



Australian Government
Attorney-General's Department

A better mutual assistance system



A review of Australia's
mutual assistance law and practice

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mutual assistance law and practice

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Consultation

We invite your comments on the issues we have presented for discussion in this paper. The public consultation phase of the Review is an important part of the development process. Please send comments to the Australian Government Attorney-General's Department by 13 October 2006.

Please send written comments to:

Extradition and Mutual Assistance Review Team
International Crime Cooperation Branch
Attorney-General's Department
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AUSTRALIA

For updates on the progress of the mutual assistance reforms please visit <http://www.ag.gov.au/extraditionandma>

reviews@ag.gov.au

We invite you to focus your submissions on the green issue boxes presented throughout this paper. These issues are intended to be a catalyst for comments and further discussion and do not represent the final policy position that will be presented to Government. Part 2 of this paper sets out a summary of the key issues that we would like your comments on.

We will put submissions on our website. Please let us know if you do not want your submission made public.

The Australian Government Attorney-General's Department looks forward to receiving comments on the issues raised in this discussion paper.

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Foreword

Many Australians would be aware of the very good work that our law enforcement authorities do in partnership with their overseas counterparts to fight both domestic and transnational crime.

However, fewer Australians may realise how critical the tool of mutual assistance is to this fight. Mutual assistance is the process countries use to provide and obtain formal Government to Government assistance in criminal investigations and prosecutions.

Without mutual assistance, a successful investigation or prosecution into terrorism, child sex offences or corruption may be frustrated or never even get off the ground.

Mutual assistance is also a key process to recover the proceeds of crime and ensure that Australia is not a safe haven for money launderers.

Criminals should be aware that if they bring the proceeds of their overseas crimes to Australia, our authorities will act together with their foreign counterparts to ensure the proceeds of their crimes are seized.

The *Mutual Assistance in Criminal Matters Act 1987* (Mutual Assistance Act) was introduced almost twenty years ago. Since that time, improved communications, the emergence of new technologies and the growth of international travel has made it more likely for the evidence and proceeds of a crime to be located in different countries.

Since the introduction of the Act, there has also been a dramatic increase in the use of mutual assistance as a tool in the investigation and prosecution of crime. Australia's use of mutual assistance to obtain assistance from overseas has doubled over the past six years alone.

Australia needs an excellent mutual assistance system to ensure that criminals cannot evade prosecution and proceeds of crime confiscation action just because the evidence or proceeds of their crime are in different countries.

That is why we are reviewing Australia's mutual assistance arrangements. We need to ensure these arrangements are as responsive and streamlined as possible to assist in the ongoing fight against domestic and transnational crime. I encourage you to contribute to the Mutual Assistance Review.



CHRIS ELLISON
Minister for Justice and Customs



Part 1: Introduction

The emergence of new technologies and the growth of international travel have made it increasingly common for evidence and proceeds of a crime committed in one country to be located in another. These same factors have contributed to the growth of transnational crimes—such as drug trafficking, money laundering and trafficking in women and children—and increased the global threat from terrorism.

Australia needs to ensure that criminals cannot evade prosecution just because evidence is in a foreign country. Australia also needs to be able to take action to deny criminals of the proceeds of their crimes, regardless of where those proceeds may be found.

Mutual assistance is the formal Government to Government process countries use to assist one another in the investigation and prosecution of criminal offences. Mutual assistance can also be used to locate, restrain, forfeit and share the proceeds of crime.

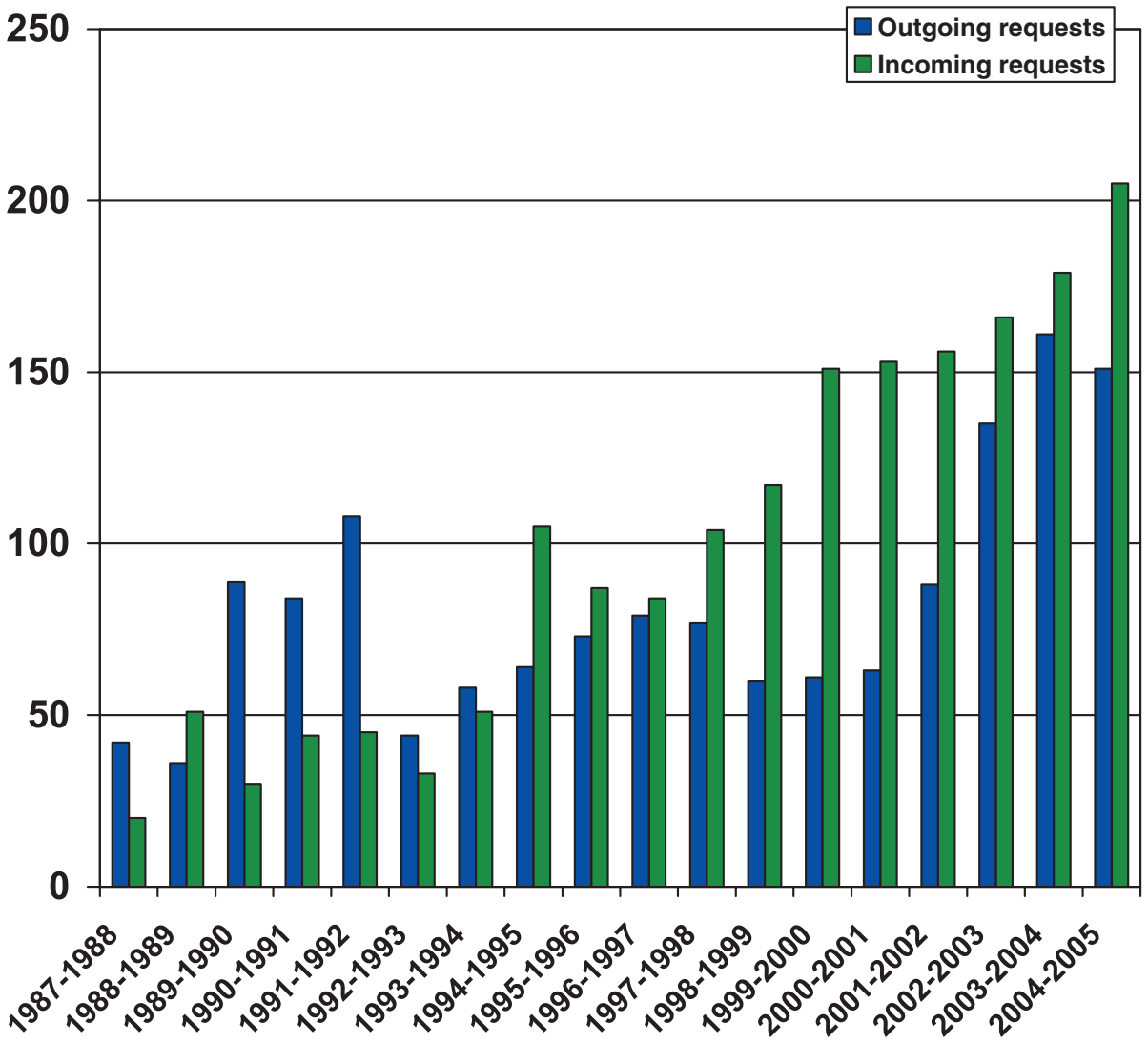
Most countries require a mutual assistance request for assistance that would involve the use of coercive powers, such as executing a search warrant or taking evidence from a person before a court. For some countries, such as Australia, it is necessary to make a mutual assistance request to obtain evidence from a foreign country where that evidence is to be used in court proceedings. There are also specific types of assistance that do not involve the use of coercive powers for which many countries require a mutual assistance request. For example, in most countries a prisoner can only voluntarily travel to another country to give evidence in response to a mutual assistance request.

In Australia, mutual assistance is primarily regulated by the Mutual Assistance Act. Under the Mutual Assistance Act, Australia can request assistance from any country and receive a request for assistance from any country.

To facilitate the mutual assistance process, Australia has entered into bilateral mutual assistance treaties with 24 countries including the United States, Hong Kong, the Netherlands and Indonesia. Australia is also a party to a number of multilateral conventions, such as the *United Nations Convention on Transnational Organised Crime*, which contain mutual assistance obligations.

It is almost twenty years since the introduction of the Mutual Assistance Act. In that time there has been an exponential growth in the use of mutual assistance both in Australia and overseas. In the past six years alone, Australia has more than doubled the number of requests it makes to foreign countries while in the same period the number of requests received by Australia has increased by over 30% (see **figure 1**). This growth is likely to continue for the foreseeable future.

Figure 1: Comparison of incoming and outgoing mutual assistance requests



Given the dramatic increase in the use of mutual assistance, and the fact that Australia's current arrangements have been in place for almost two decades, it is timely to consider how Australia's mutual assistance system can be improved.

The objective of this Review is to develop a responsive, streamlined mutual assistance system that effectively supports the investigation and prosecution of criminal offences, helps to ensure that criminals are denied the proceeds of their crimes, and which incorporates appropriate safeguards.

To achieve this objective, the Review is seeking to answer three broad questions: "What should mutual assistance do?", "How should we do it?" and "How will the right people do their jobs best?" The answers to these questions will be guided by a number of principles which are set out at **figure 2**. These include efficiency, responsiveness, accountability and the 'normalisation' of mutual assistance.

Figure 2: Guiding principles for this Review

The guiding principles for this Review

This Review is guided by the following principles:

- *Efficiency*: Resources, including time, labour and money, should be used efficiently to ensure that mutual assistance requests can be executed without unnecessary delay
- *Role clarity*: The nature and scope of the roles of the key agencies involved in the mutual assistance process should be clear to maximise the effectiveness of cooperation in mutual assistance matters
- *Responsiveness*: The mutual assistance process should facilitate fast responses to requests and enable the provision of a wide range of assistance
- *Compatible evidence*: The mutual assistance process should ensure that, to the degree possible, evidence obtained overseas can be used in Australian courts in accordance with Australian evidence principles
- *Effective law enforcement*: The mutual assistance process should effectively support the prosecution of criminals and the confiscation of their proceeds of crime
- *'Normalising' mutual assistance*: Mutual assistance should be used routinely as a standard law enforcement tool.
- *Accountability*: The mutual assistance process should have appropriate public accountability mechanisms
- *Appropriate safeguards*: Appropriate safeguards should be built into the mutual assistance process
- *Confidentiality*: The mutual assistance process should protect the confidentiality of ongoing law enforcement investigations
- *Sovereignty*: The mutual assistance process should operate to support Australia's national interests, and
- *Technological neutrality*: The mutual assistance process should be flexible enough to respond to advances in technology.

The Government is conducting this Review to ensure that Australia has the best possible mutual assistance system to cooperate with other countries to fight domestic and transnational crime. Public consultation is an important part of achieving this goal. Accordingly, we invite your comments on the issues presented in this Paper.

1.1 The scope of this Review

This Review is a wide-ranging policy Review that considers all the features of Australia's mutual assistance system, including mutual assistance legislation and practical arrangements.

The terms of reference for this Review are at Appendix 1. This Review examines the Mutual Assistance Act.

This Review is a review of mutual assistance in criminal matters only and does not consider the *Mutual Assistance in Business Regulation Act 1992*.

The Review examines the relevant parts of the *Foreign Evidence Act 1994* (Foreign Evidence Act) that set out how evidence obtained from foreign countries, through mutual assistance, can be used in Australian courts.

