

## **OTHER INSTRUMENTS**

### **SCHEME RELATING TO MUTUAL ASSISTANCE IN CRIMINAL MATTERS WITHIN THE COMMONWEALTH including amendments made by Law Ministers in April 1990**

#### **PURPOSE AND SCOPE**

1. (1) The purpose of this Scheme is to increase the level and scope of assistance rendered between Commonwealth Governments in criminal matters. It augments, and in no way derogates from existing forms of co-operation, both formal and informal; nor does it preclude the development of enhanced arrangements in other fora.
- (2) This Scheme provides for the giving of assistance by the competent authorities of one country (the requested country) in respect of criminal matters arising in another country (the requesting country).
- (3) Assistance in criminal matters under this Scheme includes assistance in
  - (i) identifying and locating persons;
  - (ii) serving documents;
  - (iii) examining witnesses;
  - (iv) search and seizure;
  - (v) obtaining evidence;
  - (vi) facilitating the personal appearance of witnesses;
  - (vii) effecting a temporary transfer of persons in custody to appear as a witness;
  - (viii) obtaining production of judicial or official records; and
  - (ix) tracing, seizing and confiscating the proceeds or instrumentalities of crime.

#### **MEANING OF COUNTRY**

2. For the purposes of this Scheme, each of the following is a separate country, that is to say
  - (a) each sovereign and independent country within the Commonwealth together with any dependent territories which that country designates; and
  - (b) each country within the Commonwealth which, though not sovereign and independent, is not designated for the purposes of the preceding subparagraph.

## COMMENTARY

### PURPOSE AND SCOPE

The opening words of Paragraph 1 reflect the concern of Law Ministers, expressed in the Communiqué issued after their 1983 Meeting, that there should be more effective co-operation and mutual assistance within the Commonwealth in criminal matters. The reference to “existing forms of co-operation” is to established channels, such as those of Interpol. The Scheme also recognises, and facilitates, the developing bilateral and regional arrangements between Governments and also between specialist enforcement agencies dealing with matters such as securities regulation or drug-trafficking. Law Ministers were well aware, when adopting the Scheme at their Harare meeting, of the progress made in other contexts but were nonetheless convinced of the great value of a Commonwealth Scheme in this field. The Scheme in no way prevents the full use, and active development, of other forms of co-operation where circumstances make that desirable. It does, however, provide a clear basis for legislative and other action in Commonwealth countries.

The scope of the Scheme is indicated in outline form in paragraph 1(3). The assistance listed is more comprehensive than that available under most existing bilateral and regional arrangements, but the present list was fully supported in the discussions leading up to the adoption of the Scheme. Indeed there was pressure to extend the Scheme to include other forms of assistance, and item (i) (tracing, seizing and confiscating the proceeds of criminal activities) was added in Harare after a special study had been made of the practical issues involved.

Paragraph 1(2) is important in establishing the terminology to be used in the rest of the Scheme. “Competent authorities” is a phrase not further defined; it will include administrative agencies and judicial bodies as appropriate to the particular context. “Country” is defined in paragraph 2, which is based on the corresponding provision in the Scheme for the Rendition of Fugitive Offenders within the Commonwealth (although that Scheme uses the more cumbersome phrase “part of the Commonwealth” throughout, not “country”).

### CRIMINAL MATTER

3. (1) For the purposes of this Scheme, a criminal matter arises in a country if the Central Authority of that country certifies that criminal or forfeiture proceedings have been instituted in a court exercising jurisdiction in that country or that there is reasonable cause to believe that an offence has been committed in respect of which such criminal proceedings could be so instituted.
- (2) “Offence”, in the case of a federal country or a country having more than one legal system, includes an offence under the law of the country or any part thereof.
- (3) “Forfeiture proceedings” means proceedings, whether civil or criminal, for an order
  - (a) restraining dealings with any property in respect of which there is reasonable cause to believe that it has been
    - (i) derived or obtained, whether directly or indirectly, from; or
    - (ii) used in, or in connection with, the commission of an offence;

- (b) confiscating any property derived or obtained as provided in paragraph (a)(i) or used as provided in paragraph (a)(ii); or
- (c) imposing a pecuniary penalty calculated by reference to the value of any property derived or obtained as provided in paragraph (a)(i) or used as provided in paragraph (a)(ii).

## COMMENTARY

### **Criminal matters arising in a country**

Paragraph 3, by defining for the purposes of the Scheme when a criminal matter arises in a country, effectively determines the stage of a criminal investigation at which it becomes possible to seek assistance. This issue was fully discussed during the preparation of the Scheme. The prevailing opinion rejected, at one extreme, the view that the Scheme should apply only when criminal proceedings had actually been instituted, and, at the other extreme, the suggestion that assistance could be sought even before the commission of an offence, by way of preventative action. It was judged appropriate to provide that the Scheme could be invoked when proceedings had been instituted or when there was reasonable cause to believe that an offence in respect of which proceedings could be instituted had been committed. The reference to the possibility of proceedings being instituted refers to matters of evidence rather to any question as to the jurisdiction of the court.

These facts (i.e., the institution of proceedings or the existence of a reasonable belief) would be certified by the requesting country, and the requested country would not normally look behind that certificate and would not examine the basis of jurisdiction asserted by the requesting country. There is, however, a provision in paragraph 5(3) enabling the requested country to seek additional information on any matter relevant to the request for assistance.

No attempt is made in the Scheme to define “criminal proceedings”. The definition of “offence” in paragraph 3(2) was inserted to clarify the position in federal or composite countries, and was originally prompted by Canadian difficulties on this point.

The reference to “forfeiture proceedings” in paragraph 3(1) with the whole of paragraph 3(3) were added at Christchurch in 1990 to make it clear that the Scheme provided for full assistance in respect of proceedings for the forfeiture of the proceeds of crime, even if those proceedings were classified as civil proceedings in the requesting country.

## CENTRAL AUTHORITIES

4. Each country shall designate a Central Authority to transmit and to receive requests for assistance under this Scheme.

## COMMENTARY

### **Central Authorities**

The Scheme follows recent international practice in this area in providing for designated persons or offices to act as transmitting and receiving points for requests for assistance, and the term central authority is used in referring to them (paragraph 4). The initiative in seeking assistance will normally

lie with some agency in the requesting country which is dealing with the case, and paragraph 5(l) spells this out. The request can be initiated by a law enforcement agency (typically a police force, but it could be, for example, an investigative section of a customs service), a public prosecution authority (but not a private prosecutor; there was a fear of ‘fishing expeditions’ by prospective plaintiffs under the guise of criminal investigation), or a judicial authority. In some circumstances a court could act on the prompting of the defendant or his legal representatives, but it was thought inappropriate to give the defence itself the right to use the Scheme, which is designed essentially for co-operation between official bodies.

The primary duty of the Central Authority of the requesting country is to satisfy itself that the request can properly be made under the Scheme and to ensure that all necessary information is provided to satisfy the detailed provisions of the Scheme and to meet specific queries raised by the Central Authority of the requested country (paragraph 5(2)(3)). Although the request must be transmitted from Central Authority to Central Authority, the Scheme does not prevent responses to the request being made directly to the agency or authority initiating the request. So, for example, if a police force in State A needs assistance in locating a person believed to be in State B, a request under the Scheme would have to be sent via the Central Authorities of the two States (but this would not prevent the use of Interpol or other formal channels: see paragraph 1(l)). Once the person concerned had been located in response to a request under the Scheme, that information could be sent directly to the police force in State A. Administrative requirements could of course be imposed in State B to enable the Central Authority of that State to monitor responses to requests, but that matter is not governed by the Scheme itself.

#### **ACTION IN THE REQUESTING COUNTRY**

5. (1) A request for assistance under this Scheme may be initiated by any law enforcement agency or public prosecution or judicial authority competent under the law of the requesting country.
- (2) The Central Authority of the requesting country shall, if it is satisfied that the request can properly be made under this Scheme, transmit the request to the central Authority of the requested country and shall ensure that the request contains all the information required by the provisions of this Scheme.
- (3) The Central Authority of the requesting country shall provide as far as practicable additional information sought by the Central Authority of the requested country.

#### **ACTION IN THE REQUESTED COUNTRY**

6. (1) Subject to the provisions of this Scheme, the requested country shall grant the assistance requested as expeditiously as practicable.
- (2) The Central Authority of the requested country shall, subject to the following provisions of this paragraph, take the necessary steps to ensure that the competent authorities of that country comply with the request.
- (3) If the Central Authority of the requested country considers
  - (a) that the request does not comply with the provisions of this Scheme, or

- (b) that in accordance with the provisions of this Scheme the request for assistance is to be refused in whole or in part, or
  - (c) that the request cannot be complied with, in whole or in part, or
  - (d) that there are circumstances which are likely to cause a significant delay in complying with the request,
- it shall promptly inform the Central Authority of the requesting country, giving reasons.

