

Part 6: What should we do in mutual assistance and how should we do it?

This part of the Paper raises key considerations for mutual assistance reform. The issues raised in this section are intended as a catalyst for further discussion and comment, and do not represent final policy recommendations.

6.1 Objects of the Mutual Assistance Act

6.1.1 What should be the objects of the Mutual Assistance Act?

The current objects of the Mutual Assistance Act are largely descriptive and set out how the Act regulates and facilitates mutual assistance.

As set out in Part 1 of this paper, the role of mutual assistance has significantly expanded in light of the increasing globalisation of crime. It is in Australia's interests to cooperate widely with other States so that we can effectively prosecute domestic and transnational crime and locate, restrain, forfeit and share the proceeds of crime. This overarching principle should guide the purpose and interpretation of the Mutual Assistance Act.

The objects of the Mutual Assistance Act could clearly state that the Act's object is to facilitate the widest range of assistance

to be given and received by Australia in investigations and prosecutions in relation to criminal matters, including locating, restraining, forfeiting and sharing the proceeds of crime. The objects could also note that the Act provides appropriate safeguards for the provision and receipt of assistance.

What are the objects of an Act?

The objects are usually at the beginning of an Act and describe the Act's purpose. Section 15AA of the *Acts Interpretation Act 1901* provides that, in the interpretation of an Act's provision, a construction that would promote the purpose or object underlying the Act must be preferred to a construction that would not promote that purpose or object.

The objects of the Mutual Assistance Act are:

- (a) to regulate the provision by Australia of international assistance in criminal matters when a request is made by a foreign country for any of the following:
 - (i) the taking of evidence, or the production of any document or other article, for the purposes of a proceeding in the foreign country
 - (ii) the issue of a search warrant and the seizure of any thing relevant to a proceeding or investigation in the foreign country
 - (iii) the forfeiture or confiscation of property in respect of a foreign serious offence
 - (iv) the recovery of pecuniary penalties in respect of a foreign serious offence
 - (v) the restraining of dealings in property that may be forfeited or confiscated, or that may be needed to satisfy pecuniary penalties imposed, because of the commission of a foreign serious offence, and
- (b) to facilitate the provision by Australia of international assistance in criminal matters when a request is made by a foreign country for the making of arrangements for a person who is in Australia to travel to the foreign country to give evidence in a proceeding or to give assistance in relation to an investigation, and
- (c) to facilitate the obtaining by Australia of international assistance in criminal matters.

1. **Objects of the Mutual Assistance Act:** What should be included in the objects of the Mutual Assistance Act?

6.2 How should Australia cooperate with other countries on incoming requests?

6.2.1 What kinds of cooperation should Australia provide to other countries?

Mutual assistance is the mechanism for Governments to assist foreign countries to investigate and prosecute crimes committed against the laws of that country, and to locate, restrain, forfeit and share the proceeds of crime. Key questions are:

- What kinds of cooperation should Australia provide to foreign countries?
- Should all investigative tools available to Australian law enforcement agencies be available for use in mutual assistance requests?
- Should we limit the kinds of assistance we provide to foreign countries?
- In what circumstances should we provide DNA information to foreign countries?
- Should the domestic provisions for providing DNA information apply, or should we enact provisions that deal specifically with obtaining material on behalf of foreign countries?
- How should we provide telecommunications interception material and surveillance device material to foreign countries?

6.2.2 How should the Minister approve the assistance?

In the current system, the Minister considers legislative and treaty requirements in deciding whether to approve a mutual assistance request. Under the Mutual Assistance Act, the Minister authorises specific types of assistance rather than the general provision of assistance. For example, the Minister can authorise a police officer to apply for a mutual assistance search warrant in accordance with Part VIIA of the Mutual Assistance Act.

An alternative approach would be for the Minister to approve the granting of assistance for the purposes set out in the request and authorise Australian authorities to execute the request in accordance with domestic law as if it was an investigation of a domestic offence.

For example, if a foreign country asked Australia to provide bank records, the Minister could approve the request from the foreign country after considering the grounds of refusal and treaty requirements. Australian authorities could then obtain the bank records using the same procedures that would apply in a domestic investigation (usually a search warrant under the *Crimes Act 1914*). There is little difference in practice between the issue and execution of a search warrant under the

How does the Minister currently approve assistance?

The Minister currently considers:

- mandatory and discretionary grounds of refusal in the Mutual Assistance Act
- legislative requirements specific to the type of assistance (in the Mutual Assistance Act and other relevant legislation, such as the *Telecommunications (Interception and Access) Act 1979*, and
- additional requirements in any bilateral or multilateral treaty.

If the Minister is satisfied of these requirements, the Minister approves the execution of the request.

Mutual Assistance Act and the issue and execution of a search warrant under the Crimes Act. In a new mutual assistance system the Minister could authorise the AFP or another appropriate law enforcement agency to use ordinary domestic powers, which would allow the AFP to apply for a search warrant under the Crimes Act.

A similar system is used in the US. In the US, mutual assistance requests are executed under the ordinary US domestic criminal law, in accordance with treaty requirements.

Such a system could apply to all kinds of assistance, or to specific forms of assistance only. For kinds of assistance not found in domestic law (such as transfer of prisoners to give evidence), specific mutual assistance provisions could be retained.

The use of the domestic investigative powers (for example search warrant powers) in the execution of mutual assistance requests would:

- ensure that the process for executing mutual assistance requests keeps pace with the domestic process
- allow the Minister to focus on Australia's international obligations and the grounds of refusal, and
- ensure that the role of the Minister is more appropriately cast.

What is a search warrant?

A search warrant is a document issued by a magistrate, justice of the peace or other authorised person, authorising a law enforcement officer to search premises or a person for material connected to an offence.

For mutual assistance requests from foreign countries, the search warrant is issued under the Mutual Assistance Act.

For domestic investigations, a search warrant is issued under the Crimes Act, or equivalent legislation in States and Territories.

2. **Minister's approval of assistance:** How should the Minister approve requests for assistance? Should the Minister authorise the specific type of assistance (as currently occurs) or should the Minister approve the request in general terms to enable Australian law enforcement agencies to action the request by exercising the powers available in ordinary domestic investigations?

6.2.3 Are the current grounds of refusal appropriate?

Australia's current mutual assistance system builds in a number of safeguards and considerations. Before providing mutual assistance to a foreign country, the Minister must consider the grounds for refusing requests that are set out in section 8 of the Mutual Assistance Act and any grounds provided for in treaties to which Australia is a party.

The Minister must refuse a request for mutual assistance if, in the opinion of the Minister:

- the request relates to the prosecution or punishment of a person for a political offence
- the request was made to prosecute, punish or otherwise prejudice a person on account of his or her race, sex, religion, nationality or political opinions

- the request relates to an act or omission that constitutes an offence under Australia’s military law but not under Australia’s ordinary criminal law
- the granting of the request would prejudice the sovereignty, security or national interest of Australia or the essential interests of an Australian State or Territory, or
- the request relates to the prosecution of a person for an offence for which the person has been acquitted or pardoned by a competent tribunal or authority in the foreign country, or has already undergone the relevant punishment provided by the law of that country (‘double jeopardy’).

The Minister may refuse a request for mutual assistance if, in the opinion of the Minister:

- the request relates to the prosecution or punishment of a person for an act or omission that does not constitute an offence against Australian law (‘dual criminality’)
- the request relates to the prosecution or punishment of a person for an act or omission that occurred outside the foreign country making the request and a similar act or omission occurring outside Australia in similar circumstances would not have constituted an offence against Australian law (‘extraterritoriality’)
- the request relates to the prosecution or punishment of a person for an act or omission for which the person could no longer be prosecuted in Australia because of lapse of time or any other reason
- the assistance could prejudice an Australian criminal investigation or proceeding
- the assistance would prejudice the safety of any person in or outside Australia
- the assistance would impose an excessive burden on the resources of the Commonwealth or of a State or Territory, or
- it is appropriate in all the circumstances of the case that the assistance requested should not be granted.

