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

**Legislation and Policy Section  
International Crime Cooperation Division  
Attorney-General's Department**

**7 March 2011**



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## **About the Human Rights Law Resource Centre**

The Human Rights Law Resource Centre is a non-profit community legal centre that promotes and protects human rights and, in so doing, seeks to alleviate poverty and disadvantage, ensure equality and fair treatment, and enable full participation in society. The Centre also aims to build the capacity of the legal and community sectors to use human rights in their casework, advocacy and service delivery.

The Centre achieves these aims through human rights litigation, education, training, research, policy analysis and advocacy. The Centre undertakes these activities through partnerships which coordinate and leverage the capacity, expertise and networks of pro bono law firms and barristers, university law schools, community legal centres, and other community and human rights organisations.

The Centre works in four priority areas: first, the effective implementation and operation of state, territory and national human rights instruments, such as the *Victorian Charter of Human Rights and Responsibilities*; second, socio-economic rights, particularly the rights to health and adequate housing; third, equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples; and, fourth, the rights of people in all forms of detention, including prisoners, involuntary patients, asylum seekers and persons deprived of liberty by operation of counter-terrorism laws and measures.

The Centre has been endorsed by the Australian Taxation Office as a public benefit institution attracting deductible gift recipient status.

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## 1. Introduction

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1. The HRLRC previously made a submission on the draft Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2009 (**2009 Draft Bill**) dated 31 August 2009 (**2009 Submission**). The 2009 Submission outlined the utility and importance of assessing the Bill in a human rights framework, and identified provisions in the 2009 Draft Bill which would better harmonise the Extradition Act and Mutual Assistance Act with human rights standards and Australia's international legal obligations. The 2009 Submission made concrete recommendations for reform where there was an incompatibility or where the Bill afforded inadequate consideration or protection of human rights.
2. This submission reviews the 2011 Draft Bill and considers the compatibility of proposed amendments to the *Extradition Act 1988* (Cth) (**Extradition Act**) and the *Mutual Assistance in Criminal Matters Act 1987* (Cth) (**Mutual Assistance Act**), as set out in the draft Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011 (**2011 Draft Bill**), with international human rights standards and Australia's obligations in this regard. This submission identifies provisions in the 2011 Draft Bill which accord with human rights standards and notes the recommendations made in the 2009 Submission which were not adopted in the 2011 Draft Bill.

## 2. Executive Summary

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### 2.1 Extradition Act

3. The HRLRC supports the following proposed amendments to the Extradition Act:
  - (a) the extension of the grounds of discrimination which prevent a person from being extradited from Australia to include discrimination on the grounds of sexual orientation (Schedule 2, Part 3, Division 2 of the Bill, amending section 7 of the Extradition Act);
  - (b) the clarification of grounds in surrender determinations and warrants to ensure all provisions relating to torture in the Extradition Act are consistent with the wording of Australia's obligations under the United Nations *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (Schedule 2, Part 3, Division 9 of the Bill, amending section 22 of the Extradition Act); and
  - (c) the removal of the proposed amendment which would make political offences a discretionary ground for refusing extradition, rather than a mandatory objection

(Schedule 2, Part 1 of the Bill, amending section 7 of the Extradition Act), meaning political offences remain mandatory extradition objections.

2. The HRLRC opposes the following proposed amendments to the Extradition Act:
  - (a) the removal of the proposed introduction of judicial discretion to defer and consolidate extradition proceedings (Schedule 2, Part 1 of the Bill, amending Part 2 of the Extradition Act).
3. The HRLRC notes the following recommendations contained in its 2009 Submission have not been incorporated in the 2011 Draft Bill and further recommends in relation to the Extradition Act that:
  - (a) the grounds of refusal contained in section 7 of the Extradition Act be expanded to ensure that extradition is refused in situations where it would expose a person to the real risk of violation of an absolute right. This would preclude extradition where a person may face:
    - (i) the death penalty;
    - (ii) torture;
    - (iii) cruel, inhuman or degrading treatment, punishment or detention; or
    - (iv) the denial of fundamental fair trial rights;
  - (b) the Extradition Act be amended to provide the person whose extradition is sought with the opportunity to respond to and challenge the statements put forward by the requesting state (Schedule 2, Part 3, Division 8, amending Part 2 of the Extradition Act);
  - (c) the Extradition Act be amended to allow for judicial review of extradition requests, to ensure that extradition decisions adequately consider human rights objections; and
  - (d) the Extradition Act be amended to remove the requirement of 'special circumstances', such that section 5 provides for a presumption of bail and against remand in custody unless detention is appropriate, necessary and proportionate, in light of the seriousness of the charge, the risk of flight, and the length of time already spent in custody.
4. The HRLRC further recommends in relation to the Extradition Act that:
  - (a) absolute liability should not apply to proposed section 15(1)(b), to ensure Australian prosecutions comply with the right to a fair trial; and

- (b) the provisions relating to the death penalty in the Extradition Act be amended to be consistent with the wording of Australia's obligations under international law.

## **2.2 Mutual Assistance Act**

5. The HRLRC supports the following proposed amendments to the Mutual Assistance Act:

- (a) the extension of the grounds of discrimination to include ~~sexual orientation~~ as a ground for refusal to requests for assistance (Schedule 3, Part 1 of the Bill, amending section 8 of the Mutual Assistance Act); and
- (b) the removal of the proposed amendment which would make political offences a discretionary ground for refusing mutual assistance, rather than a mandatory ground (Schedule 3, Part 1 of the Bill, amending section 8 of the Mutual Assistance Act), meaning political offences remain mandatory grounds on which to refuse assistance.

6. The HRLRC opposes the following proposed amendments to the Mutual Assistance Act:

- (a) the proposed amendments making double jeopardy a discretionary ground for refusal of assistance (Schedule 3, Part 1 of the Bill, amending section 8 of the Mutual Assistance Act).

