



Mutual Assistance in Criminal Matters (India) Regulations 2010¹

Select Legislative Instrument 2010 No. 197

I, QUENTIN BRYCE, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following Regulations under the *Mutual Assistance in Criminal Matters Act 1987*.

Dated 8 July 2010

QUENTIN BRYCE
Governor-General

By Her Excellency's Command

BRENDAN O'CONNOR
Minister for Home Affairs

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1 Name of Regulations

These Regulations are the *Mutual Assistance in Criminal Matters (India) Regulations 2010*.

2 Commencement

These Regulations commence on the day on which the Treaty between Australia and the Republic of India on Mutual Legal Assistance in Criminal Matters, done at Canberra in Australia on 23 June 2008, enters into force.

3 Definitions

In these Regulations:

Act means the *Mutual Assistance in Criminal Matters Act 1987*.

India means the Republic of India.

4 Application of Act

For paragraph 7 (2) (a) of the Act, the Act applies to India subject to the Treaty between Australia and the Republic of India on Mutual Legal Assistance in Criminal Matters, done at Canberra in Australia on 23 June 2008, a copy of which is set out in Schedule 1.

Schedule 1 Treaty between Australia and the Republic of India on Mutual Legal Assistance in Criminal Matters, done at Canberra in Australia on 23 June 2008

(regulation 4)

TREATY
BETWEEN AUSTRALIA AND THE REPUBLIC OF INDIA
ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

Australia and the Republic of India (hereinafter referred to as the 'Contracting States');

Desiring to make more effective the cooperation between the two countries in combating crimes, including offences related to terrorism, through mutual legal assistance;

Have agreed as follows:

ARTICLE 1
SCOPE OF APPLICATION

1. The Contracting States shall, in accordance with this Treaty, provide each other with the widest measure of mutual legal assistance in criminal matters.
2. Mutual legal assistance is any assistance given by the Requested State in respect of investigations, prosecutions or other proceedings in criminal matters in the Requesting State, irrespective of whether the assistance is sought or is to be provided by a court or some other authority.

ARTICLE 2
DEFINITIONS

For the purpose of this Treaty-

1. Criminal matters means investigations, inquiries, trials or other proceedings relating to statutory or common law offences, including those relating to forfeiture, confiscation and restraint of property and imposition of pecuniary penalties, in respect of such an offence.
2. Criminal matters shall include investigations, prosecutions or proceedings relating to offences concerning taxation, duties, customs, foreign exchange and other revenue matters.
3. Mutual legal assistance includes:-
 - (a) taking of evidence and obtaining of statements of persons including the execution of letters rogatory;
 - (b) provision of information, documents and other records;
 - (c) location and identification of persons and objects;
 - (d) execution of requests for search and seizure;
 - (e) measures to locate, restrain and forfeit the proceeds and instruments of crime;
 - (f) seeking the consent of persons to be available to give evidence or to assist in investigations in the Requesting State and, where such persons are in custody, arranging for their temporary transfer to that State;
 - (g) service of documents, including judicial documents; and
 - (h) other assistance consistent with the objects of this Treaty which is not inconsistent with the laws of the Requested State.
4. Mutual legal assistance shall not include:-
 - (a) the extradition of any person;
 - (b) the execution in the Requested State of criminal judgments imposed in the Requesting State except to the extent permitted by the law of the Requested State and this Treaty; and

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- (c) the transfer of persons in custody to serve sentences.

ARTICLE 3
COMPATIBILITY WITH OTHER TREATIES

This Treaty shall not derogate from obligations subsisting between the Contracting States whether pursuant to other Treaties or arrangements or otherwise nor prevent the Contracting States providing assistance to each other pursuant to other treaties or arrangements or otherwise.

ARTICLE 4
CENTRAL AUTHORITIES

1. The Central Authorities shall transmit and receive all requests for the purposes of this Treaty.
2. The Central Authority for Australia is the Attorney-General's Department and for the Republic of India is the Ministry of Home Affairs. Either Contracting State shall notify the other of any change of its Central Authority.
3. The Central Authorities shall arrange for the prompt execution of such requests. The Central Authorities may communicate with one another for the purposes of this Treaty.

