

AMENDMENTS TO COMMONWEALTH SCHEMES ON MUTUAL ASSISTANCE IN THE ADMINISTRATION OF JUSTICE

At their meeting in Harare in 1986 Law Ministers adopted two new Schemes as recommended to them by Senior Officials - on Mutual Assistance in Criminal Matters and on the Transfer of Convicted Offenders, in addition to adopting a number of changes to the 1966 Scheme on Rendition of Fugitive Offenders. They also established, on a more formal basis, a procedure for future reviews of Commonwealth mutual assistance arrangements, by inviting the Commonwealth Secretary-General, as the need arose, to convene meetings at Senior Official level to undertake the task of reviewing the schemes and monitoring their implementation.

Pursuant to this mandate and in preparation for the Law Ministers Meeting in Christchurch, the Legal Division organised a series of regional workshops which focused attention specifically on the Scheme relating to Mutual Assistance in Criminal Matters, followed by a pan-Commonwealth meeting of Senior Officials in London in June 1989. The June 1989 meeting, inter alia, reviewed the status of the implementation of the three Schemes in the criminal area and, in particular, considered a suggested streamlining of extradition procedures. The present paper sets out and explains the amendments which Senior Officials recommended should be made in the Commonwealth Schemes dealing with Mutual Assistance in the administration of justice. A separate report dealing with the Extradition Scheme and specifically with the issue of prima facie case requirement will be prepared and placed before Law Ministers after a meeting of Senior Officials due to be held in Auckland on 19 April.

Legal Division
Commonwealth Secretariat

March 1990

AMENDMENTS TO COMMONWEALTH SCHEMES ON MUTUAL ASSISTANCE
IN THE ADMINISTRATION OF JUSTICE

INTRODUCTION

1. This paper sets out and explains a number of amendments which Senior Officials, meeting in Lancaster House, London in June 1989, recommended should be made in two of the Commonwealth Schemes dealing with mutual assistance in the administration of justice. Senior Officials spent some time at their June 1989 meeting in detailed discussion of possible amendments to the third of those Schemes, that on the Rendition of Fugitive Offenders within the Commonwealth; those discussions are to be continued in Auckland, and are the subject of a separate paper.

TRANSFER OF CONVICTED OFFENDERS

2. Senior Officials recommend one change in the text of this Scheme as agreed in Harare. Paragraph 19 of that text deals with Acceptance of the Scheme and reads as follows:

Any country may notify the Commonwealth Secretary-General that the provisions of this Scheme shall govern the transfer of prisoners between that country and any other country that accepts the Scheme, and shall inform him of the proper channel for communications.

3. It is recommended that the paragraph be replaced by the following:

Any country which enacts legislation to give effect to this Scheme shall notify the Commonwealth Secretary-General of that fact and shall inform him of the proper channel for communication and deposit with him a copy of the legislation.

4. This amendment was originally proposed by the British Government. Its purpose is to tighten the notification procedure, especially by linking it to the enactment of legislation, so that it is easier for Governments to ascertain which countries are actually able to give effect to the Scheme.

MUTUAL ASSISTANCE IN CRIMINAL MATTERS

5. The Scheme relating to Mutual Assistance in Criminal Matters also agreed by Law Ministers in Harare, was fully discussed at the three Workshops held during 1988 at which almost all Commonwealth jurisdictions were represented. Consideration was also given at those Workshops to successive drafts of a model Mutual Assistance in Criminal Matters Bill produced to assist the preparation of the necessary implementing legislation. The discussions of the Scheme and of the draft Bill at the Workshops identified a number of points at which relatively minor adjustments to the Scheme could usefully be made. The recommended changes are set out in Appendix A and the text of the Scheme as it would stand were these amendments agreed forms Appendix B.

Paragraph 1 (Purpose and Scope)

6. Paragraph 1(3)(i) of the Scheme, as reproduced in the Minutes volume of the Law Ministers' Meeting at Harare, refers to:

'tracing, and forfeiting the proceeds of criminal activities'

but it is believed that a reference to 'seizing' should have been included (and a text used at the Workshops in 1988 contained the word 'seizure'). It is recommended that the word 'seizing' be included in the text as formally agreed.

Paragraph 3 (Criminal Matter)

7. This paragraph is important in defining the scope of the Scheme. As agreed at Harare, it referred exclusively to criminal proceedings (either instituted or certified as likely to be instituted). In Malaysia (and possibly in future other Commonwealth countries) the procedure for dealing with proceeds of crime involves proceedings which are technically civil in character. Under the Dangerous Drugs (Forfeiture of Property) Act 1988 of Malaysia, application may be made to the High Court for the forfeiture of proceeds with provision for persons affected to show cause why the forfeiture should not take effect. Although dealt with by the High Court in the exercise of its criminal jurisdiction, these proceedings were arguably not within paragraph 3 of the Scheme.

8. Senior Officials recommend that paragraph 3 be amended in order to make it clear that assistance can be requested in respect of 'forfeiture proceedings' which have been instituted in the requesting country. The proposed amended text contains a full definition of 'forfeiture proceedings' which covers proceedings to restrain dealings with property as well as its actual confiscation, and also the imposition of pecuniary penalties calculated by reference to its value, whether they be characterised as criminal or civil proceedings.

9. It is important to note that the widening of paragraph 3 is without prejudice to paragraph 7(3) of the Scheme which enables a requested country to refuse assistance insofar as the steps required in order to comply with a request cannot be taken under the law of the requested country in respect of criminal matters arising in that country.

Paragraph 15 (Service of Documents)

10. During their meeting in June 1989, Senior Officials discussed, in the context of paragraph 15, questions about the service of subpoenas addressed to witnesses resident in the requested country but required to attend a trial in the requesting country. Paragraphs 23 and 24 are also relevant to this set of questions, but do not address the question of penalties for non-compliance with a subpoena issued in another country. Senior Officials agreed to return to the matter, on the basis of a paper containing a full exploration of the issues, in Auckland.

