

Model Legislation on Mutual Legal Assistance in Criminal Matters



The Commonwealth

Office of Civil and
Criminal Justice Reform

Model Legislation on Mutual Legal Assistance in Criminal Matters



The Commonwealth

© Commonwealth Secretariat 2017

All rights reserved. This publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording or otherwise provided it is used only for educational purposes and is not for resale, and provided full acknowledgement is given to the Commonwealth Secretariat as the original publisher.

Views and opinions expressed in this publication are the responsibility of the author and should in no way be attributed to the institutions to which they are affiliated or to the Commonwealth Secretariat.

Wherever possible, the Commonwealth Secretariat uses paper sourced from responsible forests or from sources that minimise a destructive impact on the environment.

Printed and published by the Commonwealth Secretariat.

Introduction

The Commonwealth has long recognised the importance of cooperation in the administration of criminal justice. Only a year after the Commonwealth was itself constituted, it adopted the Scheme relating to the Rendition of Fugitive Offenders within the Commonwealth, the London Scheme for Extradition, which became one of the key international instruments dealing with extradition. In 1986, in view of the success of the London Scheme, the Commonwealth adopted two additional schemes for cooperation, the Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth, the Harare Scheme, and the Scheme for the Transfer of Convicted Offenders within the Commonwealth. The Harare Scheme was revised in 2011 to include novel provisions on asset recovery and the interception of telecommunications.

In recent years, there is no doubt that there is an even more pressing need for a greater degree of consultation and coordination amongst Commonwealth member countries, especially given the spate of technological advancement, which has aided crimes across borders. Legal frameworks now require more detail and particularity to meet the challenges confronting law enforcement officers in combating borderless crimes. Today, even the more traditional criminality often discloses transnational elements, in addition to increasingly more sophisticated criminality such as cybercrime, drug trafficking, economic and financial crime, human trafficking and terrorism.

This Model Legislation on Mutual Legal Assistance in Criminal Matters is principally a template to guide Commonwealth member countries which do not yet have a comprehensive legislative scheme in place for enacting or amending their domestic legislation on mutual legal assistance. There is no expectation that member countries which are already able to do so should amend their legislation.

The Model Legislation has been drafted to allow for cooperation to the widest extent possible in line with the Harare Scheme. The Model Legislation thus also provides for the more complex forms of assistance.

It should be recognised that the Model Legislation cannot simply be imported and adopted wholesale without having regard to the specific domestic context. This is especially the case for the more complex forms of assistance that have been provided for in the Model Legislation, in particular, assistance for the interception of telecommunications or asset recovery.

The Model Legislation includes, as an Annex, the Harare Scheme relating to Mutual Legal Assistance in Criminal Matters within the Commonwealth, including amendments made by Law Ministers in April 1990, November 2002, October 2005, and July 2011.

Background

At the Meeting in Edinburgh, Scotland in 2008, Commonwealth Law Ministers underscored the importance of political will on the part of Commonwealth member countries to implement the provisions of the Harare Scheme. They encouraged member countries that had not yet done so to pass the necessary domestic legislation. To facilitate this implementation process, Law Ministers requested the Commonwealth Secretariat to provide assistance to member countries by developing model legislation on mutual legal assistance.

The Secretariat subsequently convened a Working Group Meeting to consider the text of a first draft of the model legislation that it had prepared. The Working Group Meeting took place at Marlborough House, in London, from 25–28 June 2012, and was attended by experts from 10 Commonwealth member countries, representing all regions of the Commonwealth as well as the smaller jurisdictions. The majority of these countries and experts had participated in the revision of the Harare Scheme. The countries were: Australia, Canada, Guernsey, Jamaica, Malawi, Mauritius, Nigeria, Trinidad, South Africa and the United Kingdom. Kenya, Maldives and Singapore were also invited, but were unable to attend the meeting.

A second Working Group Meeting comprising the experts present on the first occasion was convened from 4–6 March 2013. The Meeting was tasked to consider further expert comments and to finalise the draft Model Legislation.

In September 2013, the draft Model Legislation was presented to Senior Officials of Commonwealth Law Ministries for their consideration. Senior Officials requested that sections 36 and 37 as well as Part VII of the Model Legislation be marked as optional. The text was revised accordingly.

The Model Legislation text includes detailed commentaries on many of the provisions, including on the provisions on the interception of communication and asset recovery. The commentary highlights, in particular, the important of safeguards in the use of the interception of communication provisions.

Model Legislation on Mutual Legal Assistance in Criminal Matters

The Model Legislation is intended as a guide to assist member countries of the Commonwealth to implement the Harare Scheme as revised in July 2011 and thus to facilitate international co-operation in criminal matters to the widest extent possible. It is important to note however that the Model Legislation cannot simply be imported and adopted wholesale without having regard to the legislative and administrative frameworks that may be currently in place in a country.

Arrangement of Sections

Part I – Preliminary

1. Short title, extent and commencement
2. Definitions
3. Scope of application
4. Other forms of international co-operation
5. Limitations with respect to scope of application
6. Central Authority

Part II – Power To Make Requests

7. Power to make requests
8. Direct requests
9. Form and content of requests

Part III— Admissibility of Evidence Obtained Abroad

10. Service
11. Evidence via audiovisual means
12. Foreign records
13. Foreign articles or things
14. Status of affidavit, certificate etc

Part IV – Receipt of Requests

15. Incoming requests
16. Receipt of requests
17. Confidentiality
18. Grounds for refusal

19. Imposition of conditions
20. Undertakings
21. Limitation on use
22. Coercive measures
23. Certification
24. Information or evidence already held by enforcement agencies in
[*enacting country*]
25. Transmission

Part V – Requests for Certain Forms of Assistance

26. Service of documents
27. Preservation of computer data
28. Evidence from witnesses
29. Transmission of evidence to requesting country
30. Evidence through live video link
31. Privilege, etc
32. Personal attendance of persons in custody
33. Application for transfer order
34. Execution of transfer order
35. Witnesses held in custody in other jurisdictions

Part VI – Assistance with Asset Recovery

36. Interim freezing order
37. Interim restraining or seizure order
38. Registration of foreign seizure or restraining order
39. Registration of foreign forfeiture or confiscation order

Part VII – Requests for Interception of Telecommunications and Related Forms Of Assistance

40. Requests for interception and other related forms of assistance
41. Consultation
42. Warrants for interception
43. Warrants subject to terms
44. Duties of service providers
45. Transmission to requesting state

An Act making provision for [enacting country] to provide and obtain assistance in criminal matters to the widest extent possible

ENACTED by the [President/Parliament] of [enacting country]

Part I – Preliminary

Short title, extent and commencement

- (1) (1) This Act may be cited as the Mutual Legal Assistance in Criminal Matters Act [insert year].
- (2) It shall extend throughout [enacting country].
- (3) It shall come into force on [insert date].

Definitions

- (2) In this Act, save where the contrary intention appears-

Central Authority shall mean the person or body designated as the Central Authority of [enacting country] under section 6 of this Act;

Competent Authority means any law enforcement agencies, prosecuting agencies or judicial authorities specified in Schedule 1 to this Act;

computer data means any representation of facts, information or concepts in a form suitable for processing in a computer system, including a programme suitable to cause a computer system to perform a function;

content data means the substance of a communication, or the message or information being conveyed by a telecommunication, whether or not any interpretation, process, mechanism or device needs to be applied or used to make the meaning of the communication, or the message or information intelligible;

covert electronic surveillance means covert surveillance carried out by or with an electronic surveillance device which transmits, records or otherwise captures audio product, visual images or location or position information, but does not include covert surveillance using a device designed primarily for the interception of telecommunications;

intercept material means any document, record or recording obtained by a country as a result of the interception of telecommunications conducted pursuant to the laws of that country;

interception of telecommunications means listening to, recording or acquiring a communication conveyed by means of telecommunications either-

- (a) between its point of origin and its point of destination while it is in transit, or
- (b) contemporaneously with the communication's transmission at the point of origin or its reception at the point of destination; and

for greater certainty, the interception of telecommunications includes the content data and may also include any available transmission data;

specified property – specified property in Part VI is any reference to property in that Part which is or may be in [*enacting country*];

telecommunications means the emission, transmission or reception of signs, signals, writing, images, sounds or intelligence of any nature by any wire, cable, radio, optical or other electromagnetic system, or by any similar technical system;

transmission data means data that-

- (a) relates to the telecommunication functions of dialling, routing, addressing or signalling;
- (b) is transmitted to identify, activate or configure a device, including a computer programme, in order to establish or maintain access to a telecommunication service for the purpose of enabling a communication, or is generated during the creation, transmission or reception of a communication and identifies or purports to identify the type, direction, date, time, duration, size, origin, destination or termination of the communication; and
- (c) does not reveal the substance, meaning or purpose of the communication.

Explanatory Note:

Most of the definitions in this clause mirror the definitions which are found in the Harare Scheme.

'Central Authority' and 'Competent Authority' in the Act refer to the Central and Competent Authorities of the enacting country. It is a core requirement of the Harare Scheme that each country designates a Central Authority and that communication takes place between Central Authorities.

Competent Authorities are not defined under the Harare Scheme, as this was considered to be a matter to be determined by each member country. This Model Legislation permits countries to identify their Competent Authorities in a schedule thereto. Depending upon the administrative arrangements in place, some countries may wish to identify their Central Authorities as Competent Authorities while others may wish to keep the functions of these authorities separate.

Scope of application

- (3) (1) This Act makes provision for [*enacting country*] to provide and obtain mutual legal assistance in criminal matters.
- (2) For the purposes of this Act, "assistance" means mutual legal assistance in criminal matters, and includes-
 - (a) identifying and locating persons;
 - (b) taking evidence or statements from persons;
 - (c) effecting service of documents;
 - (d) executing searches and seizures;
 - (e) providing and producing relevant documents, records, articles or things;
 - (f) facilitating the voluntary attendance of persons in the requesting country;
 - (g) effecting a temporary transfer of persons in custody to assist in an investigation or appear as a witness;

- (h) the identification, tracing, freezing, restraining, seizure, forfeiture and confiscation of proceeds and instrumentalities of crime;
 - (i) the return and disposal of property;
 - (j) preserving and obtaining computer data;
 - (k) interception of postal items;
 - (l) interception of telecommunications;
 - (m) covert electronic surveillance;
 - (n) any other form of assistance or evidence gathering that is not contrary to the law of [**enacting country**].
- (3) For the purposes of this Act, a “criminal matter” means an investigation, prosecution or judicial proceedings relating to a criminal offence and includes an investigation, prosecution or [**criminal or civil**] proceedings relating to-
- (a) the restraint, seizure or freezing of property that may be confiscated, forfeited or recovered by a court, or that may be needed to satisfy a pecuniary penalty, imposed in respect of an offence or other unlawful conduct;
 - (b) the confiscation, forfeiture or recovery of property by a court in respect of an offence or other unlawful conduct; and
 - (c) the imposition or recovery of a pecuniary penalty in respect of an offence or other unlawful conduct.
- (4) A criminal matter arises in a jurisdiction if the Central Authority of that jurisdiction states that-
- (a) proceedings relating to the criminal matter have been instituted in a court in that jurisdiction; or
 - (b) there is reasonable cause to suspect that there has been unlawful conduct in respect of which such proceedings could be instituted.

Explanatory Note:

Mutual legal assistance under the Act includes all types of assistance specified in paragraph 1(5) of the Harare Scheme (as amended).

The forms of assistance specified here are available for both incoming and outgoing requests. The form of assistance available under sub-clause 2(e) is intended to reflect the terms of the Harare Scheme but also to correspond with the provisions on the admissibility of evidence in Part III below.

Sub-clause (3) defines “criminal matter”. This is a core definition within the Model Legislation as its scope determines the circumstances in which assistance may be given and received. However, some countries may prefer to include it in the definitions clause.

Sub-clause (3) includes within the definition of “criminal matter” asset recovery and forfeiture provisions whether characterised as criminal or civil (in rem). Assistance may be provided where there has been an offence or other unlawful conduct. The term ‘unlawful conduct’ is not defined in the Model Legislation, although it is addressed in legislation or emerging case law in some jurisdictions. However, countries which do not have case law dealing with the meaning may wish to make

clear that 'unlawful conduct' is intended to refer to criminal conduct (albeit not necessarily conduct that has been proved to the criminal standard) rather than, for example, breaches of the law of tort or contract.

An example of a legislative definition of 'unlawful conduct' may be found in section 241 of the United Kingdom's Proceeds of Crime Act 2002.

The significance of this is that it is not a requirement in all jurisdictions to demonstrate offending to the criminal standard in order to pursue in rem recovery. Countries which do not characterise forfeiture and asset recovery as civil may nevertheless wish to adopt this definition of 'criminal matter' in order to enable them to request other jurisdictions to assist them through these measures.

Sub-clause (4) ensures that the country receiving assistance (whether the enacting country on incoming requests or another country on an outgoing request) has jurisdiction to deal with the relevant criminal matter.

Other forms of international co-operation

- (4) Nothing in this Act shall preclude [**enacting country**] from-
- (a) concluding bilateral or multilateral agreements or arrangements on co-operation in criminal matters with any state, international organisation or entity; or
 - (b) providing to any state, international organisation or entity assistance of any other form than is provided for under this Act.

Explanatory Note:

It is not intended that this legislation should restrict or discourage existing or future forms of co-operation (see paragraph 1(3) of the Harare Scheme).

Although this model legislation deals only with assistance between countries, Commonwealth member states may have obligations to provide assistance to international organisations such as Interpol, and to international criminal courts and tribunals.

This clause is intended to preclude any argument that an agreement, arrangement or form of assistance is beyond the powers of the enacting country merely because it is not dealt with expressly in this Model Legislation.

Limitations with respect to scope of application

5. Nothing in this Act shall be construed as authorising the extradition, or the arrest or detention with a view to extradition, of any person.

Central Authority

6. The [**Attorney-General/appropriate body**] shall be designated as the Central Authority for [**enacting country**], and references in this Act to the Central Authority are to the [**Attorney-General/appropriate body**] acting in that capacity.

Explanatory Note:

Designation of a Central Authority is required under paragraph 3 of the Harare Scheme. Countries may alternatively wish to consider establishing central authorities as part of their justice, home or foreign affairs ministries.

The Model Legislation does not set out the functions in paragraph 3 of the Harare Scheme, as individual clauses give these powers to the Central Authority as they arise. However, countries may prefer to list the powers of the Central Authority under this provision.

Part II – Power to Make Requests

Power to make requests

7. (1) A request for assistance under this Act may be initiated by any Competent Authority in relation to any criminal matter in which it is concerned arising under the jurisdiction of [*enacting country*].
- (2) Save where some other procedure is required by the international agreements or arrangements of [*enacting country*], and subject to the provisions of section 8, a request for assistance initiated by a Competent Authority shall be sent to the Central Authority which shall make the request to the Central Authority or other appropriate authority of the requested state.

Explanatory Note:

The Harare Scheme does not make much reference to Competent Authorities, as countries expressed the view during negotiations that the arrangements to be made as between the Competent and Central Authorities were a matter for domestic legislation. This Model Legislation adopts the approach of permitting the request for assistance to be initiated by the Competent Authority, but formally made by the Central Authority. Other models are compatible with the Scheme.