ARTICLE 5
REFUSAL OR POSTPONEMENT OF ASSISTANCE

1. Assistance shall be refused if the request relates to the prosecution of a person for a military offence, which is not also an offence under the general criminal law.
2. Assistance may be refused if the request relates to the prosecution of a person for an offence that is regarded by the Requested State as an offence of a political character. For the purposes of this Treaty the following offences shall not be regarded as offences of a political character:
 - (a) an offence in respect of which the Contracting States have an obligation to provide mutual legal assistance under a

multilateral/international treaty or convention to which both Contracting States are parties;

- (b) an offence in respect of the taking or attempted taking of the life of a Head of State, Head of Government, or a member of that person's family;
- (c) murder, culpable homicide or manslaughter;
- (d) an offence involving firearms, explosives, incendiaries, destructive devices or substances, causing death, grievous bodily harm or serious damage to property;
- (e) any other offence related to terrorism which at the time of the request is, under the law of the Requested State, not to be regarded as an offence of a political character; or
- (f) conspiracy or attempt to commit, or participation in any of the foregoing offences.

3. Assistance may be refused if:

- (a) the request relates to the prosecution of a person for an offence in respect of which the person has been tried and finally dealt with or pardoned;
- (b) the Requested State has substantial grounds to believe that the request for assistance has been made for the purpose of prosecuting a person on account of that person's race, sex, religion, nationality or political opinion or that person's position may be prejudiced for any of those reasons;
- (c) in the opinion of the Requested State, the execution of the request would impair its sovereignty, security, public order, essential public interest or prejudice the safety of any person; or
- (d) the request relates to the prosecution of a person for an offence in respect of which the punishment which might be imposed on the person may prevent the Requested State from complying under its domestic laws.

4. The Requested State may consider granting assistance in the absence of dual criminality.

5. Assistance may be postponed by the Requested State if execution of the request would interfere with an ongoing investigation, prosecution or other proceedings in the Requested State.

6. Before refusing a request for assistance or before postponing the execution of a request, the Requested State shall consider whether assistance may be provided subject to such conditions as it deems necessary. If the Requesting State accepts assistance subject to those conditions, it shall comply with them.

ARTICLE 6 CONTENTS OF REQUESTS

1. Requests for assistance shall include:
- (a) the purpose of the request and a description of the assistance sought;
 - (b) the name of the competent authority conducting the investigation or proceedings to which the request relates;
 - (c) a description of the nature of the investigation, prosecution or proceedings, a summary of the facts and a copy of the applicable laws;
 - (d) the degree of confidentiality required and the reasons therefore;
 - (e) any time limit within which the request should be executed;
 - (f) details of any particular procedure or requirement that the Requesting State wishes to be followed, including a statement as to whether sworn or affirmed evidence or statements are required and a description of the subject matter of the evidence or statements sought; and
 - (g) the court order, if any, sought to be enforced and a statement to the effect that it is a final order.

2. Requests for assistance, to the extent necessary and insofar as possible, shall also include;

- (a) the identity, nationality and location of the person or persons who are the subject of, or who may have information relevant to, the investigation, prosecution or other proceeding;
- (b) in the case of requests for the taking of evidence, search and seizure, or the location, restraint or forfeiture of proceeds or instruments of crime, a statement indicating the basis for belief that evidence or proceeds may be found in the Requested State;
- (c) in the case of lending of exhibits, the current location of the exhibits in the Requested State and an indication of the person or class of persons who will have custody of the exhibits in the Requesting State, the place to which the exhibit is to be removed, any tests to be conducted and the date by which the exhibit will be returned;
- (d) information as to the allowances and expenses to which a person appearing in the Requesting State will be entitled;
- (e) in the case of making detained persons available, an indication of the person or class of persons who will have custody during the transfer, the place to which the detained person is to be transferred and the probable date of that person's return; and
- (f) in the case of requests in respect of proceeds of crime or search and seizure, a statement describing the basis of belief that the money or property are the proceeds of crime or are liable for search and seizure.