### COMMENTARY

#### **Action in the requested country**

Paragraph 6(1) indicates the primary duty of the requested country, which is to grant the assistance requested as expeditiously as practicable. This duty is subject to various qualifications in respect of particular types of assistance, and of course arises only if the request is indeed within the scope of the Scheme.

Paragraph 6(2) indicates the responsibility of the Central Authority of the requested country to ensure that the relevant agencies in that country respond to the request. In some cases a request will be thought to be outside the scope of the Scheme; in others the Scheme itself will entitle or require the requested country to refuse to comply with the request; in others again compliance will prove practically impossible or will be subject to great delay. In all these cases paragraph 6(3) requires the Central Authority of the requested country to inform the Central Authority of the requesting country of the circumstances with a full explanation. The quality of communication between the various Central Authorities will be crucial to the Scheme's success.

#### **REFUSAL OF ASSISTANCE**

7. (1) The requested country may refuse to comply in whole or in part with a request for assistance under this Scheme if the criminal matter appears to the Central Authority of that country to concern
  - (a) conduct which would not constitute an offence under the law of that country; or
  - (b) an offence or proceedings of a political character; or
  - (c) conduct which in the requesting country is an offence only under military law or a law relating to military obligations; or
  - (d) conduct in relation to which the person accused or suspected of having committed an offence has been acquitted or convicted by a court in the requested country.
- (2) The requested country may refuse to comply in whole or in part with a request for assistance under this Scheme
  - (a) to the extent that it appears to the Central Authority of that country that compliance would be contrary to the Constitution of that country, or would prejudice the security, international relations or other essential public interests of that country; or

- (b) where there are substantial grounds leading the Central Authority of that country to believe that compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions or would cause prejudice for any of these reasons to any person affected by the request.
- (3) The requested country may refuse to comply in whole or in part with a request for assistance to the extent that the steps required to be taken in order to comply with the request cannot under the law of that country be taken in respect of criminal matters arising in that country.
- (4) An offence shall not be an offence of a political character for the purposes of this paragraph if it is an offence within the scope of any international convention to which both the requesting and requested countries are parties and which imposes on the parties thereto an obligation either to extradite or prosecute a person accused of the commission of the offence.

## COMMENTARY

### Refusal of Assistance

A requested country's duty to provide assistance is not unqualified. The Scheme sets out in paragraph 7 a number of circumstances in which compliance with the request may be refused either in whole or in part. These safeguards are a most important part of the Scheme, and were closely examined by Governments and at the preparatory meetings. There are seven broad grounds on which a requested country may refuse to provide assistance:

(i) "double criminality": (paragraph 7(1)(a))

A "double criminality requirement is a standard feature of extradition treaties; that is, action will not be taken unless the relevant conduct is an offence under the law of both the requesting and requested countries. It is not a standard feature of mutual assistance treaties, especially those in which the types of assistance afforded are relatively limited. In recent practice some treaties expressly exclude the requirement (notably the Canada - USA. Treaty of 1985), but a Draft Model Treaty developed in Australia while not imposing a double criminality requirement does allow a requested country a discretionary power to refuse compliance where the conduct would not constitute an offence under the law of that country. At the January 1986 meeting it was decided to follow the Australian lead. In some parts of the world criminal law reform, influenced by religious or ideological considerations, is defining as offences punishable with heavy penalties conduct which is accepted or much more lightly punished in neighbouring countries. This pointed to a need for some discretionary power to refuse to comply with requests. It was however the tenor of the discussions that the use of this power would be regarded as exceptional and in no way automatic.

(ii) political offences: (paragraph 7(1)(b))

Compliance may be refused where the offence or the proceedings are regarded as having a political character. The double reference to "offence" and proceedings indicates that the formal definition of the offence charged is not necessarily determinative. Paragraph 7(4), which follows closely a provision in the Scheme for the Rendition of Fugitive Offenders, protects the policy behind international conventions designed to secure the prosecution of specific offences.

(iii) military offences: (paragraph 7(1) (c))

It was felt appropriate to enable a requested country to refuse compliance where the offence existed only in a code of military law or concerned the performance of an obligation of military service.

(iv) “double jeopardy”: (paragraph 7(1)(d))

Paragraph 7(1)(d) deals with situations in which the person who is accused or suspected of having committed the offence with which the request is concerned has already been proceeded against in the requested country. It would not be desirable to make it obligatory for that country to assist in the bringing of fresh proceedings elsewhere; and this principle is equally relevant whether the original proceedings resulted in a conviction or an acquittal. As before, the requested country is empowered, but not required, to refuse compliance with the request; there may be circumstances, for example, where an acquittal was recorded because a key prosecution witness to the requesting country, where the provision of assistance would be judged appropriate.

(v) State interests - (paragraph 7(2) (a))

Paragraph 7(2) contains two provisions each reflecting aspects of ‘public policy’. One provision is concerned with the interests of the requested country itself. There need be no compliance if a request would prejudice the security, international relations or other essential public interests of that country. This would cover, for example, cases requesting the provision of information which might be relevant to the defence of the State or which might be embarrassing to relations with a neighbouring State, and any requests which were seen as improperly interfering with the business interests of the requested country (perhaps under some claim to extra-territorial anti-trust jurisdiction).

(vi) Discriminatory policies (paragraph 7(2) (b))

The requested country may refuse compliance where there are “substantial grounds” for believing that compliance would facilitate prosecution or punishment or cause prejudice based on racial, religious, nationality or political opinion grounds.

(vii) Unavailability of procedures (paragraph 7(3))

The final ground for refusal is of a quite different nature. Compliance is excused “to the extent that the steps required to be taken in order to comply with the request cannot under the law of that country be taken in respect of criminal matters arising in that country”. The general philosophy of the Scheme is that procedures and facilities available in support of criminal investigations and prosecutions initiated in one country should also be made available to assist similar endeavours undertaken in other Commonwealth countries. A requested country is not, however, required to do more than it would do in a purely domestic case. So, for example, if the taking of body samples is not provided for under the relevant law of the requested country it will refuse a request for assistance in obtaining such samples; the availability of procedures under the law of the requesting country is for this purpose quite immaterial.

## MEASURES OF COMPULSION

8. (1) The competent authorities of the requested country shall in complying with a request under this Scheme use only such measures of compulsion as are available under the law of that country in respect of criminal matters arising in that country.

- (2) Where under the law of the requested country measures of compulsion cannot be applied to any person to take the steps necessary to secure compliance with a request under this Scheme but the person concerned is willing to act voluntarily in compliance or partial compliance with the terms of the request, the competent authorities of the requested country shall make available the necessary facilities.

#### **COMMENTARY**

##### **Measures of Compulsion**

The principle just referred to is applied in a slightly more specific context in paragraph 8(1), dealing with “measures of compulsion”. It is only if a power of, for example, search and seizure or requiring the provision of samples of blood, would be available in a purely domestic case, that such a power may be used in response to a request under the Scheme. It might happen that an individual named in a request for assistance would be entirely happy to co-operate voluntarily in providing evidence which could not in the circumstances be taken by measures of compulsion. In such a case the duty of the requested country is to make available the necessary facilities (paragraph 8(2)).

##### **SCHEME NOT TO COVER ARREST OR EXTRADITION**

9. Nothing in this Scheme is to be construed as authorising the extradition, or the arrest or detention with a view to extradition, of any person.

#### **COMMENTARY**

##### **Extradition**

Paragraph 9 makes it clear that extradition (and arrest or detention with a view to extradition) is not within this Scheme. Although the present Scheme is complementary to the Scheme for the Rendition of Fugitive Offenders within Commonwealth, it does deal with quite different types of co-operation.

##### **CONFIDENTIALITY**

10. The Central Authorities and the competent authorities of the requesting and requested countries shall use their best efforts to keep confidential a request and its contents and the information and materials supplied in compliance with a request except for disclosure in criminal proceedings and where otherwise authorised by the Central Authority of the other country.

##### **LIMITATION OF USE OF INFORMATION OR EVIDENCE**

11. The requesting country shall not use any information or evidence obtained in response to a request for assistance under this Scheme in connection with any matter other than the criminal matter specified in the request without the prior consent of the Central Authority of the requested country.



## COMMENTARY

### **Confidentiality and limitation on Use of Information or Evidence**

There is an obvious need for confidentiality in dealing with requests for assistance under the Scheme. Where proceedings have not been commenced, disclosure of the making of a request or of the material supplied in response to it could be embarrassing and prejudicial to either the prosecution agency or the prospective defendant or both. Where proceedings are already in train, similar considerations apply and there is an added danger of interference with the judicial process. To meet this as far as possible, paragraph 10 imposes an obligation of confidentiality on the Central Authorities transmitting and receiving the request and on the agencies dealing with it, in respect both of the existence of the request and of the contents of the request and the response to it. The material may of course be disclosed in criminal proceedings but any other publication requires the consent of the Central Authority of the other country concerned.

