

National Interest Analysis [2017] ATNIA 29

with attachment on consultation

Agreement between Australia and the Hashemite Kingdom of Jordan on Mutual Legal Assistance in Criminal Matters

(Amman, 24 April 2017)

[2017] ATNIF 36

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

Agreement between Australia and the Hashemite Kingdom of Jordan on Mutual Legal Assistance in Criminal Matters

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Nature and timing of proposed treaty action

1. It is proposed to bring into force the *Agreement between Australia and the Hashemite Kingdom of Jordan on Mutual Legal Assistance in Criminal Matters* (the proposed Agreement), done at Amman on 24 April 2017.

2. **Article 22** of the proposed Agreement provides that it shall enter into force thirty days after the date on which the Parties have notified each other by diplomatic note that all necessary steps have been taken for the entry into force of the proposed Agreement. Before notification can be given by Australia, Australia's treaty requirements must be completed, including consideration by the Joint Standing Committee on Treaties (JSCOT) and the making of implementing regulations under the *Mutual Assistance in Criminal Matters Act 1987* (Cth) (the Mutual Assistance Act).

Overview and national interest summary

3. Mutual assistance is a formal process whereby the Government of one country (the Requesting Party) requests assistance from the Government of another country (the Requested Party) in relation to a criminal investigation or prosecution. Assistance may extend to locating, restraining and forfeiting the proceeds of criminal activity in the Requested Party's jurisdiction in relation to criminal activity that took place in the Requesting Party.

4. Mutual assistance treaties establish a framework of practical arrangements based on mutual obligation enabling Australia to request and provide information and evidence for investigating or prosecuting serious crimes. It is in Australia's interests to be able to provide and request the widest possible assistance in criminal matters, so that criminals cannot evade justice where evidence of their criminal conduct is located in a foreign jurisdiction. This is especially critical to disrupt and deter the movement of foreign terrorist fighters.

5. Australia does not currently have a bilateral agreement with Jordan to facilitate mutual assistance. Both Australia and Jordan are parties to multilateral conventions that contain certain mutual assistance obligations. However, in situations where no multilateral convention or bilateral treaty applies to the particular factual scenario, there is no obligation on either country to consider a request for assistance from the other country. The proposed Agreement provides a more comprehensive framework to govern bilateral mutual legal

assistance between Australia and Jordan and ensures that both countries are required to consider all requests for assistance, as well as providing clarity and certainty about the procedures and processes to be used in making and executing mutual assistance requests.

6. Jordan is a key partner for Australia in the Middle East. The proposed Agreement will foster greater international crime cooperation engagement to improve procedures for the sharing of foreign evidence where necessary to support the prosecution of those involved in domestic and transnational crime including terrorism.

7. The proposed Agreement adds to Australia's existing network of bilateral mutual assistance treaties with 30 other countries and our mutual assistance obligations under a number of multilateral conventions. The safeguards and protections in the proposed Agreement are consistent with those contained in the Mutual Assistance Act. The proposed Agreement can be implemented under Australia's existing domestic legislative framework for mutual assistance by way of regulations.

Reasons for Australia to take the proposed treaty action

8. Jordan is an important strategic partner in the Middle East for the Australian Government in mitigating and countering transnational crime and terrorism, including the threat posed by foreign terrorist fighters. As a transit country for foreign terrorist fighters, Jordan is likely to hold evidence required to support terrorism-related prosecutions in Australia.

9. The proposed Agreement will ensure that Australia can provide, request and receive assistance to and from Jordan in accordance with clearly defined and mutually agreed terms. Currently, Australia and Jordan are able to request and provide assistance based on reciprocity because both States have mutual assistance laws enabling assistance to be requested and provided in the absence of a treaty. However, under these processes there is no guarantee that Australia's requests will be considered.

