



Applying a Human Rights Approach to Extradition and Mutual Assistance

**Submission to the Legislation and Policy Section, International
Crime Cooperative Division of the Attorney-General's Department
on the Exposure Draft of the *Extradition and Mutual Assistance in
Criminal Matters Legislation Bill 2009***

August 2009

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1. Executive Summary

1. The Public Interest Law Clearing House (**PILCH**) welcomes the opportunity to make a submission to the Attorney-General on the Exposure Draft of the *Extradition and Mutual Assistance in Criminal Matters Legislation Bill 2009* (**Exposure Draft**). Australia's legal framework for extradition and mutual assistance – which is enshrined in the *Extradition Act 1988* (Cth) (**Extradition Act**) and the *Mutual Assistance in Criminal Matters Act 1987* (Cth) (**Mutual Assistance Act**), respectively – has remained largely unchanged since its introduction more than 20 years ago. Taking into account significant changes in the legal, cultural and political landscape during this time, reform of this framework is both timely and necessary. We commend the Attorney-General on the initiative to undertake public consultation on the Exposure Draft and, in particular, its commitment to strengthening the protection and promotion of human rights.
2. PILCH welcomes the proposed reforms in **section 50 of Schedule 2 of the Exposure Draft** to amend the definition of 'extradition objection' in sections 7(b) and (c) of the *Extradition Act* to include discrimination on the ground of sex. PILCH strongly urges the Attorney-General to ensure that the proposal to amend the definition of 'extradition objective' is retained in the Draft Bill. Whilst PILCH welcomes the proposed amendments to sections 7(b) and (c) of the *Extradition Act*, it is deeply concerned that the amendments are limited to the ground of sex and do not cover other recognised grounds of discrimination. It therefore urges the Attorney-General to ensure that the proposed amendments in section 50 of Schedule 2 include those other recognised grounds of discrimination, such as sexual orientation and gender identity.
3. PILCH welcomes the proposed reforms in **section 3 of Schedule 3 of the Exposure Draft** to amend the *Mutual Assistance Act* to include torture as a ground for mandatory refusal to provide assistance to a foreign country. PILCH urges the Attorney-General to ensure that the proposed reforms in the Exposure Draft are retained. PILCH is concerned, however, that section 3 does not include cruel, inhuman or degrading treatment or punishment as a mandatory ground for refusing to provide mutual assistance. PILCH calls on the Attorney-General to expand the mandatory grounds of refusal to include cruel, inhuman or degrading treatment or punishment. PILCH also urges the Attorney-General to define the terms 'torture' and 'cruel, inhuman or degrading treatment or punishment' and to explicitly recognise the death penalty as a form of torture and/or cruel, inhuman and degrading treatment or punishment.
4. PILCH welcomes the proposed amendments in **section 8 of Schedule 3 of the Exposure Draft**, which acknowledge the different nature of legal systems around the world and the need to ensure that these differences do not result in the imposition of the death penalty. PILCH expresses its concern, however, regarding the breadth of the discretion given to the Attorney-General and submits that this discretion should be exercised only where: a guarantee has been obtained from the country requesting mutual assistance that the person in question will *not* be subject to the death penalty; or, such assistance is exculpatory. The only exception should be where there is an imminent threat to human life and cooperation in such cases should proceed only with a report to Parliament.

5. PILCH is also concerned that the *Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations (AFP Guidelines)*, which stipulate when the Australian Federal Police (AFP) can share intelligence with foreign law enforcement agencies on a police-to-police basis that may result in the death penalty, have not yet been reformed. PILCH submits that the AFP Guidelines should be amended or such assistance should be regulated by the *Mutual Assistance Act* to ensure that cooperation with foreign law enforcement agencies does not expose individuals to the real risk of the death penalty. It is imperative that any revised Guidelines or provision in the Act stipulate that cooperation is permissible only where: a competent foreign body has provided an assurance that no person will be subject to the death penalty; or, such cooperation is exculpatory. The revised Guidelines or Act should also stipulate that the only exception is cases that involve an imminent threat to human life, and that have been subject to ministerial approval and a report to Parliament.
6. In summary, PILCH makes the following recommendations in relation to the Exposure Draft of the Bill.

Recommendation No. 1:

The proposal in section 50 of Schedule 2 of the Exposure Draft to amend the definition of 'extradition objection' in sections 7(b) and (c) of the *Extradition Act* to include the ground of sex should be retained in the Draft Bill.

Recommendation No. 2:

Section 50 of Schedule 2 of the Exposure Draft should be amended so that the definition of 'extradition objection' in sections 7(b) and (c) of the *Extradition Act* includes those other grounds of discrimination, such as sexual orientation and gender identity, that have been recognised under international human rights law.

Recommendation No. 3:

The proposed amendment in section 3 of Schedule 3 of the Exposure Draft to include torture as a mandatory ground for refusing a request by a foreign country for mutual assistance should be retained.

Recommendation No. 4:

The proposed amendment in section 3 of Schedule 3 of the Exposure Draft should be expanded to include cruel, inhuman or degrading treatment or punishment, as a mandatory ground for refusing mutual assistance to a foreign country.

Recommendation No. 5:

The Exposure Draft should include definitions of the terms 'torture' and 'cruel, inhuman or degrading treatment or punishment' that:

- are consistent with international human rights law and jurisprudence, including article 1 of CAT; and,

- explicitly recognise the death penalty as a form of torture and/or cruel, inhuman and degrading treatment or punishment.

Recommendation No. 6:

The proposed amendment in section 8 of Schedule 3 of the Exposure Draft, which seeks to expand the circumstances in which the Attorney-General must refuse to provide assistance to a foreign country that may result in the imposition of the death penalty, should be retained.

Recommendation No. 7:

Section 8 of Schedule 3 of the Exposure Draft should restrict the Attorney-General's discretion to provide mutual assistance to cases where:

- he or she has obtained a guarantee from the country seeking mutual assistance that no person will be subject to the death penalty; or,
- such assistance is exculpatory.

Section 8 should also state explicitly that:

- the only exception to the restriction on the Attorney-General's discretion are cases involving an imminent threat to human life; and,
- cooperation in such cases should proceed only with a report to Parliament.