7. The HRLRC notes the following recommendations contained in its 2009 Submission have not been incorporated in the 2011 Draft Bill and further recommends in relation to the Mutual Assistance Act that:

- (a) the Act be amended to extend the mandatory grounds of refusal of assistance to include situations where granting the request may result in a person being subject to the death penalty, cruel or inhumane treatment or punishment, arbitrary detention, an unfair trial, or being charged with an offence which is inconsistent with international human rights norms; and
- (b) the norm against ~~double jeopardy~~ be added as a mandatory ground of refusal where the request relates to the prosecution of a person for an offence for which the person has been acquitted, pardoned or punished in a country other than the requesting country.

## **2.3 Foreign Evidence Act**

8. The HRLRC notes its recommendation contained in its 2009 Submission in respect of the Foreign Evidence Act has not been incorporated in the 2011 Draft Bill and further recommends that the Foreign Evidence Act be amended so that the exclusion of any evidence obtained pursuant to or in the context of a serious human rights violation . including the

prohibition against torture and ill treatment . is mandatory and not subject to limitation or exception.

### **3. Proposed Amendments relating to Extradition (Schedule 2)**

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#### **3.1 Deferral and Consolidation of Judicial Review and Statutory Appeal of Extradition Decisions – Part 1, Division 1**

9. The HRLRC considers that the current legislation does not adequately protect the right to freedom from arbitrary detention (ICCPR, Article 9). The HRLRC notes that in recent years, numerous cases involving extradition requests have resulted in lengthy and disproportionate detention which may be inconsistent with the obligation of the Australian Government to protect from arbitrary detention.
10. The HRLRC notes with concern that proposed amendments in the 2009 Draft Bill, in respect of the introduction of judicial discretion to defer and consolidate extradition proceedings, have been removed from the 2011 Draft Bill. The HRLRC supports the reinstatement of these provisions, which may result in proceedings being determined more efficiently and expeditiously.

#### **3.2 Amendments to Political Offences – Part 3, Division 1**

11. The HRLRC welcomes the amendment to the 2011 Draft Bill which reinstates the existing provisions of the Act that pursuant to section 7 of the Extradition Act, political offences remain a mandatory objection for refusing extradition. This repeals the proposal contained in the 2009 Draft Bill which would have made political offences a discretionary ground for refusing extradition.
12. This provision accords with the ICCPR, which requires the Australian Government to ensure that all people within its territory or subject to its jurisdiction or effective control are free from discrimination on the ground of their political opinion.<sup>1</sup> The Model Treaty on Extradition provides that extradition should not be granted if the relevant offence is considered by the State to be an offence of a political nature.
13. In order to comply with its obligations under the ICCPR, the Australian Government must ensure that it does not carry out or assist prosecutions which are on political grounds. The

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<sup>1</sup> Articles 2 and 26, *International Covenant on Civil and Political Rights*.

political offence exception in section 7 of the Extradition Act acts as an important safeguard against the prosecution of offences of a political character.

### 3.3 Extension of Grounds of Refusal – Part 3, Division 2

14. The HRLRC welcomes the extension of the grounds of discrimination which prevent a person from being extradited from Australia to include discrimination based on sexual orientation. The HRLRC notes that this is in compliance with the ICCPR, which requires the Australian Government to ensure that all individuals within its territory or subject to its jurisdiction are protected from discrimination, including on the grounds of sexual orientation.<sup>2</sup>
15. The HRLRC also welcomes the amendments to the 2011 Draft Bill which ensure that all provisions relating to torture in the Extradition Act are consistent with the wording of Australia's obligations under the CAT.
16. However, as noted in the 2009 Submission, the HRLRC is of the view that the grounds of refusal contained in section 7 of the Extradition Act should be further expanded to ensure that extradition is refused in situations where it would result in human rights violations, particularly relating to: the death penalty; torture, cruel, inhuman or degrading treatment or punishment; conditions of detention that violate a person's humanity and inherent dignity; or denial of fundamental fair trial rights.

#### (a) *Death Penalty*

17. Article 6 of the ICCPR provides that every person has the inherent right to life, which has been held by the HRC to impose a non-derogable obligation not to extradite a person to a foreign country in circumstances where it is foreseeable that the person may be subject to the death penalty.<sup>3</sup>
18. In addition to being a State party to the ICCPR, Australia has ratified the Second Optional Protocol to the ICCPR Aiming at the Abolition of the Death Penalty, which contains a preambular recognition that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life. The Second Optional Protocol requires Australia to take all necessary measures to abolish the death penalty within its jurisdiction which arguable extends to taking all necessary measures within its control

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<sup>2</sup> See articles 2 and 26 of the ICCPR. See, for example, Human Rights Committee, 37th sess., General Comment 18: Non-discrimination (1989), paragraph 7; *Toonen v Australia*, Human Rights Committee, Communication No. 488/1992 UN Doc. CCPR/C/50/D/488/1992), paragraph 8.7 (concluding that the reference to sex in ICCPR arts. 2 and 26 is to be taken as including sexual orientation).

(including the refusal of extradition in death penalty matters) to prevent the imposition of the death penalty by a foreign country.

19. The HRLRC considers that the safeguards within the Extradition Act protecting people from the death penalty should be strengthened. The HRLRC observes the following comments made recently by the HRC in relation to Australia's compliance with the ICCPR:

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

**The State party should take the necessary legislative and other steps to ensure that no person is extradited to a state where he or she may face the death penalty, as well as whereby it does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another state, and revoke the residual power of the Attorney-General in this regard.<sup>4</sup>**

20. Under international human rights law, it is inadequate that diplomatic assurances act as a safeguard against the death penalty where there are substantial grounds for believing that a person would be in danger of being subjected to the death penalty upon extradition. Section 22 of the Extradition Act should be amended to provide that a extradition request is to be refused if the death penalty may be imposed on the person.

