Criminal Law Issues

REPORT OF THE COMMONWEALTH WORKING GROUP ON ASSET REPATRIATION

Table of Contents

EXECUTIVE SUMMARY

TERMS OF REFERENCE

1. In pursuance of the mandate in the Aso Rock Declaration the Commonwealth Secretary-General constituted a Working Group on the recovery and repatriation of assets of illicit origin focusing on maximising co-operation and assistance between governments. The Working Group, comprised of experts from eleven Commonwealth governments as well as other independent experts and observers, met on four occasions. They considered and discussed, *inter alia*:

- the major problems in asset tracking, recovery, and repatriation and best practice in overcoming those problems;
- the key impediments to effective international co-operation in this area and effective ways in which those impediments can be addressed;
- the laws, administrative structures and other mechanisms necessary, in both "victim" and "receiving" states to prevent the movement of assets, and to allow for effective international co-operation in tracing and confiscating the assets;
- taking into account the provisions of the United Nations Convention Against Corruption (UNCAC), in particular Article 57, the laws, administrative structures and other mechanisms necessary to provide for the return of confiscated assets;
- possible amendments to the Commonwealth Scheme for Mutual Assistance in Criminal Matters (the Harare Scheme) to provide for more effective co-operation in this area.

ISSUES ADDRESSED

2. In approaching its mandate, the Group examined the issues in a chronological manner, much as a case would develop in practice.

Misappropriation of Assets

3. Measures for co-operation and repatriation cannot be viewed in isolation from the need for all states to put in place a comprehensive regime to combat corruption, with particular emphasis on the establishment of a broad range of preventive measures. The Group recommended that countries be guided by instruments such as the *Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption* and Chapter II of the UNCAC in establishing these essential preventive measures. It is also essential to have a comprehensive regime of criminal offence provisions to govern activities that may lead to the misappropriation of funds.

Immunities

4. It is a fundamental principle that all persons are equal before the law. However in some Commonwealth countries Heads of State and Government and other officials enjoy immunities from criminal prosecution, which can preclude effective prosecution and pursuit of illicit assets in corruption cases. The Group considered that Commonwealth governments should strive for a position where there are no immunities.

Preventing the Movement of Funds

5. To prevent the movement and concealment of funds, countries need to fully implement the international standards and measures designed to prevent money laundering. This requires not only legislative action but also the adoption of relevant structures and administrative procedures. Particular emphasis is needed on enhanced scrutiny with respect to both foreign and domestic

politically exposed persons (PEPs). Effective measures should also be adopted to prevent cash smuggling and allow for cash seizures.

Serving Heads of State

6. Delicate political and practical questions were discussed concerning actions against serving Heads of State where assets believed to be obtained through corruption are located in another state. To the greatest extent possible, existing legislation and procedures for the reporting of suspicious transactions and the sharing of that information should be utilised in such situations. It may also be feasible in some situations for the country in possession of the funds to take domestic measures with reference to those assets. On a broader level the Group recommended that Heads of Government give consideration to an ad hoc Commonwealth peer review mechanism for such situations.

Mechanisms for Asset Confiscation

7. An effective system for the restraint and confiscation of proceeds of crime is fundamental to allow for the repatriation of assets. There are three different types of confiscation procedure which can be used: conviction based, non-conviction based and ordinary civil litigation. The Report recommends that Commonwealth countries that have not already done so should promptly put in place strong and comprehensive legislation for both conviction and non- conviction based asset confiscation and establish and properly fund agencies dealing with asset confiscation and management.

Tracing and Tracking of Assets

8. Legislation is of little value unless it can be effectively enforced. In this respect there is a need for training, dedicated resources and co-ordinated efforts to enhance the strength of the relevant investigative agencies. The need for adequate investigative tools and powers was discussed and some effective strategies arising from this discussion are outlined in the Report.

Mutual Legal Assistance – General

9. There are a myriad of existing obstacles to effective mutual legal assistance including: delay; a lack of understanding/communication; the need for consultation between authorities; absence of co-ordination of efforts, particularly in complex cases; and the requirement by some countries for a bilateral treaty. The Group recommends a number of steps that should be taken to overcome these impediments including allowing for the rendering of legal assistance without a requirement for a bilateral treaty and in the absence of dual criminality. The Report recommends that a Commonwealth Network should be established to assist consultation, communication and co-ordination between Commonwealth countries.

Availability of Mutual Legal Assistance

10. The need for mutual assistance to be sought and obtained in respect of investigations and proceedings for non-conviction based asset confiscation was emphasised. Amendments to the Harare Scheme were recommended in this regard and are attached hereto at **Annex 5**. While limitations on the use of mutual legal assistance in purely civil proceedings are acknowledged, the Report urges Commonwealth countries to permit the use of evidence gathered through mutual legal assistance in civil proceedings related to corruption matters. The Group also recommended further examination of the possible use of mutual legal assistance to gather evidence for civil proceedings brought by a victim country for the limited purpose of asset recovery in corruption cases.

Mutual Assistance for Freezing/Restraint/Confiscation of Assets

11. Acknowledging the balance of interests between effective and speedy recovery of assets and the property rights of individuals, the Group noted the practical advantages of direct enforcement of foreign orders for freezing/restraint and confiscation. Adoption of legislation establishing a direct enforcement system is recommended, recognising the need for an executive discretion to grant or refuse a request, for innocent third parties to challenge a restraint order in either requesting or requested states, and for the accused to have a limited right of challenge in the requested state. The Report states that such legislation should provide for the enforcement of both conviction based and non-conviction based orders.

Mutual Assistance – The Harare Scheme

12. Specific revisions were proposed to the Harare Scheme primarily to extend its application to non-conviction based asset confiscation and to add some provisions to make it a more effective tool for co-operation generally and especially with respect to restraint, confiscation and repatriation.

Restraint of Assets

13. Delay was highlighted as a major problem in effective restraint action and the Group acknowledged that the timing of restraint order applications is crucial. The Report recommends that Commonwealth countries ensure their legislative scheme for restraint and confiscation is flexible and permits early applications for a restraint order. Alongside this the Group discussed the importance of effective mechanisms for the management of restrained assets. The Report recommends that Commonwealth countries should adopt such mechanisms.

Effective Repatriation of Assets

14. Delay was again identified as a significant problem in the repatriation of assets and the final Report encourages Commonwealth countries to "fast track" corruption cases to reduce delay. The Group highlighted the need for countries to implement Chapter V of the UNCAC on Asset Recovery and in particular to put in place executive or judicial mechanisms that will allow for the repatriation of confiscated assets in corruption cases as mandated under the Convention. The Group also recommended amendments to the Harare Scheme to incorporate UNCAC provisions.

Recommendations for Implementation

15. The Group concluded that full implementation of the 58 recommendations contained in the Report is key to advance effective action in the repatriation of assets plundered through corruption. The Group identified 10 key recommendations, set out below, the implementation of which should be given priority attention. **Annex VII** references the paragraphs in the Report from which these Key Recommendations were drawn. It was also recommended that Heads of Government should commit increased resources for the Commonwealth Secretariat to assist Commonwealth countries with the implementation of these recommendations.

KEY RECOMMENDATIONS

1. Commonwealth countries should sign, ratify and implement the United Nations Convention against Corruption as a matter of urgency.

2. Commonwealth Heads of State/Government, ministers and other public officials should not have immunity from prosecution in domestic courts for alleged criminal activity. Heads of

Government should commit themselves to take active steps to ensure the removal of these immunities.

3. In cases involving allegations of corruption by serving Heads of State/Government the Commonwealth should have an ad hoc peer review mechanism in place.

4. Commonwealth countries that have yet to do so should promptly put in place strong and comprehensive legislation and procedures for criminal conviction based asset confiscation. This should include a power to confiscate in circumstances where the accused has absconded or died. Commonwealth countries should also put in place comprehensive laws and procedures for non-conviction based asset confiscation.

5. Mutual legal assistance between Commonwealth countries should be available on the basis of the Harare Scheme without a requirement for a bilateral treaty. Commonwealth countries that currently require a treaty for mutual legal assistance should consider removing such a requirement.

6. Commonwealth countries which have yet to provide for restraint and confiscation of assets in response to a foreign request should promptly adopt legislation which establishes a direct enforcement system. Commonwealth countries which have an existing law for enforcing foreign requests for restraint and confiscation should review their legislation and procedures and amend them as necessary to ensure that foreign requests for restraint and confiscation can be effectively and speedily enforced. If the current law does not provide for the enforcement of non- conviction based orders, it should be amended to do so.

7. Commonwealth countries should provide by law, either through a judicial process or executive discretion, for the return of funds minus reasonable expenses to a requesting country:

(a) in cases of misappropriation or other unlawful taking of public funds, or the laundering thereof;
(b) where the requesting country reasonably establishes its prior ownership of confiscated property; or
(c) when the requested country recognises damage to the requesting country.

8. Commonwealth countries should ensure that the law clearly prescribes how public funds may be used including by Heads of State/Government and that there are criminal offences applicable to any misuse of those funds.

9. Commonwealth countries should allocate sufficient resources to establish and properly fund central authorities and law enforcement and other agencies dealing with asset confiscation and management.

10. Commonwealth Heads of Government should keep asset repatriation on the agenda for their meetings and commit themselves to periodic review and discussion (by Heads of Government/Law and Finance Ministers) of the progress on implementation of the recommendations in the report.

REPORT

I. INTRODUCTION

Terms of Reference

1. Commonwealth Heads of Government agreed the following in the Aso Rock Declaration issued at their summit in December 2003 in Abuja:

"We recognise that corruption erodes economic development and corporate governance. We welcome the successful conclusion of the United Nations Convention against Corruption and urge the early signature, ratification and implementation of the Convention by member states. We pledge maximum co-operation and assistance amongst our governments to recover assets of illicit origin and repatriate them to their countries of origin. This will make more resources available for development purposes. To this end, we request the Secretary-General to establish a Commonwealth Working Group to help advance effective action in this area."

2. Further, in their Communiqué, Heads of Government :
"welcomed the recent adoption of the United Nations Convention against Corruption and requested member states to sign and ratify it. They noted that systemic corruption, extortion and bribery undermine good governance. They called for enhanced mutual co-operation in the repatriation of illegally acquired public funds and assets to the countries of their origin in accordance with the provisions of the Convention."

3. In pursuance of the above mandate, the Commonwealth Secretary-General constituted a Working Group comprised of experts representing eleven Commonwealth governments, and other independent experts, with particular experience in the fields of asset forfeiture and international co-operation.

4. Representatives from the United Nations Office on Drugs and Crime (UNODC), the International Monetary Fund (IMF), the World Bank, Transparency International and the International Bar Association also participated as observers to the meetings of the Group.

5. The Working Group was mandated to examine the issue of the recovery of assets of illicit origin and repatriation of those assets to the countries of origin, focusing on maximising co-operation and assistance between governments. In particular the Group was to consider, *inter alia*,:

- the major problems in asset tracking, recovery, and repatriation and best practice in overcoming those problems;
- the key impediments to effective international co-operation in this area and effective ways in which those impediments can be addressed;
- the laws, administrative structures and other mechanisms necessary, in both "victim" and "receiving" states to prevent the movement of assets, and to allow for effective international co-operation in tracing and confiscating the assets;
- taking into account the provisions of the United Nations Convention against Corruption, in particular Article 57, the laws, administrative structures and other mechanisms necessary to provide for the return of confiscated assets;
- possible amendments to the Commonwealth Scheme for Mutual Assistance in Criminal Matters (the Harare Scheme) to provide for more effective co-operation in this area.

Meetings and Participants

6. The Working Group on Asset Repatriation met in Marlborough House on four occasions - 14th to 16th of June 2004, 15th to 17th November 2004, 30 March to 1st April 2005 and 29 June to 1st July 2005. A combined list of participants for each meeting is attached as ***Annex I***.

Programme of Work

7. As a first principle, the Working Group decided not to repeat or duplicate work already undertaken in other fora and to take into consideration existing international instruments, standards and recommendations of relevance including:

The Framework of Commonwealth Principles on Promoting Good Governance and Combating Corruption (Commonwealth Framework);
The United Nations Convention against Corruption (UNCAC);
The African Union Convention on Preventing and Combating Corruption;
The revised Forty Recommendations of the Financial Action Task Force on Money Laundering; (FATF Recommendations);
The FATF Special Nine Recommendations on Combating the Financing of Terrorism;
The Wolfsberg AML Principles on Private Banking (Wolfsberg Principles);
The Commonwealth Scheme for Mutual Assistance in Criminal Matters (the Harare Scheme).

8. The Group agreed to build upon these and elaborate further on them as and when necessary.

9. In approaching its mandate, the Group examined the issues in a chronological manner, much as a case would develop in practice, as set out in an outline reference paper. The topics and subtopics below generally reflect that chronological approach though some issues of special concern have been separated out *(see **Annex II**- Outline)*.

10. During the course of its work, this Group received a presentation from an official of the Commission for Africa on the work being undertaken on asset repatriation within that forum. The Group in turn made recommendations to the Commission as to possible areas for consideration. By the time of its third meeting, the Commission for Africa had published its Report and the Group noted the recommendations on corruption and the repatriation of assets.

II. GENERAL

11. The Group noted that the UNCAC represents an excellent "roadmap" for combating corruption and obtaining the repatriation of assets. It is important that Commonwealth countries sign, ratify and implement the UNCAC as a matter of urgency.

Recommendation

R.1 Commonwealth countries should sign, ratify and implement the United Nations Convention against Corruption as a matter of urgency.

III. MISAPPROPRIATION OF ASSETS

Preventive Measures

12. Measures for co-operation and repatriation cannot be viewed in isolation from the need for all states to put in place a comprehensive regime to combat corruption with particular emphasis on the establishment of a broad range of preventive measures.

13. As a guide, Commonwealth countries should have regard to the comprehensive preventive measures outlined in the Commonwealth Framework and Chapter II of the UNCAC (***Annex III*** - *Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption)*.

Asset Declarations

14. In the context of asset repatriation, special attention should be given to the use of disclosure obligations for relevant government officials and politicians. Asset declarations /disclosures can be a very effective preventive measure. While there are benefits flowing from allowing public scrutiny of such disclosures, confidentiality may be necessary for some states because of security concerns. A proper disclosure system must include:

- requirements for disclosure by the person and close family members;
- obligations to properly maintain the records;
- proper mechanisms for review and verification of the disclosure material;
- enforcement mechanisms and adequate penalties for failure to disclose.

15. A very effective tool for authorities responsible for enforcing and following up on asset declarations is having access to tax information to verify the declarations. Commonwealth countries should provide for such access, to the extent applicable and possible in a domestic context.

Criminal Offences

16. Commonwealth countries need to have a complete range of criminal offences in domestic law to govern activities that may lead to the misappropriation of funds. It is particularly important to have clear legislative provisions which regulate the expenditure of public funds by all officials, including Heads of State and Government. Further, any misappropriation in violation of those provisions should constitute a criminal offence. Under the laws of some countries the distinction between state and private funds in relation to Heads of State and Government may be unclear or inadequately defined. This is problematic as it may prevent effective co-operation between countries in the subsequent confiscation and return of such funds, if the requesting country cannot point to specific underlying criminal activity in support of the request for assistance.

17. The use of an offence of unjust enrichment, where the onus shifts to the individual to show that the assets were acquired through legitimate means, can be an extremely effective tool to combat corruption. While recognising that in some Commonwealth countries there may be constitutional problems with such an offence, the Group was of the view that such an offence should be recommended for adoption as it is a highly useful anti-corruption measure.

18. However, because not all countries will be able to adopt such an offence, there may be problems with dual criminality should mutual assistance, extradition or restraint and forfeiture be necessary in a particular corruption case. To avoid this, corruption investigations and prosecutions should be broadly framed to cover a full range of offences so that requests for assistance can be presented and executed if necessary.

Recommendations

R.2 Commonwealth countries should have regard to the Commonwealth Framework and Chapter II of the UNCAC on Preventive Measures and adopt a comprehensive prevention regime under domestic law.

