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# Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011

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Australian Human Rights Commission Submission  
to the House of Representatives Standing Committee on Social Policy and Legal Affairs

1 August 2011

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## 1 Introduction

1. The Australian Human Rights Commission welcomes the opportunity to make this submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs on the *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011* (the Bill).

## 2 Summary

2. The Commission has actively participated in the consultation process leading to the proposed amendments to the *Extradition Act 1988* (Cth) (Extradition Act) and the *Mutual Assistance in Criminal Matters Act 1987* (Cth) (Mutual Assistance Act). The Commission made submissions to the Attorney-General's Department in relation to the:
  - *exposure draft of the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011*;
  - *exposure draft of the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2009*; and
  - *2006 Discussion paper ‘A new extradition system – a review of Australia’s extradition law and practice’*
3. The Commission emphasises the importance of ensuring that Australia’s extradition and mutual assistance laws operate in a manner consistent with international human rights.
4. The Commission does not have the capacity to prepare a detailed submission on the Bill. However, we hope the following brief comments will be of assistance. We would be willing to provide further assistance on any specific issue at your request.

## 3 Recommendations

5. The Commission makes the following key recommendations:

### **Extradition:**

**Recommendation 1:** That subsection 22(3)(b) and proposed subsection 15B(3)(a) of the Extradition Act be expanded to provide that the Attorney-General must not make a surrender determination where 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 or cruel, inhuman or degrading treatment or punishment.

**Recommendation 2:** That the residual power of the Attorney-General contained in subsection 22(3)(c) of the Extradition Act, to surrender a person for an offence which is punishable by the death penalty, be removed.

### **Mutual assistance:**

**Recommendation 3:** That the proposed mandatory ground for refusing mutual assistance be expanded to include circumstances where there are substantial grounds to believe the provision of assistance would result in the person being subjected to torture or cruel, inhuman or degrading treatment or punishment.

**Recommendation 4:** That the Mutual Assistance Act be amended to limit the Attorney-General's discretionary power to provide mutual assistance in 'special circumstances' where the offence is one in respect of which the death penalty may be imposed in the foreign country to situations where the assistance is exculpatory in nature.

## 4 Amendments to the Extradition Act

### 4.1 Refusal of extradition where extradition may result in torture or cruel, inhuman or degrading treatment or punishment

6. The Commission welcomes the proposal to align the wording of subsection 22(3)(b) of the Extradition Act with Australia's *non-refoulement* obligation under the CAT,<sup>1</sup> by providing that the Attorney-General may only make a surrender determination if he or she 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.
7. However, the Commission recommends that this protection to be expanded in order to comply with Australia's international human rights obligations.
8. Article 7 of the ICCPR provides that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.<sup>2</sup>
9. As a State Party to the ICCPR, Australia has undertaken to take the necessary steps, in accordance with its constitutional processes, to adopt such laws or other measures as may be necessary to give effect to the prohibition on torture or cruel, inhuman or degrading treatment or punishment.<sup>3</sup>
10. The Commission recommends that subsection 22(3)(b) of the Extradition Act be expanded to provide that the Attorney-General must not make a surrender determination where there are substantial grounds for believing that the person would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment.
11. The Commission also notes the proposed insertion of section 15B and recommends that subsection 15B(3)(a) be expanded to provide that the Attorney-General may only determine that the person be surrendered to the extradition country concerned if the Attorney-General does not have

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<sup>1</sup> Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, article 3(1).

<sup>2</sup> International Covenant on Civil and Political Rights, article 7.

<sup>3</sup> International Covenant on Civil and Political Rights, article 7.

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 or cruel, inhuman or degrading treatment or punishment.

#### **4.2 Refusal of extradition where extradition may result in exposure to the death penalty**

12. The Commission expresses concern over the residual power of the Attorney-General contained in subsection 22(3)(c) of the Extradition Act, to surrender a person for an offence which is punishable by the death penalty.

13. Section 22(3)(c) of the Extradition Act provides:

For the purposes of subsection (2), the eligible person is only to be surrendered in relation to a qualifying extradition offence if:

(c) where the offence is punishable by a penalty of death—by virtue of an undertaking given by the extradition country to Australia, one of the following is applicable:

(i) the person will not be tried for the offence;

(ii) if the person is tried for the offence, the death penalty will not be imposed on the person;

(iii) if the death penalty is imposed on the person, it will not be carried out;

14. Australia has committed itself to opposing the death penalty by becoming a party to the *Second Optional Protocol on the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty* (the Second Optional Protocol).

15. As stated in the preamble to the Second Optional Protocol, ‘all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life’.<sup>4</sup>

16. ‘Every human being has the inherent right to life’ as protected by article 6 of the ICCPR.<sup>5</sup>

17. The United Nations Human Rights Committee (HRC) has held that ‘countries that have abolished the death penalty, [have] ... an obligation not to expose a person to the real risk of its application’.<sup>6</sup>

18. Furthermore, the HRC has expressed the following concerns with regards to Australia’s compliance with the ICCPR:

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<sup>4</sup> *Second Optional Protocol on the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*, preamble.

