse to provide assistance where:

- the request relates to offences of a political character;
- the request relates to a military offence;
- the request relates to the investigation, prosecution or punishment of a person for an offence in respect of which the person has been

7 Article 1(3) Mutual Assistance Treaty with Malaysia.

8 Article 1(4) Mutual Assistance Treaty with Malaysia.

9 Article 4 Mutual Assistance Treaty with Malaysia.

finally convicted, acquitted or pardoned or has undergone the punishment provided by the laws of that Requesting Party;

- the prosecution is on account of the person's race, sex, religion, nationality, ethnic origin or political opinion;
- it would prejudice the sovereignty, national security, national interest, public order or other essential interests of the Requested Party;
- there is an absence of dual criminality;
- the provision of assistance could prejudice an investigation, prosecution or proceedings of the Requested Party.¹⁰

3.10 The Requested Party may refuse to provide assistance where the provision of assistance could prejudice the safety of any person, where the provision of assistance could impose an excessive burden on the resources of the Requested Party, and where the prosecution or punishment is for an extraterritorial offence which would not be punishable under the laws of the Requested Party if it took place in similar circumstances outside the requested Party.¹¹

The death penalty

3.11 The NIA notes that Malaysia retains the death penalty for a wide range of offences.¹² The Committee received a number of submissions concerned that the provision of mutual assistance to Malaysia might result in the imposition of the death penalty.

3.12 The Law Institute of Victoria (LIV) policy's on this matter advocates the refusal of mutual assistance where the death penalty might arise unless a guarantee is given:

The LIV is opposed to the Australia 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 an Australian resident for an offence subject to punishment by

10 NIA, para. 13; Article 4(1) Mutual Assistance Treaty with Malaysia;

11 Article 4(2) Mutual Assistance Treaty with Malaysia; NIA, para. 14.

12 NIA, para. 15.

death, unless an appropriate undertaking between the Australian and foreign government is given.¹³

- 3.13 The Human Rights and Equal Opportunity Commission (HREOC) proposed that mutual assistance should be refused if it exposes a person to the risk of the death penalty and at present, the risk of a person being exposed to the death penalty is not listed as a mandatory or discretionary ground for refusing assistance in the Mutual Assistance Treaty with Malaysia.¹⁴
- 3.14 However safeguards are provided through sections 8(1A) and 8(1B) of the Mutual Assistance Act and are applicable through Article 1(1) of the Mutual Assistance Treaty with Malaysia which provides that Parties will provide mutual assistance to each other 'in accordance with their respective laws'.¹⁵
- 3.15 Section 8(1A) of the Mutual Assistance Act provides that a request for mutual assistance *must* be refused if it relates to the prosecution or punishment of a person where the death penalty may be imposed, unless the Attorney-General, having regard to the special circumstances of the case, is of the opinion that the assistance should be granted.¹⁶
- 3.16 Section 8(1B) of the Mutual Assistance Act provides that a request for mutual assistance *may* be refused if the Attorney-General believes that the provision of assistance may result in the death penalty being imposed and, having taken into consideration the interests of international criminal cooperation, is of the opinion that assistance should not be granted.¹⁷
- 3.17 The Committee is satisfied that the Mutual Assistance Treaty with Malaysia and the Mutual Assistance Act provide adequate safeguards to ensure that the provision of assistance by Australia will not inadvertently result in the imposition of the death penalty.

13 The Law Institute Victoria, *Submission 7*, p. 1.

14 Human Rights and Equal Opportunity Commission, *Submission 12*, p. 6.

15 NIA, paras 15 and 16.

16 NIA, para. 15.

17 NIA, para. 15.

Mutual assistance and police-to-police assistance

- 3.18 The Committee is aware that mutual assistance in criminal matters is often confused with assistance provided under police-to-police agreements. However, there are distinct differences between police-to-police assistance and mutual assistance.