This Review also considers proceeds of crime issues. The Mutual Assistance Act provisions on proceeds of crime are linked to provisions in the *Proceeds of Crime Act 2002*¹ (Proceeds of Crime Act). This Review examines the best way to use the Mutual Assistance Act and/or the Proceeds of Crime Act to provide proceeds of crime assistance to foreign countries. There is currently a separate review being conducted of the Proceeds of Crime Act. This is an independent statutory review.²

This Review does not consider the mutual assistance provisions in the *International Criminal Court Act 2002* or the *International War Crimes Tribunals Act 1995*. These Acts deal with Australia's assistance to the International Criminal Court, the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia and have been specifically developed for those bodies.

Mutual assistance is confined to assistance requested on a Government to Government basis. It is separate from 'police-to-police', 'agency-to-agency' and other types of information assistance in criminal matters.

This Review is not a review of police-to-police or agency-to-agency assistance.

¹ The *Proceeds of Crime Act 1987* is also used in mutual assistance for actions which originated prior to the enactment of the *Proceeds of Crime Act 2002*.

² Further information on this review is available at www.crimeprevention.gov.au

Part 2: Your guide to this discussion paper

2.1 The structure of this paper

Part 2 sets out the structure of this paper and issues for discussion and seeks your comments on these issues. The issues are examined in detail in Parts 6 and 7.

Part 3 explains Australia's key international crime cooperation tools and discusses how they complement each other. Mutual assistance is one of these tools.

Part 4 describes how the current mutual assistance system works.

Part 5 explains agency-to-agency assistance and how it differs from mutual assistance. This Part also demonstrates how agency-to-agency assistance can be an alternative to mutual assistance.

Part 6 discusses the key considerations for mutual assistance reform. This Part of the paper examines what we should do in mutual assistance and how we should do it.

Part 7 considers how people in the mutual assistance process can do their jobs best. This Part discusses how we can improve our domestic and international capacity in mutual assistance.

Part 8 discusses how we can maintain and increase public awareness of mutual assistance and the possible reforms to mutual assistance.

2.2 Issues and principles considered by this paper

In light of the dramatic increase in mutual assistance, this paper considers how Australia's mutual assistance arrangements can be improved.

Throughout the paper there are green issue boxes which raise possible proposals to improve Australia's mutual assistance arrangements. These issue boxes are intended to promote further discussion and do not represent the final policy position that will be presented to Government. There are also yellow principle boxes which represent the Australian Government's policy position or intention on a particular topic.

A full list of the issues and principles considered by this paper follows. We invite your comments and submissions on the issues. Each of the issues and principles are discussed in detail in Parts 6 and 7.

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

Issue 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?

Issue 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?

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

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

Issue 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?

Issue 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?

Issue 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?

Issue 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?

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

Issue 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?

Issue 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?

Issue 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?

Issue 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?

Issue 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?

Issue 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?

Issue 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?

Issue 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?

Issue 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?

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

Issue 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?

Issue 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?

Issue 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?

Issue 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?

Issue 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?

Issue 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?

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

Issue 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?

Issue 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?

Principle 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.

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

Principle G: Enhancing skills and knowledge: The Australian Government will continue to implement strategies to ensure that participants in the mutual assistance process have the necessary skills and knowledge to make and action requests.

Principle H: Working Cooperatively: The Australian Government will explore the most effective ways to work cooperatively on mutual assistance with the States and Territories.

Principle I: Clarifying roles and responsibilities: The Australian Government will review existing arrangements with States and Territories to clarify the roles and responsibilities of agencies in the mutual assistance process.

Issue 26: Central Taskforce: The Australian Government Attorney-General's Department is Australia's Central Authority for mutual assistance and is staffed by mutual assistance case officers. Should Australia adopt a Taskforce model for mutual assistance by co-locating mutual assistance case officers with prosecutors and law enforcement officers? Which agencies should be included in the taskforce? Should the taskforce be located in the Australian Government Attorney-General's Department?

Principle J: Building international relationships: The Australian Government will continue to focus on developing international mutual assistance relationships through bilateral and multilateral treaties and active engagement with the United Nations Office on Drugs and Crime.

Issue 27: Overseas liaison officers: Should the Australian Government post international crime cooperation liaison officers in our Embassies accredited to our key international crime cooperation partners or the Central Authorities of our key international crime cooperation partners?

Principle K: Building regional relationships and capacity: The Australian Government will continue to explore opportunities to build capacity in the Asia-Pacific region in mutual assistance.

Principle L: Sharing information: The Australian Government will continue to explore the most effective ways of sharing information with other countries on our mutual assistance arrangements.

Principle M: Communication of reforms: The Australian Government will implement a comprehensive communication strategy to inform the general public about the mutual assistance process and mutual assistance reforms.

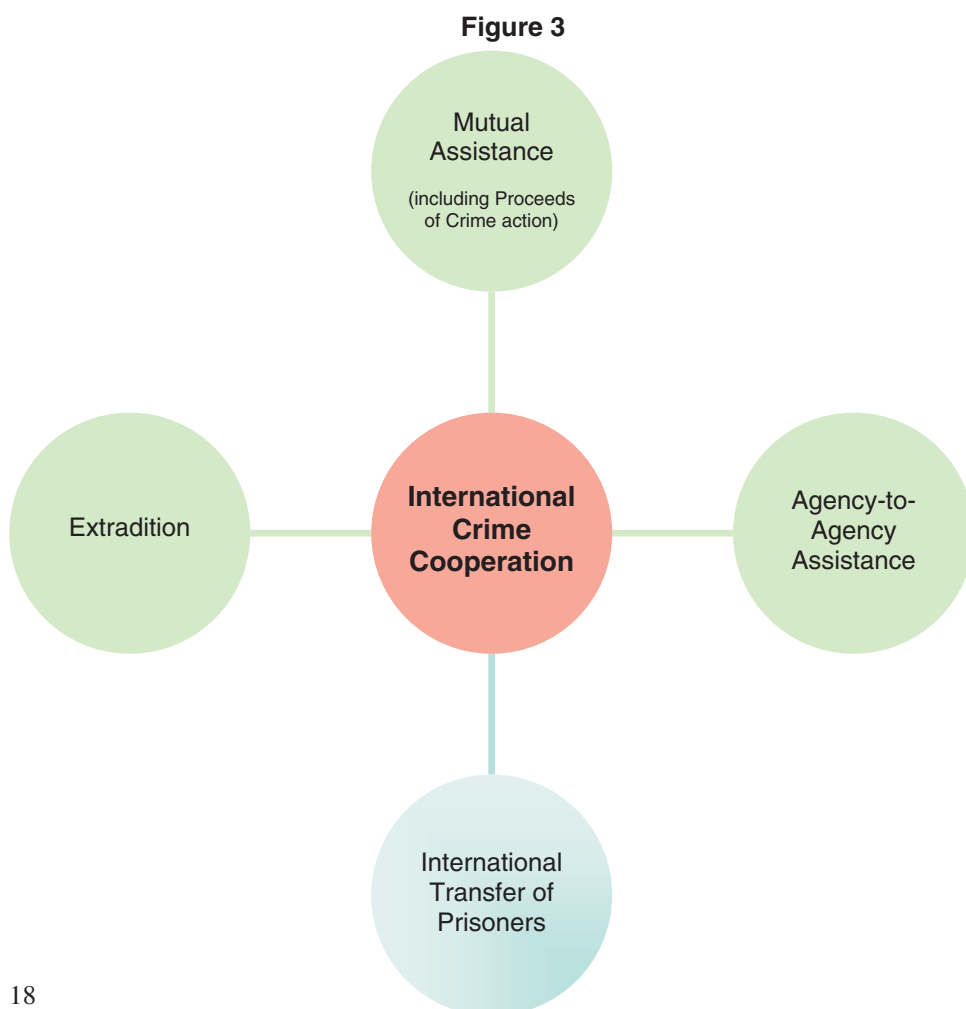
Part 3: Australia’s international crime cooperation tools

Australia uses a range of mechanisms to cooperate with other countries in criminal matters. There are three key tools that are used in investigation and prosecution and to deny criminals of the proceeds of crime: mutual assistance (including proceeds of crime action), extradition and agency-to-agency assistance.

These tools complement one another. Australian law enforcement agencies and the Australian Government Attorney-General’s Department work together to ensure that they are using the right combination of these tools to fight crime.

In addition to these tools, Australia also has an International Transfer of Prisoner scheme. This scheme allows Australians who are imprisoned in certain countries to apply to return to Australia to serve the remainder of their sentences in an Australian prison. The scheme also allows foreign prisoners who are imprisoned in Australia to apply to serve their sentences in certain foreign countries of which they are a national or with which they have community ties.

The international crime cooperation framework is illustrated at **figure 3**.



3.1 Mutual Assistance

As set out in Part 1 of this paper, mutual assistance is the particular process countries use for Government to Government assistance in criminal investigations and prosecutions.

There are links between mutual assistance and other international crime cooperation tools. For example, mutual assistance can be used to complement extradition where both the alleged offender and the evidence of a crime are in a foreign country.

For further information on mutual assistance please visit
<http://www.ag.gov.au/extraditionandma>

3.2 Proceeds of Crime action

Proceeds of crime action is an important mutual assistance tool. Under the Mutual Assistance Act and the Proceeds of Crime Act, Australia can:

- register and enforce foreign proceeds of crime orders, including foreign forfeiture orders and foreign restraining orders
- locate, restrain and forfeit the proceeds of a crime, and
- share the proceeds of a crime with the foreign country.

Australia's mechanisms to locate, restrain, forfeit and share the proceeds of crime to foreign countries are discussed in more detail in Part 6 of this paper.

What are proceeds of crime?

Proceeds of crime is any property or profit which comes from criminal activity. For example, money obtained from importing drugs would be proceeds of the crime of drug trafficking.

In this paper, the term proceeds of crime also includes instruments of crime which is anything used to assist in the commission of a crime. For example, a boat used for people smuggling would be an instrument of the crime of people smuggling.

3.3 Agency-to-Agency Assistance

Mutual assistance and agency-to-agency assistance are separate tools although they are closely linked. Mutual assistance can occur where agency-to-agency assistance has already happened or is currently underway.

Under agency-to-agency assistance Australian law enforcement and regulatory agencies can share information informally with their foreign counterparts.

The term 'agency-to-agency assistance' is a generic term that encompasses both police-to-police assistance and cooperation between non-police agencies like the Australian Taxation Office (ATO) and the Australian Securities and Investment Commission (ASIC) with their counterparts in other countries.

Agency-to-agency assistance is discussed in more detail in Part 5 of this paper.

3.4 Extradition

Extradition allows one country to send a person to another country to face criminal charges or serve a sentence. It requires a Government to Government request.

As an example, extradition is used if a person commits an offence, such as murder, in Australia and flees to the United States of America (US). In that case, Australia could make an extradition request to the US for the arrest of the person in the US and his or her return to Australia to face prosecution.

The *Extradition Act 1988* governs international extradition matters in Australia.

Unlike some countries, the Australian Government extradites its nationals, taking the view that, generally, persons who have committed a crime should be tried and punished by the criminal justice system of the country in which they committed the crime, regardless of their citizenship.