A related safeguard is contained in paragraph 11. The information of evidence obtained by the requesting country may only be used in connection with a matter other than the criminal matter specified in the request with the prior consent of the Central Authority of the requested country. The effect is that while disclosure in criminal proceedings is permitted by paragraph 10 that permission is limited to proceedings concerning the criminal matter specified in the request itself; if the evidence provided reveals the existence of further matters in respect of which criminal proceedings are taken, its use in those proceedings requires the consent of the requested country. This provision serves to protect, *inter alia*, the ‘political offences’ exception in paragraph 7(1)(a); evidence supplied for use in the context of an offence against the person cannot be used instead in proceedings based on a political offence without the approval of the requested country. In general, it is thought that “the criminal matter specified in the request” will be broadly interpreted; if, for example, evidence is sought in order to mount a prosecution against a named individual in respect of a major fraud but the prosecution is ultimately based on a conspiracy between that individual and others to effect the fraud, this would seem to be within the same “criminal matter”.

### **EXPENSES OF COMPLIANCE**

12. (1) Except as provided in the following provisions of this paragraph, compliance with a request under this Scheme shall not give rise to any claim against the requesting country for expenses incurred by the Central Authority or other competent authorities of the requested country.
- (2) The requesting country shall be responsible for the travel and incidental expenses of witnesses travelling to the requesting country, including those of accompanying officials, for fees of experts, and for the costs of any translation required by the requesting country.
- (3) If in the opinion of the requested country, the expenses required in order to comply with the request are of an extraordinary nature, the Central Authority of the requested country shall consult with the Central Authority of the requesting country as to the terms and conditions under which compliance with the request may continue, and in the absence of agreement the requested country may refuse to comply further with the request.

## COMMENTARY

## **Expenses of Compliance**

The question of the costs entailed in responding to requests for assistance was fully examined by senior officials at the January 1986 meeting. There was agreement that in most cases the costs would be borne by the requested country. This avoids the necessity for elaborate accounting and payment procedures; and as there will be a two-way traffic in requests for assistance, most countries should find that the expenditure is balanced by the services received from other countries. Paragraph 12 states that the principle that the costs fall on the requested country but indicates three exceptions and a major qualification.

The exceptions concern the travel and subsistence costs of witnesses travelling to the requesting country (and of accompanying officials in the case, for example, of witnesses transferred in custody); fees payable to expert witnesses; and the costs of any translations required by the requesting country. It is thought that these costs, which are readily identifiable, should be met by the requesting country.

The qualification concerns exceptionally heavy costs. It is recognised that in complex cases, prolonged and extensive enquiries may be required. For example, investigations into a commercial fraud may require scrutiny of the records of the financial transactions of a group of companies over an extended period. The costs of such an enquiry would be very great, could be quite prohibitive for a small country, and would not necessarily ever be balanced by any reciprocal service from the requesting country. Paragraph 12(3) enables a requested country to negotiate special terms whenever it regards the potential expenses as “of an extraordinary nature”. If terms cannot be agreed - and in some cases the required terms would include the salaries and expenses of officers seconded to a major investigation - the requested country would be entitled to refuse to comply with the request. No attempt is made to define the point at which expenses can properly be regarded as “extraordinary”, which must be a matter of experience and judgement.

In 1999 Law Ministers, having considered the concerns of various member countries on the costs associated with the provision of assistance, issued the following guidelines on the issue. These guidelines are to be kept under review.

### **Law Ministers of the Commonwealth**

**Recalling** that the purpose of the Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth (the Harare Scheme) is to increase the level and scope of assistance rendered between Commonwealth governments in criminal matters;

**Noting** that Clause 12 of the Harare Scheme provides that, subject to sub-clause (2), unless expenses of an extraordinary nature are involved in responding to requests for assistance, the requested country will pay the costs of providing assistance; and

**Noting** the concern expressed by Law Officers of Small Commonwealth Jurisdictions over the impact on national resources caused by complying with requests for assistance

**Adopted** the following guidelines to assist member countries to deal with the financial and other costs incurred by jurisdictions in responding to requests for assistance:

### **Guidelines on the Apportionment of Costs Incurred in Providing Mutual Assistance in Criminal**

## Matters

1. Where the execution of a request for assistance requires that the requesting country be represented before the courts of the requested country and where the human resources available to the Central Authority of the requested country are insufficient to meet that requirement, the Central Authority of the requested country may brief an appropriate member of the private profession to represent the requesting country on its behalf. In such case the [Attorney-General] shall use his or her best endeavours to ensure that the person so briefed has no conflict of interest and that the best interests of the requesting country are protected.
2. Where a request for assistance requires that voluminous or complex documentary or other records be located and retrieved and where the human resources available to the Central Authority of the requested country are insufficient to meet that requirement, the Central Authority of the requested country may secure the services of appropriate specialists to undertake the work necessary to respond to the request. In such case the Central Authority shall use its best endeavours to ensure that the persons whose services are secured have no conflict of interest and that the best interests of the requesting country are protected.
3. Where the Central Authority of the requested country is of the opinion that the circumstances described in paragraphs 1 and 2 above exist, it shall, before proceeding to secure non-government persons to perform the functions, consult with the requesting country on the proposed action and secure, if necessary, the agreement of the requesting country to pay for the services so contracted for on its behalf, subject to any conditions with respect to the control of costs or of the conduct of the matter agreed by both countries.
4. Where a request for assistance requires the taking of action by police officers in the requested country and the Central Authority of that country is of the opinion that such action would so divert the available police resources as to cause prejudice to the peace of the country the request may be refused.
5. Where a request for assistance seeks the making or enforcement of an order restraining dealings with any property in respect of which there is reasonable cause to believe that it has been derived or obtained, directly or indirectly, from, or used in, or in connection with, the commission of an offence and where the law of the requested country would permit any person with an interest in such property to take action for damages arising from such restraint in the event that the property was not later the subject of an order confiscating it the requested country may, if it considers it appropriate, require from the requesting country an indemnity against any loss incurred by the government of the requested country as a result of such action being successful.
6. In reaching any agreement on the apportionment of costs, the ability to share forfeited or confiscated assets or the existence of any asset sharing agreement between the relevant countries shall be taken into account.
7. Nothing in these guidelines shall be interpreted as detracting from the requirement contained in Clause 12 of the Harare Scheme that countries consult in cases where the requested country is of the opinion that the expenses required in order to comply with a request are of an extraordinary nature.

## **CONTENTS REQUEST FOR ASSISTANCE**

13. (1) A request under the Scheme shall:
- (a) specify the nature of the assistance requested;
  - (b) contain the information appropriate to the assistance sought as specified in the following provisions of this Scheme;
  - (c) indicate any time-limit within which compliance with the request is desired, stating reasons;
  - (d) contain the following information:
    - (i) the identity of the agency or authority initiating the request;
    - (ii) the nature of the criminal matter; and
    - (iii) whether or not criminal proceedings have been instituted.
  - (e) where criminal proceedings have been instituted, contain the following information:
    - (i) the court exercising jurisdiction in the proceedings;
    - (ii) the identify of the accused person;
    - (iii) the offences of which he stands accused, and a summary of the facts;
    - (iv) the stage reached in the proceedings; and
    - (v) any date fixed for further stages in the proceedings.
  - (f) where criminal proceedings have not been instituted, state the offence which the Central Authority of the requesting country has reasonable cause to believe to have been committed, with a summary of known facts.
- (2) A request shall normally be in writing, and if made orally in the case of urgency, shall be confirmed in writing forthwith.

## **COMMENTARY**

### **Form and Contents of Requests for Assistance**

Requests for assistance will normally be in writing, but it is recognised that the urgency of the case may call for an oral communication. In the latter case the request must be confirmed in writing forthwith (paragraph 13(2)). Paragraph 13 lists the information to be included in all requests; additional items of information are required in connection with requests for particular types of assistance, and these are specified in later paragraphs of the Scheme. It was thought neither necessary nor desirable to settle a Model Form of Request such as is found in some civil procedure conventions. In the present context, the circumstances are too variable and the emphasis is on the inclusion of all useful and helpful information, an emphasis which can be obscured if information is to be presented in a prescribed format of general applicability.

## **IDENTIFYING AND LOCATING PERSONS**

14. (1) A request under this Scheme may seek assistance in identifying or locating persons believed to be within the requested country.
- (2) The request shall indicate the purpose for which the information is requested and shall contain such information as is available to the Central Authority of the requesting country as to the whereabouts of the person concerned and such other information as it possesses as may facilitate the identification of that person.

## **COMMENTARY**

### **Identifying and Locating Persons**

The first type of assistance covered by the Scheme is in identifying or locating persons believed to be within the requested country (paragraph 14). In some cases the person concerned will be suspected of crime, and his location could be a prelude to an extradition application; but this is by no means the only type of case. A witness may be sought; or it may be desirable to find someone in order to eliminate him from the field of suspects; or it may be desired to identify some known associates of a person accused of criminal behaviour with a view to obtaining evidence in the requesting country.