Recommendation No. 8:

The AFP Guidelines should be amended or such assistance should be regulated by the *Mutual Assistance Act* to ensure that:

- they are consistent with Australia's obligations under human rights law, including the Second Optional Protocol; and,
- in cases where there is a risk that an individual will be charged with an offence that attracts the death penalty, cooperation with foreign law enforcement agencies may only be provided where: a guarantee has been obtained from a competent foreign body that no person will be subject to the death penalty; or, such cooperation is exculpatory. The only exception should be where there is an imminent threat to human life and cooperation in such cases should proceed only with ministerial approval and a report to Parliament.

2. About PILCH

7. PILCH is a leading Victorian, not-for-profit organisation that is committed to furthering the public interest, improving access to justice and protecting human rights. It coordinates the delivery of pro bono legal services through four pro bono clearing house referral schemes (Public Interest Law Scheme, Victorian Bar Legal Assistance Scheme, Law Institute of Victoria Legal Assistance Scheme and PilchConnect) and two pro bono outreach legal clinics (Homeless Persons' Legal Clinic and Seniors Rights Legal Clinic).
8. PILCH's objectives are to:

- improve access to justice and the legal system for those who are disadvantaged or marginalised;
- identify and seek to redress matters of public interest requiring legal assistance for those who are disadvantaged or marginalised;
- refer individuals, community groups, and not for profit organisations to lawyers in private practice, and to others in ancillary or related fields, who are willing to provide their services without charge;
- support community organisations to pursue the interests of the communities they seek to represent; and,
- encourage, foster and support the work and expertise of the legal profession in pro bono and/or public interest law.

PILCH seeks to meet these objectives by facilitating the provision of pro bono legal services, and by undertaking law reform, policy work and legal education.

9. In 2007-2008, PILCH facilitated pro bono assistance for over 2,000 individuals and organisations and provided hundreds of others with legal information and referrals. PILCH also encouraged and promoted pro bono work amongst Victorian lawyers, not just within private law firms but also those working in government and corporate legal departments. In the last year, PILCH also made numerous law reform submissions on questions of public interest. Much of this work assisted in securing human rights and access to justice for marginalised and disadvantaged members of the Australian community.
10. PILCH has a particular interest in a number of areas addressed in the Exposure Draft, including, in particular: discrimination; torture and cruel, inhuman and degrading treatment or punishment; and, the death penalty. For example, in 2008-2009, PILCH made several law reform submissions that addressed Australia's obligations to eliminate discrimination on such grounds as sex¹ and sexual orientation and gender identity.² In 2008, PILCH made a submission to the Attorney-General on the review of the AFP Guidelines, which, *inter alia*, examined Australia's obligations under international human rights law with respect to the death penalty.³

¹ See Simone Cusack and Rachel Ball, *Eliminating Discrimination and Ensuring Substantive Equality*, Submission to the Scrutiny of Acts and Regulations Committee on its Inquiry into the Exceptions and Exemptions in the *Equal Opportunity Act 1995* (Vic) (PILCH and HRLRC, 2009), available at: http://www.pilch.org.au/2009_submissions/; Michelle Panayi, Mat Tinkler and Dahni Houseman, Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality (PILCH, 2008), available at: http://www.pilch.org.au/2008_submissions/.

² See Simone Cusack, *Ensuring Respect, Recognising Diversity*, Submission to the Senate Committee on Legal and Constitutional Affairs on its Inquiry into the *Marriage Amendment Bill 2009* (Cth) (PILCH, 2009), available at: http://www.pilch.org.au/2009_submissions/.

³ See Lucy McKernan and Simone Cusack, *Review of Australian Federal Police Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations* (PILCH, 2008), available at: http://www.pilch.org.au/2008_submissions/.

3. Scope and Structure of Submission

11. This submission analyses Schedules 2 (extradition) and 3 (mutual assistance) of the Exposure Draft, through a human rights framework. PILCH has focused on those areas of the Exposure Draft in which it has expertise and experience. More specifically, this submission addresses:
- **Section 50 of Schedule 2 of the Exposure Draft**, which proposes to amend the definition of 'extradition objection' in the *Extradition Act* to include discrimination on the ground of sex;
 - **Section 3 of Schedule 3 of the Exposure Draft**, which proposes to amend the *Mutual Assistance Act* to include torture as a ground for mandatory refusal to provide assistance to a foreign country; and,
 - **Section 8 of Schedule 3 of the Exposure Draft**, which proposes to extend the circumstances in which the Attorney-General is obligated, under the *Mutual Assistance Act*, to refuse to provide assistance to a foreign country that may result in the imposition by that country of the death penalty.

It is not the intention of this submission to provide a comprehensive analysis of the entire Exposure Draft.

12. This submission begins in Section 4 by examining section 50 of Schedule 2 of the Exposure Draft and its proposal to amend the definition of 'extradition objection' in the *Extradition Act* to include sex discrimination. Section 5 then examines the proposal in section 3 of Schedule 3 of the Exposure Draft to include torture as a mandatory ground for refusing to provide mutual assistance. Last, Section 6 analyses section 8 of Schedule 3 of the Exposure Draft and its proposal to extend the circumstances in which the Attorney-General must refuse to provide assistance that may result in the imposition of the death penalty.

4. Extradition Objection on the Ground of Sex

4.1 Current Law

13. Section 7 of the *Extradition Act* defines the meaning of the term 'extradition objection'. The nature and scope of the definition is significant as it determines the circumstances in which the Federal Government must not surrender a person in relation to an extradition offence.⁴
14. As it currently stands, section 7 of the *Extradition Act* provides:

For the purposes of this Act, there is an extradition objection in relation to an extradition offence for which the surrender of a person is sought by an extradition country if:

...

⁴ See *Extradition Act*, ss 16(2)(b), 19(2)(d), 22(3)(a).

- (b) the surrender of the person, in so far as it purports to be sought for the extradition offence, is actually sought for the purpose of prosecuting or punishing the person on account of his or her race, religion, nationality or political opinions or for a political offence in relation to the extradition country;
 - (c) on surrender to the extradition country in respect of the extradition offence, the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, religion, nationality or political opinions;
- ...