In lieu of extradition, some countries prosecute their nationals themselves for crimes they may have committed in a foreign country. This can result in complex and lengthy mutual assistance requests to obtain the evidence from the country in which the alleged crime occurred. To address sovereignty issues, countries can instead extradite their nationals and then arrange for their return under the International Transfer of Prisoners scheme. This means that convicted persons would be returned to their country of nationality to serve any term of imprisonment.

The Australian Government Attorney-General's Department is currently conducting a Review of Australia's extradition arrangements. The Minister released a discussion paper on extradition on 22 December 2005 and extensive public consultations were held in the first half of 2006 on that paper. The discussion paper and public submissions are available at <http://www.ag.gov.au/extraditionandma>.

For further information on extradition please visit
<http://www.ag.gov.au/extraditionandma>

3.5 International Transfer of Prisoners

Australia's International Transfer of Prisoners scheme allows Australians who are imprisoned in certain countries to apply to return to Australia to serve the remainder of their sentences in an Australian prison.

For further information on the international transfer of prisoners please visit
<http://www.ag.gov.au/itp>

The scheme also allows foreign prisoners who are imprisoned in Australia to apply to serve their sentences in certain foreign countries of which they are a national or with which they have community ties.

The *International Transfer of Prisoners Act 1997* governs Australia's International Transfer of Prisoners scheme.

Transfers can only occur where treaty arrangements exist between Australia and the foreign country. Currently, transfers are only able to take place between Australia and Thailand,

Hong Kong, and countries which are parties to the *Council of Europe Convention on the Transfer of Sentenced Persons*.

The scheme is entirely consent based. Transfers can only take place with the consent of the prisoner, the sending country and the receiving country.

Australia's International Transfer of Prisoners scheme can work effectively together with our extradition arrangements. Once a person has been extradited and prosecuted for a crime in a foreign country, the International Transfer of Prisoners scheme enhances their rehabilitation prospects by allowing the prisoner to serve their sentence in their home country.

Case Study – Interaction of International Crime Cooperation Tools

The United Kingdom police are investigating a drug trafficking offence. The alleged offender is Australian and has returned home and deposited the profits of the crime into an Australian bank account. The United Kingdom police initially contact the AFP and request a voluntary witness statement from a key witness to the drug trafficking who also lives in Australia. The United Kingdom Government then lay charges and make mutual assistance and extradition requests to the Australian Government. Australia uses the following combination of tools to assist the United Kingdom:

- extradition to return the alleged offender to the United Kingdom to be prosecuted for the crime
- mutual assistance to require the witness to give evidence by video link at the trial, and
- proceeds of crime mechanisms to locate, restrain, forfeit and share the profits of the drug trafficking offence to the United Kingdom Government.

The offender is convicted for the crime and sentenced to imprisonment in the United Kingdom. Under the International Transfer of Prisoners Scheme, the United Kingdom, Australia and the offender all consent to a transfer and the offender returns to Australia to serve the remainder of their sentence.

Part 4: How does the current mutual assistance system work?

Australia's current mutual assistance system has the following key components:

- the Mutual Assistance Act, which regulates and facilitates the making and execution of mutual assistance requests
- the Foreign Evidence Act, which sets out how evidence obtained from foreign countries, through mutual assistance, can be used in Australian courts, and
- the Australian Government's general executive power to provide or request assistance to or from foreign countries (that is outside the Mutual Assistance Act). This power is specifically referred to in the Mutual Assistance Act.

The Mutual Assistance Act provides:

- a process for Australia to make a request to a foreign country for assistance (outgoing request), and
- a process for Australia to receive and action a request from a foreign country for assistance (incoming request).

There are different steps for each process depending on the type of assistance required.

A number of different agencies are involved in both the incoming and outgoing request processes.

The Mutual Assistance Act provides that the Attorney-General makes decisions in mutual assistance matters. However, in practice, the Minister for Justice and Customs makes many mutual assistance decisions. For convenience, this paper refers to 'the Minister' throughout and this should be read to mean either the Attorney-General or the Minister for Justice and Customs.

4.1 Current process for Australia to make a request to a foreign country for assistance (outgoing request)

The Minister decides whether to make a mutual assistance request to a foreign country on behalf of a law enforcement agency of the Australian Government, a law enforcement agency of a State or Territory or a defendant.

The Minister can request the following types of assistance under the Mutual Assistance Act from a foreign country:

- take evidence or production order proceedings
- search and seizure
- arrangements for persons, including prisoners, to give evidence or assist investigations in Australia, and
- proceeds of crime action.

The Mutual Assistance Act also allows the Minister to request other assistance which is not provided for in the Mutual Assistance Act.

The Minister can request that a foreign country **take evidence or produce documents or other articles** for the investigation or prosecution of an Australian offence. Australia may also request that an opportunity be given for a person giving evidence, or producing documents or other articles in response to a mutual assistance request, to be examined or cross-examined by video-link, from Australia. The evidence or documents can then be used in the Australian investigation or prosecution of the alleged crime.

The Minister can request that a foreign country obtain a **search warrant** or other instrument that authorises a search for, and seizure of, a thing relevant to an Australian proceeding or investigation. The evidence obtained as a result of the search and seizure can then be used in the Australian investigation or prosecution of the alleged crime.

The Minister can request that **persons, including prisoners, be transferred from a foreign country to Australia** to give evidence in a proceeding for a criminal matter or assist in an investigation. The Minister must be of the opinion that the person is capable of giving relevant evidence or assistance and has consented to being transferred to Australia. The evidence or assistance can then be used in the Australian investigation or prosecution of the alleged crime.

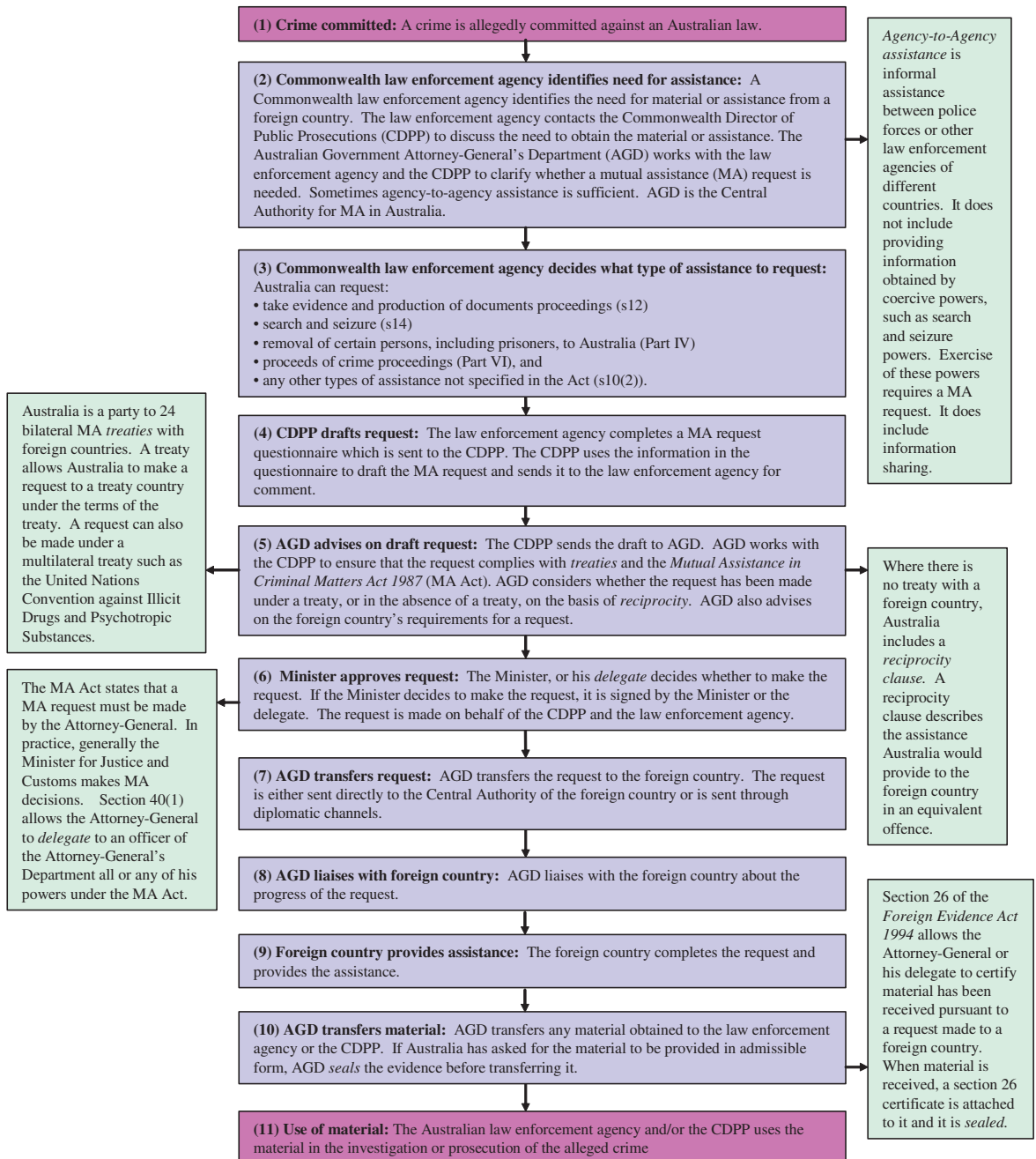
The Minister can request that a foreign country register Australian **proceeds of crime** orders, or make proceeds of crime orders on behalf of Australia.

The Minister may also make a mutual assistance request on behalf of a defendant.

Flowcharts 1 and 2 outline, in more detail, the processes for Australia to make a request to a foreign country for assistance under the Mutual Assistance Act.