In deciding whether to approve or refuse a mutual assistance request the Minister must also consider whether the offence carries the death penalty. Further information on how mutual assistance works in death penalty matters is set out below.

3. **Grounds of refusal–general:** Are the current grounds of refusal appropriate? Should any of the grounds be removed? Should any of the mandatory grounds be discretionary? Should other grounds be included?

A. **Safeguards:** Australia will retain a broad range of safeguards in the mutual assistance process.

6.2.4 **The grounds of refusal should clearly state that they apply to the investigation stage**

There are generally three stages in the criminal justice process: investigation, prosecution and punishment. In the common law system, the investigation stage generally refers to the period prior to charging a person with an offence during which the evidence is identified and examined. Prosecution refers to the trial of a person for the offence after they have been charged. Punishment is the sentence the person receives if convicted of the offence, such as imprisonment, community service or a fine.

Currently, the majority of the grounds of refusal state that they apply to the ‘prosecution or punishment’ of a person. For example, the Minister must refuse a request if the request relates to the prosecution or punishment of a person for a political offence.

Australia may also receive requests for assistance from foreign countries during the ‘investigation stage’ of an offence. The grounds of refusal should clearly state that they each apply to the investigation, prosecution and punishment stages of the criminal justice process.

B. Grounds of refusal–investigation stage: The grounds of refusal should state that they apply to the investigation stage of the criminal justice process.

6.2.5 Are the current grounds of refusal appropriate for requests for proceeds of crime assistance?

The Mutual Assistance Act provides a range of proceeds of crime mechanisms which Australia can use to assist foreign countries. The purpose of these mechanisms is to locate, restrain, forfeit and share the proceeds of crime.

The grounds of refusal in section 8 of the Mutual Assistance Act are premised on the investigation or prosecution of an alleged crime. Proceeds of crime action does not always require an investigation or prosecution of a crime. Civil based proceeds of crime action for example, does not require a prosecution or conviction of an offence. Accordingly, some of the grounds of refusal in section 8 of the Mutual Assistance Act are not applicable to requests for proceeds of crime action.

The Mutual Assistance Act could be amended to clarify that the grounds of refusal which are inapplicable to proceeds of crime action do not have to be considered in the Minister’s decision making process.

4. **Grounds of refusal–proceeds of crime:** Some of the grounds of refusal are not applicable to proceeds of crime action. Should the Mutual Assistance Act be amended to clarify that the Minister does not need to consider such grounds in making a decision on providing proceeds of crime assistance to a foreign country?

6.2.6 How should Australia consider double jeopardy?

Double jeopardy for Australia and third countries

The Mutual Assistance Act currently provides that Australia will not provide assistance to a foreign country where the request relates to the prosecution of a person for an offence for which:

- the person has been acquitted or pardoned by a competent tribunal or authority in the foreign country, or
- has already undergone the relevant punishment provided by the law of that country.

What is double jeopardy?

Double jeopardy is the principle that a person should not be twice tried or punished for the same offence or for offences arising from the same conduct.

The refusal of a mutual assistance request on the grounds of double jeopardy is currently restricted to cases where a person has already been acquitted, pardoned or punished in the requesting foreign country. There may be cases where a person has already been acquitted, pardoned or punished for the offence to which the request relates either in Australia or in a third country (a foreign country other than the requesting country).

Double jeopardy provides an important safeguard in the mutual assistance process and Australia should consider whether to extend this ground of refusal to cases where a person has already been acquitted, pardoned or punished for the offence in either Australia or a third country.

Should Australia be able to provide mutual assistance in 'special circumstances'?

There have been significant developments in recent years in Australia and the United Kingdom around the principle of double jeopardy. For example, the United Kingdom has implemented reforms which allow a person who has been acquitted of an offence, to be retried for the offence if there is new and compelling evidence and if it is in the interests of justice. An example of new and compelling evidence could be DNA evidence.

In April 2003, the Standing Committee of Attorneys-General (SCAG) referred the issue of the rule against double jeopardy to the Model Criminal Code Officers' Committee (MCCOC). MCCOC recommended that the laws on double jeopardy be changed so that an acquitted defendant could be prosecuted in three circumstances:

- prosecution for an administration of justice offence connected to the original trial (such as perjury)
- retrial of the original or similar offence where there is fresh and compelling evidence (such as DNA evidence), and
- retrial of the original or similar offence where the acquittal is tainted (eg where a witness was coerced).¹

The Council of Australian Governments (COAG) considered the issue in July 2006 and agreed that reform of the rule against double jeopardy is an important criminal law reform issue which merits nationally-consistent treatment. The meeting also decided double jeopardy law reform would be progressed via a COAG Senior Officials' working group which will report to COAG and the SCAG by the end of 2006.

In light of these developments, there may be circumstances where Australia should have the capacity to provide mutual assistance in response to a request where a person has already been tried. The double jeopardy ground of refusal could be amended so that Australia must refuse a mutual assistance request where it relates to the prosecution of a person for an offence for which the person has been acquitted, pardoned or punished in Australia, the requesting country or a third country, except in special circumstances.

¹ Double Jeopardy Model Criminal Code Officers' Committee Report March 2004, available at www.ag.gov.au/publications

5. **Double jeopardy:** Australia must refuse a mutual assistance request where the request relates to the prosecution of a person for an offence for which the person has been acquitted, pardoned or has undergone the relevant punishment in the requesting country. Should Australia also refuse requests for mutual assistance that relate to an offence for which a person has already been acquitted, pardoned or punished in Australia or another country (other than the requesting country)? Should Australia be able to respond to mutual assistance requests where a person has already been acquitted, pardoned or punished for the offence, if special circumstances exist?

6.2.7 How should Australia consider extraterritorial offences?

Common law countries, such as Australia, have traditionally only exercised jurisdiction over offences which occur in their territory. However, most civil law countries exercise extraterritorial jurisdiction in a number of forms, most commonly over any offence committed by their nationals or against their nationals. Common law countries have begun extending the circumstances in which they assert extraterritorial jurisdiction in some circumstances.

Under Australia's current mutual assistance system, the Minister may refuse a mutual assistance request on the grounds of extraterritoriality. This means that if the request relates to the prosecution or punishment of a person for an act or omission that occurred outside the requesting foreign country and a similar act or omission occurring outside Australia in similar circumstances would not have constituted an offence against Australia law, the Minister may refuse the request.

What are extraterritorial offences?

Extraterritorial offences are offences that apply to conduct that occurs outside the territory of a country for which that country claims jurisdiction to prosecute. Australia exercises some jurisdiction over offences occurring outside Australia. One example is child sex tourism committed by Australian nationals overseas.

6. **Extraterritoriality:** Currently, Australia can refuse a request for assistance where the request relates to conduct that occurred outside the foreign country (ie the foreign country has criminalised that conduct extraterritorially) and Australia does not criminalise that same conduct where it takes place outside Australia. Should Australia retain the extraterritoriality ground of refusal for mutual assistance requests?

6.2.8 How should Australia consider lapse of time?

Many countries have limitation periods on commencing proceedings for criminal offences. This means that proceedings must be commenced within a certain period of time following the alleged commission of the offence.

Currently Australia may refuse to provide assistance to a foreign country if the request relates to the prosecution or punishment of a person for an act or omission for which the

person could no longer be prosecuted in Australia because of lapse of time or any other reason.

This ground of refusal has become largely obsolete as, in Australia, generally, limitation periods only apply to summary offences (offences which are punishable by less than 12 months imprisonment, or are not punishable by imprisonment). Refusing mutual assistance requests on the grounds of lapse of time is largely inconsistent with Australia's domestic criminal law and the ground has become redundant. However, in unusual cases where lapse of time may be relevant the general power to refuse requests would apply.