R.3 Having regard to the criminal offence provisions of the UNCAC, Commonwealth countries should ensure that there are a broad range of criminal offences under domestic law for use in corruption cases, including an offence of bribery of foreign officials abroad.

R.4 Commonwealth countries should ensure that the law clearly describes how public funds may be used including by Heads of State/Government and that there are criminal offences applicable to any misuse of those funds.

R.5 Commonwealth countries should introduce an offence of unjust enrichment if it does not already exist.

Immunities

19. It is a fundamental principle of law that all persons are equal before the law. However in some Commonwealth countries Heads of State and Government and other officials enjoy immunities from criminal prosecution, which can preclude effective prosecution and pursuit of illicit assets in corruption cases, particularly if they are absolute and broadly cast.

IMMUNITY FROM PROSECUTION BY OR IN ANOTHER STATE

20. Under international law, current Heads of State/Government have immunities which are absolute while they remain in office, with respect to proceedings that may be brought against them by or in another State.

21. In the case of former Heads of State/Government there is emerging authority that they are no longer entitled to claim immunity from prosecution in another state where the act in question is governed by a treaty, such as the Torture Convention. Under that Convention and other similar instruments State Parties have an obligation to prosecute or extradite in such cases and those obligations could not be carried out if all or most of the persons covered by the treaty enjoyed immunity. There is also authority in support of an exception to "functional immunity" in cases of crimes under customary international law such as war crimes, genocide and crimes against humanity.

22. To date this exception has had limited application to convention crimes such as torture and crimes under customary international law. However, it may be that this is an area where international law can be advanced to extend this exception to corruption crimes, given the tremendous damage resulting from acts of corruption and the existence of the UNCAC. The Commonwealth, as a group of 53 states, could through its recommendations and actions perhaps encourage a movement in international law so that in future the exception to functional immunity might well be applicable to corruption offences.

23. As well, in future, it might be possible for the jurisdiction of the International Criminal Court (ICC) to be extended to cover corruption offences. While clearly the current mandate of the Court is restricted to crimes against humanity, war crimes and genocide (with aggression to be included when a definition is agreed), earlier drafts in the negotiation of the Rome Statute made reference to other crimes including terrorism and drug trafficking. Thus it is not fanciful to suggest that in future there may be scope for an extension of the use of the ICC for adjudication of

corruption cases. The Commonwealth could advance this argument before the Review Conference for the Rome Statute which is to be convened in 2009.

IMMUNITIES FROM DOMESTIC PROSECUTION

24. While the question of prosecution in other jurisdictions is relevant and of interest, the central problem in corruption matters is the existence of immunities under domestic law, some of which are constitutionally enshrined, precluding the prosecution of Heads of State/Government in domestic courts. These immunities present a major obstacle to the prosecution of corruption offences alleged to have been committed by these officials and ultimately to the recovery of assets obtained through these offences, particularly where only conviction based asset confiscation is available.

25. The state of the law on the point varies within the Commonwealth. Attached as ***Annex IV*** is a summary of the country laws on this issue within the Commonwealth as best could be determined. The survey indicates that while some countries afford immunity from civil and criminal action to Heads of State/Government the majority do not.

26. Of those that do provide immunities, some countries only allow any form of legal action to be taken after the Head of State/Government leaves office. Although this position can be pragmatic in that the Head is able to go about the business of governing without fear of prosecution, it becomes a problem where the Head of State may wish to continue in office in order to enjoy immunity. It is also a problem where he/she stays on for a long period of time as Head of State/Government while his/her corrupt activities continue unabated. In such circumstances, by the time action is taken, the assets might have long been dissipated, be untraceable, or the individual might have been too old for any effective action to be taken against him/her.

27. Even more problematic are those countries that allow for the immunities to continue after the person has left office.

28. The Group considered that Commonwealth governments should strive for a position where there are no immunities. Currently the position of these countries with such immunities is influenced by the need to guard against political or abusive suits or prosecutions against former government officials by a new regime. Also, sometimes, in cases of transition to democratic rule, promises of immunity from prosecution in limited cases may be necessary to ensure a smooth transition.

29. Optimally no Head of State/Government should have immunity from prosecution for criminal matters. The potential for abuse and the difficulties such immunities pose in cases of grand corruption are extremely significant. Thus, those countries that have some immunity should take active steps to amend their laws in order to remove any immunity for Heads of State/Government or any other officials in case of criminal prosecution.

30. The Group recognised that in some exceptional circumstances, particularly in cases of countries in transition to democracy there may be a requirement that immunities be retained for a period of time. To the extent that is the case, such immunity provisions must be very strictly crafted and limited in purpose. In particular they should:

- include an exception to the immunity in the case of serious criminal offences as defined by penalty or, as a minimum, corruption offences;
- be limited in application to the time during which the Head of State/Government is in office;
- be retrospective in application and not apply to any future acts;
- be restricted to Heads of State/Government only and not extended to other officials.

Recommendations

R.6 Commonwealth Heads of State/Government and other public officials should not have immunity from prosecution in domestic courts for alleged criminal activity.

R.7 Heads of Government should commit themselves to take active steps to ensure the removal of these immunities.

R.8 The Commonwealth Secretariat should prepare periodic reports for consideration by Heads of Government on progressive action towards reaching the optimum goal of no immunities at all from criminal prosecutions throughout the Commonwealth.

R.9 The Commonwealth as an organisation of sovereign states should advance a position for the inclusion of corruption offences within the Rome Statute of the International Criminal Court at the Review Conference for the Statute in 2009.

Cabinet Secrecy/Public Interest Immunity

31. The protections afforded under principles of cabinet secrecy or public interest immunity, while of critical importance to safeguard the operations of government, can be used to shield evidence of corrupt activities from detection. This can serve as a major impediment to both foreign and domestic corruption investigations and asset repatriation action. An examination of the current state of the law in a sampling of Commonwealth jurisdictions revealed increasing recognition of the need for more open government. This had led to increased scrutiny by the courts of claims of public interest immunity. Of particular interest with regard to asset repatriation was recognition by the courts in at least one jurisdiction that public interest immunity could not prevent the disclosure of information relevant to allegations of serious misconduct by a cabinet Minister and thus by analogy to criminal activity. As well, Law Ministers have recognised the importance of freedom of information in recommending a model law on that subject.

32. While public interest immunity must be available in appropriate cases, there should be an avenue for the review of such claims and exceptions where the evidence sought is relevant to the investigation of criminal activity.

Recommendation

R.10 The law in Commonwealth countries should provide for:

(a) a judicial review mechanism for claims of public interest immunity;

(a) exceptions to the privilege where it can be established that the information or evidence sought is relevant to the investigation of (serious) criminal activity, with appropriate safeguards on any disclosure as may be necessary.

IV. PREVENTING THE MOVEMENT OF FUNDS

33. Commonwealth countries must have in place effective schemes to combat and prevent the movement and laundering of funds. If proceeds of corruption are difficult or impossible to move between jurisdictions, it will be far easier to trace, freeze, confiscate and return those funds. It is therefore critically important that the international standards and measures aimed at preventing money laundering that have been developed are fully and effectively implemented in domestic law. As a starting point, all states need to have in place comprehensive legislation on money laundering, proceeds of crime, corruption etc. and that legislation needs to be effectively implemented and

enforced. A robust anti-money laundering regime, incorporating effective risk management systems, is essential to prevent and combat laundering generally and in particular with respect to corruption offences. Customer due diligence and record keeping requirements such as "know your customer", beneficial owner identification, know your customer's business and ongoing due diligence exercises, in addition to the essential criteria of having in place appropriate risk management systems, are central to the fight against money laundering especially in relation to corruption and the tracking and tracing of assets.[1]

Politically Exposed Persons (PEPs)

34. One component of an anti-money laundering regime of particular relevance in cases of grand corruption is use of additional safeguards with reference to PEPs. PEPs are individuals who are or have been entrusted with prominent public functions. Examples include Heads of State and Government, senior politicians, senior government, judicial or military officers, senior executives of state owned corporations, and important political party officials. The term can also extend to their family members and close associates.

35. Both the Financial Action Task Force (FATF) Recommendations (Recommendation 6) and the UNCAC (Article 52) address the issue of PEPs and require financial institutions to apply enhanced measures of scrutiny, in addition to normal due diligence, to PEPs. While the FATF recommendation limits this requirement to foreign PEPs, (albeit the interpretative note on Recommendation 6 encourages countries to also apply such standards to PEPs within their own country), the UNCAC makes no such distinction. The approach taken in the UNCAC is preferable as it ensures more comprehensive protections against the movement of funds in corruption cases. Therefore, countries should ensure that enhanced scrutiny requirements for PEPs are applied and enforced to both foreign and domestic PEPs.

36. Each state will need to determine how broad or narrow a definition of PEPs will be used. A broad application to a range of public officials is consistent with the aim of combating all forms of corruption. However, depending on the domestic context, unless the definition is kept reasonably narrow, it may be difficult for the relevant authorities in financial institutions to enforce it and it may render the concept of enhanced scrutiny meaningless. At minimum, countries should ensure that enhanced scrutiny is applied to foreign and domestic officials falling within the FATF definition of PEPs –

individuals who are or have been entrusted with prominent public functions, for example Heads of State or government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials. Business relationships with family members or close associates of PEPs involve reputational risks similar to those with PEPs themselves. The definition is not intended to cover middle ranking or more junior individuals in the foregoing categories.

37. While enhanced scrutiny with reference to PEPs is clearly a useful tool there are many complex and difficult issues which can mitigate against the effectiveness of this measure in practical application.

38. It is often very difficult to establish a link between the PEP and the impugned assets. The use of corporate bodies, networks of individuals and trusts can make it extremely difficult to detect the connection between an asset and a PEP. Further PEPs may utilise alternative remittance regimes thereby circumventing some of the protections applicable to financial institutions. Other complications include the fact that PEPs may use their relatives in order to disguise their connection to assets.

---

[1] FATF Methodology on Recommendations 5 & 6

39. A further issue relates to the identification of PEPs by financial and related institutes. In small and developing states it may be quite difficult for the relevant institutions to identify particularly foreign PEPs given their limited resources and access to information.

40. There was discussion of a possible Commonwealth list of PEPs. However, after discussion of the pros and cons, it was agreed that this would not be practicable. As well such a list might detract from the responsibilities of financial and related institutions to carry out customer due diligence.

41. However, there are ways in which the Commonwealth could assist countries in building capacity in the identification of PEPs, particularly in small and developing countries.

42. For example, some countries have made very effective use of an early warning system whereby banks and financial institutions are alerted to situations within foreign states which may make them particularly high risk for corruption activities. The Commonwealth Secretariat could assist countries with development and training in the implementation of such a system.

Cash Smuggling

43. Cash smuggling is increasingly the mechanism of choice for moving funds especially within countries that have primarily cash based economies, as is the case for a number of Commonwealth jurisdictions. There has also been an increase in cash smuggling as a method of laundering generally, in both developed and developing countries, due to enhanced regulation of financial and related institutions.[2]

44. Possible avenues to combat the use of cash smuggling include cross border cash declarations and powers for administrative cash seizures at borders. While cash declarations can be an effective tool, they are of little value unless there is an effective system in place to analyse and follow up on the reports. This may not be possible particularly in small and developing states.

Cash Seizures

45. Some countries have had considerable success in using cash seizure powers generally, in addition to seizures at the border. Legislative powers have been introduced to allow police officers to make a cash seizure anywhere within the country where there is a reasonable suspicion that the funds are the proceeds or instrumentalities of crime and the amount exceeds a specified threshold. The police may hold the funds for an initial short term period after which they must apply to a magistrate for an extension. Ultimately a magistrate will determine if the funds are to be confiscated. Experience has shown that very often in such cases the individuals involved make no attempt to challenge the seizure and the funds are confiscated. This is a tool which Commonwealth countries may wish to consider implementing. In adopting such a system, careful consideration needs to be given to ensure that there is a clear recourse to a judicial authority to prevent possible abuses. Countries will also need to keep in mind what the threshold should be particularly in countries which have cash based economies.

Recommendations

R.11 Commonwealth countries which have not already done so should implement the broad range of international initiatives directed at preventing the movement of illicit assets and combating money laundering. This should include adopting and enforcing anti-money laundering and proceeds of crime laws with relevant structures and administrative

---

[2] See also the FATF Special Recommendation IX on the cross-border movement of cash

procedures. The Commonwealth Secretariat should continue to support member countries with these efforts.

R.12 The Commonwealth Secretariat should develop programmes to assist countries with the development and implementation of early warning systems to raise awareness about political situations particularly vulnerable to corruption.

R.13 Commonwealth countries should enact laws to allow for expedited cash seizures at the border and generally throughout the country in respect of cash which exceeds a specified threshold.

R.14 Enhanced scrutiny regimes should be applied to PEPs as defined by the FATF but extending to both domestic and foreign PEPs.

R.15 The Commonwealth Secretariat should continue to support countries in the implementation of international initiatives to combat money laundering and to gather and disseminate information regarding anti-money laundering and corruption legislation within the Commonwealth.

V. SERVING HEADS OF STATE

46. One of the most difficult and politically sensitive questions is what action can be taken when assets of a current Head of State are located in another state and there is reason to believe that the assets have been obtained through corruption. One preventive measure that can be used with respect to current Heads of State/Government is to require them to make asset declarations and to make such declarations publicly available (see earlier discussion under Misappropriation of Funds). This position already applies in a number of Commonwealth countries and the rest should be encouraged to adopt the same approach.

47. In principle, where there is evidence that a Head of State or Government is involved in corrupt activities the normal systems under the domestic law and the constitution of his or her state should allow for action to be taken. Each state must have in place independent and effective mechanisms and structures that allow for investigation and prosecution in such circumstances. This can be followed by steps to pursue any assets which have been obtained through this corrupt activity. However it must be recognised that there are situations where because of weaknesses within legal systems, the political realities or the application of immunities, no effective action can be taken in the home state. In such a scenario it will be difficult for another state to take any steps regarding the illicit assets, let alone return those assets, given that it would mean sending the funds back to the person believed to have been involved in the corrupt activity.

48. The state in which such funds are located will face a number of practical problems. There will be no request for freezing or confiscation action emanating from the victim state, unless an independent law enforcement authority chooses to make one. It may be impossible to gather relevant evidence for any kind of confiscation action without the co-operation of the victim state. Further, even if evidence is obtained and assets are frozen, there is still the question as to what should be done with those assets.

49. While no doubt there are a myriad of practical problems, the fact that the individual involved is a current Head of State should not prevent the application of existing laws and procedures relating to money laundering and asset forfeiture.

50. Suspicious transactions involving a current Head of State/Government should in the normal course be reported to the FIU or other appropriate bodies or authorities in the receiving country and,

in turn, that FIU or body or authority should share the information with the country of the Head of State/Government to generate action in that state. It may also be possible to spontaneously transmit the information through judicial or law enforcement channels between countries. If such communication with the other state is not feasible or effective, the receiving state should consider methods by which the assets can be restrained and confiscated without the co-operation or involvement of the victim state. Taking into account problems relating to immunities, this would include possible money laundering prosecutions against the bank or other holder of the funds, actions against associates or others involved in the offence with associated confiscation, or the use of non-conviction based asset confiscation if sufficient evidence can be gathered to demonstrate on the civil standard that the asset was obtained through illicit activity. Alternatively, once the bank or institution is aware that the asset may be the proceeds of crime, it may effectively "freeze" the account by refusing to carry out any transactions with respect to it for fear of exposure to money laundering charges.

51. Given the seriousness of the issue and the potential devastating consequences of grand corruption, the Commonwealth may wish to consider a proactive role in addressing this problem. Governments are increasingly subjecting themselves to voluntary peer review mechanisms in various fora. Taking into account the sensitivities surrounding serious allegations of corruption by a serving Head of State/Government, it may be an appropriate area for an ad hoc Commonwealth peer review mechanism to be introduced.

Recommendations

R.16 Commonwealth countries should have in place independent and effective mechanisms by which allegations of corruption with respect to a current Head of State/Government can be investigated and prosecuted and the relevant assets can be frozen and confiscated.

