

Commonwealth Legal Assistance News



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Contributions

One of the essential elements of programmes of mutual legal assistance is the ability of officers in one country to have very ready access to information in other countries. CLAN tries to aid this process. Please help us by sending in details of your new laws, your cases, the names of officers in your Central Authorities or any other information which will help your colleagues.

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CHOGM & INTERNATIONAL CRIME

Following their Cyprus meeting Heads of Government referred various issues to Law Ministers for further work. An early opportunity to give practical effect to the hopes expressed in the Cyprus Communiqué will come when Law Ministers meet in Mauritius this month.

Money Laundering

Commonwealth Heads of Government identified money laundering as a serious threat to financial systems worldwide and agreed that the Commonwealth should support enhanced international co-operation to combating it. They commended the 40 recommendations drawn up by the FATF and urged their early implementation. In so doing they invited Law Ministers to examine how Commonwealth countries can work collectively to combat the laundering of the proceeds of all types of serious crime.

International Co-operation

CHOGM also invited Law Ministers to consider appropriate methods of enhancing international co-operation to combat commercial and other white collar crime and, in welcoming the work of the International Law Commission on the establishment of an International Criminal Court, requested the Ministers to undertake further consideration of the issues involved in the proposal. Member countries are urged to implement the Commonwealth Scheme for Mutual Assistance in Criminal Matters.

MUTUAL ASSISTANCE IN CRIMINAL MATTERS

Jersey

The Commercial Crime Unit has been provided with guidance on the making of requests of Jersey for assistance in the investigation and prosecution of offences. The following information gives details of the relevant laws of and addresses for Jersey. The CCU or the Jersey police can provide more information (on request) as to the contents of requests and other relevant matters. Jersey law and practice requires that specific information be provided in support of requests and prior consultation is highly recommended.

The United Kingdom Criminal Justice (International Co-operation) Act 1990 does **not** extend to Jersey and accordingly foreign agencies wanting to obtain evidence or assistance with investigations must do so in accordance with the relevant Jersey laws. For most purposes these laws are:

- (a) Evidence (Proceedings in other Jurisdictions) (Jersey) Order 1983
- (b) Investigation of Fraud (Jersey) Law 1991
- (c) Drug Trafficking Offences (Jersey) Law 1988
- (d) Companies (Jersey) Law 1991.

The *Evidence (Proceedings in other Jurisdictions) (Jersey) Order 1983* extended the application of the 1975 UK Act to Jersey. Despite the repeal of the UK legislation the Jersey Order made under it remains in force and can be used to compel the giving of evidence in cases where the accused has been charged with an offence or, at minimum, where a warrant of arrest has been issued.

The *Investigation of Fraud (Jersey) Law 1991* provides power to the Attorney-General to require the production of documents, their copying and the provision of explanations regarding them by the person producing in cases where:

- (a) there are reasonable grounds to suspect an offence involving "serious or complex fraud wherever committed" (serious fraud defined as a minimum of £2million), and
- (b) there is good reason to do so.

The Attorney-General will require the giving of certain undertakings before granting assistance under this law. Requests should therefore come from a central authority or another person sufficiently empowered to give (and enforce) confidentiality or use undertakings. The States of Jersey Police will, where possible, give assistance and advice to those contemplating making requests. Consultation with local authorities is encouraged before requests are made.

Under the *Drug Trafficking Offences (Designated Countries and Territories) Jersey) Regulations 1991* it is possible to obtain a **saisies judiciaires** which is the equivalent of a restraint order in the UK. Preconditions must be satisfied before the Attorney-General can consider a request for a restraining order. Among these are that the application for assistance come from a designated country, proceedings must have been (or be about to be) instituted and a confiscation order must have been (or be likely to be) made in the proceedings. Affidavit evidence is required in support of the application for assistance.

Requests for the granting of assistance under these laws should be addressed to:

Her Majesty's Attorney-General
Crown Offices
Royal Court House
St Helier
JERSEY JE1 IDD

The *Drug Trafficking Offences (Jersey) Law 1988* permits the Jersey authorities to assist in the provision of evidence in drug trafficking cases. Evidence is obtained by way of a production order obtained by the Jersey Police on behalf of the requesting country. Requests for assistance must be supported by affidavit evidence and should be made to:

The Drug Trafficking Offences Investigation Unit
Police Headquarters
Rouge Bouillon
St Helier
JERSEY JE2 3ZA

The *Companies (Jersey) Law 1991* does **not** require private companies to:

- (a) specify the details of their directors;
- (b) give details of company accounts; or
- (c) disclose beneficial ownership.

In relation to private companies, investigators can only expect to be able to obtain details of nominal capital, issued share capital and share holder who will usually be nominees.

Public companies, in addition to filing the details required of private companies, are required to supply copies of accounts and to disclose details of all their directors.