## **SERVICE OF DOCUMENTS**

15. (1) A request under this Scheme may seek assistance in the service of documents relevant to a criminal matter arising in the requesting country.
- (2) The request shall be accompanied by the documents to be served and, where those documents relate to attendance in the requesting country, such notice as the Central Authority of that country is reasonably able to provide of outstanding warrants or other judicial orders in criminal matters against the person to be served.
- (3) The Central Authority of the requested country shall endeavour to have the documents served:
  - (a) by any particular method stated in the request, unless such method is incompatible with the law of that country; or
  - (b) by any method prescribed by the law of that country for the service of documents in criminal proceedings.
- (4) The requested country shall transmit to the Central Authority of the requesting country a certificate as to the service of the documents or, if they have not been served, as to the reasons which have prevented service.
- (5) A person served in compliance with a request with a summons to appear as a witness in the requesting country and who fails to comply with the summons shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or the requested country notwithstanding any contrary statement in the summons.

## COMMENTARY

### Service of Documents

Assistance can be requested in the service of any document relevant to a criminal matter arising in the requesting country. In early drafts, this provision was limited to judicial documents (originating process, subpoenas, judgements, etc.) but the wider formulation included in the final text will cover any document of which service is required under the procedural rules of the requesting country. For example, notices of appeal by the prosecution and certificates of analysis in drugs cases were cited in Canadian observations.

It is important that the mode of service should satisfy the procedural requirements of the requesting country; hence the obligation in paragraph 15(3) to use a method of service specified in the request unless that method is incompatible with the law of the requested country. Where no special mode of service is desired or available, service will be effected in accordance with the normal procedures used in criminal cases in the requested country; as between Commonwealth countries there should be few difficulties in this provision. A certificate of service (or a statement of the reasons which prevented service) is to be supplied by the requested country: paragraph 15(4).

Paragraph 15(5) was added at Christchurch in 1990 as one of a series of amendments designed to ensure that service of documents, and other types of assistance, would not expose any person to penalties, in either the requesting or requested country, except where the Scheme provides for the use of measures of compulsion.

### EXAMINATION OF WITNESSES

16. (1) A request under this Scheme may seek assistance in the examination of witnesses in the requested country.
- (2) The request shall specify, as appropriate and so far as the circumstances of the case permit:
  - (a) the names and addresses or the official designations of the witnesses to be examined;
  - (b) the questions to be put to the witnesses or the subject matter about which they are to be examined;
  - (c) whether it is desired that the witnesses be examined orally or in writing;
  - (d) whether it is desired that the oath be administered to the witnesses (or, as the law of the requested country allows, that they be required to make their solemn affirmation);
  - (e) any provisions of the law of the requesting country as to privilege or exemption from giving evidence which appear especially relevant to the request; and
  - (f) any special requirements of the law of the requesting country as to the manner of taking evidence relevant to its admissibility in that country.
- (3) The request may ask that, so far as the law of the requested country permits, the accused person or his legal representative may attend the examination of the witness and ask questions of the witness.

## COMMENTARY

### Examination of witnesses

A major objective of the Scheme is the facilitation of the process of obtaining evidence from another country. Paragraph 16 deals with the examination of witnesses, paragraph 17 with search and seizure of property, and paragraph 18 with other types of assistance.

So far as the examination of witnesses is concerned, paragraph 16 indicates the information which a requested country needs to be given if it is to provide the appropriate assistance. It needs to know the name and address of the witness, or at least his official designation (e.g. the Senior Customs Officer at X Airport); the request for assistance could of course be combined with a request for assistance in locating or identifying the witness. It needs to know the questions to be put, or the subject-matter on which the witness is to be examined; the amount of detail will necessarily vary with the nature of the case and the stage which the investigation or actual proceedings have reached. It needs to know of any special procedural requirements as to the taking of evidence. Subject to these requirements (so far as they are permitted by the law of the requested country), that law will establish how the examination is to be conducted, by whom the questions are to be put and before whom the evidence is to be taken. The Scheme avoids going into too much detail on these points, and Central Authorities may need to consult on procedures in particular cases.

There was discussion at the preparatory meeting in January 1986 of the question of the attendance of legal representatives from the requesting country. In some cases this might well be desirable, but there can be difficulties in some jurisdictions over the appearance of counsel from abroad. Paragraph 16(3) contains a modest provision: if the law of the requested country permits, and the request for assistance raises the point, the accused person (where such a person is identified) or his legal representative (which might be limited to a practitioner from the requested country) may attend the examination and ask questions. Nothing in this provision prevents a more generous provision of rights of attendance to interested parties or their representatives, but the obligation of confidentiality in paragraph 10 must be borne in mind.

### SEARCH AND SEIZURE

17. (1) A request under this Scheme may seek assistance in the search for, and seizure of property in the requested country.
- (2) The request shall specify the property to be searched for and seized and shall contain, so far as reasonably practicable, all information available to the Central Authority of the requesting country which may be required to be adduced in an application under the law of the requested country for any necessary warrant or authorization to effect the search and seizure.
- (3) The requested country shall provide such certification as may be required by the requesting country concerning the result of any search, the place and circumstances of seizure, and the subsequent custody of the property seized.

## COMMENTARY

### Search and Seizure

Search and seizure is a sensitive area, and can raise delicate constitutional issues as to rights of privacy etc. It is important to recall in this context the general provisions in paragraph 8, under which the competent authorities of a requested country must use only such measures of compulsion as are available in that country in respect of criminal matters arising in that country, and in paragraph 7(3), which deals with the position where procedures are not available in the requested country.

Bearing these points in mind, paragraph 17(2) refers expressly to the question of warrants or authorizations. The Central Authority of the requesting country must provide all available information which might be required in order to obtain the necessary warrant or authorization to effect the search and seizure. On the other side, the requested country, having complied with a request, must give any certification needed by the requesting country as to the circumstances of search and seizure and the subsequent custody of the property seized as will ensure the admissibility of the resulting evidence: see paragraph 17(3).

#### **OTHER ASSISTANCE IN OBTAINING EVIDENCE**

18. (1) A request under this Scheme may seek other assistance in obtaining evidence.
- (2) The request shall specify, as appropriate and so far as the circumstance of the case permit:
- (a) the documents, records or property to be inspected, preserved, photographed, copied or transmitted;
  - (b) the samples of any property to be taken, examined or transmitted; and
  - (c) the site to be viewed or photographed.

#### **COMMENTARY**

##### **Other Assistance in Obtaining Evidence**

Paragraph 18 provides for the making of other requests for assistance in obtaining evidence. This covers a wide range of procedures which require neither the examination of witness nor the seizure of property, including copying, measuring, photographing and inspecting property. In some cases, such as that of examining samples referred to in paragraph 18(2)(b) this may be linked to a request for search and seizure: a warrant may be needed to obtain some material which, perhaps because of its chemical properties, needs to be analysed at once; a request under paragraph 18 could seek technical assistance in making that analysis or, in other circumstances, in transmitting the material in conditions which safeguard it for proper analysis.

#### **PRIVILEGE**

19. (1) No person shall be compelled in response to a request under this Scheme to give any evidence in the requested country which he could not be compelled to give: (a) in criminal proceedings in that country; or (b) in criminal proceedings in the requesting country.
- (2) For the purposes of this paragraph any reference to giving evidence includes references to answering any question and to producing any document.



## COMMENTARY

### Privilege

Following precedents in other international instruments, the Scheme allows claims of privilege by reference to the laws of both the requesting and requested countries: paragraph 19. To assist the authorities of the requested country and to reduce the number of cases in which evidence is obtained there only to be declared privileged in the requesting country, paragraph 16(2) (e) requires that a request for assistance in the examination of a witness should specify any provisions of the law of the requesting country as to privilege or exemption from giving evidence which appear especially relevant to the request. In the end, of course, it will be the courts in the requesting country which will rule on any claim affecting the admissibility of evidence.

### PRODUCTION OF JUDICIAL OR OFFICIAL RECORDS

20. (1) A request under this Scheme may seek the production of judicial or official records relevant to a criminal matter arising in the requesting country.
- (2) For the purposes of this paragraph “judicial records” means judgements, orders and decisions of courts and other documents held by judicial authorities and “official records” means documents held by government departments or agencies or prosecution authorities.
- (3) The requested country shall provide copies of judicial or official records which are publicly available.
- (4) The requested country may provide copies of judicial or official records not publicly available, to the same extent and under the same conditions as apply to the provision of such records to its own law enforcement agencies or prosecution or judicial authorities.