**(b) Torture, cruel, inhuman or degrading treatment**

21. Article 7 of the ICCPR enshrines the right to be free from torture, cruel, inhuman or degrading treatment or punishment. In General Comment 20, the HRC stated that this right imposes a non-derogable obligation not to extradite a person to a country in circumstances in which it is foreseeable that the person may be subject to cruel, inhuman or degrading treatment or punishment.<sup>5</sup> This jurisprudence was further developed by the HRC in General Comment 31 in which it was stated that:

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<sup>3</sup> See, eg, *Judge v Canada* (HRC 829/98).

<sup>4</sup> UN Human Rights Committee, 'Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, *Concluding Observations of the Human Rights Committee*, CCPR/C/AUS/CO/5, 2 April 2009, Advanced Unedited Version [20].

<sup>5</sup> UN Human Rights Committee, *General Comment 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art 7)*, 10/3/92.

The article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.<sup>6</sup>

22. A request should be mandatorily refused where extradition may result in a person being subject to cruel, inhuman or degrading treatment or punishment. As noted above, the prohibition against torture is absolute and extra-territorial. The prohibition extends to proscribing the aiding, abetting, procuring or in any other way giving effect to any act of torture or ill-treatment.
23. The HRLRC believes that section 7 of the Extradition Act should be further expanded to ensure that a person is not extradited in circumstances in which it is foreseeable that the person may be subject to cruel, inhuman or degrading treatment or punishment.

**(c) Conditions of detention that violate a person's humanity and inherent dignity**

24. The HRC has affirmed that if a State party extradites a person within its jurisdiction in circumstances where there is a real risk of a violation of ICCPR rights, the State party itself may be in violation of the ICCPR.<sup>7</sup> This is particularly the case where the right concerned is an absolute right.
25. Article 10 of the ICCPR provides that all persons deprived of their liberty shall be treated with humanity and respect for their inherent dignity. The right to humane treatment in detention has probably evolved to the status of a peremptory norm.<sup>8</sup> Accordingly, read in conjunction with article 2, this provision imposes an obligation on Australia not to extradite a person to a country in circumstances in which it is foreseeable that the person will be deprived of their liberty and that the conditions of detention will violate that person's humanity and inherent dignity. In a series of determinations, the HRC has held that, in order to satisfy the requirements of article 10, conditions of detention should, at the very least, be consistent with

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<sup>6</sup> UN Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, [12], UN Doc CCPR/C/21/Rev 1/Add.13 (2004).

<sup>7</sup> *Ng v Canada*, (HRC, 469/1991) [14.2], *Kindler v Canada*, (HRC, 470/91) [13.1].

<sup>8</sup> UN Human Rights Committee, *General Comment 29: States of Emergency*, UN Doc CCPR/C/21/Rev 1/Add.11 (2001), [13].

the *United Nations Standard Minimum Rules for the Treatment of Prisoners* (**Standard Minimum Rules**).<sup>9</sup> This means that Australia is under an obligation not to extradite a person unless it is satisfied that the conditions of the person's detention will comply with the Standard Minimum Rules.

**(d) Denial of fair trial rights**

26. The right to a fair trial is a peremptory norm of customary law<sup>10</sup> and enshrined in article 14 of the ICCPR. Its peremptory status and extra-territorial relevance is reflected in the Criminal Code which, by operation of sections 11.2, 15.4 and 268.117 make it an offence to aid or abet an unfair trial in another jurisdiction. Consistently with this, the European Court of Human Rights has stated that extradition may be refused when it is shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving state.<sup>11</sup>
27. Similarly, the United Kingdom House of Lords has found that the obligation not to extradite may be engaged where expulsion would expose a person to a flagrant violation of the right to a fair trial or a flagrant denial of justice<sup>12</sup> In *R v Special Adjudicator ex parte Ullah*, Lord Steyn wrote that it can be regarded as settled law that where there is a real risk of a flagrant denial of justice in the country to which an individual is to be deported article 6 [the right to a fair hearing under the *European Convention*] may be engaged<sup>13</sup>
28. In the HRLRC's view, extradition and assistance should therefore be refused in circumstances where the extraditable person has suffered a violation of the right to a fair trial or it is reasonably foreseeable that the extraditable person will suffer a violation of the right to a fair trial upon extradition. Amending the Extradition Act to protect against extradition and assistance in these circumstances would ensure that Australia is in compliance with international human rights law.

**(e) Other grounds of refusal**

29. While the scope of the state's obligation not to extradite or expel under international law has not been settled, the Human Rights Committee has left open the possibility that rights

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<sup>9</sup> See also *BS v Canada* (CAT 166/00).

<sup>10</sup> See HLC GCs No 29 & 32.

<sup>11</sup> *Soering v United Kingdom* (1989) 11 EHRR 439 [113].

<sup>12</sup> See, for example, *R v Special Adjudicator ex parte Ullah* [2004] 2 AC 323, [9], [10], [24] (per Lord Bingham), [44] (per Lord Steyn); *EM (Lebanon) v Secretary of State* [2008] 3 WLR 931, [34] per Lord Bingham; *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 25.

<sup>13</sup> [2004] 2 AC 323, [41].