7. **Lapse of time:** Currently, Australia can refuse a request for assistance where the request relates to conduct that could no longer be prosecuted in Australia because of the length of time since the conduct was committed. Should Australia continue to refuse mutual assistance requests on the grounds of lapse of time?

6.2.9 Australia will retain the grounds of refusal in death penalty matters

The Mutual Assistance Act sets clear limits on Australia's cooperation on mutual assistance in death penalty matters.

If a foreign country requests mutual assistance where a person has been charged with, or convicted of, an offence which carries the death penalty, the Minister must refuse assistance unless there are special circumstances. Special circumstances include where the evidence would assist the defence, or where the foreign country undertakes not to impose or carry out the death penalty.

If a foreign country requests mutual assistance and the Minister believes that the provision of assistance may result in the death penalty being imposed on a person and after taking into consideration the interests of international criminal cooperation, is of the opinion that in the circumstances of the case the request should not be granted, the Minister may refuse to grant the request.

These provisions accord with Australia's strong commitment to the abolition of the death penalty.

C. Grounds of refusal in death penalty matters: Australia will retain the grounds of refusal in death penalty matters.

6.2.10 How should Australia deal with requests for take evidence and production orders?

Under the Mutual Assistance Act, the Minister can authorise a magistrate to take evidence on oath from witnesses and undertake production order proceedings. This can only be done when the foreign country has commenced proceedings.

In this process, the magistrate issues a summons for the person to attend before the magistrate and give evidence and/or produce the documents or articles. The magistrate

certifies this material and provides it to the Australian Government Attorney-General's Department, which then transmits it to the foreign country.

During take evidence or production order proceedings, the magistrate may permit the following people to have legal representation:

- the person to whom the proceeding relates
- any other person giving evidence or producing documents, and
- the relevant authority of the foreign country.

What is 'take evidence and production order proceedings'?

Take evidence and production order proceedings involve compelling a person to attend court to be a witness. For example, a person could be summoned to court to testify or to hand over material such as business records. This evidence is then used in the proceedings in the foreign country.

The magistrate may also permit the following people to examine or cross-examine, through video link, the person giving evidence or producing the document:

- the person to whom the proceeding relates or their legal representative, and
- the legal representative of the foreign country.

8. **Take evidence proceedings:** Under the Mutual Assistance Act, the Minister can authorise a magistrate to take evidence on oath from witnesses and undertake production order proceedings for use in foreign proceedings. This can only be done when the foreign country has commenced proceedings. Are any reforms needed to improve take evidence proceedings?

6.2.11 How should Australia deal with requests for take evidence or production orders by video link?

Under the Mutual Assistance Act, where the Minister has authorised a magistrate to take evidence in Australia, the magistrate has a discretion to permit the examination or cross-examination of the person in Australia who is giving the evidence or producing the document through video link from that country. The Mutual Assistance Act does not specify what criteria the magistrate should consider in exercising that discretion.

The magistrate already has a general discretion to allow or refuse to allow the evidence to be taken or require production of documents or articles. A further discretion to authorise take evidence by video link may be unnecessary. If the Minister has authorised the magistrate to take the evidence and the magistrate allows the evidence to be taken, it is difficult to envisage a scenario where Australia would not want to assist the foreign country fully and facilitate the taking of that evidence by video link. While in some cases the interests of justice may be an issue, these

What is video link evidence?

Video link evidence is evidence obtained from a witness through examination or cross-examination by video link. 'Video link' is defined in the Mutual Assistance Act to mean 'a video and sound system that enables persons assembled in a place in a country to see, hear and talk to persons assembled in a place in another country'.

issues will often be a matter for the foreign court or can be dealt with in the magistrate's general discretion.

One of the roles of the magistrate in a take evidence or production order proceeding is to protect the rights of the witness in Australia. For example, the magistrate must ensure that the witness is aware of their rights against self-incrimination. The discretion the magistrate currently has to permit or not permit the examination or cross examination of the witness by video link could assist in protecting the witness.

However, it is also important to note that there may be serious consequences for the prosecution in the foreign country if a magistrate refuses to allow the examination and/or cross-examination to take place by video link. A prosecution may be frustrated because, in some cases, video link may be the only possible channel for taking critical evidence. For example, the person giving evidence may not be able to travel due to health or security reasons.

It may be appropriate for the Act to be able to require that, where the magistrate allows the taking of evidence, the magistrate must also allow that evidence to be taken by video link if requested by the foreign country. Alternatively, the magistrate's discretion could be limited by prescribing specific criteria the magistrate must be satisfied of before refusing to allow the evidence to be taken by video link.

9. Magistrate's discretion: Should the magistrate's discretion in take evidence or production order proceedings on whether to permit examination or cross-examination by video link be removed or restricted?

Video link evidence outside of the mutual assistance process

A person may give evidence in a foreign prosecution at a commercial video link facility in Australia on a voluntary basis. Some countries require a mutual assistance request for the taking of voluntary evidence via video link. Australia's Mutual Assistance Act does not prescribe any requirements for taking video link evidence via this informal channel.

6.2.12 How should Australia deal with requests for persons, including prisoners, to give evidence or assist investigations in a foreign country?

Under the Mutual Assistance Act, the Minister can make arrangements for a person to travel to a foreign country to give evidence or assist an investigation. This can include federal or State prisoners (whether or not they are remanded on bail or are in custody).

The Minister can only make these arrangements if the person consents.

The Mutual Assistance Act lists a set of undertakings that the foreign country must provide before Australia will transfer a witness to another country to give evidence. These can include:

- that the person will not be detained, prosecuted or punished for an offence against the law of the foreign country allegedly committed before they left Australia

- in the case of a prisoner, that the person will be held in custody in the foreign country, and
- that the person will be returned to Australia.

10. **Transfer of persons to give evidence:** Under the Mutual Assistance Act, the Minister can make arrangements for a person to travel to a foreign country to give evidence or assist an investigation. How should Australia deal with requests for persons to give evidence or assist investigations in a foreign country? Are the undertakings contained in the Mutual Assistance Act appropriate?

11. **Transfer of prisoners to give evidence:** Under the Mutual Assistance Act, the Minister can make arrangements for federal or State prisoners to travel to a foreign country to give evidence or assist an investigation. How should Australia deal with requests for prisoners to give evidence or assist investigations in a foreign country? Are the undertakings contained in the Mutual Assistance Act appropriate?

6.2.13 How should Australia deal with requests for forensic material, including DNA?

Australian law enforcement agencies can use a range of procedures to obtain forensic material in the investigation and prosecution of domestic crimes.

However, where a foreign country makes a mutual assistance request for such material, there are some limitations on the assistance Australia can provide.

Australia's current legislative regime for forensic material

Obtaining forensic material

The Crimes Act provides for forensic procedures to be carried out on:

- suspects in relation to indictable offences
- offenders in relation to prescribed and serious offences, and
- volunteers.

Under the Crimes Act, forensic material, which includes DNA, can be taken from suspects and offenders with or without their consent.

What is forensic material?

Forensic material includes:

- samples (including DNA)
- hand prints, finger prints, foot prints, toe prints
- photographs or video recordings, or
- casts or impressions taken from a person's body by a forensic procedure (s23WA of the Crimes Act).

A suspect, offender or a volunteer can provide their forensic material by giving informed consent to the carrying out of a forensic procedure. Volunteers can consent to their forensic material being used for limited purposes, or being used for unlimited purposes.

A court or a police officer can order that a forensic procedure be carried out on a suspect or an offender without their consent in specific circumstances.

The National Criminal Investigation DNA Database

The Crimes Act also provides for the establishment of a DNA database system (Part ID). In 2001, a national DNA database system was created. It is called the National Criminal Investigation DNA Database (NCIDD). The NCIDD is administered by the CrimTrac Agency which is an Australian Government agency underpinned by an intergovernmental agreement between the Australian Government and all States and Territories.

