

**Guide
to Investigation
and Prosecution
of
Serious Organised
Crime**



**Investigation and
Prosecution**

PART 1

Fifth Edition

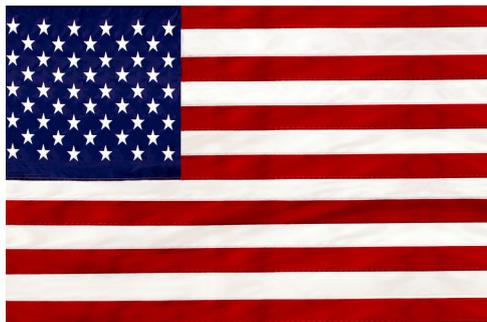
**Guide to
Investigation and
Prosecution of
Serious Organised
Crime**

Fifth Edition

2014

Edited by Dan Suter

**Funded by the US Embassy and British High
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EMBASSY of the UNITED STATES of AMERICA to BARBADOS,
the EASTERN CARIBBEAN, and the OECS



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Foreword

“The roles of the prosecutor and the investigator are interdependent. Whilst each has separate responsibilities in the criminal justice system, they need to work in partnership to enforce the law. The prosecutor cannot direct investigations, but he or she may request further investigation to pursue additional line of enquiries which are relevant to the decision-making process.”

– Paragraph 5.2 of the Code for Prosecutors in Saint Vincent and the Grenadines.

Two of the underlying critical points contained in the afore extract are the collaborative effort between investigators and prosecutors in order to enhance the criminal justice system; and the need to be thorough and informed so that intelligent and reasoned decisions can be made.

Consultation is essential to ensure the successful investigation and prosecution of serious organised crime. Investigations and prosecutions of drug trafficking, money laundering, human trafficking and the growing threat of cybercrime, can be complex. Further we are faced with the reality of limited resources. Therefore it is very important that investigators and prosecutors combine their respective skills efficiently at an early stage, in order to deploy resources appropriately.

The Guide endorses a prosecution approach so both investigators and prosecutors work as one team. As much as organised crime groups flout the laws we need to be robust in our approach and have the requisite ability to challenge this threat to our society. Through the use of the prosecution team model in Saint Vincent and the Grenadines we have been able to successfully prosecute well known organised criminals. A recent example was the conviction of seven drug traffickers, in the first trial before the High Court in over a decade. As trial Counsel the Guide was my constant companion throughout the proceedings!

Equally as our legal frameworks change, the Guide has evolved and developed into an encyclopedia of Eastern Caribbean law for prosecution teams to use. It is a useful reference point for those who maybe unfamiliar with the new laws and methods of investigating.

I hope all those that use the Guide can use it effectively as a model of best practice to tackle serious organised crime.

Colin Williams

Director of Public Prosecutions Saint Vincent and the Grenadines

October 2013

Preface by the Criminal Justice Advisor for the Eastern Caribbean for the Fifth Edition

The Eastern Caribbean is now at the forefront of implementing methods to tackle the scourge of organised crime that seeks to disrupt communities in the name of profit.

In the six months since the Fourth edition of the Guide more legislation has been passed to protect witnesses through anonymity and use of video technology in Saint Vincent and the Grenadines and Grenada. To confiscate assets, the Proceeds of Crime legislation in Antigua and Barbuda and Saint Vincent and the Grenadines, now extends confiscation to the Magistrates Court. Further the Proceeds of Crime Act 2013 in Saint Vincent and the Grenadines allows for an alternative approach of recovering assets through the civil courts, without the need for a criminal conviction. Taking away assets from drug trafficking and other forms of acquisitive crime has to be a priority. Otherwise the young will look to crime as an opportunity to make money. In tough economic times investigators and prosecutors need to make it a harsh reality that crime doesn't pay.

Through thorough investigations and robust prosecutions, the message will be loud and clear, that a life of crime means a life of being one step behind the law.

In previous editions I have written about the need to work as a team. As new legislation is passed this becomes even more relevant as prosecutors and investigators have real tools in their weaponry to out muscle the organised criminals!

Dan Suter May 2014

Preface by the Criminal Justice Advisor for the Eastern Caribbean for the Fourth Edition

This new edition brings together a new element in the tool to fight organised crime, Civil Recovery. Dominica has passed legislation to enable this innovative approach to tackle the proceeds of crime. Therefore we have included Part Four (a) so you can be guided through the process to ensure successful applications.

Results are now happening with money laundering convictions, increased cash seizures, and drug trafficking convictions in the High Court. Through a Prosecution Team approach and co-ordinated working, positive results are being achieved.

In this new improved addition we have also referenced the new legal landscape with the enactment of the Protection of Witnesses Act and Criminal Law and Procedure (Amendment) Act in Dominica. Again these are welcome reforms, to allow the use of special measures so witnesses can give their best possible evidence and also the use of video recorded suspect interviews. We have also included over thirty more reported authorities and reference to more than ten new Acts.

As always I am indebted to those who have assisted with this edition and in particular the DPP of Saint Vincent and the Grenadines, Colin Williams, the Attorney General of Dominica, Levi Peter and the former Chief Justice of the Eastern Caribbean Supreme Court, Sir Hugh Rawlins, who have taken the time to prepare Forewords.

Dan Suter October 2013

Preface by the Criminal Justice Advisor for the Eastern Caribbean for the Third Edition

“Alone we can do so little; together we can do so much”

Since the first edition of this Guide I have appreciated more about the need to have a collective approach to tackle serious organised crime. Importantly this must be from a Caribbean perspective, knowing your laws and procedures. The focus of this Third Edition, having listened to you, is to have more information on local issues such as witness protection and importantly more procedural guidance on developing areas of the law, such as cash seizures and civil recovery. This new edition has reference to over forty new cases, forms to assist with court applications for witness anonymity, special measures, cash seizure and immunity from prosecution. Now you have to use them!

Since the Second Edition there have been high profile convictions in the region against serious organised criminals. The foundation of these convictions was a Prosecution Team approach. Now the region needs to build upon the successes to maximum effect. Clear frameworks must be established to consistently have a Prosecution Team for serious organised crime investigations and I hope the Guide can assist with this process.

This Third Edition, is again produced due to your collaborative efforts and I thank all of those who have assisted with its publication.

Dan Suter, November 2012

Preface by the Criminal Justice Advisor for the Eastern Caribbean for the Second Edition

Those who are the most successful at the commission of crime tend to be the more organised. This means that a law enforcement and prosecutorial approach needs to operate as a team, ready to meet this challenge. The disorganisation of this criminality through effective prosecutions and other disruption methods must be met by joint action between law enforcement and Prosecutors. Without such an approach the criminals will take advantage to the detriment of society.

There have been positive developments with the implementation of Codes for Prosecutors and National Prosecution Services. These initiatives will establish strong foundations for tackling serious organised crime. However these developments need to be reinforced with a rigorous application of existing legislation and procedures.

The investigations of international drug trafficking, human trafficking and cybercrime, to name but a few offences, raise obstacles for a successful prosecution. However through a team approach many of these hurdles can be overcome. Through early interaction and deploying covert law enforcement techniques, serious organised criminals will meet justice. This means there must be a proactive approach rather than reactive.

Securing a conviction is only one way of dealing with serious organised crime. Criminals accept as an occupational hazard imprisonment, but not the stripping of their ill-gotten gains. The powers of confiscation, civil recovery and cash seizure

should be used at every opportunity to disrupt the illegal lifestyles of organised criminals. Then, in an irony full of purpose, these profits should be used to fund resources for law enforcement and Prosecutors to continue the battle against organised crime. As organised criminals shift tactics to meet new challenges, so the criminal justice system should empower those who fight the war to have powerful weapons at their disposal.

The mechanisms for success are available in the Eastern Caribbean to disorganise the divisive empires of criminals. With an intelligent, cohesive and audacious approach to investigations and prosecutions, criminals will fear the full weight of the law and the consequences of disrupting the fabric of society.

At the international level, there are important agreements that will assist jurisdictions in the fight against organised crime such as the Anti-Counterfeiting Trade Agreement, the Budapest Convention on Cybercrime and the 2003 San Jose, Maritime and Air Counter Narcotics Agreement. By ratifying such agreements a regional approach becomes more effective.

This is the second edition of the Guide and I am indebted to all who have contributed, I hope, to its improvement. It now has more detail on areas that practitioners wanted guidance on. So it is now truly a Guide for you and by you.

In particular I would like to thank the US Embassy in Bridgetown, the British High Commission and the Crown Prosecution Service who have been integral to the development of this Guide and without whose support we would not have been able to publish this new edition.

Dan Suter, April 2012

Preface by the Criminal Justice Advisor for the Eastern Caribbean for the First Edition

Serious organised crime is one of the major threats to the security of a nation, as it impedes the social, economic, political and cultural development of society and manifests itself in different activities including drug trafficking, human trafficking, trafficking of firearms and money laundering.

Such crime is of great concern, and regrettably occurs in the Eastern Caribbean. This type of offending causes immense suffering to those addicted to drugs, victims of gun related crime and persons trafficked for profit. It also contributes to the fear of reprisals and refusals to give evidence. Therefore there is a culture that organised criminals can evade justice. In a modern society it should never be the case that “*crime pays*”. This Guide will assist those who investigate and prosecute serious organised criminals to make certain that organised crime groups do not profit from their crimes.

At the international level, the transnational character of organised crime where offenders, victims and products of crime are located or pass through several jurisdictions, means a traditional law enforcement approach focusing on the local level can be frustrating. The United Nations *Convention Against Transnational Organised Crime* is the international community’s response to the need for international cooperation and effective enforcement to combat serious organised crime. The *Convention* focuses on offences that facilitate the illegal profit making

activities of organised criminal groups. Many of the provisions contained in the *Convention* require States to implement at the domestic level, while recognising that different States have different legislative and law enforcement regimes. Whilst not all countries in the region have ratified the *Convention*, its intention to make collective international measures both efficient and effective is supported in this Guide.

The Guide also endorses strengthening of regional cooperation to fight serious organised crime, as agreed on 10th March 2009 at a Ministerial Conference in Santo Domingo, Dominican Republic. In the Political Declaration, Ministers from the region, expressing concern about the impact of organised crime on security and development, pledged to address these threats as a high priority. Equally at the 12th United Nations Congress on Crime Prevention and Criminal Justice in Salvador, Brazil, a Declaration called for Member States to adapt their criminal justice systems to a changing world. This Guide assists to develop modern practices to meet the challenges of investigating and prosecuting of serious organised crime cases to ensure that justice is delivered.

Dan Suter

November 2010

Introduction

The purpose of this Guide is to summarise the best procedures, techniques and law in the Eastern Caribbean for investigating and prosecuting serious organised crime. An important theme in the Guide is co-operation between Investigators and Prosecutors, with an emphasis on a Prosecution Team approach.

Part 1 provides guidance on establishing this Prosecution Team to co-ordinate the investigation and prosecution of serious organised crime. This will ensure that available resources are deployed at the earliest opportunity and planning initiated to prosecute matters effectively. This will be even more important when the Criminal Procedure Rules (CPR's), that abolish Preliminary Inquiries, are implemented throughout the region. Good planning and efficient working practices by Investigators are pivotal to ensure that positive prosecution results are delivered, within the timescales established by the CPR's.

Without a co-ordinated approach from the commencement of the investigation the prosecution will become disjointed and more likely to fail. The Guide will provide assistance to Prosecutors and Investigators in the region, to meet the challenges of potentially complex and detailed investigations.

This Guide will not provide solutions to all difficulties but will establish a point of reference for a successful prosecution and consider the common issues encountered by Investigators and Prosecutors.

Chapter 1 (part 1) provides a broad definition of Serious Organised Crime so that

Prosecutors are aware of the types of criminality that will require the immediate action required in **Chapter 2** (part 1). This immediate action will provide the building blocks for any prosecution and establishes a Prosecution Team that will be dedicated throughout the matter to manage any issues that will inevitably arise.

Once the Prosecution Team is established, **Chapter 3** (part 1) outlines the advice the Prosecutor can provide on admissibility of evidence at an early stage. This will include complex areas such as hearsay on computers and telecommunications and the growing area of electronically recorded confessions. Early engagement between Prosecutor and Investigator to discuss evidence will create a stronger team ethic, an important line of communication and also prevent issues arising at too late a stage to be resolved.

Chapter 3, in this Fifth Edition, also assists the financial investigator by providing detailed reference to their available investigative powers, such as production and monitoring orders. These orders will be essential to trace assets obtained through criminal conduct. This is a crucial part of any investigation and the financial investigator will be an important member of the Prosecution Team, as indicated in **Chapter 2** (part 1). Annex E, the Code for Financial Investigations, establishes the best practice when applying for investigative orders.

The Prosecutor exercises an important discretion on behalf of the public of whether or not to institute a prosecution of a suspect, and how to conduct a prosecution once it has begun. There is a need to maintain public confidence in the administration of criminal justice, and the community has a legitimate interest in the work of its prosecution service especially in matters of serious organised crime. At Annex F the

Code for Prosecutors provides guidance for Prosecutors and promotes consistent decision making at all stages of the prosecution process to ensure such public confidence. The Code applies a two stage test: The evidential stage and the public interest stage. **Chapter 4** (part 1) provides assistance to the Prosecutor on how to approach issues surrounding the commencement of a prosecution when applying the evidential stage of the Code for Prosecutors. Further the Guide provides assistance to the Prosecution Team on how to prove drug trafficking, human trafficking, firearms and human trafficking offences. Annex Z3 – a points to prove document (P2P), a new Annex to this Fifth Edition, will be an important tool for the Investigator to know the essential elements for these offences (and others such as violent, sexual and dishonesty offences), thereby ensuring a proper application of the Code for Prosecutors.

A consideration at this stage will also be whether to restrain assets of the defendant. Part 2 provides detailed guidance on this extremely important area for the Prosecutor and will assist with challenging scenarios that occur. At Annex G a draft Restraint Order Application has been provided to aide drafting.

Chapter 4, of this Fifth Edition also provides more guidance on applications for cash seizure, an alternative disruption technique that may be deployed in conjunction to a prosecution or in isolation. Further, Annex Q provides Standard Operating Procedures for Recovering Cash, Mobile Phones and other items to assist the Investigator, and Annex R, draft Magistrates Court (Detention and Cash Forfeiture of Cash) Rules, to assist those making applications at court.

Without witnesses the prosecution will not be able to prove their case. Organised criminal organisations around the world therefore target witnesses by corruption, fear and intimidation. **Chapter 5** (part 1) details solutions to circumvent these tactics, such as use of special measures (i.e. live link) and witness anonymity. Dominica has enacted the Protection of Witnesses Act 2013, Grenada the Protection of Witnesses Act 2014 and Saint Vincent and the Grenadines the Witness (Special Measures) Act 2014. The Acts allow use of special measures (i.e. court video link) and witness anonymity and will be a model for the rest of the region. Annex S provides a precedent application for a witness anonymity application and Annex T a precedent special measures application.

Once in the court system, there can still be issues that arise. Often organised criminals will use the criminal justice system to their advantage. For example they will have matters tried in the magistrates' court to avoid higher sentences of imprisonment and potential confiscation of assets. Therefore there must be a robust application of the procedures and laws in place to avoid any manipulation of the system. **Chapter 6** (part 1) suggests procedures to ensure that a matter is dealt with fairly and appropriately. **Chapter 6** (part 1) also reviews the often-difficult area of disclosure. A defendant may make a request for disclosure of material, not relied upon by the prosecution, that could create problematic issues for the case. This chapter provides relevant authorities that can be used to allow the Prosecutor to make an informed decision, based on the facts of the particular case. Annex W provides precedent documents where material cannot be disclosed in the public interest, Annex Y a Prosecution Policy Document to determine how material not relied upon by the prosecution will be handled and Annex Z, letters to send to the defence explaining any disclosure actions.

When the matter reaches the preliminary inquiry/committal stage and subsequently trial, many problems should have been resolved. However there may still be practical issues to consider, for example the security of the advocate, witnesses and the jury.

Chapter 7 (part 1) will provide the Prosecutor with some guidance on the correct procedures to be followed.

Sentence is often an area that can be taken for granted by the Prosecutor. However it is important that an appropriate sentence is imposed and the Prosecutor has a vital role to inform the court of any sentencing guidelines. Annex Z6 provides a Sentencing Guidelines Compendium to assist the sentencing process.

Once a serious organised criminal is convicted it is very important to consider confiscation. Part 3 of this Guide will prove essential reading for those conducting confiscation proceedings. It will also assist with the preparation for confiscation proceedings and the hearing itself. It should be noted that the guidance in Parts 2 (Restraint), 3 (Confiscation), 4a (Civil Recovery - Dominica) and 4b (Civil Recovery – Saint Vincent and the Grenadines) prepared by Nicola Suter, Financial Crimes Advisor to the US Embassy, also forms the basis of a Judicial Handbook for the Eastern Caribbean Supreme Court. Therefore Investigators and Prosecutors will be equipped with the same information as the Judiciary in the region, when applying these crucial mechanisms to tackle serious organised crime.

The Eastern Caribbean has had legislation governing restraint and confiscation for number of years. Significantly, Dominica has just passed legislation to allow for civil recovery, paving the way for other States to follow and use this alternative approach

to take the profit out of crime. It is only recently that restraint and confiscation are beginning to be used to their full affect. Increasingly, governments, law enforcement agencies and Prosecutors are becoming aware that the most effective and permanent way of tackling crime is to take its proceeds out of the system.

It is important to appreciate from the outset that confiscation is a regime which looks at the *value* of the defendant's proceeds of the offences for which he or she has been convicted, not the actual proceeds themselves. Once the court has determined the value of the defendant's proceeds from his or her offending (the benefit amount) it is for the defendant to pay that amount using any, and in some cases all, of their assets. These assets may happen to be the direct proceeds of the criminal offence or may have been legitimately acquired.

It is for this reason that the High Court has the power to restrain assets pre-conviction, to ensure that they remain available to satisfy any confiscation order which may be made.

It is also important to recognise that a confiscation order is not made *in rem* (against the person's property) but *in personam* (against the defendant himself). Therefore the making of a confiscation order alone does not entitle any person in possession of the defendant's property to transfer the same to the enforcing court, unless there is a receivership order in place, or the defendant has expressly consented to the property being transferred to the court.

Civil recovery is *in rem* and provides another way to take away criminal proceeds. Using already established Civil Procedure Rules and a lower burden of proof this can be a powerful tool to recover assets when a criminal prosecution is unlikely.

As restraint, confiscation and civil recovery are increasingly used as a powerful weapon against crime in the Eastern Caribbean, it is hoped that this Guide will provide some assistance to both Investigators and Prosecutors when dealing with these matters.

This Guide has been drafted specifically for this region. It is based upon your legislation and attempts to deal with some of the issues that have already been encountered by Investigators, Prosecutors and judges as they progress applications for restraint and confiscation orders, from investigation through to the hearing in court.

To reduce harm to the community and to provide accessible information to the public on serious organised crime prosecutions affecting them, community engagement is crucial. **Chapter 8** (part 1) provides the Prosecutor with the necessary tools to be able to interact with key social groups to assist a specific prosecution and strategically reduce the harm of serious organised crime through education and communication. At Annex K a community engagement pack for schools has been included that deals directly with improving witness participation in prosecutions by educating on the court process and the fundamental role of a witness.

The media have a vital role to play in any criminal justice system, by providing the public with information on criminal proceedings. **Chapter 9** (part 1) provides the

Prosecutor with essential guidance on media handling and how to manage the extra pressures of a serious organised crime trial. Since the last edition of the Guide, the National Prosecution Service of Saint Vincent and the Grenadines have published a Media Protocol and this is provided as a precedent of good practice at Annex P.

A fundamental part of this Guide is the application of a team approach. Submission of case files for early advice, or processing charged case files, needs to be handled efficiently and consistently. A Manual of Guidance has been prepared at Annex C, through consultation with practitioners in the region and is intended to be a best practice tool. This Guide applies the forms prescribed for use in the Manual of Guidance and you will see examples within Part 1. The Manual of Guidance also provides suggested procedures for deployment of staff, review of files before committal and trial, disclosure of unused material and storage of files. The Manual of Guidance applies the use of the Code for Prosecutors and also the P2P.

In summary, investigating and prosecuting serious organised crime requires thorough preparation, knowledge of the required elements to prove an offence, understanding of the admissibility of evidence, alternative disruption techniques, close working relationships, a detailed understanding of the court system, good witness care, engagement with the community, and control of information supplied to the media. Serious organised crime prosecutions therefore are time consuming and require detailed planning and we hope this Guide will assist in each step taken to secure positive results.

To assist with the application of the Guide the following set of facts will be used to give examples of how best practice can be used to ensure a successful outcome.

Please read these facts so you can understand the application of the Guide to a common scenario in the region.

The Police conduct surveillance on Mr Yellow on 17th June following information from an informant that he is to conduct a drugs supply in the next hour. At the scene the Investigators see Mr Yellow waiting by a bus stop with a plastic bag. He is seen talking on a cell phone and a Suzuki Swift arrives shortly after the call ends, driven by Mr Green. Mr Yellow gets in the front passenger seat of the car. A short conversation is seen to take place between Mr Yellow and Mr Green and the car drives off. The Investigators strike and Mr Yellow is arrested with the same plastic bag by his feet containing a brown taped parcel with what appears to be cocaine inside. Mr Green, the driver, tries to run away but is arrested after a short chase on foot. When he is searched he has in his hand a note with Mr Yellow's telephone number, reference to a "Mr Red" and what appears to be an amount of money. Mr Green also has his cell in his back pocket of his jeans he is wearing. When Mr Yellow is arrested he confirms his cell is in the car and this is seized. Both Mr Yellow and Mr Green are transported to the local police station.

You will be provided with further facts in each chapter of Part 1 as the matter proceeds from arrest, charge, first appearance, trial and to sentence.

A disc of the Guide can be provided which will enable, for example, the forms in the Manual of Guidance to be used for efficient case preparation. The disc will also provide quick access to other parts of the Guide including the Annexes and Index.

This Guide makes reference to common law authorities from around the Commonwealth. Of course it is best practice to use Caribbean case law or relevant Privy Council decisions and these are included for your use. Case law from outside the region can be persuasive, but is most appropriately used where there is no authority or statute dealing with a particular topic.

In order to keep up to date with all legal and procedural developments in the region we also produce **INDICTMENT** a quarterly newsletter. This can be accessed from the Eastern Caribbean Supreme Court website at:

<http://www.eccourts.org/category/news-publications/newsletters/> or our Eastern Caribbean Law website at <http://www.easterncaribbeanlaw.com/>. You can also find on our website this Guide, training on its application and other documents such as each State's Code for Prosecutors.

We hope that the Guide with reference to procedures, precedents, highly persuasive Commonwealth authorities, authorities from the region and local statute, provides the basis for a uniformed approach that will enable Investigators and Prosecutors to anticipate likely issues and be better equipped to manage them effectively, efficiently and consistently.

Nicola and Dan Suter

August 2014

PART 1

Investigation and Prosecution of Serious Organised Crime

1. Definitions

1.1 Serious Organised Crime

1.1.1 In order that Investigators and Prosecutors are aware of the offences that will be covered by this Guide it is necessary to provide a definition of Serious Organised Crime.

1.1.2 Serious Organised Crime refers to participation in a serious crime in order to obtain a direct or indirect financial or other material benefit.¹ A serious crime means conduct which would generally be sanctioned by four years imprisonment or more² and will most commonly include:

- (a) Drug trafficking;
- (b) Human trafficking;
- (c) Firearm trafficking;

¹ Article 2(c) of the UN Convention Against Transnational Organised Crime

² Article 2(b) of the UN Convention Against Transnational Organised Crime

- (d) Money laundering;
- (e) Obstruction of justice through physical force, threats or intimidation or the promise, offering or giving of an undue advantage to either induce false testimony or to interfere in the giving of testimony or the production of evidence in proceedings in relation to any serious crime;³
- (f) Obstruction of justice through physical force, threats or intimidation to interfere with the exercise of official duties by a judicial officer or Investigator in relation to any serious crime;⁴
- (g) Corruption through a promise, offering or giving to a public official unfair advantage in order to refrain from acting in matters relevant to official duties when investigating or prosecuting serious crime;⁵
- (h) Corruption through the solicitation or acceptance by a public official of an unfair advantage in order to act or refrain from acting in matters relevant to official duties when investigating or prosecuting serious crime;⁶

1.1.3 Serious Organised Crime can also include intellectual property crime, identity theft and cyber crime as they may be committed in order to

³ Article 23 of the UN Convention Against Transnational Organised Crime

⁴ Article 23 of the UN Convention Against Transnational Organised Crime

⁵ Article 8 of the UN Convention Against Transnational Organised Crime

⁶ Article 8 of the UN Convention Against Transnational Organised Crime

obtain a direct or indirect financial or other material benefit. If they do arise and fit the definition of Serious Organised Crime, then the Prosecutor should consider applying this Guide and refer the final decision to the DPP.

1.1.4 It is also important to remember that Serious Organised Crime can result in extortion, violence and murders. Where this is the case the DPP should decide if the over-arching criminality has a direct or indirect financial or other material benefit and then apply this Guide. For example murder of a key witness to a large cocaine importation. As a possible motivation is evasion from justice for the drug importation, this could be classed as Serious Organised Crime.

1.2 DPP

1.2.1 Means the Director of Public Prosecutions who shall have power in any case in which he or she considers it desirable to institute and undertake criminal proceedings against any person before any court of law (other than a court-martial) in respect of any offence alleged to have been committed by that person.⁷

1.2.2 The DPP therefore has the most important role in the determination of how matters are prosecuted. In this regard the DPP can assist investigations and prosecutions of Serious Organised Crime by

⁷ **Belize:** Section 50(2) Constitution; **Saint Christopher and Nevis:** Section 65(2) Constitution; **Saint Lucia:** Section 73(2) Constitution; **Dominica:** Section 72(2) Constitution; **Saint Vincent and the Grenadines:** Section 64(2) Constitution ; **Barbados:** Section 79(2) Constitution; **Antigua and Barbuda:** Section 88(1) Constitution; **Grenada:** Section 71(2) **Grenada** Constitution and Section 34 **Anguilla** Constitution

providing guidance for charging decisions. By way of example, in Saint Lucia the DPP has given policy guidelines in relation to what quantity of drugs should result in an indictable charge. This type of guidance will equip Prosecutors and Investigators on how certain matters should be prosecuted, enabling effective management of Serious Organised Crime matters from the outset.