- violations other than those arising under Articles 6 and 7 of the ICCPR will enliven extradition obligations. For example, in General Comment 31, the HRC stated that States Partiesq obligation not to extradite, deport, expel or otherwise remove a person from their territory state are enlivened where there are substantial grounds for believing that there is a real risk of irreparable harm, *such as* that contemplated by articles 6 and 7 of the Covenantq<sup>14</sup>
30. Further, both the United Kingdom courts and the European Court of Human Rights recognise that, while ordinarily, the grounds for resisting expulsion will relate to violations of the right to life or the prohibition against torture or ill-treatment, other articles *may* provide a ground for resisting expulsion if there is a very strong case.<sup>15</sup> Thus, in *R v Special Adjudicator ex parte Ullah*,<sup>16</sup> the House of Lords accepted that a claim against expulsion engaging the obligation of non-refoulement may arise in respect of Articles 4 (the prohibition against slavery), 5 (the right to liberty and security of the person and freedom from arbitrary detention) and 6 (right to a fair hearing) of the *European Convention on Human Rights*.<sup>17</sup> Further, the House of Lords did not rule out the possibility of a claim under Article 8 (right to respect for private and family life) and Article 9 (right to freedom of thought, conscience and religion), although it did note that such cases would be exceptional.<sup>18</sup> This list is evolving and the HRLRC submits that the Bill should allow for Australian law to reflect and respond to this evolution.

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<sup>14</sup> Human Rights Committee, *General Comment No 31: The Nature of the Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), [12] (emphasis added).

<sup>15</sup> See, for example, *R v Special Adjudicator ex parte Ullah* [2004] 2 AC 323, [24] where Lord Bingham stated ~~While~~ the Strasbourg jurisprudence does not preclude reliance on articles other than Article 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case.q See also *Soering v United Kingdom* (1989) 11 EHRR 439, [113].

<sup>16</sup> [2004] 2 AC 323, [21] (per Lord Bingham), [41] . [47] (per Lord Steyn), [67] (per Lord Carswell).

<sup>17</sup> See also *Bankovic v Belgium* (2001) 11 BHRC 435, [68] (a decision of the Grand Chamber of the European Court of Human Rights in which the Court accepted the principle that Articles 5 and 6 of the European Convention may impose certain extra-territorial obligations); *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745, 795 (in which it was accepted that a flagrant violation of Article 6 may engage the obligation of non-refoulement); and *Tomic v United Kingdom* [2003] ECHR 17837/03 (in which it was not ruled out that a violation of the prohibition against arbitrary detention may give rise to protection obligations).

<sup>18</sup> [2004] 2 AC 323, [21] (per Lord Bingham), [41] . [47] (per Lord Steyn), [67] (per Lord Carswell).

### **3.4 Prosecution in Lieu of Extradition – Division 6**

31. The HRLRC recognises that extradition can have serious adverse impacts on a person and their family, particularly when the family has been residing in Australia for a long period of time. The ICCPR enshrines the protection of the family from arbitrary or unlawful interference.<sup>19</sup> As well as traumatic separation of the family, extradition can result in an increased risk that a person may be subject to human rights violations, including torture or inhuman treatment.
32. The HRLRC welcomes the proposed amendment which would enable a person to be prosecuted in Australia where Australia has refused extradition regardless of nationality, insofar as the amendment may encourage more domestic prosecutions in lieu of extradition, and thus reduce the likelihood of extraditing a person when extradition would amount to significant and unnecessary interference with their family life or other human rights violations.<sup>20</sup>
33. The HRLRC notes with concern proposed section 45(2) would confer absolute liability on the determination that a person engaged in conduct outside Australia at an earlier time is conduct which constitutes a notional Australian offence. As discussed above, the right to a fair trial is enshrined in international law. The proposed amendment appears to limit the eligible person's right to a fair trial. The HRLRC considers the proposed amendment to s45(2) should be amended to allow proposed section 45(1)(b) to be subject to the ordinary standards and burdens of proof.

### **3.5 Admission of Evidence – Part 3, Division 8**

34. The HRLRC welcomes the proposed clarification regarding the admission of evidence on review or appeal. However, as noted in the 2009 Submission, the proposed amendments do not go far enough in ensuring procedural fairness, such as equality between parties. The HRC has stated that where the judiciary is involved in deciding about extradition, it must respect fairness and equality.<sup>21</sup>

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<sup>19</sup> Article 17 ICCPR.

<sup>20</sup> See for example: *ZH (Tanzania) FC (Appellant) v Secretary of State for the Home Department* [2011] UKSC 4 (1 February 2011); *A W Khan v United Kingdom* [2009] ECHR 27(12 January 2010); *Omojudi v United Kingdom* [2009] ECHR 1820/08 (24 November 2009).

<sup>21</sup> *Ronald Everett v Spain*, (HRC, 961/2000) [6.4].

35. Equality between parties entails that each side be given the opportunity to respond to and challenge the evidence put forward by the other. In *Gertruda Hubertina Jansen-Gielen v The Netherlands*, the HRC stated that there is a duty imposed on courts to ensure that each party has the opportunity challenge the documentary evidence that the other has filed.<sup>22</sup>
36. In *Äärelä and Näkkäläjärvi v Finland*, the HRC found that a failure to afford the complainants an opportunity to comment on a brief containing legal argument submitted by the other party violated the duty of the courts to ensure equality between the parties, including the ability to contest all the argument and evidence adduced by the other party.<sup>23</sup>
37. In extradition proceedings in Australia, the person subject to the extradition request is not entitled to adduce, and the magistrate is not entitled to receive, any evidence to contradict the allegation that the person has committed an offence. The initial request for a provisional warrant is performed by the magistrate without the person who is subject to the request being represented or heard.<sup>24</sup> Then, at the later stage of determining whether the person is eligible for surrender, the magistrate is again confined to the material provided by the requesting country in determining whether the conduct of the person would have constituted an offence in Australia. Matters going to the innocence of the alleged offender are excluded by s 19(5), which states:
- In the proceedings, the person to whom the proceedings relate is not entitled to adduce, and the magistrate is not entitled to receive, evidence to contradict an allegation that the person has engaged in conduct constituting an extradition offence for which the surrender of the person is sought.
38. A person who is detained on the basis of an extradition request is thus restricted from challenging the evidence produced by the requesting country. This is contrary to the principle of equality between parties, which stipulates that that each side be given the opportunity to respond to and challenge the evidence.
39. While there is an opportunity to make submissions to the Attorney-General or the Minister for Home Affairs, this is only applicable once the magistrate has determined that the person is eligible for surrender. Therefore there is no equality at the important stage when the judiciary determines whether a person is eligible for surrender.

