

## **Treaty between Australia and the State of the United Arab Emirates on Mutual Legal Assistance in Criminal Matters**

### **Introduction**

- 3.1 The Treaty between Australia and the United Arab Emirates on Mutual Legal Assistance in Criminal Matters was signed for Australia on 26 July 2007. It was tabled on 18 September 2007 but Parliament was dissolved before the Joint Standing Committee on Treaties (JSCOT) could report on the agreement.<sup>1</sup>

### **Background**

- 3.2 Mutual Assistance (MA) Treaties provide a framework for states to provide each other the widest measure of mutual assistance in connection with investigations, prosecutions and other proceedings relating to criminal matters, irrespective of whether the assistance sought is to be provided by a court or some other authority.
- 3.3 The National Interest Analysis (NIA) states that Mutual Assistance (MA) treaties:

allow Australia to obtain information and evidence for the investigation or prosecution of crime. They also facilitate the

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1 National Interest Analysis, (NIA), para 1.

location, restraint, forfeiture and repatriation of instruments and proceeds of crime.<sup>2</sup>

- 3.4 Australia has mutual assistance treaties with 25 other countries and is also a party to a number of multilateral agreements that impose Mutual Assistance obligations.<sup>3</sup>

## Obligations

- 3.5 Article 1 of the Treaty provides that Australia and the United Arab Emirates have agreed to grant each other Mutual Assistance in connection with investigations or proceedings relating to criminal matters. The Treaty further specifies that a criminal matter includes matters connected with offences against a law relating to customs duties, foreign exchange control and other revenue matters (Article 1(2)).
- 3.6 Under the Treaty, Mutual Assistance may include:
- the taking of evidence, including testimony and statements of persons, production of documents, records and other material including by video conference or television link (Articles 1 and 9);
  - locating and identifying persons (Article 1(3)(d));
  - executing letters rogatory<sup>4</sup> (Article 1(3)(b));
  - the obtaining of statements of persons (Article 10);
  - the serving of documents (Article 8);
  - arranging for people to give evidence or to assist criminal investigations in the Requesting State, including the temporary transfer of people in custody for this purpose (Articles 11 and 12);
  - providing copies of documents and records that are open to public access (Article 14);
  - executing requests for searches, seizures and delivery of material (Article 16);

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2 NIA, para 4.

3 NIA, para 3.

4 A Letter Rogatory is a formal request from a [court](#) to a foreign court for some type of judicial assistance. The most common remedies sought by Letters Rogatory are [service of process](#) and taking of evidence.

- locating, restraining or forfeiting proceeds of crime and instruments of crime that are needed in connection with a criminal investigation or proceeding (Articles 17 and 18); and
- returning embezzled public funds (Article 19).

3.7 Australia's obligation to provide Mutual Assistance is qualified by internationally accepted grounds for refusal that are set out in the Treaty.<sup>5</sup> These grounds reflect the mandatory and discretionary grounds for refusal set out in subsections 8(1) and 8(2) of the Mutual Assistance Act. Article 3(1) of the Treaty obliges the Requested State to refuse to provide assistance if:

- the request relates to offences of a political character;
- the request relates to an offence under military law which is not also an offence under the ordinary criminal law of the Requested State;
- the request relates to the prosecution of a person for an offence in respect of which the offender has been finally acquitted or pardoned, or has served the sentence imposed;
- there are substantial grounds for believing the request has been made for the purpose of prosecuting or punishing a person on account of that person's race, sex, religion, nationality or political opinions, or that the person's position may be prejudiced for any of those reasons; or
- the request would prejudice the sovereignty, security, national interest or other essential interests of the Requested State.<sup>6</sup>

3.8 Article 3(2) gives the Requested State the discretion to refuse to provide assistance if:

- the request relates to the prosecution or punishment of a person for acts or omissions which would not constitute an offence under the laws of the Requested State;
- the request relates to the prosecution or punishment for an extraterritorial offence that does not constitute an extraterritorial offence under the laws of the Requested State;

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5 NIA, para 12.