## COMMENTARY

### Production of Judicial or official records

Judicial and official records are of course only a species of documents, and the Scheme could have treated requests for their production in the general context of obtaining documentary evidence. It was, however, felt appropriate to include a separate provision: this form of assistance involves direct co-operation between governments and public agencies in a way which takes the case outside the typical one of obtaining evidence; and it does, for that reason, voice some sensitive issues of confidentiality. After full discussion, it was agreed to distinguish between records which are publicly available in the requested country, which would normally be supplied subject only to the general provisions as to the right to refuse to comply with a request, and records not publicly available. These would be supplied, subject to those general provisions of the Scheme, to the same extent and under the same conditions (as to publication and use, for example) as apply in the requested country to the supply of those types of records to the law enforcement agencies or prosecution or judicial authorities of that country. So, for example, if health service records are treated as confidential and not made available to the police force of the requested country, they will be similarly withheld from the police of a country making a request under the Scheme.

Paragraph 20(2) defines “judicial records” and “official records”, the latter including documents held by prosecution authorities as well as by government department or agencies.

## **TRANSMISSION AND RETURN OF MATERIAL**

21. (1) Where compliance with a request under this Scheme would involve the transmission to the requesting country of any document, record or property, the requested country
- (a) may postpone the transmission of the material if it is required in connection with proceedings in that country, and in such a case shall provide certified copies of a document or record pending transmission of the original;
  - (b) may require the requesting country to agree to terms and conditions to protect third party interests in the material to be transmitted and may refuse to effect such transmission pending such agreement.
- (2) Where any document, record or property is transmitted to the requesting country in compliance with a request under this Scheme, it shall be returned to the requested country when it is no longer required in connection with the criminal matter specified in the request unless that country has indicated that its return is not desired.
- (3) The requested country shall authenticate material that is to be transmitted by that country.

## **AUTHENTICATION**

22. A document or other material transmitted for the purposes of or in response to a request under this Scheme shall be deemed to be duly authenticated if it:
- (a) purports to be signed or certified by a judge or Magistrate, or to bear in the stamp or seal of a Minister, government department or Central Authority; or
  - (b) is verified by the oath of a witness or of a public officer of the Commonwealth country from which the document or material emanates.

## **COMMENTARY**

### **Transmission and return of material authentication**

Paragraphs 21 and 22 of the Scheme contain important practical provisions concerning the supply of material in response to request for assistance; they were revised at Christchurch in 1990. These provisions deal with a number of matters: the fact that some evidence may be required, now or at a later time, for use in the requested country; the fact that third parties may have interests in particular material; and the fact that certain types of material require authentication.

The first matter is dealt with by providing that the supply of material may be postponed where it is needed for proceedings in the requested country (but with an obligation to supply certified copies of documentary material), and that material should be returned to the requested country when it is no longer needed in connection with the criminal matter specified in the request (paragraph 21(1) (a), (2)). The requested country may waive the requirement of return.

The question of third party interests can be a complex one, especially where material has a high intrinsic value and there are several claimants each asserting an interest in it. The Scheme, in paragraph 21 (1)(b), ensures that a requested country need not transmit material unless and until it agrees terms

and conditions with the requesting country which are sufficient to protect third party interests; what is appropriate will of course depend on the circumstances of the particular case.

In providing for methods of authentication of material, paragraph 22 goes rather further than other paragraphs of the Scheme. It provides for modes of authentication which will be accepted as sufficient in all countries, whether acting as requesting or requested country in a particular case; implementing legislation will need to address this point accordingly. Authentication may be by signature or certificate of judge or magistrate, the stamp or seal of a Minister, ministry, government department or the Central Authority of the requested country; or reliance may be placed on the sworn evidence of a witness as defined in paragraph 22 (b).

### **PERSONAL APPEARANCE OF WITNESSES IN THE REQUESTING COUNTRY**

23. (1) A request under this Scheme may seek assistance in facilitating the personal appearance of the witnesses before a court exercising jurisdiction in the requesting country.
- (2) The request shall specify (a) the subject matter upon which it is desired to examine the witnesses; (b) the reasons for which the personal appearance of the witnesses is required; and (c) details of the travelling, subsistence and other expenses payable by the requesting country in respect of the personal appearance of the witnesses.
- (3) The competent authorities of the requested country shall invite persons whose appearance as witnesses in the requesting country is desired; and (a) ask whether they agree to appear; (b) inform the Central Authority of the requesting country of their answer; and (c) if they are willing to appear, make appropriate arrangements to facilitate the personal appearance of the witnesses.
- (4) A person whose appearance as a witness is the subject of a request and who does not agree to appear shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or requested country.

### **COMMENTARY**

#### **Personal appearance of witnesses**

Paragraphs 23 to 25 of the Scheme contain a set of related provisions addressing the case in which it is not sufficient to obtain testimony in the requested country; in some circumstances it will be essential that the witness appears at the trial in the requesting country. The Scheme does not propose the use of any measures of compulsion in this area, although some Commonwealth governments are attracted by the idea of providing for the recognition of an international subpoena. The Scheme only provides for assistance designed to facilitate the appearance in the requesting country of a witness who is willing so to appear. Paragraph 23 deals with the usual case, of a potential witness who is resident and at liberty in the requested country; paragraph 24 with the less common, but nonetheless important case, in which the potential witness is in custody in that country; and paragraph 25 guarantees certain immunities to witnesses appearing in response to a request under the Scheme.

In the straightforward case under paragraph 23, the Scheme provides for the passage of an invitation to appear, with reasons and a statement of the travelling, subsistence and other expenses payable by the requesting country, to the potential witness. If he is willing to appear, the requested

country helps in making appropriate travel arrangements. As already noted, the costs are borne by the requesting country (paragraph 12(2) of the Scheme).

Paragraph 23(4) was added at Christchurch in 1990 to ensure that refusal to appear attracted no penalties.

#### **PERSONAL APPEARANCE OF PERSONS IN CUSTODY**

24. (1) A request under this scheme may seek the temporary transfer of persons in custody in the requested country to appear as witnesses before a court exercising jurisdiction in the requesting country.
- (2) The request shall specify:
  - (a) the subject matter upon which it is desired to examine the witnesses;
  - (b) the reasons for which the personal appearance of the witnesses is required;
- (3) The requested country shall refuse to comply with a request for the transfer of persons in custody if the persons concerned do not consent to the transfer.
- (4) The requested country may refuse to comply with a request for the transfer of persons in custody and shall be under no obligation to inform the requesting country of the reasons for such refusal.
- (5) A person in custody whose transfer is the subject of a request and who does not consent to the transfer shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or requested country.
- (6) Where persons in custody are transferred, the requested country shall notify the requesting country of:
  - (a) the dates upon which the persons are due under the law of the requested country to be released from custody; and
  - (b) the dates by which the requested country requires the return of the persons and shall notify any variations in such dates.
- (7) The requesting country shall keep the persons transferred in custody, and shall return the persons to the requested country when their presence as witnesses in the requesting country is no longer required, and in any case by the earlier of the dates notified under sub paragraph (6).
- (8) The obligation to return the persons transferred shall subsist notwithstanding the fact that they are nationals of the requesting country.
- (9) The period during which the persons transferred are in custody in the requesting country shall be deemed to be service in the requested country of an equivalent period of custody in that country for all purposes.
- (10) Nothing in this paragraph shall preclude the release in the requesting country without return to the requested country of any person transferred where the two countries and the person concerned agreed.

## COMMENTARY

### Transfer of witnesses in custody

Paragraph 24 contains the necessarily more elaborate provisions required to deal with the transfer of persons in custody to appear as witnesses. There can be no transfer if the prisoner refuses his consent (paragraph 24(3)); even if he does consent, the requested country may in its discretion refuse to comply with the request, and need not give any reasons for its refusal (paragraph 24(4)).

Paragraph 24(5) was added at Christchurch in 1990; no penalty attaches to a refusal by the person in custody to agree to a transfer.

A person transferred in custody under paragraph 24 does of course remain in custody in the requesting country. Provisions in paragraph 24(6) and (7) ensure that he will not remain in custody after the expiry of his sentence. Paragraph 24(8) is designed to ensure that a person transferred cannot, by reason of his possessing citizenship of the requesting country, prevent his return in due course to the requested country.

### IMMUNITY OF PERSONS APPEARING

25. (1) Subject to the provisions of paragraph 24, witnesses appearing in the requesting country in response to a request under paragraph 23 or persons transferred to that country in response to a request under paragraph 24 shall be immune in that country from prosecution, detention or any other restriction of personal liberty in respect of criminal acts, omissions or convictions before the time of their departure from the requested country.

(2) The immunity provided for in that paragraph shall cease:

- (a) in the case of witnesses appearing in response to a request under paragraph 23, when the witnesses having had, for a period of 15 consecutive days from the dates when they were notified by the competent authority of the requesting country that their presence was no longer required by the court exercising jurisdiction in the criminal matter, an opportunity of leaving have nevertheless remained in the requesting country, or having left that country have returned to it;
- (b) in the case of persons transferred in response to a request under paragraph 24 and remaining in custody when they have been returned to the requested country.

