

REPUBLIC OF VANUATU

BILL FOR THE MUTUAL ASSISTANCE IN CRIMINAL MATTERS (AMENDMENT) ACT NO. OF 2017

Explanatory Note

This Bill amends the Mutual Assistance in Criminal Matters Act [CAP 285] (Act), primarily to address deficiencies identified in Vanuatu's 2015 Asia/Pacific Group on Money Laundering mutual evaluation report (MER), which assessed Vanuatu's compliance against the FATF Recommendations,* and to ensure that Vanuatu is able to provide the broadest possible range of international assistance in criminal matters to foreign countries. A brief explanation of the key amendments is set out below.

Role of the Public Prosecutor

The Bill includes a provision which shifts the powers and functions to transmit, receive and execute requests for international assistance under the Act from the Attorney General to the Public Prosecutor.

Definitions

The Bill introduces new definitions for “appropriate authority” and “process”, to give meaning to existing and new provisions in the Act. The definition of “Foreign State” has been replaced with “foreign country”, which is the term used throughout the Act. Definitions of “serious offence” and “terrorist property” have been amended to ensure consistency with the Proceeds of Crime Act [CAP 284].

Authorising use of investigative powers

The Bill introduces a new section 6A, which extends the scope of international assistance Vanuatu can provide to foreign countries in criminal matters. This section allows the Public Prosecutor to authorise the use of a lawful investigative power in certain circumstances, and provided the use of the power complies with any other lawful requirement.

Refusal of assistance – Public Prosecutor’s Discretion

The Bill amends section 10 of the Act to clarify that, when the Public Prosecutor is determining whether a request for international assistance relates to conduct which would have constituted an offence against a law in Vanuatu, it does not matter whether the foreign country places the offence in the same category or uses the same name for the offence. This amendment addresses a deficiency identified in Vanuatu’s MER.

Arrangements for persons to give evidence or assist investigations

Travel of persons other than prisoners

The Bill introduces a new section 23A to clarify that the Public Prosecutor can request a foreign country to assist in arranging for a person, who is not a prisoner, to give evidence in a proceeding or give assistance in an investigation related to a criminal matter in Vanuatu. The person must consent to travel to Vanuatu to provide evidence or assistance. New subsection 25(1A) provides that the person will not be subject to penalty or liability if they refuse or fail to consent to attend.

Similarly, the Bill introduces a new paragraph 31(b) to clarify that a foreign country may request the attendance of a person, other than a prisoner, in the foreign country to give evidence or assist in an investigation about a criminal matter. New section 32A provides that the person to whom the request relates will not be subject to penalty or liability if they refuse or fail to consent to attend.

The amendments clarify the range of international assistance Vanuatu can request from and provide to a foreign country, and introduce protections for persons who refuse or fail to comply with a request.

Assistance in locating or identifying persons

The Bill introduces a new section 30A to provide that the Public Prosecutor can request assistance from a foreign country to locate or identify a person believed to be in the foreign country who might be concerned in, or could provide evidence or assistance relevant to, a criminal matter in Vanuatu. Similarly, new section 34A provides that a foreign country may request the Public Prosecutor to assist in locating or identifying a person who is believed to be in Vanuatu and sets out the process that the Public Prosecutor must follow.

The amendments clarify the range of international assistance Vanuatu can request from and provide to a foreign country.

Assistance in service of process

The Bill introduces a new section 30B, which provides that the Public Prosecutor may request a foreign country to assist in effecting service of any process for the purpose of, or in connection with, any criminal matter. This amendment clarifies the range of international assistance Vanuatu can request from a foreign country.

Similarly, new section 34B provides that a foreign country may request the Public Prosecutor to assist in effecting service of process on a person in Vanuatu and sets out the process that the Public Prosecutor must follow. This amendment clarifies the range of international assistance Vanuatu can provide to a foreign country. The section provides that a person in Vanuatu will not be subject to penalty or liability if they refuse or fail to accept or comply with a summons to appear as a witness in a foreign country served in accordance with this section.