15. The effect of this provision is that the Federal Government must not surrender a person in relation to an extradition offence if the surrender of the person would result in discrimination against him or her on grounds of race, religion, nationality, or political opinions.⁵

4.2 Nature and Scope of Proposed Reform

16. Section 50 of Schedule 2 of the Exposure Draft proposes to amend the definition of 'extradition objection' in sections 7(b) and (c) of the *Extradition Act*, by inserting the term 'sex,' after the term 'race,'. Section 51 of Schedule 2 of the Exposure Draft clarifies that '[t]he amendment made by item 50 applies in relation to an extradition request from an extradition country that is made on or after the commencement of this item'.
17. The effect of the proposed amendment in the Exposure Draft would be that the grounds of discrimination enumerated in section 7 of the *Extradition Act* would include the additional ground of sex. If passed in the form proposed, the Federal Government would thus be prohibited from surrendering a person in relation to an extradition offence if the surrender of that person would result in discrimination against him or her on grounds of race, religion, nationality, political opinions *and/or sex*. The proposed amendment would also have the effect of aligning the *Extradition Act* with the grounds for refusing assistance enumerated in section 8(1)(c) of the *Mutual Assistance Act*.⁶

4.3 Prohibition against Extradition in Cases of Discrimination on the Ground of Sex

18. PILCH welcomes the proposed amendments to sections 7(b) and (c) of the *Extradition Act 1988* and, in particular, commends the Government on its commitment to eliminating discrimination on the ground of sex. Non-discrimination and equality constitute basic and general principles relating to the protection of all human rights, and eliminating discrimination on the ground of sex is critical to the elimination of all forms of discrimination and the realisation of substantive equality.
19. Australia is obligated, under domestic and international human rights law, to respect, protect and fulfil the right to non-discrimination on the ground of sex. Article 2(1) of the

⁵ See Explanatory Document, at para 2.21.

⁶ See *Mutual Assistance Act*, s 8(1)(c) (providing: 'A request by a foreign country for assistance under this Act shall be refused if, in the opinion of the Attorney-General there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of the person's race, sex, religion, nationality or political opinions') [emphasis added].

International Covenant on Civil and Political Rights (ICCPR) requires States Parties to respect and ensure the rights in that treaty 'without distinction of any kind, such as ... sex ...'.⁷ Article 26 further provides that '[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as ... sex ...'. Article 26 moves beyond article 2(1), which prohibits discrimination in the exercise of the enumerated rights in the ICCPR, and establishes a free-standing right to non-discrimination.⁸

20. Article 2(2) of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* provides that States Parties 'undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to ... sex ...'.⁹ The Committee on Economic, Social and Cultural Rights (**CESCR**), the UN treaty body responsible for monitoring States Parties' compliance with ICESCR, has confirmed that not only are States Parties required, under article 2(2), to eliminate discrimination, but they are also required to ensure substantive equality. 'Substantive equality', it has explained, 'is concerned, in addition [to formal equality], with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience'.¹⁰
21. In addition to the obligations incumbent on States Parties under the ICCPR and ICESCR, international treaties such as the *Convention on the Elimination of All Forms of Discrimination against Women*,¹¹ the *Convention on the Elimination of All Forms of Racial Discrimination*,¹² and the *Convention on the Rights of Persons with Disabilities*,¹³ also require the elimination of discrimination on the ground of sex.
22. At the federal level, the *Sex Discrimination Act 1984* (Cth) prohibits direct and indirect sex discrimination in a number of areas of public life, including employment, education, accommodation and the administration of Commonwealth laws and programs. State and territory governments have also enacted legislative prohibitions against this form of discrimination.¹⁴

⁷ *International Covenant on Civil and Political Rights*, Dec. 16, 1966 (entered into force Mar. 23, 1976), 999 UNTS 171.

⁸ See also Human Rights Committee (**HRC**), *General Comment No. 28: Equality of Rights between Men and Women*, UN Doc CCPR/C/21/Rev.1/Add.10 (2000); HRC, *General Comment No. 18: Non-discrimination*, UN Doc HRI/GEN/1/Rev.1 at 26 (1994).

⁹ *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966 (entered into force Jan. 3, 1976), 993 UNTS 3.

¹⁰ CESCR, *General Comment No. 16: The Equal Rights of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights*, UN Doc E/C.12/2005/4 (2005), at para. 7. See also CESCR, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20 (2009).

¹¹ *Convention on the Elimination of All Forms of Discrimination against Women*, Dec. 18, 1979 (entered into force Sept. 3, 1981), 1249 UNTS 13.

¹² *International Convention on the Elimination of All Forms of Racial Discrimination*, Dec. 21, 1965 (entered into force Jan. 4, 1969), 660 UNTS 195.

¹³ *Convention on the Rights of Persons with Disabilities*, Dec. 13, 2006 (entered into force May 3, 2008), GA Res 61/106, UN Doc A/61/611 (2006).

¹⁴ See *Discrimination Act 1991* (ACT), s 7(1)(a); *Human Rights Act 2004* (ACT), s 8; *Anti-Discrimination Act 1977* (NSW), Part 3; *Anti-Discrimination Act 1992* (NT), s 19(1)(b); *Anti-Discrimination Act 1991* (QLD), s 7(a); *Equal Opportunity Act*

23. PILCH submits that the proposed amendments to sections 7(b) and (c) of the *Extradition Act 1988* accord with Australia's obligations under international and domestic human rights law. In addition to enshrining the right to non-discrimination on the ground of sex in the *Extradition Act 1988*, these amendments signal to the Australian community that it is committed to eliminating discrimination on the ground of sex and ensuring substantive equality. They also signal to the international community that Australia is not prepared to surrender a person in relation to an extradition offence if the surrender of that person would result in discrimination against him or her on the ground of sex.
24. No person should be surrendered for an extradition offence if that surrender is actually sought for the purpose of prosecuting or punishing a person on account of his/her sex or if, on surrender, a person may be prejudiced at trial, or punished, detained or restricted in his/her liberty by reason of sex. The proposed amendments ensure that the Australian Government will not, through the extradition process, enable or be complicit in sex discrimination.
25. PILCH strongly urges the Attorney-General to ensure that the proposal in section 50 of the Exposure Draft to amend the definition of 'extradition objective' in sections 7(b) and (c) of the *Extradition Act* to include the ground of sex should be retained in the Draft Bill. Anything short of its inclusion would be inconsistent with Australia's obligations under human rights law, and would send the wrong message about the value that the Government places on the right not to be discriminated against because of a person's sex.