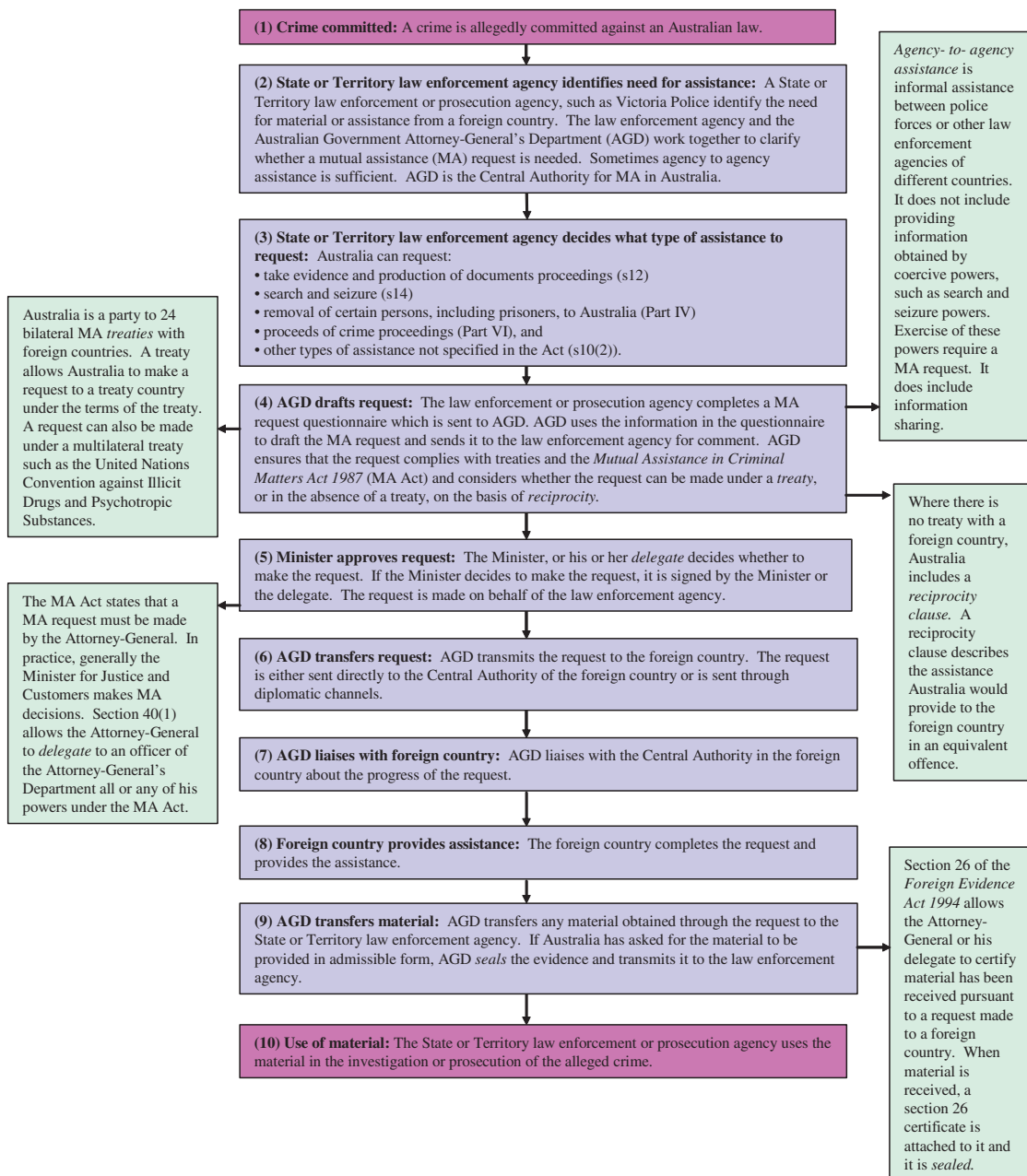
Flowchart 1

How Australia can obtain mutual assistance from a foreign country for investigation and prosecution of Commonwealth offences (outgoing request)



Flowchart 2

How Australia can obtain mutual assistance from a foreign country for investigation and prosecution of State and Territory offences (outgoing request)



4.2 Roles in the outgoing mutual assistance request process

The making of a mutual assistance request by the Australian Government to a foreign country requires the cooperation of the Australian Government Attorney-General's Department, prosecutors, law enforcement officers and the foreign country. The Minister, or his delegate, approves the making of mutual assistance requests.

The Australian Government Attorney-General's Department is the Central Authority in Australia for mutual assistance. The Attorney-General's Department:

- drafts mutual assistance requests on behalf of State and Territory enforcement and prosecution agencies
- settles mutual assistance requests on behalf of Australian Government enforcement and prosecution agencies in consultation with the Commonwealth Director of Public Prosecutions (CDPP)
- transmits mutual assistance requests to the foreign country (either directly or through diplomatic channels)
- liaises with the foreign country about the progress of requests, and
- facilitates any assistance provided by the foreign country, including
 - certifying any material under the Foreign Evidence Act if necessary, and
 - transferring any material to the law enforcement or prosecution agency for use in the investigation or prosecution of crimes.

The **Minister** (or delegate):

- approves the making of mutual assistance requests to foreign countries.

The Commonwealth Director of Public Prosecutions (CDPP):

- identifies the need for a mutual assistance request for an offence against a law of the Commonwealth, in consultation with law enforcement agencies and the Australian Government Attorney-General's Department
- drafts mutual assistance requests on behalf of Australian Government enforcement and prosecution agencies
- liaises with the Australian Government Attorney-General's Department in finalising Australian Government mutual assistance requests, and
- uses any assistance provided in response to mutual assistance requests in the prosecution of crimes.

The Australian Federal Police (AFP) or other law enforcement agency:

- identifies the need for mutual assistance requests for Commonwealth offences (other Australian Government law enforcement agencies also do this)
- provides information to the CDPP to assist in the drafting of the requests, and
- uses any assistance provided in response to mutual assistance requests in the investigation or prosecution of crimes.

State and Territory law enforcement agencies or prosecution agencies:

- identify the need for mutual assistance requests for State or Territory offences
- provide the information to the Australian Government Attorney-General's Department to assist in the drafting of the requests, and
- use any assistance provided in response to mutual assistance requests in the investigation or prosecution of crimes.

The relevant authority of the **foreign country**:

- receives requests from Australia
- executes the requests, and
- provides any assistance to Australia for Australia's use in the investigation or prosecution of crimes (including transferring any material to the Central Authority of Australia, the Australian Government Attorney-General's Department).

4.3 Current process for Australia to receive and execute a request from a foreign country for assistance (incoming request)

The Minister decides whether to approve a request for mutual assistance from a foreign country. The Minister considers the:

- specific requirements for each form of assistance
- mandatory and discretionary grounds of refusal in the Mutual Assistance Act that apply to all forms of assistance, and
- requirements in bilateral or multilateral treaties.

Australia can provide the following types of assistance in response to a mutual assistance request from a foreign country:

- take evidence or production order proceedings
- provision of evidence lawfully in the custody of an enforcement agency
- search and seizure
- arrangements for persons, including prisoners, to give evidence or assist investigations in the foreign country, and
- proceeds of crime action.

Foreign countries can also ask for assistance which is not dealt with in the Mutual Assistance Act, such as **voluntary witness statements** or **service of documents**. Generally, Australia assists with these kinds of requests where there is a lawful basis to do so.

The Minister can authorise a magistrate to conduct **take evidence or production order proceedings** for the purposes of a proceeding in a foreign country. In take evidence proceedings, a magistrate may require a person to give evidence on oath for the purposes of the foreign proceeding. In production order proceedings, a magistrate may require a person to produce documents or other articles for the purposes of the foreign proceeding. During

either of these proceedings, the Magistrate may permit any person to whom the proceeding relates or the legal representative of the foreign country, to examine or cross examine the person via video link.

The Minister can authorise a mutual assistance **search warrant** on behalf of a foreign country where material relating to a serious offence is reasonably suspected of being located in Australia. A serious offence is an offence which carries a maximum penalty of death or imprisonment for 12 months or more. A magistrate can then issue a warrant for material to be seized for a foreign country and sent to the country for use in the investigation or prosecution of the alleged offence.

The Minister can authorise **material which is already in the possession of an Australian enforcement agency** to be provided to a foreign country provided that it was lawfully obtained and is lawfully in the possession of that agency. Telecommunications interception material cannot be provided in this way. 'Enforcement agency' includes a range of agencies specified under the *Surveillance Devices Act 2004* and the *Proceeds of Crime Act 2002* such as the AFP, Australian Crime Commission and State and Territory police.

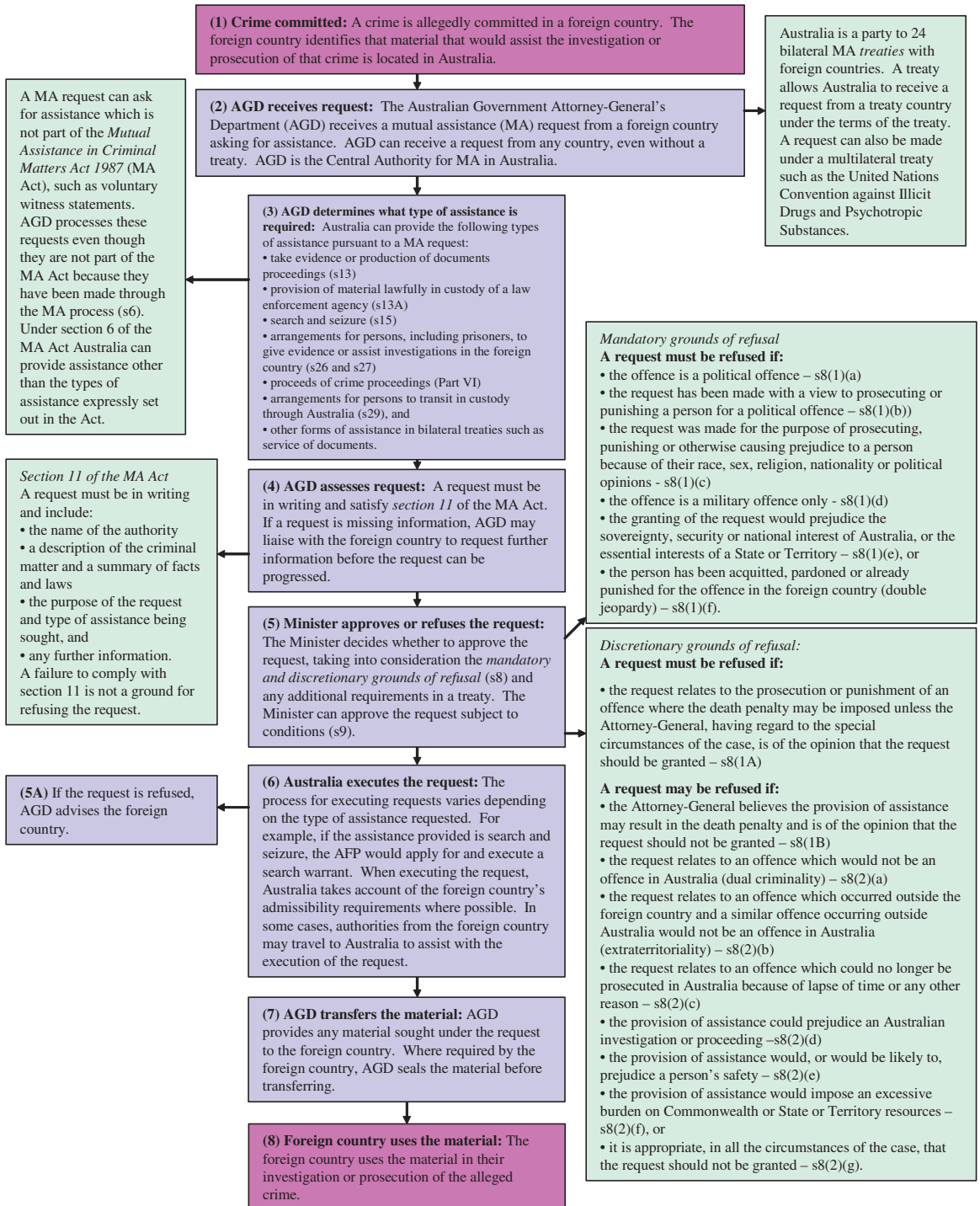
The Minister can arrange for a **person, including a prisoner, to travel from Australia to a foreign country** for the purposes of giving evidence in a foreign prosecution or assisting a foreign investigation. The person must consent and be capable of giving evidence or assisting in the investigation. People other than prisoners can travel to a foreign country to give evidence without the need for a mutual assistance request. However, the only way a prisoner can be transferred is through mutual assistance. There are a range of safeguards provided for people transferred in response to a mutual assistance request.

Proceeds of crime action on behalf of a foreign country is available through mutual assistance. Australia can register and enforce foreign forfeiture and pecuniary penalty orders where there is a conviction for a foreign serious offence. Australia can also register and enforce foreign orders without a conviction (civil based orders) for countries specified in regulations under the Mutual Assistance Act. Australia can also use a range of investigative tools, including monitoring orders and production orders, which can be used on behalf of a foreign country to locate the proceeds of crime.