Paragraph 21 (Transmission and Return of Material) and Paragraph 22 (Authentication)

11. Paragraph 22 of the Scheme as agreed in Harare provides as follows:

- (1) The requested country shall authenticate material that is to be transmitted by that country.
- (2) Authentication shall be by a stamp or seal of a Minister, ministry, government department or Central Authority of the requested country.

12. Detailed discussion of this paragraph at the 1988 Workshops revealed the desirability of some improvements in this text. It would be appropriate to deal with the need in some cases for material emanating from the requesting as well as the requested country to be authenticated (for example, a certificate of conviction relevant to forfeiture proceedings); it was desirable to refer to the option of verification by the

oath of a witness or public official; and the text could usefully be cast in language more appropriate to the issue of admissibility in evidence, by providing that material should be 'deemed to be duly authenticated' in the prescribed circumstances.

13. These matters are all attended to in the recommended revised text of paragraph 22, the former paragraph 22(1) being retained but becoming a new third sub-paragraph of paragraph 21.

Paragraphs 26 to 29 (Proceeds of Crime)

14. It will be remembered that the text of the Harare Scheme had been considered in draft at a meeting of Senior Officials held in London in January 1986. At that stage no provisions had been drafted on the subject of the forfeiture of the proceeds of crime. Some further work was done on that area and it was possible as a result to include what became paragraphs 26 to 29 inclusive of the Scheme. Senior Officials met in Harare to consider this new material, and recognised both the importance of the topic and also the necessarily tentative nature of what was then placed before Ministers, given the very limited extent of legislative provisions in Commonwealth countries. Since 1986 further legislation on the forfeiture of the proceeds of crime has been enacted in Australia, the Bahamas, Canada, and the United Kingdom, and a number of other countries (including Guyana, Mauritius and Malaysia) have new forfeiture provisions limited to the proceeds of drugs offences. This corpus of legislation was noted by the 1988 Workshops, and the amendments now recommended draw on this material.

15. The main changes recommended are:

- (a) the extension of the provisions to include the 'instrumentalities' as well as the 'proceeds' of crime;
- (b) the use to describe the proceeds of crime of language referring to 'property derived or obtained, directly or indirectly, from the commission of an offence', which language seems to have commended itself to parliamentary counsel in a number of jurisdictions;
- (c) the inclusion of an express reference to orders imposing pecuniary penalties calculated by reference to the value of such property, used in a number of jurisdictions as an alternative to forfeiture or confiscation orders; and
- (d) the inclusion of the enforcement of interim seizure or restraining orders made in the requesting country.

16. The amendments preserve the principle, set out in the recommended text of paragraph 27(5) that it is the law of the requested country which applies to determine the circumstances and the manner in which an order may be made, recognised or enforced in response to a request. Senior Officials have recognised at each stage in their discussions that constitutional and general policy considerations would lead to considerable diversity in legislation in this field; the Scheme merely provides for the availability to other Commonwealth countries of procedures deemed appropriate in the law of a requested country.

AMENDMENTS RECOMMENDED TO THE SCHEME FOR MUTUAL ASSISTANCE
IN CRIMINAL MATTERS WITHIN THE COMMONWEALTH

1. Paragraph 1(3)(i)

To read:

(i) tracing, seizing and forfeiting the proceeds of criminal activities.

2. Paragraph 3(1)

To read:

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 criminal proceedings could be so instituted.

Insert a new paragraph 3(3):

"Forfeiture proceedings" means proceedings, whether civil or criminal, for an order -

- (a) restraining dealings with any property in respect of which there is reasonable cause to believe that it has been -
 - (i) derived or obtained, whether directly or indirectly, from; or
 - (ii) used in, or in connection with,
the commission of an offence;
- (b) confiscating any property derived or obtained as provided in paragraph (a)(i) or used as provided in paragraph (a)(ii); or
- (c) imposing a pecuniary penalty calculated by reference to the value of any property so derived or obtained or so used.

3. Transfer paragraph 22(1) to become paragraph 21(3), and omit paragraph 22(2).

4. Insert a revised text of paragraph 22:

A document or other material transmitted for the purposes of or in response to a request under this Scheme shall be deemed to be duly authenticated if it:

- (a) purports to be signed or certified by a judge or magistrate, or to bear the stamp or seal of a Minister, government department or Central Authority; or

- (b) is verified by the oath of a witness or of a public officer of the Commonwealth country from which the document or material emanates.

5. Delete paragraphs 26 to 29 and substitute:

TRACING THE PROCEEDS OR INSTRUMENTALITIES OF CRIME

- 26 (1) A request under this Scheme may seek assistance in identifying, locating, and assessing the value of, property believed to have been derived or obtained, directly or indirectly, from, or to have been used in, or in connection with, the commission of an offence and believed to be within the requested country.
- (2) The request shall contain such information as is available to the Central Authority of the requesting country as to the nature and location of the property and as to any person in whose possession or control the property is believed to be.

SEIZING AND CONFISCATING THE PROCEEDS OR INSTRUMENTALITIES OF CRIME

- 27 (1) A request under this Scheme may seek assistance in securing:
- (a) the making in the requested country of an order relating to the proceeds or instrumentalities of crime; or
 - (b) the recognition or enforcement in that country of such an order made in the requesting country.
- (2) For the purpose of this paragraph, "an order relating to the proceeds or instrumentalities of crime" means
- (a) an order restraining dealings with 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;
 - (b) an order confiscating property derived or obtained, directly or indirectly, from, or used in or in connection with, the commission of an offence; and
 - (c) an order imposing a pecuniary penalty calculated by reference to the value of any property so derived, obtained or used.
- (3) Where the requested country cannot enforce an order made in the requesting country, the requesting country may request the making of any similar order available under the law of the requested country.
- (4) The request shall be accompanied by a copy of any order made in the requesting country and shall contain, so far as reasonably practicable, all information available to the Central Authority of the requesting country which may be required in connection with the procedures to be followed in the requested country.

- (5) The law of the requested country shall apply to determine the circumstances and manner in which an order may be made, recognised or enforced in response to the request.

DISPOSAL OR RELEASE OF PROPERTY

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

(a) forfeited; or

(b) obtained as a result of the enforcement of a pecuniary penalty order

as a result of a request under this Scheme.