The NCIDD contains DNA profiles obtained from DNA samples collected at crime scenes and from convicted offenders, suspects and volunteers. In some circumstances, profiles from suspects and volunteers may be compared with other profiles on the database.

The NCIDD is intended to be a national DNA database which contains all DNA profiles from all the States and Territories, as well as the DNA profiles it already holds for the Australian Government. The NCIDD does not and may not contain all of the DNA profiles held within State and Territory DNA databases. Whilst the NCIDD is operational there are some legislative amendments required at the Australian Commonwealth and State and Territory level to facilitate the effective exchange and matching of DNA data at the national level.

There are also State and Territory DNA databases. This part of the paper discusses mutual assistance on DNA information with reference to the NCIDD. However, generally the same principles would apply where Australia provides mutual assistance for DNA information that is stored only on a State or Territory database. For example, a mutual assistance search warrant could be executed on the body that administers that State or Territory database.

What is DNA?

DNA is a very long molecule that carries genetic information that governs a person's physical characteristics. DNA is found in the nucleus of every cell in the body except red blood cells and is the same throughout the body.

Because forensic scientists do not look at the whole of a person's DNA sequence, but rather a set of characteristics in non-coding DNA, the results are called a DNA profile. DNA profiles are a very powerful means of determining whether two samples may or may not have come from the same person. If two DNA profiles do not match, they must have come from two separate individuals. However, if they do match, there is only a small chance that they come from two different people.

For further information on the National Criminal Investigation DNA Database please visit <http://www.crimtrac.gov.au>

Obtaining DNA information for mutual assistance

The Mutual Assistance Act allows limited transfer of DNA information in response to a mutual assistance request from a foreign country.

Where a foreign country requires DNA information from Australia for the purposes of an investigation or prosecution in that country, the request will fall into one of the following three categories:

1. a request that DNA material be obtained from a person, with or without their consent
2. a request for DNA information which has already been obtained for a domestic investigation in Australia, and which may be stored on the NCIDD, and
3. a request for Australia to determine if DNA information from the foreign country matches any DNA information on the NCIDD or State and Territory DNA databases.

Each of these categories is discussed below.

Obtaining DNA material from a person for a foreign country

Currently, Australia cannot compulsorily conduct a forensic procedure on a suspect for the purposes of a mutual assistance request from a foreign country. The Crimes Act contains provisions on compulsorily conducting forensic procedures on suspects in relation to Australian criminal offences. These provisions do not apply to suspects in relation to foreign criminal offences.

Currently, Australia can only obtain DNA material from a person for the purposes of a mutual assistance request from a foreign country where that person volunteers and gives informed consent to the forensic procedure.

Should Australia consider allowing new DNA material to be obtained without a person's consent for a foreign country under mutual assistance, in the same way as it can be obtained for a domestic investigation?

12. **DNA from persons without consent:** Currently, Australia can only obtain DNA material from a person for a foreign country where that person consents to that process. Should Australia allow DNA material to be obtained from a person without the person's consent under mutual assistance in the same way as it can be obtained for a domestic investigation? What safeguards should apply?

Providing DNA information stored on the National Criminal Investigation DNA Database

The Crimes Act allows access to the NCIDD for the purposes of, and in accordance with, the Mutual Assistance Act (s23YDAE(2)(e)). The Crimes Act also provides that a person can disclose information on the NCIDD for the purposes of, and in accordance with, the Mutual Assistance Act (s23YO).

There are several mechanisms in the Mutual Assistance Act which can be used to provide DNA information stored on the NCIDD to a foreign country:

- DNA information can be provided in a **take evidence or production order proceeding** under the Mutual Assistance Act where criminal proceedings have commenced in the foreign country
- an Australian police officer can apply to a magistrate for a **mutual assistance search warrant** to be executed on CrimTrac, the body which administers the NCIDD. The search warrant requires that the Minister, the police officer and the

Magistrate are satisfied that there are reasonable grounds to believe that the evidential material is located in Australia, and

- Australia can provide **material which has been lawfully obtained by an enforcement agency in Australia** to a foreign country. CrimTrac is not an enforcement agency for the purposes of the Mutual Assistance Act. However, the AFP is such an enforcement agency. This procedure can be used to provide DNA information which is in the possession of the AFP.

13. **Providing information from the DNA database:** Currently, Australia can provide DNA information stored on the National Criminal Investigation DNA Database (NCIDD) to foreign countries by using the take evidence or production order proceedings in the Mutual Assistance Act or executing a mutual assistance search warrant for specifically identified DNA. DNA information can also be provided where it is in the possession of an enforcement agency. Are the current mechanisms for providing this DNA information appropriate? Are there better mechanisms for doing this?

Matching DNA from a foreign country with the NCIDD

At present, Australia cannot access the NCIDD (or State and Territory DNA databases) to 'match' a DNA sample provided by a foreign country unless the request from the foreign country meets the requirements of the search warrant provisions of the Mutual Assistance Act.

For example, where a foreign country is investigating a crime and wants to check an unknown DNA sample found at the scene of the foreign crime against Australia's NCIDD to see if there is a 'match', Australia is not currently able to assist that foreign country.

14. **DNA matching:** Currently, Australia cannot 'match' a DNA sample from a foreign country against the NCIDD unless the mutual assistance search warrant criteria are met. Should Australia allow controlled access to the NCIDD under mutual assistance for the purpose of DNA matching?

6.2.14 How should Australia deal with requests for telecommunications interception material and surveillance device material?

Australia's current laws allow for the interception of telecommunications for specified purposes, as well as the ability to use surveillance devices for law enforcement purposes.

The *Telecommunications (Interception and Access) Act 1979* (Telecommunications Interception and Access Act) prohibits interception of communications passing over a telecommunications system, except in particular circumstances, such as where an officer of

What is a surveillance device?

A surveillance device means:

- a data surveillance device
- a listening device
- an optical surveillance device
- a tracking device, or
- a device that is a combination of any two or more of the above devices.

an agency specified in the Act (such as the AFP) obtains a telecommunications interception warrant.

The Telecommunications Interception and Access Act also covers stored communications, which are communications which are not passing over a telecommunications system, but are held on equipment which are operated by telecommunication carriers, such as emails or short message service (sms) messages. In order to access stored communications, a stored communications warrant may be obtained under the Telecommunications Interception and Access Act. It is also possible to access stored communications through executing a search warrant; for example, a search warrant could be executed on a person's computer to access emails.

In order to obtain a telecommunications interception warrant, the offence must be a *serious offence* under the Telecommunications Interception and Access Act (these offences include Commonwealth, State and Territory offences). A serious offence includes:

- murder
- kidnapping,
- an offence punishable by imprisonment for life or for a period of at least 7 years and involves the loss of a person's life, serious personal injury, damage to property, fraud or child pornography, and
- money laundering offences and cybercrime offences.

The *Surveillance Devices Act 2004* (Surveillance Devices Act) enables the use of listening devices, data surveillance devices (for use in monitoring computers), optical surveillance devices and tracking devices with the authorisation of a warrant. Optical surveillance devices can be used without a warrant in certain circumstances. A law enforcement officer can apply for a surveillance device warrant where he or she believes on reasonable grounds:

- that a *relevant offence* has been or is likely to be committed, and
- the use of a surveillance device is necessary to obtain evidence for the investigation.

A *relevant offence* is an offence against the law of the Commonwealth punishable by a maximum period of 3 years or more, or an offence against the law of a state which has a federal aspect and is punishable by a maximum period of 3 years or more.

Provision of telecommunications interception, stored communications and surveillance device material under mutual assistance

The Mutual Assistance Act allows limited provision of telecommunication interception, stored communications and surveillance device material in response to a mutual assistance request from a foreign country.

