

**I N S I D E****COMMONWEALTH LAW  
MINISTERS MEETING**

- 2 Balancing individual rights with the needs of law enforcement
- 2 Study of new measures to combat money laundering

**LAW REFORM PROPOSALS**

- 3 UK - Fraud and deception

**LEGISLATIVE DEVELOPMENTS**

- 3 Public Interest Disclosure

**CASE NOTES**

- 4 Computer Misuse - Interception of telecommunications
- 5 Corruption - Judicial discretion to admit illegally obtained evidence
- 6 Constitutional Law - balancing of Rights to Fair Hearing and Freedom of Expression
- 7 Production of documents - legal - professional privilege
- 7 Proceeds of Crime - power to release seized funds for legal defence
- 7 Constitutional Law - Election Impropriety

## Commonwealth Law Ministers Meeting: Port of Spain, Trinidad and Tobago

At their meeting in Port of Spain in Trinidad and Tobago, in May this year, Commonwealth Law Ministers recognised the challenge posed to law enforcement agencies by the spread of computer and computer related crime. They agreed that the following actions should be taken:

- (a) distribution by the Commonwealth Secretariat to member countries of material on international developments in the field of high-tech crime, including national laws;
- (b) the Secretariat should seek to co-operate with and, to the extent possible, participate in work of other international organisations in this area;
- (c) the Commonwealth Schemes on the Rendition of Fugitive Offenders and Mutual Assistance in Criminal Matters be reviewed to ensure that they are capable of supporting essential international co-operation to combat high-tech crime; and
- (d) expert volunteers from member countries participate in a group to be convened by the Secretariat with a view to drafting a model law for use by Commonwealth countries. This Group was directed to take into account the work being done in the Council of Europe.

Ministers agreed further that the working group should develop a model law (or were that not feasible a set of principles or guidelines to guide the development and enactment of laws) to:

- (a) criminalise various forms of computer-related abuse;
- (b) ensure that member countries have adequate laws to investigate computer related crime, both domestically and internationally, including search and seizure of computer systems and determining the source and destination of communications; and

that the Group should pay attention to issues relating to the admissibility of computer evidence and make such recommendations consistent with the laws of evidence in member countries as may be appropriate and/or necessary for the modernisation of laws.

**COMMONWEALTH CRIMEWATCH**

Produced by the Commercial Crime Unit of the Commonwealth Secretariat as a service to Member Governments

For further information or copies, please contact: The Editor, Commercial Crime Unit, Legal & Constitutional Affairs Division (LCAD), Commonwealth Secretariat, Marlborough House, Pall Mall, London SW1Y 5HX, United Kingdom  
Tel: +44 (0) 171-747 6417/6240/6423  
Fax: +44 (0) 171-839 3302  
E-mail: d.stafford@commonwealth.int

## The Balance between Individual Rights and Global Interests in International Co-operation to Combat Crime

Ministers received a report of the conclusions and recommendations of the 1998 Oxford Conference on International Co-operation in Criminal Matters, convened by the Commercial Crime and Human Rights Units of the Commonwealth Secretariat's Legal and Constitutional Affairs Division to consider issues referred to the Secretariat by Law Ministers at their 1996 meeting.

Ministers welcomed the production of the Report and proposed publication of the papers presented to the Conference and gave general support to the conclusions of the Conference. It was noted that one of the Conference recommendations (concerning the protection of bona fide third parties in respect of restrained or confiscated property) had already been acted upon in the course of the Meeting.

Ministers asked Senior Officials to consider the Conference Report in detail, and to give specific consideration to the feasibility of adopting recommendations concerning (a) the possible amendment of the London Scheme for the Rendition of Fugitive Offenders so that a requested state would be required to refuse extradition if there were substantial evidence that the return of a fugitive would incur a real risk of a serious violation of a human rights treaty to which the requested state is a party, or to an obligation under customary international law; (b) the possible development of proposals for national laws and any necessary amendments to the Commonwealth Schemes on conditional extradition, and the extension or creation of extraterritorial criminal jurisdiction to permit prosecution in lieu of extradition; (c) the availability of court-based mutual legal assistance channels to the defence; (d) issues relating to privilege, including legal privilege and privilege against self-incrimination; (e) the interception of (and evidence obtained from the interception of) telecommunications and other forms of electronic surveillance; and (f) the taking of personal samples. Ministers asked Senior Officials to advise whether there would be benefit in developing a common Commonwealth approach to any of the other issues identified by participants at the Conference.