It is envisaged that under the model adopted here, part of the role of the Central Authority will be to ensure that requests for assistance conform to the requirements of law and the international obligations and agreements of the enacting country. It is also envisaged that the Central Authority will wish to consult Competent Authorities in order to resolve any legal issue or deficiency which arises in relation to a proposed request.

Sub-clause (2) provides that requests should be made to the Central Authority 'or other appropriate authority' of the requested state. This deals with two situations. The first is the rare circumstance of a state outside the Commonwealth which has never created a Central Authority. The second is a situation in which the enacting jurisdiction is able to make a request directly to the Competent Authority of the requested state. This will only arise pursuant to a particular agreement applicable to the states involved.

The Harare Scheme provides a number of limitations on the circumstances in which countries may make requests (including in particular the restrictions contained in Part V of the Scheme). No express provision is made for these in the model scheme, since the clause above should operate to preclude any request which is contrary to the enacting country's international obligations or agreements. If the limitations and restrictions in the Harare Scheme were given express legislative effect, there would be a risk that they would preclude closer co-operation that might be permitted under other bilateral or multilateral agreements.

Optional Provision

Direct requests

8. *[[(1) A Competent Authority may make a request and transmit it directly to any appropriate authority of the requested state:*
- (c) where permitted to do so by any agreement with the Central Authority;*
 - (d) where permitted to do so by any international agreement or arrangement; or*
 - (e) in a case of urgency, after consultation with the Central Authority.*
- (1) Where the Competent Authority transmits a request directly, it shall provide a copy of the request to the Central Authority at the same time.*
- (2) The Central Authority may make a request and transmit it directly to any appropriate authority of the requested state where permitted to do so by any international agreement or arrangement.]]*

Explanatory Note:

This clause gives a power, in certain cases, for a Competent Authority to make a request directly.

The Central Authority (of the enacting country) is provided with a copy of the request to ensure that it has records of all outgoing requests.

The clause also gives power to a Central Authority to make a request directly to an authority to which it is permitted to send a request under an international agreement or arrangement.

These provisions reflect the urgency which may be required in investigations into on-going criminal offending, including in particular cases where there is a request for interception of telecommunications or covert electronic surveillance, and situations in which the close co-operation between two particular Competent Authorities means that both countries prefer to avoid communicating through Central Authorities.

Some countries have concerns about permitting requests to be made directly by the Competent Authority, and this provision is therefore expressed as optional.

Form and content of requests

9. (1) (a) A request under this Part shall, save as otherwise provided in paragraph (b), be in writing.
- (b) In a case of urgency, a request may be made and transmitted otherwise than in writing.
 - (c) Where a request has been made other than in writing:
 - i. the contents of the request shall be recorded in writing and transmitted within **[72 hours]** of the initial request being made; and
 - ii. the written record shall be retained by the Central Authority.
- (2) A request under this Part shall:
- (a) specify the agency or authority initiating the request;
 - (b) specify the nature of the assistance requested;

- (c) specify the purpose for which the assistance is sought;
 - (d) specify a link between the criminal matter arising in [*enacting country*] and the assistance sought;
 - (e) specify the details of any particular procedure that [*enacting country*] wishes to be followed;
 - (f) indicate any time limit within which compliance with the request is desired, stating reasons;
 - (g) specify the nature of the criminal matter, and whether or not criminal proceedings have been instituted;
 - (h) where criminal proceedings have not been instituted, state the offence which [*enacting country*] has reasonable cause to believe has been, is being or will be committed, with a summary of relevant facts including the identity of any suspects if known;
 - (i) where criminal proceedings have been instituted, contain the following information:
 - i. the court exercising jurisdiction in the proceedings;
 - ii. the identity of the accused person;
 - iii. the offence(s) of which the person stands accused, a summary of the facts and the penalties which may be imposed;
 - iv. the stage reached in the proceedings; and
 - v. any date fixed for further stages in the proceedings.
 - (j) include any other information that appears to the Central Authority to be relevant in the light of the nature of the request and any applicable international agreement or arrangement.
- (3) A request under this Part may contain certification by the Central Authority of any matter of which it is satisfied on information provided to it by the Competent Authority initiating the request or otherwise.
 - (4) A request under this Part includes the original request and any information provided subsequently to supplement the original request.
 - (5) For the purpose of subsection (1), "in writing" includes e-mail, facsimile or other agreed forms of electronic transmission.

Explanatory Note:

This clause makes provision for the form and contents of outgoing requests. It sets out the matters likely to be required in a letter of request.

The clause makes provision for requests to be made otherwise than in writing (that is, typically by telephone). In such cases, a written record of the request will be made within an appropriate period of time (72 hours is suggested, but this may be modified to suit countries' administrative arrangements) and held by the Central Authority in lieu of the written request.

It should be noted that not all states will be able to accept requests made in this way and that the Harare Scheme makes more limited provision for direct requests.

Sub-clause (2) is intended to give guidance to countries as to the matters to be included in requests. However, it is not intended that any purely technical deficiency should invalidate a request, and for this reason, sub-clause (4) gives the Central Authority the power to amend or supplement a request. It is important that the Central Authority takes steps to correct a request immediately if it becomes clear that it is incorrect, incomplete or misleading.

Sub-clause (3) gives the Central Authority power to certify matters of fact in its outgoing requests.

Part III – Admissibility Of Evidence Obtained Abroad

Service

10. Any certificate of service provided pursuant to a request for service of documents under Part II of this Act shall be admissible as evidence that documents have been served in any manner indicated in the certificate.

Evidence via audiovisual means

11. (1) This section applies where another state agrees pursuant to a request made under Part II of this Act that a witness present in it shall give oral evidence in any proceedings in **[enacting country]** via live link or other audiovisual means.
 - (2) Subject to subsections (4) – (7), where this section applies, the witness in question may give evidence by those means and shall be treated in all respects as a witness to the proceedings.
 - (3) Evidence given under this section shall be admissible in any circumstances and to any extent that it would be admissible if the witness were physically present in the court room in **[enacting country]**.
 - (4) Notwithstanding subsection (2), a witness giving evidence under this section shall not be compelled to give any evidence which he could not be compelled to give in the jurisdiction in which he is physically present.
 - (5) Where a witness refuses to give evidence on the grounds that he is entitled to refuse under subsection (4), the court holding the proceedings in **[enacting country]** may request a ruling from the judicial authority of the requested state as to whether or not the witness's refusal is well-founded.
 - (6) A ruling under subsection (5) may be provided:
 - (a) pursuant to a request under Part II;
 - (b) in writing directly from the judicial authority of the requested state to the court holding the proceedings in **[enacting country]**; or
 - (c) where the judicial authority of the requested state is present with the witness giving evidence via live link, orally via live link.
 - (7) A ruling under subsection (5) shall conclusively determine whether or not the witness's refusal is well-founded in the jurisdiction in which the witness is physically present.

Explanatory Note:

This clause enables a court in the enacting country to receive evidence in criminal proceedings via live link from another jurisdiction. The witness is to be treated as though he or she is physically present in the court of the enacting country, although note that this is subject to the provisions on privilege in clause 21.

It should be noted that the requested state may contain more than one jurisdiction.

The clause also provides protection for the witness's right to claim privilege. This will only apply where a witness gives evidence via live link, since if a witness voluntarily attends the requesting country, he will be subject to its laws.

Foreign records

12. (1) This section applies to a record which is provided pursuant to a request under Part II of this Act or a copy, or an affidavit, certificate or other statement pertaining to such a record which has been made by a person who has custody or knowledge of the record.
- (2) Nothing to which this section applies shall be inadmissible in evidence by reason only that it contains a statement which is hearsay or a statement of opinion.
- (3) For the purpose of determining the probative value of anything to which this section applies the court may examine it, receive evidence orally or by affidavit, including evidence as to the circumstances in which the information contained in it was written, recorded, stored or reproduced, and draw any reasonable inference from its form or content.

Foreign articles or things

13. Where any article or thing, or an affidavit, certificate or other statement pertaining to the identity and possession of such an article or thing from the time it was obtained until its sending to the Central Authority, is provided pursuant to a request under Part II of this Act, it shall not be inadmissible in evidence by reason only that any such affidavit, certificate or other statement contains hearsay or a statement of opinion.

Status of affidavit, certificate, etc

14. (1) An affidavit, certificate or other statement provided pursuant to a request under Part II of this Act shall be admissible as proof of its contents without proof of the signature or official character of the person appearing to have signed the affidavit, certificate or other statement, save where these matters are brought into doubt by other evidence.
- (2) Unless the court decides otherwise, no record or copy of a record, no article or thing and no affidavit, certificate or other statement mentioned in this Act shall be received in evidence unless-
 - (a) the party intending to produce it has given to the party against whom it is intended to be produced [7] working days' notice of that intention, accompanied by a copy of the record, affidavit, certificate or other statement; and

- (b) in the case of an article or thing, the party intending to produce it has made it available for inspection by the party against whom it is intended to be produced for **[5]** working days following a request by that party that it be made so available.

Explanatory Note:

In most Commonwealth jurisdictions, it will be necessary to make some provision for the admissibility of evidence received pursuant to requests under the Harare Scheme, particularly in relation to the law on hearsay.

As would be expected, the Harare Scheme contains no requirements relating to the admissibility of evidence, which is entirely a matter for individual countries. Where the law relating to hearsay has been codified, admissibility of evidence received pursuant to a request may be better dealt with if necessary by amendment to the relevant statute. In default of such a statute, this clause is tentatively proposed. It is intended principally for jurisdictions in which the English common law rules on hearsay continue to apply, and in particular the requirements for notice and inspection may be amended to suit the practices of the enacting country.

Part IV – Receipt of Requests

Incoming requests

15. (1) The Central Authority shall receive, consider and arrange the execution of requests for assistance from other states.
- (2) There shall be no requirement that a request for assistance by another state be made in any particular form, save that it must be in writing unless otherwise authorised by the Central Authority.
- (3) The Central Authority shall promptly notify the requesting state where it considers that:
- (a) the request for assistance is to be refused in whole or in part;
 - (b) the request for assistance cannot be complied with, in whole or in part; or
 - (c) there are circumstances which are likely to cause a significant delay in complying with the request.

Explanatory Note:

This provision allows the enacting country (as the requested country) to execute any request made, provided that the request is in writing and the nexus between the criminal matter being investigated or prosecuted and the assistance sought is made out. In particular, sub-clause (1) gives the Central Authority the power to deal with the request.

It is good practice for a Central Authority to consult with the Competent Authority likely to execute a request where issues may arise (for example as to resources, technical capacity or consequences for an investigation in the enacting country).

The detailed requirements included in the Harare Scheme as to the contents of a request are not replicated in the Model Legislation to avoid arguments before courts about the formal or technical validity of requests for assistance. The detailed requirements in the Harare Scheme are only intended to provide guidance to requesting countries as to the information to be included in a request for assistance.

Receipt of request

16. (1) Where a request cannot be complied with, in whole or in part, or where it is otherwise desirable to do so in order to assist the requesting state, the Central Authority may seek further information from the requesting state in relation to any relevant matter before considering the request.
- (2) A request under this Part includes the original request and any information provided subsequently to supplement the original request.

Explanatory Note:

These clauses seek to ensure that any difficulty or deficiency in a request may be resolved without delay.

It is good practice for a Central Authority to acknowledge a request promptly, to seek amendment or amplification of any matter which appears to require it, and to keep requests for assistance under review until they are resolved.

It is permissible to postpone execution of a request where there is an investigation underway in the enacting country, or where evidence is required for a domestic prosecution.

Confidentiality

17. The Central Authority shall not disclose any information which might indicate that a request has been made or responded to, save that it may:
- (1) disclose information to any body competent to execute a request for assistance for the purposes of considering or executing a request;
 - (2) disclose information to the extent permitted by the requesting state; and
 - (3) disclose information which has been disclosed in public proceedings in any state, or has otherwise lost its confidentiality.

Explanatory Note:

This clause imposes a general obligation on the Central Authority of the enacting country not to disclose the contents of a request or the fact that a request has been made. This obligation is subject to certain exceptions, including obligations for disclosure in the law of the enacting country. This provision implements paragraph 31(1) – (3) of the Harare Scheme.

In cases where the requested country is unable to comply with the obligations of confidentiality, it is good practice for the requested country to so inform the requesting country before proceeding to execute the request.

In negotiating agreements, countries may wish to consider including a clause that requires the requested state to notify a potential disclosure in advance to provide the requesting state an opportunity to withdraw the request.

Grounds for refusal

18. (1) The Central Authority shall determine whether to execute or refuse any request for assistance, and for the purposes of doing so may consult with the relevant Competent Authority.
- (2) A request for assistance may be refused in whole or in part, where the Central Authority considers that-
- (a) the request relates to the investigation, prosecution or punishment of an offence of a political character not being an offence included in any relevant treaty to which **[enacting country]** and the requesting state are parties and which imposes on the parties thereto an obligation either to extradite or prosecute a person accused of that offence;
 - (b) the conduct which is the subject of the request is an offence only under military law or a law relating to military obligations of the requesting country;

- (c) compliance with the request would be contrary to the constitution or the law of [**enacting country**], or would prejudice the sovereignty, national security, international relations, national interests, public order or public interest of [**enacting country**];
- (d) there are substantial grounds to believe that compliance with the request would facilitate the investigation, prosecution or punishment of any person on account of race, ethnic origin, sex, religion, nationality or political opinions or would cause prejudice for any of these reasons to any person affected by the request;
- (e) the steps required to be taken in order to comply with the request cannot under [**enacting country**] law be taken; or
- (f) by reason of the trivial nature of the alleged offending or the low value of the likely penalty or any property likely to be forfeited or confiscated or recovered, [**enacting country**] considers that it would not have made a similar request to another country in connection with a like criminal matter arising in [**enacting country**].
- (g) the request relates to the prosecution of a person for an offence in a case where the person has been acquitted or pardoned by a competent tribunal or authority in another state, or has undergone the punishment provided by the law of that state, in respect of that offence or of another offence constituted by the same act or omission as that offence.

Explanatory Note:

Certain jurisdictions within the Commonwealth have a general public interest ground as the only ground of refusal. The Model Legislation, however, adopts the more detailed approach of paragraph 8 of the Harare Scheme of providing express safeguards to serve as a useful guide for the enacting country in responding to a request for assistance.

It is important to note that the Model Legislation does not include dual criminality or the lack of reciprocity as grounds of refusal. This approach is in line with the Harare Scheme, which encourages co-operation in the absence of dual criminality and reciprocity at its paragraphs 10 and 11.

Imposition of conditions

19. (1) The Central Authority may make the provision of assistance subject to the requesting state complying with specified conditions.
- (2) The Central Authority may refuse the request in whole or in part if the requesting country refuses to comply with any condition specified under subsection (1).

Explanatory Note:

This clause incorporates paragraph 9 of the Harare Scheme.

This clause is optional. Countries may consider that the power to impose conditions under the previous clause is sufficient.