Requests for company searches should specify whether the documents required are to be used in evidence (ie need to be certified) or are required for information. Search requests simpliciter can be directed to:

States of Jersey Police, Commercial Branch,
Police Headquarters,
Rouge Bouillon,
St Helier,
Jersey JE2 3ZA.

Where the information required from the Registrar of Companies is not available as a matter of public record a local production order will need to be obtained under one of the enabling pieces of legislation listed above and accordingly the request should comply with the requirements of the relevant law. Requests for orders for production of company papers should be directed to BOTH:

The Registrar of Companies
Financial Services Department
P.O. Box 267
The Parade
St Helier
JERSEY JE4 8TZ

AND

The Director
Financial Services Department
P.O. Box 267
The Parade
St Helier
JERSEY JE4 8TZ

who may each hold different information relating to companies and hence a request addressed to only one may not provide all possible information.

Tanzania

In Issue 1 of CLAN we listed those Commonwealth Countries which had, to our knowledge, enacted mutual assistance legislation. Unfortunately from that list we omitted **Tanzania**. That country has the Mutual Assistance in Criminal Matters Act 1991 and the Proceeds of Crime Act 1991. The **Central Authority for Tanzania** is:

The Attorney-General
Attorney-General's Chambers
Ministry of Justice and Constitutional Affairs
P.O. Box 9050
DAR ES SALAAM, TANZANIA
Facsimile: (255) 46670: Telex: 41810 LEGAL

Switzerland

The Swiss legislation governing mutual assistance is the Act on International Mutual Assistance in Criminal Matters (IMAC) of 1983. It permits Swiss authorities to assist foreign countries in the investigation and prosecution of offences whether or not an international agreement exists between Switzerland and the requesting country. Where no agreement exists IMAC comprehensively governs the subject.

The Federal Office for Police Matters supervises the enforcement of the IMAC. It will provide advice foreign ministries of justice seeking to make mutual assistance requests to ensure compliance with Swiss law. That Office has provided the CCU with material which describes the operation of the Swiss law and copies of this documentation is available from the CCU. Briefly summarised the Swiss requirements and rules are as follows.

In the execution of requests Swiss authorities will meet the legal requirements of the requesting state **unless** those requirements conflict with Swiss law or cause essential disadvantage to the persons involved.

Requests for assistance from the majority of countries should be made through the diplomatic channel although the Federal Office for Police Matters may receive requests directly from the ministry of justice of the requesting state. Requests should be accompanied by a translation into the official language of the Canton in which the request will be executed.

There are a number of grounds upon which Swiss authorities may refuse to grant a request for assistance. Briefly they are:

- (a) failure to give a guarantee of reciprocity (where there is no treaty);
- (b) the request relates to a political offence or an offence of a political nature;
- (c) there is a grave defect in the foreign procedure such as a violation of fundamental human rights or freedoms or in the detention or trial procedure in the requesting state;
- (d) the request relates to a military offence which is not also a criminal offence;
- (e) where the request relates to a fiscal offence;
- (f) where there is/would be breach of the ne bis in idem rule.

The issue of whether the acts or omissions which are the subject of the criminal offence being investigated or prosecuted constitute a fiscal, political or military offence is a complicated one. To quote the Swiss guidelines:

"If according to the account of the relevant facts contained in the request, ordinary criminal offences have been committed in connection with fiscal, political or military offences, assistance will be granted on condition that the results of the enquiries carried out in Switzerland will only be used for investigating or prosecuting the ordinary criminal offence. Assistance is excluded if in such cases punishment would be imposed only for the special (fiscal, political or military) offences because they encompass all the elements of the criminal offences and actually take precedence over them."

Requests to Switzerland must include:

- (a) a statement of the basis for making the request (treaty or undertaking as to reciprocity);
- (b) name of requesting authority and of the investigating and/or prosecuting authority;
- (c) a clear statement of the object of the request;
- (d) identification of the target of the investigation or subject of the proceeding;
- (e) summary of the facts of the case and of the law creating the alleged offence;
- (f) reason for the request i.e. the link between the request and the investigation/prosecution;
- (g) statement of procedure to be followed in executing request including text of relevant law;
- (h) list of persons needing to be present at the execution of request and reasons for the need

Countries wanting specific assistance may approach the Division of International Legal Assistance and Police Matters, in particular the International Legal Assistance Section. The Address is Federal Office for Police Matters, Bundesrain 20, 3003 Berne, Switzerland. Telephone 61-43-39.