4.4 Need to Expand Prohibition to Other Grounds of Discrimination

26. Whilst PILCH welcomes the proposed amendments to sections 7(b) and (c) of the *Extradition Act*, it is deeply concerned that the amendments are limited to the ground of sex and do not cover other recognised grounds of discrimination. Australia's obligations, under international human rights law, are not limited to refusing to surrender a person because of discrimination on the grounds of race, sex, religion, nationality, political opinions or for a political offence. Those obligations also extend to other grounds of discrimination, including ethnicity, disability, health status, sexual orientation and gender identity.¹⁵
27. PILCH submits that, if section 7 of the *Extradition Act* is to be effective and compatible with Australia's human rights obligations, it must be expanded to include other recognised grounds of discrimination. To do so otherwise would be disingenuous and only pay lip service to the rights to non-discrimination and equality.

Recommendation No. 1:

The proposal in section 50 of Schedule 2 of the Exposure Draft to amend the definition of 'extradition objection' in sections 7(b) and (c) of the *Extradition Act* to include the ground of sex should be retained in the Draft Bill.

1984 (SA), s 29(1)(a); *Anti-Discrimination Act 1998* (Tas), s 16(e); *Equal Opportunity Act 1995* (VIC), s 6(k); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 8; *Equal Opportunity Act 1984* (WA), Part II.

¹⁵ See, eg, ICCPR, arts 2(1), 26; ICESCR, art 2(1).

Recommendation No. 2:

Section 50 of Schedule 2 of the Exposure Draft should be amended so that the definition of 'extradition objection' in sections 7(b) and (c) of the *Extradition Act* includes those other grounds of discrimination, such as sexual orientation and gender identity, that have been recognised under international human rights law.

5. Torture as a Mandatory Ground of Refusal

5.1 Current Law

28. Section 8(2)(e) of the *Mutual Assistance Act* currently grants the Attorney-General discretion to refuse to provide assistance to a foreign country in circumstances where such assistance might compromise the safety of the person in question.¹⁶
29. It has been explained that 'requests involving concerns about torture can and would be refused on the basis of this ground for refusal'¹⁷. However, as the *Mutual Assistance Act* does not expressly prohibit the Attorney-General from providing assistance to a foreign country in cases that may compromise the safety of an individual, the Attorney-General is free to exercise the discretion in any way he or she deems fit, including to provide assistance in cases that may result in torture.

5.2 Nature and Scope of Proposed Changes

30. Section 3 of Schedule 3 of the Exposure Draft proposes to amend the *Mutual Assistance Act* by inserting section 8(1)(ca). Under the proposed amendment:
- [a] request by a foreign country for assistance under this Act shall be refused if, in the opinion of the Attorney-General ... there are substantial grounds for believing that the granting of the request would result in a person being subjected to torture.
31. The effect of the proposed amendment would be to include, in section 8 of the *Mutual Assistance Act*, a new ground for mandatory refusal to provide assistance to a foreign country. In cases where there are substantial grounds to believe that the provision of assistance would result in a person being subjected to torture, the Attorney-General would be required to refuse the request for assistance. The amendment would narrow the circumstances in which the Attorney-General may exercise his discretion to refuse to provide assistance to a foreign country.

5.3 State Obligations in Relation to the Freedom from Torture and Cruel, Inhuman or Degrading Treatment or Punishment

32. As a State Party to the ICCPR, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*, and the *Optional Protocol to the Convention*

¹⁶ See section 8(2)(e) of the *Mutual Assistance Act*.

¹⁷ Explanatory Document, at para. 3.4.

against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Optional Protocol), Australia has undertaken to ensure that no one is subjected to torture or to cruel, inhuman or degrading treatment or punishment.¹⁸ Article 7 of the ICCPR for example, requires Australia to ensure that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.

33. In its *General Comment No. 20*, the HRC stated that article 7 of the ICCPR imposes a non-derogable obligation on States Parties not to extradite a person to a country in circumstances in which it is foreseeable that the person may be subject to torture or cruel, inhuman or degrading treatment or punishment.¹⁹ This obligation is in addition to the prohibition, under article 3 of CAT, against extraditing a person to another state 'where there are substantial grounds for believing that he would be in danger of being subjected to torture'. PILCH submits that the international human rights obligations relating to extradition should be analogized to apply to the provision of mutual assistance.
34. PILCH submits that the obligations on the Australian Government to respect, protect and fulfil the freedom from torture and cruel, inhuman or degrading treatment or punishment, as set out in CAT and the ICCPR, extend to taking all necessary measures within its control (including the refusal to provide mutual assistance) to prevent an individual being subjected to torture or cruel, inhuman or degrading treatment or punishment by a foreign country. Support for this position can be found, *inter alia*, in CAT, which aims 'to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world'²⁰. This position was further reinforced in May 2009 when Australia became a State Party to the Optional Protocol, and was underscored by the Attorney-General's statement, at that time, that '[n]othing justifies torture – and nothing justifies a State's use of it'²¹.

5.4 Definitions of Torture and Cruel, Inhuman or Degrading Treatment or Punishment

35. Torture is defined in article 1(1) of CAT as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, of for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting

¹⁸ See ICCPR, art 7; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 18 December 2002, entered into force 22 June 2006.

¹⁹ HRC, *General Comment No 20, Replaces General Comment 7 Concerning the Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment* (1992), UN Doc. UN Doc. HRI/GEN/1/Rev.1 at 30 (1994), at para 9.

²⁰ CAT, pmblr para 7.