R.17 The procedures relating to suspicious transaction reporting should apply where suspect funds belonging to a current Head of State/Government of another country are identified. Where possible and appropriate, the FIU or other appropriate body or authority in the receiving state should communicate the information about the suspect funds to the FIU or other appropriate body or authority in the home state for action to be taken.

R.18 Where there is sufficient evidence, the receiving state should use the methods available under domestic law to obtain the restraint and confiscation of the relevant assets.

R.19 In cases involving allegations of corruption by serving Heads of State/Government the Commonwealth should have an ad hoc peer review mechanism in place.

VI. MECHANISMS FOR ASSET CONFISCATION[3]

52. An effective system for the restraint and confiscation of proceeds of crime is fundamental to respond to the various corruption cases that may arise and allow for the repatriation of assets. It is a requirement of all of the recent relevant conventions[4] and international/regional anti-money laundering standards.

---

[3] Depending on the law and practice, legislation in this area uses the term forfeiture or confiscation. For consistency the term confiscation is used throughout this document but is intended to incorporate schemes which use the term forfeiture.

[4] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, United Nations Convention against Transnational Organized Crime, and United Nations Convention against Corruption

53. The seizure and confiscation of assets associated with criminal conduct can be carried out in a variety of ways. Of key importance are the mechanisms for conviction based and non- conviction based asset confiscation.

Types of Confiscation Systems

(a) Conviction based Confiscation

54. As the name suggests in a conviction based system, a criminal conviction is generally a pre-requisite to confiscation. After a person has been convicted there is a process in place to allow a court to order the confiscation of assets as proceeds or instrumentalities of crime, either on the basis of an application or of its own initiative. Within this general concept, there are a range of approaches to criminal conviction confiscation in different jurisdictions.

55. For example, several jurisdictions employ a "value" based confiscation system. Under this regime, if a person is convicted of an offence, the court can calculate the "benefit" to the defendant from that offence. Having determined the accrued benefit, the court would then assess the defendant's ability to pay or, in other words, the value of the amount that might be realisable from the defendant's assets. On the basis of these calculations, the court would make a "confiscation" order, in the amount of the benefit or the realisable assets, whichever is less.

56. Some of these systems also employ assumptions in the calculation of the benefit. For example, the law may provide that where the defendant has been convicted of two or more offences, any property transferred to him or her at any time six years prior to the commencement of proceedings is assumed to be a benefit obtained through the offences. It will be for the person to demonstrate otherwise.

57. If the defendant fails to prove the legitimate source of his assets (or assets passing through his hands over a prescribed period) the court could make a confiscation order in relation to those assets, even though they had not been demonstrated to be part of the benefit of the conviction offence.

58. Another conviction based model is that which focuses on tainted property. In such systems, upon conviction, the sentencing judge may order confiscation if satisfied, on a civil standard, that the property is proceeds and the offence for which the conviction was obtained was committed in relation to those proceeds. Even if not satisfied that the property relates to the specific offence, the court may also order confiscation of property if satisfied beyond reasonable doubt that the property is proceeds of crime. There is also the possibility of a fine in lieu of confiscation where the property in question cannot be located, has been transferred to a third party, is outside the country, has been substantially diminished in value or has been commingled with other property.

59. Some countries employ a combined system which allows for orders relating to the "benefits" and the confiscation of tainted property.

60. While these systems all require a conviction as a prerequisite, the proceedings after conviction are generally of a civil nature, employing the civil standard of proof.

61. In some systems confiscation may be possible without a conviction if a charge has been laid and the person has died or absconded.

(b) Non-Conviction based In Rem Confiscation Proceedings (Civil Forfeiture)

62. A non-conviction based confiscation system allows the state to bring court proceedings against property on the basis that the property constitutes the proceeds or instrumentalities of crime.

This process is different from conviction based confiscation in that the action is against the property not the person i.e. an *in rem* proceeding and there is no requirement for an underlying criminal conviction of any person.

63. The standard of proof to be met in an application for civil confiscation would be that applicable in civil proceedings, which in most common law jurisdictions is the balance of probabilities.

64. While again there are variations in the laws that have been adopted, generally the procedure is as follows: Proceedings will be commenced either by an application for "freezing" or "preservation" or an application for confiscation. In some systems it is mandatory to apply for preservation first; in others an application for confiscation may be brought in the first instance.

65. While applications for "freezing" or "preservation" may be made *ex parte*, prior to any application for confiscation, notice will need to be given to all persons who may have an interest in the property.

66. Evidence will be presented following civil rules of procedure and the court will be empowered to make a confiscation order in relation to the property if satisfied on a balance of probabilities that the property is the proceeds or instrumentalities of an offence or unlawful activity.

67. All of the legislation provides safeguards which allow innocent third parties to protect their interest in any such property.

(c) Ordinary Civil Litigation

68. Quite apart from the measures outlined above, which are legislated mechanisms by which a state can pursue the seizure and confiscation of assets, private civil litigation can be used by individuals and states to seek the recovery of assets. In such cases, general civil proceedings will be launched by a lawful owner to seek the recovery of assets alleged to have been misappropriated through criminal activity. In the context of corruption cases, some victim states have resorted to using a civil lawsuit to try and recover the relevant assets within another state. This, unlike the measures above, is purely private litigation.

Mechanisms to be Employed for Effective Confiscation

69. At a minimum, it is essential that each state has in place a strong and comprehensive system for criminal asset confiscation i.e. a system premised on an underlying conviction of a person for a criminal offence. However, because of the variation in corruption offences and the range of underlying circumstances, it can be difficult and perhaps impossible to use conviction based confiscation systems to recover and return the assets of these crimes in all cases.

70. Creative approaches are needed to overcome these obstacles, particularly in circumstances where the main perpetrator is not subject to prosecution because of death, immunities or inability to bring him or her within the jurisdiction of the court. One possible approach is to prosecute offences of money laundering against individuals involved in the offences, the banks or even the recipients of the funds and to use this as a vehicle to obtain asset confiscation. In some countries it may be possible to pursue confiscation on the basis of an *in absentia* proceeding although this may be difficult because of the evidentiary burden that needs to be met. In several countries the very restricted availability of *in absentia* proceedings would limit the usefulness of this approach to recover and repatriate assets.

71. It is clear that even with a creative approach to the use of conviction based systems, there are inherent limitations to this mechanism flowing from the requirement for an underlying criminal conviction. A conviction based asset confiscation system alone will not be sufficient to comprehensively pursue and repatriate the proceeds of corruption crimes in a meaningful way in all cases.

72. A complementary non-conviction based asset confiscation regime can be used successfully to pursue the proceeds of corruption where conviction based systems may not be effective. Under this system, a confiscation action can be brought against assets alleging, on a standard of balance of probabilities, that the assets are the proceeds or instruments of crime. As there is no need for an underlying criminal conviction, it eliminates the necessity to overcome issues that may arise in prosecution including applicable immunities, death of suspects and inability to extradite, as well as evidentiary problems.

73. Successful use has been made of this procedure in several countries such as Australia, the Republic of Ireland, South Africa, the United States and recently the United Kingdom.

74. Some particular advantages of this procedure are:

- it allows for liability to be established to the civil standard and without the need for a criminal conviction to be recorded against the person in possession or ownership of the property;

- use of the process to recover assets in a victim or receiving state in cases where the accused has died or absconded and the assets cannot be confiscated and returned otherwise;

- assets can still be pursued where an individual is acquitted for whatever reason but there is sufficient evidence on a civil standard that the assets were obtained through illegal activity.

- in cases where there are problems surrounding possible prosecution or extradition because of allegations of political motivation, actions can still be taken in respect of the property on the proper evidence.

75. In some countries there may be constitutional concerns surrounding the establishment of a regime for civil confiscation. Careful consideration would need to be given to any applicable legal or constitutional constraints within each country. Countries might also wish to take into account the various cases where constitutional challenges have been brought within the jurisdictions that have existing laws for non-conviction based asset confiscation. To date, those regimes have withstood constitutional attack.

76. Countries should have in place legislative and administrative regimes which incorporate options for asset confiscation, including conviction based and non-conviction based systems that will provide the maximum flexibility to respond to the range of factual scenarios that may arise in corruption cases.

77. Any legislative scheme adopted needs to be comprehensive. In particular any non-conviction based asset confiscation regime should include appropriate investigative powers to be fully effective.

78. At the same time the legislative and administrative structures for asset confiscation should be as simple and straightforward as possible, to allow for manageable use and implementation, particularly in small and developing states with very limited resources. They would also need to

properly balance flexibility and simplicity with clarity to ensure that the rights of individuals are protected.

Recommendations

R.20 Commonwealth countries that have yet to do so should promptly put in place strong and comprehensive legislation and procedures for criminal conviction based asset confiscation. This should include a power to confiscate in circumstances where the accused has absconded or died.

R.21 Commonwealth countries should also put in place comprehensive laws and procedures for non-conviction based asset confiscation.

R.22 Commonwealth countries should allocate sufficient resources to establish and properly fund law enforcement and other agencies dealing with asset confiscation and management.

VII. TRACING AND TRACKING OF ASSETS

Training/ Experience

79. While it is important that jurisdictions adopt comprehensive money laundering and asset confiscation legislation, those laws are nothing but paper in the absence of effective enforcement. There are several current examples of states where such laws have been in place for some time but there has been little, if any, enforcement action by way of prosecutions or asset confiscation. A major impediment to effective enforcement is lack of knowledge and capacity on the part of investigating and prosecuting authorities, as well the judiciary. Because it is a relatively new field with many complexities, there is a priority need for training of police, prosecutors and judicial authorities. Technical assistance programmes within the Commonwealth should be continued and enhanced. Existing Commonwealth programmes where law enforcement mentors are placed in jurisdictions to assist with ongoing investigations and at the same time contribute to capacity development within a country or a region should be continued and enhanced.

80. On the question of capacity building and training, one possible method to resource this on a domestic level is to use confiscated assets to fund such programmes.

Dedicated Resources

81. It is of critical importance that there are dedicated units responsible for the investigation of asset confiscation cases. Experience demonstrates that little, if any, action will be taken if enforcement is left to general police units with no specialised mandate. Such units need to be multidisciplinary in structure or have available to them support from specialists and experts such as forensic accountants and tax authorities. Sufficient funds need to be allocated for the provision of such support.

Co-ordinated Efforts

82. It is also extremely useful to have joint investigative teams both on a domestic and international level to deal with these cases. This can allow for the combined strength of the individual powers of the relevant agencies to be used in the investigative process.

Investigative Tools/Powers

83. Investigators need to have access to a range of modern investigative powers in order to effectively trace and track assets. This would include production and monitoring orders and powers for authorised interception of communications.

84. There can be problems surrounding the timeliness in which bank/financial institutions respond to requests for relevant banking information. A legislative solution to this problem is a production order power through which time limits can be set within which the required information should be produced.

85. Another important tool for asset tracking is the use of compelled examinations of persons. While there may be concerns about self-incrimination, these can be addressed through limiting the use to which such information can be put. For example, a recent corruption law adopted in one jurisdiction provides for compelled statements to be taken in cases where an individual is identified to be living beyond his or her means. The evidence obtained cannot be used in any criminal proceedings but can be introduced in civil proceedings relating to the confiscation of assets.

86. It is also important to keep in mind some general enforcement initiatives that can be used to track and identify illicit assets including the extension of administrative cash seizure powers from border points to a country generally, the targeting of particular industries for investigation, and the use of storefront undercover money laundering operations.

87. Tax information can be invaluable to an investigation of this nature. The applicable law should allow law enforcement authorities access to such information by way of warrant or otherwise both with respect to domestic and foreign investigations relating to proceeds of crime.

88. The investigative powers outlined above should be applicable to both criminal conviction based and non-conviction based asset confiscation regimes.

Recommendations

R.23 For asset confiscation legislation to be effectively implemented law enforcement authorities need to have the requisite knowledge and skills. Commonwealth countries, with support from the Commonwealth Secretariat, should develop and implement programmes for training/capacity building for police, prosecutors and judicial officers in relation to asset confiscation laws and practice.

R.24 The Commonwealth Secretariat should continue with and enhance its programme for placement of prosecution and law enforcement mentors within Commonwealth countries and regions to assist with ongoing asset confiscation and money laundering cases and contribute to capacity building.

R.25 Commonwealth countries should adopt best practices for asset confiscation investigations and proceedings including:

- **establishing dedicated, law enforcement teams to investigate proceeds of crime matters which are multidisciplinary in composition or have support from experts in various relevant disciplines;**
- **establishing where possible joint investigative teams on a domestic and/or international level;**

- **providing sufficient funds for the investigation and prosecution of confiscation cases including funding specialist support;**

- **Adoption or review and amendment of laws to provide for a range of investigative powers of particular relevance to these investigations including for compelled interviews, production orders, account monitoring and interception of communications.**

R.26 Adoption or review and amendment of laws which allow for investigators to access tax information for their investigations.

VIII. MUTUAL LEGAL ASSISTANCE - GENERAL

Delay

89. There is a general problem of delay in the mutual assistance process. In asset confiscation this can be particularly damaging, given the speed at which assets can be moved around the world. In all countries there is a significant problem of the resources – financial and human - that are dedicated to mutual assistance matters. Unless this is given priority attention, there can be little progress in overcoming the problem of delay. The problem is acute for small states where there are other priorities and where one case can overwhelm the limited resources of the state. To address this problem better resourced requesting states may wish to consider in particular cases providing assistance to the requesting state bearing in mind the provisions on expenses of compliance in the Harare Scheme (Article 12).

Lack of Understanding/Communication

90. Lack of understanding of legal systems and the requirements for successful requests is also a significant impediment to effective mutual assistance. While this problem is severe as between different legal traditions, it is also problematic within the same systems, such as the common law, because of varying domestic practices.

91. To overcome this particular problem it would be useful to have a forum where mutual assistance practitioners could exchange information and discuss cases. Experience has repeatedly demonstrated the importance of personal contacts and networks for effective co-operation and how this can have a major impact on a practical level. Such contacts can be used to obtain information and identify a proper authority in a country with which there has been no previous experience. In some instances, it may be useful to enter into a memorandum of understanding between relevant authorities or offices to enhance the working relationship. Numerous examples can be given of how such contacts have enhanced mutual assistance. Some existing networks that could be looked at for possible Commonwealth adaptation would be the European Judicial Network and Eurojust.

92. Senior Officials of Law Ministries of the Commonwealth recently recommended that the Commonwealth Secretariat explore the possibility of establishing a Commonwealth Network analogous to the European Judicial Network and present recommendations to Law Ministers at their next meeting. This Working Group fully endorses that initiative. In its consideration of the matter the Secretariat might wish to explore a structure with both regional or localised networks and an overarching body. Because of the broad geographic scope of the Commonwealth, this would be one way to ensure that at least on a regional basis there could be more frequent meetings and interactions, as it is unlikely that the overarching group could meet more than once a year or every two years. As one of the central aims of the network is the development and enhancement of personal contacts, this approach would allow for better interaction towards this aim.

93. National websites which give guidance on the requirements for mutual assistance requests are very useful and all states should consider the development of such sites. To further enhance the effective exchange of operational information, a Commonwealth webpage for mutual assistance should be established. It could provide information on mutual assistance regimes in member countries with some practical advice on the making of requests and contact particulars including where possible exemplars from large experienced central authorities. It could also contain links to country websites and those of other international organisations.

Issues in Practice

Consultation

94. The importance of consultation between central and other relevant authorities prior to the submission of a formal request cannot be overstated. This is the best way in which a requesting state can ensure that the proposed request will meet the legal requirements in the requested state. If this is done, the formal request when presented is more likely to be executed as soon as possible, without the need for more formal exchanges.

Follow up

95. There is a need for central authorities to take a very proactive approach in pursuing requests for assistance that have been submitted to another state. Officials in the central authority need to contact the requested state authorities on an ongoing basis to ensure that the relevant request receives attention. Similarly a requested state should have in place at least a basic system by which receipt of requests is acknowledged. In addition to submitting requests to and following up with central authorities, in asset confiscation cases, it would be useful to copy any relevant asset confiscation authorities to ensure that the request is known and receives attention. In cases where assets are to be simultaneously frozen or seized in several jurisdictions, authorities must co-ordinate to ensure that the process is properly managed.

