

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.

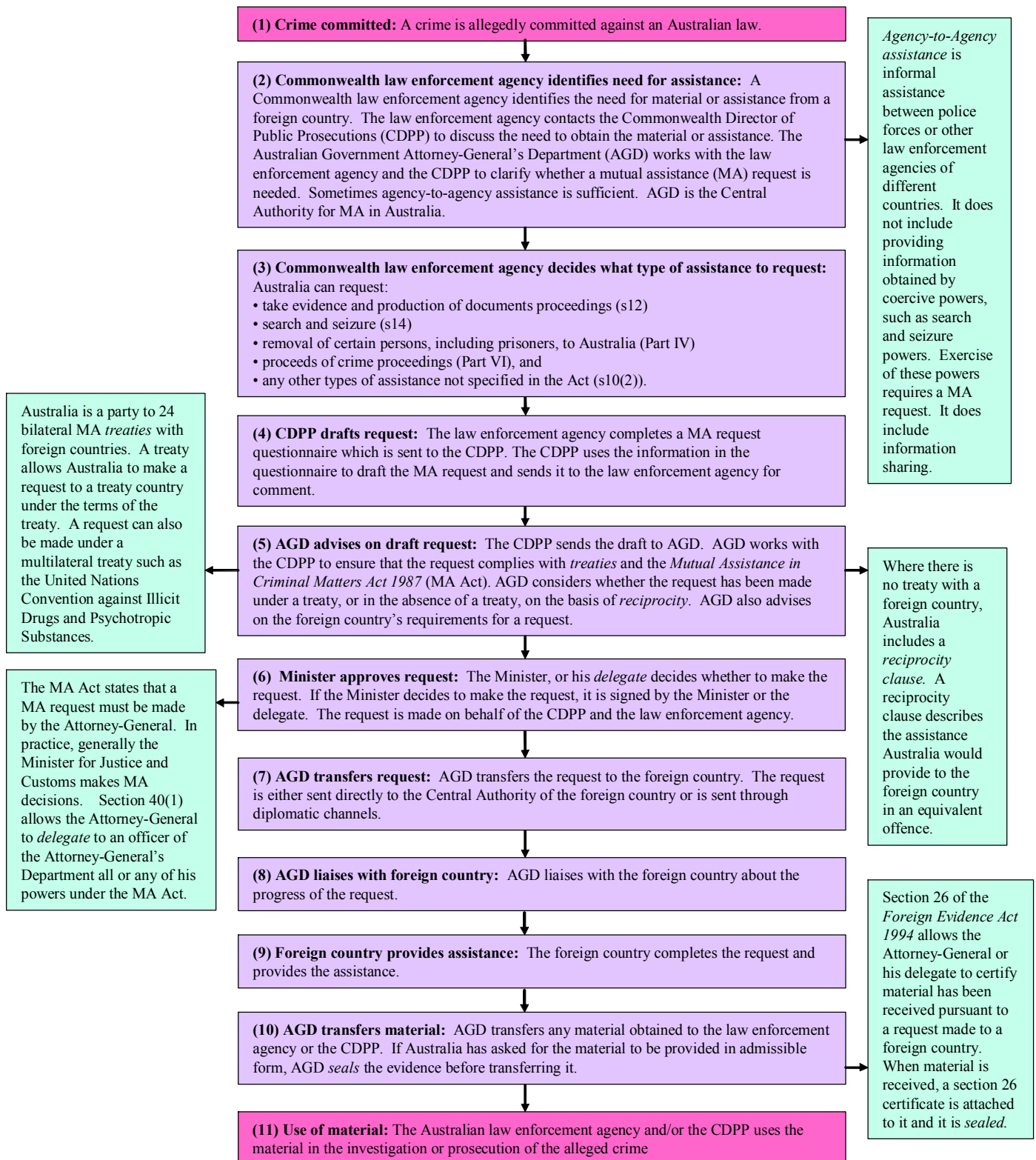
The Minister can request that a foreign country register Australian **proceeds of crime** orders, or make proceeds of crime orders on behalf of Australia.