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<sup>22</sup> *Gertruda Hubertina Jansen-Gielen v The Netherlands*, (HRC, 846/1999) [8.2].

<sup>23</sup> *Anni Äärelä and Jouni Näkkäläjärvi v Finland*, (HRC, 779/1997) [7.4].

<sup>24</sup> *Vasiljkovic v Commonwealth of Australia* (2006) 227 CLR 614, 658 (Kirby J).

40. The HRLRC considers that the Extradition Act should be amended to provide the person whose extradition is sought with the opportunity to respond to and challenge the statements put forward by the requesting state.

### 3.6 Judicial Review

41. As noted in the 2009 Submission, the HRLRC considers that judicial review should be present at every stage of extradition procedures to ensure that a person's human rights, such as the right to freedom from torture, inhuman or cruel punishment and arbitrary detention, are protected.
42. Even within the right of appeal available pursuant to section 21 of the Extradition Act,<sup>25</sup> there is no substantive review in place because the court is restricted to scrutinising formal matters, and is unable to undertake a wider review. The High Court of Australia has noted and agreed with the statement that a feature of the Extradition Act is 'a substantial shift away from judicial review of the extradition process towards the exercise of unreviewable executive discretion'.<sup>26</sup>
43. Justice Kirby stated in *Vasiljkovic v Commonwealth* that [emphasis added]:
- Owing to the nature of the magistrate's primary decision, this involvement of the courts is also extremely limited. What is being reviewed is an order confined to the scrutiny of formal matters. **There is little, if any, ambit for judicial consideration of wider questions, such as the sufficiency of the extradition request.**
- [...]
- Thus, s 19 clearly excludes judicial scrutiny of the eligibility for surrender of the person the subject of the request.**<sup>27</sup>
44. The HRLRC considers that the Extradition Act should be amended to allow for judicial review of extradition requests, to ensure that extradition decisions are properly scrutinised for their compliance with human rights standards.

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<sup>25</sup> Section 21(3) of the Act.

<sup>26</sup> *Director of Public Prosecutions (Cth) v Kainhofer* (1995) 185 CLR 528, 541 (Toohey J).

<sup>27</sup> *Vasiljkovic v Commonwealth and Others* (2006) 228 ALR 447, 484.

### 3.7 Remand

45. Section 15(6) of the Act, and sections 18, 19(9), 21(2), 49C of the 2011 Draft Bill state that the relevant court shall not remand a person on bail under the applicable section ~~unless~~ there are special circumstances justifying such remand.<sup>28</sup> As noted in the 2009 Submission, the Extradition Act thus operates to presume against bail, and provides limited grounds by which bail may be granted. Bail is very difficult to attain and the High Court has taken a very restricted interpretation of special circumstances.<sup>28</sup>

46. There are limited grounds on which detention pending extradition can be challenged, and these do not include a violation of human rights. The HRC has stated that an inability to judicially challenge arbitrary detention constitutes a violation of the ICCPR.<sup>29</sup> However, in *United Mexican States v Cabal* the High Court held that unnecessary or arbitrary detention is not a relevant consideration when determining a bail application under the Extradition Act. The Court held (emphasis added):

**In our opinion, it is an error in a bail application in an extradition matter to take into account that there is "a predisposition against unnecessary or arbitrary detention in custody".**

[...]

**In extradition cases, the general rule is that defendants are to be held in custody whether or not their detention is necessary.** Only when there is something special about a defendant's circumstances can the question of bail be considered.<sup>30</sup>

47. This provision is manifestly incompatible with the prohibition against arbitrary detention (ICCPR Art 9), which requires that any detention be reasonable, necessary, proportionate and subject to judicial review.<sup>31</sup>

48. Consistently with this view, Kirby J concluded in *Vasiljkovic v Cth* that the lack of substantive judicial review of detention pending extradition is contrary to article 9(4) of the ICCPR.<sup>32</sup>

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<sup>28</sup> See *United Mexican States v Cabal* (2001) 209 CLR 165, (Gleeson CJ, McHugh and Gummow JJ).

<sup>29</sup> *C v Australia*, (HRC, 900/1999) [8.3].

<sup>30</sup> *United Mexican States v Cabal* (2001) 209 CLR 165, 195 (Gleeson CJ, McHugh and Gummow JJ), at [195].

<sup>31</sup> See, eg, *C v Australia*.

<sup>32</sup> *Vasiljkovic v Commonwealth of Australia* (2006) 227 CLR 614, 663 (Kirby J).

49. Detention that is excessively length will also be arbitrary. This includes in relation to pre-trial detention. In *Quinn v France*, the European Court of Human Rights held that excessively lengthy detention pending extradition was contrary to the arbitrary detention provisions of the *European Convention on Human Rights*.<sup>33</sup>

It is clear from the working of article 5 para (1)(f) that deprivation of liberty under this sub-paragraph will be justified only for as long as extradition proceedings are being conducted. It follows that if such proceedings are not being prosecuted with due diligence, the detention will cease to be justified under Article 5(1)(f).