Urgency

96. There is much overuse by authorities of the term "urgent" in relation to requests. A request should only be classified as urgent where there are good reasons to do so and preferably not just because authorities in the requesting state have been dilatory in pursuing the matter. If an effective job is to be done in prioritising cases, urgent requests need to be restricted to instances of real urgency.

Co-ordination

97. In dealing with complex cases, such as those of grand corruption, where more than two jurisdictions are involved it can be helpful to hold case conferences involving all the relevant states. Often in such instances there will be litigation action in various states and these conferences will ensure that everyone is informed of the status of the matter in other relevant jurisdictions. It also affords an opportunity to strategise.

Confidentiality/Limitation of Use

98. Requesting and requested authorities must respect requirements for confidentiality and limitation of use of information, as both a requesting and requested state, and to understand the disclosure requirements in each others' jurisdictions. There are many examples of serious incidents arising from the onward sharing of information given to one agency or the public disclosure of information through the execution process.

Treaty Requirements

99. The policy of some states to require a bilateral treaty for the rendering of mutual assistance can be an impediment to international co-operation. Small and developing states simply do not have the necessary resources to negotiate even very simple bilateral mutual assistance agreements. Further, within the Commonwealth the Harare Scheme is available to serve as a multilateral basis for mutual assistance. Those states that currently require a treaty for mutual assistance should reconsider their position on this point.

International Organisations

100. International organisations can be very useful in facilitating international co-operation. The UNODC has developed a software programme which generates a mutual assistance request by prompting the insertion of information in key fields. While each request will still need to be tailored and developed for the particular case and jurisdiction, this tool will assist with the preparation of organised requests, which include key information. It will be of particular assistance to states that have limited experience with mutual assistance. The UN also maintains lists of central authorities as they relate to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Drug Convention) and will in future have such lists for the United Nations Convention against Transnational Organized Crime (TOC) and the UNCAC.

101. The Criminal Law Section of the Commonwealth Secretariat can refer authorities to appropriate contacts within another country for mutual assistance matters and generally provide advice and assistance as may be required.

Other Forms of Co-operation

102. In considering mutual assistance/international co-operation in a broader sense other forms of co-operation such as FIU to FIU, regulatory body to regulatory body and law enforcement to law enforcement, as well as co-operation between those bodies, must be utilised as far as possible.

Recommendations

R.27 Mutual legal assistance between Commonwealth countries should be available on the basis of the Harare Scheme without a requirement for a bilateral treaty. Commonwealth countries that currently require a treaty for mutual legal assistance should consider removing such a requirement. Optimally domestic law should allow for assistance to be rendered to all countries on the basis of national law without the requirement for a treaty.

R.28 Commonwealth countries which have yet to do so should promptly establish a central authority as required under the Harare Scheme.

R.29 Consultation between central and other relevant authorities (e.g. law enforcement) regarding mutual legal assistance requests should be strongly encouraged.

R.30 Central authorities and the mutual legal assistance execution process should be properly resourced and funded and Commonwealth countries should allocate sufficient resources for this purpose.

R.31 The Commonwealth Secretariat should establish a webpage which would include practical information on mutual legal assistance laws (including restraint and confiscation

requirements) and systems within member countries and provide some guidance on how to make requests to different countries.

R.32 Creation of a Commonwealth Network similar to the European Judicial Network/Eurojust adapted to the particular circumstances of the Commonwealth. This could include setting up both regional bodies as well as a Commonwealth entity.

R.33 The Commonwealth Secretariat should continue and enhance its assistance programmes to Commonwealth countries relating to capacity building and training. The Secretariat should also continue to facilitate co-operation by maintaining lists of central authorities and providing contact particulars for central authorities and other relevant officials to member countries in response to requests.

R.34 Commonwealth countries should have the legal capacity to render mutual legal assistance in the absence of dual criminality.

R.35 Commonwealth countries should adopt best practices for effective mutual legal assistance including:

(a) encouraging the development of personal contacts between central authorities and other relevant officials;

(b) where appropriate develop MOU's to enhance working relationships;

(c) to the extent possible consulting with authorities in the requested state about applicable laws and the content of a request prior to submitting any formal documentation;

(d) ensuring that requests for assistance are kept confidential and that the requesting state is consulted when circumstances arise where disclosure of the request is sought;

(e) implementing the Best Practice Recommendations of the UNODC Expert Working Group (2001).

IX. AVAILABILITY OF MUTUAL LEGAL ASSISTANCE

Investigative Assistance in Non-Conviction based (Civil) Asset Confiscation

103. Generally, mutual assistance schemes apply only to criminal matters so that assistance in terms of evidence gathering and enforcement of restraint and confiscation orders is restricted to investigations and prosecutions of offences and conviction based confiscation. This can create obstacles to effective co-operation particularly in cases of grand corruption given that there will be instances where it is not possible to pursue the confiscation and return of assets through criminal conviction based confiscation. In those cases, effective confiscation remedies may be hampered unless mutual assistance can be sought and obtained in respect of investigations and proceedings for non-conviction based asset confiscation.

104. Some countries may have difficulty, including constitutional restrictions, with extending mutual assistance in evidence gathering to non-conviction based asset confiscation investigations and proceedings. However, non-conviction based systems cannot function effectively without mutual assistance being available for such investigations and proceedings. Therefore it is imperative that mutual assistance in evidence gathering is available for non-conviction based asset confiscation.

Recommendation

R.36 Commonwealth countries should have the legal capacity to provide mutual legal assistance with respect to investigations and proceedings relating to non- conviction based asset confiscation. Similarly, the Harare Scheme should be amended to cover such types of assistance.

ORDINARY CIVIL LITIGATION TO RECOVER ASSETS

105. There is a separate and distinct issue as to whether systems such as mutual assistance can be used in respect of pure civil proceedings, where a state has brought a lawsuit to recover stolen assets. This is a much more difficult application of mutual assistance as it would extend it to pure civil proceedings where the state is an ordinary litigant.

106. Under current domestic and international law, measures such as mutual assistance, which are aimed at criminal matters, cannot be used to assist or enforce civil proceedings. Pure civil judgements can only be enforced as between states through processes such as reciprocal enforcement of judgements agreements and related domestic laws. The criminal process cannot be used for this.

107. There are practical examples where mutual assistance proceedings have been challenged as having been instituted not to support a criminal investigation or prosecution but to obtain the return of funds in a pure civil proceeding. The case law supports the practice of pursuing both criminal investigation and the return of funds in parallel and to use mutual assistance to support the criminal matter. However, it would not be permissible to use the mutual assistance process under the guise of a criminal investigation to support a purely civil process.

108. At the same time, it is a well-recognised practice in mutual legal assistance that evidence gathered for a criminal proceeding may be used in a civil proceeding, if the requested country consents to such use either generally in a treaty or on a case by case basis. Given that civil proceedings may provide the only recourse for a victim state in corruption cases, Commonwealth countries should exercise their discretion favourably and permit the use of evidence gathered through mutual assistance in such proceedings.

109. On the broader question of using mutual assistance regimes to gather evidence for civil proceedings the Group, while recognising that the existing principles would be very difficult to vary, considered that further reflection should be given to the possible application of these tools in civil proceedings in the very limited circumstances of asset repatriation.

Recommendations

R.37 The mutual legal assistance regimes in Commonwealth countries should permit evidence gathered for a criminal proceeding to be subsequently used in civil proceedings and requests for such use should be granted in corruption cases.

R.38 Commonwealth Law Ministers should examine further the issue of the possible use of mutual legal assistance to gather evidence for use in civil proceedings brought by a victim country for the recovery of assets in corruption cases.

X. MUTUAL ASSISTANCE FOR FREEZING/ RESTRAINT/ CONFISCATION OF ASSETS

Balance of Interests

110. Currently there is a significant operational problem arising from delay in the execution of requests for cross border restraint, with the result that assets are lost before effective freezing measures can be put into place. Any proposed solutions to this problem must strike an appropriate balance between effective and speedy action to prevent the dissipation of assets and the protection of the property rights of the individual.

111. For example, while stringent requirements for supporting information and evidence for restraint orders can be onerous to meet on an urgent basis, those requirements exist to protect both the individual and the requested state. If a state obtains and executes a restraint order on the basis of a foreign request and it subsequently is established to be insupportable or no confiscation order is ultimately obtained, the state may be subject to claims for any resulting damages. It was noted that Article 54(2) of the UNCAC was developed through discussions of these competing interests and it reflects a compromise position that is relevant to keep in mind. Notably, the subparagraphs provide for the freezing or seizing of property on the basis of the foreign order or through domestic action on the basis of a request, where the order/request provides "a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such action and that the property would eventually be subject to an order for confiscation."

112. On a practical level, where a state has standards to be met for the order to be executed, it is particularly important that the relevant information is provided by the requesting state in support of the request for restraint. If requests are made for supplementary information these should be responded to as quickly as possible.

Direct/Indirect Enforcement

113. Various international conventions have created obligations on State Parties to act upon requests for assistance and to enforce foreign restraint and confiscation orders. However, those conventions have recognised alternative methods that may be used to enforce such orders specifically:

- "Direct enforcement" where the foreign request is, subject to relevant pre-requisites being met, registered in the requested state and executed like a domestic order;[5]
- "Indirect enforcement" where information and evidence submitted by the requesting state is used to support an application for a domestic order for restraint or confiscation.

114. In some countries the indirect enforcement system has been used effectively to respond to foreign requests for restraint or confiscation. If sufficient evidence is provided an *ex parte* application is made to obtain the relevant order. This approach also gives the requested state the ability to consider the evidence used to obtain the foreign order.

115. However in many countries there have been difficulties with the indirect enforcement approach that have prevented its effective use, especially to obtain the speedy restraint of assets in response to foreign requests. This is particularly the case where the requesting state employs a different model for asset confiscation than the requested state. For example, if the requesting state uses a value based system and the requested state has a tainted property scheme the type of evidence

[5] In some instances it might be necessary to obtain ancillary orders for the management of the property restrained under domestic law. It may also be necessary to obtain additional orders for effective realisation of the order in the requested state.

needed to obtain the relevant order in each state will be quite different. The problem may be even more acute when the request involves two countries with different legal systems for example common law and civil law. In cases of restraint the delays arising from these problems may result in the funds disappearing before any action can be taken.

116. These difficulties do not arise with the use of a direct enforcement system as there is no need to produce evidence to meet the standards in the requested state. With this approach there is no need to litigate the issues around the merits of the restraint order in two jurisdictions. It is also a much simpler and quicker method for enforcement given that only one order need be obtained.

117. The major issue with direct enforcement is that it is not realistic to envisage a system where all restraint and forfeiture orders from every country and in every case would be directly executed upon request. With some countries, there may be problems with the underlying process through which the orders were obtained in the requesting state such that direct execution in the requested state would not be acceptable. There may be concerns as well about potential abuse of the direct enforcement system in particular cases. As a result, a system of "automatic" direct enforcement in all cases is not workable.

118. For that reason, a country using a direct enforcement system may wish to retain the right to refuse a request where it would be inappropriate to execute it either because of legal deficiencies in the process in the requesting state or inappropriate or improper motivations behind the original order.

119. Countries have used different methods to address this concern. Some countries have employed a system where certain countries have been designated with the result that requests emanating from those countries will be directly enforced. However in the experience of some countries a designation system can be difficult to work with on a practical level because of the problems and delays in the procedures for designation. It also may be difficult to decide on the countries to be designated and there is less flexibility to address problems that may arise in particular cases. Another approach to this issue is to have a general power to enforce directly orders from all countries, with an executive discretion to determine in which cases the orders would be enforced. Though this approach will naturally involve a judicial review of the executive decision taken, experience indicates it is a more workable approach which provides for sufficient flexibility and protections.

120. Because of the significant problems with indirect enforcement experienced by many countries, the preferred option, especially for small and developing countries with limited resources is a system of direct enforcement where foreign orders for restraint/seizure and confiscation could be registered and enforced as if issued in the requested state. Such a system is simpler to operate, less problematic and much less resource intensive.

Asset Management

121. Experience indicates the importance of careful management of assets that are subject to restraint. Countries need to put in place a good system for the management of such assets to ensure that their value is maintained and in some instances increased.

Effective Remedies

122. In accordance with various human rights instruments and standards, an individual affected by a restraint or confiscation order has a right to an effective remedy in response to state action. In the case of direct enforcement, arguably, the affected person has no effective remedy regarding the action in the requested state. He/she may have no opportunity for challenges and variation orders

that would otherwise be available under domestic law. At the same time, this approach does eliminate the possibility of double litigation of issues in both the requesting and requested state.

123. In the case of a confiscation order, the only recourse available should be in the requesting state where the order is made. Once all appeals and reviews have been exhausted in that state, the order should be fully enforceable in the requested state. This is no different than the enforcement of other types of final orders under analogous regimes such as the enforcement of civil judgements.

124. The more contentious issue relates to an order for restraint or seizure which one state seeks to enforce in another state given the interim nature of the order. While a direct enforcement mechanism is advisable for such orders, there is an issue as to what challenges, if any, could be brought in the requested state. In principle, challenges as to the merits, in particular relating to the underlying criminal conduct, should be brought in the requesting state where the matter originated and the relevant evidence would be located.

125. In the requested state, innocent third parties should be able to challenge the orders with a view to demonstrating why the property should not be subject to restraint.

126. There is a tension between the entitlement of an accused to pursue his or her remedy in the state in which he or she is located and requiring him or her to pursue such remedies in the requesting state.

127. It was agreed that an accused should not be allowed to forum shop and choose a location to attach the underlying criminal offences and orders where it will be most difficult for the state to respond. Their effective remedy should be pursued in the state where the matter arose and actions within the requested state should be limited to procedural questions, issues as to whether the particular property should be subject to restraint or arguments over fundamental human rights.

Use of Disclosure Statements

128. On a related point there are also concerns about the use of disclosure statements that are available under proceeds of crime legislation in many states. When these are used domestically there are protections in place to ensure there is no self-incrimination and information from them is not transmitted to prosecution authorities dealing with any substantive criminal case. If such information is being taken in one state and transmitted to another, steps will need to be taken to ensure that the same protections will be afforded by the authorities in the receiving state.

Cross Border Access to Funds

129. The Group also considered some related issues surrounding cross border restraint. In some jurisdictions, the accused is permitted to access restrained assets – assets restrained either by virtue of a domestic proceeding or in response to a foreign request – for various purposes including legal costs and necessities. This can result, in some cases, in the dissipation of the restrained assets. Other jurisdictions have by statute restricted or eliminated the access of accused persons to such assets.

Dual Criminality

130. The requirement for dual criminality for the cross border enforcement of restraint or confiscation orders can result in serious impediments to effective co-operation, particularly where the underlying offences may involve unique concepts such as continuing criminal enterprise or racketeering offences. Countries should examine their systems and determine whether it is strictly necessary to require dual criminality for the cross border enforcement of foreign restraint and confiscation orders.

Recommendations

R.39 Commonwealth countries which have yet to provide for restraint and confiscation of assets in response to a foreign request should promptly adopt legislation which establishes a direct enforcement system. The direct enforcement system should:

(i) allow for all foreign orders to be enforced but subject to an executive discretion to grant or refuse requests in particular cases;
(ii) provide for the enforcement of conviction based and non-conviction based orders;
(iii) allow for innocent third parties to challenge a restraint order or the enforcement of a confiscation order in both the requesting and requested state;
(iv) permit the accused to challenge a restraint order in the requested state on a limited basis related to procedural questions or fundamental human rights but not to challenge the underlying criminal offences or orders issued in the requesting state.

R.40 Commonwealth countries which have an existing law for enforcing foreign requests for restraint and confiscation should review their legislation and procedures and amend them as necessary to ensure that foreign requests for restraint and confiscation can be effectively and speedily enforced. If the current law does not provide for the enforcement of non-conviction based orders, it should be amended to do so.

R.41 Commonwealth countries should ensure proper co-ordination of cross border restraint and confiscation efforts and the management of assets.