²¹ Attorney General, 'Human Rights: A Moral Compass', Speech given to the Lowy Institute for International Policy, Sydney, 22 May 2009, available at: http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches_2009_22May2009-HumanRights-aMoralCompass.

in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

36. In relation to 'cruel, inhuman or degrading treatment or punishment', article 16 of CAT, states that each State Party to CAT shall

undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The individual terms 'cruel', 'inhuman' and 'degrading' are not expressly defined within CAT. However the wording of article 16 implies that the concept of cruel, inhuman or degrading treatment or punishment is a broader concept of mistreatment than that of 'torture', as defined in article 1(1). The Committee Against Torture (**CAT Committee**), the UN treaty body responsible for monitoring States Parties' compliance with CAT, has given numerous examples of acts that are not considered as torture under article 1 but are regarded as cruel, inhuman or degrading treatment or punishment under article 16. For instance, police brutality is considered a form of cruel, inhuman or degrading treatment or punishment, but not torture.²²

37. One international expert has defined 'cruel and inhuman treatment or punishment' as 'the infliction of severe pain or suffering, whether physical or mental, by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'²³. That same expert defines 'degrading treatment or punishment' as 'the infliction of pain or suffering, whether physical or mental, which aims at humiliating the victim'²⁴.

5.5 Torture

38. PILCH welcomes the proposed amendment to section 8 of the *Mutual Assistance Act*. PILCH commends the Federal Government on its opposition to torture and its commitment to introduce a mutual assistance framework that improves the legal protection available for individuals at risk of torture and is consistent with its human rights obligations.
39. PILCH recommends that the proposed amendment in section 3 of Schedule 3 of the Exposure Draft, to include torture as a mandatory ground for refusing a request by a foreign country for mutual assistance, should be retained. Excluding the proposed amendment would be inconsistent with Australia's obligations under international and domestic human rights law. It would also send the wrong message about the Government's opposition to torture.

²² See, for example, Report of the Committee against Torture, General Assembly, 25th / 26th sessions, A/56/44, Part IV, p17 [39]. See generally Manfred Nowak and Elizabeth McArthur, *The United National Convention Against Torture: A Commentary* (2008), 540.

²³ Nowak & McArthur, *ibid* at 67, 558.

²⁴ *Ibid* at 558.

5.6 Cruel, Inhuman or Degrading Treatment or Punishment

40. Whilst PILCH welcomes the proposed amendment to section 8 of the *Mutual Assistance Act*, it is deeply concerned that section 3 of Schedule 3 of the Exposure Draft does not include cruel, inhuman or degrading treatment or punishment as a mandatory ground of refusing to provide mutual assistance. The failure to broaden the mandatory grounds of refusal in this way means that the Attorney-General can still exercise his or her discretion to provide assistance to a foreign country that may result in a person being subjected to cruel, inhuman or degrading treatment or punishment.
41. Such an outcome would be in contravention of Australia's human rights obligations.²⁵ It would also send an equivocal message about Australia's opposition to cruel, inhuman or degrading treatment or punishment. PILCH therefore recommends that the proposed amendment in section 3 of schedule 3 of the Exposure Draft should be expanded to include cruel, inhuman or degrading treatment or punishment, as a mandatory ground for refusing mutual assistance to a foreign country. This could be achieved by inserting the words 'or, to cruel, inhuman or degrading treatment or punishment' after the words 'being subjected to torture' at the end of section 3.

5.7 Death Penalty as a Form of Torture and Cruel, Inhuman or Degrading Treatment or Punishment

42. PILCH notes that the death penalty is arguably a form of torture and cruel, inhuman or degrading treatment or punishment.²⁶
43. The CAT Committee has suggested that the death penalty can be a form of torture where the method of execution may cause severe pain and suffering.²⁷ In this regard, the CAT Committee has, for example, expressed concern over the use of lethal injection as a method of carrying out the death penalty.²⁸ Lethal injection is generally regarded as a relatively less barbaric method of execution, as against, for example, firing squad or hanging. Given this, more barbaric methods of execution²⁹ that cause increased pain and suffering, are also arguably torture.
44. The HRC and the CAT Committee have determined that certain methods of execution may violate the freedom from cruel, inhuman or degrading treatment or punishment.³⁰ In addition, the Constitutional Court of South Africa has found that the imposition of the death penalty, in all circumstances, constitutes a form of cruel, inhuman and degrading treatment

²⁵ See, eg, ICCPR, art 7; CAT, art 16.

²⁶ See, eg, Nowak & McArthur, above note 20, at 547.

²⁷ See *ibid*, at 59.

²⁸ See CAT Committee, *Concluding Observations: United States of America*, UN Doc. CAT/C/USA/CO/2 (2006), at para 31.

²⁹ For example Singapore uses hanging as its method of execution: *Criminal Procedure Code* (Judgment of death), art. 216.

³⁰ See HRC, *General Comment No. 20*, above note 17, at para 6. See also CAT Committee, Report of the Committee Against Torture, UN Doc. A/48/44 (1993), at para 58. See also Andrew Byrnes, "The Right to Life, the Death Penalty and Human Rights Law: An International and Australian Perspective", University of New South Wales Faculty of Law Research Series, Paper 66 (2007), 34-35, available at: <http://law.bepress.com/unswlrs/flrps/art66/>.

or punishment, in violation of the South African constitution.³¹ Furthermore the European Court of Human Rights, in *Soering v. United Kingdom*, characterised the stress of being on death row (known as the 'death row phenomenon') as a form of inhuman and degrading punishment.³²

45. PILCH submits that Australia's international human rights obligations, under the ICCPR and CAT, extend to not cooperating with foreign law enforcement agencies in circumstances where an individual may be charged with an offence that attracts the death penalty and which could therefore result in torture or, at the very least, in cruel, inhuman and degrading treatment or punishment.

5.8 Definitions

46. PILCH recommends that the terms 'torture' (as per the proposed amendment) and 'cruel, inhuman or degrading treatment or punishment' be defined in the Exposure Draft, to ensure consistency and compliance with international human rights law and jurisprudence, in particular articles 1 and 16 of CAT. Furthermore PILCH recommends that the definitions explicitly recognise the death penalty as a form of torture and/or cruel, inhuman and degrading treatment or punishment.