Optional Provision

[Undertakings

20. *[[Where any person is to provide assistance in a requesting country for the purposes of an investigation and proceedings, the Central Authority may require the requesting country to provide undertakings to ensure-*

(a) *that the person shall not:*

- i. *be detained, prosecuted or punished for any offence against the law of the requesting country that is alleged to have been committed, or that was committed, before the person's departure from [enacting country];*
- ii. *be subjected to any civil suit in respect of any act or omission of the person that is alleged to have occurred, or that occurred, before the person's departure from [enacting country], being a civil suit to which the person could not be subjected if the person were not in the requesting country; or*
- iii. *be required to give evidence in any proceeding in the requesting country other than the proceeding to which the request relates;*

unless:

- iv. *the person has left the requesting country; or*
 - v. *the person has had the opportunity of leaving the requesting country and has remained in that country otherwise than for the purpose of giving evidence in the proceeding to which the request relates;*
- (b) *that any evidence given by the person in the proceeding to which the request relates will be inadmissible or otherwise disqualified from use in the prosecution of the person for an offence against a law of the requesting country other than the offence of perjury in relation to the giving of that evidence;*
- (c) *that the person will be returned to [enacting country] in accordance with arrangements agreed by the Central Authority;*
- (d) *in a case where the person is being held in custody in [enacting country] and the Central Authority requests the foreign state to make arrangements for the keeping of the person in custody while the person is in the requesting country:*
- i. *the making of appropriate arrangements for that purpose;*
 - ii. *that the person will not be released from custody in the requesting country unless the Central Authority notifies an appropriate authority of the requesting country that the person is entitled to be released from custody under [enacting country] law; and*
 - iii. *if the person is released in the requesting country as mentioned in subparagraph (ii)—that the person's accommodation and expenses pending the completion of the proceeding to which the request relates will be paid for by the requesting country; and*
- (e) *such other matters (if any) as the Central Authority thinks appropriate.]]*

Limitation on use

21. (1) Information or evidence obtained pursuant to a request under Part II shall not be used or disclosed for any purpose other than for the criminal matter stated in the request without the prior consent of the requested state, subject to subsection (3).
- (2) Information or evidence obtained pursuant to a request under Part II is, subject to subsection (3), privileged and no person in possession of any document disclosing such information or evidence shall be required in connection with any legal proceedings to produce the document or to give evidence relating to its contents.
- (3) Information or evidence may be used or disclosed for any purpose if it has been disclosed in any public judicial hearing in which its use or disclosure was permitted.
- (4) When information or evidence obtained pursuant to a request under Part II is no longer required, it shall be returned to the requested state unless the requested state has indicated that its return is not necessary.

Explanatory Note:

This clause incorporates paragraph 31 of the Harare Scheme.

Coercive measures

22. (1) This section applies in any case where the Central Authority has asked any Competent Authority to execute a lawful request under this Part, and that authority requires a warrant, authorisation or order to provide the assistance sought.
- (2) Where any application for a warrant, authorisation or order is made under this part, the application shall be considered on the same basis as if the criminal conduct upon which the request is based had arisen in ***[enacting country]***.
- (3) For the purposes of any application under this Part, there is no requirement to establish that the conduct, if it had occurred in the ***[enacting country]*** would constitute an offence.

Explanatory Note:

The purpose of this clause is to ensure that there is a lawful basis for executive action to assist with requests for assistance. This clause will apply to many of the specified forms of assistance under Part III of the Harare Scheme. No warrant, authorisation or order will be required in order to provide other types of assistance, such as locating of persons or providing of statements by willing witnesses.

The forms of assistance available under the Harare Scheme to which this clause may apply include:

- (1) search warrants;
- (2) measures to secure the attendance of witnesses in order to give evidence via live link;
- (3) orders for restraint, confiscation or forfeiture.

It is important to note that warrants that may be required in connection with covert investigations, including warrants for the interception of telecommunications is dealt with elsewhere.

The procedure to make such applications will be governed by the existing laws of the enacting country.

Sub-clause (3) is intended to make it clear that this section may still apply in the absence of dual criminality. The judicial authority in the requested country issuing the warrant, authorisation or order only has to be satisfied that there are reasonable grounds to suspect that the offence, being a foreign offence, has been committed.

Certification

23. (1) The Central Authority may certify or arrange the certification of any fact, and certify or authenticate any record, document or other material, by any means that may be required by a requesting state to the extent permissible in the *[enacting country]*.
- (2) Nothing in subsection (1) shall be taken as affecting the power of any Competent Authority to certify any fact or certify or authenticate any record, document or other material.

Explanatory Note:

This clause ensures that the Central Authority has power to certify and authenticate certain records, documents or other material, in line with paragraph 3(2) of the Harare Scheme.

The provision may be used to provide any certificate required by the requesting state in relation to evidence provided in satisfying a request, including certification of service, providing certified copies of court orders and other documents, and providing certificates concerning the result of a search. There is also a power to certify matters of fact in drafting a request in clause 9(3).

Information or evidence already held by enforcement agencies in *[enacting country]*

24. (1) This section applies where a request seeks the provision of any information or evidence obtained by, and in the possession of, an enforcement agency in *[enacting country]* in the exercise of its powers.
- (2) The Central Authority *[subject to having obtained the necessary authorisation]* may provide the information or evidence to the requesting country if it is satisfied that the information or evidence is relevant to an investigation or proceedings in that country.

Explanatory Note:

This clause allows the enacting country to share any material it gathered during an investigation in a criminal matter in its own jurisdiction, upon receipt of a request from the requesting country for the provision of such material.

There are two situations in which this is likely to arise. The first is where material has been gathered pursuant to another criminal investigation. The second is where the information has been gathered in order to execute a prior request for assistance from a third country. The clause is intended to cover both situations.

Transmission

25. Where a decision has been made by a Central Authority to comply with a request under this Part:
- (1) any document, record, article, thing or other material required by the Central Authority in order to comply with the request may be disclosed to the Central Authority; and
 - (2) the Central Authority, or any person designated by the Central Authority may transmit any document, record, article, thing or other material required in order to comply with the request to the Central Authority or other appropriate authority of the requesting state.

Explanatory Note:

This clause provides a statutory gateway for disclosure of material to the Central Authority in the enacting country, and for the transmission of such material in order to comply with the request.

Part V – Requests for Certain Forms of Assistance

Service of documents

26. (1) This section applies to requests received under Part IV of this Act for the service of documents relevant to a criminal matter.
- (2) The Central Authority may agree to the service of documents by the requesting state directly to any intended recipient present or believed to be present in [*enacting country*].
- (3) The Central Authority may serve or cause to be served documents pursuant to this section by-
 - (a) any particular method stated in the request; or
 - (b) any method prescribed by the law of [*enacting country*] law for the service of documents in criminal proceedings.
- (4) Where a request to which this section applies is executed, the Central Authority shall promptly transmit to the requesting country a certificate or other proof 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 under Part IV 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 [*enacting country*].
- (6) This section does not preclude the service of documents on a Competent Authority to Competent Authority or informal basis.

Explanatory Note:

This clause permits the service of documents by the Central Authority, a Competent Authority or by direct transmission from the requesting country, as required by paragraph 12(6) of the Harare Scheme.

Preservation of computer data

27. (1) This section applies to requests received under Part IV of this Act for the preservation of computer data.
- (2) A request to which this section applies may be directly transmitted to the Competent Authority designated by [*an appropriate Minister*] under this section.
- (3) If the Central Authority receives a request under this part, notwithstanding subsection (2), it shall promptly transmit any request to which this section applies to the Competent Authority.

- (4) The Competent Authority under this section may issue a notice requiring any person in possession or control of computer data to which the request applies to preserve that data.
- (5) Upon issuing any notice under subsection (4), the Competent Authority shall immediately provide a copy of the notice to the Central Authority.
- (6) If the Central Authority considers that the issue of the notice is contrary to law or the constitution of **[enacting country]**, or prejudices its security, international relations or other essential public interests, it shall require the Competent Authority to discharge the notice and the Competent Authority shall comply with any such requirement.
- (7) A notice issued under subsection (4):
 - (a) shall expire 120 days after it is issued unless the Competent Authority notifies the recipient within that period that a request for assistance to obtain the computer data has been received; or
 - (b) shall otherwise cease to have effect when the Competent Authority notifies the recipient that the notice is discharged or when the computer data is provided to the Competent Authority pursuant to a request
- (8) A notice issued under subsection (4) may be renewed by issuing a new notice prior to expiry.
- (9) A notice issued under subsection (4) must include:
 - (a) the identity of the individual whose computer data is to be preserved, or a telecommunications address relevant to the investigation;
 - (b) a statement that the requesting state intends to submit a request to obtain the computer data within 120 days;
 - (c) a description of the computer data to be preserved.
- (10) Any person who receives a notice issued under subsection (4) shall ensure that the computer data identified in the notice is preserved until the notice has expired.

Explanatory Note:

This clause provides a legislative framework for the preservation of computer data. However, it is to be noted that this form of assistance can be obtained without the need of a formal request or a legislative basis.

The added value of clause 27 is that it provides for the preservation of computer data independently of self-preserving facilities or mechanisms of carriers of such data, such as financial institutions. This may be particularly useful as carriers may have different and varied protocols in relation to the preservation of data or because carriers may have decided not to store relevant data at times of high volume so as to free up their servers.

Where the computer data has already been preserved, the data can be obtained pursuant to a Mutual Legal Assistance request. However, countries should be aware of the need for immediate transmission of some evidence, for example where preserved data may indicate the involvement of other service providers and hence suggest the need for the preservation of further computer data.

Under the Harare Scheme, the preservation of computer data is intended to be an expeditious process, which does not necessarily require a formal request, and sub-clause (2) therefore gives any properly authorised Competent Authority the power to act on requests received directly. Sub-clause (3) addresses the situation in which a requesting state chooses to send a request to the Central Authority, notwithstanding that the Competent Authority is empowered to receive it directly. Whichever route is used, the intended procedure is that the data is preserved as a matter of urgency without prior consideration of the likely merits of a subsequent request for that data to be transmitted to the requesting state.

Evidence from witnesses

28. (1) Where on an application by a Competent Authority *[an appropriate judge]* is satisfied that a person has evidence to give pursuant to a request which the Central Authority has acceded to under this Part, he may make an order that the person:
- (a) attend at any location within *[enacting country]*;
 - (b) answer the questions of a person designated by the *[appropriate judge]*;
 - (c) provide a sworn statement or affidavit in relation to the request, or setting out the answers to any questions asked; and/or
 - (d) furnish any particular documents, or documents of any particular class, or any article or thing within his possession or control, to a person designated by the *[appropriate judge]*.
- (2) An order under subsection (1) may include an order for a person to attend a location to appear in proceedings in the requesting state via live link or other audiovisual means.
- (3) Where an order is made under subsection (1), it shall not apply in relation to any evidence falling within section 31.
- (4) Where an order is made under subsection (1), the *[appropriate judge]* may require the Central Authority and any person designated in the order to comply with any condition, including any condition necessary for the protection of the witness.
- (5) The Central Authority or any person designated by it may, subject to any contrary order, copy or retain any document provided pursuant to an order under this section.

Explanatory Note:

This clause provides for witnesses to provide evidence to assist in foreign proceedings under compulsion. It does not permit a person to be sent to the requesting state under compulsion.

The provision provides considerable flexibility as to the procedure by which the judge may order the compelled testimony to be obtained. In particular, the person designated by the judge could be a law enforcement official in the enacting state, but could equally be a law enforcement official who travels to the enacting state to obtain the testimony. The only limitation is that the judge has no power to order the compelled person to travel outside the jurisdiction.

This clause may be redundant where a country has a general power to obtain evidence through compulsion for the purposes of its domestic investigations, since any such powers would be available under clause 22.

A person who fails to comply with an order may be dealt with as being in contempt of court. It is for countries to decide whether this is the appropriate way of enforcing the order or whether it is preferable to amplify the clause by enacting a specific criminal offence of non-compliance with an order under this clause.

Transmission of evidence to requesting country

29. The Central Authority shall, at the conclusion of a hearing where evidence was taken or produced, ensure that a record indicating the evidence taken or produced, the date and place of the hearing, the identity of the person heard, the identities and functions of all other persons participating in the hearing and any oath or affirmation made, is transmitted to the requesting state.

Explanatory Note:

This clause deals with the situation where evidence has been taken at a hearing before the judicial authority of the requested country pursuant to a request for assistance for the purposes of proceedings in the requesting country.

This clause caters for the situation where the evidence is either transmitted to the requesting country in documentary form, as a transcript of proceedings, or in the form of video recording. In both cases, the documents or other material will have to be duly certified by the Central Authority of the requested country, as set out in the clause itself.

This provision would not typically be needed in relation to evidence through live link, since in this situation the witness is treated as though he is physically present in the requesting jurisdiction.

Evidence through live video link

30. (1) This section applies where a request is received under Part IV of this Act for oral evidence to be given in proceedings in the requesting state by a person who is physically present in [**enacting country**] through live video link or other audiovisual means.
- (2) In considering whether to comply with such a request, the Central Authority shall have regard to such measures for the protection of the person to be heard as are mentioned in the request.
- (3) The hearing shall be conducted directly by, or under the direction of, the judicial authority of the requesting state subject to any requirements to safeguard the rights of the person to be heard.

Explanatory Note:

This clause provides for a request for an individual to give evidence from enacting country to a hearing in the requesting country by way of a live video transmission.

There are thus two simultaneous hearings: one before the judicial authority in the requesting country, which is the main hearing, and the other, the hearing before the judicial authority in the enacting country, as the requested country, set up for the purposes of enabling the individual to do so.

It is important to note that the Model Legislation provides protection to the individual in both the requested and requesting countries.

First, the Central Authority in the requested country will be bound by the provisions in its law on privilege and compellability. In addition, the Central Authority in the requested country will also have to observe such measures of protection as may be prescribed by the requesting country in its request.

The individual will also be afforded protection by the judicial authority of the requested country set up for the purposes of the live video transmission as well as the judicial authority in the requesting country that is in charge of the main proceedings.

Privilege, etc

31. (1) No person shall be compelled in relation to any request received under this Part to give any evidence which he could not be compelled to give:
- (a) in criminal proceedings in [*enacting country*]; or
 - (b) in criminal proceedings in the requesting state.
- (2) For the purposes of this section, any reference to giving evidence includes answering any question and producing any document, record, item or other material relevant to a criminal matter.

Explanatory Note:

This clause enacts paragraph 18 of the Harare Scheme. It applies principally to forms of legal privilege (especially legal professional privilege and the privilege against self-incrimination) but may also apply to other grounds such as protection of official secrets and public interest immunity, confidentiality and spousal immunity.

It is not, however, intended to cover mere differences in the admissibility of evidence (for example, because a person wishes to challenge the relevance of evidence or contends that it would be inadmissible hearsay).

The clause will cover both evidence given in court and where a person is required to produce documents or make statements outside of court.

Personal attendance of persons in custody

32. (1) This section applies to a request for the temporary transfer of a person in custody in [*enacting country*] for the purposes of an investigation or to appear as a witness before a court.
- (2) Where the Central Authority authorises a request to which this section applies, the Central Authority shall notify the person in custody whose attendance in the requesting state is desired, and shall enquire whether or not the person consents to the transfer.
 - (3) The Central Authority shall refuse to comply with a request made under this section where the person in custody does not consent to the transfer.
 - (4) 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.
 - (5) Notwithstanding the consent of the person in custody, the Central Authority may refuse to comply with a request made under this section without giving reasons to the requesting country.

