

Treaty between Australia and the Federative Republic of Brazil on Mutual Legal Assistance in Criminal Matters

Introduction

- 4.1 The proposed treaty action is to bring into force the *Treaty between Australia and the Federative Republic of Brazil on Mutual Legal Assistance in Criminal Matters*, which was signed for Australia on 15 November 2014 and tabled in the Parliament on 8 September 2015.

Background

- 4.2 The National Interest Analysis (NIA) describes mutual legal assistance as a formal process by which the government of one country requests assistance from the government of another country in relation to a criminal investigation or prosecution.¹ Under mutual assistance treaties, parties can request information and evidence for the purpose of investigating or prosecuting serious crimes. They can also request for proceeds of crime located in the other party's jurisdiction to be located, restrained and returned.²
- 4.3 According to the NIA, Australia has mutual legal assistance treaties with 29 countries and mutual assistance obligations under several multilateral

1 National Interest Analysis [2015] ATNIA 16, *Treaty between Australia and the Federative Republic of Brazil on Mutual Legal Assistance in Criminal Matters* [2014] ATNIF 32 (hereafter referred to as the NIA), para 2.

2 NIA, para 2.

conventions. Australia does not currently have a bilateral agreement with Brazil to facilitate mutual legal assistance.³

- 4.4 In response to the Committee's enquiry regarding which country initiated the proposed treaty, the Attorney-General's Department advised that negotiations date back to at least 1992, when Australia presented Brazil with a draft model treaty.⁴

Proposed treaty action

- 4.5 Mutual assistance requests provide the framework for countries to seek assistance on transnational crime cases, as explained by an Attorney-General's Department official:

[...] foreign evidence can only be admitted into Australian criminal proceedings if it has been obtained under a mutual assistance request. Also, in Australia, we can only exercise coercive powers such as executing a search warrant if authorised in response to a mutual assistance request.⁵

- 4.6 Brazil and Australia are party to multilateral conventions that contain mutual assistance obligations and can currently provide assistance based on reciprocity. However a formal bilateral treaty would have a number of benefits:
- It would expand the number of offences on which Australia and Brazil can cooperate. The Committee heard evidence that multilateral conventions may only cover assistance for certain offences.⁶
 - It will guarantee mutual assistance by providing an obligation to consider requests where the treaty requirements are met. In the absence of a treaty there are no assurances that Australia's requests for assistance will be considered.⁷
 - It will establish practical arrangements and define mutually agreed terms for requesting and providing assistance.⁸

3 NIA, para 5.

4 Attorney-General's Department, *Submission 1*.

5 Ms Catherine Hawkins, First Assistant Secretary, International Crime Cooperation Division, Attorney-General's Department, *Committee Hansard*, Canberra, 12 October 2015, p. 5.

6 Ms Hawkins, Attorney-General's Department, *Committee Hansard*, Canberra, 12 October 2015, p. 8.

7 NIA, para 10.

8 NIA, para 9.

- It is specifically tailored to meet the operational and legal requirements of Australia and Brazil.⁹

Reasons for Australia to take the proposed treaty action

- 4.7 A Departmental witness told the Committee that effective international cooperation via mutual assistance treaties is essential in tackling serious and organised crime, such as drug trafficking, money laundering, human trafficking, people smuggling, cybercrime and terrorism.¹⁰ Where evidence or proceeds of crime are located in a foreign jurisdiction, it is in Australia's interests to be able to request and provide the broadest possible assistance.¹¹
- 4.8 The treaty will enable cooperation with Brazil, which government officials described as a major transshipment country for illicit drugs originating in other Latin American nations¹² and 'an important partner in South America in the fight against transnational crime and particularly in addressing the rapid expansion of the global drug market.'¹³
- 4.9 The treaty contains safeguards and protections that are consistent with those in the *Mutual Assistance in Criminal Matters Act 1987 (Cth)* (the Mutual Assistance Act). The effect of these safeguards and protections is that Australia could refuse assistance if there was a concern that the resulting sentence may be out of alignment with what would be acceptable in Australia.¹⁴
- 4.10 The safeguards allow Australia to refuse assistance in cases where the request has been made for the purpose of prosecuting someone on discriminatory grounds, or where the action did not constitute an offence in both countries (dual criminality). The safeguards also allow Australia to refuse assistance where the death sentence may be applied.

9 Ms Hawkins, Attorney-General's Department, *Committee Hansard*, Canberra, 12 October 2015, p. 5.

10 Ms Hawkins, Attorney-General's Department, *Committee Hansard*, Canberra, 12 October 2015, p. 5.

11 NIA, para 4.

12 Mr Brett Hackett, Assistant Secretary, Canada and Latin America Branch, Department of Foreign Affairs and Trade (DFAT), *Committee Hansard*, Canberra, 12 October 2015, p. 6.