Recommendation No. 3:

The proposed amendment in section 3 of schedule 3 of the Exposure Draft to include torture as a mandatory ground for refusing a request by a foreign country for mutual assistance should be retained.

Recommendation No. 4:

The proposed amendment in section 3 of schedule 3 of the Exposure Draft should be expanded to include cruel, inhuman or degrading treatment or punishment, as a mandatory ground for refusing mutual assistance to a foreign country.

Recommendation No. 5:

The Exposure Draft should include definitions of the terms 'torture' and 'cruel, inhuman or degrading treatment or punishment' that:

- are consistent with international human rights law and jurisprudence, including article 1 of CAT; and,
- explicitly recognise the death penalty as a form of torture and/or cruel, inhuman and degrading treatment or punishment.

³¹ See, e.g., *State v. Makwanyane* 1995 (3) SA 391, 1995 (6) BCLR 665 (Constitutional Court of South Africa), at paras. 265, 270–272 (citations omitted). See also Byrnes, *ibid*.

³² *Soering v. United Kingdom*, (1989) 11 EHRR 439, at para 111 (concerning a German man, who was detained in the UK pending extradition to the United States to face murder charges in Virginia. His extradition would have placed him at risk of being on death row. Soering argued that the risk of death row constituted a violation of article 3 of the *European Convention on Human Rights*, which states that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment'. The Court held that the stress of being on death row itself would expose the applicant to a real risk of treatment beyond the threshold of article 3).

6. Discretion to Provide Assistance in Death Penalty Matters

6.1 Current Law

47. Section 8(1A) of the *Mutual Assistance Act* currently provides that a request by a foreign country for assistance under that Act must be refused
- if it relates to the prosecution or punishment of a person charged with, or convicted of, an offence in respect of which the death penalty may be imposed in the foreign country, unless the Attorney-General is of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted.
48. The effect of this provision is that the Attorney-General is prohibited from providing assistance to a foreign country if that assistance relates to the prosecution or punishment of a person charged with, or convicted of, an offence that may attract the death penalty. The legislative prohibition is not absolute, however, as the Attorney-General retains discretion to provide assistance in cases where he or she considers it to be appropriate, having regard to the special circumstances of the case. This means that there may be cases where the Attorney-General authorises assistance that leads, or could lead, to a foreign state imposing the death penalty.

6.2 Nature and Scope of Proposed Reform

49. Section 8 of Schedule 3 of the Exposure Draft proposes to repeal section 8(1A) of the *Mutual Assistance Act* and substitute the following provision:
- A request by a foreign country for assistance under this Act must be refused if:
- (a) the request relates to the investigation, prosecution or punishment of:
- (i) a person arrested or detained on suspicion of having committed an offence; or
- (ii) a person charged with, or convicted of, an offence; and
- (b) the offence is one in respect of which the death penalty may be imposed in the foreign country;
- unless the Attorney-General is of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted.
50. The effect of section 8 is to extend the circumstances in which the Attorney-General must refuse to apply to provide assistance to a foreign country that may result in the imposition by that country of the death penalty. Specifically, section 8 proposes to amend section 8(1A) of the *Mutual Assistance Act* to impose an obligation to refuse to provide mutual assistance to a foreign country in cases where a person has been:
- arrested on suspicion of having committed an offence that attracts the death penalty;
 - detained on suspicion of having committed an offence that attracts the death penalty;
 - charged with an offence that attracts the death penalty; and,
 - convicted of an offence that attracts the death penalty.

This means that the refusal to provide assistance is no longer contingent on whether or not formal charges have been laid by the foreign country.³³ By way of elucidation, the Explanatory Document notes that

[t]his proposed amendment recognises that under some legal systems a suspect may be formally charged later in the legal process than in Australia. In such a situation the suspect may be held under arrest or detained for longer periods of time without being formally charged. It is appropriate that the protections contained in the Mutual Assistance Act in relation to the death penalty apply irrespective of differences in criminal procedure in foreign countries.³⁴

51. Like under the current provision, the amendment put forward in section 8 of Schedule 3 of the Exposure Draft would grant the Attorney-General discretion to provide mutual assistance in cases where he or she considers it to be appropriate, having regard to the special circumstances of the case.

6.3 State Obligations in Relation to the Death Penalty

52. All Australian states have abolished the death penalty.³⁵ Australia is also a party to the *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty* (**Second Optional Protocol**), which requires it to take steps to abolish the death penalty and ensure that no person will be executed in Australia.³⁶ These obligations arguably extend to taking all appropriate measures to prevent a foreign country from applying the death penalty. In 2007, Australia affirmed its opposition to the death penalty, endorsing a UN Resolution to 'establish a moratorium on executions with a view to abolishing the death penalty'³⁷ and, in 2009, the Attorney-General announced his intention to ban all Australian states and territories from re-introducing this practice.³⁸
53. Australia has undertaken to protect and promote the right to life.³⁹ The HRC has interpreted this right as requiring States Parties that have abolished the death penalty to protect the right to life *in all circumstances*. Accordingly, Australia must not expose a

³³ Explanatory Document, at para 3.9.

³⁴ Ibid, at para 3.10.

³⁵ See *Death Penalty Abolition Act 1973* (Cth); *Criminal Code Amendment Act 1922* (Qld); *Criminal Code Act 1968* (Tas); *Crimes (Capital Offences) Act 1975* (Vic); *Statutes Amendment (Capital Punishment Abolition) Act 1976* (SA); *Acts Amendment (Abolition of Capital Punishment) Act 1984* (WA); *Crimes (Amendment) Act 1955* (NSW), *Crimes (Death Penalty Abolition) Amendment Act 1985* (NSW), *Miscellaneous Acts (Death Penalty Abolition) Amendment Act 1985* (NSW).

³⁶ *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, opened for signature 15 December 1989, 1642 UNTS 85 (entered into force 11 July 1991), art 1(1)-(2). See also *Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); CAT.