## Money Laundering

Ministers took note of the conclusions of two meetings that had examined issues connected with money laundering: a workshop held in May 1998 on money laundering through emerging cyberspace technology, and a joint meeting of Senior Officials of Law and Finance Ministries in London in June 1998.

Ministers also:

- (a) took note of the results of the second self-evaluation of progress in implementation of the 40 Recommendations of the FATF and mandated the Commonwealth Secretariat to undertake such evaluations (in concert with other relevant anti-money laundering organisations) prior to each meeting of Law Ministers;
- (b) expressed their strong support for the initiative of the Government of Tanzania in its efforts to take forward the proposal to establish a regional anti-money laundering group in Eastern and Southern Africa;
- (c) asked Senior Officials to consider and report to them on the question whether or not a Scheme relating to Mutual Assistance Between Business Regulatory Agencies could assist Commonwealth countries in their effort to co-operate to combat abuse of cyberspace and, in particular, to prevent money laundering through emerging cyberspace technology;
- (d) asked Senior Officials to consider the issue of establishing a procedure which will enable criminal proceedings in cyber crime cases to be brought in the most appropriate jurisdiction; and
- (e) asked for the preparation of a report for their next meeting on the international law and sovereignty issues which arise when computer search techniques result in cross border investigative action.

Information on the draft U.N. Transnational Organised Crime Convention can be found on the web at:  
<http://www.ifs.univie.ac.at/uncjin/uncjin.html>

**United Kingdom Law Commission:  
Legislating the Criminal Code - Fraud and  
Deception**

Consultation Paper No. 155 dated 27 April 1999 was issued by the UK Law Commission following a reference by the Home Secretary who asked that the Commission, as part of its work on dishonesty, examine the law on fraud and in particular consider whether it

- is readily comprehensible to juries;
- is adequate for effective prosecution;
- is fair to potential defendants; and
- meets the needs of developing technology including electronic means of transfer.

The Commission was asked to make recommendations for improving the law and to consider whether the creation of a general offence of fraud would improve the criminal law.

The Law Commission considered the current law on theft, deception, conspiracy to defraud, fraudulent trading and cheating the revenue and considered whether, in the current state of the law, the problem identified in *Preddy* [1996]AC 815 in relation to bank accounts extends to the obtaining by deception of instrument or rights to instruments traded in financial markets.

The Report outlines cases for and against a general fraud offence, a general dishonesty offence and a general deception offence. In considering a general "dishonesty" offence, the Commission dealt with the issue whether such an offence would be insufficiently certain to satisfy the requirements of the European Convention on Human Rights as incorporated into English law.

The provisional conclusions of the Report include recommendations that:

- gaps in the coverage of existing deception offences should be closed by specific extension of the existing offences in the areas of obtaining property by deception and obtaining services by deception;
- the need to prove dishonesty as a separate element in deception offences should cease;
- the current law of deception is ill-suited to charging the fraudulent use of credit, debit and cheque cards and should be revised; and
- technological changes, particularly use of the internet, mean that it is possible to fraudulently obtain services without deceiving a human mind and accordingly that the offence of theft should be extended to cover this situation (or that a theft-like offence should be created to deal with this situation).

**L E G I S L A T I V E   D E V E L O P M E N T S**

**UNITED KINGDOM: Public Interest  
Disclosure Act 1998**

This Act is intended to protect employees who disclose information about certain types of matters, from being dismissed or penalised by their employers. It is inserted into and forms part of the Employment Rights Act of 1996.

Section 1 introduces Part IV A headed "Protected Disclosure", into the 1996 Act.

For disclosure to be protected under the Act ("Qualifying Disclosure"), it must tend to show one of the following:

- " (a) that a criminal offence has been committed, is being committed or is likely to be committed,

- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
- (d) that the health or safety of any individual has been, is being or is likely to be endangered,
- (e) that the environment has been, is being or is likely to be damaged,
- (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."