50. The HRLRC notes that numerous extradition cases in recent years have resulted in lengthy and disproportionate detention which may infringe the prohibition against arbitrary detention.
51. Despite this, the 2011 Draft Bill proposes no amendments to section 15(6) of the Extradition Act. The HRLRC submits that the Extradition Act should be amended to remove the requirement of 'special circumstances' and instead include a presumption against remand in custody unless detention is appropriate, necessary and proportionate, in light of the seriousness of the charge, the risk of flight, and the length of time already spent in custody.

#### **4. Proposed Amendments relating to Mutual Assistance (Schedule 3)**

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##### **4.1 Extension of Grounds of Refusal – Part 1**

52. The HRLRC welcomes the extension of the grounds of discrimination on which assistance may be refused to include discrimination based on sexual orientation. The HRLRC notes this is in compliance with the ICCPR, which requires the Australian Government to ensure that all individuals within its territory or subject to its jurisdiction are protected from discrimination, including on the grounds of sexual orientation.<sup>34</sup>

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<sup>33</sup> *Quinn v France* [1995] ECHR no. 18580/91, [48]. See also *Chahal v The United Kingdom* [1996] ECHR no. 70/1995/576/662 [113] ¶The Court recalls, however, that any deprivation of liberty under Article 5 para. 1 (f) (art. 5-1-f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 para. 1 (f)q

<sup>34</sup> See articles 2 and 26 of the ICCPR. See, for example, Human Rights Committee, 37th sess., General Comment 18: Non-discrimination (1989), paragraph 7; Human Rights Committee, Communication No. 488/1992 (*Toonen v. Australia*), UN Doc. CCPR/C/50/D/488/1992), paragraph 8.7 (concluding that the reference to sex in ICCPR arts. 2 and 26 %s to be taken as including sexual orientation+).

#### **4.2 Amendments to Political Offences – Part 1**

53. Similarly to the provisions of the Extradition Act, the HRLRC welcomes the amendment to the 2011 Draft Bill which preserves the existing provisions of section 8 of the Mutual Assistance Act which stipulates political offences are a mandatory objection for refusing extradition. This repeals the proposal contained in the 2009 Draft Bill which would have made political offences a discretionary ground for refusing assistance.
54. Australia is required to protect people within its territory or subject to its jurisdiction from all forms of discrimination, including discrimination on political grounds. The political offence exception in the Mutual Assistance Act is essential in protecting people who are likely to be prosecuted or punished for a political offence. It is an important safeguard to ensure the protection of a person's human rights.

#### **4.3 Mandatory Grounds of Refusal – Part 1**

55. The HRLRC supports the proposed clarification that the grounds for refusal apply to requests that relate to the investigation, as well as the prosecution or punishment, of a person.
56. In addition to retaining the current mandatory grounds of refusal relating to political offences, the HRLRC considers that the mandatory grounds of refusal should be extended. Currently, there are no mandatory grounds of refusal relating to a request for mutual assistance where granting the request may result in a person being subject to the death penalty, cruel or inhumane treatment or punishment, unlawful detention, discrimination, or an offence which is inconsistent with international human rights norms.
57. The HRLRC considers that, consistent with its obligations under international human rights law, Australia should retain and ensure a broad and effective range of safeguards in the mutual assistance process. These should apply in respect of the investigation, prosecution and punishment of an offence.
58. The HRLRC considers that the mandatory grounds of refusal should be extended to impose a mandatory obligation on Australia to refuse a request for mutual assistance where granting the request may result in a breach of a person's human rights under international human rights treaties. In particular, the HRLRC considers that the following mandatory grounds for refusal should be added to the Act:

**(a) Death Penalty**

59. The Mutual Assistance Act currently provides, at section 8(1A), that a request for assistance must be refused if it relates to the prosecution or punishment of a person for an offence which may carry the death penalty, unless the Attorney-General is of the opinion that special

- circumstances exist justifying the provision of assistance. Section 8(1B) of the Act provides that the provision of assistance may be refused if the Attorney-General believes that it may result in the imposition of the death penalty and the circumstances of the case warrant refusal, having regard to the interests of international criminal co-operation.
60. As discussed above, article 6 of the ICCPR provides that every person has the inherent right to life, which has been held by the HRC to impose a non-derogable obligation not to extradite a person to a foreign country in circumstances where it is foreseeable that the person may be subject to the death penalty.<sup>35</sup> In the HRLRC's view, this prohibition extends to the provision of mutual assistance, with the HRC stating that "States parties that have abolished the death penalty have an obligation [under article 6(1)] to so protect in all circumstances" For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application.<sup>36</sup>
61. In addition to being a State party to the ICCPR, Australia has ratified the Second Optional Protocol to the ICCPR, *Aiming at the Abolition of the Death Penalty*, which contains a preambular recognition that "all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life" The Second Optional Protocol requires Australia to take "all necessary measures to abolish the death penalty within its jurisdiction" which extends to taking all necessary measures within its control (including the refusal of mutual assistance in death penalty matters) to prevent the imposition of the death penalty by a foreign country.
62. Having regard to the non-derogable nature of the right to life, the desirability of abolishing the death penalty in all jurisdictions, and Australia's obligation to take all measures necessary to achieve such abolition, the HRLRC considers that section 8 of the Mutual Assistance Act should be amended to provide that a request by a foreign country for assistance in respect of an investigation of, or prosecution or punishment for, an offence in relation to which the death penalty may be imposed must be refused unless the provision of assistance would assist the defence. The Attorney-General's discretion to grant assistance in these circumstances should not be retained. That is, it should be mandatory to refuse assistance in any circumstances where such assistance may contribute to or result in the death penalty being imposed against a person.

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<sup>35</sup> See, eg, *Judge v Canada* (HRC 829/98).

<sup>36</sup> *Ibid* [10.4].

63. The HRLRC welcomes the proposed amendment of extending the ground for refusal to provide assistance in death penalty matters where a person has been arrested or detained on suspicion of committing an offence, without necessarily having been formally charged.