10. The proposed Agreement would oblige Jordan to consider Australian requests for assistance where the requirements set out in the proposed Agreement are satisfied. The proposed Agreement also provides certainty, imposes obligations at international law and institutes practical arrangements for requesting and providing assistance. The proposed Agreement contains a number of important safeguards and human rights protections, including:

- the ability to refuse to provide assistance in cases where there is a risk that the death penalty may be imposed or carried out;
- the request has been made for the purpose of prosecuting someone on account of grounds including their race, sex, religion, nationality and political opinions;
- where there are substantial grounds for believing that the person subject to the mutual assistance request would be in danger of being subjected to torture; or

- where double jeopardy¹ or dual criminality² considerations apply.

Obligations

11. The proposed Agreement will oblige Australia and Jordan to consider one another's requests for assistance in investigations or court proceedings in respect of criminal matters in accordance with the provisions of the Agreement (**Article 1(1)**). The assistance to be provided may include:

- taking evidence and obtaining statements of persons, including the execution of letters rogatory (**Article 1(3)(a)**);
- providing documents and records (**Article 1(3)(b)**);
- locating and identifying persons (**Article 1(3)(c)**);
- executing requests for search and seizure (**Article 1(3)(d)**);
- locating, identifying, restraining and confiscating proceeds or instruments of crime (**Article 1(3)(e)**);
- seeking the consent of persons to give evidence or to assist in investigations, including the temporary transfer of persons in custody (**Article 1(3)(f)**);
- serving documents (**Article 1(3)(g)**);
- collecting forensic material samples (**Article 1(3)(h)**); and
- other assistance consistent with the objects of the proposed Agreement, which is not inconsistent with the laws of the Requested Party (**Article 1(3)(i)**).

12. Mutual assistance under the proposed Agreement does not include extradition or the execution of criminal judgments (except to the extent permitted by the proposed Agreement and the Requested Party's laws) or the permanent international transfer of prisoners to serve sentences (**Article 1(4)**).

13. **Article 2** specifies that the proposed Agreement will not affect the obligations of the Parties arising from any other instruments to which either are a party. This would include situations where a Party has a specific obligation to refuse mutual assistance under an international treaty outside of the proposed Agreement.

Grounds for refusing a mutual assistance request

14. The obligation to provide assistance in **Article 1** is subject to a number of internationally accepted mandatory and discretionary grounds for refusal that largely reflect the existing grounds contained in the Mutual Assistance Act. Under **Article 4(1)**, the Requested Party must refuse to provide assistance in any of the following circumstances where the Requested Party considers:

- the request relates to a political offence or the confiscation or restraining of the proceeds or an instrument of such an offence (**Article 4(1)(a)**). This reflects the mandatory ground of refusal contained in paragraph 8(1)(b) of the Mutual Assistance Act);

¹ "Double jeopardy" prevents a person being tried or punished for the same offence twice. Where that person has already been acquitted, pardoned, or punished under the laws of the Requested Party, the Requesting Party or another country in respect of the same act or omission.

² "Dual criminality" means that the conduct in question would be a criminal offence in both Australia and Jordan.

- the request relates to conduct that would constitute an offence under the Requested Party's military law but does not constitute an offence under the ordinary criminal law of the Requested Party (**Article 4(1)(b)**). This corresponds with the mandatory ground of refusal contained in paragraph 8(1)(d) of the Mutual Assistance Act);
- there are substantial grounds for believing the request has been made for the purpose of investigating, prosecuting or punishing a person on account of their race, sex, religion, nationality or political opinions, or that the person's position may be prejudiced for any of these reasons (**Article 4(1)(c)**). This broadly corresponds with the mandatory ground of refusal contained in paragraph 8(1)(c) of the Mutual Assistance Act);
- there are substantial grounds for believing that if the request was granted, the person would be in danger of being subjected to torture (**Article 4(1)(d)**). This corresponds with the mandatory ground of refusal contained in paragraph 8(1)(ca) of the Mutual Assistance Act; and
- where execution of the request would prejudice the Requested Party's sovereignty, security, national interest or other essential interests (**Article 4(1)(e)**), which corresponds with the mandatory ground of refusal contained in paragraph 8(1)(e) of the Mutual Assistance Act.