13 Ms Hawkins, Attorney-General's Department, *Committee Hansard*, Canberra, 12 October 2015, p. 5.

14 Ms Hawkins, Attorney-General's Department, *Committee Hansard*, Canberra, 12 October 2015, p. 7.

- 4.11 The Committee heard that Brazil has abolished the death penalty for all crimes which Australia is likely to deal with under mutual assistance.¹⁵ Brazil retains the ability to use the death penalty for wartime offences only.¹⁶ The Brazilian Ministry of Foreign Affairs advised the Attorney-General's Department that wartime is defined as a time of war declared by the President of the Republic and authorised by Congress. The death penalty must be executed according to the Military Penal Code, which contains no reference to terrorism.¹⁷ There have been no executions carried out in Brazil since 1855.¹⁸

Obligations

- 4.12 The obligations as set out in the NIA are provided below.¹⁹
- 4.13 The Treaty will oblige the Parties to provide each other with assistance in the investigation and prosecution of criminal offences and related proceedings (**Article 1(1)**). The assistance to be provided may include:
- taking evidence and obtaining statements of persons, including experts (**Article 1(3)(a)**);
 - providing information, documents and other records, including criminal and government records, judicial documents and expert evaluations (**Article 1(3)(b)**);
 - locating persons and objects, including their identification (**Article 1(3)(c)**);
 - examining objects and sites to the extent that it is not inconsistent with the laws of the Requested Party (**Article 1(3)(d)**);
 - search and seizure (**Article 1(3)(e)**);
 - delivering property and evidence (**Article 1(3)(f)**);
 - making persons in custody and others available to give evidence or assist investigations (**Article 1(3)(g)**);
 - service of documents, including documents seeking the attendance of persons (**Article 1(3)(h)**);

15 Ms Hawkins, Attorney-General's Department, *Committee Hansard*, Canberra, 12 October 2015, p. 6.

16 Ms Hawkins, Attorney-General's Department, *Committee Hansard*, Canberra, 12 October 2015, p. 6.

17 Attorney-General's Department, *Submission 1*.

18 NIA, para 15.

19 NIA, paras 12 to 27.

- measures to locate, restrain and forfeit the proceeds and instruments of crime and return and share assets (**Article 1(3)(i)**); and
- other assistance consistent with the objects of the Treaty and the law of the Requested Party (**Article 1(3)(j)**).

4.14 Mutual assistance under the Treaty does not include extradition, execution of criminal judgments imposed in the territory of the Requesting Party (except to the extent permitted by the Treaty and the Requested Party's laws) and international transfer of prisoners to serve sentences (**Article 2 (Exclusions)**). Australia has an existing extradition treaty with Brazil. Australia does not have an agreement with Brazil covering the international transfer of prisoners.

4.15 The obligation to provide mutual legal assistance in **Article 1** is subject to a number of internationally accepted grounds for refusal which largely reflect the existing grounds contained in the Mutual Assistance Act. Under **Article 4(1) (Refusal or Postponement of Assistance)**, the Requested Party may refuse to provide assistance if:

- the request relates to an offence for which the death penalty may be imposed or executed (**Article 4(1)(a)**);
- execution of the request would impair the Requested Party's sovereignty, security, public order, essential public interest or prejudice the safety of any person (**Article 4(1)(b)**);
- the request relates to an offence that is regarded by the Requested Party as an offence that is, or is by reason of the circumstances in which it is alleged to have been committed or was committed, of a political character (**Article 4(1)(c)**);
- there are grounds to believe the request has been made for the purpose of prosecuting a person on account of race, sex, religion, nationality, ethnic origin or political opinions, or that that person's position may be prejudiced for any of these reasons (**Article 4(1)(d)**);
- the request relates to an offence the prosecution of which in the Requesting Party would be incompatible with the Requested Party's law on double jeopardy (**Article 4(1)(e)**);
- the request relates to an offence that is regarded by the Requested Party as an offence under military law, which is not also an offence under ordinary criminal law (**Article 4(1)(f)**);
- the request relates to an offence where acts or omissions alleged to constitute that offence would not, if they had taken place within the jurisdiction of the Requested Party, have constituted an offence, or

- could not be prosecuted in the Requested Party in similar circumstances (**Article 4(1)(g)**); or
- providing the assistance sought could impose an excessive burden on the human or financial resources of the Requested Party (**Article 4(1)(h)**).
- 4.16 Brazil abolished the death penalty for ordinary crimes in 1979 and has not carried out an execution since 1855. Australia has a long-standing policy of opposition to the death penalty. According to the NIA, **Article 4(1)(a)** relating to the death penalty is able to be implemented consistently with Australia's policy position and domestic legal requirements under subsections **8(1A)** and **8(1B)** of the Mutual Assistance Act.
- 4.17 **Article 4(4)** of the Treaty provides that, prior to refusing or postponing assistance, the Requested Party must consider whether assistance could be granted subject to any necessary conditions. If the Requesting Party accepts conditional assistance, it must comply with the conditions.
- 4.18 Where a request would interfere with an ongoing investigation, prosecution or civil proceeding, the Requested Party may temporarily delay providing assistance (**Article 4(2)**). The Requested Party must promptly inform the Requesting Party if the request is wholly or partially refused or its execution is postponed and provide reasons for the refusal or postponement (**Article 4(3)**).
- 4.19 **Article 5** (Contents of Requests) outlines the content of mutual legal assistance requests. **Article 5(1)** lists the information that is to be included in a request, including:
- the name and contact details of the competent authority (**Article 5(1)(a)**);
 - a description of the nature of the investigation or proceedings, including a summary of the facts and provision of the applicable laws (**Article 5(1)(b)**);
 - a description of the nature and purpose of the assistance sought (**Article 5(1)(c)**);
 - the need and reasons for any confidentiality required (**Article 5(1)(d)**); and
 - any time limits for compliance with the request (**Article 5(1)(e)**).
- 4.20 **Article 5(2)** lists additional information that should be included where possible to facilitate execution of the request.
- 4.21 **Article 3** (Execution of Requests) of the Treaty requires each Party to execute requests for assistance promptly in accordance with its laws (**Article 3(1)**). The Requested Party must promptly inform the Requesting Party of the outcome of the execution of the request (**Article 3(5)**). If the