Australia can provide telecommunication interception and surveillance device material to a foreign country in the following circumstances:

- Australia can provide material obtained under a telecommunications interception warrant in an 'exempt proceeding' under the Telecommunications Interception and Access Act. An exempt proceeding includes a **take evidence or production order**

proceeding under the Mutual Assistance Act for a criminal offence against the laws of the foreign country which is punishable by a maximum of 3 years or more. This is the only way telecommunications interception material can be provided in response to a mutual assistance request.

- Australia can provide material obtained under a surveillance device warrant in a relevant proceeding under the Surveillance Devices Act (s6). A relevant proceeding includes a **take evidence or production order proceeding** under the Mutual Assistance Act, for an offence against the laws of a foreign country which is punishable by a maximum period of 3 years or more.
- Australia can provide surveillance device material **which has been lawfully obtained by an enforcement agency and is lawfully held in Australia** under the Mutual Assistance Act (s13A). Australia cannot provide telecommunication interception material in this way as s13A of the Mutual Assistance Act specifically excludes telecommunications interception material.

Provision of material already in the possession of an enforcement agency

While surveillance device material can be provided to a foreign country where it has been lawfully obtained by an enforcement agency in Australia, telecommunications interception material cannot be provided to a foreign country in this circumstance.

The Mutual Assistance Act could be amended to allow for telecommunications material to be provided to a foreign country where it has been lawfully obtained by an enforcement agency in Australia.

15. Telecommunications interception material already in the possession of an enforcement agency: Currently, Australia can only provide telecommunications material through take evidence or production order proceedings under section 13 of the Mutual Assistance Act. Should Australia be able to provide telecommunications interception material and other telecommunications data such as stored communications, under section 13A of the Mutual Assistance Act in the same way that Australia can currently provide surveillance device material under this section?

Provision of telecommunication interception material and surveillance device material without a domestic investigation

Australia cannot obtain new telecommunications intercept material or surveillance device material in response to a mutual assistance request from a foreign country. In all cases, the material must have first been obtained for the purposes of a domestic investigation in Australia.

Australia could consider obtaining telecommunications interception and surveillance device material for the purposes of an investigation in a foreign country. Obtaining telecommunications interception and surveillance device material in Australia for a foreign investigation could occur in exactly the same way as for a domestic investigation. For example, the same offence thresholds would apply (eg for surveillance device material, the foreign offence would need to be have a penalty of at least 3 years imprisonment).

In deciding whether to obtain telecommunication interception or surveillance device material for a foreign country where the material is not already in existence, the Minister would need to consider both the resource implications and the possible benefits to Australian law enforcement.

Telecommunication interception and the use of surveillance devices are resource intensive investigative tools. Potentially, however, the use of these tools for a foreign country could also benefit Australian law enforcement agencies by assisting to identify domestic crimes and disrupting transnational criminal activity which has an impact on Australia. The use of these tools on behalf of a foreign country could result in fewer resources for domestic investigations.

Under Australia's current mutual assistance system the Minister has a discretion to refuse assistance to a foreign country where the provision of assistance would impose an excessive burden on the resources of the Commonwealth or of a State or Territory. This discretion allows resources to be considered in the Minister's decision making process.

16. Interception of telecommunications and use of surveillance devices without a domestic investigation: Currently, Australia cannot intercept telecommunications, access stored communications, or use most surveillance devices solely at the request of a foreign country. Where resources are available, should Australia be able to intercept telecommunications and use surveillance devices at the request of a foreign country without the need for a domestic investigation?

6.2.15 How should proceeds of crime operate in mutual assistance?

The Mutual Assistance Act and the Proceeds of Crime Act provide a range of proceeds of crime mechanisms which Australia can use to assist foreign countries.

These mechanisms can be divided into four groups:

- registration and enforcement of foreign orders (both conviction and civil based)
- tools for locating the proceeds of crime
- original orders to restrain or forfeit the proceeds of crime, and
- options available to share the proceeds of crime.

Registration and enforcement of foreign orders

The Mutual Assistance Act allows Australia to register and enforce foreign restraining, forfeiture and pecuniary penalty orders where a person has been convicted for a foreign serious offence (conviction based orders). A foreign serious offence is an offence against the law of a foreign country that carries a penalty of 12 months imprisonment or more.

Where a foreign order has been registered and enforced in an Australian court under the

What is the threshold for a conviction based order?

A conviction based order requires a conviction for a foreign serious offence. The property which is the subject of the order must be reasonably suspected of being in Australia.

Mutual Assistance Act, that order has effect as if it is an order made under the Proceeds of Crime Act.

Generally, Australia cannot initiate an order for a foreign country under the Mutual Assistance Act. An exception to this is that the Mutual Assistance Act allows Australia to apply for a restraining order where there are reasonable grounds to believe that a foreign restraining order is about to be issued. This restraining order is an interim order in force for 30 days or until a foreign restraining order is received by Australia from the foreign country and registered (s34J).

What is the threshold for a civil based order?

Civil based orders apply where the property that is the subject of the order is, or is alleged to be, the proceeds of a foreign serious offence. These orders do not require a conviction and so are called 'civil based' orders.

Australia can also register and enforce foreign restraining, forfeiture and pecuniary penalty orders for a prescribed number of countries for property which is or is alleged to be the proceeds of a foreign serious offence, whether or not a person has been convicted of the offence (civil based orders). Presently, the *Mutual Assistance in Criminal Matters Regulations 1988* prescribe five countries to which Australia can provide this assistance: the United States of America, Canada, Ireland, the United Kingdom and South Africa.

Civil based orders are one of the most effective tools for restraining and forfeiting the proceeds of crime. This is because they can be obtained prior to a person being convicted which may take a substantial period of time and allow the person to disperse assets.

Australia is only able to register civil based orders for foreign countries that are prescribed in the regulations under the Mutual Assistance Act. Australia could make this assistance available to all countries.

17. **Registration of civil proceeds of crime orders:** Should Australia make the registration of civil based proceeds of crime orders available to all countries?

Tools for locating and seizing the proceeds and/or instruments of crime

The Mutual Assistance Act also provides for a range of tools for locating and seizing the proceeds of crime.

Australia can use these investigative tools on behalf of a foreign country where a criminal investigation or proceeding has commenced in a foreign country for a foreign serious offence.

Production orders allow property tracking documents relating to the foreign offence to be obtained. Property tracking documents are documents relevant to identifying, locating or quantifying the proceeds of crime. **Monitoring orders** are also available which allow law enforcement officers to monitor activity on a

What is a foreign restraining order?

A foreign restraining order is an order made under the law of the foreign country in respect of an offence against the law of that country which is made for the purpose of preserving property, including an order restraining a certain person or persons from dealing with the property, or freezing the property or directing the seizure of the property or directing that the property be taken into official custody.

specific account with a financial institution such as a bank. **Search warrants** can also be used to obtain the proceeds or instruments of the foreign offence, or property tracking documents relating to the offence. All of these tools require the Minister's authorisation. The Act provides for the return of property where no restraining or forfeiture order is in place.

The Mutual Assistance Act also provides for **notices to financial institutions**, which do not require a criminal proceeding or investigation to have commenced in a foreign country. Notices to financial institutions enable the Attorney-General or a senior Departmental officer to require a financial institution to provide information or documents relevant to issues such as:

- determining whether an account is held by a specified person with the financial institution, or
- if a person holds an account, the balance of the account.

Sharing the proceeds of crime

Property which is subject to a registered foreign forfeiture order may be disposed of or otherwise dealt with in accordance with any direction of the Minister (s34B(3)). For example, the Minister may direct that the property is returned in full to the foreign country.

Alternatively, the Minister may direct that the property be credited to the Confiscated Assets Account. The Confiscated Assets Account is an account created under the Proceeds of Crime Act (s295). The Proceeds of Crime Act sets out a number of purposes for which property may be paid out of the Confiscated Assets Account. One purpose is **equitable sharing**. This means that Australia can share with a foreign country a proportion of any proceeds of any unlawful activity recovered under a Commonwealth law if, in the Minister's opinion, the foreign country has made a significant contribution to the recovery of those proceeds or to the investigation or prosecution of the unlawful activity (s296(4)(c)).

