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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MUTUAL ASSISTANCE IN CRIMINAL MATTERS BILL 1986

EXPLANATORY MEMORANDUM

(Circulated by the Authority of the Attorney-General

The Honorable Lionel Bowen M.H.R.)

## MUTUAL ASSISTANCE IN CRIMINAL MATTERS BILL 1986

### GENERAL OUTLINE

This Bill provides a legislative basis for Australia to enter into arrangements with other countries whereby it can request and grant assistance in criminal matters. The assistance relates to the investigation and prosecution of crime.

At present assistance between Australia and other countries is rendered informally through Interpol and is limited to investigations. Australia can take evidence with the aid of compulsory measures under its extradition legislation but this is done unilaterally and brings about no obligation on the other country to reciprocate.

This Bill will provide legislative authority for Australia to give effect to obligations which it will be undertaking with other countries in the area of mutual assistance. When Australia concludes arrangements with other countries those countries will be obliged under international law to render assistance at the request of Australia.

As presently drafted this Bill does not deal with the freezing or confiscation of the proceeds of crimes committed in foreign countries. A part dealing with this area of mutual assistance will be inserted when legislation dealing with the freezing and confiscation of the proceeds of crimes is introduced into the Parliament.

### FINANCIAL IMPACT STATEMENT

This legislation will not involve significant expenditure in the short term except for expenditure involved in the negotiation of treaties which is already included in the

Attorney-General's Department appropriation for this financial year. As mutual assistance treaties and other arrangements come into operation over time there will be expenditure involved in making and carrying out requests for mutual assistance. This expenditure will be shared between the Commonwealth and the States and, so far as the Commonwealth is concerned, will be dealt with as part of the budget process in future financial years.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clause 1 - Short Title

Formal

Clause 2 - Commencement

The legislation will come into operation on a date or dates to be fixed by Proclamation.

Clause 3 - Interpretation

This is a definitional clause.

Clause 4 - Act to extend to external Territories

Self-explanatory.

Clause 5 - Object of Act

This clause makes it clear that the object of the Act is to facilitate the provision of and the obtaining by Australia of assistance in relation to the investigation and prosecution of crime. The various possible heads of assistance are listed. It should be noted that not all these heads of assistance require legislative provisions in the substantive parts of the Act [e.g. location and identification of witnesses or suspects]. Those heads of assistance together with the heads of assistance covered under this Bill will be provided for in treaties and other arrangements under the Act.

Clause 6 - Act not to limit other provision of assistance

This clause makes it clear that the Act will not limit mutual assistance provided or obtained by Australia by means other than those provided for in treaties and other arrangements under the Act [e.g. through Interpol].

Clause 7 - Application of Act

Generally speaking assistance pursuant to the Act may only be granted if the Act has been applied to a foreign country by Regulations [Part 11 of the Act is the exception]. The Act shall only be applied to a foreign country if -

- . that country and Australia have entered into a mutual assistance treaty;
- . the country is a Commonwealth country [Commonwealth countries agreed to a Scheme in Harare earlier this year whereby mutual assistance will be reciprocally provided between Commonwealth Countries]; or
- . the foreign country can provide reciprocity of treatment.

Regulations applying the Act to a foreign country may provide that the Act applies to the foreign country subject to exceptions, conditions or qualifications.

Clause 8 - Refusal of assistance

Sub-clause (1) sets out the circumstances in which the Attorney-General is obliged to refuse assistance to a foreign country. Sub-clause 8(2) sets out the circumstances in which the Attorney-General has a discretion to refuse assistance to a foreign country. This clause is included to ensure that Australian interests are safeguarded and that no injustice or oppression is caused to individuals.

Clause 9 - Assistance may be provided subject to conditions

This clause is intended to permit the provision of assistance subject to conditions which are necessary to protect any national or individual interest. An example of such a condition would be a requirement of confidentiality.

Clause 10 - Requests by Australia

This clause makes it clear that requests for assistance may only be made by the Attorney-General or his delegate. A Central Office within the Attorney-General's Department will be established to process and monitor all requests made by and of Australia. The role of the Central Office will be similar to the present role of the Attorney-General's Department in relation to extradition.