64. However, the HRLRC notes with concern that Australia's stance against the death penalty is undermined by the provision of informal foreign assistance, such as agency-to-agency assistance, in situations where the death penalty may be, or is likely to be, imposed. The HRLRC considers that urgent legislative measures are required to ensure that government agencies, such as the Australian Federal Police, are bound by the same safeguards which protect human rights as those which bind the Executive.

**(b) Cruel, inhuman or degrading treatment or punishment**

65. The HRLRC considers that a request for assistance should be mandatorily refused where the provision of assistance may result in a person being subject to cruel, inhuman or degrading treatment or punishment. As discussed above, the prohibition against torture is absolute and extra-territorial. The prohibition extends to a prohibition against aiding, abetting, procuring or in any way giving effect to any act of torture or ill-treatment.

**(c) Conditions of detention that violate a person's humanity and inherent dignity**

66. The HRLRC considers that a request for assistance should be mandatorily refused where the provision of assistance may result in the person being detained in conditions which violate the inherent dignity of the human person. Article 10 of the ICCPR provides that all persons deprived of their liberty shall be treated with humanity and respect for their inherent dignity. Read in conjunction with article 2, this provision imposes an obligation on Australia not to provide mutual assistance to a country in circumstances in which it is foreseeable that the person will be deprived of their liberty and that the conditions of detention will violate that person's humanity and inherent dignity.

67. In a series of determinations, the HRC has held that, in order to satisfy the requirements of article 10, conditions of detention should, at the very least, be consistent with the *United Nations Standard Minimum Rules for the Treatment of Prisoners*.<sup>37</sup> This means that Australia is under an obligation not to provide mutual assistance unless it is satisfied that the conditions of the person's detention will comply with the *Standard Minimum Rules*.

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<sup>37</sup> See, eg, *Mukong v Cameroon* (HRC 458/91); *Potter v New Zealand* (HRC 632/95).

**(d) Discrimination**

68. The HRLRC considers that a request for assistance should be mandatorily refused where the provision of assistance may result in a person being prosecuted, charged, convicted or otherwise prejudiced as a result of their language, ethnic or social origin, or other status. Adapting from the non-discrimination clause of the ICCPR,<sup>38</sup> discrimination on the grounds of language, ethnic or social origin and other status should be inserted into the Act. It is important that the open-ended other status category be included, affording flexibility to the interpreters of the Act.

**(e) Being charged with an offence which is inconsistent with international human rights norms**

69. The HRLRC considers that a request for assistance should be mandatorily refused where the provision of assistance may result in the person being charged or convicted in relation to an offence which is incompatible with international human rights norms (for example, prosecution for the offence of engaging in consensual homosexual activity).

**4.4 Torture as a Mandatory Ground of Refusal – Part 1**

70. The HRLRC congratulates the government for its proposed amendment to the Mutual Assistance Act which includes a mandatory ground for refusal where there are substantial grounds to believe the provision of the assistance would result in a person being subject to torture. The HRLRC welcomes the effort of the government to ensure that its legislation is consistent with the recent recommendations made by the United Nations Committee Against Torture.<sup>39</sup>

**4.5 Double Jeopardy – Part 1**

71. Section 8(1)(f) of the Mutual Assistance Act currently provides that a request for mutual assistance must be refused if:

the request relates to the prosecution of a person for an offence in a case where the person has been acquitted or pardoned by a competent tribunal or authority in the foreign country, or has undergone the punishment provided by the law of that country, in respect of that offence or of another offence constituted by the same act or omission as that offence.

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<sup>38</sup> Article 26.

<sup>39</sup> UN Committee Against Torture, *Concluding Observations of the Committee against Torture: Australia*, CAT/C/AUS/CO/3, 22 May 2008, [15].

- This provision reflects the norm against double jeopardy. Currently Australia is only required to refuse a mutual assistance request where the request relates to the prosecution of an offence for which a person has been acquitted, pardoned or punished in the requesting country.
72. The HRLRC notes with concern the proposed 2011 Draft Bill would make double jeopardy a discretionary ground for refusing to provide assistance, rather than a mandatory objection.
73. The principle of double jeopardy is a fundamental human right and a paramount feature of our criminal justice system.<sup>40</sup> Finality is vital in this system, and the norm against double jeopardy encourages efficient and thorough investigations.
74. The principle against double jeopardy is also enshrined in article 14(7) of the ICCPR, which provides that no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country. In General Comment 32, which is an authoritative statement by the HRC on the right to a fair trial, the Committee stated that the norm against double jeopardy prohibits re-trials pursuant to the principle of *ne bis in idem* (ie, a person may not be prosecuted twice for the same offence).<sup>41</sup>
75. The HRC has held that article 14(7) only prohibits double jeopardy with regard to an offence adjudicated in a given state and does not guarantee *ne bis in idem* with respect to the national jurisdiction of two or more states.<sup>42</sup> However, the more recent Rome Statute of the International Criminal Court<sup>43</sup> provides that, pursuant to articles 17(1)(c) and 20, a person must not be tried for conduct which formed the basis of crimes for which the person has been convicted or acquitted by another court or tribunal (subject to limited exceptions). Australia has ratified the Rome Statute.
76. In the HRLRC's view, the proposed amendments making double jeopardy a discretionary ground for refusal should be rejected. The norm against double jeopardy should be:

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<sup>40</sup> Article 4 of Protocol 7 to the European Convention on Human Rights deems double jeopardy to be a non-derogable right.

<sup>41</sup> UN Human Rights Committee, *General Comment 32: Right to Equality before Courts and Tribunals and to a Fair Trial*, UN Doc CCPR/C/GC/32 (23 August 2007), [54].