- (2) The law of the requested country shall apply to determine the circumstances in which property made the subject of interim seizure as a result of a request under this Scheme may be released from the effects of such seizure.

6. The remaining paragraphs to be renumbered appropriately.

SCHEME RELATING TO MUTUAL ASSISTANCE IN CRIMINAL MATTERS
WITHIN THE COMMONWEALTH
including amendments recommended in June 1989

PURPOSE AND SCOPE

1. (1) The purpose of this Scheme is to increase the level and scope of assistance rendered between Commonwealth Governments in criminal matters. It augments, and in no way derogates from existing forms of co-operation, both formal and informal; nor does it preclude the development of enhanced arrangements in other fora.

(2) This Scheme provides for the giving of assistance by the competent authorities of one country (the requested country) in respect of criminal matters arising in another country (the requesting country).

(3) Assistance in criminal matters under this Scheme includes assistance in:

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

MEANING OF COUNTRY

2. For the purposes of this Scheme, each of the following is a separate country, that is to say:

- (a) each sovereign and independent country within the Commonwealth together with any dependent territories which that country designates; and
- (b) each country within the Commonwealth which, though not sovereign and independent, is not designated for the purposes of the preceding sub-paragraph.

CRIMINAL MATTER

3. (1) For the purposes of this Scheme, a criminal matter 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 criminal proceedings could be so instituted has been committed.

(2) "Offence", in the case of a federal country or a country having more than one legal system, includes an offence under the law of the country or any part thereof.

(3) "Forfeiture proceedings" means proceedings, whether civil or criminal, for an order -

(a) restraining dealings with any property in respect of which there is reasonable cause to believe that it has been -

(i) derived or obtained, whether directly or indirectly, from; or

(ii) used in, or in connection with,

the commission of an offence;

(b) confiscating any property derived or obtained as provided in paragraph (a)(i) or used as provided in paragraph (a)(ii); or

(c) imposing a pecuniary penalty calculated by reference to the value of any property so derived or obtained or so used.

CENTRAL AUTHORITIES

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

ACTION IN THE REQUESTING COUNTRY

5. (1) A request for assistance under this Scheme may be initiated by any law enforcement agency or public prosecution or judicial authority competent under the law of the requesting country.

(2) The Central Authority of the requesting country shall, if it is satisfied that the request can properly be made under this Scheme, transmit the request to the Central Authority of the requested country and shall ensure that the request contains all the information required by the provisions of this Scheme.

(3) The Central Authority of the requesting country shall provide as far as practicable additional information sought by the Central Authority of the requested country.

ACTION IN THE REQUESTED COUNTRY

6. (1) Subject to the provisions of this Scheme, the requested country shall grant the assistance requested as expeditiously as practicable.

(2) The Central Authority of the requested country shall, subject to the following provisions of this paragraph, take the necessary steps to ensure that the competent authorities of that country comply with the request.

(3) If the Central Authority of the requested country considers:

- (a) that the request does not comply with the provisions of this Scheme, or
- (b) that in accordance with the provisions of this Scheme the request for assistance is to be refused in whole or in part, or
- (c) that the request cannot be complied with, in whole or in part, or
- (d) that there are circumstances which are likely to cause a significant delay in complying with the request,

it shall promptly inform the Central Authority of the requesting country, giving reasons.

REFUSAL OF ASSISTANCE

7. (1) The requested country may refuse to comply in whole or in part with a request for assistance under this Scheme if the criminal matter appears to the Central Authority of that country to concern:

- (a) conduct which would not constitute an offence under the law of that country; or
- (b) an offence or proceedings of a political character; or
- (c) conduct which in the requesting country is an offence only under military law or a law relating to military obligations; or
- (d) conduct in relation to which the person accused or suspected of having committed an offence has been acquitted or convicted by a court in the requested country.

(2) The requested country may refuse to comply in whole or in part with a request for assistance under this Scheme:

- (a) to the extent that it appears to the Central Authority of that country that compliance would be contrary to the Constitution of that country, or would prejudice the security, international relations or other essential public interests of that country; or
- (b) where there are substantial grounds leading the Central Authority of that country to believe that compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions or would cause prejudice for any of these reasons to any person affected by the request.

(3) The requested country may refuse to comply in whole or in part with a request for assistance to the extent that the steps required to be taken in order to comply with the request cannot under the law of that country be taken in respect of criminal matters arising in that country.

(4) An offence shall not be an offence of a political character purposes of this paragraph if it is an offence within the scope of any international convention to which both the requesting and requested countries are parties and which imposes on the parties thereto an obligation either to extradite or prosecute a person accused of the commission of the offence.

MEASURES OF COMPULSION

8. (1) The competent authorities of the requested country shall in complying with a request under this Scheme use only such measures of compulsion as are available under the law of that country in respect of criminal matters arising in that country.

(2) Where under the law of the requested country measures of compulsion cannot be applied to any person to take the steps necessary to secure compliance with a request under this Scheme but the person concerned is willing to act voluntarily in compliance or partial compliance with the terms of the request, the competent authorities of the requested country shall make available the necessary facilities.

SCHEME NOT TO COVER ARREST OR EXTRADITION

9. Nothing in this Scheme is to be construed as authorising the extradition, or the arrest or detention with a view to extradition, of any person.

CONFIDENTIALITY

10. The Central Authorities and the competent authorities of the requesting and requested countries shall use their best efforts to keep confidential a request and its contents and the information and materials supplied in compliance with a request except for disclosure in criminal proceedings and where otherwise authorised by the Central Authority of the other country.

LIMITATION OF USE OF INFORMATION OR EVIDENCE

11. The requesting country shall not use any information or evidence obtained in response to a request for assistance under this Scheme in connection with any matter other than the criminal matter specified in the request without the prior consent of the Central Authority of the requested country.

EXPENSES OF COMPLIANCE

12. (1) Except as provided in the following provisions of this paragraph, compliance with a request under this Scheme shall not give rise to any claim against their requesting country for expenses incurred by the Central Authority or other competent authorities of the requested country.

