Mutual Assistance in Criminal Matters Bill 1987

Date Introduced: 30 April 1987
House: House of Representatives
Presented by: Hon. Lionel Bowen, M.P., Attorney-General

Digest of Bill

Purpose
To facilitate the provision and obtaining by Australia of international assistance in criminal matters.

Background
The limitations on the availability of mutual assistance in criminal matters became apparent to the Royal Commission of Inquiry into the Activities of the Nugan Hand Group, the final report of which was submitted in June 1985. The Commission found that in July 1976, the Group obtained a licence from authorities in the British colony of the Cayman Islands to establish the Nugan Hand Bank (Cayman Islands) which was to become one of the major forces in the Group's expansion. The identity of depositors with banks registered under Cayman Islands law is protected by confidentiality legislation. Under this legislation, details of bank accounts are given only in very rare circumstances and only where an international agreement exists. No such agreement existed between Australia and the United Kingdom. Regarding the financial records of the Nugan Hand Bank (Cayman Islands) as crucial evidence, the Commission explored every legal possibility in its attempts to obtain the records but was unable to succeed, its final attempt failing on the grounds that it was an investigatory and advisory rather than a prosecution authority.

It was the frustration of its inquiries by the operation of Cayman Islands law that led to the cogent recommendation by the Commission for a system of judicial assistance agreements, to which Australia would be a party, in order to overcome the limitations imposed by another country's domestic law. The Commission noted that at the time of its investigations, the United States had entered into a number of international judicial assistance agreements which provided for a wide range of assistance measures to be made available at the request of foreign authorities. Most of these agreements post-dated the 1959 European Convention on Mutual Assistance which, in the Commission's view, has provided the foundation for modern judicial assistance agreements.1

At a Conference in Harare in July 1986, Commonwealth Law Ministers agreed on a set of principles to govern the provision of assistance in criminal matters between Commonwealth countries. This Bill reflects those principles.

Outline
The Bill is a significantly amended form of the Mutual Assistance in Criminal Matters Bill 1986 which was introduced on 22 October 1986 and discharged from the Notice
Paper on 30 April 1987. The main difference is that this Bill will provide for mutual assistance in freezing, forfeiting and confiscating the proceeds of crime.

Main Provisions

Clause 3 contains the interpretation provisions, the important ones being:
- 'criminal matter' - a criminal matter relating to revenue or foreign exchange control; or a matter which, in respect of an offence, relates to forfeiture or confiscation of property, imposition or recovery of a pecuniary penalty, restraining of dealings in property, or the freezing of assets.
- 'criminal proceeding' - a trial or committal proceeding.
- 'serious offence' - an offence for which the maximum penalty is death or at least 12 months' imprisonment.

In this Digest, a reference to 'a criminal proceeding' will be a reference to 'a proceeding relating to a criminal matter', and a reference to 'an investigation' will be a reference to 'an investigation relating to a criminal matter'.

It is expressly provided in clause 5 that the object of the Bill will be to facilitate the provision and obtaining by Australia of international assistance in criminal matters, by:
- obtaining evidence, documents or other articles;
- providing documents and other records;
- locating and identifying witnesses or suspects;
- executing requests for search and seizure;
- making arrangements for persons to give evidence or assist investigations;
- forfeiting or confiscating property;
- recovering pecuniary penalties;
- restraining dealings in property, freezing assets or locating property; and
- serving documents.

Regulations may provide that this Bill is to apply to a specified foreign country subject to whatever modifications are necessary to give effect to a bilateral mutual assistance treaty. Alternatively, regulations may provide that the Bill is to apply to a specified foreign country in the absence of a treaty, subject to other modifications (clause 7).

Clause 8 deals with the grounds for refusal of a request for assistance. Refusal will be mandatory if, in the opinion of the Attorney-General
- the alleged offence is of a political character;
- there are substantial grounds for believing that the purpose of the request is to prosecute or punish a person for a political offence, or in any way prejudice a person on the basis of race, sex, religion, nationality or political opinions;
- the alleged offence would have been, had it occurred in Australia, an offence under Australian military law but not an offence under the ordinary criminal law of Australia;
- provision of assistance would prejudice the sovereignty, security or
national interest of Australia or essential interests of a State or Territory; the accused has been acquitted, pardoned or punished under the law of the foreign country for the alleged offence or for another offence constituted by the same act or omission as the alleged offence; or except for requests under clause 13, the foreign country is not one to which the Bill will apply. Refusal will be a discretionary matter if, in the opinion of the Attorney-General the alleged act or omission would not have been an offence against Australian law had it occurred in Australia; the act or omission which allegedly occurred outside the foreign country would not have been an offence against Australian law had it occurred outside Australia in similar circumstances; the person responsible for the alleged act or omission, had it occurred in Australia at the same time and been an offence against Australian law, could no longer be prosecuted for any reason; or provision of assistance could prejudice an investigation or a criminal proceeding in Australia, or the safety of any person, or would impose an excessive burden on Australian resources.

