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MUTUAL ASSISTANCE IN CRIMINAL MATTERS BILL 1986

Date introduced: 22 October 1986
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 the investigation, production of evidence and prosecution of a crime where the other country concerned will provide mutual assistance.

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 only given 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 and to be implemented by legislation in each Commonwealth country. This Bill implements those principles.

Outline

The Bill provides for the following assistance measures, subject to the existence of a mutual assistance treaty:

- the obtaining of evidence, documents and other articles;
- the provision of documents and other records;
- the location and identification of witnesses or suspects;
- the execution of requests for search and seizure;
- the freezing or confiscation of proceeds or profits of crime;
- the making of arrangements for persons to give evidence; and
- the service of documents.

It is expressly provided in the Bill that its object will be to facilitate the provision and obtaining by Australia of specified assistance measures (clause 5).

Regulations may provide that the Bill applies to a foreign country only if it has entered a mutual assistance agreement, is a Commonwealth country, or the country's laws

allow it to provide assistance in criminal matters to Australia. The regulations may also provide for conditions, exceptions or qualifications (clause 7).

The Attorney-General will be obliged to refuse assistance to a foreign country if, in the Attorney-General's opinion, an alleged offence is of a political character; there are substantial grounds for believing that the purpose of the request is to prejudice a person for their race, sex, religion, nationality or political opinions; the provision of assistance would prejudice sovereignty, security or national interest; the request concerns the prosecution for an offence of a person who has been, under the law of any country, acquitted of, pardoned or punished for that offence or another constituted by the same act or omission; or, except for requests under clause 11, the foreign country is not one to which the Bill will apply (sub-clause 8(1)). The Attorney-General will have a discretion to refuse assistance for any reason, but specifically where: an act or omission would not have been an offence in Australia or, had it so been, the person could no longer be prosecuted for some reason; the provision of assistance could prejudice an investigation or criminal proceedings in Australia, or the safety of any person anywhere, or would impose an excessive burden on resources (sub-clause 8(2)).

Only the Commonwealth Attorney-General or the Attorney-General's delegate will be able to request assistance for Australia (clause 10).

Clause 11 will empower the Attorney-General to authorise the taking of evidence or the production of documents or other articles for use in criminal proceedings in a foreign country whether or not it is a country to which this Bill will apply (sub-clause 11(1)).

The Attorney-General may request a foreign country to search for and seize evidence which may be relevant to criminal proceedings in Australia (clause 12).

Clause 13 will provide for search and seizure to be carried out in Australia at the request of a foreign country. The Attorney-General may apply for a search warrant to a Magistrate who must be satisfied that criminal proceedings have commenced in that country and that there may be evidence relevant to those proceedings within Australia (sub-clauses 13(1), (2) and (3)). The warrant will also be deemed to authorise a police officer to seize

anything else found in the course of the search which is relevant to the foreign proceedings or to the prosecution for an offence under Australian law (sub-clause 13(6)).

The Attorney-General may request a foreign country to transfer a foreign prisoner to Australia to give evidence (clause 15) and arrange with the appropriate State Minister for custody of the prisoner (clause 16) where this has been requested by the foreign country (clause 17).

Any person who comes from a foreign country to give evidence in Australia will be granted immunity from civil or criminal proceedings (other than those to which a request to give evidence relates) or detention for any act, omission or offence which allegedly occurred before that person left the foreign country (clause 18). The evidence cannot be used against the person who gave it except in a trial for perjury (clause 19).

Clause 23 deals with requests for persons to give evidence in foreign countries. In the case of prisoners, where there has been such a request and proceedings have commenced in the foreign country, the Commonwealth Attorney-General will have a discretion to direct the release of and make the necessary travel arrangements for a prisoner who is believed to be capable of giving evidence relevant to those proceedings and who has consented to do so. If the prisoner is a State as well as a Federal prisoner, this action will be subject to the approval of the appropriate State authority and, where the prisoner is not held in custody, any necessary variations being made to a parole or other order (sub-clause 23(1)). The Attorney-General will also be granted a discretionary power to arrange for any person who is not a prisoner, and who has consented to do so, to travel to a foreign country to give evidence in criminal proceedings (sub-clause 23(2)). The foreign country will be required to provide certain undertakings. These include the provision of the same sort of immunity that will be provided by clauses 18 and 19 for persons from a foreign country giving evidence in Australia. In addition, a person who is to be held in custody will be released only at the request of the Attorney-General and, if so released, will be accommodated and have expenses met by the foreign country until the completion of the proceedings (sub-clause 23(3)).

Clause 29 will permit delegation of the Attorney-General's powers except the power of delegation itself and the power to refuse assistance to a foreign country.

The Governor-General will be able to make regulations consistent with this Bill including regulations which prescribe the practice and procedure for Magistrates (clause 33).

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

6 February 1987

Bills Digest Service
LEGISLATIVE RESEARCH SERVICE

Reference

1. Royal Commission of Inquiry into the Activities of the Nugan Hand Group, Vols. 1 and 2, June 1985.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

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