(2) The requesting country shall be responsible for the travel and incidental expenses of witnesses travelling to the requesting country, including those of accompanying officials, for fees of experts, and for the costs of any translation required by the requesting country.

(3) If in the opinion of the requested country the expenses required in order to comply with the request are of an extraordinary nature, the Central Authority of the requested country shall consult with the Central Authority of the requesting country as to the terms and conditions under which compliance with the request may continue, and in the absence of agreement the requested country may refuse to comply further with the request.

CONTENTS OF REQUEST FOR ASSISTANCE

13. (1) A request under the Scheme shall:

- (a) specify the nature of the assistance requested;
- (b) contain the information appropriate to the assistance sought as specified in the following provisions of this Scheme;
- (c) indicate any time-limit within which compliance with the request is desired, stating reasons;
- (d) contain the following information:
 - (i) the identity of the agency or authority initiating the request;
 - (ii) the nature of the criminal matters; and
 - (iii) whether or not criminal proceedings have been instituted;
- (e) 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 offences of which he stands accused, and a summary of the facts;
 - (iv) the stage reached in the proceedings; and
 - (v) any date fixed for further stages in the proceedings;
- (f) where criminal proceedings have not been instituted, state the offence which the Central Authority of the requesting country has reasonable cause to believe to have been committed, with a summary of the known facts.

(2) A request shall normally be in writing, and if made orally in case of urgency shall be confirmed in writing forthwith.

IDENTIFYING AND LOCATING PERSONS

14. (1) A request under this Scheme may seek assistance in identifying or locating persons believed to be within the requested country.

(2) The request shall indicate the purpose for which the information is requested and shall contain such information as is available to the Central Authority of the requesting country as to the whereabouts of the person concerned and such other information as it possesses as may facilitate the identification of that person.

SERVICE OF DOCUMENTS

15. (1) A request under this Scheme may seek assistance in the service of documents relevant to a criminal matter arising in the requesting country.

(2) The request shall be accompanied by the documents to be served and, where those documents relate to attendance in the requesting country, such notice as the Central Authority of that country is reasonably able to provide of outstanding warrants or other judicial orders in criminal matters against the person to be served.

(3) The Central Authority of the requested country shall endeavour to have the documents served:

- (a) by any particular method stated in the request, unless such method is incompatible with the law of that country; or
- (b) by any method prescribed by the law of that country for the service of documents in criminal proceedings.

(4) The requested country shall transmit to the Central Authority of the requesting country a certificate as to the service of the documents or, if they have not been served, as to the reasons which have prevented service.

EXAMINATION OF WITNESSES

16. (1) A request under this Scheme may seek assistance in the examination of witnesses in the requested country.

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

- (a) the names and addresses or the official designations of the witnesses to be examined;
- (b) the questions to be put to the witnesses or the subject-matter about which they are to be examined;
- (c) whether it is desired that the witnesses be examined orally or in writing;
- (d) whether it is desired that the oath be administered to the witnesses (or, as the law of the requested country allows, that they be required to make their solemn affirmation);
- (e) any provisions of the law of the requesting country as to privilege or exemption from giving evidence which appear especially relevant to the request; and

(f) any special requirements of the law of the requesting country as to the manner of taking evidence relevant to its admissibility in that country.

(3) The request may ask that, so far as the law of the requested country permits, the accused person or his legal representative may attend the examination of the witness and ask questions of the witness.

SEARCH AND SEIZURE

17. (1) A request under this Scheme may seek assistance in the search for and seizure of property in the requested country.

(2) The request shall specify the property to be searched for and seized and shall contain, so far as reasonably practicable, all information available to the Central Authority of the requesting country which may be required to be adduced in an application under the law of the requested country for any necessary warrant or authorisation to effect the search and seizure.

(3) The requested country shall provide such certification as may be required by the requesting country concerning the result of any search, the place and circumstances of seizure, and the subsequent custody of the property seized.

OTHER ASSISTANCE IN OBTAINING EVIDENCE

18. (1) A request under this Scheme may seek other assistance in obtaining evidence.

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

- (a) the documents, records or property to be inspected, preserved, photographed, copied or transmitted;
- (b) the samples of any property to be taken, examined or transmitted; and
- (c) the site to be viewed or photographed.

PRIVILEGE

19. (1) No person shall be compelled in response to a request under this Scheme to give any evidence in the requested country which he could not be compelled to give

- (a) in criminal proceedings in that country; or
- (b) in criminal proceedings in the requesting country.

(2) For the purposes of this paragraph any reference to giving evidence includes references to answering any question and to producing any document.

PRODUCTION OF JUDICIAL OR OFFICIAL RECORDS

20. (1) A request under this Scheme may seek the production of judicial or official records relevant to a criminal matter arising in the requesting country.

(2) For the purposes of this paragraph "judicial records" means judgements, orders and decisions of courts and other documents held by judicial authorities and "official records" means documents held by government departments or agencies or prosecution authorities.

(3) The requested country shall provide copies of judicial or official records which are publicly available.

(4) The requested country may provide copies of judicial or official records not publicly available, to the same extent and under the same conditions as apply to the provision of such records to its own law enforcement agencies or prosecution or judicial authorities.

TRANSMISSION AND RETURN OF MATERIAL

21. (1) Where compliance with a request under this Scheme would involve the transmission to the requesting country of any document, record or property, the requested country:

- (a) may postpone the transmission of the material if it is required in connection with proceedings in that country, and in such a case shall provide certified copies of a document or record pending transmission of the original;
- (b) may require the requesting country to agree to terms and conditions to protect third party interests in the material to be transmitted and may refuse to effect such transmission pending such agreement.

(2) Where any document, record or property is transmitted to the requesting country in compliance with a request under this Scheme, it shall be returned to the requested country when it is no longer required in connection with the criminal matter specified in the request unless that country has indicated that its return is not desired.

(3) The requested country shall authenticate material that is to be transmitted by that country.