Explanatory Note:

Attendance of persons in custody is voluntary under paragraph 16 of the Harare Scheme and is therefore subject to the consent of the said persons.

Application for transfer order

33. (1) Where the Central Authority authorises a request for the temporary transfer of a person in custody in **[enacting country]** falling within section 32(1) of this Act, and the person in custody has consented in writing to the transfer, the Central Authority shall apply to a **[judicial authority]** in whose area of jurisdiction the person is detained for a transfer order.
- (2) An application for a transfer order shall contain sufficient information to enable the **[judicial authority]** to make a transfer order specifying the matters required by subsection (5) below.
- (3) A **[judicial authority]** to whom an application is made under this section may order the person in custody to be produced to the court for examination with respect to the transfer and may question him in relation to his consent and to his understanding of the effect and consequences of his consent.
- (4) A **[judicial authority]** may make a transfer order where he is satisfied that:
- (a) he has sufficient information upon which to make the order;
 - (b) the person in custody has given his consent and understands the effect and consequences of his consent;
 - (c) the person in custody will be lawfully confined in the requesting state; and
 - (d) there are adequate measures to ensure his security while he is in the requesting state and travelling to and from it.
- (5) A transfer order shall:
- (a) indicate the name of the person in custody;
 - (b) confirm that the person in custody has given his consent;
 - (c) indicate the place where the person is in custody;
 - (d) specify the subject matter upon which the requesting state has requested to question the person in custody;
 - (e) give the reasons why the transfer of the person in custody is sought;
 - (f) designate a person nominated by the requesting state into whose custody the person in custody is to be transferred; and
 - (g) specify any period of time within which the court requires the person in custody to be returned to **[enacting country]**.
- (6) The transfer order may contain any condition which the **[judicial authority]** considers necessary, including conditions that relate to the protection of the interests of the detained person, and any such condition shall be made a condition of complying with the request by the Central Authority.

Execution of transfer order

34. (1) A person who is lawfully detained within [*enacting country*] may be removed from [*enacting country*] in accordance with a transfer order made under section 33 above.
- (2) Where a person who is serving any sentence of imprisonment is removed under a transfer order, he shall be treated for all purposes connected to the time served by him as though he continued to serve that sentence in [*enacting country*].
- (3) Where there ceases to be any lawful power to detain a person transferred under a transfer order, the Central Authority shall immediately so inform the requesting state and shall procure his release.
- (4) No request shall be made to the requesting state for the extradition of any person while they are held under a transfer order.

Explanatory Note:

Clauses 33 and 34 ensure that there is power to apply for and implement a transfer order.

Witnesses held in custody in other jurisdictions

35. (1) Where a request is made under Part IV of this Act for the temporary transfer of a witness in custody, the Central Authority may nominate a person to be responsible for the security of that person.
- (2) A person nominated under subsection (1):
- (a) Shall have the power to detain the witness in accordance with the request.
- (b) Shall return that person to the custody of the state which authorised his temporary transfer when his presence is no longer required.
- (c) May nominate any other person or body to exercise any power granted to him under this section.
- (3) A witness who is detained under this section shall be repatriated promptly at the request of the requested state.
- (4) A witness who is on temporary transfer to a requesting state under this section may be released without being repatriated to the requesting state where both [*enacting country*] and the requesting state as well as the witness agree to such release.
- (5) A witness who is detained under this section and escapes from lawful custody may be arrested without a warrant and returned to custody.

Part VI – Assistance with Asset Recovery

Explanatory Note:

The following Part provides a legislative framework for the provision of assistance to support asset recovery. One of the guiding principles in drafting these clauses is that the requested country should, to the extent possible, not interfere with an order obtained in the requesting country. The requested country should instead simply register and enforce the order. However, it will remain possible for a person with an interest in the asset to have the order varied or discharged, if it is in the public interest to do so.

The clauses on asset recovery cover three potential ways of assisting the requesting country.

First, it may be that the requesting country requires the requested country to temporarily prevent the flight of funds or the depletion of assets whilst it seeks a forfeiture or confiscation order domestically. In such a case, the requested country should consider seeking an interim restraint order. In this regard, the court in the requested country would have to establish whether there are reasonable grounds to believe that the said property will be subject to confiscation or forfeiture. Alternatively, if the request concerns the possible flight of funds, and such powers are available in the requested country, the latter may consider the administrative freezing of funds for a short period of time, typically a few days.

Second, the requesting country may require the requested country to register and enforce a restraining order obtained in the requesting country.

Third, the requesting country may require the requested country to register and enforce a confiscation or forfeiture order obtained in the requesting country.

Optional Provision

[Interim freezing order]

36. *[[(1) Upon receipt of a request made under Part IV, the Central Authority may under this section issue a notice to a relevant authority or institution to freeze the specified property for a period of **[5]** working days.*
- (2) An authority or institution which receives a notice under this section shall not authorise, carry out or permit the sale, transfer, conversion or removal of specified property or any change in its legal or beneficial ownership.*
- (3) The Central Authority, upon the expiry of the time period of the notice and where a restraining order has not been made by a court, shall inform the relevant authority or institution to discharge the freeze.]]*

Explanatory Note:

This clause provides the Central Authority with the power to make use of administrative freezing powers in providing assistance to support asset recovery.

The clause is comparatively novel in common law jurisdictions. It permits a short administrative asset freeze pending consideration of a restraining order.

Relevant authorities or institutions will typically be financial institutions or other authorities like the Land Registry. Enacting countries may wish to consider adding an offence-creating provision to penalise any institution that does not comply with a notice.

In deciding on the time period of a freeze, the enacting country may wish to consider the nature of the financial structures within its jurisdiction. It is to be noted that property like real estate can be frozen too at the relevant registry where the title to the real estate is registered.

Countries should establish mechanisms that will enable their Competent Authorities to effectively manage and, where necessary, dispose of property that is frozen, seized or confiscated. These mechanisms should be applicable both in the context of purely domestic cases and pursuant to foreign requests.

It should be noted that the definition of specified property may include not only financial interests but real property and chattels.

Interim restraining or seizure order

1. (1) This section applies where, upon receipt of a request made under Part IV, the Central Authority believes that specified property that is not subject to a foreign seizing or restraining order but may be made or is about to be made the subject of a foreign seizing or restraining order is located in **[enacting country]**.
- (2) The Central Authority may apply to **[the appropriate court]** for an order seizing or restraining dealings with any specified property.
- (3) An application under this section may be made *ex parte*.
- (4) A **[judicial authority]** may grant an application under subsection (2) where there are reasonable grounds to believe that an order seizing or restraining the specified property is likely to be granted in the requesting country.
- (5) The order made under this section shall not extend to over **[90 days]**.
- (6) Where an order has been made under this section, any person who claims an interest in the property specified may apply to discharge or vary the order.
- (7) Where an application is made to discharge or vary an order under this section, the Central Authority shall consult promptly with the requesting state and ensure that any reasons it provides in favour of continuing the order are placed before the **[judicial authority]**.
- (8) A **[judicial authority]** may vary an order if satisfied that it is in the public interest to do so having regard to any financial hardship or other consequence of the interest remaining subject to the order.
- (9) A **[judicial authority]** may also discharge or vary an order under this section where there are no longer grounds to believe that a seizure or restraining order will be made in the requesting country.

Explanatory Note:

The 90-day period in sub-clause (5) is the time period for the requesting country to obtain its domestic restraining order. Countries do not have uniform practice in this regard.

It is to be noted that the order may be discharged where there are grounds to believe that the property will not be subject to a restraining order in the requesting country.

The existing procedures for the purely domestic orders will also govern such applications.

Registration of foreign seizure or restraining order

2. (1) This section applies where a request made under Part IV seeks assistance in giving effect to an order seizing or restraining property which has been issued by a court in the requesting state, and where the request includes a copy of that order.
- (2) The Central Authority may apply to **[the appropriate court]** for the registration of the foreign order seizing or restraining dealings with any specified property.
- (3) An application under this section may be made *ex parte*.
- (4) A **[judicial authority]** may grant an application under subsection (2) where it appears that a valid order for seizure or restraint of the property specified has been made in the requesting state.
- (5) An order registered in accordance with this section shall have the same effect as a seizure or restraint order made by the court in which it was registered and may be enforced as a judgment of that court.
- (6) Where an order has been made under this section, any person who claims an interest in the property specified may apply to discharge or vary the order.
- (7) Where an application is made to discharge or vary an order under this section, the Central Authority shall consult promptly with the requesting state and ensure that any reasons it provides in favour of continuing the order are placed before the **[judicial authority]**.
- (8) A **[judicial authority]** may vary an order if satisfied that it is in the public interest to do so having regard to any financial hardship or other consequence of the interest remaining subject to the order.

Registration of foreign forfeiture or confiscation order

3. (1) This section applies where a request made under Part IV seeks assistance in giving effect to an order forfeiting or confiscating property which has been issued by a court in the requesting state, and where the request includes a copy of that order.
- (2) The Central Authority may apply to **[the appropriate court]** for registration of an order confiscating or forfeiting any specified property.
- (3) The Central Authority shall notify any person who appears or claims to have an interest in specified property of any application, and they shall have a right to be heard before any order under this section is made.

- (4) A judge of [***the appropriate court***] may register an order under subsection (2) where it appears that it is a valid order for forfeiture or confiscation of the property specified, that it is final and not subject to review or appeal.
- (5) An order registered in accordance with this section shall have the same effect as a confiscation order made by the court in which it was registered and may be enforced as a judgment of that court.
- (6) A copy of any order registered under this section shall be sent to any person who appears to have an interest in specified property to which it relates.
- (7) Where an order has been made under this section, any person who claims an interest in the property specified may apply to discharge or vary the order.
- (8) Where an application is made to discharge or vary an order under this section, the Central Authority shall consult promptly with the requesting state and ensure that any reasons it provides in favour of continuing the order are placed before the [***judicial authority***].
- (9) A [***judicial authority***] may vary an order if satisfied that it is in the public interest to do so having regard to any financial hardship or other consequence of the interest remaining subject to the order.
- (10) A [***judicial authority***] may also discharge or vary an order under this section where it appears that the forfeiture or confiscation order to which it relates has been satisfied, discharged or varied so that it no longer applies to the property specified in the order, or where there are no longer grounds to believe that any such order will be made.

Optional Provision

Countries may consider legislating on the return and disposal of property, although in practice this is often dealt with on an *ad hoc* and administrative basis at a bilateral level between the requested and requesting countries.

Return and Disposal of Property

- (1) *Where an order is made under section 39, the Central Authority may, after consultation with the Minister responsible for Foreign Affairs, enter into an agreement with the requesting country for the final disposal of confiscated or forfeited property.*
- (2) *Subject to any other enactment, any property which is held pursuant to an order made under section 39 shall vest in [***such body as the enacting state may select***], save that any interest in the property obtained by a purchaser in good faith for valuable consideration, and which has not been confiscated as a result of an offence committed by the purchaser, shall be retained by him.*

Optional Part

Part VII – Requests for Interception of Telecommunications and Related Forms of Assistance

Part VII of the Model Legislation is optional as countries that wish to adopt Part VII of the Model Legislation should first ensure that safeguards are put in place to limit the intrusions into privacy. However, it was not possible to include in the Model Legislation all possible safeguards. As a result, it is important to emphasise that countries that wish to adopt the provisions on the interception of telecommunications will first need to have in place a domestic regime on the interception of telecommunications with all the necessary safeguards. The complementary work currently carried by the Secretariat's Cybercrime Expert Group on the Commonwealth Model Law on Computer and Computer Related Crimes that provides for, inter alia, the interception of electronic communications may be relevant here. It is also important for countries to note that the forms of assistance contained in Part VII are technology intensive and costly.

Requests for interception and related forms of assistance

4. A request under this Part means any request received under Part IV for any of the following:
 - (a) the interception of telecommunications;
 - (b) covert electronic surveillance;
 - (c) the interception of transmission data;
 - (d) the preservation of any computer data which may be expected to contain intercept material; or
 - (e) intercept material.

Explanatory Note:

Requests for assistance with the interception of telecommunications and related forms of assistance are dealt with separately in both the Harare Scheme and this Model Legislation because they are likely to give rise to particular issues in relation to the rights of the subject, confidentiality, technical capacity and resource issues.

The forms of request included in this Part are defined in clause 2. They reflect investigative techniques for which many countries will have legislative schemes. In some cases, it may be appropriate to refer to legislative definitions in existing statutes, although care must be taken to avoid limiting implementation of the Harare Scheme.

Consultation

5. (1) Upon receipt of a request under this Part, the Central Authority shall consult with [*any appropriate minister or body, e.g. a specialist police department*] before deciding whether to consider the request.
- (2) In deciding whether to consider the request, the Central Authority shall also have regard to whether the criminal matter arising in the requesting country is of a serious character.
- (3) Notwithstanding any ground for refusal provided under this Part, a request under this Part may be refused under section 18.

Explanatory Note:

This clause reflects the particular issues which arise in relation to these forms of assistance, including the rights of the subject, confidentiality, technical capacity and resource issues.

It also reflects the provision in paragraph 22(4) of the Harare Scheme that a country may refuse a request for these forms of assistance and is under no obligation to inform the requesting country of the reasons for refusal.

There is no definition of 'serious character' either in the Scheme or this Model Legislation. Enacting countries may leave this to the discretion of their Central Authorities, or may consider providing for a level of sentencing to reflect seriousness.

Warrants for interception

6. (1) The Central Authority or any body nominated by it may make an application to [*an appropriate judge*] for a warrant authorising the interception of telecommunications or transmission data.
- (2) Upon making any application under subsection (1), the applicant shall provide the [*appropriate judge*] with a copy of the request received under Part IV.
- (3) [*The appropriate judge*] may issue a warrant under this section if he is satisfied that there are grounds to suspect that the information obtained pursuant to this Part will contain information relevant to the commission of a criminal offence in [*enacting country*].
- (4) A warrant shall specify-
 - (a) the identity, if known, of the person whose communications are to be intercepted;
 - (b) the place at which the interception of communication may be carried out;
 - (c) a description of the type of communications sought to be intercepted;
 - (d) the identity of the person authorised to carry out the interception of communications; and

(e) the period for which it is valid, which shall not exceed **[90 days or other period which the enacting country may select]**;

and may make any direction to any telecommunications service provider or other person in order to ensure that the warrant is executed.

- (5) The applicant may apply on any number of occasions for renewal of any warrant under this section for a further period of **[90 days]**.

Explanatory Note:

This clause creates a warranty system for interception of telecommunications or transmission data obtained pursuant to a request. This reflects the fact that countries that wish to use the model legislation may not yet have enacted statutory regimes covering the interception of communications domestically. It should be noted that countries are required to agree on the duration of activities, detailed conditions, monitoring and preserving where applicable under paragraph 22(3) of the Harare Scheme.