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.

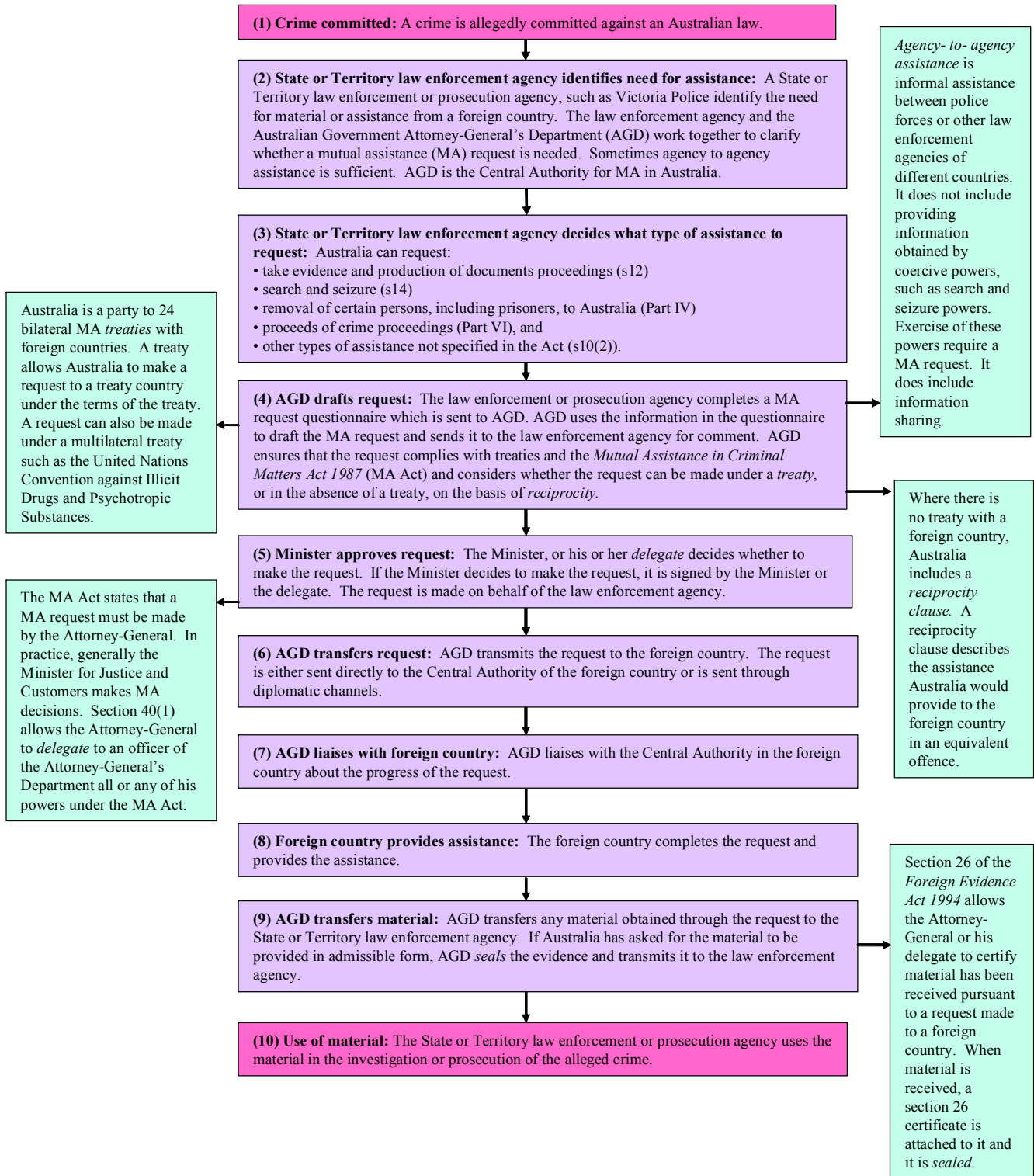
Flowchart 1

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.