1.2.3 An important decision that defines the role of the DPP in conjunction with that of the Investigator is **The Commissioner of Police and Attorney General of Antigua and Barbuda v Steadroy C. O Benjamin [2014] UKPC 8**. This decision held that the DPP can request but cannot instruct the police to institute proceedings by way of charge.

1.2.4 The Privy Council decision emphasises that the Investigator and DPP should have an effective working relationship. This is especially relevant in matters of Serious Organised Crime, which can be complex, sophisticated and involve difficult questions of law.

1.2.5 Paragraph 33 of **The Commissioner of Police and Attorney General of Antigua and Barbuda v Steadroy C. O Benjamin [2014] UKPC 8** importantly outlines that:

“The Board's conclusion does not disable it from stressing the importance of a good, mutually respectful, working relationship between the police and the Director. Unresolved conflict between them of the sort exemplified in this appeal damages public confidence in the

administration of justice. The Director can generally be expected to have a wider perception than the police of whether, for example, a proposed prosecution is in the public interest. The Director cannot instruct but he can request. The police would be wise to tread with care before deciding to reject a request by the Director not to institute proceedings.”

1.2.6 Therefore, whilst it is clear that the DPP cannot compel the Police to institute or not institute proceedings, where appropriate he or she can inform them of their opinion on the best way forward. Where matters do require a difficult decision about charging or where a decision to charge or otherwise is manifestly wrong it would be pragmatic to follow any advice proffered by the DPP.

1.3 National Prosecution Service

1.3.1 Means the principle prosecuting authority headed by the DPP. Often this will be known in the region as the Office of the DPP, Crown Prosecution Service, National Prosecution Service or Department of Public Prosecutions. Therefore for ease of reference this Guide shall refer to the principle prosecuting authority as the National Prosecution Service (NPS).

1.4 Prosecutor

1.4.1 This definition will include any Prosecutor assigned to the matter, whether Police Prosecutor, Counsel for the State, Crown Counsel or Attorney instructed, but must be under the control of the DPP.

1.5 Manual of Guidance⁸

1.5.1 This Manual defines the creation, storage and required actions for a prosecution file. This provides an effective case management system.

1.6 Code for Prosecutors⁹

1.6.1 The Code gives guidance to Prosecutors on general principles to be applied when making decisions about prosecutions. When determining whether to prosecute the Prosecutor should apply the two-stage test of whether there is a reasonable prospect of conviction¹⁰ and if it is in the public interest¹¹ to proceed.

1.6.2 The Prosecutor occupies a formidable position in the administration of criminal justice. The decisions taken may profoundly affect the lives of others. In each case, the Prosecutor must carefully evaluate the evidence and apply the law and decide if a prosecution is appropriate. The Prosecutorial discretion should be exercised in a manner that is consistent, fair and objective. Difficult decisions must be confronted, not side-stepped, and in deciding the way forward the Prosecutor will apply professional judgment, legal competence and practical life experience. The Code assists to ensure that decisions made are

⁸ See Annex C

⁹ See Annex F. Note the “Code” in Antigua and Barbuda is the “Guide for Prosecutors” and in Saint Lucia the “Code of Conduct for Crown Prosecutors.” For reference each State’s Code can be found at:

<http://www.easterncaribbeanlaw.com/category/documents/codes-for-prosecutors/> and training on application at: <http://www.easterncaribbeanlaw.com/category/documents/training/>

¹⁰ See Annex F paragraphs 7.5-7.8. In Saint Lucia and Barbados the Code defines the test as a realistic prospect of conviction

¹¹ See Annex F paragraphs 7.9-7.17

reasonable, fair and proportionate. The following cases provide examples where the DPP may have to review whether to prosecute, if the principles of the Code are not followed:

- (a) It is apparent that the law has not been properly understood and applied (**R v DPP, ex p. Jones (Timothy)** [2000] Crim LR 858).
- (b) It can be demonstrated on an objective appraisal of the case that some serious evidence supporting a prosecution has not been carefully considered (**R (on the application of Joseph) v DPP** [2001] Crim LR 489; **R (on the application of Peter Dennis) v DPP** [2006] EWHC 3211);
- (c) It can be demonstrated that in a significant area a conclusion as to what the evidence is to support a prosecution is irrational (**R v DPP, ex p. Jones (Timothy)** [2000] Crim LR 858;
- (d) The decision is perverse, that is, one at which no reasonable Prosecutor could have arrived (**R v DPP, ex p. C** [1995] 1 Cr App R 136);
- (e) NPS policy, such as that set out in the Code for Prosecutors has not been properly applied and/or complied with (**R v DPP, ex p. C** [1995] 1 Cr App R 136; **R v DPP, ex p. Manning** [2001] QB 330; **R v Chief Constable of Kent, ex p.**

L; R v DPP, ex p. B (1991) 93 Cr App R 416). This includes situations where irrelevant considerations have been taken into account (**R v DPP, ex p. Jones (Timothy) [2000] Crim LR 858**);

- (f) The decision has been arrived at because of an unlawful policy (**R v DPP, ex p. C [1995] 1 Cr App R 136**); or
- (g) It can be demonstrated that the decision was arrived at as a result of fraud, corruption or bad faith (**R v DPP, ex p. Kebilene [2000] 2 AC 326; R v Panel on Takeovers and Mergers, ex p. Fayed [1992] BCC 524**).

1.6.3 It is essential to ensure that the reasons for decisions in Form 1 of the Manual of Guidance, and in particular public interest considerations giving rise to decisions, are documented. This can be used, if necessary, to demonstrate that the decision to prosecute was taken only after a full and proper review of the case.

1.6.4 The decision of **Linton Lewis v The DPP of Saint Vincent and the Grenadines (Court of Appeal No. 26 of 2011)** emphasises the importance of the use of a Code for Prosecutors and how the Code provides a clear basis upon which a Court can conclude a decision was rational, objective and reasonable.

1.7 Investigator

1.7.1 This will mean an officer from the Police, Customs, Immigration, Inland Revenue or any other national agency that investigates Serious Organised Crime and will also include financial investigators. A combination of such officers will be referred to as an Investigative Team.

1.7.2 A specific agency investigating an offence will be referred to as the Investigating Agency.

1.7.3 The officer in charge of the investigation will be referred to as the Lead Investigator.

1.8 Prosecution Team

1.8.1 This team will be made up of the Prosecutor, DPP and Investigation Team assigned to the investigation and prosecution of the Serious Organised Crime offence.

2. Immediate Action

2.1 Preparatory Work

2.1.1 There is benefit in having local arrangements in place between the National Prosecution Service (NPS) and Investigators for the handling of incidents of Serious Organised Crime. Such arrangements should include a process for the early involvement of Prosecutors with the Lead Investigator even before arrest (including out-of-hours contact).

2.1.2 A Prosecutor will then benefit from an understanding of any intelligence material gathered and methods of investigating, including use of covert human intelligence sources (CHIS)¹², audio probes, covert surveillance and use of telephone intercept. This early involvement of a Prosecutor, knowing the tactics deployed, will give the NPS an advantage in the preparation and presentation of a case for trial, by providing advice to Investigators on admissibility of evidence and the handling of sensitive material.

2.2 Early Advice to Investigators After Arrest

2.2.1 There should be consultation between the Prosecutor and Investigators at the earliest possible opportunity after arrest. It is important to establish a Prosecution Team approach from the outset.

¹² An example would be a police informant

2.2.2 This is in accordance with the Code for Prosecutors,¹³ which provides that early consultation and advice may be sought and given in any case and may include lines of investigation, evidential requirements and any pre-charge procedures. In this regard the NPS should have a rota for an out-of-hours telephone line that will allow Investigators to contact a Prosecutor at any time of day or night.

2.2.3 In view of the sensitive and complex nature of this type of investigation, it will usually be appropriate for the Prosecutor initially contacted, to maintain responsibility for pre-charge investigative advice when required. This also provides a line of continuity for the Investigators rather than having to repeat facts for another Prosecutor to provide advice.

2.2.4 The Lead Investigator should contact the NPS as soon as the suspect/s is transported to the Police Station following arrest. This will ensure that the Investigators know whom to contact at the NPS and the assigned Prosecutor is informed of the facts enabling appropriate and timely pre-charge advice to be given.

2.2.5 If the NPS are aware of suspects having been arrested in a Serious Organised Crime matter and they have not been informed by the Investigating Agency, the NPS should identify a senior Prosecutor to lead the case and contact the Investigators.

¹³ See Annex F paragraph 5.2

- 2.2.6 The Prosecutor should be proactive in advising the Investigators on relevant pre-charge procedures and investigative techniques that will have an impact on any eventual proceedings, and in particular advise early contact with a Financial Investigator to gather evidence of direct or indirect financial or other material benefit.¹⁴
- 2.2.7 If possible, the Prosecutor should meet with the Investigation Team after arrest to gain an insight into the scope and complexity of the investigation and to provide face-to-face pre-charge advice.
- 2.2.8 Similarly, the Prosecutor should consider attending site visits or viewing exhibits (e.g. CCTV) with the Investigator at this early stage.
- 2.2.9 The Prosecutor will then be in a better position to be able to make a charging decision when he has full knowledge of all the facts.
- 2.2.10 The Prosecutor must maintain a clear audit trail. This will be of all meetings with Investigators and all decisions made by the Prosecution Team.¹⁵ This is particularly vital in complex investigations where decisions by the Prosecution Team may become crucial at trial. If any advice has been provided verbally this should be reduced to writing at the first available opportunity in order to maintain the audit trail.

¹⁴ See Code for Financial Investigations at Annex E for best practice in securing evidence

¹⁵ See Manual of Guidance for forms to be completed of meetings (Form 4) and decisions (Form 1) in Annex C

After Mr Yellow and Mr Green are transported to the Police Station, the lead Investigator contacts the NPS out-of-hours number for advice. The Investigator informs the Prosecutor on call of all the circumstances of the arrest and that it is proposed to obtain a warrant to search home addresses of the suspects. The Investigator requests a face-to-face meeting where he confirms that the operation is intelligence led by a CHIS, but the CHIS will not give evidence as he is a police informant and to disclose his identity would affect future operations. The Prosecutor advises that there should be an electronic recorded interview and the significant comment made by Mr Yellow about ownership of the cell put to him at the commencement of the interview. The Prosecutor requests that he is contacted after the interviews in order that he can consider whether there is a reasonable prospect of conviction and a prosecution is in the public interest applying the Code for Prosecutors.

2.2.11 After charge the Prosecutor who advised should consider handling the first appearance at the Magistrates Court. It is recommended that the Investigator prepares a Case Summary¹⁶ which is reviewed by the Prosecutor before serving on the defence and magistrate at the first hearing. If the Prosecutor who advised pre-charge is unable to appear

¹⁶ See Form 5 in the Manual of Guidance and **REMEMBER not to disclose any SENSITIVE material**

at this hearing, the Prosecutor attending should be fully briefed about the facts, by being provided with a copy of any charging decisions made and a Case Summary. The Prosecutor who advised pre-charge should also contact the Lead Investigator to explain who will be representing the Prosecution at the first appearance. Equally the Investigator should attend this first hearing to assist the Prosecutor.

2.2.12 After this first appearance any future dates for complying with any directions of the court or future appearances should be logged in the Case Management Spreadsheet referred to in the Manual of Guidance.¹⁷

2.2.13 A meeting should also be arranged as soon as possible after this first appearance so the Prosecution Team can meet to discuss the following:

- (a) Agreeing any further lines of investigation required;
- (b) Whether there are likely to be any other arrests;
- (c) Establishing timelines for evidence to be provided to the NPS and fixing dates for regular review meetings;
- (d) Discuss any complex issues surrounding the case that could have an impact on the proceedings such as how to control sensitive information that will be used as intelligence only.

¹⁷ See the Role of the Case Tracking Manager who will complete the Case Management Spreadsheet (CMS) at paragraphs 1.1.2-3 of Annex C

- (e) Two Prosecutors should be assigned to the matter where practicable. Their roles will be as Lead Prosecutor and Assistant Prosecutor. This will allow for continuity for example if the Lead Prosecutor is ill, on vacation or leaves the NPS

2.3 Involvement of the DPP

2.3.1 The DPP should be involved in the management of the case from the outset to provide clear leadership and to ensure that Investigators recognise the importance being attached to the case by the NPS.

2.3.2 This leadership will establish the importance of the case to the community and the Prosecution Team. The DPP may determine at an early stage that he/she should conduct press conferences or alternatively determine who is best placed to conduct them to keep the community aware of key decisions, such as charging of a suspect.¹⁸

2.3.3 The DPP will be accountable for decisions made during the prosecution processes. Therefore early involvement in the management of the case is advisable. If any policy decisions need to be made these should be made by the DPP. A policy decision is defined as one that could affect the management and conduct of the proceedings and provide the Prosecution Team with guidance on the approach to be taken.¹⁹

¹⁸ See Chapter 9 below on the Media

¹⁹ See paragraph 3.3.49 on transcription of intercept material and 6.3.6 on a disclosure policy document

2.3.4 In substantial, high profile cases, the DPP should chair monthly meetings to ensure that:

- (a) A sound prosecution strategy is in place;
- (b) The Prosecution Team is efficiently and effectively deployed;
and
- (c) Resources are closely managed.

Mr Yellow's house is searched and the Prosecutor advises that this is recorded on video. Seized are the following:

1. Plastics bags;
2. Scales;
3. Brown paper on a roll;
4. Diary with figures and names,
5. A computer; and
6. \$100,000 US in rolled up notes in an elastic band in a kitchen drawer.

3. Investigative Advice

3.1 Investigative Techniques

3.1.1 Incidents involving Serious Organised Crime (particularly those involving the use of firearms or persons well known) present substantial difficulties for the Investigative Team. This is largely because of the reluctance of witnesses to come forward for fear of reprisals. Prosecutors providing investigative advice both before and after charge will expect the Investigators to be using the investigative techniques more particularly detailed in this chapter, which could mean less reliance on witnesses.

3.2 Electronically Recorded Interviews

3.2.1 There should be an emphasis towards electronic recording of interviews with suspects. This will reduce the ability of the defence to challenge the admissibility of any confession having been obtained by coercion or violence.

3.2.2 Judges Rules

3.2.3 The Judges Rules²⁰ (**Practice Note (Judges Rules)** [1964] 1 WLR 152, 154) used in the region require a written record of the questioning to be kept. The Judges rules are administrative directions only and they do not have the force of law (**R v Voisin** [1918] 1 KB 531). Therefore the electronic recording of interviews is not precluded.

²⁰ See the content of the Judges Rules in the P2P in Annex Z3

3.2.4 In **Peart v The Queen** *Privy Council Appeal No.5 of 2005* their Lordships made the three following propositions:

- (a) The Judges' Rules are administrative directions, not rules of law, but possess considerable importance as embodying the standard of fairness which ought to be observed;
- (b) The judicial power is not limited or circumscribed by the Judges' Rules. A court may allow a prisoner's statement to be admitted notwithstanding a breach of the Judges' Rules; conversely, the court may refuse to admit it even if the terms of the Judges' Rules have been followed;
- (c) The criterion for admission of a statement is fairness. The voluntary nature of the statement is the major factor in determining fairness. If it is not voluntary, it will not be admitted. If it is voluntary, that constitutes a strong reason in support of admitting it, notwithstanding a breach of the Judges' Rules; but the court may rule that it would be unfair to do so even if the statement was voluntary.

3.2.5 Electronic recording of interviews under a relevant caution is ultimately fair both to a suspect and the Investigators, as an accurate and reliable record of the comments made in interview. The electronic recording of an interview will also establish whether a statement or answer to a question by the suspect was voluntary. Therefore this procedure is not contrary to the spirit of the Judges Rules. If there is

challenge at the point of interview or at court, it should be explained that the procedure is to ensure that the fairest and best available evidence is used (see fairness test applied in **Ricardo Williams v The Queen** *Privy Council Appeal No.37 of 2005*).

3.2.6 Procedure when Interviewing Electronically

3.2.7 On the basis that any admission or confession that is voluntarily and fairly obtained is admissible the following basic principles in any electronic recorded interview should be followed, where there is nothing prescribed to the contrary in statute (see from paragraphs 3.2.13 and 3.2.17), to ensure that the confession or admission can be adduced in evidence. In this regard Guidance for the use of Investigators has been produced at Annex A (where there is no statute). The following list in italics provides basic principles to ensure there is: prima facie evidence of recording the suspect and that the procedure is fair, to ensure admissibility. The bold print confirms the paragraphs to be followed by the Investigator from Annex A to maintain compliance with these principles:

- (a) *The voice of the speaker must be duly identified by the maker of the record or by others who recognise his voice. Where the maker has denied the voice it will require very strict proof to determine whether or not it was really the voice of the speaker*
Paragraph 4.2 (c) of Annex A requires all those in an interview room to be identified or if the suspect refuses a third party such as the Legal Advisor or Justice of the

Peace can identify;

- (b) *The accuracy of the electronically recorded interview or statement has to be proved by the maker of the record by satisfactory evidence direct or circumstantial.*

Paragraph 4.1 requires that any recording media is a new copy unwrapped in the suspect's presence and then sealed at the conclusion according to paragraph 2.2 and 11.2. If it is not practicable to have new unwrapped recording media consider using time stamps to identify the particular recording or non-recordable media;

- (c) *Every possibility of tampering with or erasure of a part of an electronically recorded interview or statement must be ruled out otherwise it may render the said interview or statement out of context and, therefore, inadmissible.*

Paragraphs 2.2 and 11.2 ensure the master recording media is sealed in the presence of the suspect and at paragraph 13.1 securely stored. The suspect is also provided with a copy of the recording media at paragraph 11.3 and if the seal of a master recording is broken, the suspect or a representative can be present. Also it is advisable to create a digital copy by a person qualified to do so;

- (d) *The recorded media must be carefully sealed and kept in safe or official custody.*

As stated above sealing will be in accordance with paragraphs 2.2 and 11 and storage at 13.1;

- (e) *The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbance.*

Paragraph 8 of Annex A deals with situations when the recording equipment fails;

- (f) *The statement must be relevant according to the rules of any appropriate Evidence Act.*

Paragraph 1.2 (m) defines a suspect so they are only interviewed if reasonably suspected of having committed an offence²¹ and under arrest for that offence. Also paragraph 4.3 requires that a suspect is cautioned²² so that anything they say may be given in evidence.

3.2.8 Production as Evidence

3.2.9 Any recording (i.e. tape, disc or any other type of recording media)²³ can be admitted as “*real evidence*” (**William Penn v The Queen**)

²¹ At Annex A the offences are defined as serious crimes and listed at paragraph 1.2 (k)

²² Full text of caution is: *You do not have to say anything, but it may harm your defence if you do not mention when questioned something which you may later rely on in court. Anything you do say may be given in evidence.* This is only a guideline at present, only Saint Vincent and the Grenadines and Dominica allow for any implications in statute for a refusal to answer questions (see 3.2.39). At common law if a suggestion requires a response and one is not provided, the silence and or conduct of the defendant may well lead to an adverse inference. However It will be for the jury to decide if a response was required **R v Collins and Keep [2003] 2 Cr.App.R.11**. In **Barbados**: Section 76 Evidence Act; **Saint Christopher and Nevis**: Section 88 Evidence Act 2011; and **Saint Lucia**: Section 76 Evidence Act prevents adverse inferences from official questioning.

²³ See definition of “*recording media*” at Annex A paragraph 1.2

HCRAP 2006/001; R v Lydon 85 Cr.App.R.221 CA). In order to put the recording in evidence as “*real evidence*” a sufficient foundation must be laid to link the defendant to the recording. Therefore there must be prima facie evidence that the defendant was recorded in the exhibit or (if he remains silent) knew of the recording (**Howey v Bradley [1970] Crim. L.R. 223, DC; R v Horne [1992] Crim L.R. 304, CA**). It is for this reason that Investigators when interviewing electronically should follow the Guidance at Annex A that will ensure this evidential requirement is satisfied²⁴.

3.2.10 Constitutional Rights

3.2.11 Electronic recording of a suspect’s interview will not breach any fundamental right enshrined in the Constitutions of the region and supports his/her right to a fair trial, with conclusive evidence of what was said or not said when interviewed and/or a statement provided. Of course in Saint Lucia and Saint Christopher and Nevis recording on tape is admissible.

3.2.12 If there is any objection to the evidence in those jurisdictions where there is no provision in statute, a Prosecutor should consider **Malone v Metropolitan Police Commissioner [1979] Ch 344, sub nom Malone v Metropolitan Police Commissioner (No 2) [1979] 2 All ER 620** where it was held that **everything is permitted except that which is expressly forbidden**. The facts involved interception of communications and are based on English statute. However there is

²⁴ See paragraph 3.2.7 (a) above

relevance on its application where there is no legislation prohibiting the use of electronically recorded interviews. If any procedure implemented is used in compliance with the Judge's Rules and due process to allow a fair trial according to a Constitution, this authority may persuade a Court that the evidence is admissible.

The Prosecutor advises the Investigator to interview both suspects and to record electronically (applying any relevant legislation). The Prosecutor advises that the suspects should be cautioned according to paragraph 4.3 and the interview commenced according to paragraph 4.2 of the Guidance at Annex A. The Prosecutor will adduce at trial the interview as real evidence. Also a request should be made for handwriting samples to compare to the note and diary seized from Mr Yellow's address. Mr Yellow refuses to answer questions when interviewed apart from to say he was, "Set up." He also refuses to provide a handwriting sample. Mr Green states in interview he knew nothing about the drugs and had no contact with Mr Yellow that day. He saw him standing by the bus stop and offered him a lift as he knew him from school. He says he is a respectable person employed as a salesman for a local soft drink distributor. He added that he was working therefore he would not have used his car for delivering drugs. He does agree to give a handwriting sample.

Following this interview the Prosecutor advises the Investigator to:

1. Send the cells for analysis to an expert to determine the calls made, content of any text messages to confirm if this account by Mr Green is accurate and see if there is any evidence of previous contact that day between the two
2. Contact the cell provider for a statement confirming subscriber information to determine attribution and if the cells are registered to Mr Yellow and Mr Green
3. Contact the cell provider for billing for the cells (The Prosecutor advises to apply for a production order or witness summons if this information is not supplied voluntarily)
4. Contact Mr Green's employer to see if he was working on 17th June

The interview has therefore led to further lines of inquiry and these have been recorded by the Prosecutor on Form 1 and sent to the Investigator with dates for completion of investigation to discuss at the next case conference.

3.2.13 Saint Lucia and Saint Christopher and Nevis

3.2.14 In Saint Lucia²⁵ and Saint Christopher and Nevis²⁶ a confession is tape-recorded when:

- (a) A suspect is suspected of having committed an offence; and
- (b) It is made in the course of official questioning
- (c) Additionally in Saint Christopher and Nevis when it is reasonably practicable to record on tape.

3.2.15 However there are alternatives to recording on tape such as questioning resulting in a confession made in the presence of a person not being an investigating official, such as a legal representative of the suspect. This means if such an alternative is used the confession would NOT have to be recorded on tape and would still be admissible.

3.2.16 Of course the legislation in each jurisdiction does not preclude electronic recording and for the reasons detailed at 3.2.1 best practice is for interviews following an arrest for a Serious Organised Offence to be electronically recorded if the equipment is available.

²⁵ **Saint Lucia:** Section 72 Evidence Act 2002 see **The Queen v Kevin Edward CLAIM No. SLUHCRD 2009/0111** for a useful judgment on interpretation of official questioning

²⁶ **Saint Christopher and Nevis:** Section 84 Evidence Act 2011. Cross refer to the Interviewing of Suspects for Serious Crimes Act (paragraph 3.2.17) and implications if an interview for a non-serious crime and reasonably practicable to record. If this situation occurs reference should be made to section 84(5) and if the court is satisfied, that in the special circumstances of the case, admission of the evidence would not be contrary to the interests of justice.

3.2.17 Saint Vincent and the Grenadines and Saint Christopher and Nevis: Interviewing of Suspects for Serious Crimes Act 2012; Grenada: Interviewing of Suspects for Serious Crimes Act 2014; Dominica: Criminal Law and Procedure Act: Antigua and Barbuda: Interviewing of Accuseds for Serious Crimes Bill 2014:

3.2.18 These Acts will require that for offences that are defined as “*serious*”²⁷ there is a presumption that an interview must be recorded electronically.²⁸

3.2.19 There are certain circumstances when the presumption can be rebutted if the Prosecutor proves beyond a reasonable doubt that any statement²⁹ made in the interview was voluntarily made and reliable.³⁰

²⁷ **Saint Vincent and the Grenadines:** Schedule 1 Interviewing of Suspects for Serious Crimes Act– this will include drug trafficking over a certain weight, money laundering and corruption offences; **Saint Christopher and Nevis:** Schedule 1 Interviewing of Suspects for Serious Crimes Act; **Dominica:** First Schedule Criminal Law and Procedure Act; **Grenada:** Schedule 1 Interviewing of Suspects for Serious Crimes Act; **Antigua and Barbuda:** Schedule 1 Interviewing of Accuseds for Serious Crimes Bill (First reading in March 2014)

²⁸ **Saint Vincent and the Grenadines:** Section 4 Interviewing of Suspects for Serious Crimes Act; **Saint Christopher and Nevis:** Section 4 Interviewing of Suspects for Serious Crimes Act; **Dominica:** Section 14D Criminal Law and Procedure Act; **Grenada:** Section 4 Interviewing of Suspects for Serious Crimes Act; **Antigua and Barbuda:** Section 4 Interviewing of Accuseds for Serious Crimes Bill

²⁹ **Saint Vincent and the Grenadines:** Section 2 Interviewing of Suspects for Serious Crimes Act 2012; **Saint Christopher and Nevis:** Section 2 Interviewing of Suspects for Serious Crimes Act; **Dominica:** Section 2 Criminal Law and Procedure Act; **Grenada:** Section 2 Interviewing of Suspects for Serious Crimes Act; **Antigua and Barbuda:** Section 2 Interviewing of Accuseds for Serious Crimes Bill: A statement is defined as an oral, written, sign language or nonverbal communication made by the suspect

³⁰ **Saint Vincent and the Grenadines:** Section 8 Interviewing of Suspects for Serious Crimes Act; **Saint Christopher and Nevis:** Section 8 Interviewing of Suspects for Serious Crimes Act; **Dominica:** Section 14E Criminal Law and Procedure Act; **Grenada:** Section 8 Interviewing of Suspects for Serious Crimes Act; **Antigua and Barbuda:** Section 8 Interviewing of Accuseds for Serious Crimes Bill

3.2.20 Unreliable Statements

3.2.21 The Acts also have provisions determining challenges to the admissibility of statements in criminal proceedings.³¹ The Acts³² direct the court to exclude a statement unfairly obtained, which makes the statement unreliable. The case law in this part of the Guide will refer to those heard in England and Wales in relation to exclusion of confession statements, which are of course persuasive authorities.