R.42 Commonwealth countries should have the legal capacity to render legal assistance in relation to requests for restraint and confiscation from another country in the absence of dual criminality.

XI. MUTUAL ASSISTANCE - THE HARARE SCHEME

131. The Harare Scheme is not a treaty. It is an instrument, like the London Scheme for Extradition, reflecting the commitment of Commonwealth Law Ministers to provide mutual assistance in criminal matters amongst the member countries of the Commonwealth. Such assistance is to be rendered on the basis of the Scheme, as implemented in domestic law, without the requirement for a treaty.

132. While the Scheme represents an important tool for the rendering of assistance amongst member countries, there are problems with its implementation. Some countries have not adopted legislation to implement the Scheme at all and still others require the existence of a treaty for the rendering of assistance. These implementation issues pose an impediment to effective assistance. While the Scheme is comprehensive in scope, some improvements are needed to make it a more effective tool consistent with modern practice, particularly in terms of restraint, confiscation and return of assets. As well, it is not clear under the current provisions that the Scheme is applicable to non-conviction based asset confiscation cases.

133. To this end the Group agreed on proposed changes to the Scheme to:

- extend the application of the Scheme to non-conviction based asset confiscation;

- ensure the Scheme applies to the various models for asset confiscation within the Commonwealth and incorporates comprehensive definitions;

- make the Scheme more effective in asset confiscation cases by providing for the production of documents, the presence of representatives of the requesting state in the execution process and providing that requests shall not be refused on the ground of bank secrecy;

- provide for an obligation to return assets in specified corruption cases;

- enhance the provisions of the Scheme relating to asset sharing.

134. Attached as ***Annex V*** is a proposed revision of the Harare Scheme for Mutual Assistance to make it a more effective tool for co-operation generally and with respect to restraint, confiscation and repatriation.

Recommendations

R.43 Commonwealth countries that have yet to do so should promptly enact mutual legal assistance legislation.

R.44 National legislation for mutual legal assistance in Commonwealth countries should implement the provisions of the Harare Scheme.

R.45 The Harare Scheme should be amended in accordance with Annex V.

XII. RESTRAINT OF ASSETS

Delay

135. Delay is a major problem in effective restraint action both domestically and in response to international requests. Such delays can result in the movement of funds making it impossible to trace them subsequently.

136. FATF Recommendation No. 38 in part emphasises the need for expeditious action in response to requests by foreign countries for the identification, freezing, seizure and confiscation of assets. Expeditious action is of particular importance in terms of the restraint of assets be it on a domestic basis or in response to a foreign request.

137. One possible measure that can be used to ensure timely restraint is an administrative "blocking" order that would prevent the movement of funds for a short period of time where the circumstances are suspicious. Some existing models give such a power to the FIU. This power gives some flexibility to authorities to hold the funds while further investigations – foreign or domestic – are carried out. In some models, the original limited order can be extended to allow for further investigations but the individual has a right to apply to the court to have the order lifted. Constitutional provisions in some countries may prevent the use of such orders or may limit the time span for which the order may be given.

138. Given the usefulness of these orders, in the absence of such restrictions, countries should provide for such a power to its FIU or other appropriate authority.

139. Money laundering requirements also can be employed effectively to carry out speedy restraint in an indirect fashion. This can be particularly useful in cases of grand corruption. For example, if authorities in a financial institution receive information from an FIU or government authority, a press release, the internet or other public sources about the potential involvement of individuals in cases of grand corruption, they have knowledge that may subject them to possible

money laundering allegations if they subsequently are involved in transactions involving those persons.

140. Another way to deal with cases where there is insufficient time to freeze assets through a court application is to seek the assistance of the financial institution or individual or organisation in delaying any transactions with the funds. This too however has its own problems including a necessary "tipping off" of the suspect.

141. On preventing the movement of funds, one should not lose sight of the importance of the application of first principles. The rigorous enforcement of Know Your Customer/ Know the Business principles and requirements for Suspicious Transactions Reports should play an important role in preventing the movement of funds and resulting in their "de facto" restraint.

Timing of Restraint Order

142. Historically, some legislation mandated that applications for restraint could be made only where charges had been laid or were imminent. This led to a host of practical problems and has resulted in recent changes in the laws in some jurisdictions to allow for such applications to be made once an investigation has commenced. This approach has problems as well for example in defining when an investigation has commenced. It is preferable therefore not to tie the making of an application or the issuance of an order to either the laying of charges or commencement of an investigation. Some preferable triggers include where there is a basis to believe that a confiscation order might ultimately issue or that assets might be dissipated.

Damages

143. Restraint orders in foreign or domestic cases invariably carry a risk of damages being assessed against the state. In cross border cases there is also a question as to how the costs of such damage awards should be shared as between states. In some jurisdictions this risk is lessened by legislative provisions that restrict the award of damages for the actions of public officials to cases involving bad faith.

Management of Assets

144. One of the most challenging problems in restraint and forfeiture is the management of assets that have been restrained. This can be an easy task in some instances and an extremely complex one in others. This is particularly the case where the asset seized is an ongoing business or enterprise requiring day-to-day management. In adopting and implementing an asset confiscation scheme a key consideration will be the mechanism for asset management. Various management models can be employed depending on the domestic context from the use of private receivers to the creation of a public service office for this purpose. Which ever model is adopted, states need to ensure that there is an effective mechanism in place for this purpose.

Access to Assets

145. A further matter highlighted concerned the issues surrounding legislation that permits access to restrained funds for legal, living and other expenses that can result in the serious dissipation of the seized assets.

Recommendations

R.46 Commonwealth countries should ensure that the legislative scheme for restraint and confiscation is flexible and permits early application for a restraint order.

R.47 Commonwealth countries should ensure that the legislative scheme contains appropriate mechanisms for asset management.

R.48 FIU's or other appropriate authorities within each country should have the power to issue short term administrative freezing orders.

XIII. EFFECTIVE REPATRIATION OF ASSETS

General

146. Separate consideration needs to be given to the mechanisms in place for the return or repatriation of confiscated assets. A distinction needs to be drawn between the sharing of assets in criminal cases such as drug matters and return of funds to victims, including state victims in cases of corruption.

147. While some cases of grand corruption may be straight forward others can be extremely complicated. For example, there may be cases where it is difficult to ascertain who the actual victim is. Where government officials receive a bribe from a private company to obtain a contract is the victim the state or the shareholders of the company? Similarly what if a government official extorts bribes from all of the bidding companies? It is again questionable whether the state is the victim. What if funds from an international organisation intended for an aid project in a country are misappropriated? Should they be returned to the state or to the organisation? There are also the complications discussed previously that will arise where the assets are believed to have been misappropriated by a current Head of State. What action can be taken in respect of such funds in the absence of a request? If action is taken should those funds be returned while the Head of State remains? These questions illustrate that there are not always clear answers to the complex issues surrounding the identification of victims for the purposes of asset repatriation.

148. Because of the complex issues involved, it is clear that discussions as to the ultimate disposition of funds should begin at the earlier stages of restraint and confiscation and not be left until the end of the process.

United Nations Convention against Corruption

149. To effectively implement Chapter V of the UNCAC on repatriation, in particular Article 57, countries should develop and implement specific mechanisms that will allow for assets confiscated in one country to be repatriated in accordance with the Convention obligations.

150. In cases involving the embezzlement of public funds or the laundering of such embezzled funds, Article 57 of UNCAC imposes an obligation on a state to return those confiscated funds to a requesting State Party. The Group was of the view that it was of critical importance to highlight and implement this aspect of UNCAC. However, it was thought that in a Commonwealth context the term embezzlement has a specific legal meaning which might be interpreted restrictively therefore the Group believed that the use of the phrase misappropriation or other unlawful taking of public funds is preferable.

151. Unless agreed otherwise, the requested State Party may deduct reasonable expenses incurred in the proceedings leading to the return of the assets. This is an important caveat as confiscation proceedings can involve considerable costs, which may be particularly onerous for small jurisdictions with limited resources. At the same time, recognition of alternative agreements highlights that it is open for some requested states to waive the deduction of costs and allow for the return of 100 per cent of the funds. But at a minimum, it is incumbent on states wishing to implement the Convention to ensure that the law allows for the return of 100 per cent of the assets confiscated

minus reasonable costs in the particular cases specified in Article 57 of UNCAC. A determination of reasonable costs should be made on the basis of actual expenditure not with regard to an artificial percentage established under domestic law.

152. This principle for the return of funds should be recognised as a distinct concept in domestic law, separate and apart from any laws or guidelines relating to asset sharing. The same principle will be applicable in other corruption cases where the requesting State Party reasonably establishes its prior ownership of such confiscated property or when the requested State Party recognises damage to the requesting State Party as a basis for returning the confiscated property, as set out in Article 57 of the Convention. In addition to the UNCAC obligations, this approach properly reflects the general equities involved in such cases.

153. There are two possible approaches to implementing this obligation under domestic law. A state can provide for the funds to be ordered returned through a judicial process either at the time of confiscation or following. Alternatively, return could be carried out using a general executive power to distribute the assets post confiscation, which power could make specific reference to the Convention obligations. Each state will need to determine which mechanisms would be most effective and appropriate taking into account domestic laws and context.

154. In other corruption cases, the UNCAC requires priority consideration to returning the assets to the requesting State Party, to prior legitimate owners or compensating the victims of crime. States may wish to consider how best to deal with such cases, including possibly employing existing sharing regimes.

Delay

155. Delay again is a significant problem in the repatriation of assets. While due process has to be maintained, which by its nature may cause delays, as far as possible states should implement fast track, priority systems for corruption cases to reduce the amount of delay to a minimum.

Requirements for Treaty/Memorandum

156. Under the legislation of some states agreements are required for the sharing or repatriation of assets, either as a stand alone agreement or as part of a mutual assistance treaty. In other jurisdictions, sharing and repatriation may take place on the basis of domestic law without the requirement for any specific agreement.

157. There are clearly many benefits to bilateral treaty arrangements, including the personal contacts and better understanding of systems forged through the process. Further the negotiation of asset sharing instruments can be relatively simple. However, for small and developing states with very limited human resources and access to technology, the requirement for a treaty or arrangement as a prerequisite to repatriation or sharing can be very onerous. Given the common interests of states in this area, bilateral agreements for repatriation of assets are unnecessary. If some framework instrument were necessary within the Commonwealth it would be useful to look at either amendments to the Harare Scheme (see earlier discussion on amendments to the Harare Scheme) or the creation of a separate scheme to provide for sharing and repatriation between Commonwealth countries without the need for bilateral treaties or arrangements.

Arrangements Regarding the Return of Assets

158. It is a reality that returning states in some instances may have legitimate concerns about a repetition of misappropriation with regard to the returned funds or more general concerns about the use that may be made of the funds by the government in power.

159. There are equally serious questions though as to why a state which happens to have received the funds, perhaps in violation of anti-money laundering standards, should be in a position to impose its views on how the returned funds should be used.

160. The compromise achieved on this issue in the UNCAC is captured as follows in Article 57, paragraph 5:

> "Where appropriate, States Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case–by–case basis, for the final disposal of confiscated property."

161. In this regard the Commonwealth might be an appropriate forum to assist countries in coming to an agreement on asset return where necessary and appropriate.

162. Small and developing states with limited resources and often not much experience face significant challenges when confronted with cases where international co-operation is needed to obtain the repatriation of funds in cases of corruption. The G8 has recently been working on an initiative to establish asset recovery teams which can be used to assist other states in their efforts to identify and recover assets misappropriated through corruption. To maximise resources and avoid duplication there is advantage in the Commonwealth aligning its work with that of the G8 in this regard.

163. In some countries, particularly those employing a UK "benefit" model of confiscation where the orders issued are *in personam.*, a form of "repatriation" is employed at the restraint phase of a proceeding. In these states the defendant may be required by court order to repatriate assets held in foreign states so that they form part of a single compilation of assets that can be managed in one state. Similarly if a receiver has been appointed in a particular case he or she may pursue the repatriation of assets through the use of a power of attorney. Some states object to the movement of assets in such manner being of the view that the assets should be frozen and confiscated in that state and dealt with in accordance with domestic sharing regimes. On the other hand, the benefits of being able to gather the assets in one jurisdiction and the resulting psychological impact that may have on the individuals involved can be an important tool for effective asset forfeiture.

Recommendations

R.49 Where the relevant countries agree the Commonwealth should assist in reaching an agreement on the final disposal of confiscated assets.

R.50 Commonwealth countries that require a bilateral treaty or memorandum of understanding for asset sharing or the return of assets should eliminate this requirement.

R.51 Clause 28 of the Harare Scheme should be amended as set out in Annex V to ensure that the Scheme can be used as a basis for the sharing of assets and to provide for the repatriation of assets.

R.52 Commonwealth countries should provide by law, either through a judicial process or executive discretion, for the return of funds minus reasonable expenses to a requesting country:

- **(a) in cases of misappropriation or other unlawful taking of public funds or the laundering thereof;**
- **(b) where the requesting country reasonably establishes its prior ownership of confiscated property; or**
- **(c) when the requested country recognises damage to the requesting country.**

R.53 The law for the return of funds in these cases should be distinct from any existing laws or provisions relating to asset sharing. Where possible, Commonwealth countries returning the funds should give consideration to waiving the deduction of reasonable costs.

R.54 Commonwealth countries are encouraged to implement "fast track" priority systems for corruption cases to reduce the amount of delay in repatriation to a minimum.

R.55 The Commonwealth Secretariat should liaise with the G8 presidency in relation to the identification of suitable cases for the establishment of case co-ordination teams and asset recovery task forces to assist member countries as appropriate.

XIV. RECOMMENDATIONS FOR IMPLEMENTATION

164. The Working Group has recommended steps that should be taken to advance effective action in the repatriation of assets plundered through corruption. But the recommended measures can only translate to real improvement on a practical level if they are fully implemented by member countries. Therefore it is equally important that measures are also put in place to ensure that real progress can be made in realising the commitment of Heads of Government to maximum co-operation and assistance amongst Commonwealth governments to recover and repatriate assets plundered through corruption.

Recommendations

R.56 Commonwealth countries should give priority attention to the implementation of the recommendations in this Report, particularly the key recommendations.[6]

R.57 Commonwealth Heads of Government should commit increased resources for the Commonwealth Secretariat to assist Commonwealth countries with the implementation of these recommendations.

R.58 Commonwealth Heads of Government should keep asset repatriation on the agenda for their meetings and commit themselves to periodic review and discussion (by Heads of Government/Law and Finance Ministers) of the progress on implementation of the recommendations in the Report.

[6] Some key recommendations comprise an amalgamation of the recommendations contained within this Report.

ANNEX I

COMMONWEALTH WORKING GROUP ON ASSET REPATRIATION

Combined List of Delegates from four meetings:
14-16 June 2004,
15-17 November 2004,
30 March – 1 April 2005,
29 June – 1 July 2005.