3. If the Requested State considers that the information is not sufficient to enable the request to be executed, it may request additional information to enable the request to be dealt with.

ARTICLE 7 LANGUAGE

1. Requests shall be submitted in the English language.

2. Supporting documents, if not in the English language, shall be accompanied by an English translation.

ARTICLE 8 EXECUTION OF REQUESTS

1. A request for assistance may be in writing. However in urgent circumstances a request may be made by any means capable of producing a written record under conditions allowing the Requested State to establish authenticity. In such cases the Requesting State shall confirm the request in writing promptly thereafter unless the Requested State agrees otherwise.

2. Requests for assistance shall be executed promptly in accordance with the law of the Requested State and, insofar as not prohibited by that law, in the manner specified by the Requesting State.

3. The Requested State may, upon request, inform the Requesting State of the date and place of execution of the request for assistance.

4. The Requested State shall not refuse to execute a request on the ground of bank secrecy.

5. The Requested State shall promptly inform the Requesting State of its decision not to comply in whole or in part with a request for assistance, or to postpone execution, and shall give reasons for that decision.

6. The Requested State may postpone the delivery of material requested if such material is required for proceedings in respect of criminal or civil matters in that State. The Requested State shall, upon request, provide certified copies of documents.

7. The Requested State shall promptly inform the Requesting State of circumstances, when they become known to the Requested State, which are likely to cause a significant delay in responding to the request.

ARTICLE 9
RETURN OF MATERIAL TO REQUESTED STATE

The Central Authority of the Requested State may require that the Central Authority of the Requesting State return any items, including documents and records, furnished to it in execution of a request under this Treaty.

ARTICLE 10
CONFIDENTIALITY

1. The Requesting State may require that the request, its contents, supporting documents and any action taken pursuant to the request be kept confidential. If the request cannot be executed without breaching the confidentiality requirement, the Requested State shall so inform the Requesting State prior to executing the request and the latter shall then determine whether the request should nevertheless be executed.
2. The Requesting State, if so requested, shall keep the information and evidence provided by the Requested State confidential, except to the extent that the evidence and information is needed for the investigation and proceeding described in the request.
3. The Requesting State shall not disclose or use information or evidence furnished for purposes other than those stated in the request, without the prior consent of the Requested State.

ARTICLE 11
SERVICE OF DOCUMENTS

1. The Requested State shall serve any document transmitted to it for the purpose of service.
2. A request to effect service of a document requiring the appearance of a person shall be made to the Requested State not less than forty five (45) days before the date on which the appearance is required. In urgent cases, the Requested State may waive this requirement.

3. The Requested State may effect service of any document by mail or, if the Requesting State so requests, in any other manner required by the law of the Requesting State which is not inconsistent with the law of the Requested State.

4. The Requested State shall return a proof of service in the manner required by the Requesting State. If service cannot be effected, the Requesting State shall be so informed and advised of the reasons.

ARTICLE 12 TAKING OF EVIDENCE

1. Where a request is made for the purpose of a proceeding in relation to a criminal matter in the Requesting State, the Requested State shall, upon request, take the evidence of witnesses, including from persons in custody, for transmission to the Requesting State. The Requesting State shall specify the subject matter about which the person is to be examined, including any questions to be asked.

2. For the purposes of this Treaty, the giving or taking of evidence shall include the production of documents, records or other material.

3. Subject to the law of the Requested State, officials of the Requesting State and persons concerned in the proceedings in the Requesting State may be permitted to be present when evidence is taken in the Requested State and to participate in the taking of such evidence in the manner as may be specified by the Requested State.

4. Persons permitted to participate in the taking of evidence may suggest questions to be put to the person whose evidence is to be taken. The Requested State will endeavour, subject to its laws and procedures, to arrange for the production of a transcript or recording of the proceedings, using any technical means.