Proceeds of Crime assistance

Enforcement of foreign forfeiture and pecuniary penalty orders

The Bill amends subsection 40(1) of the Act to extend the circumstances in which Vanuatu can enforce foreign forfeiture and pecuniary penalty orders. The amendments ensure that Vanuatu can provide international assistance to enforce a foreign non-conviction based forfeiture or pecuniary penalty order where the Public Prosecutor is satisfied that proceedings for a serious offence have been commenced in the foreign country, the property is tainted property and the accused person has absconded or died. These circumstances are consistent with the circumstances in which the Court may make a forfeiture order under the Proceeds of Crime Act where a person has absconded or died. The amendments address a deficiency identified in the MER, to an extent that is consistent with fundamental principles of domestic law.

Sharing property with foreign countries

The Bill amends subsection 42(3) of the Act to provide that arrangements made with a foreign country to share the amount forfeited under a foreign forfeiture or paid under a foreign pecuniary order must be made in accordance with the Proceeds of Crime Act.

Coordination with foreign countries

The Bill inserts a new Division 3 to Part 7 of the Act. New section 48A clarifies that the Public Prosecutor may enter into an agreement or arrangement with a foreign country to coordinate seizure and confiscation actions pursuant to a request for assistance from a foreign country. This amendment ensures that the Public Prosecutor's authority to enter into such arrangements is clear on the face of the legislation and addresses a deficiency identified in Vanuatu's MER.

*The Financial Action Task Force (FATF) is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction. The FATF Recommendations are recognised as the global anti-money laundering and counter-terrorist financing standard.



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REPUBLIC OF VANUATU

BILL FOR THE MUTUAL ASSISTANCE IN CRIMINAL MATTERS (AMENDMENT) ACT NO. OF 2017

An Act to amend the Mutual Assistance in Criminal Matters Act [CAP 285].

Be it enacted by the President and Parliament as follows-

1 Amendment

The Mutual Assistance in Criminal Matters Act [CAP 285] is amended as set out in the Schedule.

2 Commencement

This Act commences on the day on which it is published in the Gazette.

SCHEDULE

AMENDMENTS OF MUTUAL ASSISTANCE IN CRIMINAL MATTERS ACT [CAP 285]

SCHEDULE

**AMENDMENTS OF MUTUAL ASSISTANCE IN
CRIMINAL MATTERS ACT [CAP 285]**

1 Whole of the Act

Delete “Attorney General” (wherever occurring), substitute “Public Prosecutor”

2 Section 1

Insert in their correct alphabetical positions

“appropriate authority”, in relation to a foreign country, means a person or government department or agency whom the Public Prosecutor is satisfied is authorised under the law of that country:

- (a) in the case of a request by that country to Vanuatu for assistance in a criminal matter, to make the request; or
- (b) in the case of a request by Vanuatu to that country for assistance in a criminal matter, to receive the request;

“foreign country” means any country other than Vanuatu and every constituent part of such country, including a territory, dependency or protectorate, which administers its own laws relating to international cooperation;

“process” means any summons, warrant, order or other document in respect of a criminal matter that is issued:

- (a) by any Court of Vanuatu or by any Judge or judicial officer, the Registrar or Deputy Registrar or an Assistant Registrar of the Supreme Court; or
- (b) by any Court of a foreign country or by any Judge, Magistrate or Judicial Officer of such a Court;”

3 Section 1(definition of “Foreign State”)

Delete “Foreign State”

4 Section 1(definition of “serious offence”)

Repeal the definition, substitute

““serious offence” has the same meaning as in the Proceeds of Crime Act;”

5 Section 1(definition of “terrorist property”)

Delete “given to it under”, substitute “as in”

6 After section 6

Insert in Part 2

“6A. Public Prosecutor can authorise use of investigative powers

- (1) The Public Prosecutor may authorise the use of a lawful investigative power if:
- (a) a request for assistance from a foreign country is made; and
 - (b) the request relates to:
 - (i) a proceeding or investigation for a criminal matter involving a serious offence that has commenced in the foreign country; or
 - (ii) terrorist property.

- (2) If the Public Prosecutor authorises the use of an investigative power under subsection (1), the actual use of the investigative power must still comply with any other lawful requirement.”

