

## **Mutual Assistance:**

In relation to the Scheme on Mutual Assistance in Criminal Matters (the Harare Scheme) Ministers adopted the following amendments to paragraphs 27 and 28 of the Scheme:

### **AMENDMENTS TO THE HARARE SCHEME ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS**

#### **Paragraph 27 of the Scheme**

Add after sub-paragraph (5) a new sub-paragraph as follows:

The law of the requested country may provide for the protection of the interests of bona fide third parties in property restrained or confiscated as a result of a request made pursuant to this Scheme, by providing:

- (a) for the giving of notice of the making of orders restraining or confiscating property; and
- (b) that any third party claiming an interest in property so restrained or confiscated may make an application to a court of competent jurisdiction for an order
  - (i) declaring that the interest of the applicant in the property or part thereof was acquired bona fide; and
  - (ii) restoring such property or the value of the interest therein to the applicant.

#### **Additional material added to the commentary on Paragraph 27**

Paragraph (6) was added in 1999 to meet the concerns of member countries that the Scheme may not adequately reflect the intention that the interests of bona fide third parties in restrained or confiscated property. The provision is intended to operate for the benefit of bona fide third parties **in the requested country**. The law of the requesting country is expected to deal with these interests where the third party's interest is one which ought to be protected under that law. Nothing in this new paragraph is intended to facilitate review by a foreign court of the order itself - it merely recognises that in the requested country, claims of bona fide interests not brought to the attention of the court making the order may exist and may need to be adjudicated.

#### **Paragraph 28 of the Scheme**

Add after sub-paragraph (2) a new sub-paragraph as follows:

- (3) *The law of the requested country may provide that the proceeds of an order of the type referred to in sub-paragraphs 27(2)(b) and (c), or the value thereof, may be*
  - (i) *returned to the requesting country; or*
  - (ii) *shared with the requesting country in such proportion as the requested country in its discretion deems appropriate in all the circumstances.*

## **Additional material added to the commentary on Paragraph 28**

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

### **Resource Implications of Mutual Assistance**

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

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

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

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

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

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

1. Where the execution of a request for assistance requires that the requesting country be represented before the courts of the requested country and where the human resources available to the Central Authority of the requested country are insufficient to meet that requirement, the Central Authority of the requested country may brief an appropriate member of the private profession to represent the requesting country on its behalf. In such case the [Attorney-General] shall use his or her best endeavours to ensure that the person so briefed has no conflict of interest and that the best interests of the requesting country are protected.
2. Where a request for assistance requires that voluminous or complex documentary or other records be located and retrieved and where the human resources available to the Central Authority of the requested country are insufficient to meet that requirement, the Central Authority of the requested country may secure the services of appropriate specialists to undertake the work necessary to respond to the request. In such case the Central Authority shall use its best endeavours to ensure that the persons whose services are secured have no conflict of interest and that the best interests of the requesting country are protected.

3. Where the Central Authority of the requested country is of the opinion that the circumstances described in paragraphs 1 and 2 above exist, it shall, before proceeding to secure non-government persons to perform the functions, consult with the requesting country on the proposed action and secure, if necessary, the agreement of the requesting country to pay for the services so contracted for on its behalf, subject to any conditions with respect to the control of costs or of the conduct of the matter agreed by both countries.
4. Where a request for assistance requires the taking of action by police officers in the requested country and the Central Authority of that country is of the opinion that such action would so divert the available police resources as to cause prejudice to the peace of the country the request may be refused.
5. Where a request for assistance seeks the making or enforcement of an order restraining dealings with any property in respect of which there is reasonable cause to believe that it has been derived or obtained, directly or indirectly, from, or used in, or in connection with, the commission of an offence and where the law of the requested country would permit any person with an interest in such property to take action for damages arising from such restraint in the event that the property was not later the subject of an order confiscating it the requested country may, if it considers it appropriate, require from the requesting country an indemnity against any loss incurred by the government of the requested country as a result of such action being successful.
6. In reaching any agreement on the apportionment of costs, the ability to share forfeited or confiscated assets or the existence of any asset sharing agreement between the relevant countries shall be taken into account.
7. Nothing in these guidelines shall be interpreted as detracting from the requirement contained in Clause 12 of the Harare Scheme that countries consult in cases where the requested country is of the opinion that the expenses required in order to comply with a request are of an extraordinary nature.