PART II - TAKING OF EVIDENCE AND PRODUCTION OF DOCUMENTS OR  
OTHER ARTICLES IN RESPECT OF CRIMINAL PROCEEDINGS IN FOREIGN  
COUNTRIES

Clause 11 - Power to obtain evidence, documents or other  
articles in respect of criminal proceedings in foreign  
countries

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This clause empowers the Attorney-General to authorize an Australian Magistrate to take evidence and have documents and articles produced for the purpose of transmission to a foreign country for the purposes of a proceeding relating to a criminal matter in that foreign country. 'Criminal matter' is defined in the interpretation clause [clause 3] to comprehend revenue matters, and proceedings for freezing and confiscation and recovery of pecuniary penalties as well as proceedings in relation to offences.

The procedures in this clause may be used whether or not the Act applies to the foreign country. This is consistent with existing provisions in the Australian extradition legislation which will be repealed in a separate Bill.

Sub-clause (2) sets out the procedures to be followed by a Magistrate in taking the evidence etc.

Sub-clause (3) permits the person to whom the proceeding relates to be present or represented and that fact to be recorded.

Sub-clause (4) permits the Magistrate to use the relevant compulsory powers of the jurisdiction in which the evidence etc is being taken to require the attendance of witnesses. This sub-clause also ensures that the witness will have the same protections as a witness in a domestic proceeding.

Sub-clause (5) provides that the person to whom the proceeding relates cannot be compelled to give evidence.

Sub-clause (6) makes it clear that the procedures of the clause cannot be used when the documents are publicly available. In such a case they would simply be made available administratively.

### PART III ASSISTANCE IN RELATION TO SEARCH AND SEIZURE

#### Clause 12 - Requests by Australia for search and seizure

This clause permits the Attorney-General to request a foreign country to search and seize for things in that country which may be relevant to a serious offence [i.e. an offence carrying twelve months imprisonment or more] alleged or likely to be

committed in Australia. The clause is limited to serious offences since it is not considered appropriate to seek such assistance for minor offences.

Clause 13 - Requests by foreign countries for Search and Seizure

This clause provides for a foreign country to request search and seizure in Australia. Where such a request is made the Attorney-General may, in his discretion, apply to a Magistrate to issue a search warrant. The Magistrate in turn must be satisfied that there are reasonable grounds to believe that -

- . a criminal proceeding, as defined in sub-clause 9, has commenced in the foreign country; and
- . there may be a thing relevant to these criminal proceedings in Australia,

before issuing a warrant.

Sub-clause (5) provides for the warrant to state relevant facts in relation to its execution.

Sub-clause (6) provides that where another thing that is relevant to a foreign or domestic proceeding or prosecution is found in the course of a search that thing may also be seized.

Sub-clause (7) provides for the Attorney-General to direct how things seized are to be dealt with or for a police officer, in the case of a thing relevant to a State proceeding, to deal with the thing in accordance with the law of the State.

Sub-clause (8) provides for notice to be given of basic information in relation to the search.



Clause 14 - Hindering execution of a search warrant

This clause provides for an offence of hindering a police officer in execution of a search warrant under the Act.

PART IV - ARRANGEMENTS FOR PERSONS TO GIVE EVIDENCE

Division 1 - Requests by Australia

Clause 15 - Requests for removal of certain persons to Australia

This clause permits the Attorney-General to request a foreign country to transfer one of its prisoners to Australia to give evidence.

Clause 16 - Arrangements between Attorney-General and State Ministers in relation to custody of persons

This clause is necessary since foreign prisoners transferred to Australia will need to be kept in custody in State gaols. It should also be noted that the States and the Northern Territory will be enacting legislation to permit such prisoners to be so kept in custody.

Clause 17 - Custody of certain prisoners

This clause provides the legal authority to keep a foreign prisoner in custody in Australia.

Clause 18 - Certain prisoners brought to Australia not to be prosecuted or detained for offences acts or omissions that occurred prior to departure from foreign country

This 'safe-conduct' provision ensures that any person [whether a foreign prisoner or not] who comes to Australia to give evidence shall not be prosecuted for an offence committed in Australia prior to the person's departure from the foreign country. Without this protection a witness might not consent to give evidence.

Clause 19 - Limitation on use of evidence given by certain prisoners

This clause provides in effect that a person who comes to Australia to give evidence shall not have the evidence given used against the person except in the situation where the person commits perjury. It is in effect an indemnity provision and is considered necessary to facilitate the consent of foreign persons to give evidence.