It is immaterial that the criminal offence referred to in paragraph (a) was committed outside the UK

or that the criminal law infringed is not a UK law. It is important that the disclosure be made in good faith and not for personal gain.

An employee (or "worker") is protected from any detriment (in the form of an act or omission on the part of his employer) on the ground that he has made a protected disclosure. This right is enforceable by complaining to the Employment Tribunal.

A dismissal (be it outright or under the guise of redundancy) for making a protected disclosure is treated as unfair dismissal and the same remedies are available to aggrieved persons.

The Act also amends section 237 of the Trade Union and Labour Regulations (Consolidation) Act by adding "protected disclosure cases" to the list of cases to which the exclusion of the right to complain of unfair dismissal do not apply.

**Comment:**

*For the purposes of the criminal law, the many cases to which this Act apply would include the protection of whistleblowers in the financial services sector, employees of businesses which are used as fronts for more illegitimate affairs like drug trafficking and money laundering, etc.*

## CASE NOTES

### **Crime - Computer Misuse - Interception of telecommunications - Admissibility of printouts from logging device - Interception of Telecommunications Act, ss. 1(1),(3)(a) & 9; Computer Misuse Act 1990 - Words and Phrases "Prosecutor" - Limitation Period (UK)**

The defendant was charged in the magistrate's court with 5 offences of obtaining unauthorised access to a computer system contrary to section 1(1) of the UK Computer Misuse Act 1990 and two offences of fraudulent use of a telecommunications system contrary to section 42 of the UK Telecommunications Act 1984. He was convicted. He appealed to the Crown Court which dismissed his appeal. He further appealed by way of case stated.

The brief facts leading to the case were as follows:

The defendant was suspected of using a public telecommunication system for the purpose of hacking, i.e., obtaining unauthorised access to computer systems. The police then fitted a logging device called 'monologue' to the defendant's telephone, from which was printed information on the times and dates of use of the telephone, duration of the calls, and the numbers dialled. By comparing this information with the computer printouts of the telecommunications network of three companies, it was found that the defendant's telephone was used to access the computer-controlled networks of those companies and use them to make telephone calls at the expense of the companies. Most of the calls were traced to the Philippines from where the defendant's wife came. The trial court rejected the defendant's explanation that he was innocently using a

number given to him by a friend to obtain reduced charge calls and found that he in fact knew that his access enabled him to dishonestly avoid paying for the calls he made.

The defendant had argued on appeal that section 9 prohibited the court from allowing in evidence the product of the interception of the defendant's telephone because to do so would be to adduce evidence that suggested an offence under section 1 of the Act. The defendant had also queried the Magistrate's decision that for the purposes of the Computer Misuse Act, the "prosecutor" did not include the police who charged the defendant but referred only to the Crown Prosecution Service; and that the prosecution was brought within the time limit envisaged by the Act.

The issues for determination by the court on the case stated were threefold:

- (1) Was the court right to rule that section 9 of the Interception of Telecommunications Act 1985 did not preclude it from receiving in evidence the printouts from the logging devices placed on the defendant's line?
- (2) Was the court right to hold that the 'prosecutor' for the purposes of the Computer Misuse Act was the Crown Prosecution Services, and that therefore the charges were brought within the time limit set out by that Act?
- (3) Did the time limit start to run from when the evidence came into the possession of the prosecutor or from the time he gave his opinion that there was evidence to proceed?

➡ **Held:** Allowing the Appeal;

1. Section 9 of the Interception of Telecommunications Act did not preclude the Crown Court from receiving in evidence the printouts from the logging device on the defendant's telephone. Section 1(2) provides that

*"a person shall not be guilty of an offence under this section if-(a) the communication is intercepted in obedience of a warrant issued by the Secretary of State under section 2 below; or (b) that a person has reasonable grounds for believing that the person to whom, or by whom, the communication is sent has consented to the interception".*

It is only in respect of cases in which warrants are required to be obtained, that an objection on the grounds of inadmissibility may be raised; (*R v. Owen* [1999] 1 W.L.R.949). The present case did not fall within that category and the printouts were therefore admissible.