Flowchart 3 describes the general process of receiving and executing an incoming request from a foreign country for assistance under the Mutual Assistance Act.

Flowchart 3

How Australia can provide mutual assistance to a foreign country for a foreign investigation or prosecution (incoming request)



4.4 Roles in the incoming request process

As with outgoing requests, prosecutors, police, the Australian Government Attorney-General's Department and the foreign country cooperate on incoming mutual assistance requests. The Minister approves providing the assistance to a foreign country.

The relevant authority of the **foreign country**:

- makes requests to Australia
- liaises with the Australian Government Attorney-General's Department on the progress of the requests, and
- receives any assistance from Australia, including material or evidence, pursuant to the requests and arranges for its use in the investigation or prosecution of the alleged crimes.

The **Australian Government Attorney-General's Department is the Central Authority in Australia for mutual assistance**. The Attorney-General's Department:

- receives and assesses mutual assistance requests on behalf of the Minister
- refers mutual assistance requests to the AFP and liaises with them on the execution of requests
- liaises with the CDPP where required
- liaises with the Central Authority of the foreign country on the progress of the requests, and
- facilitates any assistance pursuant to the requests, including receiving any material or evidence once requests have been executed and transferring that material to the foreign country.

The **Minister**:

- approves or refuses requests for mutual assistance from a foreign country.

The **CDPP**:

- represents the foreign country in take evidence or production order proceedings
- assists the AFP in applying for mutual assistance search warrants, and
- advises on and appears in proceedings to register foreign proceeds of crime orders.

The **AFP** assists in the execution of incoming requests through:

- executing search warrants
- locating evidence
- conducting enquiries
- interviewing witnesses
- taking statements
- assisting with proceeds of crime action, and
- arranging the travel of witnesses.

4.5 Analysis of the current mutual assistance system

The current mutual assistance system has served Australia well for close to 20 years. Some of its **major strengths** include:

Ability to make and receive requests from any country: Australia can make a mutual assistance request to any country and Australia can receive a mutual assistance request from any country. The process is assisted by 24 bilateral mutual assistance treaties and some multilateral international conventions to which Australia is a party. The ability to make and receive requests from any country ensures that Australia can effectively contribute to combating crime both domestically and internationally.

Ability to provide and request a wide range of international assistance: Australia is able to provide and request a wide range of assistance, including requesting and executing search warrants and proceeds of crime action. Australia is also able to provide and obtain international assistance in criminal matters other than the kinds of assistance set out in the Mutual Assistance Act, such as voluntary witness statements.

Safeguards: A range of safeguards are built into the mutual assistance process. For example, Australia refuses to provide assistance in death penalty matters except where there are special circumstances, such as where the evidence would assist the defence. Australia also refuses to provide assistance in matters where the person is being prosecuted on discriminatory grounds because of their race, sex, religion, nationality or political opinions.

Ability to provide material to foreign countries that has already been lawfully obtained: Under the Mutual Assistance Act, Australia can provide material that was lawfully obtained and is in the possession of a domestic law enforcement agency directly to a foreign country, except for telecommunications interception material. This allows for a very efficient means of providing material to foreign countries for use in their criminal proceedings and also supports joint investigations between Australia and foreign countries.

Ability to make a request on behalf of a defendant: Under the Mutual Assistance Act, the Minister can make a mutual assistance request to a foreign country on behalf of a defendant in a criminal proceeding. This means that both the prosecution and the defence can make a request to obtain evidence that is located outside of Australia for their case. This serves the overall interests of justice.

There are a number of **challenges** in the current system for Australia to address, including:

Increase in the use of mutual assistance: Closer cooperation between countries in fighting crime has led to a dramatic increase in the use of mutual assistance. The mutual assistance process must become more efficient and streamlined to respond to the growing number of mutual assistance requests.

‘Normalising’ mutual assistance: Given the increasing need for law enforcement to cooperate across borders, mutual assistance should be a standard law enforcement tool. It is important that mutual assistance is better understood and used routinely.

Delays: The processes of making and receiving mutual assistance requests can be unnecessarily complex and can involve significant delays. This means that a criminal may escape prosecution or confiscation action because of the delays in obtaining the necessary evidence for their prosecution or the confiscation of their illicit gains.

Role Clarity: There are a range of Australian, State and Territory Government agencies involved in the mutual assistance process. The specific role of each agency needs to be clarified and could be better coordinated. This would create a more efficient and streamlined mutual assistance process.

New technologies in law enforcement: A range of new technologies in law enforcement has emerged in the past 20 years, such as the use of DNA. It is timely to consider the nature and scope of the cooperation Australia can provide to foreign countries.

Responsiveness: Advances in technology have also increased the speed and urgency of a law enforcement response. Australia's mutual assistance arrangements need to be flexible enough to allow a quick response to urgent law enforcement investigations.

Building strong relationships and capacity in foreign countries: Australia's ability to successfully use mutual assistance to combat crime is dependent on building strong relationships with our counterparts in foreign countries and the capacity of our neighbours to cooperate and share information. Reforming our own laws and practical arrangements is not enough. Australia should also actively build strong relationships and provide assistance to other countries to improve their mutual assistance capacity.

Evidence obtained through mutual assistance: One of the key purposes of mutual assistance is to obtain evidence that can be used in court for prosecution or confiscation action. Where Australia receives evidence from a foreign country for use in domestic proceedings, the Foreign Evidence Act applies. The mutual assistance system needs to ensure that evidence obtained by way of mutual assistance requests can be used effectively in prosecution and related proceedings.

Part 5: What is agency-to-agency assistance?

Mutual assistance and agency-to-agency assistance are separate forms of international crime cooperation that complement one another.

‘Agency-to-agency assistance’ is a generic term that encompasses both police-to-police assistance and cooperation between agencies like the ATO and ASIC with their counterparts in other countries.

Mutual assistance requires formal Government to Government requests and is governed by particular procedures. In contrast, Australian law enforcement and regulatory agencies can share information informally, and often more quickly, with their foreign counterparts.

Most Australian federal investigative agencies have liaison and information sharing arrangements with their counterparts in foreign countries. For example, the Australian Customs Service can exchange information with foreign Customs agencies to facilitate the enforcement of customs laws and the prevention, investigation and combating of customs offences.

The information shared through agency-to-agency channels generally does not entail the exercise of coercive powers and does not require a mutual assistance request to be made.

Sometimes the terms ‘police-to-police assistance’ and ‘agency-to-agency assistance’ are used interchangeably. ‘Police-to-police assistance’ refers to assistance that the AFP or State and Territory police services give their counterparts in foreign police services. In this paper, the term ‘agency-to-agency assistance’ is used throughout and includes ‘police-to-police assistance’.

5.1 Expediting cooperation through the use of agency-to-agency assistance

The United Nations Office on Drugs and Crime (UNODC) Expert Working Groups’ Report on Mutual Legal Assistance Casework Best Practice in 2001 identified the value of agency-to-agency assistance where:

- coercive measures are not required (ie the evidence can be provided voluntarily), or
- evidence can be obtained from public records or publicly available sources.³

The report recognised that, whenever possible, assistance should be sought through agency-to-agency channels because it is ‘faster, cheaper and more flexible than the more formal route of mutual legal assistance.’⁴

Agency-to-agency assistance can also be used to complement a formal mutual assistance request. Police, regulatory or investigative agencies can make advance preparations or provide non-coercive assistance at the same time as the mutual assistance request is being

³ UNODC’s Expert Working Groups’ Report on Mutual Legal Assistance Casework Best Practice in 2001, page 9. http://www.unodc.org/pdf/lap_mlaeg_report_final.pdf

⁴ UNODC’s Expert Working Groups’ Report on Mutual Legal Assistance Casework Best Practice in 2001, page 9. http://www.unodc.org/pdf/lap_mlaeg_report_final.pdf

processed by the central authority. In these cases, the mutual assistance request should acknowledge the complementary agency-to-agency assistance.

The implementation of joint investigative teams on transnational crime is a good example of the value of agency-to-agency assistance.

It is important that the Australian Government Attorney-General's Department, police, prosecutors and regulatory agencies have a broad understanding of the various mechanisms for information exchange with foreign countries. This will ensure that Australian agencies use the most efficient and effective ways to obtain and provide international assistance.

5.2 Examples of Australian Government agency-to-agency assistance

This section provides a brief description of the international information sharing arrangements of some key Australian Government law enforcement and regulatory agencies.

Australian Federal Police (AFP)

International cooperation is a key function of the AFP under the *Australian Federal Police Act 1979*. The AFP exchanges intelligence and information with its international counterparts as part of its international cooperation in combating transnational crime. Each year, the AFP transmits around 13,000 pieces of information to overseas law enforcement agencies and receives around 11,000 pieces of information in return.⁵

The AFP can also provide other forms of assistance to its international counterparts on a police-to-police basis, including the provision of physical surveillance and obtaining and providing voluntary witness statements.

The AFP has 17 memoranda of understanding (MOUs) with overseas counterpart agencies, which include provisions on information sharing arrangements. In addition, the AFP shares information through an extensive overseas liaison officer network. The AFP currently has 86 liaison officers at 31 posts in 26 countries. By 2007, the AFP will have 88 officers at 33 posts in 28 countries.

The AFP's dissemination of information to foreign law enforcement agencies outside of the formal mutual assistance regime is governed by the *Privacy Act 1988*

What does the AFP do?

The AFP's role is to enforce Commonwealth criminal law and to protect Commonwealth and national interests from crime in Australia and overseas. It works closely with a range of other law enforcement bodies at State, Territory, Commonwealth and international levels, enhancing safety and providing a secure regional and global environment. The new challenges the AFP faces include counter terrorism, human trafficking and sexual servitude, cyber-crime, peace operations, protection and other transnational crimes.

What is a Memorandum of Understanding?

A written document signed by two or more parties setting out mutually agreed arrangements which is not necessarily legally binding.

For further information on the AFP please visit <http://www.afp.gov.au>

⁵ Comments made by the AFP Commissioner to the Senate Legal and Constitutional Committee on 17 February 2006.

(Privacy Act), the *Australian Federal Police Act 1979* and other legislative provisions that govern the release of specific information.

Australian Crime Commission (ACC)

The ACC is authorised under the *Australian Crime Commission Act 2002* (ACC Act) to cooperate with its overseas counterparts. This cooperation can include sharing information and conducting joint operations.

The ACC is authorised to disseminate information in its possession to a foreign law enforcement agency if that information is relevant to the foreign agencies' activities. The Chief Executive Officer (CEO) of the ACC, or a delegate of the CEO, can approve the sharing of that information. Information can only be provided where its sharing would not be contrary to any relevant Commonwealth, State or Territory law. Information can include information obtained using the ACC's compulsory powers. These compulsory powers include examining witnesses and issuing notices to produce documents.

In addition, the ACC can seek information on a police-to-police basis through the AFP and the AFP liaison officer network.

What does the ACC do?

The ACC is a Commonwealth statutory body working to counter serious and organised crime. It has both intelligence and investigative capabilities and performs a number of important functions, including criminal intelligence collection and analysis and conducting intelligence-led investigations into federally relevant criminal activity.