3.2.22 Unreliable confession statements were given a broad interpretation by the Court of Appeal (England and Wales) in **R v Fulling 1987 2 All E.R. 65**. This included:

- (a) Confessions obtained as the result of an inducement - for example a promise of bail or a promise that a prosecution would not arise from the confession statement;
- (b) Hostile and aggressive questioning;
- (c) Failure to record accurately what was said;
- (d) Failure to caution;

³¹ **Saint Vincent and the Grenadines:** Section 9 Interviewing of Suspects for Serious Crimes Act; **Saint Christopher and Nevis:** Section 9 Interviewing of Suspects for Serious Crimes Act; **Dominica:** Section 14F Criminal Law and Procedure Act; **Grenada:** Section 9 Interviewing of Suspects for Serious Crimes Act; **Antigua and Barbuda:** Section 9 Interviewing of Accuseds for Serious Crimes Bill

³² **Saint Vincent and the Grenadines:** Section 9(2) Interviewing of Suspects for Serious Crimes Act; **Saint Christopher and Nevis:** Section 9(2) Interviewing of Suspects for Serious Crimes Act; **Dominica:** Section 14F(2) Criminal Law and Procedure Act; **Grenada:** Section 9(2) Interviewing of Suspects for Serious Crimes Act; **Antigua and Barbuda:** Section 9(2) Interviewing of Accuseds for Serious Crimes Bill

- (e) Failure to provide an Appropriate Adult³³ where one is required;
- (f) Failure to comply with the Code of Practice (Guidance in schedule 2 of the Acts) for example failure to explain to the suspect his right to a legal advisor;³⁴
- (g) Failure of a legal advisor to act properly - for example by making interjections during interview which are hostile to the suspect.

3.2.23 It is important that Prosecutors take into consideration whether confession statements to be adduced are reliable or not when applying the Code for Prosecutors. Therefore an early decision should be taken on the admissibility of a confession statement rather than just letting the court decide the issue.

3.2.24 Review of Confession

3.2.25 Confession evidence often forms a crucial part of the prosecution case against a defendant. When reviewing cases, in which they intend to introduce evidence of a confession, Prosecutors should examine

³³ An Appropriate Adult is defined in the Guidance at Schedule 2 of the Act (and Acts in **Saint Christopher and Nevis, Dominica, Grenada** and Bill in **Antigua and Barbuda**) and will protect the interests of juveniles and a person who is mentally disordered or mentally vulnerable

³⁴ Paragraph 4.4 of the Guidance at Schedule 2 of the Act (and Act in **Saint Christopher and Nevis**), paragraph 4.5 in **Dominica** and 4.1(b) in **Grenada** and **Antigua and Barbuda**. Further in **Antigua and Barbuda** and **Grenada**, if an authorizing officer believes on reasonable grounds that communication with a legal advisor would result in the escape of an accomplice or the fabrication or destruction of evidence; or the questioning is so urgent having regard to the safety of other people, that it should not be delayed, the authorizing officer can delay this right for a time that is reasonable in the circumstances.

carefully the circumstances in which the confession was made to decide on its admissibility.

3.2.26 If a challenge to the admissibility of a confession appears likely steps should be taken to obtain additional evidence covering the circumstances in which it was made. For example, a statement from a physician who examined the suspect during the relevant period may be useful to rebut any allegation that the suspect was abused by Investigators. A further example, applying the law in Grenada, would be a statement from an authorizing officer justifying why an interview took place without a legal advisor, when this right had been delayed in accordance with the Act.

3.2.27 Unfairly Obtained Evidence

3.2.28 The Acts³⁵ enable a court to exclude evidence which would otherwise be admissible against a defendant on the basis it would be unfair to adduce it. The nature of the courts discretion (applying section 78 of Police and Criminal Evidence Act (England and Wales)) was explained by Lord Lane C.J. in the case of **R v Quinn** *Crim L.R. 581*:

"...The function of the judge is therefore to protect the fairness of the proceedings, and normally proceedings are fair if... all relevant evidence [is heard] which either side wishes to place before [the court],

³⁵ **Saint Vincent and the Grenadines:** Section 9 Interviewing of Suspects for Serious Crimes Act; **Saint Christopher and Nevis:** Section 9 Interviewing of Suspects for Serious Crimes Act; **Dominica:** Section 14F Criminal Law and Procedure Act; **Grenada:** Section 9 Interviewing of Suspects for Serious Crimes Act; **Antigua and Barbuda:** Section 9 Interviewing of Accuseds for Serious Crimes Bill

but proceedings may become unfair if, for example, one side is allowed to adduce relevant evidence which, for one reason or another, the other side cannot properly challenge or meet."

3.2.29 Prosecutors should note that each case will turn on its own facts, and that the courts have resisted attempts to fetter their discretion. See for example **R v Samuel** 1988 Q.B 615 where the court held that because of the infinite variety of circumstances, it was undesirable to attempt any general guidance as to how the discretion should be exercised.

3.2.30 Challenges to the Fairness of Evidence

3.2.31 Areas where successful challenges may be made include where evidence has been obtained as a result of:

- (a) Breaches of a constitutional right;
- (b) Breach of the Guidance in the second schedule of the Act;
- (c) Bad faith on the part of the Investigator.

3.2.32 Review of Evidence

3.2.33 Prosecutors should be familiar with the provisions of the Guidance in the second schedule of the Acts and be alert to potential breaches. If the provisions of the Guidance are not followed, the consequences of the failure to comply may result in evidence being excluded. However, not all breaches will render evidence inadmissible. The court will look for a significant and substantial breach before going on to consider

whether or not to exclude evidence obtained as a result of the breach.

3.2.34 Having identified evidence that is likely to be challenged Prosecutors will need to:

- (a) Establish the facts, and if necessary ask the Investigator for an explanation as to their actions;
- (b) Apply the relevant law and provisions of the Guidance to the facts, and decide if the court is likely to find a significant and substantial breach of the defendant's rights.

3.2.35 In any event, Prosecutors should apply the Code for Prosecutors during the review process. In particular, if it appears probable that the court will exclude the evidence, the Prosecutor will decide whether or not there is a reasonable prospect of a conviction without it.

3.2.36 Challenging Admissibility

3.2.37 The admissibility of a confession statement may be challenged in the High Court or the magistrates court by the defence in the course of a "voire dire" (a trial within a trial). The Acts³⁶ provide that the court:

"...shall not allow a statement to be given in evidence against a defendant except in so far as the prosecution proves to the court

³⁶ **Saint Vincent and the Grenadines:** Section 9(2) Interviewing of Suspects for Serious Crimes Act; **Saint Christopher and Nevis:** Section 9(2) Interviewing of Suspects for Serious Crimes Act; **Dominica:** Section 14F(2) Criminal Law and Procedure Act; **Grenada:** Section 9(2) Interviewing of Suspects for Serious Crimes Act; **Antigua and Barbuda:** Section 9(2) Interviewing of Accuseds for Serious Crimes Bill

beyond reasonable doubt that the statement was made by the defendant voluntarily, and is reliable.”

3.2.38 This requires the calling of witnesses by the prosecution to support its case for the evidence to be admitted. The defendant is not obliged to give evidence or call witnesses in support of his or her case. Nor is the court concerned as to the truthfulness of the confession (**R v Davis** 1990 *Crim. L.R.* 860).

3.2.39 Adverse Inference

3.2.40 A court can draw an adverse inference from a defendant's silence in circumstances as set out in the Acts in Grenada, Saint Vincent and the Grenadines and Dominica.³⁷ This section has been drawn from section 34 of the Criminal Justice and Public Order Act 1994 (England and Wales) (CJPOA). Therefore the case law in this section will refer to authorities from England and Wales, which are of course persuasive authorities in the region.

3.2.41 The adverse inference allows an inference to be drawn when a suspect is silent when questioned under caution prior to charge.³⁸ An

³⁷ **Saint Vincent and the Grenadines:** Section 11 Interviewing of Suspects for Serious Crimes Act; **Dominica:** Section 14H Criminal Law and Procedure Act; **Grenada:** Section 11 Interviewing of Suspects for Serious Crimes Act; **Antigua and Barbuda:** Section 11 Interviewing of Accuseds for Serious Crimes Bill

³⁸ **Saint Vincent and the Grenadines:** Section 11(1)(a) Interviewing of Suspects for Serious Crimes Act; **Dominica:** Section 14H(1)(a) Criminal Law and Procedure Act; **Grenada:** Section 11(1)(a) Interviewing of Suspects for Serious Crimes Act; **Antigua and Barbuda:** Section 11(1)(a) Interviewing of Accuseds for Serious Crimes Bill

inference can also be drawn when a suspect is silent on charge.³⁹ These subsections are distinct and the fact that no inference can be drawn from silence during questioning does not mean that no adverse inference can be drawn from silence on charge.

3.2.42 In **Dervish and Anori [2001] EWCA Crim. 2789**, the trial judge had ruled that the defendants' no comment interviews were inadmissible, but had directed that the jury may draw an adverse inference from silence at charge in accordance with section 34(1)(b) of the CJPOA. At the Court of Appeal, the defendants had argued that this approach was wrong as the two limbs of section 34 were inextricably linked. The Court of Appeal rejected this argument and approved the judge's approach.

There are two points that arise:

- (a) If faced with a situation of silence on charge and interview, a Prosecutor should remind the court of the potential drawing of adverse inference under both subsections, and;
- (b) If there is any doubt as to the admissibility of the interviews, the Prosecutor should be prepared to invite the court to draw an adverse inference on being charged if applicable.

³⁹ **Saint Vincent and the Grenadines:** Section 11(1)(b) Interviewing of Suspects for Serious Crimes Act; **Dominica:** Section 14H(1)(b) Criminal Law and Procedure Act; **Grenada:** Section 11(1)(b) Interviewing of Accuseds for Serious Crimes Act; **Antigua and Barbuda:** Section 11(1)(b) Interviewing of Accuseds for Serious Crimes Bill

3.2.43 The Right to Silence and Constitutional Rights

3.2.44 The right to silence is protected by the European Convention of Human Rights. The Constitution of Saint Vincent and the Grenadines, provides that:

"...nothing shall prevent the prosecution or the court from commenting on his [defendant's] failure to give evidence on his own behalf or prevent the court from drawing inferences from any such failure."⁴⁰

3.2.45 This relates specifically to a defendant not being compelled to give evidence at trial and there is no reference to a failure to answer questions when interviewed after arrest in the Constitutions in the region.

3.2.46 Guidance can therefore be taken from authorities relating to the European Convention on Human Rights (ECHR) where equally there is no express entitlement to remain silent. The decisions show that the right to silence has been held to be part of the generally recognised international standard of justice and is part of the system established by the ECHR (**Murray (John) v UK (1996) 22 E.H.R.R. 29**). However, this right is not absolute:

"Whether the drawing of adverse inferences from an accused's silence infringes Article 6 [ECHR – Right to a Fair Trial] is a matter to be

⁴⁰ **Saint Vincent and the Grenadines**: Section 8(7) Constitution of Saint Vincent and the Grenadines the same section at 8(7) is in the Constitution of the Commonwealth of **Dominica**. There is no equivalent provision in **Grenada** nor **Antigua and Barbuda** and no reference to silence in the Constitution.

determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight to be attached to them by national courts in their assessment of the evidence and the degree of compulsion inherent in the situation."
(Murray (John) v UK (1996) 22 E.H.R.R. 29.)

3.2.47 Section 34 CJPOA is not, per se, a breach of the ECHR. In **Condron v UK (2001) 31 E.H.R.R. 1**, the European Court of Human Rights recognized that the CJPOA aims to strike an appropriate balance between the right to silence and the drawing of adverse inferences. Particular caution is required before an adverse inference can be drawn, but in a situation when an explanation is clearly called for from the defendant, then his silence will be relevant in assessing the persuasiveness of the evidence adduced by the prosecution.

3.2.48 The purpose of the adverse inference is:

- (a) To discourage a defendant from fabricating a defence late in the day; and
- (b) To encourage the defendant to make speedy disclosure of any genuine defence or any fact which may go toward establishing a genuine defence. (See **R v Roble [1997] Crim LR 449**).

3.2.49 In **R v Argent [1997] 2 Cr.App.R. 27**, Lord Bingham set out the six formal conditions that must be satisfied before an adverse inference can be drawn:

- (a) There must be proceedings against a person for an offence;
- (b) The alleged failure to mention a fact at trial must have occurred before charge, or on charge;
- (c) The alleged failure must have occurred during questioning under caution;
- (d) The questioning must have been directed to trying to discover whether or by whom the alleged offence was committed;
- (e) The alleged failure of the suspect must have been to mention any fact relied on in his defence in those proceedings;
- (f) The alleged failure must have been to mention a fact which in the circumstances existing at the time the suspect could reasonably have been expected to mention when so questioned.

3.2.50 "*In the circumstances*" has been construed to include, when relevant, time of day, defendant's age, experience, mental capacity, state of health, sobriety, tiredness, knowledge, personality and legal advice might all be relevant (**R v Howell** [2003] *Crim.L.R.* 405).

3.2.51 When the adverse inference applies, such inferences may be drawn from the silence as appear proper to a court or jury in determining whether the suspect is guilty of the offence charged. An adverse inference can also apply in determining applications to dismiss charges or that there is no case to answer.

3.2.52 Prosecutors should bear in mind that the courts have indicated that the adverse inference provisions should be interpreted restrictively as effectively it restricts a common law right that was once thought to offer appropriate protection to defendants against the risk of injustice (**R v Bowden** [1999] 2 Cr.App. R. 176). In **R v Brizzalari** [2004] EWCA Crim 310, the Court of Appeal urged Prosecutors not to complicate trials and summings up by invoking an adverse inference "*unless the merits of the individual case required that it should be done.*"

3.2.53 What Prevents an Adverse Inference Applying?

3.2.54 No adverse inferences can be drawn if Investigators have made up their mind to charge (**Pointer** [1997] Crim.L.R. 676).

3.2.55 However if the Investigator still has an open mind to the involvement or otherwise of the suspect, an interview can proceed even if there is clear evidence of guilt (**Gayle** [1999] Crim.L.R. 502, CA).

3.2.56 No adverse inference can be drawn if the case is so complex or related to matters so long ago, that silence would be justified as no sensible immediate response was appropriate.

3.2.57 No adverse inferences can be drawn if the facts in question were not known to the defendant at the time when he failed to disclose them (**Nickolson** [1999] Crim. L.R. 61).

3.2.58 No adverse inferences can be drawn unless legal advice is offered or

made available from the initial stages of interrogation.⁴¹ **Murray (John) v UK** (1996) 22 *E.H.R.R.* 29; **Averill v UK** [2001] 31 *E.H.R.R.* 3).

3.2.59 The language of the adverse inference sections indicates that adverse inferences cannot be drawn if the defendant faces trial on a different offence from that with which he was charged.

3.2.60 A bare admission of facts in the prosecution case, or a mere suggestion or hypothesis are not facts relied on by the defence for the purposes of an adverse inference (**Betts and Hall** [2001] 2 *Cr.App.R.* 16). Mere suggestion or hypothesis cannot be a foundation for adverse inferences (**Nickolson** [1999] *Crim. L.R.* 61).

3.2.61 When Can an Adverse Inference Apply?

3.2.62 Adverse inferences can be drawn from failure to mention facts even though the Investigator did not ask questions about all the charges eventually laid especially where the suspect could have made a note for his legal advisors (**Napper** [1996] *Crim. L.R.* 591, CA).

3.2.63 Adverse inferences can be drawn if there is a failure to mention a fact that could relate to something said at a second or subsequent interview and which was not mentioned at the first interview (**McLernon** [1992] *N.I.* 168).

⁴¹ **Saint Vincent and the Grenadines**: Section 11(3) Interviewing of Suspects for Serious Crimes Act; **Dominica**: Section 14H(3) Criminal Law and Procedure Act; **Grenada**: Section 11(3) Interviewing of Suspects for Serious Crimes Act; **Antigua and Barbuda**: Section 11(3) Interviewing of Accuseds for Serious Crimes Bill

3.2.64 Adverse inferences can be drawn from failure to mention a fact later relied on even though it causes no surprise to the prosecution (**Fox and Sullivan**, *unreported*, 2.07.9). The defence can rebut allegations of recent fabrication by calling a third party to give evidence that the fact was disclosed at the time (usually the legal advisor who attended the interview).

3.2.65 Adverse inferences can be drawn even though the details of the fact relied on and not mentioned to the Investigator, had been communicated to a third party (**Taylor** [1999] *Crim.L.R.* 77 CA).

3.2.66 The fact relied on need not be in the defendant's own evidence.

Reliance can be through the evidence of other witnesses or even through cross-examination of prosecution witnesses or the defendant or his witnesses (**Bowers** [1998] *Crim L.R.* 817, CA). **Webber** [2004] *UKHL1* is the most recent case to reiterate this point.

3.2.67 Adverse inferences can be drawn even when the truth or otherwise of the defendant's explanation for failure to mention the fact is the very question the jury has to decide in determining guilt (**Hearne and Coleman** [2000] 6 *Archbold News* 2, May 4 and **Gowland-Wynn** [2001] *EWCA Crim* 2715).

3.2.68 Pre-Interview Disclosure

3.2.69 As noted above, no adverse inferences can be drawn if the facts were not known to the defendant at the time when "*he failed to disclose them*" at interview/charge. The Court of Appeal (England and

Wales) has held in **R v Argent** [1997] 2 Cr App R 27, **R v Imran and Hussain** [1997] Crim L.R. 754 CA and **R v Roble** [1997] CLR 346 that if the Investigator discloses little or nothing of the case against the suspect, so that a legal advisor cannot usefully provide advice to their client, then this may be a good reason to advise the suspect to remain silent.

3.2.70 This means that the interviewing or investigating officer must disclose sufficient information to enable the suspect to understand the nature and circumstances of their arrest. There is no requirement for the Investigator to present a prima facie case before questioning the suspect or to give the legal advisor a full briefing before questioning the suspect (**Imran and Hussain** [1997] Crim.L.R. 754, CA and **Farrell** [2004] EWCA Crim 597).

3.2.71 If the Investigator feels that it is necessary to withhold information from the legal advisor during a pre-interview briefing, they should be able to explain clearly the reasons supporting this approach in any future proceedings.

3.2.72 Prosecutors should be made aware of all pre-interview disclosure that takes place in order to assess whether an adverse inference may properly be drawn at trial and to anticipate, and prepare for, any defence arguments on the point. The Prosecutor should be requesting this information if the Investigators do not include it in the case papers. Assessing pre-interview disclosure in such a manner will enable the prosecution to present an accurate picture to the court of the basis of

the case and the supporting evidence that was made known to the suspect and his legal advisor at the time of interview. Such an approach will assist in rebutting defence assertions that the silence was reasonable in the circumstances. It can also help Prosecutors foresee likely lines that the defence may take and advise the police on further lines of inquiry.

3.2.73 Legal Advice to Remain Silent

3.2.74 To avoid the drawing of an adverse inference, some defendants will state that they remained silent because they were advised to do so by their legal advisor. The defendant's statement that he was silent on legal advice is not hearsay provided that the purpose is limited to explaining why the defendant decided to remain silent. However, such a course will not necessarily avoid the application of the adverse inference sections. In **R v Hoare and Pierce** [2004] EWCA Crim 784 the Court of Appeal (England and Wales) held that when such an explanation is put forward, a jury should consider whether it was reasonable for a defendant to rely on such advice.

3.2.75 This principle was further developed in **R v Beckles** [2005] 1 WLR 2829 in which the Court of Appeal (England and Wales) set out a two stage test for juries to consider before drawing an adverse inference:

- (a) Did the defendant genuinely rely on the legal advice, i.e. did the defendant accept the advice and believe that he was entitled to follow it? and

- (b) Was it reasonable for the defendant to rely on the advice? By way of example, a defendant may be acting unreasonably if he relied on the legal advice to remain silent because he had no explanation to give and the advice suited his own purposes.

3.2.76 Reasonableness does not depend on whether the advice was legally correct (**R v Argent** [1997] *Crim.L.R.* 449 CA and **R v Roble** [1997] *Crim.L.R.* 449, CA).

3.2.77 The Defendant Waiving Legal Privilege

3.2.78 The inquiry into the reasonableness or otherwise of relying on legal advice may lead to the defendant's legal professional privilege being deemed to have been implicitly waived. As a result, that lawyer who gave the advice may have to give evidence.

3.2.79 Privilege will not be waived if the defendant merely gives evidence to the effect that he was advised to be silent. If the defendant explains the reasons for the advice or the circumstances then that could amount to a waiver of the privilege (**R v Bowden** [1999] 4 *All E.R.* 43).

3.2.80 Privilege will not be waived if a legal advisor is called to rebut an inference of subsequent fabrication by giving evidence that the fact was communicated to him by the defendant at or about the time of the interview (**R v Condon and Condon** [1997] 1 *W.L.R.* 827).

3.2.81 If privilege is waived, then the prosecution can ask questions of the defendant and the legal advisor (if called) to discover whether such

advice was given for tactical reasons. Such questions that could be asked are:

- (a) Why was the advice was given;
- (b) if there were any other reasons for the advice;
- (c) The nature of the advice (**R v Condron** [1997] 1 Cr.App.R. 185).

3.2.82 Whether privilege has been waived will depend on the facts of each case, and where appropriate, should be raised in the absence of the jury.

3.2.83 Prepared and Self-Serving Statements Practice and Procedure

3.2.84 To avoid the drawing of an adverse inference, some defendants will read out a pre-prepared statement and then refuse to answer any further questions. In some cases, it will be the legal advisor who reads out the statement.

3.2.85 An adverse inference cannot be drawn by a defendant who merely refuses to answer police questions after a pre-prepared statement is read out (**R v Knight** [2003] EWCA 1977 and **R v Turner (Dwaine)** [2004] EWCA Cim 3108).

3.2.86 Nor can an adverse inference be drawn if the defendant gives evidence at trial that is completely consistent with his pre-prepared statement (**R v Knight** [2003] EWCA 1977 and **R v (1) Ashgar Ali (2) Liaqat Ali (3) Sarfraz Ali** [2001] EWCA Crim 683).

3.2.87 However, it is important for Prosecutors to realise that an adverse inference **can** be drawn if the defendant gives evidence that is inconsistent with the statement or mentions a fact which at the time of the interview, it would have been reasonable to include in the pre-prepared statement. In **R v Knight [2003] EWCA 1977**, Laws LJ stated:

*"We wish to make it crystal clear that of itself the making of a pre-prepared statement gives **no automatic immunity against adverse inferences under section 34 [CJPOA].**" (paragraph 13).*

3.2.88 When evidence has been given which is inconsistent with the contents of a pre-prepared statement, the inferences that a jury can draw are not limited to recent fabrication. This is because the courts have recognised that such an inference would be of limited use when a pre-prepared statement is read out in interview. However, it is open for a jury to consider whether the suspect did not respond to the questions because his/her account would not stand up to questioning or any other adverse inference that they deem appropriate (**R v Beckles and Montague [1999] Crim LR 148**).

3.2.89 Prosecutors are advised not to serve the interview containing the pre-prepared interview as part of prosecution's case, especially if the statement is very full or there is a potential problem as discussed in What prevents an adverse inference applying? above, so that there is a doubt as to whether a court could properly draw an adverse inference. Rather, it should be viewed as a self-serving statement and therefore, inadmissible. A self-serving statement is a statement by an accused,

which is wholly exculpatory, and the admission of which is sought in order to prove the truth of the contents therein. Moreover, in **R v Pearce** 69 Cr.App.R 365 CA, it was held that self-serving statements which are prepared by suspects and handed to the police with a view to it becoming part of the prosecution case eventually, should be excluded by the judge at trial (pages 369-370 of the judgment).

3.2.90 Self-serving statements can become admissible as previous inconsistent statements. That is to say that the pre-prepared statement could be used to cross-examine the accused if he/she departs from its contents whilst giving evidence. Where no such rules and principles exist, inconsistent statements can still be admitted or proved in Saint Vincent and the Grenadines applying statute from England Wales.⁴²

3.2.91 Further in Saint Vincent and the Grenadines, without any prescribed procedure in its own law and applying the law in England and Wales, such statements could be adduced⁴³ as evidence of the truth of matters stated, as if oral evidence of the matter were admissible. Effectively, this means that a jury or Magistrate would have to consider the two evidential statements which have been adduced, but which are

⁴² See paragraph 3.3.5 below for basis of this assertion for **Saint Vincent and the Grenadines** applying the Criminal Procedure Act 1865 (**England and Wales**). Therefore any inconsistent or former statement is mentioned to the witness and he must be asked whether or not he made such a statement before proof of the making of the statement is given.

⁴³ See section 119 Criminal Justice Act 2003 (**England and Wales**)

inconsistent with each other. Such a situation would reflect on the credibility of the defendant.

3.2.92 Prosecutors should ensure that they know the contents of the pre-prepared statement sufficiently well in order to immediately recognise when a defendant is departing from its contents whilst giving evidence. By careful cross-examination, backed by full preparation, Prosecutors should probe any such inconsistencies thereby bringing it to the attention of the jury. Pragmatically, this procedure has the same effect as drawing an adverse inference, and was endorsed by Laws LJ in **R v Knight [2003] EWCA 1977**:

"Nor does it follow that, in a case in which it is not suggested that any adverse inference should be drawn under section 34, the prosecution can be required to adduce as part of their evidence a pre-prepared wholly self-serving statement. In such a case the law remains as stated in Pearce." (paragraph 14.)

3.2.93 Procedure

3.2.94 Evidence of the failure to mention the fact in questions can be given either before or after evidence has been given which tends to establish the fact. Initially, the prosecution should normally just state that the defendant, after being cautioned, did not answer questions. If and when he gives evidence and mentions facts which in the view of prosecution counsel he could reasonably have been expected to mention in interview, he can then be cross-examined as to why he did not mention them in interview. The issue is normally put before the judge in the

absence of the jury at the conclusion of all the evidence. If the judge rules that no adverse inference can be drawn, they will have to expunge the cross-examination from their memory.