Countries will wish to agree measures to ensure that the rights of those whose communications may be intercepted, including any claim to legal privilege, are protected.

Warrants will necessarily be obtained *ex parte*.

Countries may wish to consider the need for making public aggregated data about the number and duration of warrants issued, in order to ensure that the public has information about the extent to which these powers are used.

Warrants subject to terms

7. Where a **[judicial authority]** issues a warrant under section 42, he may make it subject to any terms which are desirable in the public interest or to ensure that:
- (a) secrecy is preserved as to the existence of the warrant and the contents of any intercept material; and
 - (b) the rights of any person whose telecommunications or transmission data are intercepted are preserved or kept under review.

Explanatory Note:

This clause enables a judge to impose terms on a warrant, either in order to preserve secrecy as to the existence of the warrant and contents of any intercept material, or to preserve or keep under review the rights of any person whose telecommunications or transmission data are intercepted.

A judge might typically use these powers to ensure that there is not extended interception of communications which are not the intended target of the warrant; to ensure that legally privileged communications are not monitored or recorded; or to set limits on the dissemination of intercept material.

Duties of service providers

8. Any person directed to provide assistance by way of information, facilities or technical assistance by the Central Authority pursuant to a warrant under this Part shall without delay comply with that direction and in such a manner that the assistance is rendered:

- (a) as unobtrusively; and
 - (b) with the minimum interference to the services that such person normally provides to the party affected by the warrant;
- as can reasonably be expected in the circumstances.

Explanatory Note:

This provision requires co-operation from providers of telecommunications services. 'Telecommunications' is defined in clause 2.

Countries which do not have infrastructure and legislation dealing with domestic interception may need to ensure that their telecommunications service providers have interception capacity. Training and capacity building may be required to ensure that telecommunications service providers are able to comply with warrants within a reasonable time.

Countries may also wish to consider enacting a provision along the following lines:

"Any person who provides a telecommunications service shall take all necessary and practicable measures to ensure that interception of telecommunications and transmission data can be carried out expeditiously in accordance with any warrant granted under this Part."

Transmission to requesting state

9. Where material is obtained pursuant to this Part, any such material and any related order, warrant or associated transmission data may be:
- (a) disclosed to the Central Authority for transmission to the requesting state;
or
 - (b) transmitted directly to any Competent Authority in the requesting state identified as the appropriate recipient in the request.

Explanatory Note:

This clause provides for either immediate (real-time) or subsequent transmission of material obtained under this Part. Either alternative is acceptable under paragraph 23(h) of the Harare Scheme.

Note that these provisions are in addition to the general provision on transmission in Part IV.

Annex

Revised Scheme Relating To Mutual Legal Assistance In Criminal Matters Within The Commonwealth

Including amendments made by Law Ministers in April 1990,
November 2002, October 2005 and July 2011

(With commentaries)

Revised Scheme Relating to Mutual Legal Assistance

IN CRIMINAL MATTERS WITHIN THE COMMONWEALTH

including amendments made by Law Ministers in April 1990,
November 2002, October 2005 and July 2011

(With commentaries)

Part I

General Provisions

Paragraph 1: Purpose And Scope

- (1) The purpose of this Scheme is to encourage and enable countries to co-operate with each other to the widest extent possible for the purposes of criminal matters in accordance with this Scheme and their respective domestic laws.¹
- (2) This Scheme provides for the giving of assistance by one country ("the requested country") in respect of criminal matters arising in another country ("the requesting country").²
- (3) The Scheme does not affect any existing forms of co-operation, either formal or informal, nor does it preclude the development of any future forms of co-operation.
- (4) Countries are encouraged to adopt such legislative or other measures as may be necessary to implement the provisions of this Scheme.
- (5) Mutual legal assistance in criminal matters under this Scheme includes, but is not limited to, assistance in:³
 - (a) identifying and locating persons;
 - (b) taking evidence or statements from persons;

1 The opening sub-paragraph of the Revised Harare Scheme (RHS) reflects the need for wider co-operation in criminal matters within the Commonwealth, as expressed by Law Ministers.

2 Sub-paragraph 1(2) of the RHS, unlike the equivalent provision in the Harare Scheme (HS), makes no reference to the authority responsible for the giving of assistance, to accommodate the varied and differing roles of judicial, governmental and executive authorities across the Commonwealth, in the provision of mutual legal assistance. Nevertheless, it remains a core requirement of the Scheme that each country designates a Central Authority and that communication between countries takes place primarily between Central Authorities.

3 Sub-paragraph 1(5) of the RHS sets out in outline the general scope of the Scheme, although the list of items is not exhaustive.

- (c) effecting service of documents;
- (d) executing searches and seizures;
- (e) providing and producing relevant documents, records, items and other material;
- (f) facilitating the voluntary attendance of persons in the requesting country;
- (g) effecting a temporary transfer of persons in custody to assist in an investigation or appear as a witness;
- (h) the identification, tracing, freezing, restraining, forfeiture and confiscation of proceeds and instrumentalities of crime;
- (i) the return and disposal of property;
- (j) obtaining and preserving computer data;
- (k) interception of postal items;
- (l) interception of telecommunications;
- (m) covert electronic surveillance.

Paragraph 2: Interpretation And Definitions⁴

- (1) 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.
- (2) For the purposes of this Scheme, a criminal matter arises in a country if the Central Authority of that country certifies that criminal or forfeiture proceedings have been instituted in a court exercising jurisdiction in that country or that there is reasonable cause to believe that an offence has been committed in respect of which such proceedings could be so instituted.⁵
- (3) For the purposes of this Scheme, the following definitions shall apply:

Central Authority means an authority or authorities designated under paragraph 3;

computer data means any representation of facts, information or concepts in a form suitable for processing in a computer system, including a program suitable to cause a computer system to perform a function;

4 Paragraph (2) of the RHS is important in establishing the terminology to be used in the rest of the RHS. The definition of "country" and "criminal matter" in sub-paragraphs 2(1) and 2(2) of the RHS remain largely unchanged from the HS.

5 Sub-paragraph 2(2) determines the stage at which it becomes possible to seek assistance. It provides that the RHS can be invoked either where proceedings have been instituted or, at the investigative stage, where there is reasonable cause to believe that an offence in respect of which proceedings could be instituted had been committed. The term "proceedings" is further defined in the Scheme to cover criminal and forfeiture proceedings.

content data means the substance of a communication, or the message or information being conveyed by a telecommunication, whether or not any interpretation, process, mechanism or device needs to be applied or used to make the meaning of the communication, or the message or information intelligible;

covert electronic surveillance⁶ means covert surveillance carried out by or with an electronic surveillance device which transmits, records or otherwise captures audio product, visual images or location or position information, but does not include covert surveillance using a device designed primarily for the interception of telecommunications.

criminal matter means criminal proceedings as well as investigations or proceedings relating to:

- (a) the restraint or freezing of property that may be confiscated or forfeited by a court, or that may be needed to satisfy a pecuniary penalty imposed in respect of an offence;
- (b) the confiscation or forfeiture of property by a court in respect of an offence; and
- (c) the imposition or recovery of a pecuniary penalty in respect of an offence;

criminal proceedings, in relation to an offence, means:

- (a) a trial of a person for the offence; or
- (b) any proceeding to determine whether any person should be tried for an offence;

dual criminality means conduct which would constitute an offence under the laws of both the requesting and requested countries;

instrumentalities of crime means any property used, or intended to be used, in connection with the commission of an offence;

intercept material any document, record or recording obtained by a country as a result of the interception of telecommunications conducted pursuant to the laws of that country, save where the interception was authorised for the purposes of complying with a request under paragraph 22 of this Scheme;

interception of telecommunications means listen to, record or acquire a communication conveyed by means of telecommunications either:

- (a) between its point of origin and its point of destination while it is in transit; or
- (b) contemporaneously with the communication's transmission at the point of origin or its reception at the point of destination;

For greater certainty, the interception of telecommunications includes the content data and may also include any available transmission data.

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;

⁶ It is important to note that "covert electronic surveillance" is defined in relation to a "device". Consequently, cell site data (information which is used by the service provider to locate and identify the phone for communication purposes) does not fall within the definition, but can instead be obtained retrospectively where the data has already been stored, pursuant to paragraph 20, Preservation of Computer Data, or within the "interception of transmission data" if obtained in real time.

postal item means any letter, package, or other item which is being or will be carried by a postal service;

postal service means any service, whether public or private, which:

- (a) consists of one or more of the following: the collection, sorting, conveyance, distribution and delivery of postal items; and
- (b) is offered or provided for the purpose of making available or facilitating a means of transmission of postal items from place to place;

preservation of computer data means the protection of computer data which already exists in a stored form from modification or deletion, or from anything that would cause its current quality or condition to change or deteriorate;

proceeds of crime includes any property, benefit or advantage that is wholly or partly obtained, derived or realised directly or indirectly as a result of the commission of a criminal act or omission;

property means assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and includes legal documents or instruments evidencing title to, or interest in, such assets;

stored communication means the content data which is no longer in the course of transmission and which has been stored in a form allowing retrieval;

subscriber information⁷ means any information held by the service provider relating to the name, address, telephone number, e-mail address, Internet Protocol address or any similar identifier associated with a subscriber to any telecommunications service;

telecommunications means the emission, transmission or reception of signs, signals, writing, images, sounds or intelligence of any nature by any wire, cable, radio, optical or other electromagnetic system, or by any similar technical system.

transmission data means data that

- (a) relates to the telecommunication functions of dialing, routing, addressing or signaling;
- (b) is transmitted to identify, activate or configure a device, including a computer program, in order to establish or maintain access to a telecommunication service for the purpose of enabling a communication, or is generated during the creation, transmission or reception of a communication and identifies or purports to identify the type, direction, date, time, duration, size, origin, destination or termination of the communication; and
- (c) does not reveal the substance, meaning or purpose of the communication.

⁷ The definition of "telecommunications" is intended to cover a process (of emission, transmission or reception), rather than that which is conveyed by the process.

Paragraph 3: Central Authorities

- (1) Each country shall designate a Central Authority for the purposes of this Scheme.⁸
- (2) The tasks of a Central Authority may include:⁹
 - (a) making, receiving and transmitting requests for assistance and executing or arranging for the execution of such requests;
 - (b) where necessary, certifying or authenticating, or arranging for the certification and authentication of, any documents or other material supplied in response to a request for assistance; and
 - (c) taking practical measures to facilitate the expeditious execution and transmission of requests for assistance.
- (3) For the purposes of this Scheme, communication shall take place directly between Central Authorities unless the countries have agreed otherwise.
- (4) Countries shall promptly notify the Commonwealth Secretariat of their designated Central Authorities and any changes thereto.¹⁰
- (5) The Commonwealth Secretariat shall maintain an updated database of such Central Authorities, and make the database available to all countries.

Paragraph 4: Contents And Form Of Request For Assistance

- (1) A request under the Scheme shall, to the extent possible:¹¹
 - (a) specify the agency or authority initiating the request;
 - (b) specify the nature of the assistance requested;
 - (c) specify the purpose for which the assistance is sought;
 - (d) establish a link between the criminal matter and the assistance sought;
 - (e) specify the details of any particular procedure that the requesting country wishes to be followed;

8 The Scheme follows international practice in this area, as also reflected by the HS, in making it mandatory that each country designates a Central Authority as the primary contact point. Although the request must be transmitted from Central Authority to Central Authority, the Scheme does not prevent responses to the request being made directly to the agency or authority initiating the request to accommodate the differing roles for judicial, governmental and executive authorities in different countries in the provision of assistance in criminal matters.

9 The primary tasks of the Central Authority of the requesting country are set out at sub-paragraph 3(2) of the RHS. Sub-paragraph 5(2) of the RHS further requires that the Central Authority satisfies itself that the request can properly be made under the Scheme and that all necessary information has been provided.

10 Sub-paragraphs 3(4) and 3(5) are added to ensure that countries notify the Commonwealth Secretariat of their designated Central Authorities and any changes thereto. The RHS further requires the Secretariat to maintain and make available an updated database of the Central Authorities within the Commonwealth.

11 Paragraph 4 of the RHS reproduces paragraph 14 of the HS by setting out the contents and form of the request. Given the diverse practice in the Commonwealth, it was not deemed appropriate to provide a template of a letter of request, as a further annex to the RHS. Nevertheless, this provision sets out, in a systematic way, the information which in most circumstances will be required. It is also important to note that the information specified at sub-paragraph 4 (1) (a), (b), (c), (d), (g), (h) and (i) of the RHS are basic information that must be submitted in every request. It is important to note that all requests ought to contain information regarding the possible penalties for the offence in question.

- (f) indicate any time limit within which compliance with the request is desired, stating reasons;
- (g) specify the nature of the criminal matter, and whether or not criminal proceedings have been instituted;
- (h) where criminal proceedings have not been instituted, state the offence which the requesting country has reasonable cause to believe has been, is being or will be committed, with a summary of known facts;
- (i) where criminal proceedings have been instituted, contain the following information:
 - (i) the court exercising jurisdiction in the proceedings;
 - (ii) the identity of the accused person;
 - (iii) the offence(s) of which the person stands accused, and a summary of the facts and the penalties which may be imposed;
 - (iv) the stage reached in the proceedings; and
 - (v) any date fixed for further stages in the proceedings.
- (2) Requests shall be in writing unless otherwise agreed and in the language required by the requested country.
- (3) Where further information is required before a request under this Scheme can be executed, such information shall, in so far as practicable, be provided by the requesting country within any deadlines set by the requested country.

Paragraph 5: Execution Of Requests¹²

- (1) The requested country shall, subject to its domestic laws, take all reasonable steps to ensure that the request is complied with expeditiously.¹³
- (2) The Central Authority of the requested country shall promptly inform the Central Authority, or other authority as agreed, of the requesting country, giving reasons as appropriate, where it considers that:
 - (a) the request does not comply with the provisions of this Scheme;
 - (b) the request for assistance is to be refused in whole or in part;
 - (c) the request cannot be complied with, in whole or in part; or
 - (d) there are circumstances which are likely to cause a significant delay in complying with the request.
- (3) The requested country may postpone a decision to execute a request in whole or in part where the immediate execution of the request would interfere with an ongoing investigation or prosecution in the requested country.¹⁴

12 Paragraph 5 of the RHS replaces paragraph 7 of the HS, 'Action in the Requested Country'. Sub-paragraph 7(1) of the HS was considered redundant, given that the requested country can only act according to its domestic law.

13 Sub-paragraph 5(1) of the RHS reaffirms the obligation on the requested country to take all reasonable steps to ensure that the request is complied with.

14 Sub-paragraph 5(3) of the RHS allows the requested country to postpone a decision to execute a request in whole or in part, where the immediate execution of the request would interfere with an ongoing investigation or prosecution in the requested country.