5. A person who is required to give evidence in the Requested State under this Article may decline to give evidence where either:

- (a) the law of the Requested State permits that witness to decline to give evidence in similar circumstances in proceedings originating in the Requested State; or

(b) the law of the Requesting State permits that witness to decline to give evidence in such proceedings in the Requesting State.

6. If any person claims that there is a right to decline to give evidence under the law of the Requesting State, the Central Authority of that State shall, upon request, provide a certificate to the Central Authority of the Requested State as to the existence of that right. In the absence of evidence to the contrary, the certificate shall provide sufficient evidence as to the existence of that right.

ARTICLE 13 OBTAINING OF STATEMENTS OF PERSONS

1. The Requested State shall, upon request, endeavour to obtain statements of persons for the purpose of an investigation or proceeding in relation to a criminal matter in the Requesting State.

2. For the purposes of requests under this Article, the Requesting State shall specify the subject matter about which it seeks statements from persons including any questions which it seeks to put to the person.

ARTICLE 14 AVAILABILITY OF PERSONS IN CUSTODY TO GIVE EVIDENCE OR ASSIST IN INVESTIGATIONS

1. Upon request, a person serving a sentence or otherwise held in custody in the Requested State may be temporarily transferred to the Requesting State to assist investigations or to give evidence, provided that the person consents.

2. When the person transferred is required to be kept in custody under the law of the Requested State, the Requesting State shall hold that person in custody and shall return the person in custody at the conclusion of the execution of the request.

3. Where the Requested State advises the Requesting State that the transferred person is no longer required to be held in custody, that person shall be set at liberty and be treated as a person present in the Requesting State pursuant to a request seeking that person's attendance under Article 15.

ARTICLE 15
AVAILABILITY OF OTHER PERSONS TO GIVE
EVIDENCE OR ASSIST INVESTIGATIONS

1. The Requesting State may request the assistance of the Requested State in inviting a person to :
 - (a) appear as a witness in proceedings in relation to a criminal matter in the Requesting State unless that person is the person charged; or
 - (b) assist investigations in relation to a criminal matter in the Requesting State.
2. The Requested State shall, if satisfied that satisfactory arrangements for that person's security will be made by the Requesting State, invite the person to consent to appear as a witness in proceedings or to assist in the investigations. That person shall be informed of any expenses and allowances payable.

ARTICLE 16
SAFE CONDUCT

1. Subject to paragraph 2 where a person is in the Requesting State pursuant to a request made under Articles 14 or 15:-
 - (a) that person shall not be detained, prosecuted or punished in the Requesting State for any offence, nor be subject to any civil suit, being a civil suit to which the person could not be subjected if the person were not in the Requesting State, in respect of any act or omission which preceded the person's departure from the Requested State; and
 - (b) that person shall not, without that person's consent, be required to give evidence in any proceeding or to assist any investigation other than the proceeding or investigation to which the request relates.

2. Paragraph 1 of this Article shall cease to apply if a person, being free to leave the Requesting State, has not left within thirty (30) days after receiving official notification that the person's attendance is no longer required or, having left, has voluntarily returned.
3. A person appearing in the Requesting State pursuant to a request made under Articles 14 or 15 shall be subject to the law of that State relating to contempt, perjury and the making of false declarations.
4. Any person who fails to appear in the Requesting State may not be subjected to any sanction or compulsory measure in the Requested State.

ARTICLE 17
PROVISION OF PUBLICLY AVAILABLE DOCUMENTS
AND RECORDS

1. The Requested State shall provide copies of publicly available documents and records of Government departments and agencies.
2. The Requested State may provide copies of any official document or record in the same manner and under the same conditions as such document or record may be provided to its own law enforcement and judicial authorities.

ARTICLE 18
CERTIFICATION AND AUTHENTICATION

1. Documents, records or objects transmitted pursuant to this Treaty shall not require any form of authentication, except as required by the Requesting State.
2. Insofar as not prohibited by the law of the Requested State, documents, records or objects shall be provided in a form or accompanied by such certification as may be specified by the Requesting State in order to make them admissible according to the law of the Requesting State.