3.2.95 Antigua and Barbuda - ONDCP

3.2.96 Pursuant to section 23 of the Office of National Drug and Money

Laundering Control Policy Act 2003 any interviews of suspects can be conducted by video or audio device. Similar Standing Orders to the Guidance in the aforementioned Acts have been drafted and should be followed.

3.2.97 Planning

3.2.98 Before conducting interviews, especially where there are multiple

suspects, preparation by the Investigators is essential. The Lead Investigator should brief interviewing officers on the tactics to be deployed in interview (i.e questions to be asked and aims of the interview) and agree disclosure that will be provided to the defence Attorney. Decisions will should also be made at any briefing on the order of interviews of multiple suspects or whether they will be simultaneous. As soon as the first interviews are concluded there should be a de-brief from each interviewing officer on the content of their suspect interview. The Lead Investigator can then decide what tactics will be deployed for any further interviews, including any further disclosure.

3.2.99 Where there has also been a cash seizure consideration will have to be given as to whether there should be two interviews. The first under caution for any criminal offence and the second for any cash forfeiture proceedings. If this second interview takes place it should be fully explained to the suspect that anything said could be used as evidence in the civil cash seizure proceedings.⁴⁴

3.3 Telecommunication Evidence

3.3.1 Details of calls/texts/Blackberry messages made and received on a cell phone attributed to a suspect may provide evidence of association with other known offenders. The timing and pattern of calls might link the suspect to the sequence of events surrounding the commission of the offence and support inferences of participation (**DPP v Varlack** *Privy Council Appeal No 23 of 2007*). However will the evidence of the content of texts, Blackberry messages (BBM) and any other form of typed telecommunication evidence be admissible?

3.3.2 When considering admissibility, the following should be considered:

- (a) Is the evidence relevant to an issue in the case? Relevance is usually a matter of common sense or evidence that is “*logically probative*” (per Lord Steyn **R v Randall** [2004] 1 WLR 56). Evidence of communication between co-defendants or others unknown, who are a party to a criminal enterprise, will be relevant when the content is in relation to the matter charged.

⁴⁴ See Annex Q at paragraphs 2, 7 and 12 for more guidance

- (b) If the evidence is relevant, the next issue is whether the evidence is hearsay i.e. an out of court statement the purpose for which is to rely on the truth of the statement.
- (c) However if the evidence can be brought within one of the exceptions to the hearsay rule or it is real evidence (**R v M (Rizwan)** EWCA Crim 3067; WL 22477344) then it would be admissible.

3.3.3 Therefore it is important to consider the relevant statutes or rules of evidence determining admissibility of hearsay evidence⁴⁵ and consider each country in turn, as the admissibility of hearsay differs.

3.3.4 **Saint Vincent and the Grenadines**

3.3.5 In Saint Vincent and the Grenadines where no such rules and principles exist for hearsay, they could be adopted or derived from English statutes or common law. The statutory basis for this proposition is the all-embracing section 3 of the Evidence Act:

“Whenever any question shall arise in any criminal or civil proceedings whatsoever in or before any court, court martial or tribunal, or before any person having by law, or by consent of parties, authority to hear, receive and examine evidence, touching the admissibility or sufficiency

⁴⁵ **Saint Lucia:** Evidence Act No. 5 of 2002; **Grenada:** Evidence Act Chapter 92; **Saint Vincent and the Grenadines:** Evidence Act, CAP 220; **Antigua and Barbuda:** Evidence (Special Provisions) Act 2009, Act No.5 ; **Dominica:** Evidence Act Chapter 64); **Saint Christopher and Nevis:** Evidence Act 2011; **Barbados:** Evidence Act 1994

of any evidence, the competency or obligation of any witness to give evidence, the swearing of any witness, the form of oath or affirmation to be used by any witness, the admissibility of any question put to any witness, the admissibility or sufficiency of any document, writing, matter or thing tendered in evidence, such question shall, except as provided for in this Act, be decided according to the law and practice administered for the time being in England with such modifications as may be applicable and necessary in Saint Vincent and the Grenadines.”

3.3.6 Therefore if a matter arose concerning the admissibility of hearsay evidence, in the absence of a local statutory provision, the Criminal Justice Act 2003 (England and Wales) could be applied. This Act, since the 4th April 2005, has radically changed the law concerning hearsay.

3.3.7 In **R v Riat** [2012] EWCA Crim 1509 LJ Hughes when describing the framework of hearsay explained that the Criminal Justice Act meant:

“..the common law prohibition on the admission of hearsay evidence remains the default rule but the categories of hearsay which may be admitted are widened. It is essential to remember that although hearsay is thereby made admissible in more circumstances than it previously was, this does not make it the same as first-hand evidence. It is not. It is necessarily second-hand and for that reason very often second-best. Because it is second-hand, it is that much more difficult to test and assess. The jury frequently never sees the person whose word is being relied upon. Even if there is a video recording of the witness’

interview, that person cannot be asked a single exploratory or challenging question about what is said. From the point of view of a defendant, the loss of the ability to confront one's accusers is an important disadvantage. Those very real risks of hearsay evidence, which underlay the common law rule generally excluding it, remain critical to its management. Sometimes it is necessary in the interests of justice for it to be admitted. It may not suffer from the risks of unreliability which often attend such evidence, or its reliability can realistically be assessed. Equally, however, sometimes it is necessary in the interests of justice either that it should not be admitted at all, or that a trial depending upon it should not be allowed to proceed to the jury because any conviction would not be safe.”

Indeed the explanatory notes for this Act states that the purpose of this reform is that the:

"Rules on evidence will be changed...to allow the use of reported (hearsay) evidence where there is good reason why the original source cannot be present or where the judge otherwise considers it would be appropriate".

3.3.8 The effect of the Criminal Justice Act is to enable evidence to be admitted of *"implied assertions"*. This reverses the decision made in **R v Kearley** (1992) 2AC 228. In **Kearley** police officers had been at the home of the defendant and whilst there had answered telephone calls and personal calls from people asking about drugs that the defendant had for sale. The callers were not called as witnesses. The

prosecution wished to adduce the evidence to prove that the intended recipient of the calls was a dealer in drugs. The House of Lords decided that, evidence of the fact that the defendant dealt in drugs, from the caller's words were hearsay and thus inadmissible. It now follows that the callers' words would not fall within the definition of being hearsay because the purpose of the call was not to cause another person to believe that the recipient of the call was a drug dealer but simply to request drugs.

3.3.9 Telecommunication evidence such as billing records may be admissible pursuant to section 115 as a business document and texts/BBM's and billing pursuant to section 114 of the Criminal Justice Act, in the interests of justice.

3.3.10 In accordance with section 115 a statement contained in a document is admissible of any matter stated if:

- (a) Oral evidence would be admissible as evidence of the matter;
- (b) The document or the part containing the statement was created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office;
- (c) The person who supplied the information contained in the statement (the relevant person) had or may reasonably be

supposed to have had personal knowledge of the matters dealt with; and

- (d) Each person (if any) through whom the information was supplied, from the relevant person to the person creating or receiving the information in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office (section 117(2) of the Criminal Justice Act).

3.3.11 Equally the telephone billing and content of a text/BBM could be admissible pursuant to section 114(1) of the Criminal Justice Act at the courts discretion. When exercising the discretion under section 114(1)(d) the court must have regard to the following (and any others it considers relevant):

- (a) How much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
- (b) What other evidence has been, or can be, given on the matter or evidence mentioned above;
- (c) How important the matter or evidence mentioned is in the context of the case as a whole;
- (d) The circumstances in which the statement was made;

- (e) How reliable the maker of the statement appears to be;
- (f) How reliable the evidence of the making of the statement appears to be;
- (g) Whether oral evidence of the matter stated can be given and, if not, why it cannot;
- (h) The amount of difficulty involved in challenging the statement;
- (i) The extent to which that difficulty would be likely to prejudice the party facing it.

3.3.12 Section 114(1)(d) will be considered only in cases where admissibility under the other statutory provisions and the retained common law rules is not allowed.

3.3.13 The test for admissibility is the, "*interests of justice*". The court will consider the factors outlined at paragraph 3.3.11 above to consider if it is in the interests of justice test to admit the evidence. Prosecutors will need to take these factors into account when considering the likely admissibility of evidence that the prosecution propose to call. These will also be the factors to take account of when the defence adduce hearsay evidence. The Prosecutor will need to decide whether to oppose any application by the defence or agree to admit the evidence.

3.3.14 The courts in England and Wales have already indicated a willingness to use section 114(1)(d). For example, in **R v Xhabri** [2006] 1 Cr. App.

R. 26 the Court of Appeal when considering an application to admit the previous complaint of a rape victim stated that even if the previous complaint fell outside the strict construction of compliance with the relevant section of the Criminal Justice Act 2003 they would admit the evidence under section 114(1)(d).⁴⁶

The cells return from analysis and Mr Yellow's cell has a text message stating, "You ready to meet at the collection point" sent from an unknown cell number. An application could be made pursuant to section 114 of the Criminal Justice Act in Saint Vincent and the Grenadines to admit this message in the interests of justice as this is important explanatory evidence of the reason why Mr Yellow was at the bus stop on 17th June and collected by Mr Green. However as the maker of the statement is unknown and cannot be called to give this evidence the defence may apply pursuant to section 126 to refuse to admit the message.

3.3.15 Dominica

3.3.16 Section 39 of the Interpretation and General Clauses Act Cap.

3:01 of Dominica provides:

⁴⁶ Also see Criminal Justice Act section 126 which is a free standing jurisdiction to refuse to admit hearsay evidence and section 125 requires a judge to look to see whether the hearsay evidence is so unconvincing that any conviction would be unsafe.

"All other matters of procedure not herein nor in any other Ordinance expressly provided for, shall be regulated, as to the admission thereof, by the law of England, and the practice of the Superior Courts of criminal law in England."

3.3.17 Therefore Dominica may not be able to validly adopt, receive or apply any English statute or common law concerning the admissibility of documentary evidence that was enacted or decided after the 2nd November, 1978, without legislative intervention or law reform.

3.3.18 The section 3 provision of the Saint Vincent and the Grenadines Evidence Act, unlike section 39 of the Dominica Interpretation and General Clauses Act, is ambulatory, dependent on what the current law of England is at the time you are resolving admissibility issues arising, absent domestic law. Therefore the Criminal Justice Act 2003 (England and Wales) cannot be applied in Dominica and hearsay is inadmissible, subject to common law exceptions (see paragraph 3.3.37 below re exceptions).

3.3.19 Grenada

3.3.20 The Evidence Act Cap 92 addresses hearsay as follows:

- (a) Section 36 B re-affirms the admissibility in evidence of a statement of any fact by existing common law rules (see paragraph 3.3.37 below re exceptions). However implied assertions as identified in **Kearley** (see paragraph 3.3.8 above)

would still be inadmissible as only statements of fact are admissible;

- (b) Section 36C makes a person's written statements admissible as their direct oral evidence in criminal proceedings under certain statutory notice conditions which require:
- The Statement is signed by the maker
 - Statement is served on all interested parties 21 days before it is proposed to tender it in evidence
 - None of the other parties or their Attorneys within 10 days object to the written statement being tendered in evidence
 - A declaration as to the truth of the contents of the statement by the maker
- (c) Section 36D allows a written statement to be admissible where the maker is either dead, unfit, cannot be found⁴⁷ abroad and it is not reasonably practicable to secure their attendance⁴⁸, or will not attend through threats of bodily harm.⁴⁹
- (d) Section 36F provides for the admissibility of business documents in criminal proceedings under certain statutory conditions where the person who supplied the information or made the statement for similar reasons, as outlined re section 36D, is unavailable or through elapse of time has no

⁴⁷ See paragraph 5.7; 7.2.27 and footnote 48

⁴⁸ Absence abroad will only apply if it is not reasonably practicable to bring the witness to court, either in person or by video link. If the witness is lost, all reasonably practicable steps must have been taken to get him before the court: this will include not only looking for him if he disappears but also keeping in touch with him to avoid him disappearing: see for example **R v Adams** [2008] 1 Cr App R 35 and **R v Kamuhuza** 173 JP 55

⁴⁹ See paragraph 3.3.33 (b)

recollection of the matters in the statement.

- (e) Section 36G establishes the admissibility prerequisites for computer hearsay documents. Essentially the prosecution will have to prove that the computer was properly working at the material time.

3.3.21 There is an anomaly in section 36F as identified in the drafting of the Criminal Justice 1988 Act (England and Wales) whereby the person who recorded the statement needs to be unavailable or have no recollection of the information. This issue was reviewed in **R v Deroda [2000] 1 Cr App R 41** and the decision in **Bedi [1992] 95 Cr App R 21** where it was accepted that reports of the loss or theft of credit cards compiled by a bank employee from information supplied by the owners of the cards were '*made*' by the employee rather than by the owners of the cards. This meant that the contents of the report were inadmissible as hearsay, as the evidence came from the owners of the card to the bank employee. Therefore the information was recollected and a witness was available. This could be an important consideration for a Prosecutor in a matter of cybercrime where for example there has been money obtained by deception from a bank account that has been reported by the loser to the bank staff. In this situation the loser or owner of the bank account would have to give evidence about the deception rather than the bank staff.

3.3.22 Section 36F(4) establishes the criteria for estimating the weight to be attached to a business document admissible in criminal proceedings.

This means regard will be given to whether the person supplying the information in a business document did so contemporaneously and if they had any incentive to conceal or misrepresent the facts.

3.3.23 Saint Lucia and Barbados

3.3.24 The Evidence Act of Barbados and Saint Lucia are similar and make former hearsay documentary evidence, the statement of an unavailable witness who previously made an out of court statement⁵⁰, the out of court statement of an available witness while testifying, expert reports and oral opinion evidence all admissible where the relevant requirements under the statute are met.

3.3.25 However the same anomaly as outlined in Grenada at paragraph 3.3.21 also applies in section 55 in Saint Lucia and Barbados whereby the person who recorded the statement needs to be unavailable or have no recollection. Equally implied assertions as identified in **Kearley** (see paragraph 3.3.8 above) would still be inadmissible as only statements of fact are admissible.

3.3.26 In Saint Lucia and Barbados, section 61 specifically allows telecommunications evidence of the:

- (a) The identity of the person from whom or on whose behalf the message was sent;
- (b) The date on which, the time at which, or the place from which,

⁵⁰ See footnote 48

the message was sent; or

- (c) The identity of the person to whom the message was addressed.

3.3.27 Antigua and Barbuda

3.3.28 Section 37 of the Evidence (Special Provisions) Act 2009 allows admission of first hand hearsay. Although implied assertions (see paragraph 3.3.8 above) would still be inadmissible as only statements of fact are admissible. The Act introduces automatic admissibility of a statement made by an identifiable person of evidence that would be admissible if that person were available to give oral evidence but is unable to do so because either:

- (a) The person is dead (section 37(a));
- (b) The person is unfit to attend as a witness because of their bodily or mental condition (Section 37(b));⁵¹
- (c) The person is outside Antigua and Barbuda and it is not reasonably practicable to secure his attendance (Section 37(c));⁵²
- (d) The person cannot be found although such steps as it is reasonably practicable to take to find him have been taken

⁵¹ This is fundamentally different to the Criminal Justice Act 2003 (**England and Wales**) that refers to the unfitness in relation to being a witness as opposed to attending as a witness.

⁵² See footnote 48

(Section 37(d));⁵³

- (e) There is a limited form of admissibility if the reason for non-availability to give oral evidence is through threats of bodily harm and reasonable steps cannot be taken to protect the witness (Section 37(e)).⁵⁴

3.3.29 Section 38 of the Act still allows the credibility of a witness to be challenged, whose statement is received in evidence.

3.3.30 Business records or a record, whether in paper, electronic or any other form, made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence on production of the record.⁵⁵ This means that telephone billing can be adduced as a document produced in the ordinary course of the business of the telecommunications company.

3.3.31 The defence is entitled to cross-examine an employee of the telecommunications company who may reasonably be expected to have knowledge of the making or contents of the billing produced or received in evidence.⁵⁶ Equally if the defence adduce in evidence telephone billing the prosecution can cross-examine.

⁵³ See footnote 48

⁵⁴ See paragraph 3.3.33 (b) re unfairness which a court should take into account although not stipulated within the Act

⁵⁵ Section 40 Evidence (Special Provisions) Act 2009

⁵⁶ Section 40(9) Evidence (Special Provisions) Act 2009

3.3.32 Saint Christopher and Nevis

3.3.33 The Evidence Act 2011 at Parts VII and VIII provide for relevance of evidence and exceptions to the relevance rule, respectively. The provisions of the Act, under these Parts, substantially abrogate the common law hearsay rule. However the same anomaly as outlined in Grenada at paragraph 3.3.21 also applies in section 57 whereby the person who recorded the statement needs to be unavailable or have no recollection and again implied assertions would still be inadmissible. The changes include the admissibility of an out of court statement of a witness who is fearful of death, injury or financial loss (Section 67(3)(b)(vi)), unfit to attend (Section 67(3)(b)(ii)), and significantly is kept away from the proceedings by threats of bodily harm and no reasonable steps can be taken to protect the witness (Section 67(3)(b)(v)). The Prosecutor will apply for leave for the statement to be admitted for any of these reasons (Section 67(4)) and serve notice on the parties 21 days before the hearing where the statement will be tendered (Section 67(5)). The Court when reviewing an application for leave pursuant to section 67(4) will consider the following:

- (a) The contents of the statement;
- (b) Unfairness to any party to the proceedings and in particular the effect on the party that will be unable to challenge the statement. In **R v Riat** [2012] EWCA Crim 1509 on this issue the England and Wales Court of Appeal in relation to a similar

provision held that:

*“In particular, the court must consider the content of the statement, and the risk of unfairness to any party which would ensue from its admission, especially as a result of difficulty challenging it. Further ... to consider the availability of special measures. That shows that the court should take all possible steps to enable a fearful witness to give evidence notwithstanding his apprehension. This may be impossible, but very frequently it is perfectly practicable; a degree of (properly supported) fortitude can legitimately be expected in the fight against crime.”;*⁵⁷

(c) Any other relevant circumstances.

3.3.34 The Act at section 61 also allows:

- (a) The identity of the person from whom or on whose behalf a text message was sent;
- (b) The date on which, the time at which or the place from which a text message was sent; or
- (c) The identity of the person to whom the text message was addressed.

3.3.35 Part XVI of the Act (Sections 144-153) provides for electronic evidence and the provisions in that Part were taken from the OECS

⁵⁷ Also see **Horncastle** [2009] EWCA 964; [2010] 2 AC 373 (paragraphs 83-88)

Electronic Evidence Model Bill and the HIPCAR Electronic Evidence Model Bill. The HIPCAR model Bill with guidance is essential reading for the Prosecutor and can be located at: http://www.itu.int/ITU-D/projects/ITU_EC_ACP/hipcar/reports/wg2/docs/HIPCAR_1-3-B_Model_Policy_Guidelines_and_Legislative_Texts_Privacy_and_Data_Protection.pdf

In relation to the text message on Mr Yellow's cell stating, "*You ready to meet at the collection point*" sent from an unknown cell number, an application could be made in Saint Christopher and Nevis for leave to admit the text on the basis that the sender cannot be found after all reasonable efforts have been taken to find him or her (Section 67(3)(b)(iv) Evidence Act 2011). When applying for leave for the text to be admitted in the interests of justice (Section 67(4) Evidence Act 2011) the Prosecutor should submit this is important explanatory evidence of the reason why Mr Yellow was at the bus stop on 17th June and collected by Mr Green. As the maker of the statement is unknown and cannot be called to give this crucial evidence the Prosecutor should call the Investigator to confirm the steps taken to identify and locate the sender of the text (**R v Castillo** [1996] 1 Cr. App. R.438 and see paragraph 7.2.27 below). For example the Investigator may be able to give evidence that the subscriber check

confirmed the text was made on a pay-as-you-go phone and the shop that sold it has no record of who purchased it. Further it could be submitted that there is no unfairness to Mr Yellow by admitting the text without calling the maker as the content of the text supports the evidence that he did meet at the bus stop shortly thereafter to meet Mr Green with the cocaine and therefore is more probative than prejudicial. The Prosecutor could also submit, applying section 71 of the Evidence Act 2011, that the text is not hearsay as the content shows the maker was a party to the offence to supply the cocaine and the contents are a representation against the interests of the unknown participant (Sections 71(2)(d) and Section 71(4)).

3.3.36 Text, BBM and any other Typed Telecommunication Evidence

3.3.37 As summarised above admissibility of the content of text and BBM can depend upon the relevant law on hearsay in a jurisdiction. Equally important will be to consider any exceptions to the hearsay rule. Below are relevant principles and exceptions to consider:

- (a) If there is prima facie evidence that a defendant is the author of a text message/BBM (i.e. it is on a phone attributed to him and he/she can be shown to have been in possession of it at the time of sending) then the text message/BBM can be

admitted as “*real evidence*” (**R v M (Rizwan)** [2003] EWCA Crim 3067; **Howey v Bradley** ante; **R v Horne** ante). Equally the text/BBM can be admitted as a common-law exception to the hearsay rule as a confession. A confession in this context would mean a voluntary statement by the defendant confessing to his or her, own acts, knowledge or intentions.

- (b) A text/BBM by another to the defendant maybe exhibited by the other party who sent it. Its significance will be what was said to the defendant. The text may contain assertions of fact. Putting it in evidence does not make it evidence of the truth of the assertions. That would be hearsay. If a matter is within the knowledge of the other party he or she may give direct evidence of it. This assumes that the statement within the text/BBM can be properly attributed to this other party and cannot be excluded for any other reason. Examples would be where the text contained assertions of fact prejudicial to the defendant which could not be supported by other admissible evidence or that it contained prejudicial and irrelevant material, such as the author’s knowledge of the defendant’s previous convictions. In either case editing may solve the problem and should be decided by the judge or magistrate.
- (c) If the sender does not give evidence of the text/BBM as part of the prosecution case, for example they are unknown, it will have to be determined what the purpose of admitting the

text/BBM is. It would of course be hearsay to admit the text/BBM if the object is to establish the truth of what is contained in the text/BBM. However there could be a common-law exception if the statement is in furtherance of a common enterprise. This principle is particularly associated with charges of conspiracy. Although, it is not restricted to just conspiracy and can apply where complicity is alleged. In **Gray [1995] 2 Cr.App.R.100** it was held that the acts and declarations of a person engaged in a joint enterprise and made in pursuance of that joint enterprise might be admissible against another, but only where the evidence shows complicity of that other in a common offence or series of offences.

Mr Yellow sends to Mr Green a text saying, "*Mr Red says bus stop*". Mr Yellow cannot confess to the acts of others that he has not seen and of which he can only have knowledge by hearsay. It is Mr Red who has made the arrangement for the bus stop and this is inadmissible, unless the author was called to give evidence about what he wrote in the text or the text can be shown to be in furtherance of the common purpose. The Prosecutor will submit that this was an act and declaration in furtherance of a common purpose to supply cocaine. In order to satisfy this principle the Prosecutor must ensure:

1. That the text by Mr Yellow was in the course and furtherance of the common purpose to supply the cocaine on the facts of this case i.e. the text was specifically sent to facilitate the arrangement for Mr Green to collect Mr Yellow at the bus stop; and
2. That independent evidence is adduced through the surveillance officers on 17th June of the existence of the common purpose to supply cocaine. This evidence will show that Mr Green did collect Mr Yellow, who had a bag containing cocaine, at a bus stop.

Mr Yellow's cell also has the text message stating, "*You ready to meet at the collection point*" The text is sent from a cell number not registered to an individual. In order for the text from the unknown person to be admissible against Mr Yellow and Mr Green, using this same exception, the Prosecutor:

1. Must present the text as evidence of the common design to supply the cocaine on the facts i.e. the timings of the text will be significant and if the text is sent shortly before Mr Green does pick up Mr Yellow then it is a commonsense conclusion that this text relates to the transport arrangements for the supply of the cocaine; and

2. Must adduce evidence of the existence of a conspiracy and that Mr Yellow and Mr Green were participants. The particulars of the conspiracy on the charge can refer to an agreement with a person unknown. This person doesn't have to be before the court for the matter to proceed against Mr Yellow and Mr Green. In this case the particulars could refer to Mr Red as another party to the conspiracy. The prosecution case against Mr Red would be he was to be the recipient of the cocaine. This is supported by the note in Mr Green's hand and the text from Mr Yellow to Mr Green, referring to Mr Red contacting him for collection at the bus stop.

- (d) A text/BBM would be admissible when it is not proposed to assert the truth of the contents, but the fact that a text/BBM was sent and the instant reaction of the recipient (**Subramanian v Public Prosecutor [1956] 1 W.L.R.956; Ratten v R [1972] A.C. 378; R v Andrews[1987] AC 281, HL**). In other words, a text/BBM may be admissible as evidence very closely connected to a relevant event. This common-law exception is known as "*res gestae*" Such statements may be admitted if one of the following conditions is met:

- The statement is made by a person who was so emotionally overpowered by an event that the possibility that he/she was lying can be disregarded;
- The statement accompanied an act that can properly be evaluated as evidence only if considered together with the statement. For example, if the act doesn't make sense without the statement; or
- The statement relates to a physical sensation or mental state, such as an intention or emotion.

For the text, "*Mr Red says bus stop*" to be admissible applying this exception, there must be evidence of the reaction of Mr Green when receiving the text. If Mr Green immediately drove to collect Mr Yellow after receiving this text, it could be admitted to show Mr Green's state of mind when he received the message and supporting the proposition that it was only then that he drove to meet Mr Yellow at the bus stop.

3.3.38 Attribution

3.3.39 Attribution of a cell is crucial for the Prosecution Team to assert that one defendant was in touch with another. Of course if a cell is seized from a suspect upon arrest attribution can be established. However there are problems in adducing evidence of attribution where there are incriminating text messages to a person who cannot be identified

through the network provider. There isn't an evidential standard to establish attribution and the matter will usually for the jury to attach such weight as appropriate. For example it may be important to establish the significance of apparently innocent telephone numbers, which have been contacted by the suspect. A careful investigation of such numbers may provide overwhelming evidence of attribution of a cell when this is disputed (e.g. calls to family members, friends etc).⁵⁸ In **R v Mason**, Court of Appeal (E&W), 14th February 2006, it was held that an entry in the memory of a co-Defendant's phone, which linked the number attributed to the Defendant to him by name, was an admissible attribution. However if the attribution is so weak that presentation of the evidence will be inherently unreliable and unfair to the defendant, a Court may exclude it. Therefore important consideration must be given as to how the Prosecution attribute cell numbers to relevant individuals and Defendants.