Paragraph 6: Applicable Law

All requests under this Scheme shall be dealt with according to the law of the requested country.¹⁵

Paragraph 7: Costs

- (1) The costs of executing a request shall be borne by the requested country, unless otherwise agreed by the countries.¹⁶
- (2) Where expenses of a substantial or extraordinary nature are or will be required to execute the request, the countries shall consult in advance to determine the manner in which the costs shall be borne.¹⁷
- (3) For the purposes of sub-paragraph (2), substantial or extraordinary expenses may include but are not limited to:¹⁸
 - (a) fees and reasonable expenses of expert witnesses;
 - (b) the costs incurred pursuant to paragraph 15;
 - (c) the costs of temporarily transferring persons in custody pursuant to paragraph 16;
 - (d) the costs of establishing and operating live video links or other audiovisual means, and the interpretation and transcription of such proceedings;
 - (e) the costs incurred for the interception of telecommunication; and
 - (f) the costs incurred for conducting surveillance.

15 Paragraph 6 of the RHS underscores the general principle in mutual assistance in criminal matters that the laws of the requesting country govern the execution of the request. To be sure, the provision covers both substantive law (e.g. grounds of refusal which may not be set out in the Scheme) and procedural law applicable to the execution of the request. It is important to note, in this regard, that sub-paragraph 4(1)(e) of the RHS allows the requesting country to specify the details of formalities and procedure that it wishes, where admissibility of evidence gathered in the requested country requires such formalities and procedures to be adhered to.

16 This provision reaffirms the general principle that the costs of executing requests will be borne by the requested country in most cases, as is the practice in the HS and other mutual legal assistance instruments.

17 Under the HS, it is for the requesting country to meet the travel and incidental expenses of witnesses travelling to the requesting country, including those of accompanying officials, the fees of experts, and the costs of any translation. However, paragraph 7 of the RHS provides countries some flexibility to agree on an alternative arrangement.

18 Sub-paragraph 7(3) sets out the types of expenses that can properly be regarded as "of substantial or extraordinary nature". These include the costs of establishing and operating live video links or other audiovisual means, and the costs of interpretation and transcription of such proceedings, the costs incurred for the interception of communications and the costs incurred for conducting surveillance. However, the list is not exhaustive and is left to states to determine. Reference can also be made to the Guidelines on the Apportionment of Costs Incurred in Providing Mutual Assistance in Criminal Matters as adopted by Law Ministers in 1999, especially in view of the concerns of various small jurisdictions on the costs associated with the provision of assistance.

Part II

Grounds For Refusal

Paragraph 8: General

- (1) The requested country may refuse to comply in whole or in part with a request for assistance under this Scheme where the Central Authority of that country considers that:¹⁹
 - (a) the request relates to an offence or proceedings of a political character;²⁰
 - (b) the conduct which is the subject of the request is an offence only under military law or a law relating to military obligations of the requesting country;
 - (c) the request relates to an offence, the prosecution of which in the requesting country would be incompatible with the requested country's law on double jeopardy;²¹
 - (d) compliance with the request would be contrary to the constitutions or domestic laws of that country, or would prejudice the sovereignty, national security, international relations, national interests, public order or other essential public interest of that country;²²
 - (e) there are substantial grounds to believe that compliance with the request would facilitate the prosecution or punishment of any person on account of race, ethnic origin, sex, religion, nationality or political opinions or would cause prejudice for any of these reasons to any person affected by the request; and²³
 - (f) the steps required to be taken in order to comply with the request cannot under the law of that country be taken;²⁴

19 Paragraph 8 of the RHS sets out the circumstances in which compliance with the request may be refused either in whole or in part. All the grounds of refusal under the HS are repeated, except for the "dual criminality", to mirror recent international practice to render assistance in the absence of dual criminality.

20 A request for assistance may be refused where the offence or the proceedings are regarded as having a political character. The double reference to "offence" and proceedings indicates that the formal definition of the offence charged is not necessarily determinative. In determining whether an offence is of political character, sub-paragraph 8(2) of the RHS requires countries to adhere to the developments in international conventions.

21 Sub-paragraph 8(1)(c) of the RHS deals with situations of double jeopardy, that is, where proceedings would have already been brought in the requested country against the person for the commission of the same offence that forms the subject of the request. This principle is relevant whether the original proceedings resulted in a conviction or an acquittal. Similar to the HS, the requested country is empowered, but not required, to refuse compliance with the request on the basis of double jeopardy. There may be circumstances, for example, where an acquittal was recorded because a key prosecution witness was in the requesting country. In this situation, the provision of assistance may be judged appropriate.

22 Sub-paragraph 8(1)(d) of the RHS concerns aspects of public policy and the general interests of the country.

23 Sub-paragraph 8(1)(e) of the RHS further adds ethnic origins and sex to the grounds set out in sub-paragraph 8(2)(b) of the HS. It is noted that in the context of anti-discrimination laws, it is more common to use the terms 'sex discrimination' than 'gender discrimination'. In addition, the United Nations Model Treaty on Mutual Assistance in Criminal Matters uses the word 'sex'.

24 This provision reflects the general principle that procedures and facilities available in support of criminal investigations and prosecutions initiated in one country should also be made available to other countries. The requested country is not, however, required to do more than it would do in a purely domestic case.

- (g) By reason of the trivial nature of the alleged offending or the low value of the likely penalty or any property likely to be forfeited or confiscated, the requested country would not have made a similar request to another country in connection with a like criminal matter arising in the requested country.²⁵
- (2) 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 deems the offence not to be one of a political character or imposes on the parties thereto an obligation either to extradite or prosecute a person accused of the commission of the offence.
- (3) Assistance shall not be refused solely on the ground of bank or other financial institution secrecy rules.
- (4) A request made pursuant to Part VI may be refused where the property to be recovered is of *de minimis* value.

Paragraph 9: Imposition Of Conditions By Requested Country²⁶

- (1) The requested country may make the provision of assistance subject to the requesting country complying with specified conditions.
- (2) If the requesting country refuses to comply with the conditions, the requested country may refuse to grant the assistance sought in whole or in part.

Paragraph 10: Dual Criminality²⁷

Each country is encouraged to render assistance in the absence of dual criminality.

Paragraph 11: Reciprocity

Each country is encouraged to render assistance in the absence of reciprocal arrangement.

25 It was proposed that this provision be added to allow countries to refuse *de minimis* requests, given the concerns of a number of Central Authorities over their capacity to deal with a growing number of requests for assistance involving offences that might be characterised as "minor" in nature or that had occurred in the distant past. The proposal also ensures that countries are not required to devote resources to assistance in matters which they would regard as too trivial to merit investigation or prosecution if they arose domestically.

26 Paragraph 9 of the RHS reproduces the principles reflected in sub-paragraph 7(4) of the HS which allow the requested country to make the granting of assistance subject to the requesting country giving certain undertakings.

27 Paragraphs 10 and 11 reflect the recognition that strict requirements of dual criminality and reciprocity often hinder international co-operation in bringing criminal offenders to justice and that the international trend is to limit or abolish them where possible. These provisions are also in line with the spirit of the purpose of the Scheme, which is to encourage and enable countries to co-operate with each other to the widest extent possible for the purposes of criminal matters.

Part III

Requests For Certain Forms Of Assistance

Paragraph 12: Service Of Documents

- (1) A request under this Scheme may seek assistance in the service of documents relevant to a criminal matter arising in the requesting country.²⁸
- (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 other 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 or other proof as to the service of the documents or, if they have not been served, 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.²⁹
- (6) Documents which are intended to be served on persons in the requested country may, with the prior consent of the Central Authority of the requested country, be transmitted directly to persons who are present in the requested country.³⁰

28 Paragraph 12 of the RHS finds its origins in paragraph 17 of the HS. In early drafts of paragraph 17 of the HS, the provision was limited to judicial documents (original process, subpoenas, judgments), but a wider formulation was eventually accepted to include any document of which service is required under the procedural rules of the requesting country. Paragraph 12 extends the scope of the provision so that it also applies to any documents which relate to the criminal matter, including the civil recovery of assets.

29 The provision constitutes a recognition that it would not be appropriate for countries to penalise a witness for refusing to comply with a summons served on them while they were outside the jurisdiction of that country. This is in conformity with established principles of national sovereignty and extraterritorial jurisdiction. It is important to remember that such a proposed witness may not be guilty of any wrongdoing and may have no connection with the requesting country; moreover, if the witness does not wish to travel to the requesting country other measures to obtain the evidence are available under the Scheme. If the witness later enters the requesting country, it is then open to the country to serve a further summons on the witness which would be enforceable in the usual way.

30 Early drafts of paragraph 12 of the RHS also sought to add to paragraph 17 of the HS by further allowing countries to send documents directly to a person who is present in the territory of the requested country, provided that the address of that person is known. The RHS allows direct transmission subject to a necessary safeguard requiring the requesting country to first obtain the consent of the Central Authority of the requested country.

Paragraph 13: Provision Or Production Of Documents, Records, Items Or Other Material

- (1) A request under this Scheme may seek the provision or production of any document, record, item or other material relevant to a criminal matter arising in the requesting country.³¹
- (2) The requested country is encouraged to provide copies of any document, record, item or other material not publicly available, to the same extent and under the same conditions as apply to the provision of such material to its own law enforcement agencies or prosecution or judicial authorities.³²

Paragraph 14: Taking Statements Or Evidence From Persons

- (1) A request under this Scheme may seek assistance in taking statements or hearing evidence from persons in the requested country.³³
- (2) In addition to the information required by paragraph 4, a request under this paragraph shall also specify³⁴:
 - (a) the name, address or official designation of the person;
 - (b) the status of the person in the investigation or proceedings in the requesting country;
 - (c) any law of the requesting country as to privilege or exemption from giving evidence which may be relevant to the request; and
 - (d) whether the request is for the person to give a statement or evidence in the course of judicial proceedings through live video link or other audiovisual means.
- (3) Where the request is for the person to be questioned other than in the course of judicial proceedings through live video link or other audiovisual means, the request shall also specify so far as the circumstances of the case permit³⁵:

31 Paragraph 13 of the RHS finds its origins in paragraph 22 of the HS. However, unlike paragraph 22 of the HS, paragraph 13 of the RHS is not only limited to the production of judicial or official records, relevant to a criminal matter, such as judgments, orders and decision of the courts, other documents held by judicial authorities, government departments or agencies or prosecution authorities.

32 The wording of paragraph 13(2) underscores the principle that the assistance afforded by the requested country to the requesting country should be the same as is available to the requested country had the criminal matter arisen within its jurisdiction. Nevertheless there are sufficient safeguards in the Scheme, such as the provisions on confidentiality, the possibility to impose conditions as well as the overall discretion to refuse assistance. In addition, the wording has the effect of narrowing the scope of assistance, especially where the laws of the requested country may be silent on the matter, but assistance can nevertheless be forthcoming under some form of international agreement.

33 It is noted that paragraph 15 is intended to encompass all forms of witness evidence, including statements, affidavits, depositions and testimony in other countries by live link. Although giving evidence by telephone link is not specifically provided for by the Scheme, the paragraph would also cover any such request. The paragraph could also in principle apply to a requirement for a person to attend court to produce documents under the laws of some countries. To be sure, its equivalent provision under the HS, paragraph 18 on 'Examination of Witnesses' does not appear to be limited to examination of witnesses in court. Sub-paragraph 18(2) of the HS suggests that the examination can also take place at the investigation stage.

34 Sub-paragraph 14(2) contains matters to be specified in any such request under this paragraph in either case.

35 Sub-paragraph 14(3) sets out the remaining matters to be specified in a request. Again, the provision that the request should specify whether the evidence is to be provided orally or in writing and to specify any requirement as to the manner of taking evidence permits a country to request evidence in statement form. It should be observed that any request for the accused or his representative to attend would necessarily be subject to the immigration laws of the requested country, and that if the admission of the accused into the requested country was thought undesirable, this could be refused as contrary to the national interests of the requested country under paragraph 8 (1) (d).

- (a) the questions to be put to the person or the subject matter about which the person is to be questioned;
 - (b) whether the person is to provide a written statement;
 - (c) whether the person is to take an oath or make a solemn affirmation;
 - (d) any requirement of the law of the requesting country as to the manner of taking evidence relevant to its admissibility in that country;
 - (e) whether any official of the requesting country wishes to be present and to participate in the execution of the request;³⁶
- (4) Where the request is for a person to give evidence in judicial proceedings through live video link or other audiovisual means, the request shall also specify so far as the circumstances permit the requirements in sub-paragraph (3) above, and the following shall also apply³⁷:
- (a) measures for the protection of the person to be heard shall be agreed, where necessary, between the requesting and requested countries;
 - (b) the hearing shall be conducted directly by, or under the direction of, the judicial authority of the requesting country to the extent that it does not contravene the law of the requested country;
 - (c) where the requesting country or the person to be heard so requests, the requested country shall ensure, in so far as possible, that the person to be heard is assisted by an interpreter, if necessary; and
 - (d) without prejudice to any measures agreed for the protection of the person, where a judicial authority of the requested country is present during the hearing, that judicial authority shall at the conclusion of the hearing ensure that there is a record available to the requesting country indicating the date and place of the hearing, the identity of the person heard, the identities and functions of all other persons in the requested country participating in the hearing, and any oath or affirmation made.
- (5) The person from whom a statement or evidence is sought shall be entitled to claim any right not to make a statement or to give evidence which would accrue to that person under the law of either the requested or the requesting country.
- (6) Each country shall take the necessary measures to ensure that, where witnesses are being heard within its territory through live video link or other audiovisual means from requested countries and refuse to give evidence when under an obligation to do so or do not give evidence according to the truth, its

36 It is noted that officials of the requesting country typically have no jurisdiction in the requested country. Nothing in the Scheme is intended to undermine this principle, which is a matter for the domestic law of countries. However, it may in some circumstances be appropriate for officials of the requesting country to participate in taking evidence, for example by asking questions directly under the supervision of officials of the requested country for the purposes of taking a statement. The Scheme does not provide for any right to do so as this is a matter for agreement between countries, but it makes provision for the wishes of the requesting country to be communicated in order to make the position clear and give guidance on the contents of a request.

37 Where a witness gives evidence by means of live video link while present in the requested country, he is nevertheless participating in a hearing which takes place in the requesting country. Accordingly, sub-paragraph 2(b) provides that the hearing is conducted directly by the court (or other judicial authority) of the requesting country. It follows that the procedure is that of the requesting country, although the hearing must not contravene the law of the requested country. There is no requirement that the judicial authorities or any other representative of the requested country be present when the person is heard although sub-paragraph 3 provides that if they are present, they must make a record of the hearing available to the requesting country.

domestic law applies in the same way as if the hearing took place in a domestic court and was subject to domestic procedure.

Paragraph 15: Voluntary Attendance Of Persons In The Requesting Country

- (1) A request under this Scheme may seek assistance in facilitating the personal attendance of a person for the purposes of an investigation or to appear as a witness before a court exercising jurisdiction in the requesting country.³⁸
- (2) In addition to the information required by paragraph 4, the request shall also specify:
 - (a) the subject matter relevant to the person's attendance;³⁹
 - (b) the reasons why the personal attendance of the person is required;
 - (c) where appropriate, that arrangements for the person's security whilst travelling to and from the requesting country and while the person is in the requesting country have been provided for;⁴⁰
 - (d) where appropriate, details of the travelling, accommodation, subsistence and other expenses payable by the requesting country in respect of the personal attendance of the person; and
 - (e) the effect and consequences of the person's consent, including the person's rights and obligations.
- (3) The requested country shall notify a person whose attendance in the requesting country is desired and, if the person is willing to attend, assist in facilitating the person's attendance to the extent possible.⁴¹
- (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.⁴²

38 Paragraph 16 of the RHS aims to facilitate the attendance of a person in the requesting country to assist in an investigation or appear as a witness in proceedings. Paragraph 16 goes beyond its equivalent provision in the HS, paragraph 25, which is limited to the voluntary attendance of witnesses before a court exercising jurisdiction in the requesting country, in view of the overall aim of increasing the scope of assistance in the RHS.