## COMMENTARY

### Immunities

Paragraph 25 of the Scheme confers on witnesses appearing in response to a request under the Scheme immunity from prosecution in respect of acts or omissions before the date on which they left the requested country and from detention in respect of convictions recorded before that date.

## **TRACING THE PROCEEDS OR INSTRUMENTALITIES OF CRIME**

26. (1) A request under this Scheme may seek assistance in identifying, locating and assessing the value of property believed to have been derived or obtained, directly or indirectly, from, or to have been used in, or in connection with, the commission of an offence and believed to be within the requested country.
- (2) The request shall contain such information as is available to the Central Authority of the requesting country as to the nature and location of the property and as to any person in whose possession or control the property is believed to be.

### **COMMENTARY**

Paragraphs 26 to 28 of the Scheme are a revised text approved by Law Ministers in Christchurch in 1990. They replace paragraphs 26 to 29 of the original text. The object of the paragraphs is to provide a framework for co-operation between Commonwealth governments in tracing and seizing the proceeds and instrumentalities of crime.

#### **Tracing the proceeds of instrumentalities of crime**

Paragraph 26 is the counterpart in this context of paragraph 14 which deals with the location of persons. Here assistance may involve not only the location of property but also its identification and the assessment of its value. There may be circumstances in which the relevant property is not to be seized (perhaps because of legitimate third party interests) but penalties are to be imposed by reference to the value of the property; a reliable assessment of that value is clearly important.

#### **Proceeds of crime**

The present text of the Scheme contains no formal definition of “the proceeds of crime”, but paragraph 26 indicates the meaning of this term by speaking of property derived or obtained, directly or indirectly, from the commission of an offence. The Scheme does not, of course, prevent a country from adopting a more far-reaching definition for its own purposes in what is still a developing area of law.

## **SEIZING AND CONFISCATING THE PROCEEDS OF INSTRUMENTALITIES OF CRIME**

27. (1) A request under this Scheme may seek assistance in securing:
- (a) the making in the requested country of an order relating to the proceeds of instrumentalities of crime; or
  - (b) the recognition or enforcement in that country of such an order made in the requesting country.
- (2) For the purpose of this paragraph, “an order relating to the proceeds of instrumentalities of crime” means:
- (a) an order restraining dealings with any property in respect of which there is reasonable cause to believe that it has been derived or obtained, directly or indirectly, from, or used in, or in connection with, the commission of an offence;

- (b) an order confiscating property derived or obtained, directly or indirectly, from, or used in or in connection with, the commission of an offence; and
  - (c) an order imposing a pecuniary penalty calculated by reference to the value of any property so derived, obtained or used.
- (3) Where the requested country cannot enforce an order made in the requesting country, the requesting country may request the making of any similar order available under the law of the requested country.
- (4) The request shall be accompanied by a copy of any order made in the requesting country and shall contain so far as reasonably practicable, all information available to the Central Authority of the requesting country which may be required in connection with the procedures to be followed in the requested country.
- (5) The law of the requested country shall apply to determine the circumstances and manner in which an order may be made, recognised or enforced in response to the request.
- (6) The law of the requested country may provide for the protection of the interests of bona fide third parties in property restrained or confiscated as a result of a request made pursuant to this Scheme, by providing:
- (a) for the giving of notice of the making of orders restraining or confiscating property; and
  - (b) that any third party claiming an interest in property so restrained or confiscated may make an application to a court of competent jurisdiction for an order 38
    - (i) declaring that the interest of the applicant in the property or part thereof was acquired bona fide; and
    - (ii) restoring such property or the value of the interest therein to the applicant.

## COMMENTARY

### **Seizure and confiscation and proceeds and instrumentalities**

Paragraph 27 deals with the seizure and confiscation of proceeds and instrumentalities. The request may either seek the making in the requested country of an order of one of the three classes listed in paragraph 27(2) (restraint orders, confiscation orders, or pecuniary penalty orders) or the recognition or enforcement in the requested country of such an order already made in the requesting country. Which of these options will be best depends upon the current state of the law in the requested country; some countries will have a full range of possible orders, other will not know, for example, the “pecuniary penalty order” which features in Australian legislation. Again, some countries will have provisions enabling them to enforce foreign confiscation orders on the analogy of foreign money-judgements, but most will not; paragraph 27(3) makes it clear that in such a case the requesting country can adopt the other approach, seeking a fresh order in the requested country.

Paragraph (6) was added in 1999 to meet the concerns of member countries that the Scheme may not adequately reflect the intention that the interests of bona fide third parties in restrained or confiscated property. The provision is intended to operate for the benefit of bona fide third parties in the requested country. The law of the requesting country is expected to deal with these interests where the

third party's interest is one which ought to be protected under that law. Nothing in this new paragraph is intended to facilitate review by a foreign court of the order itself - it merely recognises that in the requested country, claims of bona fide interests not brought to the attention of the court making the order may exist and may need to be adjudicated.

#### **DISPOSAL OR RELEASE OF PROPERTY**

28. (1) The law of the requested country shall apply to determine the disposal of any property
- (a) forfeited; or
  - (b) obtained as a result of the enforcement of a pecuniary penalty order as a result of a request under this Scheme.
- (2) The law of the requested country shall apply to determine the circumstances in which property made the subject of interim seizure as a result of a request under this Scheme may be released from the effects of such seizure.
- (3) The law of the requested country may provide that the proceeds of an order of the type referred to in sub-paragraphs 27(2)(b) and (c), or the value thereof, may be
- (a) returned to the requesting country; or
  - (b) shared with the requesting country in such proportion as the requested country in its discretion deems appropriate in all the circumstances.

#### **COMMENTARY**

##### **Disposal of property**

This paragraph contains provisions formerly in paragraph 27(4) of the Harare text; it makes it clear that the law of the requested country determines what happens to property seized or made the subject of restraint. That law may allow that in appropriate cases, the property of part thereof may be paid over the authorities in the requested country, but arrangements may have to be agreed in particular cases.

Paragraph 3 was added in 1999 to encourage the practice of asset sharing. One motivating factor for the addition of the paragraph was the concern expressed, particularly by small countries and jurisdictions, over the cost implications involved in handling complicated and lengthy requests. The provision is deliberately discretionary and is designed to complement paragraph 1.

#### **CONSULTATION**

29. The Central Authorities of the requested and requesting countries shall consult promptly, at the request of either, concerning matters arising under this Scheme.



## **OTHER ASSISTANCE**

30. After consultation between the requesting and the requested countries assistance not within the scope of this Scheme may be given in respect of a criminal matter on such terms and conditions as may be agreed by those countries.

## **NOTIFICATION OF DESIGNATIONS**

31. Designations of dependent territories under paragraph 2 and of Central Authorities under paragraph 4 shall be notified to the Commonwealth Secretary-General.

## **COMMENTARY**

### **Consultations and other assistance**

The Scheme will depend for its success on the level of co-operation between Commonwealth Governments in ensuring the enactment of appropriate implementing legislation and between Central Authorities in operating its provisions. Paragraph 30 underlines this by referring to a duty to engage in prompt consultations at the request of another country in relation to matters arising under the Scheme; this should ensure that difficulties are promptly resolved and misunderstandings cleared up. As paragraph 31 makes clear, the Scheme does not seek to limit the scope of co-operation; if particular types of assistance which the Scheme does not cover are desired to meet the circumstances of a particular case, they can be provided by agreement.

## **THE LONDON SCHEME FOR EXTRADITION WITHIN THE COMMONWEALTH**

### **Incorporating the amendments agreed at Kingstown in November 2002.**

1. (1) The general provisions set out in this Scheme will govern the extradition of a person from the Commonwealth country, in which the person is found, to another Commonwealth country, in which the person is accused of an offence.
- (2) Extradition will be precluded by law, or be subject to refusal by the competent executive authority, only in the circumstances mentioned in this Scheme.
- (3) For the purpose of this Scheme a person liable to extradition as mentioned in paragraph (1) is described as a person sought and each of the following areas is described as a separate country:
  - (a) each sovereign and independent country within the Commonwealth together with any dependent territories which that country designates, and
  - (b) each country within the Commonwealth, which, though not sovereign and independent, is not a territory designated for the purposes of the preceding sub-paragraph.

### **EXTRADITION OFFENCES AND DUAL CRIMINALITY RULE**

2. (1) A person sought will only be extradited for an extradition offence.
- (2) For the purpose of this Scheme, an extradition offence is an offence however described which is punishable in the requesting and requested country by imprisonment for two years or a greater penalty.
- (3) In determining whether an offence is an offence punishable under the laws of both the requesting and the requested country, it shall not matter whether:
  - (a) the laws of the requesting and requested countries place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology;
  - (b) under the laws of the requesting and requested countries the elements of the offence differ, it being understood that the totality of the acts or omissions as presented by the requesting country constitute an offence under the laws of the requested country.
- (4) An offence described in paragraph (2) is an extradition offence notwithstanding that the offence:
  - (a) is of a purely fiscal character; or
  - (b) was committed outside the territory of the requesting country where extradition for such offences is permitted under the law of the requested country.

