

Third Study Commission Questionnaire 2023 – Taiwan

For 2023, the Third Study Commission, which focuses on Criminal Law, decided to study "Mutual cooperation in the investigation of criminal cases and in the presentation of evidence".

In order to facilitate discussion and to assist us in learning from colleagues, we ask that each country answers the following questions:

- 1. Does your country have any legislation, or regulations, and/or court rules of procedure that are relevant to the topic of our focus this year - mutual cooperation in the investigation of criminal cases and in the presentation of evidence in a criminal proceeding at court? Please explain.**

Australia's mutual assistance system is governed by the *Mutual Assistance in Criminal Matters Act 1987* (Cth) (the Act) which facilitates the obtaining of evidence for the investigation and prosecution of transnational crime and proceeds of crime. Per the Explanatory Memorandum, the Act provides the legislative basis for Australia to enter into arrangements with other countries whereby it can request and grant assistance in criminal matters, with assurance of reciprocity. The Act is supported by a number of Regulations which establish mutual obligations with specific countries, for example the *Mutual Assistance in Criminal Matters (Brazil) Regulation 2016* (Cth), and is reinforced by over 25 bilateral mutual assistance treaties to which Australia is party.

The type of assistance Australia can provide to foreign states includes executing search warrants, taking evidence from a witness in Australia for foreign criminal proceedings, arranging for witnesses to travel, and registering and enforcing orders restraining and forfeiting proceeds of crime. Australia's International Crime Cooperation Central Authority is also responsible for mutual assistance, extradition, international transfer of prisoners, requests for assistance from the International Criminal Court, and requests for assistance from International War Crimes Tribunals.

- 2. In your country, when a crime is being investigated does the judiciary have any role (a) in the request for information from a foreign state and/or (b) in the provision of information to a foreign state?**

No. Mutual assistance requests made by Australia to foreign countries are made by the First Assistance Secretary of the International Crime Cooperation Division under a delegation from the Attorney-General of Australia. The majority of requests are made on behalf of the Australian Federal Police (AFP) and the Cth Director of Public Prosecutions. A foreign state will also make a request for mutual assistance from Australia through the Attorney-General's Department. The requests to and from Australia must be in writing and satisfy s 11 of the Act. There is no judicial involvement in requests for information to investigate crime.

3. **If your answer to either 2 (a) or 2 (b) is yes, what legislation, regulations or rules of procedure apply to the decision of a judge involved at the investigation stage?**

N/A

4. **What is the legislation or court rules that relate to the taking of evidence from a witness in a foreign state, or the giving of evidence from a witness in your country to a court in a foreign country? Please explain these including the role played by a judge in both scenarios.**

There are a number of applicable international agreements which facilitate the taking of evidence from a witness in a foreign state, or the giving of evidence from a witness in Australia to a court in a foreign country. Australia is party to the following international agreements:

- *Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970;*
- Bilateral treaties with Korea and Thailand;
- Bilateral treaties between the United Kingdom and other European countries that have been extended to Australia by the UK. These bilateral treaties were concluded in the 1920s and 1930s and many of the countries extended the treaty to their external territories at the time. Even though those territories are now independent states, in many instances the treaty continues to operate.

All requests to take evidence under international agreements must use a Letter of Request. To satisfy Australia state and territory Court Procedure Rules, the Letter of Request must be **certified by the requesting judicial authority** and accompanied by two certified copies. The Letter of Request is then sent to the relevant authority, in Australia this is either the AGD or Department of Foreign Affairs depending on the country to whom the request is being made.

Where there is no international agreement in place, the diplomatic channel is used to make requests which will be considered and executed on the basis of comity.

Parties must ensure that the taking of evidence in Australia is done in accordance with the rules of both the Australian jurisdiction and the foreign court that requires the evidence. Judicial officers play an important role in ensuring the evidence taken meets these requirements.

5. **As a judge, if you receive a request for assistance from a foreign country, whether at the investigation stage or in the context of a court proceeding (a hearing or a trial), is it relevant to your determination of whether and how to assist that the basic human rights, principles of natural justice, and/or rules of procedural fairness that exist in your country are respected? Please explain.**

It is important that the rules of the Australian jurisdiction are complied with when providing mutual

assistance to a foreign country, this includes acting in accordance with basic human rights, principles of natural justice and rules of procedural fairness. A clear example of this is the requirement for the extradition process (initiated at the request of a foreign state) to have appropriate human rights safeguards and opportunity for judicial review in respect of Australia's obligations under international human rights conventions such as the *International Covenant for Civil and Political Rights* and the *Convention Against Torture and Other Cruel or Degrading Treatment or Punishment*.

- 6. Describe your own personal experience(s) as a judge that are relevant to the topic of our focus this year, whether it be presiding over an extradition hearing (a request to extradite an accused person to another country in order to be prosecuted in that other country), or receiving evidence in a court proceeding in your country from a witness who is testifying from another country and with the help of court officials in that other country, or helping to arrange for a witness in a court proceeding in another country to testify from a place in your own country, or responding to a request for assistance from an international court such as The Hague, or something else. These are just examples of things that you may have experienced; they are not meant to be exhaustive.**

I worked as a barrister at The Hague for approximately 3 years from 2003 at the International Criminal Tribunal for the former Yugoslavia (ICTY), dealing with alleged war crimes arising from the conflict in the early 90s. All the witnesses I cross-examined from the former Yugoslavia were in person in The Hague.

An issue arose in a recent matter I presided over in Australia whereby the testimony of a witness had to be taken at short notice because the witness was about to leave for a jurisdiction for which Australia had no mutual assistance agreement. Issues of legal costs may arise in such a matter.