2. In the peculiar facts of this case, it could not be said that the Crown Prosecution Service was the "prosecutor" for the purposes of section 11 of the Computer Misuse Act 1985. "Usually any person actively involved in making or prosecuting a charge is deemed to prosecute it", and in this case the police officer who charged the defendant was a prosecutor.

3. The requirement that a prosecution under the Computer Misuse Act shall not be brought more than three years after the commission of the offence, is a departure from the normal requirement that summary prosecution should be brought within six months; it is therefore a provision in favour of the prosecutor and should be construed strictly. Time began to run when the detective constable had all the material on which the prosecution was eventually brought.

Convictions on the Computer Misuse Act offences quashed.

*Morgan v. D.P.P.* [1999] W.L.R. 968.

### **Corruption - illegally obtained evidence - whether trial judge should have exercised discretion to exclude. Sections 7 & 121 of the Criminal Code (Queensland - Australia)**

The appellant was a police officer in the Gold Coast area of Queensland. He was prosecuted for the following offence: "being a person employed in

the public service, corruptly agreed to receive a benefit, namely \$3000, on account of his afterwards doing an act with a view to the protection of an intended offender from detection contrary to section 121(1)(a) of the Criminal Code". He was convicted. The evidence against him was that he had agreed with one Evans who happened to be an operative of the Criminal Justice Commission, that he would provide protection to Evans against detection by the police for drug trafficking. Evans had been informed by a drug dealer that she enjoyed police protection. Evans mounted investigations and the trail led to the appellant. Evans posed as a drug dealer and it was agreed between the two of them that Evans would telephone the appellant before engaging in any drug activities and the appellant would give the signal whether or not to go ahead. Evans tape-recorded their conversations.

At the trial, defence counsel sought to exclude the evidence of the agreement between Evans and the appellant. The trial judge however, admitted the agreement into evidence.

The appellant appealed to the Supreme Court of Queensland, against his conviction, contending that the trial judge was wrong in not excluding the evidence of the agreement because the agreement was obtained illegally and consequently, the trial judge should have exercised his discretion to exclude it from the trial.

Counsel for the appellant argued that:

- (1) the Criminal Justice Commission was not empowered to carry out investigations of suspected misconduct unless there was a suspicion that a known person had engaged in official misconduct. In this case the appellant was not under such suspicion and the provisions of the Criminal Code did not therefore apply to him;
- (2) the provisions did not authorise the instigation of misconduct by a member of the police service and Evans' action in making the offer was therefore illegal and constituted an offence under section 121 (1)(b) which forbids the corrupt offer of any benefit to a public officer in order to induce him to act corruptly;

⊖ Held: dismissing the Appeal.

1. It is too narrow a construction of the words "suspected misconduct by members of the police service" to say that the appellant should have been under suspicion before he could have been

investigated. The words were capable of including and should be construed to include "a reasonable suspicion of misconduct by one or more members of the police service notwithstanding that no specific police officer can be identified as the subject of that suspicion and the phrase "investigation of official misconduct" should be construed to include the investigation of any such suspicion"

2. The court would not decide on the illegality of Evans' actions because full arguments were not heard on the point. It was also unnecessary to do so because the Court's opinion was that the trial judge rightly exercised his discretion to admit the evidence complained about. The illegality by Evans could not be said to be so grave or so calculated that considerations of public policy should require its exclusion. "Plainly the assumed illegality here was deliberate. But the only reasonable inference open on the evidence was that, far from being an entrapped unwary innocent, ... the appellant was a police officer to whom a trail of corruption led, and who had made known his availability to provide protection to a drug dealer for money. It was then probably impossible to expose his corruption without making a corrupt offer to him. Considerations of public policy in this case required admission of the evidence of his corrupt agreement".

*R v. Swift* [1999]; Supreme Court of Queensland CA No. 295 of 1998.

### **Constitutional Law : balancing of Right to Fair Hearing with Freedom of Expression - Pre-trial adverse publicity - Application for stay of Proceedings - Constitution of Zimbabwe 1979. (Zimbabwe)**

The applicant was a former president of Zimbabwe, a religious leader and a renowned academic. He had received various honours and acted in various capacities in the international arena. He was thus a very well-known public figure.