AUTHENTICATION

22. A document or other material transmitted for the purposes of or in response to a request under this Scheme shall be deemed to be duly authenticated if it:

- (a) purports to be signed or certified by a judge or magistrate, or to bear the stamp or seal of a Minister, government department or Central Authority; or
- (b) is certified by the oath of a witness or of a public officer of the Commonwealth country from which the document or material emanates.

PERSONAL APPEARANCE OF WITNESSES IN THE REQUESTING COUNTRY

23. (1) A request under this Scheme may seek assistance in facilitating the personal appearance of witnesses before a court exercising jurisdiction in the requesting country.

(2) The request shall specify

- (a) the subject matter upon which it is desired to examine the witnesses;
- (b) the reasons for which the personal appearance of the witnesses is required; and
- (c) details of the travelling, subsistence and other expenses payable by the requesting country in respect of the personal appearance of the witnesses.

(3) The competent authorities of the requested country shall invite persons whose appearance as witnesses in the requesting country is desired; and

- (a) ask whether they agree to appear;
- (b) inform the Central Authority of the requesting country of their answer; and
- (c) if they are willing to appear, make appropriate arrangements to facilitate the personal appearance of the witnesses.

PERSONAL APPEARANCE OF PERSONS IN CUSTODY

24. (1) A request under this Scheme may seek the temporary transfer of persons in custody in the requested country to appear as witnesses before a court exercising jurisdiction in the requesting country.

(2) The request shall specify

- (a) the subject matter upon which it is desired to examine the witnesses;
- (b) the reasons for which the personal appearance of the witnesses is required;

(3) The requested country shall refuse to comply with a request for the transfer of persons in custody if the persons concerned do not consent to the transfer.

(4) The requested country may refuse to comply with a request for the transfer of persons in custody and shall be under no obligation to inform the requesting country of the reasons for such refusal.

(5) Where persons in custody are transferred, the requested country shall notify the requesting country of:

- (a) the dates upon which the persons are due under the law of the requested country to be released from custody and
- (b) the dates by which the requested country requires the return of the persons and shall notify any variations in such dates.

(6) The requesting country shall keep the persons transferred in custody, and shall return the persons to the requested country when their presence as witnesses in the requesting country is no longer required, and in any case by the earlier of the dates notified under sub paragraph (5).

(7) The obligation to return the persons transferred shall subsist notwithstanding the fact that they are nationals of the requesting country.

(8) The period during which the persons transferred are in custody in the requesting country shall be deemed to be service in the requested country of an equivalent period of custody in that country for all purposes.

(9) 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 agreed.

IMMUNITY OF PERSONS APPEARING

25. (1) Subject to the provisions of paragraph 24, witnesses appearing in the requesting country in response to a request under paragraph 23 or persons transferred to that country in response to a request under paragraph 24 shall be immune in that country from prosecution, detention or any other restriction of personal liberty in respect of criminal acts, omissions or convictions before the time of their departure from the requested country.

(2) The immunity provided for in that paragraph shall cease

(a) in the case of witnesses appearing in response to a request under paragraph 23, when the witnesses having had, for a period of 15 consecutive days from the dates when they were notified by the competent authority of the requesting country that their presence was no longer required by the court exercising jurisdiction in the criminal matter, an opportunity of leaving have nevertheless remained in the requesting country, or having left that country have returned to it;

(b) in the case of persons transferred in response to a request under paragraph 24 and remaining in custody when they have been returned to the requested country.

TRACING THE PROCEEDS OR INSTRUMENTALITIES OF CRIME

26. (1) A request under this Scheme may seek assistance in identifying, locating, and assessing the value of, property believed to have been derived or obtained, directly or indirectly, from, or to have been used in, or in connection with, the commission of an offence and believed to be within the requested country.

(2) The request shall contain such information as is available to the Central Authority of the requesting country as to the nature and location of the property and as to any person in whose possession or control the property is believed to be.

SEIZING AND CONFISCATING THE PROCEEDS OR INSTRUMENTALITIES OF CRIME

27. (1) A request under this Scheme may seek assistance in securing:

- (a) the making in the requested country of an order relating to the proceeds or instrumentalities of crime; or
- (b) the recognition or enforcement in that country of such an order made in the requesting country.

(2) For the purpose of this paragraph, "an order relating to the proceeds or instrumentalities of crime" means:

- (a) an order restraining dealings with 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;
- (b) an order confiscating property derived or obtained, directly or indirectly, from, or used in or in connection with, the commission of an offence; and
- (c) an order imposing a pecuniary penalty calculated by reference to the value of any property so derived, obtained or used.

(3) Where the requested country cannot enforce an order made in the requesting country, the requesting country may request the making of any similar order available under the law of the requested country.

(4) The request shall be accompanied by a copy of any order made in the requesting country and shall contain, so far as reasonably practicable, all information available to the Central Authority of the requesting country which may be required in connection with the procedures to be followed in the requested country.

(5) The law of the requested country shall apply to determine the circumstances and manner in which an order may be made, recognised or enforced in response to the request.

DISPOSAL OR RELEASE OF PROPERTY

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

- (a) forfeited; or
 - (b) obtained as a result of the enforcement of a pecuniary penalty order;
- as a result of a request under this Scheme.

(2) The law of the requested country shall apply to determine the circumstances in which property made the subject of interim seizure as a result of a request under this Scheme may be released from the effects of such seizure.

CONSULTATION

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

OTHER ASSISTANCE

30. After consultation between the requesting and the requested countries assistance not within the scope of this Scheme may be given in respect of a criminal matter on such terms and conditions as may be agreed by those countries.

NOTIFICATION OF DESIGNATIONS

31. Designations of dependent territories under paragraph 2 and of Central Authorities under paragraph 4 shall be notified to the Commonwealth Secretary-General.

SERVICE OF INTERNATIONAL WITNESS SUMMONSES

Introduction

1. This paper has been prepared at the request of, and in the light of discussion at, the Senior Officials meeting held in Lancaster House, London, in June 1989. Although the matter had been touched upon in some of the earlier meetings concerning the Scheme for Mutual Assistance in Criminal Matters, it came to Senior Officials as a direct result of the deliberations of the Workshop held in Bermuda in December 1988.