THE BAHAMAS

Mr Bernard Turner (Chairman of the Group)
Director of Public Prosecutions
Office of the Attorney General
P O Box N3007
Nassau, The Bahamas
Tel: +1 242 502 0410
Fax: +1 242 356 9277
Email: attgenbt@batelnet.bs

CANADA

Ms Carole Sheppard
Justice Canada
Federal Prosecution Services
284 Wellington St.
Ottawa. On. K1A 0H8 Canada
Tel: + 1 613 941 3528
Fax: + 1 613 957 8412
Email: carole.sheppard@justice.go.ca

Mr Daniel Murphy
Senior Counsel, Justice Canada
Strategic Prosecution Policy Section
EMB – Room 2021
284 Wellington Street
Ottawa, Ontario
Canada K1A OHB
Tel: + 1 613 952 5034
Fax: + 1 613 941 8742
Email: daniel.murphy@justice.gc.ca

Mr Paul Saint-Denis
Senior Counsel
Criminal Law Policy Section
Department of Justice
East Memorial Building,
284 Wellington St. Room 5081
Ottawa, Canada K1V 0H4
Tel: (613) 957-4751 Office
Fax: (613) 941-4122
Email: psaintde@justice.gc.ca

FIJI ISLANDS

Mr Alipate Qetaki
Chairman Fiji Law Reform
Commission/ Law Revision Commissioner
Level 6, Suvavou House
P O Box 2213, Government Buildings
Suva, Fiji
Tel: +679 330-7201/+679 330 9866
extn.860
Fax: +679 330 2404
Email: Aqetaki@govnet.gov.fj

KENYA

Mr. John Githongo
Permanent Secretary
Governance and Ethics
Office of the President
State House, PO Box 40530, 00100
Nairobi, Kenya
Tel: 00 254 20 248562 / 316300
Fax: 00 254 20 247862
Email:governance@wananchi.com/
governance@statehouse.kenya.go.ke
Personal e-mail: ngwataniro@yahoo.co.uk

Mr Tom M Mboya
Principal Parliamentary Counsel
Attorney General's Chambers
Legislative Drafting Department
P O Box 40112
Nairobi, Kenya
Tel: 00 254 20 227461
Fax: 00 254 20 211082
Mobile: 00 254 0722875443
Email: tmboya_2000@yahoo.com

MALAYSIA

Mr Umar Saifuddin Jaafar
Senior Federal Counsel
Attorney General's Chambers
Level 6, Block C3,
Federal Government Administrative Centre,
62512 Putrajaya, MALAYSIA
Tel: +603-8885 5000 (general)
+603-8885 5110 (direct)
Fax + 603-8888 3518
Email: umar@agc.gov.my &
usj66@hotmail.com

NIGERIA

Mr Emmanuel Akomaye
Director General
Economic & Financial Crimes Commission
Plots1017 – 1018 Coree Bay Crescent
Opposite Rock View Hotel
FCT Abuja
Tel: + 234-9 413 1885 (direct line)
Tel/Fax: + 234-9 413 1884
Mobile + 234 803 786 9894
Email: eakomaye@efccnigeria.org.

SINGAPORE

Mr Mathew Joseph
Deputy Senior State Counsel
International Affairs Division
Attorney-General's Chambers
1 Coleman Street
#10-00, The Adelphi
Singapore 179803
DID : +65 6332 5912
Fax: +65 6332 5203
Email: Mathew_JOSEPH@agc.gov.sg

LESOTHO

Mr Leaba L Thetsane
Director of Public Prosecutions
P O Box 33
Maseru 100
Kingdom of Lesotho
Tel: 00 266 22 316602 / 22316283
Fax: 00 266 22316602 / 22310929
Mobile: 00 266 588 66253
Email thets@law.gov.ls

SOUTH AFRICA

Mr Willie Hofmeyr
Deputy National Director of Public Prosecutions
Head: Asset Forfeiture Unit
National Prosecuting Authority
P O Box 752
Pretoria 0001 South Africa
Tel: +27 12 845 6696/6000
Fax: +27 12 804 7335
Email: wahofmeyr@npa.gov.za

TRINIDAD & TOBAGO

Mr David West
Head of the Central Authority
Ministry of the Attorney General
Cabildo Chambers
25 - 27 St Vincent Street
Port of Spain
Tel: +1 868 623 4904
Fax: +1 868 627 9171
Email`: centralauthoritytt@tstt.net.tt &
dvwwest@hotmail.com

UNITED KINGDOM

Mr Simon Regis
Head of UK Central Authority
Judicial Corporation Unit, Home Office
5th Floor Fry Building
2 Marsham Street
London SW1P 4DF
Tel: 020 7035 1276
Fax: 020 7035 6985
Mobile: +44 7879 668 694
Email: simon.regis@homeoffice.gsi.gov.uk

EXPERTS

Mr Pascal Gossin
Chief of Section
Federal Office of Justice
Bundesrain 20
CH - 3003 Berne
Switzerland
Tel: +41 31 322 4301
Fax: +41 31 322 5380
Email: pascal.gossin@bj.admin.ch

Mr Stephen Gentle
Kingsley Napley
Knights Quarter
14 St John's Lane
London EC1M 4AJ
Tel: 0207 814 1250
Fax: 0207 490 2288
Email: sgentle@kingsleynapley.co.uk

Mr Herman Kessy
Deputy Director Banks Supervision
Bank of Tanzania
P O Box 2939
Dar es Salaam Tanzania
Tel: + 255 22 2111294
Fax: + 255 22 2113941
Email: hmkessy@hq.bot-tz.org

Mr Christopher Murray
Kingsley Napley
Knights Quarter
14 St John's Lane
London EC1M 4AJ
Tel: 020 7814 1200 direct: 78141230
Fax: 020 7490 2288 direct: 7702 5139
Email: cmurray@kingsleynapley.co.uk

Mr Colin Powell
Chairman
Offshore Group of Banking Supervisors
PO Box 267, Nelson House
David Place, St Helier
Jersey
Tel: 01534 822114
Fax: 01534 822001
Email: c.powell@jerseyfsc.org

OBSERVERS

Transparency International (TI)
Mr Alan Perry
Transparency International (TI)
Partner & Head of Public International Law Group
Kendall Freeman, Solicitors
43 Fetter Lane
London EC4A 1JU
Tel: 020 7556 4447
Fax: 020 7716 3717
Email: alanperry@kendallfreeman.com

Mr Colin Joseph
Partner, Kendall Freeman, Solicitors
43 Fetter Lane, London EC4A 1JU
Tel: 020 7556 4434
Fax: 020 7716 3672
Email: colinjoseph@kendallfreeman.com

UN Office on Drugs and Crime
Ms Kimberly Prost
Chief, Legal Advisory Section
Treaty & Legal Affairs Branch
United Nations Office on Drugs and Crime
Vienna International Centre
P O Box 500
A1400 Vienna , Austria
Tel: 00 43 1 26060 5338
Fax: 00 43 1 26060 5949
Mobile: 00 43 699 1459 5338
Email: Kimberly.Prost@unodc.org

Ms Valerie Lebaux
Legal Officer
Crime Conventions Section
Treaty and Legal Affairs Branch
Division for Treaty Affairs
United Nations Office on Drugs and Crime
Tel: 0043 1 26060 4258
Fax: 0043 1 26060 6711
Email: valerie.lebaux@unodc.org

World Bank
Mr J. Halligan
World Bank, 1818 H St., NW
Washington, DC 20433, USA
Tel: 202 458 1480
Fax:202 522 2433
Email: Jhalligan@worldbank.org

OBSERVERS (CONTD)

International Monetary Fund
Ms Margaret Cotter
Legal Division
International Monetary Fund
700 19th Street N W
Washington DC 20431, U S A
Tel: +1-202 623 5841
Fax + 1 202 623 4661
Email: mcotter@imf.org

International Bar Association
Mr Michael O'Kane
Peters & Peters
2 Harewood Place
Hanover Square
London W15
Tel: 020 7409 9702 / 7629 7991
Fax: 020 7499 6792
Email: law@petersandpeters.co.uk

Mr Monty Raphael
Peters & Peters
2 Harewood Place
Hanover Square
London W15
Tel: 020 7409 9702 / 7629 7991
Fax: 020 7499 6792
Email: montyr@petersandpeters.co.uk

COMMONWEALTH SECRETARIAT

Mrs Betty Mould-Iddrisu
Director
Legal & Constitutional Affairs Division
b.mould-iddrisu@commonwealth.int

Dr Eliawony J Kisanga
Deputy Director
Economic Affairs Division
e.kisanga@cmmonwealth.int

Mr Ayodele Oke
Head of Office
Office of the Deputy-Secretary-General (FM)
a.oke@commonwealth.int

Ms Adaora Ikenze
Adviser (Africa)
Political Affairs Division
a.ikenze@commonwealth.int

COMMONWEALTH SECRETARIAT (CONTD)

Miss Noreen John
Adviser
West Africa Section
Governance & Institutional Development Division
n.john@commonwealth.int

Mr Debi Prasad Dash
Consultant
Criminal Law Section
Legal and Constitutional Affairs Division
d.dash@commonwealth.int

Ms Ruth Armstrong
Consultant
Criminal Law Section
Legal and Constitutional Affairs Division
r.armstrong@commonwealth.int

Ms Veronic Wright
Consultant
Criminal Law Section
Legal and Constitutional Affairs Division

WORKING GROUP ON ASSET REPATRIATION
OVERVIEW OF ISSUES

Paper prepared by the Commonwealth Secretariat

1. The Working Group is to examine the issue of the recovery of assets[1] of illicit origin and repatriation of those assets to the countries of origin, focusing on maximising co-operation and assistance between governments. In particular the Group should consider, *inter alia*:

- the major problems in asset tracking, recovery, and repatriation and best practice in overcoming those problems;
- the key impediments to effective international co-operation in this area and effective ways in which those impediments can be addressed;
- the laws, administrative structures and other mechanisms necessary, in both "victim"[2] and "receiving"[3] states to prevent the movement of assets, and to allow for effective international co-operation in tracing and confiscating[4] the assets;
- taking into account the provisions of the United Nations Convention against Corruption (UNCAC), in particular Article 57, the laws, administrative structures and other mechanisms necessary to provide for the return of confiscated assets;
- possible amendments to the Commonwealth Scheme for Mutual Assistance in Criminal Matters (Harare Scheme) to provide for more effective co-operation in this area.

2. The Group is expected to prepare a report with specific recommendations for the advancement of effective action in this area.

3. In order to avoid duplication, the Group is requested to build on existing international instruments and recommendations and not to repeat them. In particular the Group is asked to take into account and, where appropriate, elaborate on the existing measures in:

The Framework of Commonwealth Principles on Promoting Good Governance and Combating Corruption (Framework);
The United Nations Convention against Corruption (UNCAC);
The African Union Convention on Preventing and Combating Corruption;
The revised Forty Recommendations of the Financial Action Task Force on Money Laundering (FATF Recommendations);
The Wolfsberg AML Principles on Private Banking (Wolfsberg Principles);
The Commonwealth Scheme for Mutual Assistance in Criminal Matters (the Harare Scheme).

4. In terms of the organisation of the work, it is suggested that the issues be examined in a chronological manner, much as a case would develop in practice. This would involve consideration of the following stages:

---

[1] The term "asset" is used throughout the paper. It is intended to be broadly interpreted to cover all forms of "property" as that term is defined in the UN Convention against Corruption.

[2] The term "victim state" is used in the paper as a reference to a state from which government funds have been misappropriated.

[3] The term "receiving state" is used throughout the paper to refer to a state in which misappropriated assets from another state are located.

[4] The term "confiscation" is used throughout the paper. It should be read to include both confiscation and forfeiture for those systems which use "forfeiture" as opposed to "confiscation".

- misappropriation of assets by Heads of State or Government/ public officials/ elected officials;
- movement of assets (out of the "victim state", internationally and into and within receiving state);
- tracing, tracking of assets;
- gathering evidence through mutual assistance;
- pursuing restraint and confiscation through mutual assistance;
- restraining assets;
- confiscating assets;
- return/repatriation of assets.

5. Consideration should be given to problems and issues relating to domestic laws and measures and, where relevant, the impediments to effective international co-operation, arising at each stage. For the first meeting, it may be useful to consider these stages with a view to identifying the problems, gaps, and issues as well as the impediments to co-operation. At the subsequent meetings the Group can identify appropriate laws and measures, as well as best practices to address the problems and impediments identified. This approach will allow for time between meetings for any follow up research that may be required.

6. The Group is encouraged to engage in broad ranging and open discussions of the issues the experts consider relevant. To facilitate the discussions, the following are some possible questions that the Group could consider. However these are not intended to be exhaustive of the matters to be discussed and should not in any way limit the extent or focus of the discussions. The Group may also decide to focus on a completely different set of questions and points than those outlined below.

MISAPPROPRIATION OF ASSETS

7. Issues relating to laws/practices to prevent misappropriation of state assets.

- Is there an absence of controls in place to regulate the expenditure of state funds by heads of government, heads of state, public officials, elected officials?
- What gaps or problems can be identified in terms of reporting and accounting requirements particularly with respect to high level government officials not subject to general public service controls?
- Are the existing general criminal offence provisions in most states relating to theft, fraud and misappropriation of funds sufficient for these cases or are specific offences required?
- Are there gaps in terms of criminal offences and/or asset restraint and confiscation provisions which create problems in terms of international co-operation in the tracking, restraint, confiscation and return of assets?

MOVEMENT OF ASSETS

8. Issues relating to the movement of misappropriated assets within the victim state, to another state and within the receiving state.

- Are there particular weaknesses in anti-money laundering regimes which are exploited in these cases?
- Can common typologies for movement of assets in such cases be identified?
- Are there particular problems with the existing standards and practices relating to politically exposed persons?
- Are there issues surrounding the enforcement of anti-money laundering regulations in relation to financial institutions or in respect of other organisations/bodies?

TRACING, TRACKING ASSETS

9. Issues relating to tracing and tracking assets domestically and internationally.

- In terms of domestic investigations are there problems in terms of investigative resources and/or training and capacity for asset tracing?
- Is there an absence of effective investigative tools for the tracking of assets?
- What informal and formal avenues are available for tracking, tracing assets internationally?
- What are the key practical problems in tracking assets cross border using the avenues described above?
- What, if any, bank secrecy impediments exist?

USE OF MUTUAL ASSISTANCE TO GATHER EVIDENCE

10. Issues surrounding the use of mutual assistance to gather evidence for criminal prosecutions in corruption cases and for asset restraint and confiscation proceedings.

- What kinds of practical problems do requesting states face with requests for assistance aimed at gathering evidence for corruption prosecutions?
- What kinds of practical problems do requested states face with requests for assistance aimed at gathering evidence for corruption prosecutions?
- What kinds of problems do requesting states face with requests for assistance aimed at gathering evidence for asset restraint/confiscation proceedings?
- What kinds of problems do requested states face with requests for assistance aimed at gathering evidence for asset restraint/confiscation proceedings?
- Are there problems with the use of the Harare Scheme in these cases?
- Should any of the provisions of the Harare Scheme be amended to enhance co-operation in evidence gathering?
- Are there problems in using the Harare Scheme to obtain and provide for evidentiary assistance in investigations and proceedings relating to civil asset confiscation?

USE OF MUTUAL ASSISTANCE TO OBTAIN CROSS BORDER RESTRAINT AND CONFISCATION OF ASSETS

11. General issues with the use of mutual assistance to obtain the restraint/confiscation of assets.

- What kinds of practical problems do requesting states face with requests for assistance aimed at restraint/confiscation?
- What kinds of practical problems do requested states face with requests for assistance aimed at restraint/confiscation?
- Are there problems with the provisions of the Harare Scheme relating to requests for restraint/confiscation?
- Are there provisions lacking in the Harare Scheme to allow for effective co-operation in restraint/confiscation?
- What, if any, delays are encountered with requests for restraint and confiscation made through mutual assistance channels and what are the apparent causes of any such delay?

RESTRAINT OF ASSETS

12. Issues relating to the restraint of assets where the predicate corruption offence occurs in one state and proceeds of the offence are located in another state.

- Are there problems arising from a lack of dual criminality relating to the predicate offences?

- What, if any, problems arise from the sufficiency of information/evidence provided in support of a request for restraint?
- Does a lack of asset restraint and confiscation laws in the "victim" state prevent effective restraint action in the receiving state?
- Are there problems arising from the incompatibility of the asset restraint and confiscation regimes between states?

13. A state can execute a request for restraint of assets either directly (registering and enforcing a foreign order of restraint as if it were a domestic order) or indirectly (by taking information and evidence provided by the requesting state and using it to obtain a restraint order under domestic proceeds of crime laws).

- What problems are encountered in use of the "direct" system of enforcement?
- What problems are encountered in the use of the "indirect" system of enforcement?

CONFISCATION OF ASSETS

14. Issues relating to the confiscation of assets where the predicate corruption offence occurs in one state and proceeds of the offence are located in another state.

15. Under the international conventions, a state can execute a request for confiscation of assets either directly (registering and enforcing a foreign order of confiscation as if it were a domestic order) or indirectly (by taking information and evidence provided by the requesting state and using it to obtain a domestic confiscation order under domestic proceeds of crime laws).