Assistance to a foreign country may be provided subject to such conditions as the Attorney-General determines (clause 9).

Requests by Australia for assistance may be made by the Attorney-General (clause 10). A request by a foreign country for assistance may be made to the Attorney-General or a person authorised by the Attorney-General (sub-clause 11(1)) and must be accompanied by the particulars specified in sub-clause 11(2).

The Attorney-General may request a foreign country to take evidence or produce documents or other articles for a criminal proceeding in Australia (clause 12).

Clause 13 will empower the Attorney-General to authorise an Australian Magistrate to take evidence or order the production of documents or other articles for a criminal proceeding in a foreign country.

The Attorney-General may request an authority in a foreign country to authorise a search for and seizure of evidence relevant to a criminal proceeding or investigation involving a serious offence against an Australian law. There must be reasonable grounds for believing that the evidence may be located in that country (clause 14).

Parallel provisions will apply to a request for search and seizure by a foreign country. The Attorney-General may authorise a police officer to apply to a Magistrate of the relevant State or Territory for a warrant to search for and seize any evidence that a police officer believes, on reasonable grounds, to be relevant. The Magistrate must be satisfied that there are reasonable grounds for issuing a warrant (clause 15).

The Attorney-General may request a foreign country to authorise the removal of a foreign prisoner to give evidence in a criminal proceeding or to assist an investigation relating to a criminal matter in Australia. The prisoner must be capable of giving relevant evidence and must have consented to do so (clause 16). The Attorney-General may arrange with a State Minister for custody of the prisoner (clause 17).
A person who is in Australia from a foreign country to give evidence or to assist an investigation is not to be detained, prosecuted or punished for any offence or subjected to any civil suit, for any act or omission, which occurred or allegedly occurred before the person left the foreign country. This protection will cease to apply when the person has left or been given the opportunity to leave Australia (clause 19). Evidence cannot be used against the person who gave it except in proceedings for perjury (clause 21).

Clauses 22 to 25 deal with the imprisonment, release and escape from custody of foreign prisoners in Australia.

The Attorney-General will be empowered to make arrangements for any person in Australia to travel to a foreign country to give evidence in a criminal proceeding, and to direct the release of a prisoner for this purpose, subject to State approval where necessary. There must be reasonable grounds for believing that a person is capable of giving evidence and the Attorney-General must be satisfied that the person has consented to do so. The foreign country will be required to provide undertakings on certain matters. These include provision of the same sort of protection as will be provided by clauses 19 and 21 for persons from a foreign country in Australia (clause 26). Similar provisions will apply to assistance in foreign investigations (clause 27).

Part VI of the Bill (clauses 32 to 37) deal with the proceeds of crime.

Clauses 32 and 33 will enable the Attorney-General to request a foreign country to enforce specified orders against property believed to be located in that country, and to issue specified orders or warrants under the Proceeds of Crime Act 1987. This will apply to property which is the subject of a serious offence.

Where a foreign country requests that certain orders be enforced against property which is the subject of a serious offence, the Attorney-General may authorise the Director of Public Prosecutions to apply for registration of the orders in a specified court. In the case of a foreign forfeiture or pecuniary order, the Attorney-General must be satisfied that a person has been convicted of the offence and that the conviction and order are not subject to further appeal in the foreign country (clause 34).

Clauses 35 to 37 deal with requests from foreign countries for search and seizure warrants and restraining and information gathering orders to be issued under the Proceeds of Crime Act 1987.

The Governor-General will be empowered to make arrangements with a State Governor for the administration of this Bill (clause 39). The Governor-General will also have power to make regulations consistent with this Bill, including regulations which prescribe the practice and procedure for Magistrates (clause 44).

Reference

For further information, if required, contact the Law and Government Group.