### **WARRANTS, OTHER THAN PROVISIONAL WARRANTS**

3. (1) A person sought will only be extradited if a warrant for arrest has been issued in the country seeking extradition and either –
  - (a) that warrant is endorsed by a competent judicial authority in the requested country (in which case, the endorsed warrant will be sufficient authority for arrest), or
  - (b) a further warrant for arrest is issued by the competent judicial authority in the requested country, other than a provisional warrant issued in accordance with clause 4.
- (2) The endorsement or issue of a warrant may be made conditional on the competent executive authority having previously issued an order to proceed.

### **PROVISIONAL WARRANTS**

4. (1) Where a person sought is, or is suspected of being, in or on the way to any country but no warrant has been endorsed or issued in accordance with clause 3, the competent judicial authority in the destination country may issue a provisional warrant for arrest on such information and under such circumstances as would, in the authority's opinion, justify the issue of a warrant if the extradition offence had been an offence committed within the destination country.
- (2) For the purposes of paragraph 1, information contained in an international notice issued by the International Criminal Police Organisation (INTERPOL) in respect of a person sought may be considered by the authority, either alone or with other information, in deciding whether a provisional warrant should be issued for the arrest of that person.
- (3) A report of the issue of a provisional warrant, with the information in justification or a certified copy thereof, will be sent to the competent executive authority.
- (4) The competent executive authority who receives the information under paragraph (3) may decide, on the basis of that information and any other information which may have become available, that the person should be discharged, and so order.

### **COMMITTAL PROCEEDINGS**

5. (1) A person arrested under a warrant endorsed or issued in accordance with clause 3(1), or under a provisional warrant issued in accordance with clause 4, will be brought, as soon as practicable, before the competent judicial authority who will hear the case in the same manner and have the same jurisdiction and powers, as nearly as may be, including power to remand and admit to bail, as if the person were charged with an offence committed in the requested country.
- (2) The competent judicial authority will receive any evidence which may be tendered to show that the extradition of the person sought is precluded by law.
- (3) Where a provisional warrant has been issued in accordance with clause 4, but within such reasonable time as the competent judicial authority may fix:
  - (a) a warrant has not been endorsed or issued in accordance with clause 3(1), or

- (b) where such endorsement or issue of a warrant has been made conditional on the issuance of an order to proceed, as mentioned in clause 3(2), no such order has been issued, the competent judicial authority will order the person to be discharged.
- (4) Where a warrant has been endorsed or issued in accordance with 3(1) the competent judicial authority may commit the person to prison to await extradition if –
  - (a) such evidence is produced as establishes a prima facie case that the person committed the offence; and
  - (b) extradition is not precluded by law but, otherwise, will order the person to be discharged.
- (5) Where a person sought is committed to prison to await extradition as mentioned in paragraph (4), notice of the fact will be given as soon as possible to the competent executive authority of the country in which committal took place.

#### **OPTIONAL ALTERNATIVE COMMITTAL PROCEEDINGS**

- 6. (1) Two or more countries may make arrangements under which clause 5(4) will be replaced by paragraphs 2-4 of this clause or by other provisions agreed by the countries involved.
- (2) Where a warrant has been endorsed or issued as mentioned in clause 3(1), the competent judicial authority may commit the person sought to prison to await extradition if –
  - (a) the contents of a record of the case received, whether or not admissible in evidence under the law of the requested country, and any other evidence admissible under the law of the requested country, are sufficient to warrant a trial of the charges for which extradition has been requested; and
  - (b) extradition is not precluded by law, but otherwise will order that the person be discharged.
- (3) The competent judicial authority will receive a record of the case prepared by an investigating authority in the requesting country if it is accompanied by –
  - (a) an affidavit of an officer of the investigating authority stating that the record of the case was prepared by or under the direction of that officer, and that the evidence has been preserved for use in court; and
  - (b) a certificate of the Attorney General of the requesting country that in his or her opinion the record of the case discloses the existence of evidence under the law of the requesting country sufficient to justify a prosecution.
- (4) A record of the case will contain –
  - (a) particulars of the description, identity, nationality and, to the extent available, whereabouts of the person sought;
  - (b) particulars of each offence or conduct in respect of which extradition is requested, specifying the date and place of commission, the legal definition of the offence and the relevant provisions in the law of the requesting country, including a certified copy of any such definition in the written law of that country;

- (c) the original or a certified copy of any document of process issued in the requesting country against the person sought for extradition ;
- (d) a recital of the evidence acquired to support the request for extradition; and
- (e) a certified copy, reproduction or photograph of exhibits or documentary evidence.

#### **SUPPLEMENTARY INFORMATION**

- 7. (1) If it considers that the material provided in support of a request for extradition is insufficient, the competent authority in the requested country may seek such additional information as it considers necessary from the requesting country, to be provided within such reasonable period of time as it may specify.
- (2) Where a request under paragraph (1) is made after committal proceedings have commenced the competent judicial authority in the requested country may grant an adjournment of the proceedings for such period as that authority may consider reasonable for the material to be furnished, which aggregate period should not exceed 60 days.

#### **CONSENT ORDER FOR RETURN**

- 8. (1) A person sought may waive committal proceedings, and if satisfied that the person sought has voluntarily and with an understanding of its significance requested such waiver, the competent judicial authority may make an order by consent for the committal of the person sought to prison, or for admission to bail, to await extradition.
- (2) The competent executive authority may thereafter order extradition at any time, notwithstanding the provisions of clause 9.
- (3) The provisions of clause 20 shall apply in relation to a person sought extradited under this clause unless waived by the person.

#### **RETURN OR DISCHARGE BY EXECUTIVE AUTHORITY**

- 9. After the expiry of 15 days from the date of the committal of a person sought, or, if a writ of habeas corpus or other like process is issued, from the date of the final decision of the competent judicial authority on that application (whichever date is the later), the competent executive authority will order extradition unless it appears to that authority that, in accordance with the provisions set out in this Scheme, extradition is precluded by law or should be refused, in which case that authority will order the discharge of the person.

#### **DISCHARGE BY JUDICIAL AUTHORITY**

- 10. (1) Where after the expiry of the period mentioned in paragraph (2) a person sought has not been extradited an application to the competent judicial authority may be made by or on behalf of the person for a discharge and if –
  - (a) reasonable notice of the application has been given to the competent executive authority, and

- (b) sufficient cause for the delay is not shown, the competent judicial authority will order the discharge of the person.
- (2) The period referred to in paragraph (1) will be prescribed by law and will be one expiring either –
  - (a) not later than two months from the person's committal to prison, or
  - (b) not later than one month from the date of the order for extradition made in accordance with clause 9.

#### **HABEAS CORPUS AND REVIEW**

- 11. (1) It will be provided that an application may be made by or on behalf of a person sought for a writ of habeas corpus or other like process.
- (2) It will be provided that an application may be made by or on behalf of the government of the requesting country for review of the decision of the competent judicial authority in committal proceedings.

#### **POLITICAL OFFENCE EXCEPTION**

- 12. (1) (a) The extradition of a person sought will be precluded by law if the competent authority is satisfied that the offence is of a political character;
- (b) Sub paragraph (a) shall not apply to:
  - (i) offences established under any multilateral international convention to which the requesting and the requested countries are parties, the purpose of which is to prevent or repress a specific category of offences and which imposes on the parties an obligation either to extradite or to prosecute the person sought;
  - (ii) offences for which the political offence or offence of political character ground of refusal is not applicable under international law.
- (c) If the competent executive authority is empowered by law to certify that the offence of which a person sought is accused is an offence of a political character, and so certifies in a particular case, the certificate will be conclusive in the matter and binding upon the competent judicial authority for the purposes mentioned in this clause.
- (2) (a) A country may provide by law that certain acts shall not be held to be offences of a political character including:
  - (i) an offence against the life or person of a Head of State or a member of the immediate family of a Head of State or any related offence (i.e. aiding and abetting, or counselling or procuring the commission of, or being an accessory before or after the fact to, or attempting or conspiring to commit such an offence),
  - (ii) an offence against the life or person of a Head of Government, or of a Minister of a Government, or any related offence as described above,
  - (iii) murder, or any related offence as described above,

- (iv) any other offence that a country considers appropriate.
  - (b) A country may restrict the application of any of the provisions made under sub paragraph (b) to a request from a country which has made similar provisions in its laws.
13. The extradition of a person sought also will be precluded by law if –
- (a) it appears to the competent authority that:
    - (i) the request for extradition although purporting to be made for an extradition offence was in fact made for the purpose of prosecuting or punishing the person on account of race, religion, sex, nationality or political opinions, or
    - (ii) that the person may be prejudiced at trial or punished, detained or restricted in personal liberty by reason of race, religion, sex, nationality or political opinions.
  - (b) the competent authority is satisfied that by reason of
    - (i) the trivial nature of the case, or
    - (ii) the accusation against the person sought not having been made in good faith or in the interests of justice, or
    - (iii) the passage of time since the commission of the offence, or
    - (iv) any other sufficient cause, it would, having regard to all the circumstances be unjust or oppressive or too severe a punishment for the person to be extradited or, as the case may be, extradited before the expiry of a period specified by that authority.
  - (c) the competent authority is satisfied that the person sought has been convicted (and is neither unlawfully at large nor at large in breach of a condition of a licence to be at large), or has been acquitted, whether within or outside the Commonwealth, of the offence for which extradition is sought.