ARTICLE 19
SEARCH AND SEIZURE

1. The Requested State shall, in so far as its law permits, execute a request for search and seizure and delivery of material to the Requesting State.
2. Search and seizure shall be conducted by the Requested State to the same extent and under the same conditions as would apply to its own law enforcement and judicial authorities in accordance with its laws.
3. The Requested State shall provide such information as may be required by the Requesting State concerning, but not limited to, the identity, condition, integrity and continuity of possession of the documents, records or objects seized and the circumstances of the seizure.
4. The Requesting State shall observe any conditions imposed by the Requested State in relation to any seized material which is delivered to the Requesting State. Before imposing any such conditions, the Requested State shall consult the Requesting State.

ARTICLE 20
PROCEEDS AND INSTRUMENTS OF CRIME

1. The Requested State shall, upon request, endeavour to ascertain whether any proceeds or instruments of crime are located within its jurisdiction and shall notify the Requesting State of the results of its inquiries.
2. Where pursuant to paragraph 1 suspected proceeds or instruments of crime are found, the Requested State shall take such measures as are permitted by its law to prevent any dealing in, transfer or disposal of, those suspected proceeds or instruments of crime, pending a final determination in respect of those proceeds by a court of the Requesting State.
3. The Requested State shall, to the extent permitted by its law, give effect to a final order forfeiting or confiscating the proceeds or instruments of crime made by a court of the Requesting State.

4. In the application of this Article, the rights of bona fide third parties shall be respected under the law of the Requested State.

5. Proceeds or instruments forfeited or confiscated pursuant to this Treaty shall accrue to the Requested State, unless otherwise agreed.

ARTICLE 21 REPRESENTATION AND EXPENSES

1. Unless otherwise provided in this Treaty the Requested State shall make all necessary arrangements for the representation of the Requesting State in any proceedings arising out of a request for assistance and shall otherwise represent the interests of the Requesting State.

2. The Requested State shall meet the cost of executing the request for assistance, except that the Requesting State shall bear:-

- (a) the expenses associated with conveying any person to or from the territory of the Requested State, and any fees, allowances or expenses payable to that person whilst in the Requesting State pursuant to a request under Articles 14 or 15;
- (b) the expenses associated with escorting officers conveying a person including a person in custody; and
- (c) the expenses associated with the taking of evidence from the Requested State via video, satellite or other technological means.

3. If it becomes apparent that the execution of the request requires expenses of an exceptional nature, the Contracting States shall consult to determine the terms and conditions under which the requested assistance can be provided.

ARTICLE 22 CONSULTATION

The Contracting States shall consult promptly, at the request of either, concerning the interpretation, the application or the carrying out of this Treaty either generally or in relation to a particular case. The Central Authorities may also agree on such practical measures as may be necessary to facilitate the implementation of this Treaty.

ARTICLE 23
ENTRY INTO FORCE AND TERMINATION

1. The Contracting States shall inform each other in writing of the completion of their internal procedures required for entry into force of this Treaty. The Treaty shall enter into force thirty (30) days after the date of the latter communication.

2. This Treaty shall apply to requests whether or not the relevant acts or omissions occurred prior to this Treaty entering into force.

3. Either of the Contracting States may terminate this Treaty at any time by giving notice to the other through diplomatic channels; and if such notice is given the Treaty shall cease to have effect six (6) months after the receipt of the notice.

In witness whereof, the undersigned being duly authorized thereto by their respective Governments, have signed this Treaty.

Done in duplicate at Canberra this the twenty third day of June, two thousand and eight, in English and Hindi, both texts being equally authentic. In case of any divergence of interpretation, the English text shall prevail.

**For the Government of
Australia**

**For the Government of the
Republic of India**

.....
Hon Stephen Smith
Minister for Foreign Affairs

.....
Hon Pranab Mukherjee
Minister for External affairs

Note

1. All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See <http://www.frli.gov.au>.