39 The Harare Scheme, which provided for the voluntary attendance of persons to appear as witnesses, required specification of the subject matter upon which it is desired to examine the witnesses. The provision now also encompasses appearance for the purposes of an investigation. The provision has therefore been broadened. Although paragraph 4 requires that the nature of the criminal matter must be specified, paragraph 16 additionally requires that the subject matter relevant to the person's attendance be specified, so that the person is in a position to make an informed decision whether to attend voluntarily to assist in an investigation.

40 Sub-paragraph 15(2)(c) of the RHS requires, where appropriate, confirmation that arrangements for the person's security whilst travelling to and from the requesting country and while the person is in the requesting country have been provided for. The request for information does not, however, extend to providing the details of the actual arrangements for the person's security.

41 To be sure, the requesting country usually holds the primary responsibility for making arrangements for the attendance of persons in its territory.

42 Sub-paragraph 15(4) of the RHS reproduces sub-paragraph 25(4) of the HS, which was added at Christchurch in 1990, to ensure that refusal to appear attracted no penalties. The effects and consequences of a person's consent, including their rights and obligations, may vary from country to country and case to case. However, it is important that information about the domestic provisions which ensure that a witness's rights under the paragraphs relating to immunity and privilege should be provided so that the requested country and witness are clear as to the extent of the protections. Additionally, it may be appropriate to make clear other rights and obligations such as whether the witness will be subject to any compulsion if he withdraws consent after arriving in the requesting country.

*Paragraph 16: Personal Attendance Of Persons In Custody*⁴³

- (1) A request under this Scheme may seek the temporary transfer of a person in custody in the requested country for purposes of an investigation or to appear as a witness before a court exercising jurisdiction in the requesting country.
- (2) In addition to the information required by paragraph 4, the request shall also specify:
 - (a) the subject matter relevant to the person's attendance;
 - (b) the reasons why the person is required;
 - (c) where appropriate, confirmation that arrangements have been made to ensure the person's security whilst travelling to and from the requesting country and while the person is in the requesting country;⁴⁴
 - (d) where appropriate, details of travelling and other expenses payable by the requesting country in respect of the person's attendance;
 - (e) the effect and consequences of the person's consent; and
 - (f) that the person will be lawfully confined, and subject to all the laws and rules applicable, in the requesting country.⁴⁵
- (3) The requested country shall only execute the request for the transfer of the person in custody where the person in custody consents in writing to the transfer.
- (4) Notwithstanding the consent of the person in custody, the requested country may refuse to comply with a request for that person's transfer and shall be under no obligation to inform the requesting country of the reasons for such refusal.⁴⁶
- (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.

43 Paragraph 16 of the RHS contains the more elaborate provisions required to deal with the transfer of persons in custody to appear as witnesses. While the equivalent provision in the HS (paragraph 26) is limited to the temporary transfer of a person in custody in the requested country for purposes of an investigation, paragraph 16 of the RHS also extends to the temporary transfer of a person in custody in the requested country for purposes of an investigation. However, the personal attendance of persons in custody in the requesting country should only be requested where absolutely necessary, especially in the context of an investigation. If a foreign agency wishes to interview a person in custody in another country, subject to the consent of that country, it is encouraged to send officers to that country rather than seek the transfer of that person to its country. It is noted that certain countries only allow for transfer of "sentenced" persons who are in custody, thus excluding the transfer of persons in pre-trial detention. In addition, some countries will not allow the transfer of young persons serving a custodial sentence regardless of whether the young person consents to the transfer. It follows that requests to these countries for the transfer of such persons would be rejected.

44 Sub-paragraph 16(2)(c) of the RHS also requires, where appropriate, confirmation that arrangements for the person's security whilst travelling to and from the requesting country and while the person is in the requesting country have been provided for. The request for information does not, however, extend to providing the details of the actual arrangements for the person's security.

45 The provision is worded so as not to limit the flexibility of the requesting country to place persons in an appropriate location other than a prison, provided the person remains under lawful custody.

46 Pursuant to sub-paragraph 16(3) of the RHS, the prisoner cannot be transferred if he does not consent. Even where the person does consent, the requested country may, pursuant to sub-paragraph 16(4) of the RHS, exercise discretion and refuse to comply with the request, without giving any reasons. Sub-paragraph 16(5) of the RHS reaffirms that no penalty attaches to a refusal by the person in custody to agree to a transfer.

- (6) Where a person in custody is transferred, the requested country shall notify the requesting country of the date, and of any variation thereto:⁴⁷
 - (a) upon which the person is due under the law of the requested country to be released from custody; and
 - (b) by which the requested country requires the return of the person.
- (7) The requesting country shall keep the person transferred in custody, and shall return the person to the requested country when the presence of the person in the requesting country is no longer required, and in any case by the earlier of the dates notified under sub-paragraph (6) above.
- (8) The obligation to return the person transferred shall continue notwithstanding the fact that the person is a national of the requesting country.
- (9) The period during which the person transferred is 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 have agreed to such release.

Paragraph 17: Immunity Of Persons⁴⁸

- (1) A person attending the requesting country in response to a request under:
 - (a) paragraph 15 shall be immune in that country from prosecution, detention or any other restriction of personal liberty in respect of criminal acts, omissions or convictions occurring before the time of the departure of the person from the requested country; or
 - (b) paragraph 16 shall be immune in that country from prosecution in respect of criminal acts, omissions or convictions occurring before the time of the departure of the person from the requested country.
- (2) The immunity provided for in those paragraphs shall cease:
 - (a) in the case of a person attending the requesting country in response to a request under paragraph 15, when the person having had, for a period of 15 consecutive days from the dates when the person was notified by the requesting country that the person's presence was no longer required in relation to the criminal matter, an opportunity of leaving has nevertheless remained in the requesting country, or having left that country has returned to it; or
 - (b) in the case of a person who has been transferred in response to a request under paragraph 15 and remains in custody, when the person is returned to the requested country.

⁴⁷ Sub-paragraphs 16(6) and (7) of the RHS ensure that the person will not remain in custody after the expiry of his sentence. Sub-paragraph 16(8) is designed to ensure that a person transferred cannot, by reason of his possessing citizenship of the requesting country, prevent his return in due course to the requested country.

⁴⁸ Paragraph 17 of the RHS, like paragraph 27 of the HS, confers on witnesses appearing in response to a request under the Scheme immunity from prosecution in respect of acts or omissions before the date on which they left the requested country and from detention in respect of convictions recorded before that date.

Paragraph 18: Privilege⁴⁹

- (1) In response to a request under this Scheme, no person shall be compelled to give any evidence in the requested country which a witness 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, record, item or other material relevant to a criminal matter.

Paragraph 19: Search And Seizure

- (1) A request under this Scheme may seek assistance in the search for, and seizure of property, including documents, records, items or other material relevant to a criminal matter in the requested country.⁵⁰
- (2) In addition to the information required by paragraph 4, the request shall also specify the property, including documents, records, items or other material relevant to a criminal matter, to be searched for and seized and shall contain, so far as reasonably practicable, all information available to 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 authorisation to effect the search and seizure.⁵¹
- (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 the seizure, and the subsequent custody of the property, including documents, records, items or other material relevant to a criminal matter seized.

49 Paragraph 18 of the RHS replicates paragraph 21 of the HS, subject to minor drafting changes. Paragraph 18 follows other international instruments in allowing claims of privilege by reference to the laws of both the requesting and requested countries. Sub-paragraph 14(2)(f) further requires that a request for assistance in the examination of a witness should specify any provisions of the law of the requesting country relating to privilege or exemption from giving evidence which appear especially relevant to the request. In the end, it will be for the courts in the requesting country to rule on any claim affecting the admissibility of evidence.

50 Paragraph 19 of the RHS replicates paragraph 19 of the HS, but removes the reference to computer data, which is now covered by the term "property". "Property", for the purposes of the Scheme, is further defined as assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and includes legal documents or instruments evidencing title to, or interest in, such assets. Paragraph 19 of the RHS also makes it clear that property will include documents, records, items or other material relevant to a criminal matter. It is important to recall in this context the basic principle that any action under paragraph 19 of the RHS, including measures of compulsion, will be governed by the laws of the requested country. This provision is also subject to the general provisions on cost.

51 Sub-paragraph 19(2) of the RHS refers expressly to the question of warrants or authorisations. The requesting country must provide all available information which might be required in order to obtain the necessary warrant or authorisation to effect the search and seizure. The requested country, having complied with a request, must give any certification needed by the requesting country as to the circumstances of search and seizure and the subsequent custody of the property seized to ensure the admissibility of the resulting evidence.

Paragraph 20: Requests For The Interception Of Postal Items

- (1) A request under this Scheme may seek assistance for the interception of a postal item during the course of its carriage by a postal service and subsequent transmission to the requesting country of the postal item or where appropriate a copy or record thereof.
- (2) The request may only be made where:
 - (a) it appears to the requesting country that there are grounds to suspect that the information obtained pursuant to this interception will be relevant to the commission of a criminal offence in the requesting country;
 - (b) the criminal matter arising in the requesting country is, in the view of the requesting country of a serious character; and
 - (c) it appears to the requested country that there are grounds to suspect that the information obtained pursuant to this interception will be relevant to the commission of a criminal offence in the requested country.
- (3) Investigative activities undertaken pursuant to this paragraph shall take place insofar as they are permissible under the domestic law of the requested country and the duration and the detailed conditions of such activities shall be agreed between the requesting and requested countries.
- (4) Without prejudice to the general grounds of refusal in Part II of this Scheme, the requested country may refuse a request for assistance under this Paragraph and shall be under no obligation to inform the requesting country of the reasons for such refusal.

Paragraph 21: Preservation Of Computer Data

- (1) A request for the preservation of computer data under this paragraph made by an agency or authority competent to make such a request under the laws of the requesting country can be directly transmitted to an agency or authority competent to receive such a request under the laws of the requesting country.⁵²
- (2) A request may be made pursuant to sub-paragraph (1) where it appears to the requesting agency or authority that there are grounds to suspect⁵³ that the preserved computer data may contain information relevant to criminal activities in the requested country.
- (3) In addition to the information required by paragraph 4 of this Scheme, a request for the preservation of computer data shall include:
 - (a) the identity of the agency or authority making the request;
 - (b) a brief description of the conduct under investigation;
 - (c) the identity of the individual whose computer data is to be preserved, or that person's telecommunications address;

52 Sub-paragraph 20(1) aims to ensure that requests for preservation of computer data can be made and fulfilled in an expeditious manner, given that it may be particularly volatile. This is ensured, where domestic law permits, by removing the need to communicate with Central Authorities at this stage. Central Authorities are only brought in subsequently when requests to obtain the preserved information are effected.

53 Given that the content of communications could be preserved pursuant to this paragraph, sub-paragraph 20(2) requires, as a measure to increase privacy safeguards to prevent abuse, that the agency or authority making the request meets a threshold of "grounds to suspect" in order to request the preservation of computer data.

- (d) a statement that the requesting country intends to submit a request under this Scheme to obtain the computer data within the period specified in sub-paragraph (4)(a); and
 - (e) a description of the computer data to be preserved and its relevance to the investigation or prosecution.⁵⁴
- (4) The preservation of computer data pursuant to a request made under this paragraph shall be for a period of one hundred and twenty (120) days.
 - (5) Notwithstanding the general grounds for refusal contained in paragraph 9, a request for the preservation of computer data under this paragraph may be refused only to the extent that it appears to the requested country that compliance would be contrary to its laws and/or constitution, or would prejudice its security, international relations, or other essential public interests.
 - (6) If the requested country considers that the preservation of computer data pursuant to a request made under this paragraph will not ensure the future availability of the computer data, or will threaten the confidentiality of, or otherwise prejudice the investigation in the requesting country, it shall promptly inform the requesting country, which shall then determine whether the request should nevertheless be executed.
 - (7) Where the requesting country submits a request for assistance to obtain the preserved computer data to the requested country's Central Authority before the expiry of that period, the data shall continue to be preserved pending the determination of that request and, if the request is granted, until the data is obtained pursuant to the request for assistance.⁵⁵

54 Sub-paragraph 20(3) includes the required content of requests outlined at Paragraph 4 of the RHS as well as a statement regarding the intention to make a subsequent request to obtain the preserved data. In addition, in order to ensure that there is a proper balance between the ability of law enforcement to conduct effective investigations, and the protection of the reasonable expectations of privacy of individuals, it is important to clearly describe and delineate the data being sought pursuant to a given preservation request. Therefore, sub-paragraph 20(3) also ensures that the telecommunications address belonging to the individual whose data is to be preserved, as well as the identity of that individual (if known) be included in the request for preservation, along with the description of the computer data sought.

55 Sub-paragraph 20(4) aims to clarify the procedure at various stages of the process envisaged by this provision.

Part V

Interception Of Telecommunications And Covert Electronic Surveillance

*Paragraph 22: Scope Of This Part*⁵⁶

- (1) Save in the case of a request falling within paragraph 27, a request for assistance falling within this Part may only be made if it appears to the requesting country that there are grounds to suspect that the information obtained pursuant to this Part will contain information relevant to the commission of a criminal offence in the requesting country.
- (2) A request for assistance falling within paragraphs 23, 25 and 26 of this Part may only be made where:
 - (a) the criminal matter arising in the requesting country is, in the view of the requesting country, of a serious character;⁵⁷ and
 - (b) it appears to the requested country that there are grounds to suspect that the information obtained pursuant to this Part will contain information relevant to the commission of a criminal offence in the requested country.⁵⁸
- (3) Investigative activities undertaken pursuant to paragraphs 23, 25 and 26 of this Part shall take place insofar as they are permissible under the domestic law of the requested country and the duration of such activities, the detailed conditions, and the monitoring and preserving of the product of such activities, where applicable, shall be agreed between the requesting and requested countries.⁵⁹
- (4) Without prejudice to the general grounds of refusal in Part II of this Scheme, the requested country may refuse a request for assistance under this Part and shall be under no obligation to inform the requesting country of the reasons for such refusal.⁶⁰

56 Part V of the RUS reflects the need for the mutual legal assistance regime to effectively respond to current forms and manifestations of transnational crime, including terrorism, and the inextricable linkages to technological innovations. The provisions are largely inspired from the European Union Convention and the Council of Europe Convention on Cyber Crime. Nevertheless, the proposed provisions are envisaged to be of a flexible and enabling nature, in keeping with the overall character of the Scheme. Thus, countries are encouraged, to the extent permitted by their domestic law, to take such measures as may be necessary, to allow for the appropriate use by their law enforcement agencies of the types of assistance contemplated within their jurisdictions and to allow for the admissibility in Court, of evidence derived therefrom. Note that sub-paragraph 7(3)(e) provides that the costs of interception of telecommunications are to be met by the requesting country.