<sup>42</sup> See, eg, *AP v Italy* (HRC, 204/86) [7.3] and *ARJ v Australia* (HRC, 692/96) [6.4].

<sup>43</sup> UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90.

- (a) Retained as a mandatory ground of refusal where the request relates to the prosecution of a person for an offence for which the person has been acquitted, pardoned or punished in the requesting country; and
- (b) Added as a mandatory ground of refusal where the request relates to the prosecution of a person for an offence for which the person has been acquitted, pardoned or punished in a country other than the requesting country.

#### **4.6 Foreign Evidence – Formerly Schedule 1, Part 3**

- 77. Article 15 of CAT provides that each 'State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made'.
- 78. The rule of exclusion applies equally whether the forum State or another State was responsible for the torture.<sup>44</sup> Customary international law also requires the exclusion from judicial proceedings of evidence obtained as a result of torture.<sup>45</sup>
- 79. International law and jurisprudence also requires the exclusion of evidence that, although not obtained as a result of torture, was obtained in the context of cruel, inhuman or degrading treatment or punishment. The *United Nations Declaration against Torture* declares in article 12 that any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment may not be invoked as evidence against the person concerned.<sup>46</sup>
- 80. The HRC holds the view that evidence obtained as a result of cruel, inhuman or degrading treatment should be excluded from judicial proceedings in order to discourage violations of article 7 of the ICCPR (prohibition on torture and other cruel, inhuman or degrading treatment)

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<sup>44</sup> *A v Secretary of State for the Home Department (No. 2)* [2006] 1 All ER 575; Tobias Thienel, 'The Admissibility of Evidence Obtained by Torture under International Law' (2006) 17 *European Journal of International Law* 349, 360.

<sup>45</sup> See the authorities collected in Nicholas Grief, 'The Exclusion of Foreign Torture Evidence: A Qualified Victory for the Rule of Law' (2006) 2 *European Human Rights Law Review*, 201, 214-215; and Tobias Thienel, 'The Admissibility of Evidence Obtained by Torture under International Law' (2006) 17 *European Journal of International Law* 349, 364-5.

<sup>46</sup> *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, General Assembly Resolution 3452, Annex, 9 December 1975.

and article 14(3)(g) of the ICCPR (no compulsion to confess guilt).<sup>47</sup> The International Commission of Jurists has declared that evidence which is obtained by means which constitute a serious violation of human rights is never admissible.<sup>48</sup>

81. The HRLRC considers Australia is not meeting its obligations of ensuring that evidence obtained as a result of torture or in the context of cruel, inhuman or degrading treatment or punishment is excluded. The HRLRC is concerned that not all the recommendations made by the Committee Against Torture have been incorporated into the proposed amendments.

82. In particular, the Committee recently commented in relation to Australia that:

The Committee is concerned that the State party lacks uniform legislation to exclude admission of evidence made as a result of torture. Furthermore, the Committee is concerned over reports indicating that confessional evidence obtained under ill-treatment in other countries has been used in criminal proceedings in Australia.

**The State party shall ensure compliance with article 15 of the Convention by the application of uniform and precise legislation in all States and Territories excluding the admission of statements as evidence if made as a result of torture.**<sup>49</sup>

83. Furthermore, the HRLRC again notes the following comments made recently by the HRC in relation to Australia's compliance with the ICCPR:

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

**The State party should take the necessary legislative and other steps to ensure that no person is extradited to a state where he or she may face the death penalty, as well as whereby it does not provide assistance in the investigation of crimes that may result in**

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<sup>47</sup> UN Human Rights Committee, *General Comment No 20, Replaces General Comment 7 Concerning the Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment* (1992) [12]; UN Human Rights Committee, *General Comment No 32: Right to Equality before Courts and Tribunals and to a Fair Trial* (2007) [6], [41].

<sup>48</sup> International Commission of Jurists, *Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism* (28 August 2004) [7].

<sup>49</sup> UN Committee Against Torture, *Concluding observations of the Committee against Torture: Australia*, CAT/C/AUS/CO/3, 22 May 2008, [30].

**the imposition of the death penalty in another state, and revoke the residual power of the Attorney-General in this regard.**<sup>50</sup>

84. Where Australia receives evidence from a foreign country for use in domestic proceedings, the *Foreign Evidence Act 1994* (Cth) (**Foreign Evidence Act**) applies. Broadly, the Foreign Evidence Act permits the adduction of foreign evidence in domestic proceedings if the evidence would have been admissible if it had been adduced from the person at the proceeding (section 24(2)(b)) and justice would be served by the admission of the evidence (section 25(1)). Section 25(2) of the Foreign Evidence Act then sets out a range of considerations to which a court should have regard in determining whether justice would be better served by the admission or exclusion of the foreign evidence.
85. Section 26 of the Foreign Evidence Act limits the court's discretion to exclude evidence in proceedings relating to a range of terrorism and security-related offences. Foreign evidence may only be excluded in such proceedings where the court is satisfied that adducing the foreign material would have a substantial adverse effect on the right of a defendant in the proceeding to receive a fair hearing. Proposed section 26A provides that foreign material obtained under a warrant or other instrument is to be accompanied by a certificate signed by a senior officer of a foreign law enforcement agency attesting to the process used to obtain the material. However, there are no safeguards to ensure that the process used does not violate international human rights.
86. In the HRLRC's view, the Foreign Evidence Act should be amended such that the exclusion of any evidence obtained pursuant to or in the context of a serious human rights violation, including particularly the prohibition against torture or ill-treatment, is mandatory and not subject to limitation or exception.

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<sup>50</sup> UN Human Rights Committee, 'Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, *Concluding Observations of the Human Rights Committee*, CCPR/C/AUS/CO/5, 2 April 2009, Advanced Unedited Version [20].