3.3.40 Cell Site Analysis

3.3.41 Cell site analysis, if available, can be an important evidential tool, providing evidence of the location of the phone throughout a sequence of relevant events (see how such evidence was used in **DPP v Varlack** *Privy Council Appeal No 23 of 2007*).

3.3.42 Cell phone evidence may not prove the identity of an offender, but may be powerful when combined with other circumstantial evidence. For example a stop check or observation of the suspect at a location close

⁵⁸ See diagram of how such evidence can be presented at Table 7 on page 571

to a particular cell site may prove possession of the cell at the relevant time.

3.3.43 Landline

3.3.44 Landline telephone evidence may also be important to show contact with other persons. Billing and subscriber details should be applied for to present this evidence. However consideration will have to be given to how any calls can be attributed to a particular person if a number of persons reside at an address.

3.3.45 Applications

3.3.46 It can take time to obtain telecommunication data in the form of billing and subscriber checks and therefore applications⁵⁹ must be made at the earliest opportunity.

3.3.47 Interception

3.3.48 In some jurisdictions interception of telecommunications is intelligence only material⁶⁰ and in others can be used as evidence.⁶¹ However, if

⁵⁹ In some jurisdictions by disclosure order or production order: **Grenada**: Section 28 Interception of Communications Act 2013; **Saint Lucia**: Section 24 Interception of Communications Act; **Antigua and Barbuda**: Section 57 Evidence (Special Provisions) Act 2009; **Saint Christopher and Nevis**: Section 24 Interception of Communications Act 2011.

⁶⁰ For example **Saint Lucia** see Interception of Communications Act Cap 3.12 section 18

⁶¹ **Saint Christopher and Nevis**: Section 25 Interception of Communications Act 2011; **Antigua and Barbuda**: Section 62 Evidence (Special Provisions) Act 2009 – application see section 60 at 3.6.2Fn ; **Grenada**: Section 33 Interception of Communications Act 2013 – however also see Interception of Communications (Amendment) Act 2013 at section 3 where section 5(2) of the substantive Act has been amended so that an interception obtained by a warrant is inadmissible in criminal proceedings .

interception evidence can be used lawfully in Country A, then this may be admissible in Country B (where interception intelligence only material), as long as Country B did not request Country A to commence the interception (**R v P** [2000] All ER (D) 2260).

3.3.49 If interception can be used in evidence, considerations will have to be made at an early stage as to how much will be transcribed. A policy decision will have to be made by the DPP about what parts forming the prosecution case will be transcribed and how information that may assist the defence case will be disclosed to allow a fair trial.

3.3.50 Also, to establish the identity of the caller/recipient of the interception, evidence may have to be obtained from a voice expert using acoustic, spectrographic and sophisticated auditory techniques (**R v Flynn and St John** [2008] 2 Cr. App.R 20, CA).⁶²

3.3.51 Expert evidence is to be preferred, but the prosecution may assert that Investigators recognised or identified a particular speaker. If so witness statements should be served setting out the basis for their opinion (**R v Chenia** [2003] 2 Cr.App.R. 6, CA and **R v Flynn and St John** ante). The following minimum safeguards should be followed:

(a) The voice recognition exercise should be carried out by

⁶² See 3.3.53, which would suggest evidence admissible if an Investigator recognising. For admissibility of a voice expert witness where there is statute the specialized knowledge sections of any Evidence Act would apply see **Saint Lucia**: Section 66 Evidence Act 2002; **Barbados**: Section 66 Evidence Act 1994 and **Saint Christopher and Nevis**: Section 78 Evidence Act 2011. The Prosecutor should submit that the techniques required are specialized knowledge based on the expert's training, study or experience.

- someone other than the officer investigating;
- (b) Proper records should be kept of the amount of time spent in contact with the suspect by any Investigator giving voice recognition evidence, of the date and time spent by any such Investigator in compiling any transcript of a recording, and of any annotations on a transcript made by a listening officer as to his views as to the identity of the speaker; and
 - (c) Any Investigator attempting a voice recognition exercise should not be provided with a transcript bearing the annotations of any other Investigator.

3.3.52 Other evidence may support the inference that the speaker can be identified, for example observations of the suspect on a telephone at the time the interception is made.

3.3.53 The admissibility of voice identification evidence by a witness at the commission of an offence has been held to go to the question of weight (rather than admissibility) of the evidence and is a matter to be decided by the jury (**Holder (Stevenson) v R (2005) 67 WIR 60**). Such evidence could be tested by vigorous cross-examination with a view to impugning its credibility and reliability. It may be merely a strand in the total evidential fabric, and then the cumulative effect of all the evidence would be a matter for the jury. If, for example, the purported voice identification evidence is tenuous, unconvincing, uncertain or unreliable, such matters go to the weight to be attached to the evidence but do not affect its admissibility.

3.3.54 Application of Interception of Communication Acts in Grenada, Saint Christopher and Nevis and Saint Lucia

3.3.55 The purpose of the Acts is to provide a model legal framework for lawful interception of communications (including postal in Saint Christopher and Nevis and in Saint Lucia) with the principal aims of:

- (a) Prohibiting unlawful interception of communications;
- (b) Defining a limited number of circumstances for authorisation of interception;
- (c) To establish standards for giving such authorisation and executing it;
- (d) To balance the power of the State and individual privacy;
- (e) To protect confidentiality and freedom of communications; and
- (f) Determining the admissibility of the product.

3.3.56 Definitions

3.3.57 The definition for an “**authorised officer**”⁶³ determines who will be able to carry out interception procedures. The Acts provide that the Commissioner of Police, Director of the FIU (FIA in Saint Lucia),⁶⁴ and any person exercising the functions of those persons or acting on their behalf will be authorised officers. The latter two provisions will obviously assist when the Commissioner and Director are out of State

⁶³ **Saint Lucia:** Section 2(1) Interception of Communications Act; **Saint Christopher and Nevis:** Section 2(1) Interception of Communications Act 2011; **Grenada:** Section 3 Interception of Communications Act 2013

⁶⁴ and in **Saint Lucia** the Comptroller of Customs and in **Saint Christopher and Nevis** a person authorised to intercept communications under the Anti- Terrorism Act Cap. 4.02, the Telecommunications Act Cap. 16.05, the Electronic Crimes Act No. 27 of 2009 or any other law in **Saint Christopher and Nevis**

or otherwise absent from office.

3.3.58 For a legislative text that prohibits interception of communications, it is very important, firstly, that the definition of any technology is neutral, and, secondly, to avoid any limitations that could exclude relevant types of communications from the ban on interception. That is why the definition of “**communications**” is drafted with the aim to include anything transmitted by data and signals conveyed across a communication network or any part thereof through the use of any electronic, mechanical, optical, wave, electromechanical, or other device.⁶⁵

3.3.59 The definition of “**communications network**” has been drafted to provide a clear distinction between facilities, infrastructure and services. Communications network is therefore defined as any facility or infrastructure used by any person to provide communication services. The Acts in Saint Christopher and Nevis and Saint Lucia distinguish between public and private networks for the purpose of interception. However for all Acts, identical safeguards and procedures shall be applicable for both types of networks in order to protect equally the rights of individuals using them.

3.3.60 In order to determine what is prohibited and regulated by the legislative text, the definition of “**intercept**” means acquiring, viewing, capturing, monitoring⁶⁶ of the contents or a portion thereof, of any

⁶⁵ In **Saint Christopher and Nevis** and in **Saint Lucia** also includes anything transmitted by post

⁶⁶ Definition in **Grenada** also includes a “copy” of the contents of a part of.

communication during transmission through the use of any interception device or method. This definition provides two key elements to define what the verb 'intercept' includes. First of all, it comprehends the different actions that can be carried out to intercept, such as viewing, monitoring, copying and capturing. Secondly, it establishes that within the framework of interception all this is applicable only to the communication during its transmission.

3.3.61 The definition of “**intercepted communication**” is important in order to distinguish it from, for instance, stored communications data. Even if communications are stored after the interception is made, the main approach to define it as intercepted is that it has been captured during its transmission. The definition of intercepted communication is also relevant in order to apply provisions protecting confidentiality of intercepted data and obligations to destroy all records.

3.3.62 Since the definition of interception includes the reference to the term “**interception device**”, the latter is defined to include any electronic, mechanical, optical, wave, electromechanical instrument, equipment or apparatus which is used or can be used, whether by itself or in combination with any other instrument, equipment, programmes or apparatus to intercept any communication. In order to protect normal business activity, the definition of interception device excludes any instrument, equipment or apparatus, or any component thereof that is furnished and being used in the ordinary course of operation of business either by customers or by communications providers.

3.3.63 The term “**stored communications data**” in Grenada, and in Saint Christopher and Nevis and Saint Lucia “**communications data**”, is the distinction between communication during its transmission and communications that either have not commenced, or have completed, passing over a communications system. This is relevant for drawing a clear line between interception and the disclosure of communications that have already been transmitted.

3.3.64 Prohibition on Interception

3.3.65 The Acts create an offence of unlawful interception and explain the circumstances that can justify the lawfulness of the interception.⁶⁷ This approach allows implementing strict safeguards and then limiting the interception to serious crimes and national security issues. The main purpose of creating an offence is to protect the privacy of the users of communications services by criminalising interception of any communication during its transmission other than in accordance with the provisions of the legislative text. Criminalisation of unlawful interception is a necessary measure to protect communications from intrusion. First of all, interception of communications represents a serious infringement on individual privacy which justifies the use of criminal sanctions. Prohibiting interception of communications by means of criminal sanction ensures that the victim will obtain assistance from law enforcement agencies in identifying the source of

⁶⁷ **Grenada:** Section 5(1) Interception of Communications Act; **Saint Christopher and Nevis:** Section 3(1) Interception of Communications Act; **Saint Lucia:** Section 3(1) Interception of Communications Act

criminal conduct. Furthermore, the victim has no remedy in civil law if the interception of communications was carried out without unauthorised entry into private premises. Finally, criminalisation of the unlawful interception also meets the reasonable expectations of the communications' parties to the communication: any intrusion should be prohibited unless authorised in compliance with law.

3.3.66 There are narrow exceptions⁶⁸ which include that interception can be lawful when it is authorised and to justify the interception in certain cases when judicial authorisation is not necessary. The Acts also provide a lawful excuse for the interception made in the case of emergency by an authorised officer. This provision is important to secure the right to take all reasonable measures to prevent death or injury or any damage to a person's physical or mental health, or of mitigating any injury or damage to a person's physical or mental health or in the interests of national security when there is no possibility to apply for authorisation in advance. However, it should be specially emphasized that this provision covers only cases of real urgency.⁶⁹

3.3.67 Application

3.3.68 The Acts prescribe that the following may apply ex parte to High Court Judge in chambers⁷⁰ for an interception warrant/direction:⁷¹

⁶⁸ **Grenada:** Section 5(2) Interception of Communications Act; **Saint Christopher and Nevis:** Section 3(2) Interception of Communications Act; **Saint Lucia:** Section 3(2) Interception of Communications Act

⁶⁹ **Grenada:** Section 5(3)(b) Interception of Communications Act; **Saint Christopher and Nevis:** Section 3(3)(b) Interception of Communications Act; **Saint Lucia:** Section 3(3)(b) Interception of Communications Act

⁷⁰ Section 6 of the Act in **Grenada** does not refer to an application being made in chambers and any application should specifically request that it is so heard

- (a) **Grenada:** Authorised Officer;⁷²
- (b) **Saint Christopher and Nevis:** The DPP;⁷³
- (c) **Saint Lucia:** The DPP or the Attorney General⁷⁴

3.3.69 The Acts define that an application for an interception direction or warrant must be in written form and be accompanied by an affidavit from the authorising officer specifying the circumstances in which such request is made.⁷⁵ The aim is to ensure that the process of application for the authorisation follows certain requirements and, since all documents must be provided in written form, to guarantee the transparency of the application process.

3.3.70 Applications must be made in writing and the affidavit will give reasons for the authorisation of interception. This provision assures that a factual basis for granting the interception direction is provided. Interception may cover only the specific person presumed to be contacted. Further the Acts require the purpose of applying for a direction for a person to be specified, thereby preventing “exploratory” or general interception.

3.3.71 To guarantee that interception is granted only for a particular case, the

⁷¹ In **Saint Lucia** and **Saint Christopher and Nevis** interception direction and in **Grenada** interception warrant

⁷² **Grenada:** Section 6(1) Interception of Communications Act 2013

⁷³ **Saint Christopher and Nevis:** Section 4(1) Interception of Communications Act

⁷⁴ **Saint Lucia:** Section 4(1) Interception of Communications Act

⁷⁵ **Grenada:** Section 6(2) Interception of Communications Act; **Saint Christopher and Nevis:** Section 4(2) Interception of Communications Act; **Saint Lucia:** Section 4(2) Interception of Communications Act

legislation includes the requirement to present a detailed affidavit, containing:

- (a) All the particulars of the case, including facts and other grounds on which the application is submitted;
- (b) Period for which it is requested that the direction/warrant be in force;
- (c) The basis for believing that evidence relating to the ground on which the application is made will be obtained through the interception.
- (d) Provide justification for the interception as a 'last resort' measure. This requires providing the details of the difficulties which would have arisen if the investigation is restricted to conventional methods or why conventional methods have failed.

When an application is made on the ground of national security it should be accompanied by written authorisation signed by the Minister of National Security.⁷⁶ This provision intends to secure that the particulars of the case related to national security is provided to the court.

3.3.72 In order to develop safeguards for the confidentiality of the application for interception, the Acts introduce a set of measures to restrict access

⁷⁶ **Grenada:** Section 6(3) Interception of Communications Act; **Saint Christopher and Nevis:** Section 4(4) Interception of Communications Act; **Saint Lucia:** Section 4(4) Interception of Communications Act

to the application for an interception direction or warrant.⁷⁷ The Acts establish the requirements for the confidentiality of the application and procedures assuring non-disclosure of the application information. The whole concept of interception as a hidden investigation could be undermined if any information concerning the applications is divulged. To protect the secrecy of the investigation and to provide a safeguard for the confidentiality of the application, the Acts criminalise the disclosure of the existence of the application for the interception direction.⁷⁸ This offence should be enforced applying the Code for Prosecutors because deliberate breach of security of the application could lead to a conspiracy to undermine the investigation and hamper the administration of justice. However, to maintain the balance and to protect the right of any person to seek legal advice, exemptions from the scope of criminalisation with regard to disclosure are available if made to an attorney-at-law.⁷⁹

3.3.73 Issuance

3.3.74 The Acts provide a framework for granting an authorisation to intercept communications after applying for an interception direction or warrant. Since the approach is to restrict the power to intercept to a limited

⁷⁷ **Grenada:** Section 6(4) and (5) Interception of Communications Act; **Saint Christopher and Nevis:** Section 4(5) and (6) Interception of Communications Act; **Saint Lucia:** Section 4(5) and (6) Interception of Communications Act

⁷⁸ **Grenada:** Section 7(1) Interception of Communications Act; **Saint Christopher and Nevis:** Section 4(7) Interception of Communications Act; **Saint Lucia:** Section 4(7) Interception of Communications Act

⁷⁹ **Grenada:** Section 7(2) and (3) Interception of Communications Act; **Saint Christopher and Nevis:** Section 4(8) and (9) Interception of Communications Act; **Saint Lucia:** Section 4(8) and (9) Interception of Communications Act

number of circumstances, this section ensures that robust safeguards are in place and the court must be satisfied with the necessity of carrying out interception.

3.3.75 As a safeguard against the power to intercept communications, the Acts establish a set of circumstances that shall be analysed and confirmed by the court before the issuance of the interception direction or warrant.⁸⁰ The first set of requirements relates to the nature of the criminal activity that justifies the authorisation to intercept. A High Court Judge authorising the interception must be satisfied on the facts alleged in the application that there are reasonable grounds to believe that obtaining the information is necessary:

- (a) In the interests of national security; or
- (b) For the prevention or detection of a particular serious (referred to in a Schedule in the Act) , including cases of mutual legal assistance.⁸¹

3.3.76 National security represents a particular ground for the infringement of person's right to the privacy of communication. This ground for granting authorisation to intercept may raise the question of balancing State interests and individual privacy. The freedom from interference with

⁸⁰ **Grenada:** Section 8(1) Interception of Communications Act; **Saint Christopher and Nevis:** Section 5(1) Interception of Communications Act; **Saint Lucia:** Section 5(1) Interception of Communications Act

⁸¹ In **Saint Lucia** the Judge may also issue a direction if there are reasonable grounds to believe interception is necessary in the interests of public order, public morality, public safety and public health. In **Saint Christopher and Nevis** and **Saint Lucia** an application and affidavit should stipulate when it is made on the basis of a serious offence having been committed or is about to be committed for the benefit or at the direction of or in association with a person, a group of persons or syndicate involved in organised crime.

privacy is not absolute, since it must be set against competing public interests. Limitation of this freedom must be necessary for the exercise of the competing interests and national security is one of them.

3.3.77 The term “**national security**” is not defined for the purpose of the Acts, since it should be in line with the legislation of each national jurisdiction.

3.3.78 The second ground for granting an interception direction or warrant is the prevention or detection of any offence specified in the schedule, where there are reasonable grounds to believe that such an offence has been, is being or may be committed. It is important for any authorising officer when preparing an application or affidavit on this ground that the means of investigation must be proportionate to the gravity of the matter under investigation. As interception of communications without the consent of the parties is a serious interference with privacy, such measure can be justified only if the offence under investigation is serious in nature.

3.3.79 In relation to transborder crime the provision on mutual legal assistance is essential as the new means of communications may entail multi-jurisdiction transmissions of data. This makes international cooperation important. The Act allows the State applying to be able to respond to requests for mutual legal assistance requiring the interception of communications.

3.3.80 Interception will only be authorised with regard to the investigation of

a particular case⁸² and only if the interception will support the investigation. Further there must be a ground for suspicion and interception must not be authorised on the off-chance of discovering crime.

3.3.81 The issuance of an interception direction or warrant is further restricted to the cases where other procedures for obtaining information have not been or are unlikely to be successful or are too dangerous to apply in the circumstances or are impracticable due to the urgency of the case.⁸³ This means that interceptions will not be authorised unless the information is not reasonably available by less intensive methods. The authorisation needs to be justified not on the ground of relative ease of deploying interception techniques, but the reasonableness of carrying it out. This justification balances efficiency with the competing public interest in providing protection for the privacy of communications. It ensures that the means of investigation are proportionate to the immediacy and gravity of the crime.

3.3.82 The Judge must also be satisfied that it is necessary, on reasonable grounds, to believe that an interception direction/warrant can serve the best interests of the administration of justice. This is an additional safeguard to impose more stringent controls if the law enforcement agency merely wants to go on a “*fishing expedition*”.

⁸² **Grenada:** Section 8(1)(b) Interception of Communications Act; **Saint Christopher and Nevis:** Section 5(1)(b) Interception of Communications Act; **Saint Lucia:** Section 5(1)(b) Interception of Communications Act

⁸³ **Grenada:** Section 8(1)(c) Interception of Communications Act; **Saint Christopher and Nevis:** Section 5(1)(c) Interception of Communications Act; **Saint Lucia:** Section 5(1)(c) Interception of Communications Act

Therefore any authorising officer preparing the application and affidavit must be clear on the purpose of the interception.⁸⁴

3.3.83 As an additional safeguard that ensures that each application is decided on an individual basis, the Judge can require any additional information related to the application, deemed necessary.⁸⁵

3.3.84 Scope and Form of Interception Direction/Warrant

3.3.85 The Acts provide rules on the scope and form of the interception direction/warrant to secure that the interference with privacy is kept to a minimum. Therefore it is necessary to establish the formal requirement of authorisation and to permit interception only to be conducted for certain premises, persons and communications. A set of requirements with regard to scope and form of the interception direction/warrants aims to:

- (a) Provide the certain formal framework for each case of interception;
- (b) Restrict the power to intercept; and
- (c) Decrease the impact of the interception to third parties.

3.3.86 As no interception can take place without an interception direction or warrant, they must be specific as to what the person executing the interception can do. Furthermore, to safeguard the privacy, the Judge

⁸⁴ **Grenada:** Section 8(1)(d) Interception of Communications Act; **Saint Christopher and Nevis:** Section 5(1)(d) Interception of Communications Act; **Saint Lucia:** Section 5(1)(d) Interception of Communications Act

⁸⁵ **Grenada:** Section 8(2) Interception of Communications Act; **Saint Christopher and Nevis:** Section 5(2) Interception of Communications Act; **Saint Lucia:** Section 5(2) Interception of Communications Act

issuing should have the power to impose conditions that he may consider being appropriate.

3.3.87 The Acts require that an interception direction or warrant will be issued in the prescribed (writing) form.⁸⁶ The written form is essential to balance two important components:

- (a) To secure the right to intercept and to request assistance; and
- (b) To restrict this right to particular persons, premises and communications.

Thus, a written form of the interception direction or warrant countervails the necessity to effect particular intrusion with the need to eliminate the prospect for abuse. It is very important for an interception direction to be as specific as possible. Subsections (1) (a), (b), (c), and (d) of the relevant sections,⁸⁷ provide the scope of the authorisation with regard to the authority of the person executing it.

3.3.88 Duration and Renewal of Interception Direction/Warrant

3.3.89 The principal aim of this part of the Acts is to limit the authorisation to intercept to a certain period of time to avoid endless interception. Furthermore, this provides a regulation for the renewal of the interception direction or warrant when the period of validity specified in the interception direction turned out to be too short to reach the aim of the interception. This latest option is critical if it is necessary to

⁸⁶ **Grenada:** Section 9(1) Interception of Communications Act; **Saint Christopher and Nevis:** Section 6(1) Interception of Communications Act; **Saint Lucia:** Section 6(1) Interception of Communications Act

⁸⁷ **Grenada:** Section 9(1) Interception of Communications Act; **Saint Christopher and Nevis:** Section 6(1) Interception of Communications Act; **Saint Lucia:** Section 6(1) Interception of Communications Act

continue the interception without interruption caused by a new application.

3.3.90 The Acts prescribe that an interception direction or warrant will cease to have effect at the end of the “**relevant period**”. This relevant period of validity varies:

- (a) **Grenada**: Ninety days;
- (b) **Saint Christopher and Nevis**: Three months; and
- (c) **Saint Lucia**: Five months

3.3.91 The Acts in Saint Christopher and Nevis and Saint Lucia allow a renewal of an interception direction if the Judge is satisfied that the circumstances, which have been a ground for the authorisation to intercept is justified.⁸⁸ In Grenada there is no prescribed procedure, therefore a new application and affidavit will have to be submitted before the expiry of ninety days to ensure continuity of interception.⁸⁹

3.3.92 Entry Warrant

3.3.93 The Acts provide the possibility to include an entry warrant where there is an interception direction or warrant. The execution of the interception direction or warrant may require entry to a premises. In the absence of a power to enter premises, an authorised officer would have to apply for a separate warrant under existing national legislation authorising him to enter the target premises. However, a separate application is

⁸⁸ **Saint Christopher and Nevis**: Section 7(2) Interception of Communications Act; **Saint Lucia**: Section 7(2) Interception of Communications Act

⁸⁹ See Annex Z4 where an affidavit has been drafted for use.

undesirable since it may cause delays in execution of the interception direction or warrant. Therefore in Saint Christopher and Nevis and Saint Lucia an application for an entry order to be made at the same time as the interception direction⁹⁰ and in Grenada forms part of the interception warrant.⁹¹

3.3.94 The Acts allow authorisation of an entry for the purpose of installing, maintaining, using or recovering any interception device used to intercept communications specified in the direction or warrant⁹²

3.3.95 The procedure for preparation of affidavits differs in the jurisdiction. In Saint Christopher and Nevis and Saint Lucia a separate affidavit is required confirming the reasons for an entry warrant.⁹³ Whereas in Grenada only one affidavit is required for both the interception and entry, as the entry will form part of the interception warrant.

3.3.96 In Saint Christopher and Nevis and Saint Lucia, where the entry warrant is a separate order, the Acts stipulate that an entry warrant will expire if the interception direction expires or the interception direction is terminated.⁹⁴ Further after the interception direction has

⁹⁰ **Saint Christopher and Nevis:** Section 8(2)(a) Interception of Communications Act; **Saint Lucia:** Section 8(2)(a) Interception of Communications Act

⁹¹ **Grenada:** Section 9(3) and 17 Interception of Communications Act

⁹² In **Saint Christopher and Nevis** (section 8(7)(a)) and **Saint Lucia** (section 8(7)(a)) also to intercept a postal article

⁹³ **Saint Christopher and Nevis:** Section 8(3) Interception of Communications Act; **Saint Lucia:** Section 8(3) Interception of Communications Act

⁹⁴ **Saint Christopher and Nevis:** Section 8(2)(a) Interception of Communications Act; **Saint Lucia:** Section 8(2)(a) Interception of Communications Act

terminated the authorised officer must as soon as practicable remove any interception device.⁹⁵

3.3.97 Termination of the Interception Direction/Warrant or Entry Warrant

3.3.98 Once interception is no longer necessary or there is an abuse of the process the interception direction or warrant or entry warrant will be terminated. This is an essential mechanism to guarantee the interception is in full compliance with the requirements of the legislative text. In addition, it should ensure that the interference is used only as an exceptional measure.

3.3.99 An interception direction or warrant may be revoked by a High Court Judge if:⁹⁶

- (a) An authorised officer fails to submit a report on progress; or
- (b) If upon receipt of such report on progress the Judge is satisfied that the objectives of the interception direction or warrant or entry warrant have been achieved; or
- (c) The grounds on which the interception direction or warrant or entry warrant or both cease to exist; or
- (d) Terminate the entry warrant if there remains no utility in the purpose of the warrant as the interception can be completed without it.