Discretionary grounds for refusing a mutual assistance request

15. **Article 4(2)** of the proposed Agreement sets out discretionary grounds for refusal. Parties may refuse assistance if:

- the request relates to conduct that if it had occurred in the Requested Party would not have constituted an offence at the time the request was received, or the confiscation or restraining of the proceeds or an instrument of such an offence (dual criminality requirement) (**Article 4(2)(a)**). This corresponds with the discretionary ground of refusal contained in paragraph 8(2)(a) of the Mutual Assistance Act);
- the person to whom the request relates would be exposed to 'double jeopardy' (**Article 4(2)(b)**), which corresponds with the discretionary ground of refusal contained in paragraph 8(2)(c) of the Mutual Assistance Act);
- it could prejudice an investigation or court proceeding in the Requested Party (**Article 4(2)(c)**), which corresponds with the discretionary ground of refusal contained in paragraph 8(2)(d) of the Mutual Assistance Act);
- it could prejudice the safety of any person (**Article 4(2)(c)**), which corresponds with the discretionary ground of refusal contained in paragraph 8(2)(e) of the Mutual Assistance Act);
- it could impose an excessive burden on the resources of the Requested Party (**Article 4(2)(c)**), which corresponds with the discretionary ground of refusal contained in paragraph 8(2)(f) of the Mutual Assistance Act); and
- the request relates to the investigation, prosecution or punishment of a person for an offence in respect of which the death penalty may be imposed or executed (**Article 4(2)(d)**).

16. Jordan retains the death penalty for serious crimes, including drug offences. Australia has a longstanding policy of opposition to the death penalty. The provision in **Article 4(2)(d)** of the proposed Agreement relating to the death penalty is consistent with Australia's policy position and domestic legal requirements. **Article 4(3)** provides that, before refusing to provide assistance, the Parties should consult on whether the assistance could be provided subject to conditions. This could include an undertaking that the death penalty will not be imposed or, if imposed, will not be carried out, which is consistent with the existing provisions in subsections 8(1A) and 8(1B) of the Mutual Assistance Act. If the Requesting Party accepts conditional assistance, it must comply with those conditions (**Article 4(3)**).

17. **Article 5(1)** lists the information that is to be included in a mutual assistance request, including:

- a description of the assistance sought, including the purpose for which it is sought (**Article 5(1)(a)**);
- contact details of the competent authority conducting the investigation or court proceeding to which the request relates (**Article 5(1)(b)**);
- a description of the nature of the criminal matter, including a statement of the relevant laws (**Article 5(1)(c)**);
- a description of the acts or omissions constituting the alleged offence (**Article 5(1)(d)**);
- in asset recovery matters: the order of the competent authority (**Article 5(1)(e)**);
- details of any particular requirements to be followed (**Article 5(1)(f)**);
- any requirements for confidentiality (**Article 5(1)(g)**); and
- any time limits for compliance with the request (**Article 5(1)(h)**).

18. **Article 5(2)** lists other information that may facilitate execution of the request and should also be included, where possible.

19. **Article 6(1)** of the proposed Agreement requires each Party to execute requests for assistance in accordance with its laws, and to the extent those laws permit, in the manner requested. **Article 6(2)** allows the Requested Party to postpone the delivery of material requested if such material is required for proceedings in respect of criminal or civil matters in its jurisdiction. 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 Party (**Article 6(3)**). The Requested Party must also promptly inform the Requesting Party if it is unable to comply, in whole or in part, with a request for assistance (**Article 6(4)**).

20. **Article 7** states that, where requested, the Requesting Party shall return the material provided under the proposed Agreement once it is no longer needed.