³⁷ UN General Assembly, Moratorium on the use of the Death Penalty, Res. No. 62/149, UN Doc. A/RES/62/149 (2008).

³⁸ See, for example, Cynthia Banham, "Canberra to act on death penalty ban", *The Age*, July 1 2009. available at <http://www.theage.com.au/national/canberra-to-act-on-death-penalty-ban-20090630-d3su.html>.

³⁹ ICCPR, art 6. See also *Universal Declaration of Human Rights*, GA Res. 217A (III), UN Doc. A/810 at 71 (1948), art 3.

person to the real risk of the application of the death penalty, including by another country.⁴⁰

54. Australia has further undertaken to ensure that no one is subjected to cruel, inhuman or degrading treatment or punishment. As explained in Section 5 above, the HRC has determined that certain methods of execution may violate this fundamental freedom.⁴¹ In addition, the Constitutional Court of South Africa has held that the death penalty will *always* constitute cruel, inhuman and degrading treatment or punishment.⁴² In PILCH's view, Australia is required to refuse to provide mutual assistance or cooperate with foreign law enforcement agencies where the death penalty is a foreseeable outcome.⁴³
55. Australia is under a general obligation to respect, protect and fulfil human rights.⁴⁴ The obligation to *protect*, which requires Australia to take measures that prevent third parties (including foreign governments) from interfering with the exercise or enjoyment of rights, has particular relevance to when it is lawful to provide mutual assistance to, or cooperate with, a foreign country, when it might foreseeably result in the death penalty. The obligation to protect requires states to adopt positive measures to regulate and oversee the conduct of third parties.⁴⁵ In the context of the death penalty, Australia is thus obligated to adopt policies and guidelines that 'protect' human rights and fundamental freedoms, including the right to life and the freedom from torture and cruel, inhuman and degrading treatment, of individuals subject to the jurisdiction of foreign countries.

6.4 Refusal to Assist in Cases Where a Person Has Been Arrested or Detained

56. PILCH welcomes the proposed amendments in section 8 of schedule 3 of the Exposure Draft. The amendments are significant insofar as they recognise the different nature of legal systems around the world and the need to ensure that these differences do not result in a situation in which the Attorney-General provides mutual assistance that leads, or could lead, to a person being subject to the death penalty. The obligations incumbent on the Government to respect, protect and fulfil the right to life and the freedom from torture and cruel, inhuman or degrading treatment or punishment do not change simply because, in a number of states, persons may be formally charged later in the legal process than in Australia. PILCH endorses the statement in the Explanatory Document that it is therefore appropriate 'that the protections contained in the Mutual Assistance Act in relation to the death penalty apply irrespective of differences in criminal procedure in foreign countries'.

⁴⁰ *Judge v. Canada*, HRC, Communication No. 829/1998, UN Doc. CCPR/C/78/D/829/1998 (2003).

⁴¹ See HRC, *General Comment No. 20*, above note 17, at para. 6. See also Byrnes, above note 28, at 34-35.

⁴² See *State v. Makwanyane*, above note 29, at paras 265, 270-272 (citations omitted). See also Byrnes, *ibid*.

⁴³ See Michael Walton, *Background Paper: Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*, 3rd ed., (New South Wales Council for Civil Liberties, 2008), at para 35, at: <http://www.nswccl.org.au/docs/pdf/bp4%202005%202op%20paper.pdf>.

⁴⁴ Andrew Byrnes, Maria Herminia Graterol and Renée Chartres, *IWRAW Asia Pacific Expert Group Meeting on CEDAW Article 2: National and International Dimensions of State Obligation; State Obligation and the Convention on the Elimination of Discrimination against All Forms of Discrimination against Women* (revised May 2007), at paras 22-28, available at: <http://www.iwraw-ap.org/aboutus/pdf/Background%20paper.pdf>.

⁴⁵ See generally *ibid*, at para 59.

57. PILCH is deeply concerned, however, about the breadth of the discretion bestowed upon the Attorney-General to provide mutual assistance in cases where he or she considers it to be appropriate, having regard to the special circumstances of the case. PILCH submits that, in accordance with Australia's obligations under international human rights law, the Attorney-General should be permitted to exercise his or her discretion to provide mutual assistance only in limited circumstances. More specifically, the Attorney-General should be permitted to exercise his or discretion only where:

- a guarantee has been obtained from the country requesting mutual assistance that the person in question will *not* be subject to the death penalty; or,
- such assistance is exculpatory.

The one and only exception to this rule should be where there is an imminent threat to human life and cooperation in such cases should proceed only with a report to Parliament.

58. In order to ensure full compliance with Australia's international human rights obligations, PILCH submits that section 8 of Schedule 3 of the Exposure Draft should clarify the circumstances in which, or provide guidance on when, it is permissible for the Attorney-General to exercise his or her discretion to provide mutual assistance.

6.5 Refusal to Provide Police-to-Police Assistance

59. Whilst PILCH welcomes the proposed amendments to section 8(1A), it notes that the Exposure Draft fails to address the circumstances in which it is permissible for the AFP to share intelligence with foreign law enforcement agencies on a police-to-police, when such cooperation may foreseeably result in the imposition of the death penalty by a foreign country. PILCH understands that this may be because, in the past, informal assistance between foreign law enforcement agencies has not been addressed in the *Mutual Assistance Act*, which is applied only to formal Government-to-Government requests for legal assistance.

(a) AFP Guidelines

60. Under the AFP Guidelines, the AFP is free to share intelligence with foreign law enforcement agencies on a police-to-police basis, provided that the person, who is the subject of the intelligence, has not yet been charged with an offence that attracts the death penalty.

61. The Guidelines provide that

Police-to-police assistance can be provided, without reference to the Attorney-General or Minister for Home Affairs, until charges are laid for the offence.

Information provided by the AFP to foreign law enforcement agencies must be in accordance with the *Australian Federal Police Act 1979*, and any other legislation, treaty, convention, Ministerial Direction, agreement, memorandum of understanding, policy, guideline, and practical guide or associated document relevant to the provision of information to foreign law enforcement agencies.