For further information on the ACC please visit
<http://www.crimecommission.gov.au>

Australian Customs Service (Customs)

Customs exchanges information with its international counterparts to facilitate the enforcement of customs laws and the prevention, investigation and combating of customs offences. The *Customs Administration Act 1985* allows Customs to disclose information in its possession to an overseas agency or an international organisation. Customs can only disclose such information where:

- the disclosure is in accordance with an agreement entered into with the agency or organisation
- the agency or organisation has made an undertaking in relation to use and further disclosure of the information as required by the Act, and
- the CEO has authorised that disclosure.

Customs currently has over 15 bilateral MOUs with overseas counterpart agencies and is in the process of negotiating more.

What does Customs do?

Customs manages the security and integrity of Australia's borders. It works closely with other government and international agencies to detect and deter unlawful movements of goods and people across the border.

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

Like the AFP, Customs also has an extensive overseas liaison officer network. Customs officers are posted in Washington, Brussels, Bangkok, Tokyo, Beijing and Jakarta.

The types of information shared between Customs and its overseas counterparts include the movement of goods, customs law enforcement techniques and customs intelligence reports.

Australian Securities and Investments Commission (ASIC)

ASIC can exchange information with the government, or an agency, of a foreign country pursuant to the provisions of s127 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act). ASIC has 35 bilateral MOUs with overseas regulators and is a party to one multilateral MOU.

ASIC's overseas counterparts can exercise coercive powers to obtain information requested by ASIC which can be used in administrative, civil and criminal investigations and administrative and civil proceedings.

In providing assistance to a foreign regulator in relation to criminal investigations or proceedings, ASIC must rely on either assistance based on non-coercive powers or the mutual assistance process under the Mutual Assistance Act.

Note: Under the *Mutual Assistance in Business Regulation Act 1992*, ASIC is able to obtain information on behalf of a foreign country, including through coercive powers, for use in administrative, civil and, in certain circumstances, criminal investigations and proceedings. The Mutual Assistance in Business Regulation Act is not considered in this paper or as part of the Mutual Assistance Review.

Australian Tax Office (ATO)

The ATO can exchange information with its overseas counterparts under tax treaties. Tax treaties aim to prevent double taxation and fiscal evasion and foster cooperation between Australia and other international tax authorities by enforcing their respective tax laws. Australia has tax treaties with more than 40 countries. Under the treaties, the ATO can release information in its possession at the time of the request, as well as initiate action to gather information at the request of the foreign authority.

What does ASIC do?

ASIC enforces and regulates company and financial services laws to protect consumers, investors and creditors. It regulates Australian companies, financial markets, financial services organisations and professionals who deal and advise in investments, superannuation, insurance, deposit taking and credit.

For further information on ASIC please visit

<http://www.asic.gov.au>

What does the ATO do?

The ATO is the Government's principal revenue collection agency. Its role is to manage and shape tax, excise and superannuation systems that fund services for Australians. The ATO also addresses broader issues affecting Australia's revenue systems, such as aggressive tax planning, persistent tax debtors, globalisation and the cash economy.

For further information on the ATO please visit

<http://www.ato.gov.au>

Australian Transaction Reports and Analysis Centre (AUSTRAC)

AUSTRAC can share information with authorised international agencies under the *Financial Transactions Reports Act 1988* (FTR Act). An ‘authorised international agency’ must be a foreign country agency and not an international organisation such as Interpol. AUSTRAC must have an agreement with the agency in the form of letters of exchange or an MOU to exchange information.

AUSTRAC has established 46 Instruments with international counterparts for the exchange of financial intelligence, usually in the form of MOUs. The information AUSTRAC shares includes suspect transaction records, analysis and intelligence reports. AUSTRAC conducts significant preliminary research into the integrity, system of law, security and privacy arrangements of the relevant country and agency before entering into an MOU.

Other agencies (such as the AFP and the ATO) are also authorised to share AUSTRAC’s information internationally. The requirements for sharing that information are set out in domestic MOUs between AUSTRAC and those agencies.

What does AUSTRAC do?

AUSTRAC is Australia’s anti-money laundering regulator and specialist financial intelligence unit. AUSTRAC collects, analyses and disseminates financial intelligence to domestic agencies and international counterparts.

For further information on AUSTRAC please visit

<http://www.austrac.gov.au>

Department of Immigration and Multicultural Affairs (DIMA)

DIMA exchanges information with its international counterparts as part of facilitating the entry, stay and departure arrangements of non-citizens, border control and the settlement of migrants and humanitarian entrants. The disclosure of DIMA client information is currently governed by the disclosure provisions:

- in the *Privacy Act 1988*—for example, DIMA visa application forms seek to make clients reasonably aware that their application may be provided to a range of agencies. This is in line with Information Privacy Principle (IPP) 11 in the Privacy Act, and
- in the *Migration Act 1958* in relation to Movement Records (s488), and Personal Identifiers such as a photograph or other image of the person’s face and shoulders (s336A-L) (more than 120 foreign Governments are gazetted to obtain this information).

What does DIMA do?

DIMA’s key objectives are to:

- manage the lawful and orderly entry and stay of people in Australia, including through effective border security, and
- promote a society which values Australian citizenship, appreciates cultural diversity and enables migrants to participate equitably.

DIMA has a number of MOUs with overseas counterpart agencies which include provisions on information sharing arrangements. In addition, DIMA shares information through an extensive overseas officer network. DIMA has 140 Australian officers at 42 posts in 38 countries.

For further information on DIMA please visit

<http://www.immi.gov.au>

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).⁶

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.

⁶ 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 though 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.

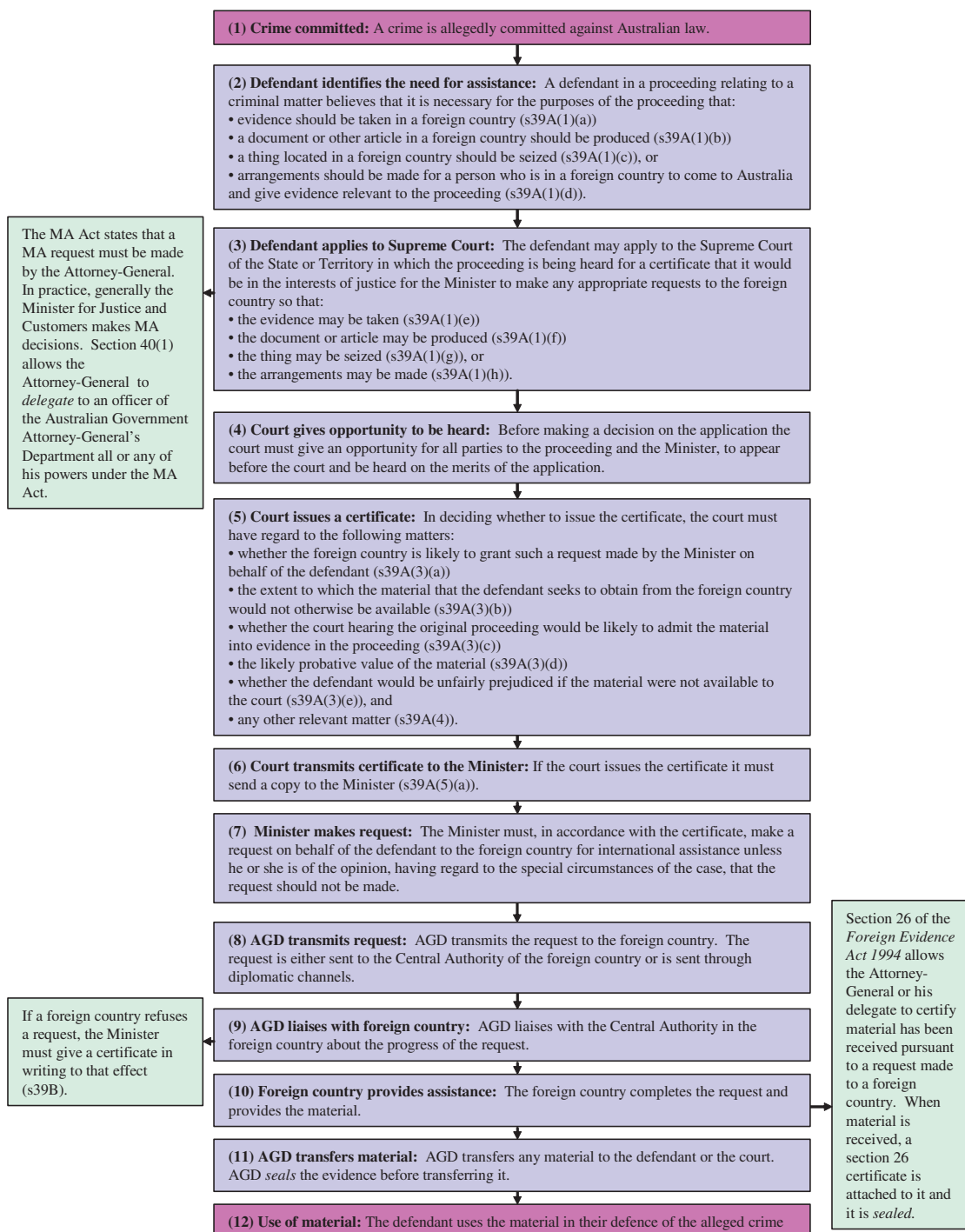
Once the request has been completed the foreign country sends the material to the Australian Government Attorney-General's Department. The Australian Government Attorney-General's Department seals the evidence and sends it to the court or the defendant.

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.⁷

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.

What is judicial review?

Judicial review is where a court reviews a decision to make sure that the decision-maker used the correct legal reasoning or followed the correct legal procedures.

This process is different to **merits review**. Merits review involves 'stepping into the shoes' of the original decision maker to make administrative decisions according to the merits of individual cases.

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

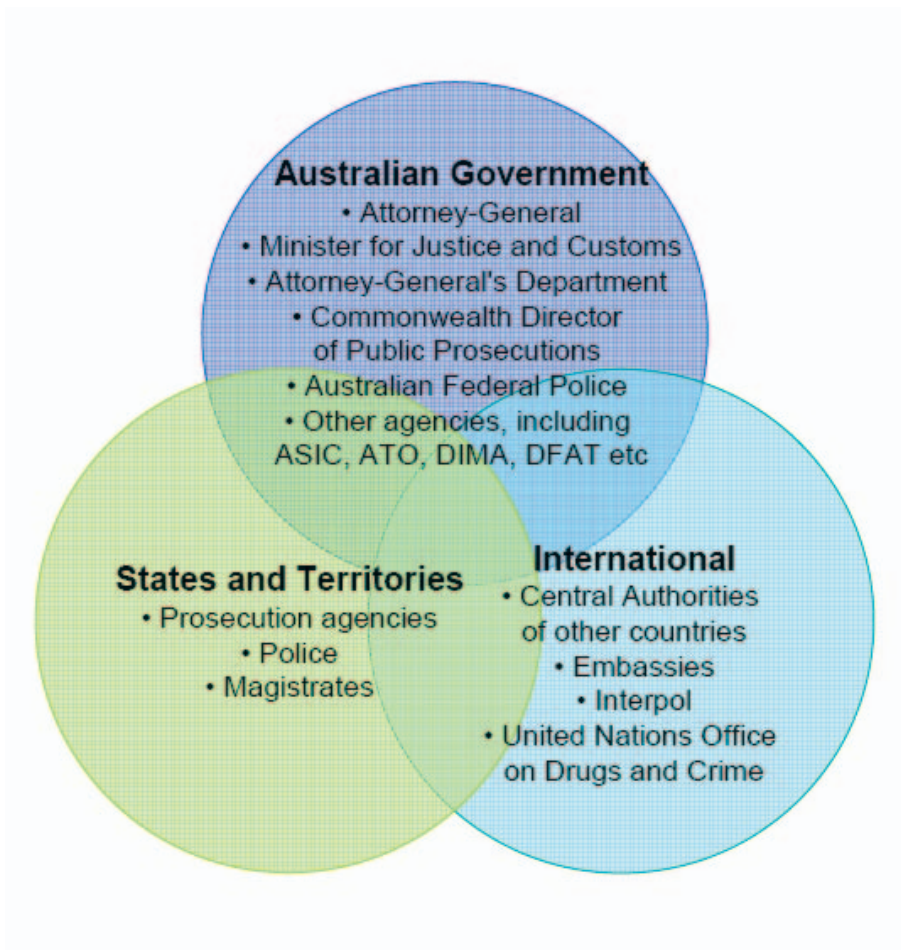
F. Judicial review of mutual assistance decisions: Avenues for judicial review on mutual assistance decision will continue to be available.