21. **Article 8** of the proposed Agreement provides that the Requesting Party may require that an application for assistance and the granting of assistance be kept confidential (**Article 8(1)**). The Requested Party shall inform the Requesting Party where the request cannot be executed without breaching confidentiality to enable consideration of whether the request should be executed (**Article 8(2)**). The Requested Party may also require that information and evidence it provides be kept confidential, except to the extent that the information and evidence is needed for the investigation or proceeding to which the request

relates (**Article 8(3)**). Furthermore, the information and evidence obtained may not be used or disclosed by the Requesting Party for any purpose other than those stated in the request without the prior consent of the Requested Party (**Article 8(4)**). However, if there is an imminent risk of serious harm or death, or likely serious harm or death, to a person or persons, the Requesting Party may use the information or evidence provided under the proposed Agreement to prevent that harm or death from occurring, while seeking consent from the Requested Party (**Article 8(5)**).

22. **Articles 9 to 18** of the proposed Agreement set out specific requirements for the following forms of assistance available under the proposed Agreement:

- service of documents (**Article 9**);
- taking of evidence (**Article 10**);
- obtaining voluntary statements (**Article 11**);
- the availability of persons in custody to give evidence or to assist investigations (**Article 12**);
- the availability of other persons to give evidence or assist investigations (**Article 13**);
- the guarantee of safe conduct of any person who is in the Requesting Party in order to give evidence or assist in investigations, pursuant to a request made by the Requesting Party (**Article 14**);
- provision of publicly available and official documents (**Article 15**);
- certification and authentication requirements for documents, records or objects provided through a request for assistance (**Article 16**);
- search and seizure (**Article 17**); and
- proceeds and instruments of crime (**Article 18**).

23. **Article 19** provides that the Central Authority of each Party may enter into subsidiary arrangements consistent with the purposes of the proposed Agreement and with the laws of both Parties.

24. **Article 20(1)** of the proposed Agreement 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.

25. **Article 21** obliges the Parties to consult with each other promptly regarding the interpretation, application or carrying out of the proposed Agreement either generally or in relation to a particular case.

Costs

26. **Article 20(2)** of the proposed Agreement provides that the Requested Party shall meet the ordinary costs of fulfilling the request for assistance, and 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.

27. Where expenses are of a substantial or extraordinary nature the Parties must consult to determine the terms and conditions upon which the request is to be executed and the manner in which costs shall be allocated (**Article 20(3)**).

28. In accordance with the usual practice for mutual assistance requests, expenses incurred by Australia when making or responding to mutual assistance requests under the proposed Agreement will be met from existing budgets of relevant Commonwealth agencies, in relation to Jordanian requests, and by the Australian investigative and prosecutorial agencies seeking assistance in relation to Australian requests.

Implementation

29. Mutual assistance treaties are given effect in Australia's domestic law by the making of regulations. It is proposed that the proposed Agreement will be implemented through making regulations under section 44 of the Mutual Assistance Act consistent with the implementation of other mutual assistance treaties entered into by Australia. Section 7 of the Mutual Assistance Act allows regulations to provide that the Mutual Assistance Act applies to a specified foreign country subject to any mutual assistance treaty between that country and Australia that is set out in the regulations.

Regulation Impact Statement

30. The Office of Best Practice Regulation has been consulted and confirms that a Regulation Impact Statement is not required.

Future treaty action

31. The proposed Agreement is silent as to amendment. In the absence of an amendment provision, Article 39 of the *Vienna Convention on the Law of Treaties* ([1974] ATS 2) applies to allow amendment by agreement between the Parties.

32. Any amendment to the proposed Agreement would be a treaty action and would be subject to Australia's domestic treaty requirements.

Termination

33. Under **Article 22(3)** of the proposed Agreement, either Party may terminate the proposed Agreement by written notice at any time. The proposed Agreement will cease to be in force after six months from the date of receipt of the notice. Termination of the proposed Agreement will not affect any requests made prior to termination taking effect. Termination by Australia would be subject to Australia's domestic treaty requirements.

Contact details

Transnational Crime Branch
Criminal Justice – Policy and Programmes Division
Attorney-General's Department.

ATTACHMENT ON CONSULTATION

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34. The State and Territory Governments have been consulted through the Commonwealth-State/Territory Standing Committee on Treaties (SCOT). Information on the negotiation of the proposed Agreement was provided to State and Territory representatives through the biannual SCOT meetings. No requests for further information or comments on the proposed Agreement have been received to date.