

Treaty between Australia and the Kingdom of Thailand on Mutual Assistance in Criminal Matters

Introduction

- 2.1 The *Treaty between Australia and the Kingdom of Thailand on Mutual Assistance in Criminal Matters*, done at Kuala Lumpur, 27 July 2006 ('the Treaty') provides a formal framework for the provision of mutual assistance between Australia and Thailand. Mutual assistance treaties allow Australia to provide and obtain formal assistance in criminal investigations and prosecutions.¹ Mutual assistance treaties are also used to recover the proceeds of crime.²

Background

- 2.2 Australia has mutual assistance treaties with 26 other countries and is also party to a number of multilateral treaties that impose mutual assistance obligations.³

1 National Interest Analysis (NIA), para. 4.

2 NIA, para. 4.

3 NIA, para. 3.

- 2.3 The Mutual Assistance Treaty with Thailand is based on Australia's model mutual assistance treaty and the provisions of the *Mutual Assistance in Criminal Matters Act 1987* (Cth) ('the Mutual Assistance Act').

Australia and Thailand already enjoy a close and supportive bilateral relationship with a long history of cooperation in areas of law enforcement and counter-terrorism.⁴

The Mutual Assistance Treaty with Thailand

- 2.4 The key obligation of the Treaty is the commitment to grant the widest measure of mutual assistance in connection with investigations, prosecutions and other proceedings relating to criminal matters, irrespective of whether the assistance is sought to be provided by a court or some other authority.⁵
- 2.5 The Treaty specifies that a criminal matter includes matters connected with offences against a law relating to taxation, customs, and excise duties, foreign exchange control and other revenue matters.⁶ The Treaty does not apply to military offences which are not also offences under the ordinary criminal law.⁷
- 2.6 Under the Treaty, mutual assistance may include:
- Taking of testimony and statement and producing evidence and obtaining statements of persons (Article 9)
 - Providing records of government offices or agencies (Article 10)
 - Serving documents (Article 12)
 - Executing requests for searches, seizures and delivery of articles (Article 13)
 - Arranging for people to give evidence or to assist in criminal investigations in the Requesting State, including the temporary transfer of people in custody for this purpose (Articles 14 and 17);

4 Mr Steven Marshall, *Transcript of Evidence*, 18 June 2007, p. 29.

5 NIA, para. 9; Article 1 of the Treaty.

6 NIA, para. 10; Article 1(2) of the Treaty.

7 NIA, para. 10; Article 1(7) of the Treaty.

- Locating and identifying persons or objects (Article 15)
- Locating, restraining or forfeiting instruments or proceeds of crime (Article 16); and
- Providing other assistance consistent with the objects of the Treaty and the law of the Requested State (Article 1(3)(h)).

2.7 Information and evidence received under the Treaty must not be disclosed or used for purposes other than those stated in the request without the prior consent of the Requested State.⁸ In addition, both Australia and Thailand can require that a mutual assistance request be kept confidential.⁹

Grounds for refusing a request

2.8 The Treaty contains mandatory and discretionary grounds for refusing a mutual assistance request. The mandatory grounds, included in Article 2(1) oblige a Requested State to refuse to provide assistance if:¹⁰

- The request would prejudice the sovereignty, security, national interest or other essential interest of the Requested State.
- The request relates to a political offence;
- The request is based on a person's race, sex, religion, nationality or political opinions;
- The request relates to an offence for which the person has already been acquitted or pardoned, or has served the sentence imposed.

2.9 The discretionary grounds for refusal, provided in Article 2(2) of the Treaty, allows a request for mutual assistance to be refused if the request relates to:¹¹

- Acts or omissions which are not an offence under the laws of the Requested State;

8 NIA, para. 20; Article 8 of the Treaty.

9 NIA, para. 20; Articles 8(2) and 8(3) of the Treaty.

10 See NIA para. 13.

11 See NIA para. 14.

- An extraterritorial offence which is not an extraterritorial offence under the laws of the Requested State;
- An offence which could no longer be prosecuted in the Requested State because of the lapse of time;
- The provision of assistance that could prejudice an investigation or proceeding in the Requested State;
- The provision of assistance could prejudice the safety of any person in the Requested State;
- The provision of assistance could impose an excessive burden on the resources of the Requested State.