⁷ Administrative Review Council, *The Scope of Judicial Review: Report to the Attorney-General*, Report no.47, April 2006, vii.

Part 7: How will the right people do their jobs best?

There are many people, from both domestic and international agencies, involved in the mutual assistance process. The figure below shows the range of agencies which participate in the mutual assistance process.

Figure 4



Part 4 of this paper identified the specific roles of each agency in the mutual assistance process. This part of the paper considers how people can best carry out those roles. Given the dramatic increase in the use of mutual assistance and its essential role in combating crime, it is imperative that we improve domestic and international capacity in the mutual assistance process.

7.1 Improving domestic capacity

7.1.1 Enhancing skills and knowledge

The Australian Government Attorney-General's Department is currently undertaking two major projects to enhance the skills and knowledge of participants in the mutual assistance process.

The Case Management Project is streamlining current practices in mutual assistance and extradition casework areas and examining how key information can be more readily accessed and applied.

It is important that Australia's law enforcement and prosecution agencies be aware of the availability of mutual assistance and understand how mutual assistance works. The Technical Expertise Project is providing training on mutual assistance to a variety of stakeholders, including Australian Government agencies and State and Territory law enforcement and prosecution authorities by enhancing the skills and knowledge of key participants in the mutual assistance process which will further encourage Australian agencies to use mutual assistance as a routine law enforcement tool.

The Australian Government Attorney-General's Department has also implemented a public awareness strategy on international crime cooperation, including mutual assistance. As part of this strategy, the Australian Government Attorney-General's Department has set up a webpage which includes links to fact sheets, flowcharts and Frequently Asked Questions on mutual assistance. This provides Australian agencies with access to information on how mutual assistance works.⁸

G. Enhancing skills and knowledge: The Australian Government will continue to implement strategies to ensure that participants in the mutual assistance process have the necessary skills and knowledge to make and action requests.

7.1.2 Working cooperatively with all Australian agencies

All Commonwealth, State and Territory law enforcement and prosecution agencies can seek mutual assistance from foreign countries through the Australian Government Attorney-General's Department and can be involved in executing requests from foreign countries. For the mutual assistance process to operate as efficiently as possible, it is important that Commonwealth, State and Territory agencies build strong, enduring relationships.

One way of doing this is to establish expert groups and liaison networks so that Commonwealth, State and Territory agencies can recognise and share their expertise. A regular forum could be held to exchange information and expertise on mutual assistance and international crime cooperation more generally.

⁸ More information is available at www.ag.gov.au/extraditionandma

For complex matters, or matters which involve more than one agency, the Australian Government Attorney-General's Department could hold a strategic meeting at the commencement of the matter with all relevant stakeholders to discuss the assistance sought, to clarify the roles and responsibilities of each agency and to establish key timeframes. This initial meeting could be followed up with regular liaison meetings where appropriate.

H. Working Cooperatively: The Australian Government will explore the most effective ways to work cooperatively on mutual assistance with the States and Territories.

7.1.3 Clarifying roles and responsibilities

As demonstrated by figure 4 and flowcharts 1, 2 and 3, the roles and responsibilities of agencies in the mutual assistance process can overlap and there can be multiple handling in dealing with mutual assistance requests.

This Review provides an opportunity to clarify the role of Commonwealth, State and Territory agencies in the mutual assistance process.

The Commonwealth has Administrative Arrangements with all States and the Northern Territory on practices and procedures in dealing with mutual assistance requests.

The Administrative Arrangements are substantially similar in content. Each Arrangement provides for the establishment of a National Consultative Committee, whose basic function is to oversee the general operation of the Arrangements and to report yearly to SCAG. The Arrangements also establish State mutual assistance liaison officers. In addition, the Arrangements set out the distribution of costs for processing mutual assistance requests and allow for the rotation of officers between the relevant State or Territory authorities and Commonwealth authorities to increase the understanding of agencies' roles in the mutual assistance process.

These arrangements do not reflect current practice. They were completed over 10 years ago and little appears to have been done to implement them. The National Consultative Committee has not formally met since 1991. The Committee report had previously been listed on the SCAG agenda as an item for consideration but was removed from the agenda in 2002.

The Mutual Assistance Review provides a timely opportunity to create new agreements with each State and Territory. The Australian Government could negotiate an MOU with each State and Territory which clearly describes the roles and responsibilities of the parties and clarifies the distribution of costs between the parties. Either SCAG or the Australasian Police Ministers' Council could be useful forums to progress and report on these MOUs.

I. Clarifying roles and responsibilities: The Australian Government will review existing arrangements with States and Territories to clarify the roles and responsibilities of agencies in the mutual assistance process.

7.1.4 Should Australia adopt a Central Taskforce model?

Currently, Australia's Central Authority for mutual assistance comprises case officers in the Australian Government Attorney-General's Department.

However, as Part 4 of this paper identified, the mutual assistance process involves a number of other agencies, including the AFP, the CDPP and State and Territory law enforcement and prosecution agencies. Some mutual assistance cases also involve other agencies such as ASIC or the ATO.

The US's Central Authority for mutual assistance comprises officers from their Justice Department. A Federal Bureau Investigations Officer and a United States Marshall are co-located with the Central Authority to assist with the execution of requests.

An integrated taskforce approach to dealing with mutual assistance, that includes officers from law enforcement and prosecution agencies co-located in the Central Authority, could be a very effective model for Australia. The taskforce could comprise officers from the:

- Australian Government Attorney-General's Department
- AFP
- State or Territory prosecuting agencies
- CDPP, and
- other agencies where appropriate for a large or complex case.

26. **Central Taskforce:** The Australian Government Attorney-General's Department is Australia's Central Authority for mutual assistance and is staffed by mutual assistance case officers. Should Australia adopt a Taskforce model for mutual assistance by co-locating mutual assistance case officers with prosecutors and law enforcement officers? Which agencies should be included in the taskforce? Should the taskforce be located in the Australian Government Attorney-General's Department?

7.2 Improving international capacity

7.2.1 Building international relationships

Mutual assistance has emerged as an essential law enforcement tool to combat crime and confiscate the proceeds of crime. It is important that Australia continues to build strong relationships with its key mutual assistance partners.

Australia currently has 24 bilateral treaties on mutual assistance and is also a party to a number of multilateral treaties, including the *United Nations Convention against Corruption* and the *United Nations Convention against Transnational Organised Crime* which include mutual assistance provisions. Australia will continue to focus on bilateral and multilateral treaty negotiations in mutual assistance. While Australia can make and receive mutual assistance requests without a treaty, a treaty provides certainty for Australia on how Australian mutual assistance requests will be dealt with by the other country.

What is the United Nations Office on Drugs and Crime?

The United Nations Office on Drugs and Crime is mandated to assist United Nations Member countries in their struggle against illicit drugs, crime and terrorism. The three pillars of the UNODC work programme are:

- research and analytical work to increase knowledge and understanding of drugs and crime issues
- normative work to assist States in the ratification and implementation of international treaties, the development of domestic legislation on drugs, crime and terrorism, and the provision of secretariat and substantive services to the treaty-based and governing bodies, and
- field-based technical cooperation projects to enhance the capacity of Member States to counteract illicit drugs, crime and terrorism.

Australia will also continue to actively engage with the United Nations Office on Drugs and Crime (UNODC). The UNODC is the key United Nations body responsible for strengthening regional and international cooperation in preventing and combating transnational crime. For example, the UNODC has published a model mutual assistance act and treaty and an Expert Working Groups' Report on Mutual Legal Assistance Casework Best Practice in 2001.

For further information on the UNODC please visit <http://www.unodc.org>

J. Building international relationships: The Australian Government will continue to focus on developing international mutual assistance relationships through bilateral and multilateral treaties and active engagement with the United Nations Office on Drugs and Crime.

Australia could consider posting international crime cooperation liaison officers overseas. Law enforcement officers and case officers could be posted to either the Embassies or the Central Authorities of Australia's major international crime cooperation partners, such as the United States of America and the United Kingdom. Officers could be posted permanently or on a temporary basis.

Liaison officers could be expected to play an important role in facilitating the timely progress of Australia's international crime cooperation matters and ensure Australia provides an appropriate level of assistance to requesting parties. In light of the significant growth in mutual assistance requests, progressing mutual assistance matters would form a key part of the liaison officer's role. However, liaison officers would also play an important role in facilitating the timely progress of Australia's other international crime cooperation matters, such as requests for extradition and international transfer of prisoners. Liaison officers would also have a role in engaging with international bodies such as the UNODC.

This initiative is encouraged in the UNODC's Informal Expert Working Groups' Report on Mutual Legal Assistance Casework Best Practice in 2001. The report suggests that 'experience shows that these "on-site" initiatives produce faster and more useful mutual legal assistance than is usually possible through "distance" dealings'.⁹

27. **Overseas liaison officers:** Should the Australian Government post international crime cooperation liaison officers in our Embassies accredited to our key international crime cooperation partners or the Central Authorities of our key international crime cooperation partners?

7.2.2 Building regional relationships and capacity

The Australian Government's White Paper on Australia's Overseas Aid Program (White Paper) identified the following three key themes that are relevant to mutual assistance:

- Australia's aid focus will continue to be the Asia-Pacific region
- Australia needs to strengthen cooperation on transboundary threats with a focus on areas such as transnational crime, drug and human trafficking and counter-terrorism, and
- the Australian Government will develop a whole-of-government anti-corruption strategy. This strategy will include a law and justice pillar with five key operational themes: prevention, criminalisation, international cooperation, recovery of assets and technical assistance.

What is the Australian Government's White Paper on Australia's Overseas Aid Program?

The Australian Government's White Paper on Australia's Overseas Aid Program provides the strategic framework for the direction and delivery of Australia's aid program over the next ten years. The Paper was launched by the Australian Minister for Foreign Affairs, the Hon Alexander Downer MP, on 26 April 2006.

Our neighbours in the Asia-Pacific region are key partners in mutual assistance. Australia's work in improving regional capacity in mutual assistance is, and will continue to be, a part of this broader whole-of-government framework in regional development.