6 NIA, para 12.

- the prosecution or punishment for an offence which, had it been committed in the Requested State, could no longer be prosecuted by reason of lapse of time or any other reason;
- the provision of assistance sought could prejudice an investigation or proceeding in the Requested State;
- the provision of assistance sought could prejudice the safety of any person in the Requested State; or
- the provision of assistance sought could impose an excessive burden on the resources of the Requested State.<sup>7</sup>

3.9 Article 3(3) of the Treaty states that prior to refusing a request for assistance, the Requested State will consider whether assistance may be granted subject to such conditions as it deems necessary. If the Requesting State accepts the conditions for granting assistance, it is bound by the Treaty to comply with the conditions.<sup>8</sup>

3.10 The UAE retains the death penalty for serious crimes.<sup>9</sup> Subsection 8(1A) of the *Mutual Assistance in Criminal Matters Act 1987* (Cth) (the Mutual Assistance Act) requires that a request for assistance must be refused where the provision of assistance relates to the prosecution or punishment of a person where the death penalty may be imposed, unless the Attorney-General or the Minister for Home Affairs, having regard to the special circumstances of the case, is of the opinion that the assistance should be granted.<sup>10</sup>

3.11 Pursuant to section 8(1B) of the Mutual Assistance Act a request for assistance may be refused if the Attorney-General or the Minister for Home Affairs believes that the provision of the assistance may result in the death penalty being imposed and, having taken into consideration the interests of international criminal cooperation, is of the opinion that assistance should not be granted. These provisions of the Mutual Assistance Act are reflected in the Treaty. Article 3(2)(e) allows Australia to refuse to grant a Mutual Assistance request that may result in the death penalty being imposed or executed.<sup>11</sup>

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7 NIA, para 13.

8 NIA, para 16.

9 The US Department of State human rights reports for 2006 and 2007 provide further information on capital punishment in the UAE. The reports can be found at: <http://www.state.gov/g/drl/rls/hrrpt/2006/78865.htm> and <http://www.state.gov/g/drl/rls/hrrpt/2007/100608.htm>.

10 Mr Steven Marshall, *Transcript of Evidence*, 8 May 2008, pp. 10 and 14. NIA, para 15.

11 NIA, paras 12 and 13.

- 3.12 Each country may require that an application for assistance, its contents and related documents, and the granting of assistance be kept confidential (Articles 7(1) and 7(2)). The Treaty requires that information and evidence obtained under the Treaty not be used for purposes other than those stated in the request without the prior consent of the Requested State (Article 7(3)).<sup>12</sup>

## **Implementation**

- 3.13 Article 24 of the Treaty provides that the Treaty shall enter into force 30 days after the exchange of instruments of ratification. Before Australia can exchange instruments of ratification, regulations need to be made under the Mutual Assistance Act to implement the Treaty.<sup>13</sup>
- 3.14 Section 7 of the Mutual Assistance Act provides that regulations may provide that the Act applies to a foreign country subject to any Mutual Assistance treaty between Australia and that country.<sup>14</sup>

## **Police-to-police cooperation and other information exchanges**

- 3.15 The Committee is aware that mutual assistance in criminal matters is often confused with assistance provided under police-to-police cooperation arrangements. Mutual assistance arrangements allow governments to make requests to another government to exercise coercive powers to obtain evidence or information for the purposes of an investigation or a prosecution. There are also a range of other agency-to-agency relationships, which are usually done in the form of a memorandum of understanding for the essentially voluntary exchange of information.<sup>15</sup>
- 3.16 The Committee has previously expressed concern that investigations for some crimes in particular countries can only result in a limited number of outcomes, for example, successful drug trafficking investigations are very likely to result in the death penalty in particular countries.<sup>16</sup>

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12 NIA, para 18.

13 NIA, para 2

14 NIA, para 19.

15 JSCOT Report 79, p.20.

16 JSCOT Report 79, p.22.

- 3.17 Australia may attach conditions to the use of information provided through police-to-police agreements, however, the Committee understands from evidence received in earlier inquiries that this is not normal practice.<sup>17</sup>
- 3.18 In evidence to the Committee, Civil Liberties Australia expressed its concerns and noted previous comments by the Committee in relation to this issue:
- In relation to intelligence and data exchange, we wish to revisit our continuing contention that the AFP should be formally restrained by words in this type of treaty and/or by formal instruction from the minister. We believe the AFP should not be permitted to pass on intelligence against Australian citizens which might result in their being subjected to the death penalty in a foreign nation if the intelligence in question or other information available to the AFP means that the Australian citizen could be charged in Australia with a similar or related offence. We believe that JSCOT should require words to be drafted so that future treaties and AFP guidelines reflect JSCOT and CLA's concerns.<sup>18</sup>
- 3.19 These issues may arise in the context of police-to-police relationships and in relation to other intelligence sharing arrangements. In this regard it also should be noted that Australia has concluded memoranda of understanding on cooperation on counter-terrorism activities with thirteen countries: Indonesia, the Philippines, Malaysia, Cambodia, Thailand, Brunei, Fiji, Papua New Guinea, East Timor, India, Pakistan, Afghanistan and Turkey. The texts of these memoranda of understanding are all security classified and not in the public domain.<sup>19</sup>
- 3.20 While this is an issue separate from consideration of the terms of the Mutual Assistance Treaty with the UAE, the Committee remains concerned that information shared lawfully through police-to-police assistance or other intelligence and security cooperation arrangements may result in the imposition of the death penalty.