2.10 The Committee received a submission from Dr Ben Saul suggesting that it would be more appropriate for Australia to *mandatorily* rather than *discretionarily* refuse assistance where a request is made with regard to an offence punishable by the death penalty.¹²

2.11 The Committee has considered issues relating to the provision of mutual assistance and the death penalty in prior reports.¹³ It is the Committee's view that appropriate safeguards should be in place to protect against the imposition of the death penalty. However, the discretion provided under the Agreement in these instances is also valuable and marks an appropriate balance between the safeguards and the practical demands and benefits of providing mutual assistance.

2.12 Article 2(2)(e) of the Treaty entitles Thailand to refuse a mutual assistance request on the basis of reciprocity where Australia has refused a mutual assistance request based on the death penalty. The Committee was informed that none of Australia's other bilateral mutual assistance treaties have a similar provision:

No, it is not in any of our bilateral mutual assistance treaties. I suppose it is a novel provision in terms of Australia's treaty approach. One of the reasons it was undertaken was that the Thai government were concerned that, with the range of offences subject to the death penalty within their jurisdiction, it might end up being a situation of imbalance. Part of the approach in negotiations to overcome that was to provide a

12 Dr Ben Saul, *Submission 5*.

13 See JSCOT Report 79 which discusses the Australia – Malaysia Mutual Assistance in Criminal Matters Agreement and JSCOT Report 83, at paras 4.19-4.26, which discusses the value of intelligence cooperation.

basis upon which, if Thailand were concerned about a continual refusal on that basis, they could then, in effect, treat like with like.¹⁴

Benefits of the Treaty

- 2.13 A framework for formal mutual assistance requests between Australia and Thailand is important in combating transnational crime:

Ratifying the Treaty will ensure that Australia can provide, request and receive mutual assistance to and from the Kingdom of Thailand in accordance with clearly defined and mutually agreed terms.¹⁵

- 2.14 The Treaty has specific advantages over the exchange of mutual assistance outside of the bilateral treaty framework:

We have been providing or exchanging mutual assistance with Thailand for a considerable period of time. That has proceeded relatively well. One of the advantages of a treaty is that it codifies and clarifies the respective abilities of each state to provide assistance and it also provides obligations in a treaty level document.¹⁶

- 2.15 The Committee was informed that the types of mutual requests expected under the Treaty would probably relate to transnational crime and drugs:

I think there would be a fair degree of interest in requests which might relate to, obviously, transnational crime – that may include drug related matters. It may also include other matters of a transnational dimension such as people smuggling, trafficking in women and children and the like. We have a fairly strong relationship with Thailand both at a police-to-police level and a government-to-government level in terms of cooperating across the gamut of criminal activities. I think the key ones of interest to Australia would

14 Mr Steven Marshall, *Transcript of Evidence*, 18 June 2007, p. 30.

15 NIA, para. 8.

16 Mr Steven Marshall, *Transcript of Evidence*, 18 June 2007, p. 32.

be those which have that transnational component for obvious reasons.¹⁷

Implementation

- 2.16 The Treaty will be implemented through regulations passed under the Mutual Assistance Act.¹⁸ Section 7 of the Mutual Assistance Act states that if a treaty is enacted by way of regulations the Act applies subject to the limitations, conditions, exceptions or qualifications that are necessary to give effect to the Treaty.¹⁹
- 2.17 Mutual assistance requests are to be made through the designated central authority and, under Article 3(3), Australia's central authority is identified as the Commonwealth Attorney-General's Department.²⁰

Costs

- 2.18 Article 7 of the Treaty details the responsibility for costs for fulfilling mutual assistance requests and in general, the costs of fulfilling an ordinary mutual assistance request will be assumed by the Requested State.²¹

Conclusion and recommendation

- 2.19 The Committee supports the Treaty with Thailand as it provides a formal framework through which assistance can be provided, received and requested between Australia and Thailand.

17 Mr Steven Marshall, *Transcript of Evidence*, 18 June 2007, p. 32.

18 NIA, para. 21.

19 NIA, para. 21.

20 NIA, para. 23.

21 Article 7(1) of the Treaty; NIA, para. 22.

Recommendation 1

The Committee supports the *Treaty between Australia and the Kingdom of Thailand on Mutual Assistance in Criminal Matters, Kuala Lumpur, 27 July 2006*, and recommends that binding treaty action be taken.