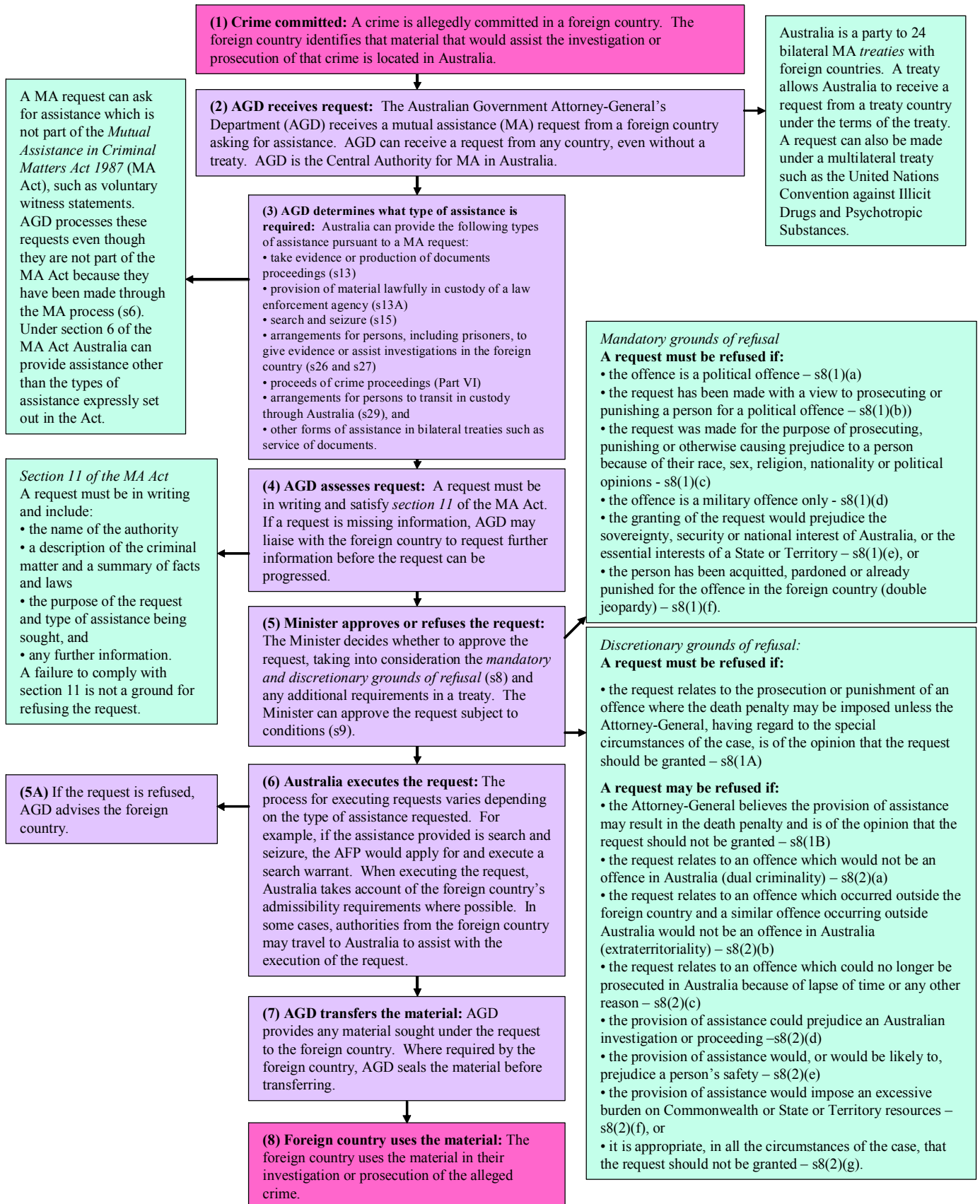
The Minister can arrange for a **person, including a prisoner, to travel from Australia to a foreign country** for the purposes of giving evidence in a foreign prosecution or assisting a foreign investigation. The person must consent and be capable of giving evidence or assisting in the investigation. 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.