Money obtained by enforcement of a foreign pecuniary penalty order (with amounts taken out for certain costs) is credited to the Confiscated Assets Account; there is no discretion for the Minister to direct that the money be dealt with in another way. Because this money is credited to the Confiscated Assets Account, the Minister can share the money with the foreign country under the equitable sharing provisions in the Proceeds of Crime Act (s296(1)(c)).

What is a foreign forfeiture order?

A foreign forfeiture order means:

- an order, made under the law of the foreign country, for the forfeiture of property in respect of an offence made against the law of that country, or
- a declaration, made under the law of a foreign country, evidencing forfeiture of property under the law of that country.

What is a foreign pecuniary penalty order?

A foreign pecuniary penalty order means an order, made under the law of a foreign country, imposing a pecuniary penalty in respect of the offence against the law of that country. This does not include an order for the payment of a sum of money by way of compensation, restitution or damages to an injured person.

Original orders under the Proceeds of Crime Act

In some circumstances, the Proceeds of Crime Act can be used to take proceeds of crime action in response to a mutual assistance request.

- The Director or Public Prosecutions can make originating applications on behalf of any foreign country in relation to a foreign indictable offence for orders under the Proceeds of Crime Act such as a restraining order in relation to property that is suspected of being the proceeds of a foreign indictable offence (s19), restraining order in relation to literary proceeds in respect of a foreign indictable offence (s20), forfeiture order in relation to property where the court is satisfied that it is proceeds of a foreign indictable offence (s49), literary proceeds order in relation to a foreign indictable offence (s152), and a production order for property tracking documents relevant to literary proceeds in relation to a foreign indictable offence (s202).
- In some circumstances a request will reveal contact that may justify action under the Proceeds of Crime Act for the commission of an Australian offence. This typically occurs with money laundering.
- Where there is evidence that a person has engaged in money laundering (within the last six years and the offence has a penalty of at least three years imprisonment) of the proceeds of a foreign indictable offence in Australia, their property can be restrained under the Proceeds of Crime Act.

The interaction between the Mutual Assistance Act and the Proceeds of Crime Act provides a wide range of tools for Australia to locate, restrain, forfeit and share the proceeds of foreign crime located in Australia. In practice, both of these Acts are used, both separately and together (depending on the circumstances) to deal with mutual assistance requests on proceeds of crime.

18. Interaction between the Mutual Assistance Act and the Proceeds of Crime Act:
Is the interaction between the Mutual Assistance Act and the Proceeds of Crime Act appropriate and effective? How can the interaction be streamlined or improved?

6.2.16 How should Australia deal with requests for service of documents?

Service of documents used to be a kind of assistance dealt with in the Mutual Assistance Act. It was removed in 1996 because Australia can serve documents on behalf of a foreign country without a mutual assistance request. However, in practice, Australia receives a substantial number of mutual assistance requests for service of documents.

Many of Australia's bilateral treaties provide that Australia's assistance to the foreign country will include service of documents.

When Australia serves documents on a person in Australia on behalf of a foreign country, this has no legal consequences for the person in Australia. However, it can have legal consequences in the foreign country. For example, if a person in Australia is served an indictment for a proceeding in a foreign country, Australian law does not compel the

person to attend the proceeding in the foreign country. However, if the person later travels to the foreign country they may be subject to punishment under the foreign country's law for their non-attendance.

An alternative to Australia serving documents under mutual assistance is that the foreign country serves the document directly—either through their diplomatic officials in Australia, or through the mail.

There may be concerns about the Australian Government authorising this action, although this approach is already open under existing law.

What is 'service of documents'?

The process by which a judicial document is provided to a person. For example, the document can be delivered to them in person.

What types of documents does Australia currently serve under mutual assistance?

Australia can serve documents relating to criminal matters in a foreign country. This can include the following documents:

- Indictments
- Summons, and
- Notices (such as a notice of discontinuance or a notice of acquittal).

19. **Service of documents:** Should Australia continue to deal with requests for service of documents through the mutual assistance process? What alternatives to this process could be used?

6.2.17 What should be included in mutual assistance requests from other countries?

Mutual assistance requests from foreign countries may be made to the Minister or a person authorised by the Minister to receive requests. In practice, requests are received by the Australian Government Attorney-General's Department, which is the central authority for mutual assistance in Australia. If mutual assistance requests are received by other Australian agencies or an Australian court, they must be sent to the Australian Government Attorney-General's Department.

Under the Mutual Assistance Act, mutual assistance requests must be in writing and include:

- the name of the authority concerned with the criminal matter to which the request relates
- a description of the nature of the criminal matter
- a summary of the relevant facts and laws
- a description of the purpose of the request and the nature of the assistance being sought, and
- any information that may assist in giving effect to the request.

The information that is included in a mutual assistance request is a critical aspect of the mutual assistance process. Detailed and accurate information assists Australia to process mutual assistance requests more efficiently.

Should mutual assistance requests be required to contain any other specific information to assist in the efficient processing of mutual assistance requests? For example, mutual assistance requests could include the contact details of the person in the foreign country

capable of responding to enquiries on the request. This would provide Australia with a direct point of contact in the foreign country to assist in progressing the request.

Currently, when a mutual assistance request has insufficient information, the Australian Government Attorney-General's Department liaises with the foreign country. This practice could be reflected in the Mutual Assistance Act so that it is clear that if the information provided in the mutual assistance request is not sufficient, then Australia can request that the foreign country provide additional information before progressing the request.

20. Content of Mutual Assistance Requests: Should mutual assistance requests from foreign countries be required to contain any additional information? Should the Mutual Assistance Act reflect the practice of liaising with foreign countries to ensure their requests meet the requirements in the Act?

6.3 How can Australia cooperate with other countries on outgoing requests?

6.3.1 How should Australia make arrangements for persons in a foreign country, including prisoners, to give evidence or assist investigations in Australia?

Under the Mutual Assistance Act, the Minister can request that a person travel from a foreign country to Australia to give evidence or assist an investigation. This can include foreign prisoners.

In the case of a prisoner, the Minister must be of the opinion that the person is capable of giving the relevant evidence or assistance and has given his or her consent to being removed to Australia for this purpose.

The Mutual Assistance Act lists a set of immunities that Australia provides to a person giving evidence in a proceeding or assisting an investigation in Australia under a mutual assistance requests (s19). These include:

- that the person will not be detained, prosecuted or punished in Australia for any offence allegedly committed before the person left the foreign country under the mutual assistance request, and
- that the person will not be required to answer any question in the proceeding that the person would not be required to answer in a proceeding in the foreign country.

21. Transfer of persons to give evidence in Australia: Under the Mutual Assistance Act, the Minister can make arrangements for a person, including a prisoner, to travel to Australia from a foreign country to give evidence or assist an investigation. How should Australia make arrangements for persons to give evidence or assist investigations in a foreign country? Are the arrangements contained in the Mutual Assistance Act appropriate?

6.3.2 How should Australia ensure that evidence obtained from a foreign country can be used in Australian proceedings?

Evidence from a foreign country can only be used in domestic criminal proceedings in Australia if that evidence satisfies the requirements of Part III of the Foreign Evidence Act. This Part of the Foreign Evidence Act provides specific procedures to enable evidence obtained from other countries through mutual assistance to be used in criminal and related civil proceedings in Australian courts, subject to appropriate safeguards.

There are three key issues in the Foreign Evidence Act that impact on whether foreign evidence can be used in Australian domestic proceedings.

Testimony requirements

Under the Foreign Evidence Act, foreign evidence must have been taken under:

- oath or affirmation, as in Australia, or
- such caution or admonition as would be accepted by courts in the foreign country in which the material was obtained.