7 Paragraph 7(2)(a)

(a) Delete “Convention, Treaty”, substitute “agreement”

(b) Delete “mutual”, substitute “international”

8 After subsection 10(1)

Insert

- “(1A) For the purposes of paragraphs (1)(a) to (c), in determining whether conduct would have constituted an offence against a law in Vanuatu, it does not matter whether the laws of the foreign country place the conduct constituting the offence within the same category of offence or denote the offence by the same terminology as Vanuatu.”

9 After section 23

Insert

“23A. Request for attendance of person in Vanuatu

- (1) The Public Prosecutor may request a foreign country to assist in arranging for a person who is in the foreign country to give evidence in a proceeding that has commenced in Vanuatu if:

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- (a) the proceeding relates to a criminal matter; and
 - (b) the Public Prosecutor is of the opinion that the person:
 - (i) is capable of giving evidence in the proceeding; and
 - (ii) has consented to travel to Vanuatu to give evidence in the proceeding.
- (2) The Public Prosecutor may request a foreign country to assist in arranging for a person who is in the foreign country to give assistance in an investigation that has commenced in Vanuatu if:
- (a) the investigation relates to a criminal matter; and
 - (b) the Public Prosecutor is of the opinion that the person:
 - (i) is capable of giving assistance in the investigation; and
 - (ii) has consented to travel to Vanuatu to give assistance in the investigation.
- (3) If the Public Prosecutor makes a request under subsection (1) or (2), the Public Prosecutor may arrange with the appropriate authority of the foreign country for:
- (a) the transportation of the person to Vanuatu; and
 - (b) the return of the person to the foreign country; and
 - (c) other relevant matters.”

10 Paragraph 25(1)(b)

Repeal the paragraph, substitute

“(b) because of a request under section 23A;”

11 After subsection 25(1)

Insert

“(1A) If the Public Prosecutor makes a request pursuant to section 23 or 23A, the person to whom the request relates is not subject to any penalty or liability or otherwise prejudiced in law by reason only of that person’s refusal or failure to consent to attend as requested.”

12 Subparagraph 27(1)(a)(ii)

Repeal the subparagraph, substitute

“(ii) because of a request under section 23A; and”

13 After section 30

Insert in Division 1 of Part 5

“30A. Assistance in locating or identifying persons in a foreign country

The Public Prosecutor may request the appropriate authority of a foreign country to assist in locating, or in identifying (if the person’s identity is unknown) and locating, a person believed to be in the foreign country if the Public Prosecutor is satisfied that:

- (a) the request relates to a criminal matter in Vanuatu; and
- (b) there are reasonable grounds for believing that the person to whom the request relates:
 - (i) is or might be concerned in, or could give or provide evidence or assistance relevant to, the criminal matter; and
 - (ii) is in the foreign country.

30B. Assistance in service of process in a foreign country

The Public Prosecutor may request the appropriate authority of a foreign country to assist in effecting service of any process in the foreign country if the Public Prosecutor is satisfied that:

- (a) the request relates to a criminal matter in Vanuatu; and
- (b) it is necessary or desirable to serve that process on a person in that country.”

14 Paragraph 31(b)

Repeal the paragraph, substitute

“(b) the foreign country requests the:

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- (i) removal of a prisoner who is in Vanuatu (whether or not in custody) to; or
- (ii) attendance of a person (other than a prisoner) in, the foreign country to give evidence at the proceeding or assist in the investigation; and”

15 Paragraphs 31(c) and (d)

After “prisoner” (wherever occurring), insert “or person (other than a prisoner)”

16 After section 32

Insert

“32A. No penalty for failure or refusal to consent

If a foreign country makes a request pursuant to section 31, the person to whom the request relates must not be:

- (a) subject to any penalty or liability; or
- (b) otherwise prejudiced in law,

by reason only of that person’s refusal or failure to consent to attend as requested.”