The primary distinction is that the mutual assistance arrangements allow governments to make requests to another government for that government to exercise coercive powers to obtain evidence or information for the purposes of an investigation or a prosecution. The range of other agency-to-agency relationships, which are usually done in the form of a memorandum of understanding – they are not treaty-status documents – are for essentially the voluntary exchange of information. None of those arrangements can include arrangements for the use of coercive powers.¹⁸

- 3.19 Mutual assistance and police-to-police assistance were commonly confused in media reports of the arrest of the 'Bali Nine' by Indonesian police. For instance, the submission from the New South Wales Council for Civil Liberties (NSW CCL) referred to a media report that suggested that evidence obtained through coercive procedures, such as the execution of a search warrant on Myuran Sukumaran's Sydney home on 26 April 2005, was handed to Indonesian officials voluntarily.¹⁹

- 3.20 If correct, this would mean that the Australian Federal Police passed on information obtained through coercive means to the Indonesian National Police outside of the mutual assistance framework. However, the Australian Federal Police informed the Committee that this media report was in fact incorrect.

The Australian Federal Police categorically refute this allegation. All information provided to the Indonesian National Police was obtained through voluntary means.²⁰

- 3.21 Representatives from the Attorney-General's Department later reiterated that the AFP cannot provide assistance to another country on a police-to-police basis which requires the exercise of coercive

18 Ms Joanne Blackburn, *Transcript of Evidence*, 19 June 2006, p. 33.

19 NSW Council for Civil Liberties, *Submission 8*, p. 3.

20 Federal Agent Tim Morris, *Transcript of Evidence*, 4 September 2006, p. 3.

powers.²¹ The AFP also cannot voluntarily share information which has been obtained using coercive powers for the purposes of an Australian investigation in the absence of a mutual assistance request.²²

Police-to-police assistance and the death penalty

3.22 Under AFP guidelines, police-to-police assistance can be provided, without reference to the Minister, until charges are laid for the offence, even where there is the potential that the investigation will result in a charge for which the death penalty can be imposed.²³ After charges have been laid for which the death penalty can be imposed, the general rule is that no information is to be shared under police-to-police agreements. However, under the AFP guidelines, the Minister for Justice and Customs can allow police-to-police assistance to continue.²⁴

3.23 The Committee was informed that prior to a charge being laid, the AFP does not attempt to second-guess the likely outcome of an investigation.

...generally speaking, we would not refuse a police-to-police request because there was a potential that one of the persons subject to the investigation may be subject to a charge that could attract the death penalty some time at a later date.²⁵

3.24 The Committee was concerned that some investigations in particular countries can only result in a limited number of outcomes, for instance, successful drug trafficking investigations are very likely to result in the death penalty in particular countries.

21 Ms Joanne Blackburn, *Transcript of Evidence*, 4 September 2006, p. 4.

22 Ms Joanne Blackburn, *Transcript of Evidence*, 4 September 2006, p. 6.

23 Federal Agent Tim Morris, *Transcript of Evidence*, 4 September 2006, p. 5; Australian Federal Police, *Exhibit 3-AFP Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations*, p. 2.

24 Federal Agent Tim Morris, *Transcript of Evidence*, 4 September 2006, p. 5; Australian Federal Police, *Exhibit 3-AFP Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations*, p. 2.

25 Federal Agent Tim Morris, *Transcript of Evidence*, 4 September 2006, p. 8.

- 3.25 Conditions are sometimes attached to the use of information provided through police-to-police agreements however the Committee was informed that this was not normal practice.²⁶
- 3.26 The Committee remains concerned that information shared lawfully through police-to-police assistance may inadvertently result in the imposition of the death penalty. However, this matter is outside the scope of the Committee's inquiry into the Mutual Assistance Treaty with Malaysia.

Human rights

- 3.27 HREOC's submission to the Committee's inquiry was concerned that the provision of mutual assistance could result in a breach of a person's human rights in the Requesting Country. In particular, HREOC pointed out that Malaysia has not signed or ratified the *International Covenant on Civil and Political Rights (ICCPR)*, the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)* or the *Convention Relating to the Status of Refugees (the Refugee Convention)*. To ensure that Australia did not breach its international obligations by granting a request of mutual assistance HREOC recommended:

Mutual assistance shall not be granted unless the Requested Country has made reasonable inquiries to satisfy itself that there is no real risk that providing assistance may result in a breach of a person's rights under the ICCPR, CAT or the Refugee Convention.²⁷

- 3.28 The Attorney-General's Department informed the Committee that although no specific assessment of Malaysia's human rights record was undertaken, the terms of the Mutual Assistance Act cover Australia's international obligations.