2. That Workshop had before it the text of the Treaty between the United States of America and the Commonwealth of the Bahamas on Mutual Assistance in Criminal Matters (see Volume Three of the Materials on the Scheme, p.181 et seq.). Article 17(1) of that Treaty reads as follows:

The Requested State shall effect service of any document relating to or forming part of any request for assistance properly made under the provisions of this Treaty transmitted to it for this purpose by the Requesting State; provided that the Requested State shall not be obliged to serve any subpoena or other process requiring the attendance of any person before any authority or tribunal in the Requesting State.

The proviso (emphasised above) was added in the course of negotiating the Treaty. An identical text appears in the United Kingdom-United States Treaty concerning mutual assistance between the United States and the Cayman Islands (Materials, volume 3, p.263 et seq.; the relevant provision is Article 13(1)). It was the absence of any corresponding provision in paragraph 15 of the Commonwealth Scheme which attracted comment in Bermuda.

3. For ease of reference, paragraph 15 of the Scheme is reproduced:

Service of documents

- 15 (1) A request under this Scheme may seek assistance in the service of documents relevant to a criminal matter arising in the requesting country.
- (2) The request shall be accompanied by the documents to be served and, where those documents relate to attendance in the requesting country, such notice as the Central Authority of that country is reasonably able to provide of outstanding warrants or other judicial orders in criminal matters against the person to be served.
- (3) The Central Authority of the requested country shall endeavour to have the documents served
- (a) by any particular method stated in the request, unless such method is incompatible with the law of that country; or
- (b) by any method prescribed by the law of that country for the service of documents in criminal proceedings.
- (4) The requested country shall transmit to the Central Authority of the requesting country a certificate as to the service of the documents or, if they have not been served, as to the reasons which have prevented service.

The issues for consideration

4. The basic question concerns the attitude which should be taken to a request from a foreign Government for assistance in serving a document in the nature of a summons or subpoena where:

- (a) the foreign Government wishes measures of compulsion to be available in and under the law of the requested country; or
- (b) failure to obey the summons will expose the person on whom it is served to penalties under the law of the requesting country; or
- (c) to obey the summons will expose that person to prosecution for a crime in connection with which the summons was issued; or
- (d) to obey the summons will expose that person to prosecution for other crimes or to other penalties or legal proceedings.

The 'international subpoena'

5. The first issue identified in paragraph 4(a) above (where a foreign Government wishes measures of compulsion to be available in the requested country) is actually better known as the question of the 'international subpoena'. This was fully discussed at the meeting of Senior Officials held in Marlborough House in January 1986 to consider the draft of what became the Harare Scheme, and the introduction of any provision in the draft Scheme along the lines of the 'international subpoena' was decisively rejected.

6. It may be useful to give a brief resumé of the arguments. The case for the 'international subpoena' was developed in a Working Paper prepared for the meeting by the Government of Australia. It pointed out that in a number of cases (especially drug conspiracy cases but other criminal cases also) evidence taken abroad on commission might be inadmissible; the absence of an opportunity for cross-examination by the defendant was cited as a possible ground for inadmissibility. It was argued that service of an enforceable subpoena might be an advantage even to willing witnesses, who could more easily obtain leave of absence from an employer and might be released from some obligations of confidentiality which would otherwise apply. Under the proposal made by the Australian Government, service of such a subpoena and its enforcement would be discretionary and would be refused were it to be judged harsh or unconscionable (see Criminal Working Paper No.3 of the January 1986 Meetings).

7. Senior Officials from Australia and Malaysia testified to the usefulness of regional provision for 'backing' witness summonses, giving them the status of 'international subpoenas'; Australia had such arrangements with New Zealand and Fiji; Malaysia with Singapore and Brunei. However, Senior Officials from Lesotho, Trinidad and Tobago, Zimbabwe, Jamaica, Botswana, Britain, India and Canada all raised objections, citing practical human rights and constitutional considerations; in many of those countries, it was judged most unlikely that Parliamentary approval for the necessary legislation would be forthcoming (see Summary Record of the January 1986 Meeting, pp.51-52).

8. International treaty practice reveals little support for the 'international subpoena' notion. There is, exceptionally, provision in the United States-Italian Mutual Assistance Treaty for the compulsory appearance of a witness in the requesting State (applying both to witnesses in custody for other reasons in the requested State - art.16(1) - and those at liberty there - art.15(1)); persons compelled to appear are given immunity from prosecution based on truthful testimony given pursuant to a request under the Treaty (art.17(1)). In general, however, international practice is that "witnesses and

experts are completely free not to go to the requesting country" (Explanatory Report to the European Convention on Mutual Assistance, art.8). It is significant that even in the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, the obligation to provide assistance in this context is merely to "facilitate or encourage, to the extent consistent with ... domestic law and practice, the presence" of witnesses "who consent to assist in investigations or participate in proceedings" (art.7(4)).

9. In the Criminal Justice (International Co-operation) Bill introduced in the United Kingdom Parliament in 1989, this practice is reflected in Clause 1 which provides in relevant part:

1. (1) This section has effect where the Secretary of State receives from the government of, or other authority in, a country or territory outside the United Kingdom -

- (a) a summons or other process requiring a person to appear as defendant or attend as a witness in criminal proceedings in that country or territory; or
- (b) a document issued by a court exercising criminal jurisdiction in that country or territory and recording a decision of the court made in the exercise of that jurisdiction,

together with a request for it to be served on a person in the United Kingdom.

(2) The Secretary of State, or where the person to be served is in Scotland, the Lord Advocate may cause the process or document to be served by post or, if the request is for personal service, direct the chief officer of police for the area in which that person appears to be to cause it to be personally served on him.

(3) Service by virtue of this section of any such process as is mentioned in subsection (1)(a) above shall not impose any obligation under the law of any part of the United Kingdom to comply with it.

(4) Any such process served by virtue of this section shall be accompanied by a notice -

- (a) stating the effect of subsection (3) above;
- (b) indicating that the person on whom it is served may wish to seek advice as to the possible consequences of his failing to comply with the process under the law of the country or territory where it was issued; and
- (c) indicating that under that law he may not, as a witness, be accorded the same rights and privileges as would be accorded to him in criminal proceedings in the United Kingdom.