The material must also be signed or certified by a judge, magistrate or officer in the foreign country.

Evidentiary requirements of Australian jurisdictions

Under the Foreign Evidence Act, foreign evidence may be used in domestic proceedings in Australia, unless:

- the person who gave the evidence is able to attend the proceedings in Australia, or
- the evidence would not have been admissible if the evidence had been adduced from the person at the proceedings (paragraph 24(2)(b) Foreign Evidence Act).

This means that foreign evidence must comply with the requirements of the evidence legislation of the Australian State or Territory in which the proceedings are being conducted.

Courts' discretion to refuse to allow the use of foreign evidence

The Foreign Evidence Act provides that foreign evidence may not be used if the evidence would not have been allowed to be used in the court had the evidence been adduced at the proceedings.

Australian courts also have a broad general discretion not to allow the use of foreign evidence if it appears that, having regard to the interests of the parties to the proceedings, justice would be better served if the material were not used. There are a number of criteria the court may take into account when deciding whether to allow the use of material, including:

- the extent to which the foreign material provides evidence that would not otherwise be available, and
- whether exclusion of the foreign evidence would unfairly prejudice any party to the proceeding.

The court's broad discretion in this area is limited where the prosecution is for a 'designated offence' under the Foreign Evidence Act. Designated offences include a range of Commonwealth terrorism and security-related offences. In proceedings for designated offences, the court may only refuse to allow the use of foreign evidence if its use would have a substantial adverse effect on the right of a defendant to receive a fair hearing.

Australia should ensure that judges and legal practitioners have the necessary familiarity with the Foreign Evidence Act to ensure that foreign evidence obtained under mutual assistance is not unnecessarily excluded from use in an Australian court.

22. **Use of foreign evidence:** Where Australia receives evidence from a foreign country for use in domestic proceedings, the *Foreign Evidence Act 1994* (Foreign Evidence Act) applies. Are the current mechanisms in the Foreign Evidence Act the most appropriate mechanisms for allowing the use of foreign evidence in domestic proceedings? Are Australian courts' current discretions under the Foreign Evidence Act to refuse to allow the use of foreign evidence in domestic proceedings appropriate?

6.3.3 Request from Australia for mutual assistance to a foreign country on behalf of a defendant

The most common form of mutual assistance is a Government to Government request for information on behalf of an investigating or prosecuting authority. However, the Mutual Assistance Act also provides a mechanism for Australia to make a mutual assistance request on behalf of a defendant for the purposes of a proceeding.

A defendant may apply to the Supreme Court in the State or Territory where the proceeding is being heard for a certificate that it would be in the interests of justice for the Minister to make a mutual assistance request on their behalf, where the defendant believes that evidence that is located in a foreign country is necessary for the purposes of the proceeding.

The Court may issue a certificate if it believes it is in the interests of justice for the Minister to make the request to the foreign country. Before making a decision on whether to issue a certificate, the court must give all parties to the proceeding and the Minister an opportunity to be heard.

In deciding whether to issue the certificate the court must take a number of matters into account, including:

- whether the foreign country is likely to grant such a request on behalf of the defendant (s39A(3)(a))
- the extent to which the material that the defendant seeks to obtain from the foreign country would not otherwise be available (s39A(3)(b))

- whether the court hearing the original proceeding would be likely to admit the material into evidence in the proceeding (s39A(3)(c))
- the likely probative value of the material (s39A(3)(d))
- whether the defendant would be unfairly prejudiced if the material were not available to the court (s39A(3)(e)), and
- any other relevant matter (s39A(4)).

Once the court decides to issue a certificate, the Minister must, in accordance with the certificate, make a request on behalf of the defendant to the foreign country for international assistance unless he or she is of the opinion, having regard to the special circumstances of the case, that the request should not be made.

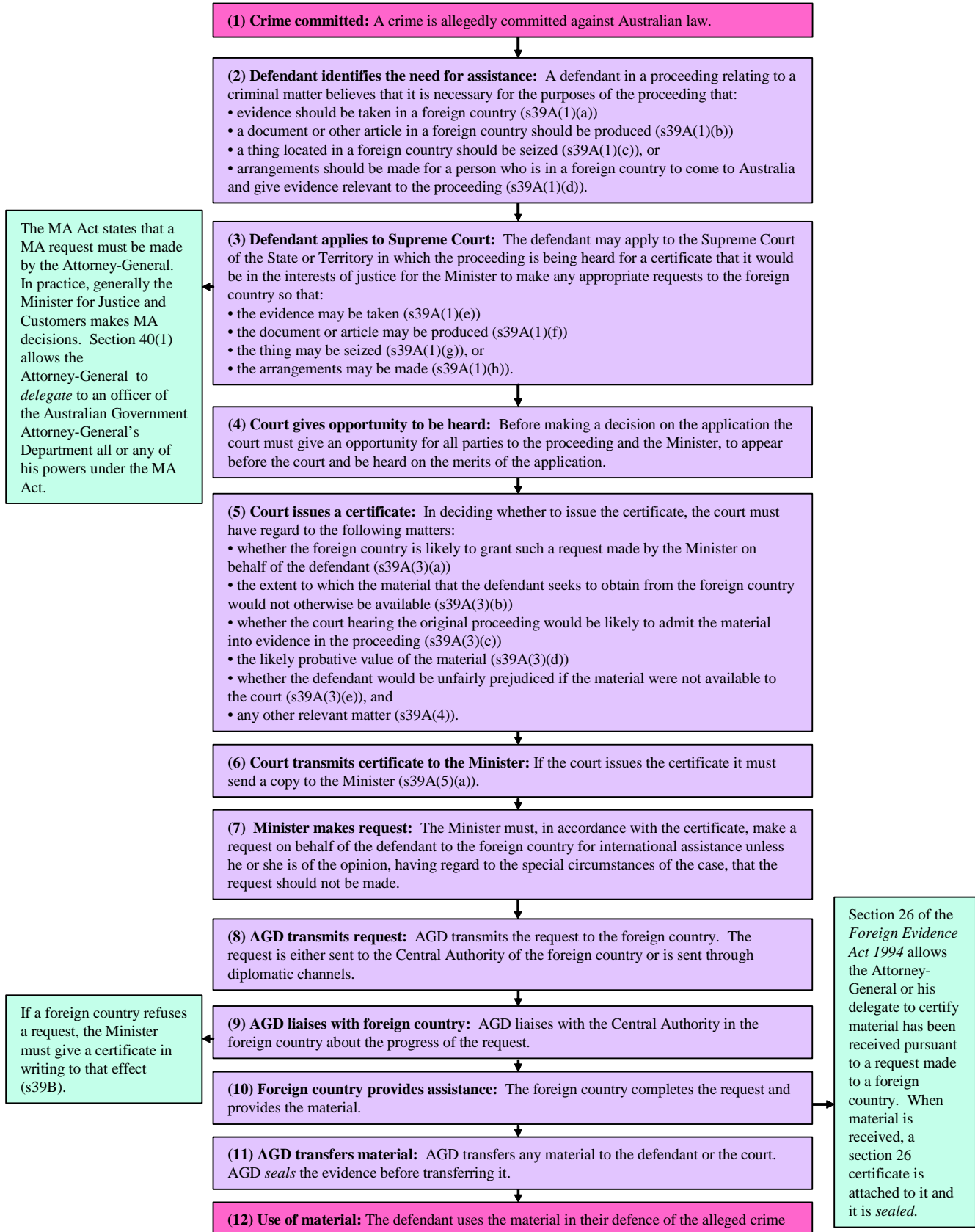
After the request is transmitted to the foreign country the Australian Government Attorney-General's Department liaises with the foreign country on the progress of the request. If the foreign country refuses the request, then the Minister must issue a certificate in writing to that effect.

Once the request has been completed the foreign country sends the material to the Australian Government Attorney-General's Department. The Australian Government Attorney-General's Department seals the evidence and sends it to the court or the defendant.