#### **DISCRETIONARY BASIS FOR REFUSAL OF EXTRADITION**

14. A request for extradition may be refused in the discretion of the competent authority of the requested country if –
- (a) judgment in the requesting country has been rendered in circumstances where the accused was not present; and
    - (i) no counsel appeared for the accused; or
    - (ii) counsel instructed and acting on behalf of the accused was not permitted to participate in the proceedings;
  - (b) the offence for which extradition is requested has been committed outside the territory of either the requesting or requested country and the law of the requested country does not enable it to assert jurisdiction over such an offence committed outside its territory in comparable circumstances;

- (c) the person sought has, under the law of either the requesting [or requested] country become immune from prosecution or punishment because of [any reason, including] lapse of time or amnesty;
- (d) the offence is an offence only under military law or a law relating to military obligations.

#### **DISCRETIONARY GROUNDS OF REFUSAL**

15. (1) Any country may adopt the provisions of this clause but, where they are adopted, any other country may in relation to the first country reserve its position as to whether it will give effect to the other clauses of the Scheme or will give effect to them subject to such exceptions and modifications as appear to it to be necessary or expedient or give effect to any arrangement made under clause 23(a).
- (2) A request for extradition may be refused if the competent authority of the requested country determines –
- (a) that upon extradition, the person is likely to suffer the death penalty for the extradition offence and that offence is not punishable by death in the requested country; and
  - (b) it would be, having regard to all the circumstances of the case and to the likelihood that the person would be immune from punishment if not extradited, unjust or oppressive or too severe a punishment for extradition to proceed.
  - (c) In determining under paragraph (a), whether a person would be likely to suffer the death penalty, the executive authority shall take into account any representations which the authorities of the requesting country may make with regard to the possibility that the death penalty, if imposed, will not be carried out.
- (3) (a) A request for extradition may be refused on the basis that the person sought is a national or permanent resident of the requested country.
- (b) For the purpose of sub paragraph a, a person shall be treated as a national of a country that is –
- (i) a Commonwealth country of which he or she is a citizen; or
  - (ii) a country or territory his or her connection with which determines national status.
- (c) The assessment under paragraph (b) should be at the date of the request.

#### **ALTERNATIVE MEASURES IN THE CASE OF REFUSAL**

16. (1) For the purpose of ensuring that a Commonwealth country cannot be used as a haven from justice, each country which reserves the right to refuse to extradite nationals or permanent residents in accordance with clause 15 paragraph (3), will take, subject to its constitution, such legislative action and other steps as may be necessary or expedient in the circumstances to facilitate the trial or punishment of a person whose extradition is refused on that ground.



- (2) The legislative action necessary to give effect to paragraph (1) may include –
- (a) providing that the case be submitted to the competent authorities of the requested country for prosecution;
  - (b) permitting:
    - (i) the temporary extradition of the person to stand trial in the requesting country on condition that, following trial and sentence, the person is returned to the requested country to serve his or her sentence; and
    - (ii) the transfer of convicted offenders; or
  - (c) enabling a request to be made to the relevant authorities in the requesting country for the provision to the requested country of such evidence and other information as would enable the authorities of the requested country to prosecute the person for the offence.

#### **COMPETENT AUTHORITY**

17. (1) The competent authorities for the purpose of clauses 12, 13, 14 and 15 will include
- (a) any judicial authority which hears or is competent to hear an application described in clause 11, and
  - (b) the executive authority responsible for orders for extradition.
- (2) It will be sufficient compliance with sub paragraphs 12, 13, 14 and 15 if a country decides that the competent authority for those purposes is exclusively the judicial authority or the executive authority.

#### **POSTPONEMENT OF EXTRADITION AND TEMPORARY TRANSFER OF PRISONERS TO STAND TRIAL**

18. (1) Subject to the following provisions of this clause, where a person sought –
- (a) has been charged with an offence that may be tried by a court in the requested country or
  - (b) is serving a sentence imposed by a court in the requested country, then until discharge (by acquittal, the expiration or remission of sentence, or otherwise) extradition will either be precluded by law or be subject to refusal by the competent executive authority as the law of the requested country may provide.
- (2) Subject to the provisions of this Scheme, a prisoner serving such a sentence who is also a person sought may, at the discretion of the competent executive authority of the requested country, be extradited temporarily to the requesting country to enable proceedings to be brought against the prisoner in relation to the extradition offence on such conditions as are agreed between the respective countries.

### **PRIORITY WHERE TWO OR MORE REQUESTS MADE**

19. (1) Where the requested country receives two or more requests from different countries for the extradition of the same person, the competent executive authority will determine which request will proceed and may refuse the other requests.
- (2) In making a determination under paragraph (1), the authority will consider all the circumstances of the case and in particular –
  - (a) the relative seriousness of the offences,
  - (b) the relative dates on which the requests were made, and
  - (c) the citizenship or other national status and ordinary residence of the person sought.

### **SPECIALTY RULE**

20. (1) This clause relates to a person sought who has been extradited from one country to another, so long as the person has not had a reasonable opportunity of leaving the second mentioned country.
- (2) In the case of a person sought to whom this clause relates, detention or trial in the requesting country for any offence committed prior to extradition (other than the one for which the person was extradited or any lesser offence proved by the facts on which extradition was based), without the consent of the requested country, will be precluded by law.
- (3) When considering a request for consent under paragraph (2) the executive authority of the requested country may seek such particulars as it may require in order that it may be satisfied that the request is otherwise consistent with the principles of this Scheme.
- (4) Consent under paragraph (2) shall not be unreasonably withheld but where, in the opinion of the requested country, it appears that, on the facts known to the requesting country at the time of the original request for extradition, application should have been made in respect of such offences at that time, that may constitute a sufficient basis for refusal of consent.
- (5) The requesting country shall not extradite a person sought who has been surrendered to that country pursuant to a request for extradition, to a third country for an offence committed prior to extradition, without the consent of the requested country.
- (6) In considering a request under paragraph (5) the requested country may seek the particulars referred to in paragraph (3) and shall not unreasonably withhold consent.
- (7) Nothing in this clause shall prevent a court in the requesting country from taking into account any other offence, whether an extradition offence or not under this Scheme, for the purpose of passing sentence on a person convicted of an offence for which he or she was surrendered, where the person consents.

## **RETURN OF ESCAPED PRISONERS**

21. (1) In the case of a person who –
- (a) has been convicted of an extradition offence by a court in any country and is unlawfully at large before the expiry of the sentence for that offence, and
  - (b) is found in another country, the provisions set out in this Scheme, as applied for the purposes of this clause by paragraph (2), will govern extradition to the country in which the person was convicted.
- (2) For the purposes of this clause this Scheme shall be construed, subject to any necessary adaptations or modifications, as though the person unlawfully at large were accused of the offence for which there is a conviction and, in particular –
- (a) any reference to a person sought shall be construed as including a reference to such a person as is mentioned in paragraph (1); and
  - (b) the reference in clause 5(4) to evidence that establishes a prima facie case shall be construed as a reference to such evidence as establishes that the person has been convicted.
- (3) The references in this clause to a person unlawfully at large shall be construed as including reference to a person at large in breach of a condition of a licence to be at large.

## **ANCILLARY PROVISIONS**

22. Each country will take, subject to its constitution, any legislative and other steps which may be necessary or expedient in the circumstances to facilitate and effectuate –
- (a) the transit through its territory of a person sought who is being extradited under this Scheme;
  - (b) the delivery of property found in the possession of a person sought at the time of arrest which may be material evidence of the extradition offence; and
  - (c) the proof of warrants, certificates of conviction, depositions and other documents.

## **ALTERNATIVE ARRANGEMENTS AND MODIFICATIONS**

23. Nothing in this Scheme shall prevent –
- (a) the making of arrangements between Commonwealth countries for further or alternative provision for extradition, or
  - (b) the application of the Scheme with modifications by one country in relation to another which has not brought the Scheme fully into effect.