Enforceability of penalties

10. Much closer to the concerns aired in Bermuda is the issue identified in paragraph 4(b), the question arising where failure to obey the summons will expose the person on whom it is served to penalties under the law of the requesting country.

11. Here international treaty practice seeks to exclude (or at least severely limit) the possibility of such penalties being applied. Amongst treaties which exclude that possibility entirely is the European Convention on Mutual Assistance, article 8 of which reads:

A witness or expert who has failed to answer a summons to appear, service of which has been requested [under the Convention] shall not, even if the summons contains a notice of penalty, be subjected to any punishment or measure of restraint, unless subsequently he voluntarily enters the territory of the requesting Party and is there again duly summoned.

12. Similarly, recent treaties entered into by Australia (which has been conspicuously active in this field) contain a provision on the following lines:

A person who does not answer a summons to appear [in the Requesting State] as a witness or expert shall not by reason thereof be liable to any penalty or be subjected to any coercive measures notwithstanding any contrary statement in the summons (Australia-Austria Treaty, art.10(4). See to the same effect the Treaties with Italy, art.14(5); Luxembourg, art.13(5); Netherlands, art.14(4).

Enforceability of penalties - limited exclusion

13. A more qualified provision is found in some treaties. In the United States-Switzerland Treaty (the first bilateral mutual assistance treaty negotiated by the United States), article 24(1) provides:

A person, other than a national of the requesting State, who has been served with legal process calling for his appearance in the requesting State, pursuant to Article 22, shall not be subjected to any civil or criminal forfeiture, other legal sanction or measure of restraint because of his failure to comply therewith, even if the document contains a notice of penalty. (Emphasis added).

14. This position was also taken by the Government of Jamaica in its Reservation in respect of paragraph 15 of the Commonwealth Scheme. Jamaica reserved the right to protect from legal sanction for failure to appear in proceedings in obedience to a document served pursuant to the Scheme any person who is not a national of the requesting country.

Prohibition of service if penalties attached

15. It will be seen that the position taken by the Bahamas in its treaty negotiations with the United States goes further than that reflected in the material cited in the paragraphs immediately above. It involves the reservation of a right to refuse to serve any subpoena or other process requiring the attendance of a person before a court in the Requesting State. Presumably "subpoena" is used in its literal sense, of a document to which penalties or sanctions are attached; the reservation of the right to refuse to serve "other process", including witness summonses carrying no (overt) sanctions, takes the position still further.

Summons addressed to defendants

16. It is convenient at this stage to refer to the question of summons addressed to potential defendants, identified in paragraph 4(c) above. The Commonwealth Scheme does not appear to provide for this type of assistance, the provisions in paragraphs 23 and 24 of the Scheme referring expressly to a request relating to appearance "as witness", and paragraph 25 conferring immunity from prosecution in respect of criminal acts committed before the witnesses departed, in response to the request, from the requested country.

17. Nonetheless, the Government of Jamaica in its reservation in respect of paragraph 15 of the Scheme, reserved the right to refuse to serve documents on a person other than a national of the requesting country where that person would be a defendant in criminal proceedings. This particular reservation, including its reference to nationality, was inspired by article 22(2) of the U.S. - Switzerland Treaty.

18. The European Convention does provide for the service of summonses addressed to defendants; the provision is designed to assist the issuing of default judgements (i.e. in the absence of any appearance by the defendant) which are common in civil law jurisdictions.

What is the practice of States?

19. In the discussions leading up to the preparation of the Harare Scheme, some reference was made to article 8 of the European Convention, set out in paragraph 11 above. The inclusion of a similar provision in the Commonwealth Scheme was thought unnecessary. It has been asserted, at several points in discussions of the Scheme, that Commonwealth countries do not in criminal matters issue subpoenas for service outside the jurisdiction with sanctions for non-compliance. The recent United Kingdom Bill already referred to provides as follows, clause 2(3) being especially pertinent:

2 (1) Process of the following descriptions, that is to say:

- (a) a summons requiring a person charged with an offence to appear before a court in the United Kingdom; and
- (b) a summons or order requiring a person to attend before a court in the United Kingdom for the purpose of giving evidence in criminal proceedings,

may be issued or made notwithstanding that the person in question is outside the United Kingdom and may be served outside the United Kingdom in accordance with arrangements made by the Secretary of State.

(2) [Relates to Scotland]

(3) Service of any process outside the United Kingdom by virtue of this section shall not impose any obligation under the law of any part of the United Kingdom to comply with it and accordingly failure to do so shall not constitute contempt of any court or be a ground for issuing a warrant to secure the attendance of the person in question or, in Scotland, for imposing any penalty.

(4) Subsection (2) [sic; (3) seems to have been intended] above is without prejudice to the service of any process (with the usual consequences for non-compliance) on the person in question if subsequently effected in the United Kingdom.

20. If this does indeed reflect the general practice in Commonwealth countries, the inclusion of further safeguards in paragraph 15 of the Harare Scheme is probably unnecessary, though it might be judged desirable to include a provision to emphasise what is already generally accepted. The issue would nonetheless continue to be important in negotiating treaties with non-Commonwealth countries.

21. An examination has been made of United States practice, for this was a source of some anxiety in the Bermuda discussion especially to those for whom international travel almost always entailed transit via the United States. The fear was that service of a

subpoena in the Bahamas under a treaty with the United States might expose the person on whom it was served to penalties for non-compliance when he next visited the relevant U.S. jurisdiction; and of course the same could be true in respect of other treaty partners of the U.S.A.