In a trial of D for murder, it was alleged (by D) that he had committed the crime under some form of diminished responsibility brought upon him by repeated homosexual abuse which he suffered at the hands of the applicant in the many years that he (D) served as the applicant's aide-de-camp. This allegation received a lot of media publicity and further allegations of similar nature were made by others against the applicant. Consequent upon D's statement in court, the trial judge

recommended that the Attorney General launch a full inquiry into the allegations. Following police investigations, the applicant was charged with sodomy and indecent assault.

He brought the present application seeking a permanent stay of prosecution of the charges. He contended that there was a real risk that he would not receive a fair trial as a result of the adverse media publicity and also because of some of the statements made by the prosecution at the opening of the case against him.

➊ **Held:** Dismissing the application;

1. The right to fair hearing is the cornerstone of the legal system, and is intended to protect both the accused and society in general. Freedom of expression (the press) is also crucial to the public nature of the administration of justice. Although it is not the function of the courts to act as censors, it may sometimes be necessary to avoid a situation where media coverage adversely influences or trespasses upon the proceedings or the judicial officer trying them. Where media reporting of a judicial process, or in advance of it, is so irresponsible and prejudicial as to render the unfairness irreparable and the administration of justice impossible, the court will have no option but to grant a stay of proceedings.

2. Because the applicant is a person of high public standing, it was not surprising that the case against him received greater media coverage than cases against more ordinary members of the public.

3. Having established that there was pre-trial publicity that was adverse against the applicant, the question to be asked was whether it was of such magnitude as "very effectively to poison the fountain of justice before it begins to flow" (Wills, J. in *R v. Parke* [1903] 2 KB 432, at 438). A person who pleads prejudice as a result of pre-trial publicity must establish on a balance of probability that there is a real or substantial risk of partiality. This test is satisfied only when the safety mechanisms built into the judicial system to ensure impartiality, become inadequate for a fair trial to be rendered impossible of attainment. Although judges are mere mortals with human frailties, yet the possibility was very remote for a judge "imbued with basic impartiality, legal training and power of objective thought", to be either consciously or unconsciously, influenced by matters which are extraneous to the issues before him. The basis on which the assessors who sit with the judge are selected are also such that they are able to disabuse themselves of information which

they are not entitled to consider. There was therefore little possibility that the judge and assessors would be affected by the extensive media coverage of the allegations surrounding the applicant.

4. The applicant had failed to establish that there existed a real or substantial danger that he would not be afforded a fair hearing before the High Court on the charges he faced

*Banana v. Attorney General of Zimbabwe*, [1999] 1 LRC 120.

**Evidence: Production of documents - whether record of client's visit to solicitor subject to legal professional privilege - Police and Criminal Justice Act 1984, section 10(1) - (UK)**

R was interviewed by police in respect of a charge of serious assault. He refused to answer questions posed by the police. The police knew that prior to the interview he had visited a solicitor. They sought to obtain the production of the record of R's visit to the solicitor. The order was granted, but the solicitor's reply was that there was no such document. The police further sought and obtained a clarified order which listed the specific documentation required from the solicitor.

R then applied for judicial review of this further order contending that the documents were subject to legal professional privilege under section 10(1) of the Police and Criminal Justice Act 1984.

☛ **Held:** refusing the application;

While the courts would interpret section 10(1) broadly, they could not extend the privilege beyond communications made in connection with the giving of legal advice. The record of a client's visit was not a communication. Moreover, it was possible for a document to be partially subjected to legal professional privilege; all that needed to be done was to blank out the part of the document that was subject to protection and to produce the rest.

In this case the nature of the documents required was such that they were not subject to the legal professional privilege, since they only related to the record of the client's visit and not to any communication between solicitor and client; they could therefore be produced.