62. The recent and much publicised 'Bali Nine' case provides a paradigmatic example of the practical effect of the AFP Guidelines. On 17 April 2005, 9 Australian

citizens were arrested in Bali, by the Indonesian National Police (INP), for their alleged involvement in the trafficking of heroin to Australia. The arrests occurred as a result of intelligence that the AFP provided to the INP. Several members of the 'Bali Nine' are currently on death row as a result of their respective convictions for drug trafficking offences. Although the AFP's decision to provide intelligence to the INP was lawful,⁴⁶ the case highlights the serious and potentially irreparable harm that can arise from the sharing of such intelligence.

(b) Review of the AFP Guidelines

63. As demonstrated in the 'Bali Nine' case, there is an urgent need to clarify the nature and scope of the AFP Guidelines, and ensure their compliance with human rights law. In *Rush v. Commissioner of Police*, Justice Finn stressed the need to examine the AFP Guidelines and the lawfulness of providing information that predictably could lead to the charging of a person with an offence that attracts the death penalty.⁴⁷ The AFP Guidelines were amended in 2006, following Justice Finn's decision in this case. Notwithstanding those amendments, the AFP Guidelines still permit the sharing of intelligence in cases that could result in the charging of an individual with an offence that attracts the death penalty.
64. In 2008, the Attorney-General undertook a review of the AFP Guidelines.⁴⁸ PILCH understands that the purpose of the review was to ensure that the AFP Guidelines reflect Government policy on the death penalty. In its submission to the Attorney-General, PILCH made the following recommendations:
- The review of the AFP Guidelines should be informed by, and any revised guidelines should be consistent with, Australia's obligations under human rights law, including the Second Optional Protocol.
 - To avoid uncertainty amongst members of the AFP and the broader public regarding the lawfulness of cooperating with foreign law enforcement agencies, the AFP Guidelines should ensure that, in cases where there is a risk that an individual will be charged with an offence that attracts the death penalty, cooperation with foreign law enforcement agencies may only be provided where: a guarantee has been obtained from a competent foreign body that no person will be subject to the death penalty; or, such cooperation is exculpatory. The only exception should be where there is an imminent threat to human life and cooperation in such cases should proceed only with ministerial approval and a report to Parliament.

⁴⁶ *Rush v Commissioner of Police*, [2006] FCA 12 (finding the AFP's actions to be lawful as the provision of information to the INP occurred prior to any member of the 'Bali Nine' being charged with an offence that exposes them to the risk of the death penalty). See generally Ronli Sifris, "Balancing Abolitionism and Cooperation on the World's Scale: The Case of the Bali Nine", *Federal Law Review*, Volume 35, Issue 1, 2007, pp 81-109.

⁴⁷ *Rush v Commissioner of Police*, *ibid*, at para 1.

⁴⁸ See Daniel Flitton, "Police Ties with Asia Reviewed" *The Age*, 3 October 2008, available at: <http://www.theage.com.au/national/police-ties-with-asia-reviewed-20081002-4sv7.html>.

(c) Need for Reform

65. As at the time of writing, PILCH understands that the review of the AFP Guidelines is ongoing and that no decision has yet been made to amend the Guidelines to make them compatible with international human rights law and jurisprudence.
66. PILCH recognises that, in the interests of regional peace and security, it is necessary and desirable for Australia to cooperate with foreign law enforcement agencies. However, such cooperation should never be permitted to jeopardise Australia's compliance with human rights, and expose individuals to the real risk of the death penalty. Ensuring compliance with human rights does not mean that the AFP needs to cease all cooperation with foreign law enforcement agencies. However, it does require that the AFP not assist in the investigation, prosecution or punishment of an offence in respect of which the death penalty may be imposed, or which may result in a person being subject to cruel, inhuman or degrading treatment or punishment. PILCH submits that this should be the case regardless of whether or not charges have been laid. Assistance should not be provided where it exposes individuals to a real risk that the death penalty might be applied to them. Where cooperation is deemed to be essential, such as in cases where there is an imminent threat to human life, safeguards should be put in place to ensure, to the maximum extent possible, that no individual is put at real risk of the death penalty.
67. PILCH submits that the AFP Guidelines should be amended or such assistance should be regulated by the *Mutual Assistance Act* to ensure that cooperation with foreign law enforcement agencies does not expose individuals to the real risk of the death penalty. It is imperative that any revised guidelines or provision in the *Mutual Assistance Act* stipulate that cooperation with foreign law enforcement agencies is permissible only where: a competent foreign body has provided an assurance that no person will be subject to the death penalty; or, such cooperation is exculpatory. The revised guidelines or Act should further stipulate that the only exception to this rule is cases that involve an imminent threat to human life, and that have been subject to ministerial approval and a report to Parliament. These measures are necessary in order to prevent complicity by the AFP in the conviction and punishment by death of individuals overseas.

Recommendation No. 6:

The proposed amendment in section 8 of schedule 3 of the Exposure Draft, which seeks to expand the circumstances in which the Attorney-General must refuse to provide assistance to a foreign country that may result in the imposition of the death penalty, should be retained.

Recommendation No. 7:

Section 8 of schedule 3 of the Exposure Draft should restrict the Attorney-General's discretion to provide mutual assistance to cases where:

- he or she has obtained a guarantee from the country seeking mutual assistance that no person will be subject to the death penalty; or,

- such assistance is exculpatory.

Section 8 should also state explicitly that:

- the only exception to the restriction on the Attorney-General's discretion are cases involving an imminent threat to human life; and,
- cooperation in such cases should proceed only with a report to Parliament.

Recommendation No. 8:

The AFP Guidelines should be amended or such assistance should be regulated by the *Mutual Assistance Act* to ensure that:

- they are consistent with Australia's obligations under human rights law, including the Second Optional Protocol; and,
- in cases where there is a risk that an individual will be charged with an offence that attracts the death penalty, cooperation with foreign law enforcement agencies may only be provided where: a guarantee has been obtained from a competent foreign body that no person will be subject to the death penalty; or, such cooperation is exculpatory. The only exception should be where there is an imminent threat to human life and cooperation in such cases should proceed only with ministerial approval and a report to Parliament.