- What problems are encountered in use of the "direct" system of enforcement?
- What problems are encountered in the use of the "indirect" system of enforcement?

16. Many states operate under a conviction based system of asset confiscation requiring the conviction of an individual before assets may be confiscated.

- What problems arise from this requirement for a criminal conviction before assets may be confiscated?
- Generally will a conviction in the victim state support confiscation in the receiving state or is a conviction in the receiving state required?
- Are there problems with proof of the conviction or the sufficiency of information and evidence provided in support of a request for confiscation?
- Are there problems relating to dual criminality with respect to the predicate offence?

17. There has been a recent trend toward the adoption of non conviction based or "civil" asset confiscation regimes within states.

- What, if any, potential impediments are there to the use of civil asset forfeiture for the confiscation of assets in these cases?
- Are there difficulties that arise if the victim state does not have a similar civil asset confiscation regime in place?

REPATRIATION OF ASSETS

18. Issues surrounding the return of assets to a "victim" state.

- Are there problems arising from an absence of legal mechanisms for return?

19. States may employ different forms of legal measures to return confiscated assets to another state. One approach would be to empower the courts to order the funds "returned" at the time of or after confiscation. Another approach would be to give an executive authority power to release confiscated funds to the requesting state.

- What problems are anticipated with the "judicial" or the "executive" model?

- Taking into account the provisions of the UNCAC what problems are anticipated in meeting the conditions for the return of funds?

ANNEX III

MISAPPROPRIATION OF ASSETS
Preventive Measures

Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption

1. The Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption sets out a number of preventive measures which include national actions, international actions and actions by the Commonwealth as an Association. The measures contained in the Framework constitute actions which would lead into a policy of zero tolerance in the fight against corruption. These actions would encompass the prevention of corruption, the enforcement of laws against it and the mobilisation of public support for anti-corruption strategies.

National Actions

2. The Framework urges all Commonwealth countries which have not done so to develop national strategies to promote good governance and eliminate corruption. The strategies would need to be comprehensive in engendering transparency and accountability in all sectors and in covering all the active and passive actors in corruption. Emphasising on the need for ethics and integrity in the public and private sectors, the Framework stresses that corruption at the highest level causes the greatest threat to the stability and well-being of societies and its elimination must be given the highest priority in the implementation of effective anti-corruption strategies.

3. In dealing with economic and fiscal policies, the Framework identifies opportunities for seeking economic rents as a major cause of corruption. It urges the initiation of policy reform in economic management that can help to maximise transparency and certainty and minimise administrative discretion which would reduce rent-seeking as well as eliminate incentives which generate corrupt practices.

4. The Framework calls for the need to improve the management, efficiency and delivery of public services as an essential element for any national strategy to enhance governance and reduce corruption. This is particularly critical, in view of the increasing trend towards contracting out and/or privatising services previously provided by the state. The measures to improve management and efficiency should encompass all those who have responsibilities for providing goods and services in the public interest.

5. On public service and providers of public services, the Framework urges the development of a merit-based, professional and non-partisan civil service which is appropriately sized, well-motivated and well-paid as a preventive measure to corruption. Rule of law should apply equally to all those involved in the administration and provision of services in the public interest, as it does to the whole of civil society.

6. Codes of conduct, with appropriate sanctions for breaches that are enforced consistently and vigorously, should bind those holding offices of trust. There should also be promotion of ethical standards, which instil pride in the virtues of integrity, professionalism, efficiency, transparency and impartiality in the public service through education and training.

7. In financial management, the Framework urges the development of sound management systems as essential tools for good governance, which enable governments to set macro-economic targets to allocate resources, and to implement programmes and projects efficiently. It recommends the establishment of rigorous accounting, financial reporting and auditing systems covering all public

programmes and investments. Auditors-General or other auditing authorities should be sufficiently independent to allow open criticism of government finances. Countries should be encouraged to adopt codes of fiscal transparency. Countries also need to have effective regulations for their financial sectors (including private financial institutions and parastatals), that reduce opportunities for corrupt practices.

8. To eliminate corruption in public procurement, governments should be encouraged to review their procurement practices and develop comprehensive guidelines with transparent processes to cover contracts for goods, civil works and services, and criteria for using all types of procedures ranging from prudent shopping to national and international competitive bidding.

9. The Framework also spells out preventive measures that need to be taken in the judiciary and the legal systems of Commonwealth countries. It urges the entrenchment of independent judiciary as a key preventive measure to corruption. This requires objective criteria for the selection and removal of judges, adequate remuneration, security of tenure, and independence from the executive and legislative branches of government. It also expects judges to act properly in accordance with their office and to be subject to the ordinary criminal laws of the land.

10. The legal system would also need to be strengthened through vigorous applications and enforcement of existing laws. The Framework urges governments to make effective use of existing criminal and civil laws to obtain the appropriate remedy in each case. It encourages governments to enhance investigative policing and prosecutorial services to ensure compliance with the law. It calls for strengthening of laws against corruption to provide a meaningful deterrent (active and passive corruption should be made criminal offences), comprehensively covering all holders of all offices of trust; criminal law should provide for the seizure and forfeiture of the proceeds of corruption; there should be provisions for protection of witnesses and whistle-blowers in cases involving corruption. There should be statutes which permit investigators and prosecutors to base criminal proceedings on the discovery of significant increases in assets of the holder of an office of trust, which cannot be reasonably attributed to lawful source of income; the laundering of proceeds of crime must be criminalised and laws which provide for the granting of assistance to other countries investigating and prosecuting money laundering offences, must be available to ensure effective international co-operation to combat money laundering.

11. The Framework also prescribes the need for civil administrative and regulatory laws that enhance preventive measures.

- The use of damages awards and the facility to void contracts may be appropriate in many cases.

- Administrative action such as the use of disciplinary procedures, can contribute to the battle against corruption and ease over-burdened court systems by dispensing appropriate sanctions.

- Regulations requiring declaration of assets and financial interests by holders of offices of trust.
- Non-criminal laws such as those providing for the disqualification of directors guilty of improper conduct in the management of corporations, and the regulation of financial institutions to prevent money laundering.

12. At the national level, the Framework promotes the involvement of civil society as an independent and creative partner in the development of coalitions to improve governance and combat corruption.

International Actions

13. The Framework recognises the critical importance that international preventive actions have in the success of any national strategy. It urges all countries (developed and developing) to join the battle against cross-border corruption. This would involve the mobilisation of international support for a global compact against corruption, negotiated under the auspices of the United Nations with universal participation which builds on the positive elements of existing conventions and other regional and international initiatives (*the UN Convention Against Corruption is an example of this expected outcome*).

14. With regard to preventive measures in programmes of international financial institutions and aid agencies, the Framework recommends the need for added scrutiny, greater transparency and accountability, and appropriate conditionality in procurement using multilateral and bilateral aid resources. It also recommends that the levels of corruption in recipient countries should be taken into account in determining the quantum and direction of external assistance. Issues related to governance and corruption should also be taken up by international financial institutions, in policy dialogue with recipient countries and in the development of country assistance strategies.

15. To prevent corruption in procurement using resources from international financial institutions, the Framework urges these institutions to strengthen their procurement guidelines along the lines of the anti-fraud/corruption provisions of the 1996 World Bank guidelines on procurement. It also encourages bilateral donors to reduce tied aid since the tying of aid to procurement from a donor country reduces the scope for competitive bidding and increases the incentives for corrupt practices.

16. The Framework suggests actions in the areas of monitoring corruption, the arms trade, and money laundering which would enhance preventive measures. On monitoring corruption, it calls for the need to improve the methodological basis for the quantitative assessments applied by monitoring agencies such as Transparency International. In the arms trade, it recommends more transparency in the trade, which could include wider and more detailed reporting in arms trade transactions in the UN arms register; the creation of a new international code of conduct for the arms trade, requiring the disclosure of greater information by all parties involved; and the inclusion of specific clauses in arms sales contracts that reduce the role of middle-men and ban illegal commissions. On money laundering, it urges countries to implement the FATF's 40 recommendations and encourages the development of regional anti-money laundering groups to strengthen anti-money laundering measures across the Commonwealth, which would provide a basis for stronger mechanisms to enable the expeditious repatriation of proceeds of corruption.

Commonwealth Actions

17. The Commonwealth-wide preventive measures proposed in the Framework include both political actions by Commonwealth countries collectively, and practical actions taken by Commonwealth governments and the Commonwealth Secretariat. The Framework emphasises that the Commonwealth's commitment to promote good governance and fight corruption should be credible, tangible and visible. It urges Commonwealth Heads of Government to adopt a declaration that commits the Commonwealth to specific principles, standards and goals and establish a mechanism/process to facilitate its implementation as well as periodic review of progress. The Framework also calls for the Commonwealth to support a truly global compact against corruption that would fill gaps in existing instruments and be universal in its scope, thus creating a level playing field for all countries. It suggested that the Commonwealth could work through the UN system in developing such a compact (*the UN Convention Against Corruption is an example of this expected outcome*).

18. The Framework encouraged Commonwealth countries to maximise the use of existing co-operation schemes and keep them under review in order to meet the needs of all countries seeking to combat corrupt practices. It also suggested that the Commonwealth should work with other international agencies to develop effective standards to ensure that all off-shore financial centres are not used to launder proceeds of corrupt practices.

19. Commonwealth governments were also encouraged to give the Secretariat additional resources to enable it to assist member countries with policy advice and technical support to design their own anti-corruption strategies and to compile and disseminate information on emerging good practices in combating corruption and improving governance.

ANNEX IV

Summary of the Position Regarding Immunities from Domestic Prosecution of Head of State/Government in the Commonwealth"

	Country	Presidential & Vice-Presidential Immunity (serving)	Presidential Immunity (past)	High-Ranking Govt. Officials (serving)	High-Ranking Govt. Officials (past)
1	CYPRUS	Immune from criminal proceedings ***Can be prosecuted for any offence including corruption following special leave from President of Supreme Court**		Immune from criminal proceedings ***Can be prosecuted for any offence including corruption following special leave from Supreme Court**	
2	FIJI	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings
3	GHANA	Immune from civil and criminal proceedings for acts or omissions done while in office	Civil or criminal proceedings may be instituted within **three** years of leaving office ***In respect of anything done or omitted to be done before or during the term of office**	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings
4	JAMAICA	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings
5	LESOTHO	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings
6	MALAYSIA	The King (constitutional monarch) can only be prosecuted or sued by a Special Court established under Article 182 of the Federal Constitution, in respect of his personal criminal/civil liability. A prosecution/ civil suit against the King shall not be instituted except	-ditto- -ditto-	None	None

	Country	Presidential & Vice-Presidential Immunity (serving)	Presidential Immunity (past)	High-Ranking Govt. Officials (serving)	High-Ranking Govt. Officials (past)
		with the consent of the Attorney General (Article 183 Federal Constitution). NOTE: The King (Ruler) is the Head of State. The Head of Government - the Prime Minister has no immunity			
7	MAURITIUS	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings
8	NEW ZEALAND	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings
9	ST LUCIA	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings
10	SINGAPORE	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings
11	SRI LANKA	Immune from civil and criminal proceedings for acts or omissions done while in office	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings
12	TONGA	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings
13	BANGLADESH	Yes	None	Yes	None
14	THE BAHAMAS	None	None	None	None
15	CANADA	None	None	None	None
16	THE GAMBIA				
17	INDIA	Yes	None	None	None
18	KENYA	President has immunity from criminal and civil proceedings during the entire term of office Serving Vice-Presidents do not enjoy immunity	None	None	None

	Country	Presidential & Vice-Presidential Immunity (serving)	Presidential Immunity (past)	High-Ranking Govt. Officials (serving)	High-Ranking Govt. Officials (past)
19	NIGERIA	Full immunity, both civil and criminal, while in office bills	None	Immunity for Governors and Deputy Governors, both civil and criminal, while in office	None
20	PAKISTAN	Yes	None	None	None
21	SOUTH AFRICA	None	None	None	None
22	TANZANIA	President, while in office	None	None	None
23	TRINIDAD & TOBAGO	None	None	None	None
24	UNITED KINGDOM	HM The Queen, as Head of State	N/A	None	None
25	CAMEROON	Yes	Yes	None	None
26	BOTSWANA	Yes	None	None	None
27	MALAWI	Yes	None	None	None
28	ST VINCENT/ GRENADINES	None	None	None	None
29	ANTIGUA & BARBUDA	None	None	None	None
30	BARBADOS	None	None	None	None
31	BELIZE	None	None	None	None
32	DOMINICA	None	None	None	None
33	GRENADA	None	None	None	None
34	GUYANA				
35	ST KITTS & NEVIS	None	None	None	None
36	MALTA	None	None	None	None

ANNEX V

PROPOSED AMENDMENTS TO THE SCHEME RELATING TO MUTUAL ASSISTANCE IN CRIMINAL MATTERS WITHIN THE COMMONWEALTH (THE HARARE SCHEME)

including amendments made by Law Ministers in April 1990 and November 2002

PURPOSE AND SCOPE

1. (1) The purpose of this Scheme is to increase the level and scope of assistance rendered between Commonwealth Governments in investigations and proceedings relating to offences and confiscation proceedings. 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:

(a) identifying and locating persons;
(b) serving documents;
(c) examining witnesses;
(d) search and seizure;
(e) obtaining evidence including the production of documents;
(f) facilitating the personal appearance of witnesses;
(g) effecting a temporary transfer of persons in custody to appear as a witness;
(h) obtaining production of judicial or official records; and
(i) tracing, restraining, 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 sub-paragraph.

CRIMINAL MATTER

3. (1) For the purposes of this Scheme, a criminal matter means an investigation or proceeding relating to an offence or to confiscation proceedings.

(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) "Confiscation proceedings" means proceedings, whether conviction based or non-conviction based, for:

(a) an order restraining dealings with or seizing[1] any proceeds or instrumentalities;

(b) a confiscation order related to proceeds or instrumentalities;

(c) an order imposing a pecuniary penalty calculated by reference to the value of any proceeds or instrumentalities.

(4) "instrumentalities" means any property:

(a) used in or in connection with or destined for use in or in connection with an offence; or

(b) that facilitates or is otherwise concerned in an offence.

(5) proceeds means property that:

(i) has been derived or obtained whether directly or indirectly, from an offence; or

(ii) is or represents the benefit derived from an offence.[2]

CENTRAL AUTHORITIES

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

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.

---

1 This is intended to cover systems where seizure is used to restrain some types of property.

2 This is intended to address the current problem that "value" or "benefit" confiscation systems such as in the UK or South Africa are not covered by the Scheme.

(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.

(4) The requested country may make the granting of assistance subject to the requesting country giving an undertaking that:

(a) the evidence provided will not be used directly or indirectly in relation to the investigation or prosecution of a specified person; or

(b) a court in the requesting country will determine whether or not the material is subject to privilege.

(5) If the requesting country refuses to give the undertaking under sub paragraph (4), the requested country may refuse to grant the assistance sought in whole or in part.

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.

(5) A request for assistance under this Scheme shall not be denied on the grounds of bank secrecy.[3]

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.

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.

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.

---

[3] This is now a provision in all modern treaties and is of particular importance for proceeds investigations.

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.

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.

CONTENTS OF 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 proceedings have been instituted.

(e) where proceedings relating to an offence have been instituted, contain the following information:

(i) the court exercising jurisdiction in the proceedings;

(ii) the identity 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 proceedings relating to non-conviction based confiscation have been instituted, contain the following information:

(i) the court exercising jurisdiction in the proceedings;

(ii) a description of the property alleged to be subject to confiscation;

(iii) the stage reached in the proceedings; and

(iv) any date fixed for further stages in the proceedings.

(g) where proceedings have not been instituted, state the offence which is under investigation or, in the case of non conviction based confiscation describe the nature of the investigation to date, 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.

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.

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.

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 and a representative of the requesting state[4] may attend the examination of the witness and ask questions of the witness.

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.

---

[4] It is unclear why this was not in the original scheme but it would seem appropriate to allow for both sides of proceedings to be represented and participate.

(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.