Clause 20 - Conditions of Imprisonment

This clause applies the relevant laws of the State where the prisoner is kept in custody to that prisoner while the prisoner is in custody in Australia.

Clause 21 - Release of certain persons upon request by foreign country

This clause permits the release of a foreign prisoner in Australia if the foreign country so requests. It is intended to cover the situation where the person's sentence expires while in Australia.

Clause 22 - Arrest of person who has escaped from custody

This clause permits the arrest and return to custody of a foreign prisoner who escapes while in Australia.

Division 2 - Requests by foreign countries

Clause 23 - Requests for giving of evidence at hearings in foreign countries

Sub-clause (1) permits the Attorney-General, in his discretion, to direct that a federal prisoner be released from custody to give evidence in a foreign country. The Attorney-General is also empowered to make arrangements for the travel of the prisoner in custody and, in the case of parolees, to vary the conditions of parole, to permit the transfer of the person to this foreign country.

The powers in sub-clause (1) extend to federal prisoners who are also State prisoners. The sub-clause does however recognise that in those cases State approval will be required in addition to a direction from the Attorney-General for such persons to be released or have their conditions of parole varied.

The release of State prisoners and, in the case of State parolees, the variation of parole orders to permit these persons to give evidence overseas, are matters for State approval.

Complementary State legislation will be required to facilitate the transfer of joint Federal/State prisoners and State prisoners.

A prisoner may not be transferred pursuant to this sub-clause (1) -

- . unless the prisoner consents; and
- . unless the foreign country gives adequate undertakings in respect of matters specified in sub-clause (3).

Sub-clause (2) permits the Attorney-General to make arrangements for the travel of any person [other than a prisoner] to a foreign country to give evidence if

- . the person consents; and
- . adequate undertakings in respect of the matters specified in sub-clause (3) are given.

The matters specified in sub-clause (3) are directed to ensuring that the person -

- . will be immune from civil or criminal suit in the foreign country;
- . will not have the evidence the person gives used against that person;
- . will, if the person is a prisoner, not be released unless the Attorney-General so requests; and
- . will, if the person is a prisoner, and if released at Australia's request, [if for instance the sentence expires whilst the person is in the foreign country] be accommodated and paid expenses pending completion of proceedings in the foreign country.

Article 24 - Effect of removal to foreign country on  
prisoner's term of imprisonment

This clause in effect gives a prisoner credit for time spent in custody overseas.

PART V - CUSTODY OF PERSONS IN TRANSIT

Clause 25 - Transit

Sub-clause (1) permits the Attorney-General to direct that a prisoner, who is being transported from one foreign country to another foreign country through Australia to give evidence, be kept in custody in Australia during the course of the person's transportation. The clause is only operative if the Act applies to at least one of the foreign countries concerned.

Sub-clause (2) permits the Attorney-General to direct that the person being held in custody in Australia pursuant to sub-clause (1) be released if the person's transportation is not continued within a reasonable time.

Clause 26 - Arrest of person in transit

This clause permits the arrest and return to custody of a person who escapes after the Attorney-General has directed that the person be kept in custody pursuant to clause 25.

PART VI - SERVICE OF DOCUMENTS

Clause 27 - Service of Documents

This clause permits the Attorney-General to arrange for the service of process in Australia and for proof of the service of Australian process overseas.

PART VII - MISCELLANEOUS

Clause 28 - Arrangements with States

This clause permits the making of arrangements between the Commonwealth and the States for the administration of the Act and in particular to permit State Magistrates to perform functions under the Act.

Clause 29 - Delegation

This clause permits the Attorney-General to delegate his powers under the Act, apart from the power of delegation itself and powers under clause 8, to an officer of the Attorney-General's Department.

Clause 30 - Jurisdiction of Courts

This clause is necessary to permit Magistrates to deal with matters arising under the Act without those matters being removed to the High Court.

Clause 31 - Evidence

This clause is to facilitate proof that Australia and other countries are parties to treaties if the validity of the application of the Act pursuant to clause 7 is called in

question.

Clause 32 - Authentication of documents

Magistrates will have to examine foreign documentation in making decisions under the Act. This clause provides that such documentation will be admissible if authenticated by courts and officials of the foreign country concerned in the manner set out in sub-clause (2).

Clause 33 - Regulations

This clause provides for a regulation making power.