⁹⁵ **Grenada:** Section 11(3) Interception of Communications Act; **Saint Christopher and Nevis:** Section 8(9) Interception of Communications Act; **Saint Lucia:** Section 8(9) Interception of Communications Act

⁹⁶ **Grenada:** Section 11(1) Interception of Communications Act; **Saint Christopher and Nevis:** Section 9(1) Interception of Communications Act; **Saint Lucia:** Section 9(1) Interception of Communications Act

3.3.100 An authorised officer must be notified forthwith about the revocation, in writing in order to comply with the requirements of the Act concerning removal of equipment and to cease interception immediately.⁹⁷

3.3.101 The Acts also ensure that when the interception direction or warrant terminates no evidence will be admissible in any legal proceedings.⁹⁸ Further in Saint Christopher and Nevis and Saint Lucia any postal article intercepted will either be returned or destroyed. However the postal article will not be returned where there is a threat to national security or if legal proceedings are contemplated or the article needs to be used in any proceedings.⁹⁹

3.3.102 Urgent Application

3.3.103 The Acts provide a procedure for urgent cases that require an interception to be carried out as soon as possible to reduce delays that would impair the investigation.

3.3.104 In those cases oral applications are permitted and the High Court Judge may in urgent situations dispense the requirements of a written application and allow the authorised officer¹⁰⁰ to orally apply for an

⁹⁷ **Grenada:** Section 11(2) Interception of Communications Act; **Saint Christopher and Nevis:** Section 9(2) Interception of Communications Act; **Saint Lucia:** Section 9(2) Interception of Communications Act

⁹⁸ **Grenada:** Section 12 Interception of Communications Act; **Saint Christopher and Nevis:** Section 9(3)(a) Interception of Communications Act; **Saint Lucia:** Section 9(3)(a) Interception of Communications Act

⁹⁹ **Saint Christopher and Nevis:** Section 13(3) Interception of Communications Act; **Saint Lucia:** Section 14(3) Interception of Communications Act

¹⁰⁰ In **Saint Christopher and Nevis** the DPP and in **Saint Lucia** the DPP or Attorney General. However in **Grenada** section 13(3)(b) does refer to the DPP

interception direction or entry warrant or interception warrant. The High Court Judge will issue the direction or entry warrant or interception warrant if he or she is satisfied that circumstances exist that would justify the grant of an interception direction or entry warrant or interception warrant.¹⁰¹ Further in any urgent application the particulars of the urgency of the case or the other exceptional circumstances which, in the opinion of the authorised officer justifies an oral application will need to be set out.¹⁰²

3.3.105 A High Court Judge can only authorise an urgent application if he or she is satisfied that there are reasonable grounds to believe that the interception direction or entry warrant or interception warrant should be issued and it is not reasonably practicable to apply in written form.¹⁰³ This provision aims to ensure that the urgent direction or warrant can be granted only in exceptional circumstances. In Grenada the Judge will make a written note of the application so there is a record of the oral application.¹⁰⁴

3.3.106 An interception direction or entry warrant or interception warrant issued on the basis of an oral application should have the same scope as for a standard interception direction or entry warrant or interception

¹⁰¹ **Grenada:** Section 13(2)(a) Interception of Communications Act; **Saint Christopher and Nevis:** Section 10(2)(a) Interception of Communications Act; **Saint Lucia:** Section 10(2)(a) Interception of Communications Act

¹⁰² **Grenada:** Section 13(2)(b) Interception of Communications Act; **Saint Christopher and Nevis:** Section 10(2)(b) Interception of Communications Act; **Saint Lucia:** Section 10(2)(b) Interception of Communications Act

¹⁰³ **Grenada:** Section 13(3)(a) and (b) Interception of Communications Act; **Saint Christopher and Nevis:** Section 10(3)(a) and (b) Interception of Communications Act; **Saint Lucia:** Section 10(3)(a) and (b) Interception of Communications Act

¹⁰⁴ **Grenada:** Section 13(4) Interception of Communications Act

warrant. This provision aims to avoid different standards with regard to urgent applications and normal procedures.¹⁰⁵

3.3.107 The period of validity for every emergency interception direction or warrant varies:

- (a) **Grenada:** Forty-eight hours;
- (b) **Saint Christopher and Nevis:** Seventy-two hours; and
- (c) **Saint Lucia:** Seventy-two hours

3.3.108 After this period the direction or warrant will expire. The process is less than clear about how to then extend any urgent application. The Acts require that a Judge reviews the urgent application on the expiration of the period of validity.¹⁰⁶ However to ensure continuous interception it is recommended that a written application and affidavit is prepared in good time before the expiry of the period of validity and a further ex parte hearing in chambers is listed. Therefore thought must be given to preparing and listing this next application as soon as the urgent application is granted to avert any break of interception.

3.3.109 If the Judge is satisfied after receiving the written application that either the interception direction or warrant or entry warrant are necessary, he will make an order affirming the renewal.¹⁰⁷ If not

¹⁰⁵ **Grenada:** Section 13(5) Interception of Communications Act; **Saint Christopher and Nevis:** Section 10(4) Interception of Communications Act; **Saint Lucia:** Section 10(4) Interception of Communications Act

¹⁰⁶ **Grenada:** Section 13(8) Interception of Communications Act; **Saint Christopher and Nevis:** Section 10(6) Interception of Communications Act; **Saint Lucia:** Section 10(6) Interception of Communications Act

¹⁰⁷ **Grenada:** Section 13(10) Interception of Communications Act; **Saint Christopher and Nevis:** Section 10(8) Interception of Communications Act; **Saint Lucia:** Section 10(8) Interception of Communications Act

satisfied the interception can be terminated.¹⁰⁸

3.3.110 It should also be noted that in relation to the relevant period for the interception direction or warrant, the clock starts from the date and time the urgent application was issued.¹⁰⁹

3.3.111 Modification of Interception Direction or Warrant or Entry Warrant

3.3.112 The Acts enable an application for modification of an existing interception direction or warrant or entry warrant if the circumstances have changed.¹¹⁰ This can be applicable in cases where the cell numbers of a person needed to be intercepted change. This means that a separate application need not be made, ultimately saving time. The process of application remains the same to secure that all safeguards are applicable. The grounds for the execution of the interception shall also remain the same.

3.3.113 Report on Progress¹¹¹

3.3.114 A report on progress is a necessary measure for oversight of the execution of an interception direction or warrant. It enables a Judge

¹⁰⁸ **Grenada:** Section 13(11) Interception of Communications Act; **Saint Christopher and Nevis:** Section 10(10) Interception of Communications Act; **Saint Lucia:** Section 10(10) Interception of Communications Act

¹⁰⁹ **Grenada:** Section 13(13) Interception of Communications Act; **Saint Christopher and Nevis:** Section 10(12) Interception of Communications Act; **Saint Lucia:** Section 10(12) Interception of Communications Act

¹¹⁰ **Grenada:** Section 10 Interception of Communications Act; **Saint Christopher and Nevis:** Section 11 Interception of Communications Act; **Saint Lucia:** Section 11 Interception of Communications Act

¹¹¹ **Grenada:** Section 14 Interception of Communications Act (see also section 15 where a final report is required from the authorising officer after the warrant expires); **Saint Christopher and Nevis:** Section 12 Interception of Communications Act; **Saint Lucia:** Section 12 Interception of Communications Act

who has issued the direction, warrant or entry warrant to be sure that interception is carrying in accordance with the law and authorisation. The Judge who issued an interception direction, warrant or entry warrant, has the power to order the authorised officer, to report in writing about the progress that has been made or any other matter that the Judge considers necessary. Such an order is binding and may entail the revocation of an interception direction, warrant or entry warrant. The request can be made by a Judge at the time of issuance or at any stage before the date of expiry.

3.3.115 Execution of Interception

3.3.116 The Acts establish the duties and responsibilities of public bodies (authorised officer) and persons to execute interception. The law provides an essential framework for the process of carrying out the interception. It includes obligations to provide assistance, provisions dealing with the confidentiality of the intercepted information and obligations to destroy interception records. Strict regulations and safeguards are provided to ensure that information is kept confidential and irrelevant data destroyed.

3.3.117 The Acts grant an authorised officer with the power to require a person that is specified in the direction or warrant or entry warrant to intercept communications and assist in the execution.¹¹² This duty to provide assistance is crucial since law enforcement agencies very

¹¹² **Grenada:** Section 18 Interception of Communications Act; **Saint Christopher and Nevis:** Section 16 Interception of Communications Act; **Saint Lucia:** Section 16 Interception of Communications Act

often depend upon the support from the person who has specific knowledge about communications networks or operates them. However, the obligation to provide assistance is limited to the scope of authorisation and duties specified in the interception direction, warrant or entry warrant. This provision is essential to ensure that no unreasonable demands are made with regard to the person that is required to provide assistance. It provides the right to refuse a request for assistance that is not in compliance with the interception direction, warrant or entry warrant. However, any person who is required to provide assistance to an authorised officer by virtue of an interception direction, warrant or entry warrant and refuses to do so commits an offence.¹¹³ The criminalisation of the refusal to provide assistance is necessary because the interception direction, warrant or entry warrant is granted in exceptional circumstances for investigation of serious crimes or protecting national security and the success in executing the interception or entry often depends on the assistance from communication providers. When the request for assistance is refused, it may undermine the investigation and hamper the administration of justice in general.

3.3.118 Interception often interferes with the privacy not only of the person whose communications are subject of the interception, but also third parties' right to private communications. In order to limit the intrusion of third parties' lawful interests, the Acts oblige an authorised officer or a

¹¹³ **Grenada:** Section 18(3) Interception of Communications Act; **Saint Christopher and Nevis:** Section 16(3) Interception of Communications Act; **Saint Lucia:** Section 16(3) Interception of Communications Act

person that intercepts or assists in the interception of communications to take all reasonable steps to minimise the impact of interception on third parties.¹¹⁴

3.3.119 Confidentiality of Intercepted Communications

3.3.120 The privacy concerns and the need to maintain the secrecy of interception justify the requirement for confidentiality and for an obligation to destroy irrelevant data. There is also the need to protect, to the feasible maximum, privacy of third parties whose communications are intercepted without their consent. To address this need for confidentiality, the Acts all contain provisions prohibiting unauthorised use or disclosure of intercepted material.¹¹⁵

3.3.121 Strict safeguards on the extent to which intercepted material may be disclosed, copied and retained, require an authorised officer to make a set of arrangements to ensure the confidentiality of interception.¹¹⁶

3.3.122. The Acts regulate the deletion of records. This is essential because not all data gleaned from an interception is relevant. Since interception of communications normally lasts for weeks or months, it is very likely

¹¹⁴ **Grenada:** Section 18(2) Interception of Communications Act; **Saint Christopher and Nevis:** Section 16(5) Interception of Communications Act; **Saint Lucia:** Section 16(5) Interception of Communications Act

¹¹⁵ **Grenada:** Section 19 Interception of Communications Act; **Saint Christopher and Nevis:** Section 17(1)(a) and (b) Interception of Communications Act; **Saint Lucia:** Section 17(1) Interception of Communications Act – also regulations made under sections 36(2)(b) and (c) ; and the Interception of Communications (Code of Conduct) Regulations

¹¹⁶ **Grenada:** Section 19(1)(a) and (b) Interception of Communications Act; **Saint Christopher and Nevis:** Section 16 Interception of Communications Act; **Saint Lucia:** Section 16 Interception of Communications Act

that personal information not relevant for the investigation are obtained. Much of the information gained as a result of interception relates to third parties who have contacts with those targeted by the interception. The possibility to keep this data will certainly result in an invasion of privacy both of third parties and of the target of interception. From a privacy point of view, the person whose rights have been affected by an interception ought to be notified about the infringement. This entails the problem of subject, time and circumstances of such notification. All these problems could be avoided if the privacy of the person affected by an interception could be safeguarded by the destruction of the intercepted material. As a result the Acts contain an obligation to immediately destroy any records that are not related to the aim of the interception.¹¹⁷ In addition, as soon as it appears that no proceedings or no further proceedings, will be undertaken, the records should be destroyed.

3.3.123 An offence is committed by a failure to comply with the requirements to destroy records. The aim of this provision is to implement another strong safeguard to protect the privacy of communications and to ensure that all information irrelevant for the purpose of the interception is destroyed.¹¹⁸

3.3.124 In Grenada provision is made to prevent interception of privileged

¹¹⁷ **Grenada:** Section 21 Interception of Communications Act; **Saint Christopher and Nevis:** Section 17(2) Interception of Communications Act; **Saint Lucia:** Section 17(2) Interception of Communications Act

¹¹⁸ **Grenada:** Section 22 Interception of Communications Act; **Saint Christopher and Nevis:** Section 17(3) Interception of Communications Act; **Saint Lucia:** Section 17(3) Interception of Communications Act

communications.¹¹⁹ This includes not only those communications between an attorney-at-law and his or her client but also medical, banking and financial. If the communication is deemed to be in furtherance of a criminal purpose this will not be a privileged communication and can be intercepted. For those jurisdictions where there isn't a similar section any concern in relation to interception of privileged communications should be referred to the DPP or Attorney General.

3.3.125 Admissibility in Legal Proceedings

3.3.126 In Saint Lucia section 18 of the Act maintains the product of the interception as intelligence only material, that will not be used in legal proceedings. Subsection (1) specifies that as well as no evidence being adduced, no question asked, no assertion or disclosure made, can disclose or tend to suggest that there has been any interception.

3.3.127 There are exceptions in section 19 that will allow reference to the interception where offences within the Act are committed. To allow to the contrary would prevent successful prosecutions for those offences. For example a failure to provide assistance contrary to section 16(3). Without disclosure of the existence of the interception a prosecution couldn't proceed.

3.3.128 Another exception allows disclosure to a prosecutor to determine the fairness of the proceedings. There maybe intercept material that

¹¹⁹ **Grenada:** Section 30 Interception of Communications Act

undermines the prosecution case or assists the defence case according to any relevant statutory test or the common law test in **Maureen Peters v The Queen** *HCRAP 2009/005 BVI*. This disclosure to the prosecutor, known as a Preston Briefing in England and Wales following the House of Lords decision in **R v Preston** [1994] 2 AC 130), allows the prosecutor to be briefed to assess the material in light of the proceedings. It should be standard practice for such Preston Briefings to take place with the Prosecution Team where interception has taken place, before any trial. Where any disclosure has been made by the defendant to advance their defence by way of a defence statement or through any denials in interview before charge, these should be made available to those who conducted the interception. They can they alert the Prosecution Team if there is any material that would effect the fairness of the proceedings in a Preston Briefing.

3.3.129 There are no equivalent sections in Grenada and the section 5(2) amendment appears to restrict evidence of intercepted communications by warrant in criminal proceedings. However section 33 provides for admissibility of the product in court. Until this conflict is resolved the position remains unclear as to whether the product is intelligence only. The 5(2) amendment was maybe intended to allow an authorised officer to collect intelligence material without a warrant, whilst a parallel process of material obtained by warrant would be admissible in criminal proceedings. However the amendment has left ambiguity.

3.3.130 In Saint Christopher and Nevis section 25 allows evidence of the intercepted communications to be adduced in evidence in criminal or civil proceedings. However under subsection (3) no evidence shall be adduced or question asked that suggests or tends to suggest the disclosure of the following “**sensitive information**”:

- (a) Any of the details pertaining to the method by which the communication was intercepted or that might result in the disclosure of any of the details pertaining to the method by which data was obtained;
- (b) The identity of any party who supplied the data; or
- (c) The identity of any party carrying out or assisting in the interception.

3.3.131 Pursuant to subsection (3) paragraph (b) a statement confirming that the evidence was obtained by a court issued warrant will be sufficient disclosure as the source and origin of the communication.

3.3.132 Order Requiring Disclosure of Protected Information

3.3.133 Protected information may come into the possession of an authorised officer by virtue of a interception or entry warrant or both or by other lawful means. However a key may be necessary to access the communication data and understand it in an intelligible format., hence why it is referred to as ‘protected’ information. Therefore where an authorised officer in Saint Christopher and Nevis and Saint Lucia has reasonable grounds to believe that a person, has access to a key to the protected information and disclosure is necessary in the interests of

national security or to prevent or detect a crime listed in the Schedule¹²⁰, an application may be made to a High Court Judge.¹²¹

3.3.134 In order to preserve the confidentiality, disclosure may only be made to an authorised officer named in the disclosure order or such other person as specified in the order.¹²²

3.3.135 Effects of Disclosure Order

3.3.136 The order will have been complied with where a key is provided that will give access to the protected information. If the person in the order does not have access to the protected information or is incapable of obtaining access in an intelligible format without the key, they will have complied once they have supplied the key that is in their possession.

3.3.137 If there are a number of keys that will allow access the person named in the disclosure order may select which keys to disclose. If a person named in the order is no longer in possession of the key but has access that will disclose where the key is located they must provide this information. To ensure compliance, an offence is included for failure to abide with a disclosure order without reasonable excuse.

¹²⁰ **Saint Christopher and Nevis:** Section 21(1)(b) Interception of Communications Act; **Saint Lucia:** Section 21(1)(b) Interception of Communications Act

¹²¹ **Saint Christopher and Nevis:** Section 21(2)(a) Interception of Communications Act; **Saint Lucia:** Section 21(2)(a) Interception of Communications Act

¹²² **Saint Christopher and Nevis:** Section 21(5) Interception of Communications Act; **Saint Lucia:** Section 21(5) Interception of Communications Act

3.3.138 The Acts only permit disclosure as is proportionate to the aim of the application.¹²³ Therefore any application must consider if there are any alternative methods and if the application will succeed in obtaining the required data in an intelligible form. Again requirements are stipulated to ensure that access to the disclosed key or information is kept to a minimum to preserve confidentiality.¹²⁴

3.3.139 Where loss or damage is incurred by a person who has supplied the key as a result of the disclosure order or whose protected information or key was disclosed, following the failure of the confidentiality requirements in the Act a claim may be made to an independently established Tribunal.¹²⁵

3.3.140 Tipping Off

3.3.141 An offence is provided where any information secured by way of a disclosure order is disclosed.¹²⁶ A defence is set out that would allow a person to show that they neither knew nor had reasonable grounds for suspecting the disclosure order contained a requirement to keep the information disclosed confidential.¹²⁷

¹²³ **Saint Christopher and Nevis:** Section 21(4) Interception of Communications Act; **Saint Lucia:** Section 21(4) Interception of Communications Act

¹²⁴ **Saint Christopher and Nevis:** Section 21(5) Interception of Communications Act; **Saint Lucia:** Section 21(5) Interception of Communications Act

¹²⁵ **Saint Christopher and Nevis:** Section 22(9) Interception of Communications Act; **Saint Lucia:** Section 22(9) Interception of Communications Act

¹²⁶ **Saint Christopher and Nevis:** Section 23 Interception of Communications Act; **Saint Lucia:** Section 23 Interception of Communications Act

¹²⁷ **Saint Christopher and Nevis:** Section 23(4) Interception of Communications Act; **Saint Lucia:** Section 23(4) Interception of Communications Act

3.3.142 Communications Data

3.3.143 This Part of the Acts was developed to provide the possibility to disclose stored communication data that has already passed in transmission, is therefore by definition not considered as a subject for interception. and does not require interception equipment to be installed. That is why less strict rules are applied in the cases when access to stored data is needed. However, stored data are protected by the same virtue of the law as communication during their transmission. In Grenada it is an offence to unlawfully gain access to stored communication data.¹²⁸

3.3.144 Disclosure of Stored Communication Data

3.3.145 The Acts enable the designated person (defined as the Minister responsible for National Security) in Saint Lucia, and the Court in Saint Christopher and Nevis and Grenada, to require a communication provider to obtain and or disclose stored communications data¹²⁹ by using a disclosure notice/order.¹³⁰ As a safeguard to protect confidentiality of stored communications data, the Acts limit the conditions under which disclosure orders/notice can be issued to:

- (a) Interests of national security;
- (b) Purpose of preventing or detecting crimes listed in the Schedule;

¹²⁸ **Grenada:** Section 27(1) Interception of Communications Act

¹²⁹ In **Saint Christopher and Nevis** and **Saint Lucia** stored communications data is referred to as communications data, but this section will refer to stored communications data

¹³⁰ In **Saint Lucia** a disclosure notice and in **Saint Christopher and Nevis** and **Grenada** a disclosure order
Grenada: Section 28 Interception of Communications Act; **Saint Christopher and Nevis:** Section 24 Interception of Communications Act; **Saint Lucia:** Section 24 Interception of Communications Act

- (c) In the interests of public order;
- (d) In the interests of public health; or
- (e) For the purpose in an emergency, of preventing death, injury or any damage to a person's physical or mental health, or of mitigating any injury or damage to a person's physical or mental health¹³¹

3.3.146 The Acts prohibit the issue of a disclosure order/notice unless the designated person/Court¹³² is satisfied that it is necessary to obtain the stored communications data and disclose it to an authorised officer.¹³³

3.3.147 The Acts prescribe a set of the requirements with regard to the disclosure notice/order.¹³⁴ It requires that the circumstances and reason for granting it shall be specified as well as the stored communication data in relation to which it applies and the manner in which disclosure is to be made. In addition, the authorised officer needs to be identified and the date of issue. The reason for establishing these requirements with regard to the disclosure notice/order is to make the procedure transparent and to limit the

¹³¹ In addition in **Saint Christopher and Nevis** see section 24(4): in the interests of the economic well-being of Saint Christopher and Nevis; for the purpose of assessing or collecting any tax, duty, levy or other imposition, contribution or charge payable to a government department; for any purpose, not falling in paragraphs, (a) to (g) which are specified for the purposes of this section by an order published in the *Gazette* made by the Minister pursuant to this section.

¹³² In **Grenada** this is a High Court Judge however in **Saint Christopher and Nevis** Court isn't defined.

¹³³ **Grenada**: Section 28(2) Interception of Communications Act; **Saint Christopher and Nevis**: Section 24(3) Interception of Communications Act; **Saint Lucia**: Section 24(3) Interception of Communications Act

¹³⁴ **Grenada**: Section 28(4) Interception of Communications Act; **Saint Christopher and Nevis**: Section 24(5) Interception of Communications Act; **Saint Lucia**: Section 24(4) Interception of Communications Act

disclosure to individual cases by specifying all particulars of the authorisation.

3.3.148 A set of restrictions to the authorisation are made by prohibiting any requirement related to stored communications data to be obtained after the end of the period of one month beginning on the date on which the order/notice is issued.¹³⁵ The Acts also forbid the disclosure of any stored communications data not in the possession of the provider of the communications service, or required to be obtained by him or her, after the end of such period.¹³⁶

3.3.149 In order to keep a disclosure order/notice confidential, subject to limited exclusions, the Acts require a communication provider, who receives such order/notice to keep its existence and operation as well as related information, confidential.¹³⁷ To ensure the right of the communication provider to seek legal advice, the Acts among other exemptions, enable communication operators to disclose information to attorneys-at-law within legal consultation.¹³⁸

3.3.150 In order to protect the secrecy of the disclosure order/notice, the Acts

¹³⁵ **Grenada:** Section 28(5)(a) Interception of Communications Act; **Saint Christopher and Nevis:** Section 24(6)(a) Interception of Communications Act; **Saint Lucia:** Section 24(5)(a) Interception of Communications Act

¹³⁶ **Grenada:** Section 28(5)(b) Interception of Communications Act; **Saint Christopher and Nevis:** Section 24(6)(b) Interception of Communications Act; **Saint Lucia:** Section 24(5)(b) Interception of Communications Act

¹³⁷ **Grenada:** Section 28(6) Interception of Communications Act; **Saint Christopher and Nevis:** Section 24(8) Interception of Communications Act; **Saint Lucia:** Section 24(7) Interception of Communications Act

¹³⁸ **Grenada:** Section 28(7)(b)(ii) Interception of Communications Act; **Saint Christopher and Nevis:** Section 24(9)(b) Interception of Communications Act; **Saint Lucia:** Section 24(8)(b) Interception of Communications Act

criminalise the failure to meet confidentially requirements.¹³⁹

3.3.151 Admissibility of Stored Communication Data

3.3.152 Subject to sections 18 and 19 of the Acts in Saint Lucia stored communications data will be admissible evidence.¹⁴⁰ However no question will be asked how the stored communication data was obtained¹⁴¹ and it will be sufficient for any witness statement to refer to the fact it was obtained by a disclosure order or notice.¹⁴²

3.3.153 In Saint Christopher and Nevis section 25 will allow the evidence to be admissible subject to the non-disclosure of sensitive information.¹⁴³

3.3.154 In Grenada section 33 of the Act will allow stored communication data to be admitted in evidence in criminal or civil proceedings, subject to the law relating to admissibility of evidence (i.e. hearsay)

3.3.155 False Statements

3.3.156 The Acts criminalise making false statements knowingly in the applications or affidavits.¹⁴⁴ This provision is a safeguard to prevent the possible abuse that arises from the application process when the decision of the High Court Judge (designated person) is based entirely

¹³⁹ **Grenada:** Section 29 Interception of Communications Act; **Saint Christopher and Nevis:** Section 24(12) Interception of Communications Act; **Saint Lucia:** Section 24(10) Interception of Communications Act

¹⁴⁰ **Saint Lucia:** Section 25 Interception of Communications Act

¹⁴¹ **Saint Lucia:** Section 25(2)(a) Interception of Communications Act

¹⁴² **Saint Lucia:** Section 25(2)(b) Interception of Communications Act

¹⁴³ See paragraph 3.3.130

¹⁴⁴ **Grenada:** Section 6(6) Interception of Communications Act; **Saint Christopher and Nevis:** Section 35 Interception of Communications Act; **Saint Lucia:** Section 35 Interception of Communications Act

on the evidence submitted by the applicant. The person whose communications are to be intercepted has no opportunity to question supporting evidence at the time of the application. Thus, when an authorised officer swears the affidavits, he or she shall be a subject of prosecution if false evidence is knowingly provided.

3.3.157 Forms

3.3.158 For precedents of application forms and affidavits see Annex Z4

3.3.159 **Application of Evidence (Special Provisions) Act 2009 Antigua and Barbuda**

3.3.160 This Act is similar in principle but less detailed than the Interception of Communications Acts in the region. Section 60 sets out the procedure, grounds for authorising and definitions.