For further information on the White Paper please visit <http://www.ausaid.gov.au>

⁹ UNODC's Informal Expert Working Groups' Report on Mutual Legal Assistance Casework Best Practice in 2001, page 10. http://www.unodc.org/pdf/lap_mlaeg_report_final.pdf

The Australian Government is working with countries in the Asia-Pacific region to increase their capacity in mutual assistance. In particular, the Australian Government has developed two programs to provide targeted assistance to countries in the Pacific and South East Asia regions: the Pacific Legal Knowledge Program and the Regional Legal Assistance Unit in the Australian Government's Attorney-General's Department.

The Pacific Legal Knowledge Program has been developed to assist officers of Pacific island countries to share knowledge and skills in a range of legal areas, including international crime cooperation. For example, in December 2005, the Australian Government Attorney-General's Department held an initial workshop under the Program for law and justice sector officials in Vanuatu. A follow-up workshop will be held in Cairns in the second half of 2006.

The Regional Legal Assistance Unit provides assistance to South East Asian countries to strengthen their legal frameworks and capacity for international crime cooperation. Upon receiving a request for technical assistance, the Unit works cooperatively with the country to tailor a package of assistance to the country's needs. The Unit provides a range of technical assistance, including drafting legislation and designing workshops to increase the skills and knowledge of relevant officials. The Unit has also drafted model legislation on mutual assistance which can be adapted to the needs of any country.

Officers of the Australian Government Attorney-General's Department also regularly attend and present at workshops aimed at strengthening mutual assistance capacity. Recent activities undertaken by the Australian Government Attorney-General's Department have included:

- coordinating a three day workshop at the Jakarta Centre for Law Enforcement Cooperation for over 60 legal and law enforcement officers from 22 countries on the practical aspects of international cooperation in counter-terrorism cases
- working with representatives of the CDPP to provide training at the Asian Development Bank (ADB)/Organisation for Economic Cooperation and Development (OECD) Anti-Corruption Initiative for Asia
- presenting a scenario-based practical training session for the Association of Southeast Asian Nations (ASEAN) Government Legal Officers Training on Mutual Legal Assistance in Criminal Matters
- working with representatives of the AFP and CDPP to present a practical workshop to Chinese officials in Beijing, China on Australia's proceeds of crime mechanisms, and
- playing an active role in the Asia Pacific Economic Cooperation (APEC) Anticorruption and Transparency Taskforce Experts Workshop, in Shanghai, on prosecuting corruption through the denial of safe haven, asset recovery and extradition.

K. Building regional relationships and capacity: The Australian Government will continue to explore opportunities to build capacity in the Asia-Pacific region in mutual assistance.

7.2.3 Sharing information

It is important that all countries share up-to-date information on their mutual assistance arrangements. Countries will be more likely to make mutual assistance requests where there is clear guidance on requirements for those requests.

The UNODC's Informal Expert Working Groups' Report on Mutual Legal Assistance Casework Best Practice in 2001 stated:

The provision of information to foreign authorities was also highlighted as an important measure to facilitate effective cooperation. States should develop guidelines on domestic law and procedures relating to mutual legal assistance to inform foreign authorities on the requirements that must be met to obtain assistance. Any such guidelines should be made available to foreign authorities through a variety of methods, such as, for example, publication on a website...¹⁰

The Australian Government Attorney-General's Department is implementing a public awareness strategy on Australia's mutual assistance arrangements. As part of this strategy, the Department has set up a webpage which includes links to factsheets, flowcharts and Frequently Asked Questions on Australia's procedures for mutual assistance.

The link to the website is

<http://www.ag.gov.au/extraditionandma>

The Australian Government Attorney-General's Department could also set up a secure website for access by Australia's mutual assistance partners. This could include checklists and precedents to assist those foreign countries in making mutual assistance requests to Australia.

The Commonwealth Secretariat has also undertaken to set up the Commonwealth Network of Contact Persons (CNCP). The CNCP aims to facilitate communication in mutual assistance matters between member countries through a central database. The database will include the contact numbers of officers that can assist with mutual assistance questions for that member country.

The sharing of information through the webpage on mutual assistance and the CNCP enables other countries to gain an understanding of Australia's mutual assistance system and provides a direct contact for any queries.

L. Sharing information: The Australian Government will continue to explore the most effective ways of sharing information with other countries on our mutual assistance arrangements.

¹⁰ UNODC's Informal Expert Working Groups' Report on Mutual Legal Assistance Casework Best Practice in 2001, page 8. http://www.unodc.org/pdf/lap_mlaeg_report_final.pdf

Part 8: Communication & awareness

How can we maintain and increase public awareness of the mutual assistance process and the mutual assistance reforms?

It is important to ensure that the public has a good understanding of the mutual assistance process. Public understanding of and confidence in, the mutual assistance process is essential to the success of a new mutual assistance system. The Australian Government will use a comprehensive communication strategy to increase the understanding and confidence of the public, including journalists, members of Parliament, lawyers and other agencies and organisations involved in the mutual assistance process.

The Australian Government will use this comprehensive communication strategy to:

- increase public understanding of what mutual assistance is and how we propose to reform mutual assistance
- increase public understanding of the differences between agency-to-agency assistance and mutual assistance, and
- increase public confidence in the mutual assistance process.

These goals could be achieved by:

- being open and accountable about mutual assistance procedures and cases without compromising operational law enforcement
- maintaining a comprehensive website that details current mutual assistance laws, procedures and reform proposals
- producing and maintaining up to date public information documents
- undertaking a ‘roadshow’ event to inform magistrates, law societies and the public in States and Territories about mutual assistance, and
- using the media as a means of relaying information by increasing journalists’ understanding of mutual assistance through targeted information packages.

In early 2006, the Australian Government Attorney-General’s Department began the implementation of a public awareness strategy on international crime cooperation, including mutual assistance and extradition. As part of this strategy, the Australian Government Attorney-General’s Department has set up a webpage which includes links to factsheets, flowcharts and Frequently Asked Questions on mutual assistance and extradition. The Australian Government Attorney-General’s Department will continue implementation of this strategy in 2006-2007.

M. Communication of reforms: The Australian Government will implement a comprehensive communication strategy to inform the general public about the mutual assistance process and mutual assistance reforms.

APPENDICES

Appendix 1 – Terms of reference

Review of Australia’s extradition and mutual assistance arrangements

Having regard to:

- the critical importance of extradition and mutual assistance in effectively combating terrorism and transnational and domestic crime
- the need to increase capacity for law enforcement cooperation between Australia and other countries on extradition and mutual assistance matters
- the importance of ensuring that these two Acts provide a meaningful legal framework for international law enforcement in the 21st century, and
- Australia’s international legal obligations,

comprehensive reviews of Australia’s extradition and mutual assistance policies and processes and the operation of the *Extradition Act 1988* and the Mutual Assistance Act will be undertaken.

Scope

These Reviews will consider:

- a. changes needed to reflect the changing nature, scope and extent of transnational and domestic crime, including the types of offences that are captured and the range of circumstances where responses are time critical
- b. increasing the efficiency, effectiveness and quality of current extradition and mutual assistance processes, including by:
 - streamlining the operation of the Acts
 - remedying any anomalies in the operation of the Acts
 - incorporating advancements in technology, such as videolink technology, and
 - examining the interaction of existing legislation with extradition and mutual assistance processes.

Consultation

The Reviews will be undertaken by the Commonwealth Attorney-General’s Department and will include:

- a. the release of discussion papers on extradition and mutual assistance on the Department’s website
- b. consultation with key stakeholders within the Australian Government, including the AFP, the CDPP, the Australian Government Solicitor, the Department of Prime Minister and Cabinet, the Department of Foreign Affairs and Trade, the Department of Immigration and Multicultural and Indigenous Affairs, the Australian Security

Intelligence Organisation, the Ombudsman and the Human Rights and Equal Opportunity Commission

- c. consultation with other key stakeholders including relevant State and Territory agencies and the Law Council of Australia
- d. consultation with other interested persons, and
- e. consultation with a range of international stakeholders.

Note: The Australian Government's response in May 2004 to the Joint Standing Committee on Treaties Inquiry into Australia's Extradition Law and Policy (Report 40) will be the starting point for the Reviews.

Appendix 2 – Where can I get more information on mutual assistance?

The Australian Government Attorney-General's Department's Extradition and Mutual Assistance Website: <http://www.ag.gov.au/extraditionandma>

Primary sources

The *Mutual Assistance in Criminal Matters Act 1987* is available at:
[http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/64D60FCA9ABD78BACA25716A008199E8/\\$file/MutAssistCriminalMatt1987_WD02.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/64D60FCA9ABD78BACA25716A008199E8/$file/MutAssistCriminalMatt1987_WD02.pdf)

The *Mutual Assistance in Criminal Matters Regulations 1988* are available at:
[http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrumentCompilation1.nsf/0/BA72D2A83D5ED731CA256F80000E4CED/\\$file/MutAsstCrimMatters1988WD02.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrumentCompilation1.nsf/0/BA72D2A83D5ED731CA256F80000E4CED/$file/MutAsstCrimMatters1988WD02.pdf)

Cases on mutual assistance are available on Austlii: <http://www.austlii.edu.au>

Parliamentary debate on the Mutual Assistance Act:

Commonwealth of Australia, Parliamentary Debates, House of Representatives, 22 October 1986, pp 2558 – 2561 (Second reading speech)
<http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=HANSARDR&Criteria=DOC DATE:1986-10-22%3BSEQ NUM:114%3B>

Commonwealth of Australia, Parliamentary Debates, Senate, 29 May 1987, pp 3256-3257 (Second reading speech)
<http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=HANSARDS&Criteria=DOC DATE:1987-05-29%3BSEQ NUM:83%3B>

Commonwealth of Australia, Parliamentary Debates, House of Representatives, 26 June 1996, pp 2831-2835 (Second reading speech Amendments)
<http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=HANSARDR&Criteria=DOC DATE:1996-06-26%3BSEQ NUM:90%3B>

International sources

United Nations Office on Drugs and Crime (UNODC)–Model Treaty on Mutual Assistance in Criminal Matters:
http://www.unodc.org/pdf/model_treaty_mutual_assistance_criminal_matters.pdf

UNODC–Model Mutual Assistance in Criminal Matters Bill 2000:
http://www.unodc.org/pdf/lap_mutual-assistance_2000.pdf

UNODC–Informal Expert Working Groups' Report on Mutual Legal Assistance Casework Best Practice (2001)
http://www.unodc.org/pdf/lap_mlaeg_report_final.pdf

Appendix 3 – Abbreviations and acronyms

ACC	Australian Crime Commission
ADB	Asian Development Bank
AFP	Australian Federal Police
AGD	Australian Government Attorney-General's Department
APEC	Asia Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
ASIC	Australian Securities and Investment Commission
ATO	Australian Taxation Office
AUSTRAC	Australian Transaction Reports and Analysis Centre
CDPP	Commonwealth Director of Public Prosecutions
CEO	Chief Executive Officer
CNCP	Commonwealth Network of Contact Persons
COAG	Council of Australian Governments
DIMA	Department of Immigration and Multicultural Affairs
DNA	Deoxyribonucleic Acid
MCCOC	Model Criminal Code Officers' Committee
NCIDD	National Criminal Investigation DNA Database
OECD	Organisation for Economic Cooperation and Development
SCAG	Standing Committee of Attorneys-General
UNODC	United Nations Office on Drugs and Crime