OTHER ASSISTANCE IN OBTAINING EVIDENCE

18. (1) A request under this Scheme may seek other assistance in obtaining evidence including the production of documents.[5]

(2) The request shall specify, as appropriate and so far as the circumstances of the case permit:

(a) the documents, records or property to be produced, 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.

PRIVILEGE

19. (1) The laws of the requested country may provide[6] that no person shall be compelled in response to a request under this Scheme to give any evidence in the requested country which he or she 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.

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.

---

[5] The production of financial documents is of critical importance in proceeds investigations. While probably covered by the general reference to other assistance with evidence gathering, it is perhaps worth specifying by reference to production of documents.

[6] The current mandatory nature of this provision is inconsistent with some of the newer laws where not all objections in both states are permitted. This could be of particular importance in terms of compelled interviews in financial/proceeds investigations. This amendment would make the application of this principle discretionary as opposed to mandatory.

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 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.

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.

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 agree.

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.

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 proceeds or instrumentalities of crime 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.

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 or 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 or instrumentalities of crime" means:

(a) an order restraining dealings with or seizing any proceeds or instrumentalities;

(b) an order confiscating any proceeds or instrumentalities; and

(c) an order imposing a pecuniary penalty calculated by reference to the value of any proceeds or instrumentalities.

(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

(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.

DISPOSAL OR RELEASE OF PROPERTY

28. (1) The law of the requested country shall apply to determine the disposal of any property

(a) confiscated; 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 shall provide that property confiscated or obtained pursuant to an order of the type referred to in sub-paragraphs 27(2)(b) and (c) or the value thereof be returned to a requesting country where:

(i) the property was confiscated in relation to an offence involving the misappropriation or other unlawful taking of public funds or the laundering of such funds, where the requesting country was the victim of the offence; or

(ii) the requesting country reasonably establishes its prior ownership of the confiscated property to the requested country or the requested county recognises damage to the requesting country as a basis for returning the confiscated property.

(4) Subject to subsection (3) the law of the requested country shall provide that the property confiscated or obtained under an order of the type referred to in sub-paragraphs 27(2)(b) and (c), or the value thereof, may be:

(i) returned to the requesting country; or

(ii) shared with the requesting country in such proportion as the requested country in its discretion deems appropriate in all the circumstances.

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.

SUMMARY OF RECOMMENDATIONS

R.1 Commonwealth countries should sign, ratify and implement the United Nations Convention against Corruption as a matter of urgency.

R.2 Commonwealth countries should have regard to the Commonwealth Framework and Chapter II of the UNCAC on Preventive Measures and adopt a comprehensive prevention regime under domestic law.

R.3 Having regard to the criminal offence provisions of the UNCAC, Commonwealth countries should ensure that there are a broad range of criminal offences under domestic law for use in corruption cases, including an offence of bribery of foreign officials abroad.

R.4 Commonwealth countries should ensure that the law clearly describes how public funds may be used including by Heads of State/Government and that there are criminal offences applicable to any misuse of those funds.

R.5 Commonwealth countries should introduce an offence of unjust enrichment if it does not already exist.

R.6 Commonwealth Heads of State/Government and other public officials should not have immunity from prosecution in domestic courts for alleged criminal activity.

R.7 Heads of Government should commit themselves to take active steps to ensure the removal of these immunities.

R.8 The Commonwealth Secretariat should prepare periodic reports for consideration by Heads of Government on progressive action towards reaching the optimum goal of no immunities at all from criminal prosecutions throughout the Commonwealth.

R.9 The Commonwealth as an organisation of sovereign states should advance a position for the inclusion of corruption offences within the Rome Statute of the International Criminal Court at the Review Conference for the Statute in 2009.

R.10 The law in Commonwealth countries should provide for:

(a) a judicial review mechanism for claims of public interest immunity;
(b) exceptions to the privilege where it can be established that the information or evidence sought is relevant to the investigation of (serious) criminal activity, with appropriate safeguards on any disclosure as may be necessary.

R.11 Commonwealth countries which have not already done so should implement the broad range of international initiatives directed at preventing the movement of illicit assets and combating money laundering. This should include adopting and enforcing anti-money laundering and proceeds of crime laws with relevant structures and administrative procedures. The Commonwealth Secretariat should continue to support member countries with these efforts.

R.12 The Commonwealth Secretariat should develop programmes to assist countries with the development and implementation of early warning systems to raise awareness about political situations particularly vulnerable to corruption.

R.13 Commonwealth countries should enact laws to allow for expedited cash seizures at the border and generally throughout the country in respect of cash which exceeds a specified threshold.

R.14 Enhanced scrutiny regimes should be applied to PEPs as defined by the FATF but extending to both domestic and foreign PEPs.

R.15 The Commonwealth Secretariat should continue to support countries in the implementation of international initiatives to combat money laundering and to gather and disseminate information regarding anti-money laundering and corruption legislation within the Commonwealth.

R.16 Commonwealth countries should have in place independent and effective mechanisms by which allegations of corruption with respect to a current Head of State/Government can be investigated and prosecuted and the relevant assets can be frozen and confiscated.

R.17 The procedures relating to suspicious transaction reporting should apply where suspect funds belonging to a current Head of State/Government of another country are identified. Where possible and appropriate, the FIU or other appropriate body or authority in the receiving state should communicate the information about the suspect funds to the FIU or other appropriate body or authority in the home state for action to be taken.

R.18 Where there is sufficient evidence, the receiving state should use the methods available under domestic law to obtain the restraint and confiscation of the relevant assets.

R.19 In cases involving allegations of corruption by serving Heads of State/Government the Commonwealth should have an ad hoc peer review mechanism in place.

R.20 Commonwealth countries that have yet to do so should promptly put in place strong and comprehensive legislation and procedures for criminal conviction based asset confiscation. This should include a power to confiscate in circumstances where the accused has absconded or died.

R.21 Commonwealth countries should also put in place comprehensive laws and procedures for non-conviction based asset confiscation.

R.22 Commonwealth countries should allocate sufficient resources to establish and properly fund law enforcement and other agencies dealing with asset confiscation and management.

R.23 For asset confiscation legislation to be effectively implemented law enforcement authorities need to have the requisite knowledge and skills. Commonwealth countries, with support from the Commonwealth Secretariat, should develop and implement programmes for training/capacity building for police, prosecutors and judicial officers in relation to asset confiscation laws and practice.

R.24 The Commonwealth Secretariat should continue with and enhance its programme for placement of prosecution and law enforcement mentors within Commonwealth countries and regions to assist with ongoing asset confiscation and money laundering cases and contribute to capacity building.

R.25 Commonwealth countries should adopt best practices for asset confiscation investigations and proceedings including:

- establishing dedicated, law enforcement teams to investigate proceeds of crime matters which are multidisciplinary in composition or have support from experts in various relevant disciplines;
- establishing where possible joint investigative teams on a domestic and/or international level;
- providing sufficient funds to the investigation and prosecution of confiscation cases including funding specialist support;
- adoption or review and amendment of laws to provide for a range of investigative powers of particular relevance to these investigations including for compelled interviews, production orders, account monitoring and interception of communications.

R.26 Adoption or review and amendment of laws which allow for investigators to access tax information for their investigations.

R.27 Mutual legal assistance between Commonwealth countries should be available on the basis of the Harare Scheme without a requirement for a bilateral treaty. Commonwealth countries that currently require a treaty for mutual legal assistance should consider removing such a requirement. Optimally domestic law should allow for assistance to be rendered to all countries on the basis of national law without the requirement for a treaty.

R.28 Commonwealth countries which have yet to do so should promptly establish a central authority as required under the Harare Scheme.

R.29 Consultation between central and other relevant authorities (e.g. law enforcement) regarding mutual legal assistance requests should be strongly encouraged.

R.30 Central authorities and the mutual legal assistance execution process should be properly resourced and funded and Commonwealth countries should allocate sufficient resources for this purpose.

R.31 The Commonwealth Secretariat should establish a webpage which would include practical information on mutual legal assistance laws (including restraint and confiscation requirements) and systems within member countries and provide some guidance on how to make requests to different countries.

R.32 Creation of a Commonwealth Network similar to the European Judicial Network/Eurojust adapted to the particular circumstances of the Commonwealth. This could include setting up both regional bodies as well as a Commonwealth entity.

R.33 The Commonwealth Secretariat should continue and enhance its assistance programmes to Commonwealth countries relating to capacity building and training. The Secretariat should also continue to facilitate co-operation by maintaining lists of central authorities and providing contact particulars for central authorities and other relevant officials to member countries in response to requests.

R.34 Commonwealth countries should have the legal capacity to render mutual legal assistance in the absence of dual criminality.

R.35 Commonwealth countries should adopt best practices for effective mutual legal assistance including:

(a) encouraging the development of personal contacts between central authorities and other relevant officials;

(b) where appropriate develop MOU's to enhance working relationships;

(c) to the extent possible consulting with authorities in the requested state about applicable laws and the content of a request prior to submitting any formal documentation;

(d) ensuring that requests for assistance are kept confidential and that the requesting state is consulted when circumstances arise where disclosure of the request is sought;

(e) implementing the Best Practice Recommendations of the UNODC Expert Working Group (2001).

R.36 Commonwealth countries should have the legal capacity to provide mutual legal assistance with respect to investigations and proceedings relating to non conviction based asset confiscation. Similarly, the Harare Scheme should be amended to cover such types of assistance.

R.37 The mutual legal assistance regimes in Commonwealth countries should permit evidence gathered for a criminal proceeding to be subsequently used in civil proceedings and requests for such use should be granted in corruption cases.

R.38 Commonwealth Law Ministers should examine further the issue of the possible use of mutual legal assistance to gather evidence for use in civil proceedings brought by a victim country for the recovery of assets in corruption cases.

R.39 Commonwealth countries which have yet to provide for restraint and confiscation of assets in response to a foreign request should promptly adopt legislation which establishes a direct enforcement system. The direct enforcement system should:

(i) allow for all foreign orders to be enforced but subject to an executive discretion to grant or refuse requests in particular cases;
(ii) provide for the enforcement of conviction based and non-conviction based orders;
(iii) allow for innocent third parties to challenge a restraint order or the enforcement of a confiscation order in both the requesting and requested state;
(iv) permit the accused to challenge a restraint order in the requested state on a limited basis related to procedural questions or fundamental human rights but not to challenge the underlying criminal offences or orders issued in the requesting state.

R.40 Commonwealth countries which have an existing law for enforcing foreign requests for restraint and confiscation should review their legislation and procedures and amend them as necessary to ensure that foreign requests for restraint and confiscation can be effectively and speedily enforced. If the current law does not provide for the enforcement of non-conviction based orders, it should be amended to do so.

R.41 Commonwealth countries should ensure proper co-ordination of cross border restraint and confiscation efforts and the management of assets.

R.42 Commonwealth countries should have the legal capacity to render legal assistance in relation to requests for restraint and confiscation from another country in the absence of dual criminality.

R.43 Commonwealth countries that have yet to do so should promptly enact mutual legal assistance legislation.

R.44 National legislation for mutual legal assistance in Commonwealth countries should implement the provisions of the Harare Scheme.

R.45 The Harare Scheme should be amended in accordance with Annex V.

R.46 Commonwealth countries should ensure that the legislative scheme for restraint and confiscation is flexible and permits early application for a restraint order.

R.47 Commonwealth countries should ensure that the legislative scheme contains appropriate mechanisms for asset management.

R.48 FIU's or other appropriate authorities within each country should have the power to issue short term administrative freezing orders.

R.49 Where the relevant countries agree the Commonwealth should assist in reaching an agreement on the final disposal of confiscated assets.

R.50 Commonwealth countries that require a bilateral treaty or memorandum of understanding for asset sharing or the return of assets should eliminate this requirement.

R.51 Clause 28 of the Harare Scheme should be amended as set out in Annex V to ensure that the Scheme can be used as a basis for the sharing of assets and to provide for the repatriation of assets

R.52 Commonwealth countries should provide by law, either through a judicial process or executive discretion, for the return of funds minus reasonable expenses to a requesting country:

(a) in cases of misappropriation or other unlawful taking of public funds or the laundering thereof;

(b) where the requesting country reasonably establishes its prior ownership of confiscated property; or

(c) when the requested country recognises damage to the requesting country.

R.53 The law for the return of funds in these cases should be distinct from any existing laws or provisions relating to asset sharing. Where possible, Commonwealth countries returning the funds should give consideration to waiving the deduction of reasonable costs.

R.54 Commonwealth countries are encouraged to implement "fast track" priority systems for corruption cases to reduce the amount of delay in repatriation to a minimum.

R.55 The Commonwealth Secretariat should liaise with the G8 presidency in relation to the identification of suitable cases for the establishment of case co-ordination teams and asset recovery tasks forces to assist member countries as appropriate.

R.56 Commonwealth countries should give priority attention to the implementation of the recommendations in this report, particularly the key recommendations.[1]

R.57 Commonwealth Heads of Government should commit increased resources for the Commonwealth Secretariat to assist Commonwealth countries with the implementation of these recommendations.

R.58 Commonwealth Heads of Government should keep asset repatriation on the agenda for their meetings and commit themselves to periodic review and discussion (by Heads of Government/Law and Finance Ministers) of the progress on implementation of the recommendations in the report.

[1] Some key recommendations comprise an amalgamation of the recommendations contained within this Report.

ANNEX VII

KEY RECOMMENDATIONS WITH REPORT REFERENCES

1. Commonwealth countries should sign, ratify and implement the United Nations Convention against Corruption as a matter of urgency. (Taken from recommendation 1, page 2).

2. Commonwealth Heads of State/Government, Ministers and other public officials should not have immunity from prosecution in domestic courts for alleged criminal activity. Heads of Government should commit themselves to take active steps to ensure the removal of these immunities. (Taken from recommendations 6 and 7, page 6).

3. In cases involving allegations of corruption by serving Heads of State/Government the Commonwealth should have an ad hoc peer review mechanism in place. (Taken from recommendation 19, page 11).

4. Commonwealth countries that have yet to do so should promptly put in place strong and comprehensive legislation and procedures for criminal conviction based asset confiscation. This should include a power to confiscate in circumstances where the accused has absconded or died. Commonwealth countries should also put in place comprehensive laws and procedures for non-conviction based asset confiscation. (Taken from recommendation 20, page 14 and 21, page 15).

5. Mutual legal assistance between Commonwealth countries should be available on the basis of the Harare Scheme without a requirement for a bilateral treaty. Commonwealth countries that currently require a treaty for mutual legal assistance should consider removing such a requirement. (Taken from recommendation 27, page 19)

6. Commonwealth countries which have yet to provide for restraint and confiscation of assets in response to a foreign request should promptly adopt legislation which establishes a direct enforcement system. Commonwealth countries which have an existing law for enforcing foreign requests for restraint and confiscation should review their legislation and procedures and amend them as necessary to ensure that foreign requests for restraint and confiscation can be effectively and speedily enforced. If the current law does not provide for the enforcement of non-conviction based orders, it should be amended to do so. (Taken from recommendations 39 and 40, page 25).

7. Commonwealth countries should provide by law, either through a judicial process or executive discretion, for the return of funds minus reasonable expenses to a requesting country:

(a) in cases of misappropriation or other unlawful taking of public funds, or the laundering thereof;

(b) where the requesting country reasonably establishes its prior ownership of confiscated property; or

(c) when the requested country recognises damage to the requesting country. (Taken from recommendation 52 page 31).

8. Commonwealth countries should ensure that the law clearly prescribes how public funds may be used including by Heads of State/Government and that there are criminal offences applicable to any misuse of those funds. (Taken from recommendation 4, page 4).

9. Commonwealth countries should allocate sufficient resources to establish and properly fund central authorities and law enforcement and other agencies dealing with asset confiscation and management. (Taken from recommendation 22, page 15 and recommendation 30, page 20).

10. Commonwealth Heads of Government should keep asset repatriation on the agenda for their meetings and commit themselves to periodic review and discussion (by Heads of Government/Law and Finance Ministers) of the progress on implementation of the recommendations in the report. (Taken from recommendation 58, page 32).