3.3.161 Definitions

3.3.162 Section 60(1) defines “**intercept**” as including, *“listen to, record or acquire a communication or acquire the substance, meaning or purport of a communication.”*

3.3.163 Whilst communication isn’t defined, private communication is as, *“any oral communication, or any telecommunication, that is made by an originator who is in Antigua and Barbuda or is intended by the originator to be received by a person who is in Antigua and Barbuda and that is made under circumstances in which it is reasonable for the originator to expect that it will not be intercepted by any person other*

than the person intended by the originator to receive it, and includes any radio-based telephone communication that is treated electronically or otherwise for the purpose of preventing intelligible reception by any person other than the person intended by the originator to receive it.”

3.3.164 Whilst this definition doesn't include postal services, emails (see table 5 above for procedure to access emails) or other social media communication it could be used to install audio probes to record conversations (see paragraph 3.14.4 below).

3.3.165 Application

3.3.166 The procedure for applying is to the High Court ex parte and in writing, signed by the Solicitor General or the DPP. The application will be supported by an affidavit from a police officer confirming the following:¹⁴⁵

- (a) The facts relied on to support the application;
- (b) Facts of the alleged offence;
- (c) The type of private communication to be intercepted;
- (d) Names of persons to be intercepted, their address and occupations;
- (e) General description of the nature and location at which private communications will be intercepted;
- (f) How the communications will be intercepted;
- (g) Any previous applications, providing detail of the reasons for refusing, the Judge and date the application was made;

¹⁴⁵ **Antigua and Barbuda:** Section 60(2) Evidence (Special Provisions) Act 2009

- (h) Period for interception;
- (i) In a case other than terrorism, whether other investigatory methods have been tried and failed; why they are unlikely to succeed; or the urgency requires interception to be used.

3.3.167 A High Court Judge will only authorise an application if satisfied that:¹⁴⁶

- (a) It would be in the best interests of the administration of justice to do so;
- (b) In the case of an investigation of an offence other than an offence related to terrorism, that other investigative procedures have been tried and have failed; other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures; and
- (c) That the offence being investigated is not an offence under the Prevention of Terrorism Act, 2005.

3.3.168 An authorisation will not be granted where there are legally privileged communications.¹⁴⁷ However if there are reasonable grounds to believe that an attorney-at-law or a member of the attorney-at-law's family has been a party to an offence or is about to become, authorisation may be approved. The Judge if authorising interception may also give terms and conditions to protect genuinely legally privileged communications.

¹⁴⁶ **Antigua and Barbuda:** Section 60(3) Evidence (Special Provisions) Act 2009

¹⁴⁷ **Antigua and Barbuda:** Section 60(4) Evidence (Special Provisions) Act 2009

3.3.169 An authorisation will state:¹⁴⁸

- (a) The offence in respect of which private communications may be intercepted;
- (b) The type of private communication that may be intercepted;
- (c) The identity of the persons, if known, whose private communications are to be intercepted;
- (d) Generally describe the place at which private communications may be intercepted, if a general description of that place can be given;
- (e) Generally describe the manner of interception that may be used;
- (f) Contain the terms and conditions considered advisable in the public interest; and
- (g) Be valid for a period, not exceeding sixty days.

3.3.170 Any authorisation will also permit entry to install, maintain or remove a device covertly. After the expiry of the authorisation an ex parte application in writing, supported by affidavit can be made to remove any device covertly.

3.3.171 Renewal

3.3.172 A renewal will again require a written application ex parte to a Judge, with a written endorsement from the Solicitor General or DPP and a supporting affidavit from a police officer. The affidavit will depose the following:¹⁴⁹

¹⁴⁸ **Antigua and Barbuda:** Section 60(6) Evidence (Special Provisions) Act 2009

¹⁴⁹ **Antigua and Barbuda:** Section 60(10) Evidence (Special Provisions) Act 2009

- (a) The reason and period for which the renewal is required;
- (b) Full particulars, together with times and dates, when interceptions, if any, were made or attempted under the authorisation, and any information that has been obtained by any interception; and
- (c) The number of instances, date and name of Judge, in relation to previous renewal applications for the same authorisation.

3.3.173 Confidentiality

3.3.174 In order to preserve confidentiality, all documents in relation to an application shall be sealed and securely stored in court.¹⁵⁰ The sealed packet will only be opened where:

- (a) There is an application for a further authorisation or renewal;¹⁵¹
- (b) A Judge of the High Court orders them to be opened for copying and examination;¹⁵²
- (c) A trial Judge or Magistrate may order them to be opened for copying and examination if there is a relevant matter raised in trial about the authorisation or the defendant applies to view them to prepare for trial.¹⁵³ Where the defendant applies to view the documents the court will allow the prosecutor to delete any reference to:¹⁵⁴
 - (i) The identity of a confidential informant;
 - (ii) Any investigations that could be compromised;

¹⁵⁰ **Antigua and Barbuda:** Section 60(13) Evidence (Special Provisions) Act 2009

¹⁵¹ **Antigua and Barbuda:** Section 60(14) Evidence (Special Provisions) Act 2009

¹⁵² **Antigua and Barbuda:** Section 60(15) Evidence (Special Provisions) Act 2009

¹⁵³ **Antigua and Barbuda:** Section 60(16) Evidence (Special Provisions) Act 2009

¹⁵⁴ **Antigua and Barbuda:** Section 60(18) Evidence (Special Provisions) Act 2009

- (iii) Persons involved in the investigation to prevent harm or disclosure of surveillance techniques;
- (iv) Interests of innocent persons that may be prejudiced.

3.3.175 The defendant can make a further application for the deleted parts to be disclosed and a Judge may disclose if it would assist his defence.¹⁵⁵ If this order is made the Prosecution Team will have to decide whether it is in the public interest to proceed in view of the dangers outlined in paragraph 3.3.174 above.

3.3.176 Urgent Applications

3.3.177 If due to the urgency of the situation it's not possible to make a written application, the Solicitor General or DPP may make an oral application, ex parte to a High Court Judge pursuant to section 61. The DPP or Solicitor General will have to establish that interception is required before an authorisation could under section 60, with reasonable diligence, be obtained. Therefore any oral submissions will require reference to how evidence or intelligence could be lost, threats to life or the recovery of evidence or prejudice to the national interest could be suffered without an urgent application being made.

3.3.178 If the Judge agrees that the urgency of the matter requires interception to commence he or she will order this for a maximum period of thirty six hours. The Judge may also attach any necessary conditions as appropriate. This will require the DPP or Solicitor General to apply for a

¹⁵⁵ **Antigua and Barbuda:** Section 60(21) Evidence (Special Provisions) Act 2009

condition to enter to install, remove and maintain a device to intercept.

3.3.179 No reference is made in the Act to the procedure thereafter. Therefore consideration will have to be given to preparing a written application and affidavit immediately in order to continue any monitoring under section 60.

3.3.180 Admissibility

3.3.181 Section 62 of the Act allows the interception to be used in evidence subject to serving the following:

- (a) A transcript of the private communication, where it will be adduced in the form of a recording, or a statement setting out full particulars of the private communication, where evidence of the private communication will be given orally; and
- (b) A statement confirming the time, place and date of the private communication and the parties to it, if known.

3.4 **Closed Circuit Television and Visually Recorded Evidence**

3.4.1 Closed Circuit Television (CCTV) and videos recorded by Investigators on surveillance may provide images of the offender at the time of the incident or at a relevant location in the sequence of events before or after the incident. There is no evidence more directly relevant than a videotape showing the commission of a crime (**William Penn v The Queen** ante). There is no effective distinction between a bystander who witnesses an incident, a security officer who watches the incident on CCTV and a man who later looks at the videotape. For admissible identification evidence, where a photographic image (from

surveillance) or a still from CCTV is sufficiently clear, the jury can compare it with the defendant sitting in the dock, drawing their own inferences and perceptions (**A-G's Ref (No.2 of 2002)** [2003] 1 Cr App R 321 and **Dodson and Williams** (1984) 79 Cr App R 220).

3.4.2 A witness may give evidence that he recognises or identifies a person from viewing a video. In such circumstances the magistrate or the jury will have to apply the *Turnbull Guidelines* (**Turnbull** [1977] Q.B. 224; 63 Cr.App.R.132). The *Turnbull Guidelines* arise where the case against a defendant depends wholly or substantially on the correctness of an identification of the defendant, which the defence alleges to be mistaken. It is imperative for a judge to warn the jury (and a magistrate to direct themselves) of the special need for caution before convicting the defendant in reliance on the correctness of the identification. Additionally the judge should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness was made. Some of these circumstances may include: For how long was the defendant under observation by the witness? At what distance was the witness from the defendant? What length of time elapsed between the original observation and the subsequent identification to the Investigator? In the context of CCTV evidence this will need consideration of the position of the camera and nature and clarity of the film (**Taylor v Chief**

Constable of Cheshire 84 Cr.App.R.191,DC; also see **The Queen v Richard Kieran Stevens** [2002] NICA where a conviction was upheld despite no specific direction to the jury when there was other supportive identification evidence). Furthermore in Saint Lucia and Barbados consideration will have to be given whether there are special circumstances that support the identification. Section 102 of the Evidence Act in both Saint Lucia and Barbados mandates that the judge direct that the defendant be acquitted where there is no evidence of special circumstances that tend to support the identification evidence, and it is not reasonably open to find the defendant guilty except on the basis of identification evidence (**Earl Hunte v The Queen** HCRAP 2006/012). In Barbados in **DPP's Reference No.1 of 2001** (unreported judgment delivered on 26th February 2002) it was held that in an identical provision to the Evidence Act in Saint Lucia (section 102(3) Evidence Act) the judge was permitted to have regard to other matters including the fact that the visual identification evidence of one witness can constitute support for the identification by another provided he warns the jury in clear terms that even a number of honest witnesses can all be mistaken. Therefore it is important the Prosecution Team carefully review cases where the only evidence is identification to confirm whether there is any other supportive evidence. Other supportive evidence could include forensics or telecommunications evidence that places a suspect at a scene.

- 3.4.3 The Prosecutor could consider whether to instruct a facial mapping expert if the image is not clear to compare a CCTV image with control

images of the suspect (**A-G's Ref (No.2 of 2002)**; **Stockwell (1993)** 97 Cr App R 260; **Clarke [1995]** 2 Cr App R 425, **Hookway [1999]** Crim LR 750 and **R. v Atkins (Dean)** [2009] EWCA Crim 1876; [2010] 1 Cr. App. R. 8.)

3.4.4 If identification by a witness is disputed or where the Lead Investigator believes there may be an identification issue, an identification procedure, such as an identification parade, should be held as soon as reasonably practicable. The Investigator should consider if there are any security concerns with the witness being seen by the suspect. If so the Investigator may conduct the procedure through a one-way vision screen. A suggested procedure is outlined in Annex D. In Saint Lucia and Barbados section 100 of their respective Evidence Acts and section 110 of the Evidence Act in Saint Christopher and Nevis, mandates that evidence of identification is inadmissible unless a parade is held (see **Earl Hunte v The Queen** for interpretation of this section in Saint Lucia). However there are exceptions to this rule and the Prosecution Team will have to review those within section 100(2) of the Evidence Acts in Saint Lucia and Barbados and section 110(2) of the Evidence Act in Saint Christopher and Nevis, and be prepared to provide evidence in court as to why it was not reasonable to hold a parade. The application of the exceptions could include, by way of example, when the Investigator is aware of credible threats to the safety of the witness if they attend the parade (Evidence Act in Saint Lucia and Barbados section 100(2)(c) and Evidence Act in Saint Christopher and Nevis section 110(2)(c)). However this would have to

be balanced with the following:

- (a) Methods of protecting the witness that will allow him or her to attend the parade;
- (b) Ensuring a fair trial for the suspect if charged; and
- (c) The importance of the identification evidence (Saint Lucia and Barbados section 100(2)(b) and Saint Christopher and Nevis section 110(2)(b)).

Mr Yellow in interview is asserting he has been "set up." It is reasonable to believe he may allege the money was planted in his property. The video of the search will prove that the \$100,000 US was seized from a drawer in a kitchen cupboard. In order to adduce the evidence the Prosecutor advises that there must be a statement from the officer filming, detailing the following:

1. Date and time the video was taken;
2. Location of the video (i.e. address of property)
3. Officers at search and any other persons present;
4. Confirmation a search warrant was obtained;
5. Confirmation that the video was in working order;
6. Continuity (chain of custody) of the video recording and exhibit reference of video-tape; and
7. Continuity of any copies made (i.e. opening and resealing of bag and exhibit reference of copy)

3.4.5 CCTV is a form of filming where the public will be able to see the cameras. The cameras do not film covertly or interfere in the privacy of an individual's home. In those circumstances there is no breach of privacy. The main purpose of CCTV is to protect the public. Therefore the capture of an alleged offence is fulfilling CCTV's raison d'être, to ensure the safety of the community and bring those to justice who commit criminal offences.

3.4.6 Secret filming in a public place could amount to an infringement if it was not open to those who were subject to it to take any action to prevent it. The number of examples is few in this category but has been held to include persons filmed in cells in the Magistrates' Court. Albeit court is a public place, those in the cells could not avoid being filmed: **R v Loveridge (William), Lee (Charles Sonny) and Loveridge (Christine)**, *The Times*, May 3, 2001, CA. However the unlawfulness of the filming in this case was only relevant to the trial process if it interfered with the right to a fair trial. On the facts the admission of evidence of a facial comparison expert who viewed the unlawful video with another video of an offence being committed did not prejudice the fairness of the trial. Therefore, there needs to be a link between the unlawfulness and the defendant's inability to have a fair trial, for such evidence to be inadmissible.

3.4.7 In relation to covert filming there should be appropriate authorisation¹⁵⁶ by a Lead Investigator before deploying, to ensure the lawfulness of

¹⁵⁶ For an example in statute see **Antigua and Barbuda**: Section 56 (4) Evidence (Special Provisions) Act 2009

this tactic. This authorisation would need to consider the fundamental rights and freedoms in the region of the subject of the filming, and in particular their right to privacy. The Lead Investigator will therefore have to consider the following:

- (a) **Proportionality:** The subject's situation and any known history should be taken into account and the seriousness of the offence. It is about balancing the seriousness of the crime being investigated and the threat to the general public against the interference with the privacy of the individual concerned. The Lead Investigator should ask him/herself:
- Is the use of covert surveillance proportionate to the mischief being investigated?
 - Is the covert surveillance proportionate to the intrusion on the target and others who may be caught by it?
 - Are there no other overt means of obtaining the information that is being sought?
- (b) **Necessity:** The Lead Investigator will have to determine that this method is needed to detect the criminal activity suspected and prevent it occurring in the future; and
- (c) **Reasonable:** The Lead Investigator will have to balance the fundamental rights and freedoms in the Constitution with the importance of the proposed evidence and whether there is any other way of securing the evidence in the circumstances

If such considerations are not reviewed by way of an authorisation and this failure can be linked to the defendant having an unfair trial, the evidence could be inadmissible.

3.4.8 Equally where there is no prescribed procedure for authorisation, the Lead Investigator should be satisfied that all steps have been taken to avoid unnecessary intrusion into any third party's privacy. This is known as "*collateral intrusion*". Remember that if there has been an unlawful intrusion into any party's privacy (including a defendant) the aggrieved party could sue for damages.

3.4.9 The law in the Caribbean follows that of English authorities, that illegally obtained evidence will not be deemed inadmissible just because of that fact (**Herman King v. R** (1969) 1 AC 304, PC; and **Kuruma v. R** [1955] 1 All ER 236, PC). In **Herman King** and **Kuruma** searches were conducted unlawfully, but the gravamen of the decision remains that evidence was not inadmissible merely because it was illegally obtained. However it is still good practice for there to be an authorisation to ensure a considered decision was taken that will ensure the defendant has a fair trial.

3.4.10 Where there is statute¹⁵⁷ and applying the common law (**Kuruma, Son of Kaniu v The Queen** [1955] AC197), the courts will prohibit the admission of evidence whose probative value is counterbalanced by the risk of unfair prejudice to the accused. This is subject to the discretion of the court applying statute (see sections 116 Evidence Acts of Barbados and Saint Lucia and section 125 in Saint Christopher and Nevis), where on balance there is a greater desirability in the particular

¹⁵⁷ **Barbados:** Section 115 Evidence Act 1994 ; **Saint Lucia:** Section 115 Evidence Act 2002; **Saint Christopher and Nevis:** Section 124 Evidence Act 2011

circumstances to admit than to exclude it. Where applicable statute will provide guidelines for the exercise of judicial discretion, and these cover the relative importance of the evidence in the proceedings, the severity of the violation and difficulty in obtaining the evidence without such violations.

The surveillance officers confirm to the Prosecutor they recorded the events of 17th June on video. However due to the quick response following the intelligence provided by the CHIS they were unable to obtain the required authority. The Prosecutor advises that the Lead Investigator should now review retrospectively to decide if the surveillance and video were necessary, reasonable and proportionate in the circumstances, remembering they were tactics deployed on the basis of cogent intelligence. The Prosecutor's opinion is there was no time to obtain authorisation and any delay would have led to the loss of evidence and the continuation of unlawful activity. The video is important evidence proving the commission of a serious crime and the failure to authorise was not due to any misconduct. Also there is no link to the failure to authorise prejudicing the defendant's right to a fair trial. Therefore the Prosecutor concludes the footage will be admissible.

3.4.11 Photographs

3.4.12 There may be a general power under law to admit into evidence in criminal proceedings, photographs of any scene of a crime, or of any object seized by an Investigator for purposes of criminal investigation. Where there is the power in statute to admit photographs of goods or moveable property into evidence, the law is tightly controlled to ensure that the rights of accused persons are adequately taken into account. Accordingly, relevant statute in the region sets out certain preconditions for such admission.¹⁵⁸ One of the requirements is that the accused, his attorney or his representative should have been present at the taking of the photograph, or endorsed a copy. A sufficient opportunity should also have been afforded for the accused to accede to the use of the photograph as evidence, or alternatively to signal his objection. However, if the relevant statute confirms in exceptional circumstances, a certificate from the taker of the photograph as to reasons for non-compliance may be accepted, concerns in relation to contamination and security at a scene may legitimately be raised as an exceptional reason for not having the accused or his representative present.¹⁵⁹

¹⁵⁸ **Antigua and Barbuda:** Section 12B Evidence (Amendment) Act 2009; **Barbados:** Sections 132B(2)-(3) Evidence Act 1994; **Saint Lucia:** Sections 2 and 3 Administration of Justice (Miscellaneous Provisions) Act 1999 the preconditions for admission of photographs into evidence broadly mirror those outlined in section 132B Barbados Evidence Act.

¹⁵⁹ **Saint Lucia:** Section 3(8) Administration of Justice (Miscellaneous Provisions) Act 1999 allows for a Lead Investigator and the officer taking the picture to give a Statement recording the fact the accused and his representative were not present – no exceptional reasons are required.

3.5 Computer Evidence

3.5.1 Where appropriate, computer equipment should be seized from premises controlled or occupied by the suspect. Consideration will need to be given as soon as possible to instructing a forensic computer expert. Analysis of the computer may reveal, for example, that the suspect has accessed websites relating to large money transactions.

3.5.2 Evidence of usage of social networking websites may prove association with other offenders and aliases of the suspect.

3.5.3 Evidence of emails sent and received may prove participation, as the timing and pattern of messages might link the suspect to the sequence of events surrounding the commission of the offence. The Investigator should send at the earliest opportunity a preservation letter to the relevant email provider to preserve the emails and prevent disposal, before a formal letter of request is sent for the evidence if abroad or an application for production if a domestic provider.¹⁶⁰ See Annex B for an example preservation letter and letter of request.

3.5.4 The same considerations about hearsay as outlined at paragraphs 3.3.37 (a) to (d) should be reviewed by the Prosecution Team for emails sent and received by the defendant (also see **R v M (Rizwan)** ante at paragraph 3.3.37 (a) above)

¹⁶⁰ For example **Antigua and Barbuda**: Section 57 Evidence (Special Provisions) Act 2009 – in other jurisdictions consider production orders.

In the diary seized from Mr Yellow's property two names, "Mr Red" and "Agro" feature with numbers alongside. The Prosecutor advises that the computer should be analysed. The expert analysing confirms that there are emails to "Mr Red" and "Agro" by the sender. The Prosecutor immediately writes a preservation letter to the out of State provider, in order that the emails are retained. A letter of request is then prepared for the provider, located in the United States, to obtain the emails and subscriber details of the email addresses of the sender and also for "Mr Red" and "Agro" (See Annex B for an example of a Letter of Request based on these facts and paragraph 3.12 below on the procedure for Legal Mutual Assistance). The Prosecution Team hope to identify who both "Mr Red" and "Agro" are and whether they may form part of a larger conspiracy.

3.6 Covert Policing

3.6.1 Covert surveillance (such as covert observations and audio probes) is an important evidence-gathering tactic. The benefit of covert observations is demonstrated in **Kashif Mustaphakhan and Derek Parke v. The Queen** *Criminal Appeals No.s 19 and 20 of 2003* when it was used to infer joint possession of drugs. When Investigators intend to utilise covert surveillance or remove drugs/money from a location and implement a controlled delivery, the Prosecutor must consider from

the outset the likely admissibility of the evidential product,¹⁶¹ management of evidence to be used as part of the prosecution case¹⁶² and the potentially serious disclosure issues, which may arise.¹⁶³

3.6.2 It will be necessary for the Prosecution Team to obtain a warrant for the interference of property to install an audio probe and its removal.¹⁶⁴ This also applies where drugs/money are removed and a dummy package replaced for a controlled delivery¹⁶⁵. If an authorisation has not been obtained, the considerations outlined above at paragraphs 3.4.7-10 should be reviewed by the Prosecution Team, with an assessment undertaken to determine if the product will be admissible.

3.6.3 The Prosecutor should not automatically advise that such evidence would be inadmissible due to lack of legislation but consider if there has been undue prejudice to the defendant. The Prosecutor will have to weigh up any fundamental rights violated with the importance of the evidence. This will include whether there were other ways of securing the evidence, the seriousness of the charge and whether the defendant has been provided with a fair opportunity to challenge the evidence.

¹⁶¹ See paragraph 3.8.1 (b) re interpretation of code words or slang, 3.8.1 (c) re identification of voices on audio probe evidence, 3.3.51 re voice recognition and 3.14 re lawfully audacious and Investigator tactics

¹⁶² See paragraph 3.3.49 re Policy Decision for intercept material

¹⁶³ See paragraph 6.3.11 (d) in relation to management of sensitive material and disclosure.

¹⁶⁴ In **Antigua and Barbuda** application for authorisation (also required for intercept) signed by Solicitor-General or DPP, but application may be made ex parte: Section 60(2) Evidence (Special Provisions) Act 2009

¹⁶⁵ **Saint Lucia** see section 34 Drugs (Prevention of Misuse) Act re Minister of Health entering into an agreement with another State for a controlled delivery out of Saint Lucia. See paragraph 4.3.2 footnote 480 re importation offence if controlled drug replaced with a dummy/placebo package

3.7 Scientific Evidence

3.7.1 DNA¹⁶⁶, Bodily Samples and Impressions (i.e. Fingerprints)

3.7.2 When available, DNA and/or fingerprint evidence can be important evidence to link a defendant to exhibits such as drug packaging, guns or mobile phones. For any evidence there must be continuity to avoid the defence suggestion of contamination. This means statements from the following:

- (a) Investigator who seized the exhibit;
- (b) Investigator who lifted the fingerprints/took a photograph of the prints;
- (c) Investigator who has sent the exhibit for analysis to a laboratory;
- (d) Any Investigator who has opened the sealed exhibit;
- (e) Investigator who takes the DNA sample/fingerprints from the suspect/defendant;
- (f) Investigator who sends the DNA sample/fingerprints to the laboratory for comparison; and

¹⁶⁶For a guide on the use of DNA for Prosecutors and Investigators a useful reference is:

[http://www.cps.gov.uk/legal/assets/uploads/files/lawyers'%20DNA%20guide%20KSWilliams%20190208%20\(i\).pdf](http://www.cps.gov.uk/legal/assets/uploads/files/lawyers'%20DNA%20guide%20KSWilliams%20190208%20(i).pdf)

- (g) Expert who examines the exhibit with reference to the samples compared.

3.7.3 If an authorisation from a senior officer or a court order is necessary to obtain DNA, samples or impressions from the suspect this should be made as soon as possible.¹⁶⁷

3.7.4 If there is no legislation allowing for the taking of DNA and/or bodily samples and/or impressions, then an Investigator, in order to protect the fundamental rights of the suspect, must:

- (a) Inform the suspect before obtaining his/her consent to the taking of a DNA/sample/impression, of his/her right to consult with, and have in attendance, an attorney-at-law or adult of his/her choice;
- (b) Ensure when a blood or urine sample is taken, the suspect is afforded the opportunity to retain a portion of the sample for purposes of independent testing;

¹⁶⁷ **Antigua and Barbuda:** re DNA sample section 58 Evidence (Special Provisions) Act 2009 and fingerprints (or other impressions i.e dental, feet) section 59 Evidence (Special Provisions) Act 2009; **Barbados:** Forensic Procedures and DNA Identification Act 2005; **Saint Christopher and Nevis:** Section 5(3) DNA Act 2013 re court order where consent for non-intimate (i.e. DNA) sample refused. Where an application is made to court (using Form 6 of the first Schedule) the same considerations will be applied to those for the taking of an intimate sample (e.g. blood and semen) when consent has been refused (sections 18-22). The officer will have to satisfy the court on the balance of probabilities (section 39 defines the burden of proof) that an order should be granted in the public interest due to the gravity of the offence (section 18(3)(a)) and the evidence is likely to be significant for the purposes of the investigation (section 18(3)(e)) and this is the best method to secure that evidence (section 18(3)(3)). The power for taking fingerprints and other impressions (but no power to take DNA) often in relevant Police Act: see **Dominica:** Section 12(2) Police Act; **Saint Christopher and Nevis:** Section 38 Police Act; **Saint Lucia:** Section 25 Police Act; **Saint Vincent and the Grenadines:** Section 15 Police Act. See also **Antigua and Barbuda:** Section 22(3) The Office of National Drug and Money Laundering Control Policy Act 2003 and use of reasonable force if authorised by Director or Deputy Director

- (c) Ensure for Intimate samples analysis, that they are conducted by medical practitioners and other designated health professionals.

Again the Prosecutor should not automatically advise that such evidence would be inadmissible due to lack of legislation but consider the issues at paragraphs 3.4.7-10 and 3.6.3 above.