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17 JSCOT Report 79, p. 22.

18 Mr Bill Rowlings, *Transcript of Evidence*, 8 May 2008, pp. 3-4.

19 See <http://www.dfat.gov.au/globalissues/terrorism.html> and answer to Question on Notice 1813, 10 August 2005, House of Reps *Hansard* p. 256.

- 3.21 After careful consideration, and reflecting on this Committee's predecessors' inquiries relating to Mutual Assistance and other arrangements (*See Reports 79, 84 and 87*), the Committee has concluded that there should be a general review of Australian policy and procedures concerning police-to-police cooperation and other information exchanges, including intelligence sharing arrangements, with a view to developing new instructions to regulate police-to-police and other assistance arrangements not governed by agreements at the treaty level. The instructions should prevent the exchange of information with another country if doing so would expose an Australian citizen to the death penalty.
- 3.22 In view of the agencies and issues involved, a review of the current policy and procedures would appropriately be undertaken by the Parliamentary Joint Committee on Intelligence and Security.

## **Costs**

- 3.23 Under Article 21(2) of the Treaty, the Requested State will meet all ordinary costs of fulfilling a request for assistance. The Requesting State shall bear the expenses associated with:
- conveying any person to or from the Requested State and any fees, allowances or expenses payable to that person while in the Requesting State for the purpose of providing evidence, testimony or assistance with an investigation;
  - conveying custodial or escorting officers;
  - the establishment and operation of electronic communication facilities, and the interpretation of proceedings;
  - service of documents when such expenses are imposed in accordance with the law of the Requested State; and
  - exceptional expenses in fulfilling the request, following consultation between the States.
- 3.24 Requests for Mutual Assistance are to be made through diplomatic channels to a designated Central Authority, in Australia the Commonwealth Attorney-General's Department. Departmental expenses incurred in making and receiving requests for Mutual Assistance will be met from existing Departmental funds.

## Consultation

- 3.25 The State and Territory Governments have been consulted through the Commonwealth-State/Territory Standing Committee on Treaties. Information on the negotiation of the Treaty was provided to State and Territory representatives for consideration at its meetings on 27 September 2006 and 18 May 2007. No requests for further information or comments on the Treaty were received.<sup>20</sup>
- 3.26 Negotiations with the UAE about the Treaty were not in the public domain as Australia follows the international practice that a bilateral treaty remains confidential to the parties until is signed. As the Treaty will operate within the existing framework set out in the Mutual Assistance Act and is based on the model bilateral Mutual Assistance treaty, no wider consultations were conducted.<sup>21</sup>

## Conclusions and recommendation

- 3.27 The Committee recognises the importance of international cooperation in combating transnational crime and strongly supports the establishment of a framework which will ensure Australia and the UAE can provide and receive timely assistance in accordance with clearly defined and mutually agreed terms. However, the Committee remains concerned about the adequacy of the current arrangements for ensuring that police-to-police cooperation and other information exchanges outside formal Mutual Assistance Arrangements, including intelligence sharing arrangements, do not expose Australian citizens to the death penalty.

### Recommendation 5

**The Committee supports the *Treaty between Australia and the State of the United Arab Emirates on Mutual Legal Assistance in Criminal Matters* and recommends that binding treaty action be taken.**

20 NIA, Consultation, p.1.

21 NIA, Consultation, p.2.



## **Recommendation 6**

**The Committee recommends that the Parliamentary Joint Committee on Intelligence and Security be asked to undertake a general review of Australian policy and procedures concerning police-to-police cooperation and other information exchanges, including intelligence sharing arrangements, with a view to developing new instructions to regulate police-to-police and other assistance arrangements not governed by agreements at the treaty level. The instructions should prevent the exchange of information with another country if doing so would expose an Australian citizen to the death penalty.**