...the Extradition Act and the Mutual Assistance Act contain within their provisions both full reflection of Australia's international human rights obligations and a wide range of safeguards which are applied on a case-by-case basis to

26 Federal Agent Tim Morris, *Transcript of Evidence*, 4 September 2006, p. 7.

27 HREOC, *Submission 12*, p. 3.

determine whether in the particular case the extradition or the mutual assistance will be granted.²⁸

- 3.29 As mentioned above, these provisions are sections 8(1A) and 8(1B) of the Mutual Assistance Act and Article 1(1) of the Mutual Assistance Treaty with Malaysia. The Committee is satisfied that the Mutual Assistance Treaty with Malaysia and the Mutual Assistance Act provide adequate human rights safeguards.

Costs

- 3.30 The Requested Party bears all ordinary costs associated with providing assistance under the Mutual Assistance Treaty with Malaysia.²⁹ Australia and Malaysia are to consult if, during the course of executing a request, it becomes apparent that expenses of an extraordinary or substantial nature will be necessary to fulfil the request.³⁰
- 3.31 The costs incurred by Australia will be met from the existing budget of the Attorney-General's Department.³¹

Implementation

- 3.32 The terms of the Mutual Assistance Treaty with Malaysia will be implemented through regulations under the Mutual Assistance Act.³² The Mutual Assistance Act and regulations implement the terms of Australia's 24 other bilateral mutual assistance treaties and the terms of the Mutual Assistance Treaty with Malaysia are consistent with the terms of the Mutual Assistance Act.³³

28 Ms Joanne Blackburn, *Transcript of Evidence*, 4 September 2006, p. 11.

29 Article 23 Mutual Assistance Treaty with Malaysia.

30 NIA, para. 21.

31 NIA, para. 22.

32 NIA, para. 26.

33 NIA, para. 20.

Consultation

- 3.33 No public consultation occurred as negotiations with Malaysia on the Mutual Assistance Treaty were not in the public domain.³⁴ The Mutual Assistance Treaty with Malaysia was included on the schedule of the Commonwealth-State/Territory Standing Committee on Treaties (SCOT) in January 2006 and SCOT met in May 2006. No comments were received by the Attorney-General's Department as a result of that meeting.³⁵
- 3.34 In addition to writing to the Premiers and Chief Ministers of the States and Territories and the Presiding Officers of the State and Territory Parliaments, the Committee wrote to forty individuals and organisations inviting them to comment on both the Extradition Treaty with Malaysia and the Mutual Assistance Treaty with Malaysia. As a result of these invitations, the Committee received an additional seven submissions.³⁶

Conclusion and recommendation

- 3.35 The Committee recognises the importance of international cooperation in combating transnational crime and supports the establishment of a framework which will ensure Australia and Malaysia can provide and receive timely assistance in accordance with clearly defined and mutually agreed terms.

34 NIA, Consultation Annex, para. 2.

35 Ms Joanne Blackburn, *Transcript of Evidence*, 4 September 2006, p. 15.

36 The Committee received seven submissions as a result of its invitation from the: Office of the Privacy Commissioner, the Law Institute Victoria, the New South Wales Council for Civil Liberties, the Australian Federal Police, Victoria Legal Aid, the Human Rights and Equal Opportunity Commission and the Solicitor-General.

Recommendation 2

The Committee supports the *Treaty between the Government of Australia and the Government of Malaysia on Mutual Assistance in Criminal Matters (Putrajaya, 15 November 2005)* and an *Exchange of Notes between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters (Kuala Lumpur, 7 December 2005)* and recommends that binding treaty action be taken.