22. In the Federal Rules of Criminal Procedure applied in U.S. District Courts it is provided, in effect, that a subpoena directed to a witness in a foreign country may be issued where the witness is a national or resident of the United States but currently abroad (see F.R. Crim. P., rule 17 (e) (2), applying 28 U.S. Code s.1783). There are a number of judicial decisions emphasising that subpoenas cannot be addressed to aliens resident abroad. In practice, therefore, the anxiety referred to in the previous paragraph is soundly based only in respect of U.S. citizens or others ordinarily resident within the U.S. This does not mean, of course, that a prospective treaty partner of the U.S. can ignore the issue; but it is significant that the Swiss treaty and the Jamaican position (cited in paragraphs 13 and 14, above, respectively) include reference to the nationality factor. In effect they provide facilities to jurisdictions such as the United States in respect of service upon its own nationals, but not upon others ordinarily resident in that jurisdiction and on that basis regarded by the law of that jurisdiction as being within its subpoena powers.

Immunities of witnesses

23. Paragraph 4(a) and (d), above, identified various risks which might be run by a person voluntarily obeying a summons to appear as a witness served under the Commonwealth Scheme or similar treaty provision. This is dealt with in the Scheme in paragraph 25, as follows:

Immunity of persons appearing

- 25 (1) Subject to the provisions of paragraph 24, witnesses appearing in the requesting country in response to a request under paragraph 23 or persons transferred to that country in response to a request under paragraph 24 shall be immune in that country from prosecution, detention or any other restriction of personal liberty in respect of criminal acts, omissions or convictions before the time of their departure from the requested country.
- (2) The immunity provided for in this paragraph shall cease
- (a) in the case of witnesses appearing in response to a request under paragraph 23, when the witnesses having had, for a period of 15 consecutive days from the dates when they were notified by the competent authority of the requesting country that their presence was no longer required by the court exercising jurisdiction in the criminal matter, an opportunity of leaving have nevertheless remained in the requesting country, or having left that country have returned to it;
 - (b) in the case of persons transferred in response to a request under paragraph 24 and remaining in custody when they have been returned to the requested country.

24. Some countries are prepared to give more extensive immunities. So, section 19 of the Mutual Assistance in Criminal Matters Act (No.85 of 1987) of Australia provides that the person concerned shall not

"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 the foreign country pursuant to the request" (s.19(1)(d))

and also shall not

"be required to give evidence in any proceeding in Australia other than the proceeding to which the request relates (if any)" (s.19(1)(e)).

25. These matters were considered at the meeting of Senior Officials in January 1986 and the general opinion was that paragraph 25 should not refer to civil actions (following in this respect extradition practice). This decision does not of course prevent Commonwealth Governments from making more generous provision along the lines of the Australian provision if policy and general legal considerations so indicate.

Appropriate action

26. The provision of compulsory measures in support of subpoenas issued in other countries (i.e. the 'international subpoena') is referred to in this paper solely because it stands at one end of the range of opinion on relevant issues. It was fully discussed in 1986 and it is believed that Senior Officials will not wish to reopen the matter.

27. On the point directly arising out of the discussions at the Bermuda Workshop, there remains some uncertainty (which can readily be resolved at the meeting of Senior Officials) as to whether any Commonwealth country does in practice issue subpoenas for service out of the jurisdiction and treat non-compliance as punishable contempt of court. If this practice is found, and it is thought desirable to limit its effect, consideration will have to be given to a further amendment of the Commonwealth Scheme. It may in any event be judged desirable to amend the Scheme on this point in the interests of clarity. This might take the form of an additional provision in each of paragraphs 23 (personal appearance of witnesses in the requesting country) and 24 (personal appearance of persons in custody). (The full text of paragraphs 23 and 24 in their present form is given for ease of reference in an Appendix).

28. The provisions might read:

23(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 the requested country.

24(4A) 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 the requested country.

29. It will be seen that this neither excludes service of a document altogether (as in the Bahamas-U.S. Treaty) nor allows the imposition of sanctions on a national of the requesting country (as in the Swiss-U.S. Treaty, and not excluded by the Jamaican reservation to the Commonwealth Scheme).

30. There does not appear to be any need for amendment to paragraph 25 of the Scheme on immunities granted to persons appearing as witnesses.

APPENDIX: PRESENT TEXT OF PARAGRAPHS 23 AND 24

Personal appearance of witnesses in the requesting country

23. (1) A request under this Scheme may seek assistance in facilitating the personal appearance of witnesses before a court exercising jurisdiction in the requesting country.
- (2) The request shall specify
- (a) the subject matter upon which it is desired to examine the witnesses;
 - (b) the reasons for which the personal appearance of the witnesses is required; and
 - (c) details of the travelling, subsistence and other expenses payable by the requesting country in respect of the personal appearance of the witnesses.
- (3) The competent authorities of the requested country shall invite persons whose appearance as witnesses in the requesting country is desired; and
- (a) ask whether they agree to appear;
 - (b) inform the Central Authority of the requesting country of their answer; and
 - (c) if they are willing to appear, make appropriate arrangements to facilitate the personal appearance of the witnesses.

Personal appearance of persons in custody

24. (1) A request under this Scheme may seek the temporary transfer of persons in custody in the requested country to appear as witnesses before a court exercising jurisdiction in the requesting country.
- (2) The request shall specify
- (a) the subject matter upon which it is desired to examine the witnesses;
 - (b) the reasons for which the personal appearance of the witnesses is required.
- (3) The requested country shall refuse to comply with a request for the transfer of persons in custody if the persons concerned do not consent to the transfer.
- (4) The requested country may refuse to comply with a request for the transfer of persons in custody and shall be under no obligation to inform the requesting country of the reasons for such refusal.
- (5) Where persons in custody are transferred, the requested country shall notify the requesting country of:

(a) the dates upon which the persons are due under the law of the requested country to be released from custody and

(b) the dates by which the requested country requires the return of the persons

and shall notify any variations in such dates.

- (6) The requesting country shall keep the persons transferred in custody, and shall return the persons to the requested country when their presence as witnesses in the requesting country is no longer required, and in any case, by the earlier of the dates notified under sub-paragraph (5).
- (7) The obligation to return the persons transferred shall subsist notwithstanding the fact that they are nationals of the requesting country.
- (8) The period during which the persons transferred are in custody in the requesting country shall be deemed to be service in the requested country of an equivalent period of custody in that country for all purposes.
- (9) Nothing in this paragraph shall preclude the release in the requesting country without return to the requested country of any person transferred where the two countries and the person concerned agree.