57 This provision reflects the intention of countries that assistance in the interception of communications, which may be intrusive and resource-intensive, should only be requested in relation to the most serious criminal offences. Sub-paragraph 21(1)(a) avoids being prescriptive as to the offences that are to be regarded as of a serious character, but instead accords flexibility to the requesting country to determine in accordance with its domestic law which offences are to be regarded as being of serious character.

58 Sub-paragraph 21(2)(b) reflects the policy direction of Senior Officials at their Meeting in October 2010.

59 Sub-paragraph 21(3) contains important guidance and limitations with respect to carrying out the type of assistance covered under Part V. Moreover, it is noted that such activities need not be "in accordance" with the procedures of the requested country. It will suffice that compliance with the request does not contravene the laws of the requested country.

60 Sub-paragraph 21(4) provides the requested country with a broad and general discretion to refuse requests under Part V. It follows that a request under Part V may be refused where the requested country would not carry out the measure proposed in the request in relation to the criminal matter if it arose in its jurisdiction, for any number of reasons, including in the circumstances where the requested country is of the view that the criminal matter is not considered to be of a serious character under its domestic law.

Paragraph 23: Interception Of Telecommunications

- (1) A request under this Part may seek assistance for the interception of telecommunications.
- (2) A request under this Part may be made where the subject of the interception is in the requested country, and the requesting country needs the assistance of the requested country to effect or facilitate the interception of the subject's telecommunications.
- (3) A request under this Part may also be made where the subject of the interception of telecommunications is in the requesting country and the requesting country needs the assistance of the requested country to effect or facilitate the interception of the subject's telecommunications.
- (4) In addition to the information required by Paragraph 4 of this Scheme, a request under this paragraph shall include:
 - (a) details of any provision of law under which an interception order or warrant for the interception of telecommunications is required in the requesting state and any provision of law which ensures respect for the rights of those whose telecommunications are intercepted;
 - (b) a copy of any related order or warrant obtained, if any;
 - (c) information for the purpose of identifying the subject of the requested interception;
 - (d) information as to the location of the subject;
 - (e) the desired duration of the interception;
 - (f) if possible, the provision of sufficient technical data, in particular the relevant network connection number, telecommunications address or service identifier, to ensure that the request can be executed;
 - (g) the type of telecommunications proposed to be intercepted; and
 - (h) the requesting country's preference as to the form of assistance to be provided by the requested country, being either
 - (i) the interception and immediate transmission to the requesting country of telecommunications; or
 - (j) the interception, recording and subsequent transmission to the requesting country of telecommunications.
- (5) Notwithstanding any preference expressed by the requesting country under subparagraph (4)(h) above, the requested country may comply with a request for assistance under this paragraph by either means.

Paragraph 24: Interception Of Transmission Data

- (1) A request under this paragraph may seek assistance for the interception of transmission data.
- (2) In addition to the information required by paragraph 4 of this Scheme, a request for the interception of transmission data shall include:⁶¹

⁶¹ Sub-paragraph 24(3) specifies the technical and other information required to ensure that an interception of transmission data can be carried out. It also requires certain information with a view to ensuring that the privacy rights of the subjects of the interception of transmission data are

- (a) the identity of the agency or authority making the request;
- (b) confirmation that an investigation is underway, and that the information requested will be relevant to that investigation;
- (c) a brief description of the conduct under investigation;
- (d) the telecommunication address of the individual whose transmission data is to be intercepted and, when known, his or her identity;
- (e) a description of the transmission data to be intercepted and its relevance to the investigation or prosecution;
- (f) the type of telecommunications proposed to be intercepted; and
- (g) the desired duration of the interception.

Paragraph 25: Disclosure Of Intercept Material

- (1) A request under this Scheme may seek assistance for the disclosure of intercept material to the requesting country.
- (2) In addition to the information required by paragraph 4, a request under this paragraph shall include:⁶²
 - (a) confirmation that an investigation is underway, and that the information requested will be relevant to the investigation;
 - (b) information for the purpose of identifying the requested intercept material;
 - (c) the time period for which intercept material is sought;
 - (d) a request for confirmation as to whether or not the intercept material has been edited;⁶³ and
 - (e) a request for a copy of any order or warrant obtained in order to permit the interception, if any.
- (3) Each country is encouraged to adopt such provisions as may be necessary to enable it to comply with such a request.

Paragraph 26: Covert Electronic Surveillance

- (1) A request under this Scheme may seek assistance for covert electronic surveillance.
- (2) In addition to the information required by paragraph 4 of this Scheme, a request under this paragraph shall include:
 - (a) details of any provision of law under which an order or warrant for covert electronic surveillance is required in the requesting state and any provision of law which ensures respect for the rights of those under covert electronic surveillance.⁶⁴

appropriately protected.

62 Sub-paragraph 25(2) was inserted to address some of the privacy concerns associated with the sharing of intercept material.

63 Sub-paragraph 25(2)(d) is intended to cover situations where the intercept material may have been stored in an edited, processed or altered form such as summaries/gists of audio or visual product, still images, printouts of written messages, or transmission data relating to the communication.

64 It is important to note that the information regarding the laws of the requesting country must be provided, even when no warrant or order would be obtained under the circumstances (for instance, in countries where such a process would not be required for the purposes of making a request under the Scheme).

- (b) a copy of any related order or warrant obtained, if any;
- (c) information for the purpose of identifying the subject and location of the requested covert electronic surveillance; and
- (d) the desired times and duration of the covert electronic surveillance.

Paragraph 28: Subscriber Information⁶⁵

- (1) A request for the provision of subscriber information under this paragraph in connection with a criminal matter may be made by an agency or authority competent to make such a request under the laws of the requesting country and may be directly transmitted to an agency or authority competent to receive such a request under the laws of the requested country.
- (2) In addition to the information required by paragraph 4, a request under this paragraph shall include: ⁶⁶
 - (a) the identity of the agency or authority making the request;
 - (b) confirmation that it relates to a duty or function of the agency or authority making the request;
 - (c) information for the purpose of locating the requested subscriber information;
 - (d) one of the name, address, telephone number, e-mail address, Internet Protocol address or any similar identifier associated with the subscriber whose information is sought under this Paragraph; and
 - (e) details of the subscriber information requested.
- (3) Each country is encouraged to adopt such provisions as may be necessary to enable it to comply with such a request.

⁶⁵ Sub-paragraph 27(1) sets out the purpose of the paragraph as a whole, in a manner consistent with that of other paragraphs under this Part. It is important to note that there is no need to involve Central Authorities in making a request for subscriber information given that such information is usually required quickly.

⁶⁶ Sub-paragraph 27(2) sets out the requirements for making a request for subscriber information. In particular, sub-paragraph 27(2)(d) requires the requesting country to provide at least one piece of subscriber information (such as name, or Internet Protocol address) in order to obtain any of the other information available under the paragraph.

Part VI

Asset Recovery⁶⁷

Paragraph 29: Forfeiture And Confiscation

- (1) A request under this Scheme may seek assistance in the identification, tracing, restraining, freezing, seizure, forfeiture and confiscation of proceeds and instrumentalities of crime believed to be within the requested country.⁶⁸
- (2) In addition to the information required by paragraph 4, a request for assistance under sub-paragraph (1) shall also include:
 - (a) details of the property in relation to which assistance is sought, including, where known, the estimated value of the property;
 - (b) the location of the property;
 - (c) the link between the property and any offence in respect of which the request is made;
 - (d) details of any third party interests in the property and any notification provided to the third party by the requesting country; and
 - (e) a certified copy of the relevant court order or decision.
- (3) Each country is encouraged to take such measures as may be necessary to:
 - (a) freeze, restrain or seize property upon receipt of a freezing, restraint or seizure order issued by a court of a requesting country;
 - (b) freeze, restrain or seize property upon receipt of a request that provides a basis for the requested country to believe that there are reasonable grounds for taking such actions and that the property would eventually be subject to an order of confiscation or forfeiture; and
 - (c) preserve property for confiscation or forfeiture.

⁶⁷ Part VI enables co-operation in all aspects of asset recovery arising out of criminal proceedings and extends the scope of the provision dealing with tracing, restraining and confiscating (etc) the proceeds of crime contained in paragraphs 28 – 30 of the HS.

⁶⁸ The assets in question must constitute the proceeds or instrumentalities of crime. It is important to note that "proceeds of crime" include any property, benefit or advantage that is wholly or partly obtained, derived or realised directly or indirectly as a result of the commission of a criminal act or omission; and 'instrumentalities of crime' means any property used, or intended to be used, in connection with the commission of an offence. Although the assets in question must therefore be connected with a criminal offence, there is no requirement that any proceedings in the requesting country for restraint or confiscation should be criminal: the paragraph is intended to cover civil forfeiture proceedings. Nor is there any requirement that the requesting country should have secured a criminal conviction or instituted criminal proceedings against the subject of the request, or that the subject of the request should be the offender (although the rights of bona fide third parties are protected). Similar to the HS, the provision permits both recognition and enforcement of orders made in the requesting country and the making of orders in the requested country (whether or not there is any order in the requesting country).

- (4) Each country is encouraged to take such measures as may be necessary to:
 - (a) give effect to an order of confiscation or forfeiture issued by a court of a requesting country; and
 - (b) allow confiscation or forfeiture of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases as provided by domestic law.
- (5) Before lifting any measures taken pursuant to sub-paragraph (3), the requested country shall, wherever possible, give the requesting country an opportunity to present its reasons in favour of continuing the measure.
- (6) Nothing in this paragraph shall prejudice the rights of *bona fide* third parties, including countries.⁶⁹

Paragraph 30: Return And Disposal Of Property

- (1) Countries are encouraged to conclude agreements for the final disposal of confiscated or forfeited property.⁷⁰
- (2) Countries shall give due consideration to:
 - (a) returning confiscated or forfeited property or the value thereof to the requesting country;
 - (b) returning such property to its legitimate owners; and
 - (c) compensating the victims of the crime.
- (3) The requested country may deduct reasonable expenses incurred in the return or disposal of confiscated or forfeited property pursuant to this paragraph.⁷¹
- (4) The law of the requested country shall apply to determine the circumstances in which property made the subject of interim restraint or seizure as a result of a request therefor may be released from the effects of such restraint or seizure.⁷²

69 It is a matter for the domestic law of countries to provide appropriate safeguards. Provisions in the HS identifying possible domestic safeguards have been removed, it being felt that most member countries now have well-developed statutory regimes in relation to asset recovery so that such guidance is no longer necessary. *Bona fide* third parties may include countries which have an interest in the assets to be confiscated or forfeited, for example because they would also have a right to bring proceedings for confiscation. This provision is drafted to ensure the flexibility for countries, while reflecting the concerns addressed in other international instruments in this regard, such as Article 53(c) of the United Nations Convention against Corruption.

70 This provision is to be read together with Paragraph 6 above, which provides that the law of the requested country governs the execution of any request. However, it also encourages countries to reach agreement as to the disposal of confiscated or forfeited property on a multilateral, bilateral or case by case basis as seems appropriate to them, and in taking into account the interests of those involved.

71 Sub-paragraph 30 (3) deals with reasonable expenses incurred in the return or disposal of confiscated assets, such as costs associated with storage, administration or realisation of confiscated assets. A country would not normally deduct the cost of a domestic investigation or prosecution from assets returned to a foreign country and as a matter of international practice costs of judicial proceedings relating to the execution of mutual assistance requests are borne by the requested party.

72 This paragraph reproduces paragraph 30 (2) of the HS and deals specifically with the issue of release of seized property and the law applicable for that purpose.

Part VII

Miscellaneous Provisions⁷³

Paragraph 31: Transmission And Return Of Documents, Records, Items Or Other Material

- (1) Where compliance with a request under this Scheme would involve the transmission to the requesting country of any document, record, item or other material relevant to a criminal matter, the requested country may:
 - (a) postpone the transmission of such material, where the material is required in connection with proceedings in the requested country, and in such a case, the requested country shall, where appropriate, provide a certified copy of the material, pending transmission of the original; or
 - (b) 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) The requested country shall, as appropriate, authenticate any document, record, item or other material that is to be transmitted by that country.
- (3) Where any document, record, item or other material is transmitted to the requesting country, 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 the requested country has indicated that its return is not necessary.⁷⁴

Paragraph 32: Confidentiality And Limitation On Use Of Information And Evidence⁷⁵

- (1) The requested country shall keep confidential any information which might indicate that a request has been made or responded to.

73 Part VII reproduces paragraphs 10, 11, 12 and 23 of the HS. It is noted that the provisions relating to authentication under paragraph 24 of the HS are removed on the basis that this is a matter best dealt with under the domestic law of the requested country, which, in any case, governs the execution of requests under the scheme.

74 This provision reflects the general principle that the documents, records, items or other material are the property of the requested country and ought rightfully to be returned, unless otherwise stated. However, it is open to Central Authorities to agree to an alternative arrangement between them.

75 Paragraph 32 of the RHS combines paragraphs 11 and 12 of the HS, dealing with confidentiality and the limitation on the use of information or evidence. There is an obvious need for confidentiality in dealing with requests for assistance under the Scheme. Where proceedings have not been commenced, disclosure of the making of a request or of the material supplied in response to it could be prejudicial to either the prosecution agency or the prospective defendant or both. Where proceedings are already underway, similar considerations apply and there is an added danger of interference with the judicial process.

A related safeguard is that the information or evidence obtained by the requesting country may only be used in connection with a matter other than the criminal matter specified in the request with the prior consent of the Central Authority of the requested country. The effect is that while disclosure in criminal proceedings is permitted, that permission is limited to proceedings concerning the criminal matter specified in the request itself. Where the evidence provided reveals the existence of further matters in respect of which criminal proceedings are taken, its use in those proceedings requires the consent of the requested country. This provision serves to protect, inter alia, the 'political offences' exception.

- (2) If the request cannot be executed without breaching confidentiality, the requested country shall so inform the requesting country, which shall then determine whether and the extent to which it wishes the request to be executed.
- (3) The requesting country shall not use or disclose any information or evidence obtained under this Scheme for any purpose, other than for the proceedings stated in the request, without the prior consent of the requested country.
- (4) The requesting country shall comply with any other limitations imposed by the requested country on the use or transmission of the information or evidence provided.
- (5) Unless otherwise indicated by the requested country, when executing the request, information or evidence the contents of which have been disclosed in a public judicial hearing related to the request, may thereafter be used for any purpose.

Paragraph 33: Consultation

The requested and requesting countries shall consult promptly, at the request of either, concerning matters arising under this Scheme.⁷⁶

Paragraph 34: Scheme Not To Cover Arrest Or Extradition

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.

⁷⁶ The Scheme will depend for its success on the level of co-operation between Commonwealth governments in ensuring the enactment of appropriate implementing legislation and between Central Authorities in operating its provisions. Paragraph 33 of the RHS, like its equivalent provision in the HS, underlines this principle by referring to a duty to engage in prompt consultations at the request of another country in relation to matters arising under the Scheme; this should ensure that difficulties are promptly resolved and misunderstandings cleared up.



The Commonwealth