17 After section 34

Insert in Part 5

“34A. Assistance in locating or identifying persons in Vanuatu

- (1) The appropriate authority of a foreign country may request the Public Prosecutor to assist in locating, or in identifying (if the person’s identity is unknown) and locating, a person who is believed to be in Vanuatu.
- (2) If, on receiving a request referred to in subsection (1), the Public Prosecutor is satisfied that:
 - (a) the request relates to a criminal matter in the foreign country; and
 - (b) there are reasonable grounds for believing that the person to whom the request relates:

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(i) is or might be concerned in, or could give or provide evidence or assistance relevant to, the criminal matter; and

(ii) is in Vanuatu,

the Public Prosecutor may authorise, in writing, assistance in accordance with this section.

- (3) If, in relation to a request made under subsection (1), the Public Prosecutor authorises assistance in accordance with this section, the Public Prosecutor must forward the request to the appropriate government department or agency in Vanuatu.
- (4) The government department or agency referred to in subsection (3) must use its best endeavours to locate, or identify and locate, the person to whom the request relates, and advise the Public Prosecutor of the outcome of those endeavours.
- (5) On receipt of such advice, the Public Prosecutor must inform the appropriate authority of the foreign country of the result of the enquiries made pursuant to the request.

34B. Assistance in service of process in Vanuatu

- (1) The appropriate authority of a foreign country may request the Public Prosecutor to assist in effecting the service of any process on a person in Vanuatu.
- (2) If, on receipt of a request made under subsection (1), the Public Prosecutor is satisfied that:
- (a) the request relates to a criminal matter in that foreign country; and
 - (b) there are reasonable grounds for believing that the person to be served is in Vanuatu; and
 - (c) the appropriate authority has furnished sufficient details of the consequences of a failure to comply with such process,

the Public Prosecutor may authorise assistance in accordance with this section.

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- (3) If service is authorised under subsection (2), the Public Prosecutor must direct an authorised officer to arrange service, and in such a case the authorised officer must:
- (a) use his or her best endeavours to have the process served:
- (i) in accordance with procedures proposed in the request; or
- (ii) if those procedures would be unlawful in Vanuatu, or if no procedures are so proposed, in accordance with the law of Vanuatu; and
- (b) if the document:
- (i) is served, transmit to the Public Prosecutor for transmission to the appropriate authority of the foreign country a certificate as to service; or
- (ii) is not served, transmit to the Public Prosecutor for transmission to the appropriate authority of the foreign country a statement of the reasons which prevented the service.
- (4) If a person in Vanuatu is served a summons to appear as a witness in a foreign country under subsection (3), the person must not be:
- (a) subject to any penalty or liability in Vanuatu; or
- (b) otherwise prejudiced in law in Vanuatu,

by reason of the person's refusal or failure to accept or comply with the summons, despite any contrary statement contained in the summons."

18 Subsection 40(1)

Repeal the subsection, substitute

"(1) Subsection (2) applies if:

- (a) a foreign country requests the Public Prosecutor to make arrangements for the enforcement of:
- (i) a foreign forfeiture order, in connection with a serious offence or terrorist property, against property that is believed to be located in Vanuatu; or

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- (ii) a foreign pecuniary penalty order, in connection with a serious offence, if some or all of the property available to satisfy the order is believed to be located in Vanuatu; and
 - (b) the Public Prosecutor is satisfied of the matters in subsection (1A), (1B) or (1C).
- (1A) The Public Prosecutor is satisfied that:
- (a) a person has been convicted of a serious offence; and
 - (b) the conviction and the order are not subject to further appeal in the foreign country.
- (1B) The Public Prosecutor is satisfied that:
- (a) proceedings for a serious offence against property referred to in paragraph (1)(a) were commenced; and
 - (b) any property is tainted property in relation to the offence; and
 - (c) the accused charged with the offence has absconded or died.
- (1C) The Public Prosecutor is satisfied in the case of terrorist property that the property to which the request relates is the subject of a court order in the foreign country.”

19 Subsection 42(3)

After “subsection (2)”, insert “in accordance with the Proceeds of Crime Act”

20 After section 48

Insert in Part 7

“Division 3 - Coordination with foreign countries

48A. Agreements and arrangements

The Public Prosecutor may enter into an agreement or arrangement with a foreign country for the purpose of coordinating seizure and confiscation actions pursuant to a request under this Act.”