Requested Party becomes aware of circumstances likely to cause significant delay in responding to the request for assistance, it must promptly inform the Requesting State (**Article 3(4)**).

- 4.22 **Article 7(1)** (Limitation and use of Confidentiality) of the Treaty provides that the Requested Party may require, after consultation with the Requesting Party, that information or evidence provided, or its source, be kept confidential or be disclosed or used subject to terms and conditions it specifies. **Article 7(3)** provides that the Requesting Party may require that a request, its contents and supporting documents and any action taken be kept confidential except to the extent necessary to execute it or under terms and conditions specified by it. **Article 7(2)** of the Treaty requires that information and evidence obtained under it not be used for purposes other than those stated in the request without the prior consent of the Requested Party.
- 4.23 **Article 8** (Certification and Authentication) of the Treaty sets out certification and authentication requirements for documents, records or objects provided through a request for assistance.
- 4.24 **Article 9** (Language) provides that requests and supporting documents must be accompanied by a translation into the language of the Requested Party.
- 4.25 **Article 10** (Representation) provides that the Requested Party shall make all necessary arrangements for the representation of the Requesting Party in any proceedings arising out of a request for assistance, and shall otherwise represent the interests of the Requesting Party.
- 4.26 **Articles 12 to 22** of the Treaty set out requirements for specified forms of assistance available under the Treaty. This includes:
- taking of evidence (**Article 12**);
 - obtaining of statements (**Article 13**);
 - presence of persons involved in proceedings (**Article 14**);
 - transmission and return of documents and objects (**Article 15**);
 - availability of persons to give evidence or assist investigations (**Article 16**);
 - making persons in custody available to give evidence or assist investigations (**Article 17**);
 - the safe conduct of any person who is in the Requesting Party in order to give evidence or assist in investigations (**Article 18**);
 - requests relating to proceeds and instruments of crime (**Article 19**);
 - service of documents (**Article 20**);

- provision of publically available and official documents (**Article 21**);
and
 - search and seizure (**Article 22**).
- 4.27 **Article 23** (Other Assistance) specifies that the Treaty will not affect the obligations between the Parties, pursuant to other treaties or arrangements, or otherwise.
- 4.28 **Article 27** (Consultation and Dispute Settlement) of the Treaty provides that the Parties shall consult promptly on the interpretation, application and implementation of the Treaty, and if the Central Authorities of the Parties are unable to agree, any dispute shall be resolved through consultation by diplomatic channels.

Implementation

- 4.29 The NIA proposes that the treaty be implemented through new regulations under the Mutual Assistance Act. Under section 7 of the Act, regulations can be used to stipulate the countries the Act applies to, subject to any mutual assistance treaty between Australia and that country.
- 4.30 This is the mechanism through which mutual assistance treaties are given effect in Australia's domestic law and is consistent with the implementation of other mutual assistance treaties.²⁰

Costs

- 4.31 As outlined in the NIA, Article 11(1) (Expenses) of the treaty provides that the Requested Party shall meet the costs of fulfilling the request for assistance. The Requesting Party shall bear the travel expenses of any person travelling to or from the Requested Party in connection with a mutual assistance request, including custodial or escorting officers, as well as expert's fees and expenses.
- 4.32 Where expenses are of an extraordinary nature the Parties shall consult to determine the terms and conditions under which the requested assistance can be provided (Article 11(2)).²¹
- 4.33 Expenses related to mutual assistance requests under the proposed treaty would be met from existing budgets, principally from those of the
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20 NIA, para 30.

21 NIA, para 28.

Attorney-General's Department and the Australian Federal Police (who execute the majority of requests). This is the usual practice for mutual assistance treaties.²²

Conclusion

4.34 The Committee supports Australia's ratification of the Treaty between Australia and the Federative Republic of Brazil on Mutual Legal Assistance in Criminal Matters and recommends that binding treaty action be taken.

Recommendation 2

4.35 **The Committee supports Australia's ratification of the *Treaty between Australia and the Federative Republic of Brazil on Mutual Legal Assistance in Criminal Matters* and recommends that binding treaty action be taken.**

Mr Angus Taylor MP
Chair

12 November 2015

²² NIA, para 29.