*R v. Crown Court at Manchester, ex parte R (Legal Professional Privilege)* Times, 15 February 1999. - (QBD)

**Proceeds of Crime (Drug Trafficking) - seizure by Customs Officers - whether Magistrate empowered to allow part release to fund legal defence - s.42 Drug Trafficking Act 1994 - (UK).**

H was arrested by officers of the Department of Customs and Excise, just as he boarded a flight from the UK to Columbia. He was found to be in possession of a large amount of cash, suspected of being the proceeds of drug trafficking. The money was seized from him and detained for three months by order of a magistrate. At the expiry of the three months, a further detention order was made for another three months. H applied and was allowed to have his legal expenses paid from the money that was being detained by the Commissioners of Customs and Excise.

The Commissioners appealed against the decision of the magistrate allowing H to pay for his defence from the seized funds.

☛ **Held:** allowing the appeal;

Where money was seized under section 42 of the Drug Trafficking Act of 1994, a magistrate did not have jurisdiction to order that part of it be released for purposes of allowing the person from whom it was seized to pay for his legal defence. The Magistrate was therefore wrong to have made such an order.

*Customs and Excise Commissioners v. Harris*; Times 24 February 1999, QBD.

**Constitutional Law - Elections - allegations of impropriety involving bribery and corruption - Election Act 1991, s.18 (Zambia)**

This petition was filed to contest the election of Frederick Chiluba to the presidency of the Republic of Zambia, in November 1996. The petition alleged inter alia, corruption and bribery on the part of the respondent (President Chiluba), some members of his party and some government officials. Some of the evidence alleged that cash gifts were given to members of the public in a particular District (Chongwe) by some government ministers. The petitioners also alleged that council houses were sold at a discount just before the elections to lure people to vote for the respondent. Government ministers also did

other seemingly philanthropic acts, such as giving boats and other gifts to people in order to get them to vote for the respondent. These latter acts, the petitioners alleged amounted to "treating".

At trial the Court found that the evidence proved:

- (1) that the programmes for the sale of the council houses had started long before the elections, although the actual sales may have helped the campaigns;
- (2) that there was "treating" as alleged;
- (3) that there were cash gifts to some voters which would amount to bribery and corruption.

➔ **Held:** (inter alia) Dismissing the application;

1. The question to be asked, in relation to the selling of the houses was whether the government's exercise which was taken advantage of, could amount to the corrupt practice of bribery envisaged in regulation 51 of the Electoral (General) Regulations, so as to be caught by the spirit of section 18 of the Elections Act? The answer was that the activities complained of did not fall within the ambit of the Regulations. Also,

it was extremely doubtful that the house sales could have significantly affected the result of the elections in a nation-wide constituency.

2. As to the "treating" issue, it should be borne in mind that the constituency for the presidential elections was national and the "treating" established could not have prevented the majority of voters in the country from electing the candidate they preferred.

3. The timing of public philanthropic gifts must have had some influence on the affected voters yet the regulations are silent on such matters and on any possible improper donations when not directed at individual benefits. "As at the present moment, public philanthropic activity is not prohibited by the regulations and we can do no more than urge the authorities concerned to address this lacuna so that there can be a closed season at election time for any activity suggestive of vote buying including any public and official charitable activity involving public funds and not related to emergencies or any life-saving or life threatening situations."

*Lewanika and Others v. Chiluba*, [1999] 1 LRC 138.

## INTERNATIONAL ASSOCIATION OF PROSECUTORS 4TH ANNUAL CONFERENCE AND GENERAL MEETING

5-10 September 1999

The Supreme People's Procuratorate of the Peoples Republic of China will host the 4th Annual Conference of the International Association of Prosecutors in Beijing, China from 5 - 10 September 1999. This year's Conference will concentrate on the subjects of **fraud and corruption**.

This valuable Association, with which the Commonwealth Secretariat maintains close links, is of great value to prosecutors. Its Constitution provides that its objectives include the promotion of effective and efficient prosecutions of the highest standard; the assistance of prosecutors in dealing with organised and international criminal activity, the exchange of information and the study of comparative criminal law and procedure. Membership can be on an individual, association or prosecution services basis.

More information on membership and on the 1999 Conference is available from:

Barry Hancock,  
General Counsel, International Association of Prosecutors  
P.O. Box 26508, LONDON SE3 7WN, UK  
Fax: 44 181 853 1868  
E-mail: hancockiap@aol.com