23. Request on behalf of a defendant: Is the current system the most appropriate system for providing a defendant with an opportunity to seek mutual assistance?

Flowchart 4 describes how a defendant can obtain mutual assistance from a foreign country.

Flowchart 4 How a defendant can obtain mutual assistance from a foreign country – (outgoing request)



6.4 Other issues

6.4.1 Confidentiality of mutual assistance requests made by a foreign country to Australia

The Mutual Assistance Act provides that it is an offence for a person to intentionally disclose:

- the contents of a request for mutual assistance made by a foreign country to Australia
- the fact that such a request has been made, or
- the fact that such a request has been granted or refused

unless disclosure is necessary in the performance of the person's duties or the Minister has approved such disclosure (s43C). This offence only applies where the person has knowledge of the request because of his or her office or employment. The penalty for this offence is two years imprisonment.

This provision ensures that Australia can comply with any confidentiality conditions that a foreign country may request when making a mutual assistance request to Australia.

Australia's capacity to assure a foreign country of the confidentiality of that country's mutual assistance request has important implications for Australia's international crime cooperation relationships. A foreign country is more likely to reciprocate the level of assistance provided by Australia where Australia has demonstrated its commitment to safeguarding the confidentiality of ongoing law enforcement operations in the foreign country.

D. Confidentiality of incoming mutual assistance requests: Australia will retain strict confidentiality requirements for incoming mutual assistance requests.

6.4.2 Confidentiality of mutual assistance requests made by Australia to a foreign country

There is no equivalent offence for disclosing the existence or content of requests to a foreign country from Australia to the offence that currently applies to mutual assistance requests from a foreign country to Australia.

In some mutual assistance matters, it will be critical that no information about a request is disclosed because disclosure may jeopardise an ongoing law enforcement operation. Australia could consider amending the Mutual Assistance Act to include a similar offence for outgoing requests to the offence which currently applies to disclosing incoming mutual assistance requests. Disclosure of a mutual assistance request from Australia to a foreign country would be prohibited unless disclosure is necessary in the performance of the person's duties or the Minister has approved such disclosure.

However, unlike the offence for disclosing incoming requests which applies to all persons who have knowledge of the request because of their office or employment, an offence for disclosing outgoing requests should be restricted to Commonwealth officers. Many outgoing mutual assistance requests are made by the Australian Government on behalf of States or Territories. In those cases, State and Territory governments and law enforcement authorities should be able to make their own decisions on whether to publicly discuss their request.

For example, where there has been media reporting of a particular matter, a law enforcement authority may wish to provide confirmation to a victim of the alleged crime or to the public more generally that they are actively pursuing evidence in a foreign country.

24. Confidentiality of outgoing mutual assistance requests: It is currently an offence for a person to disclose information about a request from a foreign country for mutual assistance where they have obtained that information as part of their employment. Should there be a similar requirement for Commonwealth officers only to keep confidential any mutual assistance requests from Australia to a foreign country?

6.4.3 How should the Mutual Assistance Act allow appropriate information sharing?

The mutual assistance process involves the sharing of information, including personal information, between the Central Authority (the Australian Government Attorney-General's Department), law enforcement agencies, prosecuting authorities and other agencies external to the criminal justice system. Information is also shared with State and Territory agencies and with entities in foreign countries.

These information flows are subject to the Privacy Act and its Information Privacy Principles. The Privacy Act and the Information Privacy Principles provide a principle-based regulatory scheme, describing the minimum standard to which agencies must comply when handling personal information. The Information Privacy Principles provide that personal information cannot be used or disclosed except for the purpose for which it was collected. There are a number of exceptions to this principle, including where:

- disclosure is reasonably necessary for the enforcement of the criminal law, or
- disclosure is required or authorised by or under law. Disclosure is authorised by law if legislation clearly and expressly provides that the personal information may be disclosed in specific circumstances.

The Office of the Privacy Commissioner's Guidelines on the Information Privacy Principles note that the definition of 'criminal law' is limited to Commonwealth, State, or Territory criminal law. However, where the Commonwealth discloses

What is personal information?
The Privacy Act defines personal information as information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained from the information or opinion.

For further information on privacy please visit <http://www.privacy.gov.au>

personal information in accordance with the Mutual Assistance Act, 'criminal law' may include the law of non-Australian jurisdictions. The Guidelines note that it may be more appropriate to justify the use or disclosure of personal information in mutual assistance under the 'required or authorised by or under law' exception rather than the general 'enforcement of the criminal law' exception.

The Mutual Assistance Act could be amended to expressly identify and authorise personal information flows in the mutual assistance process to make it clearly fall within the 'required or authorised by or under law' exception in the Privacy Act. This approach would provide a degree of transparency and certainty in the mutual assistance process.

These provisions would be specific and not simply authorise information sharing generally. Such provisions would identify:

- the type of personal information that could be shared
- the agencies which could share the information
- the agencies which could receive the information, and
- the purpose for which the information could be shared.

For example, a provision may authorise the Australian Government Attorney-General's Department to provide the AFP with a person's name, date of birth and bank account number for the purpose of executing a search warrant on that bank account in compliance with a mutual assistance request received from a foreign country.

25. **Privacy:** Mutual assistance can involve personal information flows between a range of agencies in Australia and between Australia and foreign countries for law enforcement purposes. Should the Mutual Assistance Act expressly identify and authorise the personal information flows in the mutual assistance process?

6.4.4 The application of the *Freedom of Information Act 1982* to mutual assistance documents

Currently, all mutual assistance documents are potentially subject to the operation of the *Freedom of Information Act 1982* (Freedom of Information Act), which means they can be released under a freedom of information request unless they fall within one or more of the general exemptions under the Act. Mutual assistance documents include documents created in the course of responding to or making mutual assistance requests as well as evidence or information gathered for the purpose of a mutual assistance request.

The freedom of information exemptions that have been applied to mutual assistance documents in the past include:

- documents affecting national security, defence or international relations (s33)
- internal working documents (s36)
- documents affecting the enforcement of law and public safety (s37)
- documents affecting personal privacy (s41), and
- documents subject to legal professional privilege (s42).

Guidance on the meaning and application of these and other exemptions in the Freedom of Information Act is available in Freedom of Information Act Memorandum No 98 entitled 'Exemptions Sections in the Freedom of Information Act', published by the Australian Government Attorney-General's Department and available at www.ag.gov.au/foi.

E. Application of the Freedom of Information Act to mutual assistance documents: The Freedom of Information Act and applicable exemptions will continue to apply to mutual assistance decisions.

6.4.5 Judicial review of mutual assistance decisions

The Administrative Review Council notes that 'judicial review plays a vital role in Australia's system of government.' The availability of judicial review supports fundamental values such as the rule of law, the safeguarding of individual rights and accountability, consistency and certainty in the administration of legislation.²

Judicial review is available to review discretionary administrative decisions made by a decision maker in the mutual assistance process.

Judicial review is available for mutual assistance decisions under:

- the *Administrative Decisions Judicial Review Act 1977*
- s39B of the *Judiciary Act 1903*, and
- s75(v) of the *Constitution*.

Examples of mutual assistance decisions that are reviewable are:

- the decision to make a request to a foreign country (eg a defendant in Australia may wish to seek review of a decision to seek evidence from a foreign country that would assist the prosecution in Australia of their alleged crime), and
- the decision to refuse to make a request (eg a defendant in Australia may wish to seek review of a refusal to make a request on their behalf).

It should be noted that the party seeking review will have to establish standing with the court before being able to access judicial review.

For further information on judicial review please visit <http://www.law.gov.au/arc>

F. Judicial review of mutual assistance decisions: Avenues for judicial review on mutual assistance decision will continue to be available.

² Administrative Review Council, *The Scope of Judicial Review: Report to the Attorney-General*, Report no.47, April 2006, vii.