EXTRADITION CASE NOTES

Extradition - Abuse of Process - Application of the Rule in Ex parte Bennett in the Requested State

In 1992 the States of Jersey issued a warrant for the arrest of a man accused of murdering a person five years earlier and were seeking his return to face trial. The fugitive was on a vessel on the high seas when intercepted by British naval vessels carrying police officers from both Jersey and Gibraltar. He was arrested, on the basis of the Jersey warrant, by an officer of the Jersey Police and later re-arrested on the basis of a Gibraltar provisional warrant issued pursuant to the Fugitive Offenders (Gibraltar) Order 1967 as he was being conveyed on the naval vessel to Gibraltar. The fugitive alleged that he was kidnapped or hijacked by the armed services and the two police forces and sought first the issue of a writ of habeas corpus and, in this case, an out of time application for leave to apply for judicial review of the magistrate's decision.

Held: the decision of the House of Lords in *R. v. Horseferry Magistrate's Court; ex parte Bennett* does not apply to extradition proceedings in a Requested State. In extradition proceedings compliance with the extradition law is the only criterion - in this case compliance with the Fugitive Offenders (Gibraltar) Order - and extradition procedure is unlike concepts appropriate to local criminal procedures. The Requesting State has *locus standi* in the matter. The application for leave was refused.

R. v. The Stipendiary Magistrate; ex parte Newall (Supreme Court of Gibraltar, judgment delivered 7 October 1993)

Extradition - Pre-trial Discovery - jurisdiction of the court to order discovery - Fugitive Offenders Act 1881, s.5

The fugitive was arrested in New Zealand pursuant to an application from Hong Kong for his surrender to face various charges of conspiracy to defraud and obtaining by deception. During the course of proceedings the fugitive sought from the Government of Hong Kong a large number of documents seized pursuant to a search warrant issued in the Crown Colony. The legal representative refused access, inter alia, to the documents and accordingly application was made to the District Court for an order to produce.

Held: Extradition proceedings are limited. The court is not required to make any final decision on the charges or any final conclusion as to guilt or innocence of a fugitive. It follows that the court need only consider whether the evidence before it raises a strong or probable presumption that the plaintiff committed the offences - in other words whether there is a strong or likely inference from the facts produced that the plaintiff committed the offences. The law on pre-trial discovery is not directly applicable in extradition proceedings. There is no jurisdiction for a district court to order general discovery in an application for extradition of the nature involved in this case.

Flickinger v. Crown Colony of Hong Kong & Anor [1991] Law Reports of the Commonwealth (Crim) 77 (High Court of New Zealand)

Citations for previously noted cases

CLAN Issue No 1 noted the case of *R. v. Metropolitan Stipendiary Magistrate, ex parte Lee*. The decision of the Queens Bench Division is now reported at [1993] 1 WLR 1294.

MUTUAL ASSISTANCE CASE NOTES

Proceeds of Crime - Registration of Foreign Orders - Enforcement where subject dies

In 1989 a grand jury in the United States indicted Jose Gonzalo Rodriguez-Gacha for a series of drug trafficking offences. Later that year the United States applied to the United Kingdom for the issue of restraining orders in respect of certain bank accounts held by Rodriguez-Gacha in Britain. Those orders were issued and accounts frozen. In November 1989 the accused was shot and killed. The question arose whether, in the absence of a conviction, the confiscation orders subsequently made by the US courts as the result of civil proceedings in rem against the frozen funds, could be registered and enforced in the United Kingdom.

Under United Kingdom law the death of the accused would have resulted in the discharge of the restraining orders, however, the definition of "external confiscation order" in section 26 of the Drug Trafficking Offences Act 1986 does not require that the foreign order be made in criminal (as opposed to civil) proceedings.

In 1991 the final US confiscation orders were registered in the United Kingdom and garnishee orders nisi were made absolute by the High Court in October of that year.

(The report of this case comes from the Asset Forfeiture Unit of the Solicitor's Office, HM Customs and Excise)

LEGISLATIVE DEVELOPMENTS

Bank Secrecy - Luxembourg

The Luxembourg Chamber of Deputies adopted Bill No. 3600 relating to the financial sector on 24 March 1993. The principal object of the new law is the implementation of the second Banking Directive of the European Community Council 89/646/CEE of 15 December 1989.

Of particular interest are the modifications relating to bank secrecy. It is now possible for bank secrecy, still enshrined in the legislation, to be waived in criminal cases. A breach of the obligation to keep secret information confided in the scope of a bankers professional activities constitutes a criminal offence unless disclosure of information is authorised or required by or under a legislative provision.

Financial institutions, their managers and employees are required to co-operate with national authorities charged with combating money laundering. They must supply information requested by the appropriate authorities and must report to the State Prosecutor suspicion of money laundering.

TRANSFER OF CONVICTED OFFENDERS

The Secretary-General has been notified of two further proper channels of communication established pursuant to the Scheme for the Transfer of Convicted Offenders within the Commonwealth:

MALAWI

The Attorney-General
Ministry of Justice
Private Bag 333
LILONGWE 3
MALAWI

NIGERIA

Ministry of Foreign Affairs
P.M.B. 130
ABUJA
NIGERIA