<sup>5</sup> *International Covenant on Civil and Political Rights*, article 6.

<sup>6</sup> In *Judge v Canada* 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003).

The Committee notes with concern the residual power of the Attorney-General, in ill-defined circumstances, to allow the extradition of a person to a state where he or she may face the death penalty, as well as the lack of a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state, in violation of the State party's obligations under the Second Optional Protocol.

The State party should take the necessary legislative and other steps to ensure that no person is extradited to a state where he or she may face the death penalty, as well as whereby it does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another state, and revoke the residual power of the Attorney-General in this regard.<sup>7</sup>

19. In their Concluding Observations on Australia the United Nations Committee Against Torture expressed concern about the reliance on diplomatic assurances and reminded State parties that:

under no circumstances can they resort to diplomatic assurances as a safeguard against torture or ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return.<sup>8</sup>

20. The Commission is of the view that the imposition of the death penalty can constitute a violation of the prohibition of inhuman treatment under article 3 of CAT and article 7 of the ICCPR. Accordingly, the Commission is concerned about any reliance on undertakings or diplomatic assurances where there are substantial grounds to believe that if an individual were surrendered to the extradition country he or she would face a real risk of being subjected to the death penalty.

21. The Commission recommends that the residual power of the Attorney-General contained in subsection 22(3)(c) of the Extradition Act, to surrender a person for an offence which is punishable by the death penalty, be removed.

#### **4.3 Refusal of extradition where extradition may result in discrimination**

22. The Commission welcomes the proposal to expand the scope of extradition objections to include discrimination on the grounds of sex and sexual orientation.

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<sup>7</sup> UN Human Rights Committee, 'Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant, *Concluding Observations of the Human Rights Committee*, CCPR/C/AUS/CO/5, 2 April 2009, Advanced Unedited Version.

<sup>8</sup> UN Committee Against Torture, *Concluding Observations of the Committee against Torture: Australia*, CAT/C/AUS/CO/3, 22 May 2008, [16]

## 5 Amendments to the Mutual Assistance Act

### 5.1 Clarification that grounds for refusal apply at the investigation stage

23. The Commission welcomes the clarification that grounds for refusing mutual assistance apply to requests relating to the *investigation* stage, and not just at the *prosecution or punishment* stage.
24. This expands the scope of grounds for refusal that safeguard human rights.

### 5.2 Torture or cruel, inhuman or degrading treatment or punishment as a mandatory ground of refusal

25. The Commission welcomes the proposal to insert an express mandatory ground for refusal where there are substantial grounds to believe the provision of assistance would result in a person being subjected to torture.
26. This enhanced protection offered by changing the *discretionary* ground of refusal to a *mandatory* ground of refusal is a welcome amendment that affirms Australia's strong position against torture.
27. However, the Commission recommends that this protection be further expanded to comply with Australia's international human rights obligations.
28. Article 7 of the ICCPR provides that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.<sup>9</sup>
29. The Commission recommends that the proposed mandatory ground for refusal be expanded to circumstances where there are substantial grounds to believe the provision of assistance would result in the person being subjected to torture or cruel, inhuman or degrading treatment or punishment.

### 5.3 Limit the discretion to provide assistance in death penalty matters where a person has been arrested or detained on suspicion of committing an offence

30. The Commission welcomes the proposal to expand the scope of the grounds on which the Attorney-General must refuse a request for mutual assistance to include circumstances where a person has been *arrested or detained on suspicion of committing an offence* which carries the death penalty, not just when they have been *charged with or convicted* of the offence.
31. However, the Commission notes with concern the discretionary power of the Attorney-General to provide mutual assistance in 'special circumstances'

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<sup>9</sup> International Covenant on Civil and Political Rights, article 7.

where the offence is one in respect of which the death penalty may be imposed in the foreign country.<sup>10</sup>

32. As discussed, Australia has committed itself to opposing the death penalty by becoming a party to the Second Optional Protocol.

33. The explanatory memorandum to the Bill states:

As is the case in respect of existing subsection 8(1A), the ‘special circumstances of the case’ warranting assistance may 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.<sup>11</sup>

34. The Commission expresses concern about the reliance on undertakings or diplomatic assurances where there are substantial grounds to believe the provision of assistance would result in an individual being subjected to the death penalty.

35. The Commission supports the provision of assistance where that assistance is exculpatory in nature as provided in the explanatory memorandum. However, the Commission remains concerned that ‘special circumstances’ are not defined and therefore a real risk remains that an individual may be exposed to human rights violations.

36. The Commission recommends an amendment to the Mutual Assistance Act to limit Attorney-General’s discretionary power to provide mutual assistance in ‘special circumstances’ where the offence is one in respect of which the death penalty may be imposed in the foreign country to situations where the assistance is exculpatory in nature.

#### **5.4 Expansion of discrimination as a ground for refusal**

37. The Commission welcomes the proposal to extend the grounds on which a mutual assistance request must be refused to include discrimination on the basis of sexual orientation.

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<sup>10</sup> *Mutual Assistance in Criminal Matters Act 1987* (Cth) section 8.

<sup>11</sup> Explanatory Memorandum, *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011*, [3.43].