3.7.5 Drug Analysis/Purity

3.7.6 An analysts certificate is required to prove an exhibit is a controlled drug. Evidence of the purity of the drug can be important evidence to establish that a suspect is close to the source of the drugs.¹⁶⁸

3.7.7 Equally evidence of any pre-cursor chemicals that have been used to mix drugs can be important to show that drugs were being used for maximising profit. Evidence of *cutting* drugs will be important evidence of commercial supply. The analyst should provide a statement confirming the pre-cursor chemicals contained within the controlled drugs. To adduce such evidence of *cutting* an expert opinion is required, for example by an Investigator as detailed in paragraph 3.8.1(a).

3.7.8 Other Scientific Evidence

3.7.9 Other significant scientific evidence that maybe considered, includes fibre transfers, drug transfers, mechanical fit (for example comparison

¹⁶⁸ See paragraph 4.3.11 (a)

of tape in suspect's house to tape on a packet of drugs) or other particle transfer (for example firearm discharge residue - fine debris emitted from a firearm when it is discharged) linking a suspect to an incriminating article. However evidence will be corroborative rather than conclusive evidence of participation in Serious Organised Crime due to limitations in this type of evidence. These limitations will have to be reviewed by the Prosecution Team and can include the following:

- (a) Possibility of transfer of particles to the suspect from other persons or other objects, which have been in the proximity of e.g. a discharged firearm or drugs;
- (b) A particular concern is the suspect's potential contact with Investigators in contact with incriminating articles and/or exhibits. The continuity¹⁶⁹ of exhibits and the movements of all relevant officers should be established;
- (c) Particle transfer evidence is readily lost with time and it may be difficult to interpret the detection of very small amounts.

The Prosecutor advises the Investigation team to have forensics conducted on the following:

1. The packaging containing the drugs;
2. A mechanical fit of the brown paper roll in Mr Yellow's house to determine if the same as used for

¹⁶⁹ See 6.9 and 3.7.2

- the drug packaging seized on 17th June;
- 3. DNA from the top and bottom notes of the \$100,000 and elastic band to link cash to any party;
- 4. DNA and fingerprints on scales;
- 5. Battery and/or sim card in the cell if any dispute that they belong to either suspect;
- 6. Purity of the cocaine seized

3.7.10 It is important that the Prosecution Team is aware of the availability of any resources to conduct scientific analysis. Table 1¹⁷⁰ below confirms what scientific evidence is available in each country with a forensic lab. Within CARICOM member States there are a total of ten forensic labs. Of these, five are national labs, three are law enforcement labs, and two are private labs. The distribution of the various labs is as follows: the Bahamas has one law enforcement lab; Barbados has one law enforcement lab, one national lab and one private lab; Belize has a national lab; Guyana has a law enforcement lab; Jamaica has one national and one private lab; Saint Lucia and Trinidad and Tobago each have a national laboratory. For those countries that don't have a forensic lab they will have to send the exhibit for testing where the service is available.

3.7.11 Whilst there is limited capacity for crime scene investigation examination in Antigua and Barbuda, Grenada, Dominica, Saint

¹⁷⁰ Information obtained from the Capacity Assessment of Forensic Laboratories in Caricom Member States 31st January 2011 (Barnes, Shields and Seepersad). This study didn't include the telephone lab in Antigua

Christopher and Nevis and Saint Vincent and the Grenadines, these jurisdictions mainly use the labs in Table 1 below.

3.7.12 Consideration will have to be given when the service is sourced out of country, to continuity (chain of custody) and delay. In this regard there should be no issue with an exhibit being sent by courier services overseas as long as the chain of custody is maintained. This would still require an Investigator providing a statement with the courier reference number on the package and a statement with this same reference by the laboratory personnel that receives the exhibit and vice versa upon return to the Investigators.¹⁷¹ Also to avoid unnecessary delay, a request for such evidence out of country must be requested in good time.

Table 1

Forensic Service/Country	Barbados	Belize	Saint Lucia	Guyana	TT	Jamaica	Bahamas
Drug Analysis							
Fingerprints							
DNA							
Firearms							
Explosives, fire debris							
Fibres							

¹⁷¹ See **Damien Hodge v The Queen** detailed at paragraph 6.9 below. Fed Ex was used in this matter and it was held that the fact that a representative of FedEx did not testify to the delivery of the package containing the exhibit to the Royal Virgin Islands Police Force was not fatal

Forensic Service/Country	Barbados	Belize	Saint Lucia	Guyana	TT	Jamaica	Bahamas
Hairs							
Paints							
Glass							
Video and Image Analysis							
Handwriting analysis							
Gunshot residue							
Testing for precursor chemicals							
Computers							
Impressions, Shoes, Tyre-marks							
Forensic audio							

Key:

 **Forensic capability available in country**

Note: Although not listed above, In Antigua and Barbuda there is the capability to forensically examine computers and telephones.

3.8 Expert Evidence

3.8.1 This should be considered for:

- (a) Valuation of drugs to show the profit involved for organised criminals (**R v Bryan** *unreported, November 8, 1984 CA.*; **R v Hodges** [2003] 2 Cr.App.R 15);

(b) The evidence of code words or slang used by drug dealers (**R v Nguyen**, *unreported*, August 22, 2007 [2007] NSWCCA 249),

Including:

- Interpretation of any dealers lists showing amounts of money that equate to the value of drugs;¹⁷²
- Interpretation of encoded jargon, slang or vague conversations, within covertly monitored audio in order to demonstrate how they represent criminality, or links to specific evidence;
- Interpretation of suspect annotations or records in order to demonstrate implications to currency, exchange rates or percentage costs, logistics, or transactions;
- Interpretation of terminology describing money laundering methodology and typology

(c) Voice recognition for an audio probe if identification is disputed

(**Flynn (2008) EWCA Crim 970**);¹⁷³

(d) Handwriting analysis where it is anticipated that there will be a dispute (**R v. O'Sullivan 53 Cr.App.R.274**); and

(e) Methods of laundering the proceeds of crime and in particular:

- Overview of legitimate financial systems and instruments in comparison to criminal misuse or exploitation;

¹⁷² See Annex M and the case summary explaining how this is important evidence

¹⁷³ As detailed at paragraph 3.3.51

- Generic or specific overview of evidence regarding money laundering geography, logistics, mechanisms or implications;
- Demonstrations of potential, or likely, profit margins or indications as to the scale and scope of laundering activity;
- Calculations to show how illegitimately transferred quantities of cash / funds may be shown to represent proceeds of crime; and
- Explanations of how evidence compares to legitimate financial market or industry activity.

3.8.2 Of course opinion evidence is not admissible but the courts may accept the opinion of an expert witness if it recognises the expert as holding specialized knowledge based on training and experience, and his/her opinion is substantially grounded in that knowledge.¹⁷⁴ Therefore it is important to provide evidence of this knowledge in any statement or report prepared by an expert.

3.8.3 Expert witnesses must prepare evidence based upon a platform of impartiality, employing their knowledge, research and enquiries to the evidence of a case without response to influences from others more motivated towards a desired outcome. On this basis all evidence from an expert should be transparently prepared and presented, accountable, corroborated by other data or material wherever possible

¹⁷⁴ For example see **Saint Lucia**: Section 66 Evidence Act 2002

and presented to the courts with the same levels of independence, impartiality and fairness, with consideration of all the influencing evidence, facts and circumstances. If challenged, an expert witness must be able to provide supporting information to clarify their independent involvement with the case to support their appearance of impartiality.

3.8.3(a) It is important to clarify that at common law the courts have held that a factual witness, such as a law enforcement officer giving evidence about drug supply routes and prices, can give opinion evidence. The law distinguishes between “*opinion*” and “*fact*” evidence. This difference can be best demonstrated by those witnesses who have “*medical expertise or scientific or commercial expertise*” (per Rix L.J. in **R v O** [2010] EWCA Crim 2985 at para.27) and those that have practical experience and can prove the primary facts upon which their evidence is based. In the latter category will be evidence from a law enforcement officer with experience on for example gang behaviour (**David Jahwell Cox v The Queen** 2012 CA (Bda)15 Crim) or the method of supply of drugs (**R v Hodges and Walker** [2003] 2 Cr.App.Rep. 15 see Crim LR 474). It is important to note that the sources of the law enforcement officer’s expertise are not required to be proved by calling all the persons through whom the relevant information had passed through. The Criminal Law Review editor’s commentary to **R v Hodges and Walker** distinguishes between “*scientific*” evidence that might be given by a suitably qualified expert

and an officer “*who is an ‘expert’ as to the regular habits of drug users and dealers in the area where he works.*” (page 474).

3.8.3(b) **David Jahwell Cox v The Queen** (per Zaaca P. at page 15)

provides the following helpful practical considerations for the court when the Prosecution decide to call a specialist law enforcement officer to give expert evidence:

- (a) The nature of the evidence, distinguishing factual (evidence of primary facts) from opinion evidence;
- (b) What parts of the factual evidence are based on hearsay;
- (c) Establishing the basis on which the officer is entitled to give opinion evidence – his or her experience and qualifications;
- (d) Distinguishing practical experience from academic qualifications
- (e) Using terms such as “*experienced police officer*” or “*expert on gang behaviour*” rather than “*gang expert*” simpliciter
- (f) Directing the jury as to the scope of the opinion evidence and the basis for permitting it; and
- (g) Above all bearing in mind the potential prejudice for the defendant before permitting it to be introduced.

3.8.4 The evidence of an expert is designed to provide evidential support to a prosecution case or confiscation hearing and to de-mystify certain complex material that might otherwise be beyond the capability of the court (judge and jury) to understand in isolation. The court is not bound by such evidence, but may consider it in their decision making

obligations. Expert evidence is a facility available to both prosecution and defence teams.

- 3.8.5 Expert witnesses are required to adopt an impartial and independent approach to the evidence by applying their own perspectives, knowledge and reasoning to the evidence of a case. Expert witnesses cannot be selective; if they find evidence that supports the defence they are bound to interpret and reveal this.
- 3.8.6 Once allocated to a case and following service of their evidence, the expert witness is open to be approached by either party and asked to consider specific evidence or assertions.
- 3.8.7 An expert witness falls under greater scrutiny than a standard witness. Their rationale and reasoning must be suitably transparent for all parties to scrutinise them. Therefore an expert witness must maintain a curriculum vitae to reassure the Prosecutor and trial judge on a case by case basis that their experience and capability to interpret or explain evidence is commensurate with the nature and extent of the criminal activity in question.
- 3.8.8 The use of expert evidence has had proven benefits with regard to influencing guilty pleas, impacting upon the outcome of trials and sentencing and negotiating or establishing figures for the purpose of Confiscation.
- 3.8.9 An expert witness should be sought and allocated when a case is developed to the stage where evidence is being gathered (surveillance

or physical) with a view to developing towards a prosecution. The allocated expert witness will then follow the progress of the case with a view to providing assistance with interpreting material and then applying an evidential perspective to the case as it concludes or develops through staged interventions.

3.8.10 Where expert opinion evidence is key to establishing the identity of an offender, the Prosecutor should consider instructing a second expert to back up the opinion of the original expert. This would apply regardless of whether the defence have served expert evidence.

3.8.11 The Prosecutor should consider whether it is appropriate to meet an expert witness in conference ahead of trial. The trial advocate(s) and Investigator should attend any such conference.

The Prosecutor advises that the note found on Mr Green and the diary seized The Prosecutor advises that the note found on Mr Green and the diary seized from Mr Yellow's property are significant. This will require an Investigator from the drugs squad to give an expert Statement on whether any amounts referred to in each exhibit could be equated to drug prices. Any statement must detail the officer's experience and how they know through their every day work cocaine prices for dealers applying R v Bryan. Then they can comment, with their expert knowledge, on whether the amounts in the exhibits refer to prices for cocaine. The Prosecutor suggests a handwriting

comparison is conducted to determine if Mr Green and/or Mr Yellow and/or another wrote the note in Mr Green's possession and if Mr Yellow wrote the diary. Albeit there is a comparison sample provided for Mr Green the Prosecutor instructs the Investigator to confirm if any written items seized from Mr Yellow's house search can be attributed to Mr Yellow and compared to the diary.

3.9 Assisting Offenders

3.9.1 The DPP should give consideration in appropriate cases to giving an undertaking not to prosecute or further prosecute a suspect who has been charged. This immunity is usually granted for an accomplice who agrees to give evidence against another accomplice (**R v Turner (1975) 61 Cr App R 67**). The DPP should endeavour to assess, in cooperation with the Investigating Agency, the strength of the prosecution case with and without the information from the potential accomplice/witness and should be satisfied that the person is able and prepared to provide reliable evidence on significant aspects of the case and would be a credible witness. In making to this judgement, some or all of the following factors may be relevant:

- (a) The seriousness of any offence(s) concerning which the evidence, information, co-operation, assistance or other benefit would be provided; as a rule non-prosecution agreements should only be considered in serious cases;

- (b) The seriousness of any offence(s) which the potential witness might have committed, in comparison with (a) above, including the extent to which the potential witness had coerced or incited another person to take part in the offence(s) under investigation;
- (c) The importance and value of the evidence, information, co-operation, assistance or other benefit to be provided;
- (d) Whether it is possible to obtain the evidence, information, co-operation, assistance or other benefit from another witness, or in another manner;
- (e) The strength of the prosecution case without the evidence that it is expected that the witness can give; and, if some other charge could be established against the defendant without the witness' evidence, the extent to which that other charge would reflect the defendant's criminality;
- (f) The impact of the evidence that it is expected that the witness can give on the prospects of conviction in the case taken as a whole (the prospects of the conviction may actually be reduced because of the bad character and lack of candour of the witness when giving evidence);
- (g) The criminal history of the witness and full details of his or her contacts with the Investigators in order to assess credibility;
- (h) Whether there are other indicators tending to confirm that the evidence or information that the witness might give is true;

- (i) The number of occasions and the circumstances in which any undertaking has been made with the witness in the past; the expectation of an undertaking should not be seen as a licence to continue to commit offences;
- (j) Whether the interests of justice (including the protection of the public and the interests of the victim) would be better served by obtaining the proposed evidence, information, co-operation, assistance or other benefit; or by the conviction of the person with whom it is proposed to make an undertaking;

3.9.2 The terms of the undertaking should be written and stipulate that the undertaken maybe withdrawn if the beneficiary does not give evidence in accordance with the statement provided to the prosecution.¹⁷⁵

3.9.3 The Investigators must never decide to grant immunity as this is a decision to be taken by the DPP (**R v Croydon JJ ex p Dean (1993) 98 Cr App R 76**). This will avoid the situation that a suspect has been induced to confess on the basis they will not be prosecuted. Furthermore this power should only be granted sparingly by the DPP and after a full consideration of the accomplice evidence to be given. In most cases full immunity will be rare and an accomplice should usually plead guilty to his part in the criminality and reference made when sentenced to his assistance so appropriate credit is given.¹⁷⁶

3.9.4 In order to benefit from an undertaking it is best practice that a person

¹⁷⁵ Applying the principles in any relevant Criminal Code or (if any) relevant legislation

¹⁷⁶ See Paragraph 5.6.8 below re protection of Assisting Offenders

must:

- (a) Fully admit their own involvement in the crime or crimes under investigation;
- (b) Provide the Investigators with all information available to them regarding the matters under investigation and those involved;
- (c) Agree to maintain continuous and complete co-operation throughout the investigation and until the conclusion of any criminal or other proceedings arising from the said investigation, including giving evidence in court where appropriate.

3.9.5 In every case where an accomplice or potential co-defendant indicates that he or she is willing to assist the prosecution, the terms under which this assistance is to be given, the range of assistance that is to be provided and any benefit to the offender should be reduced to writing with as much precision as is possible.¹⁷⁷

3.9.6 As a matter of good practice those offenders who are to give evidence for the prosecution and who wish to benefit from an undertaking should be required fully to admit their criminality. This process, often called '*cleansing*', should be part of the de-briefing process carried out by the Investigating Agency in the process of obtaining the evidence of the potential assisting offender. Cleansing protects the integrity of the informer system, countering the suggestion that unscrupulous '*deals*'

¹⁷⁷ See Annex U: Immunity Notice and Annex V: Restricted Use Undertaking re DPP thinks that for the purposes of the investigation or prosecution of any offence it is appropriate to offer any person an undertaking that information of any description will not be used in any criminal or confiscation proceedings or civil recovery

have been struck between the offender and the prosecution, just to obtain testimony against others. From a tactical point of view, full cleansing minimises the risk that the value of assisting offender's evidence will be reduced to nothing by cross-examination on criminal activities he has not admitted but which are well known to his former accomplices. It follows that the requirement for full cleansing may be somewhat less important where the offender is willing to provide assistance by way of intelligence only and is not prepared to give evidence in court.

3.9.7 Cases may arise where an assisting offender is not prepared to admit all his other criminality but his willingness to give evidence is considered of such importance that it should not be refused on this ground alone. Any decision to use as a witness an assisting offender who has refused to undergo full cleansing must be recognised as a high risk strategy and very careful consideration will have to be given to the credibility of the witness in front of the jury. Cases where it is appropriate to proceed with such a witness should be thought of as truly exceptional (**R v Blackburn** [2007] EWCA Crim 2290).

3.9.8 Within existing common law rules prosecutorial discretion can be used to secure the co-operation of potential co-defendants in an informal and strategic manner. Examples of the exercise of this discretion might include:

- (a) A review decision by the Prosecution Team to prosecute only the main offenders and to call peripheral offenders as witnesses;

- (b) Informing the court, when an accomplice or other witness gives evidence, that the witness will not be prosecuted on the basis of anything he may say in the course of truthful evidence on that occasion. This situation may arise at short notice when the court of its own motion warns the witness against self incrimination during the course of their testimony. However it is preferable for such ad hoc non-prosecution undertakings to be expressly limited to offending of which the prosecution is aware or which the offender has already admitted in the course of his evidence; blanket undertakings not to prosecute any offending which is revealed should never be given.

3.9.9 Consideration should be given by the DPP to the procedure by which the Investigators, with the concurrence of the Prosecution Team, make the sentencing judge aware, in confidence, of assistance given by an accused to the prosecution whether in relation to the present case or more generally. This maybe through '*texts*', where the Investigator, with the concurrence of the prosecution, make the sentencing judge aware, in confidence, of assistance given by an accused to the prosecution whether in relation to the present case or more generally (**R v King** (1988) 7 Cr. App. R (S) 227; **R v Piggott** (1994) *unreported*, Court of Appeal; **R v Huddersfield Justices ex parte D** 12th July 1996 (*unreported*)).

3.10 Accomplice Evidence

3.10.1 Important factors to consider about accomplice evidence and whether to prosecute include:

- (a) The quality of the evidence as well as the quality of the witness;
- (b) The value of the evidence to the Investigators in an operation against a serious organised criminal may incline against prosecuting the witness;
- (c) The gravity of the offence committed by the witness; generally, the more serious the offence, the more likely the witness will be prosecuted.

3.10.2 It should be further noted that ordinarily a participator in the crime of which the defendant is accused should not be called as a prosecution witness without a clear indication from that accomplice that he is willing to give evidence in favour of the prosecution (**R v Sinclair**, *The Times 18 April 1989, CA.*) Where it is proposed to call an accomplice for the prosecution at the High Court it is the practice to omit him from the indictment, or take his plea of guilty on arraignment.

3.11 Financial Investigation

3.11.1 Financial investigation may provide material of use in all types of investigations, including those with no obvious link to money or assets. This is possible because most people have some kind of property, money or assets, and use service providers. Many also use electronic

means of payment and banking instead of cash. This development has created sources of information that can reveal details about a person's life, activities, interests, associates, plans and desires, all of which can be used to detect and combat crime.

3.11.2 Targeting Acquisitive Crime

3.11.3 Financial investigation and the tools provided by asset recovery legislation provide an effective means to reduce acquisitive crime. By recovering the proceeds of crime, investigators disrupt a criminal's ability to fund further crime and remove their incentive by creating a continued deterrent. Additionally, it is possible for the proceeds of crime to be recovered in cases where a successful criminal conviction is not assured (see Cash Seizure and Civil Recovery at paragraphs 4.2.4-28 below).

3.11.4 Reassuring the Public

3.11.5 The use of financial investigation to recover the proceeds of crime improves the public's perception of Investigators. Negative role models are removed from communities and criminals' well-flaunted assets can be confiscated.

3.11.6 A prison sentence may be viewed as an occupational hazard by the criminal, however, the removal of all their criminally earned assets can have a far deeper impact. Put simply, confiscation makes sure that *'crime does not pay'*.

3.11.7 Types of Financial Information

3.11.8 Financial information includes all types of information that is connected to money, assets, expenditure and finance, of any kind. This information is present in almost every aspect of a person's life (their home, work and plans, both present and future). Non-cash based methods of dealing with money and assets such as credit and store loyalty cards generate financial information. Investigators can analyze this information to obtain material to assist the investigation. It can help establish a person's whereabouts, their possible intentions, evidence of a crime, motive and whether they are living beyond their means.

3.11.9 A substantial amount of financial information is available to all police officers, although there are restrictions. Financial investigators (FI's) are able to access that information more easily because of their training and the control that some data owners place on access to financial information. For these reasons, more complex enquiries are usually conducted by FIs. Prosecutors and/or Investigators, to refer financial cases to financial Investigators, can use form 6 of the Manual of Guidance.

3.11.10 Investigations

3.11.11 Investigators and Prosecution Teams should be aware of the wide range of financial information that could be of relevance to a criminal investigation or a confiscation investigation. All Investigators should be aware not only of the wide ranging powers that can be used for a financial investigation, but also how they can come into contact with

financial information during the course of their routine duties. This includes searches of the person, searches of vehicles and searches of premises.

3.11.12 Opportunities to gather financial information can arise when:

- (a) Conducting a legal search in relation to an offence such as drug dealing or money laundering where there are reasonable grounds to believe that financial information will lead to evidence to benefit that investigation;
- (b) Conducting a legal search into an offence where the situation evolves so that the officer becomes aware of reasonable grounds to suspect that another offence has been committed – and the financial information is evidence of that offence;
- (c) Conducting a legal search into an offence and the officer makes notes of financial information for intelligence purposes (without specifically searching for it).

Investigators should note that the grounds for the search must be justified, regardless of the financial information requirement.

3.11.13 It is also important that Investigators know that Investigative powers provided by proceeds of crime and money laundering prevention legislation in the region (i.e. production orders and search warrants) can only be used while conducting a money laundering or confiscation investigation. Any applications for production orders or any

other information gathering orders,¹⁷⁸ to obtain evidence of criminal lifestyle and assets held by the suspect or by another on his/her behalf, should be made as soon as reasonably practicable. The basic reason being that organised criminals will move their assets if put on notice of an investigation and to secure and preserve the evidence the FI's must act quickly. It is for this reason that the Investigator, FI or Prosecution Team should consider what investigative powers should be used if an operation is still covert.

3.11.14 If these powers identify evidence of other offences, the material obtained may be used within that further criminal investigation (**Chevalier v AG et al** (1985) 38 WIR 240). If such investigation powers are being used and evidence such as financial information becomes available that also assists a confiscation matter as an incidental by-product of the original criminal investigation, it can also be used.

3.11.15 Where premises are being searched in relation to a crime, it is possible that financial information of relevance to the investigation may be found. In drugs cases, officers will be looking for controlled drugs, drugs paraphernalia, cash and financial records. If the investigation is not drug related but concerns an acquisitive crime such as a fraud, financial information may be relevant to that offence or any future confiscation procedure. Financial information also has a wider investigative use in providing details of a person's lifestyle and motives. During a house search officers may note, for example, if the resident is obviously living

¹⁷⁸ For example monitoring orders or disclosure of information by Government Departments – see Table 2

beyond their means and/or the house has apparent and excessive signs of unexplained wealth. The officer should make a note of this type of information in the search log and in a statement.

3.11.16 Useful financial information from a search of the person, vehicle or premises will be:

- (a) Bank account numbers listed on bank cards, credit cards and cheque books;
- (b) Information from bank and building society books and account statements (both the suspect's and their family's, noting that production orders may not reveal accounts owned by the suspect in other names);
- (c) Information from financial documents regarding pensions, investments, mortgages;
- (d) Information from business documents suggesting a working relationship between the suspect and a business or company;
- (e) Expenditure information from bills including utility bills, receipts, car and house contents insurance papers;
- (f) Personal photographs reflecting expenditure, such as holiday snaps;
- (g) Jewellery, watches, designer clothes;
- (h) Information disclosing a personal Post Office box where items can

be sent;

- (i) The car, bike or motorbike the person was driving.

3.11.17 Information held by financial institutions can show the lifestyle of a person and whether they are living beyond their means. This includes information from:

- (a) Bank accounts;
- (b) Bank statements, direct debits, standing orders, credit and debit slips, supplemental information such as managers' written notes, identity documents used to open accounts (banks must be satisfied with the identity of a person opening an account), account opening forms, safety deposit boxes, copies of ledgers of business, credit and charge card accounts, credit and charge card statements, pensions, insurance schemes, mortgages and any other previously unidentified accounts.

3.11.18 These can inform an Investigator of payments to and from other persons, the lifestyle of the individual (their wealth, the turnover in their account), their spend patterns (for example, where they went on holiday, their travel, meals, hobbies and other interests), and any financial problems. In addition, automated teller machines can provide information on:

- (a) Sums withdrawn;

(b) Geographical location at a certain time;

(c) Routines.

3.11.19 Various government agencies and departments hold financial information of potential use to an Investigation. For example:

(a) Tax status

(b) Employment information;

3.11.20 Importance of Financial Evidence

3.11.21 The use of evidence of an extravagant lifestyle can be very persuasive. However it must be relevant and will usually be supportive of a case where the prosecution assert that the defendant has accumulated assets through criminal activity rather than through legitimate activity. Therefore the evidence of wealth will have to be of, “....*probative significance to an issue in the case.*” **R v Morris** [1995] 2 Cr.App.R.69, CA, Morland J. at p.75G)

3.11.22 By way of example in **R v Gordon** [1995] 2 Cr.App.R.61 evidence of large sums of cash was admissible, as was the existence of active bank accounts with large credits which was relevant to forestall a defence argument as to the cash, that the accused did not trust banks. But it was not relevant or admissible to cross-examine as to pass credits and withdrawals which could only found an inference of past drug dealing (as opposed to present and active drug dealing).

3.11.23 The FI should consider the following evidence to determine if there is support for living an extravagant lifestyle:

- (a) Evidence of expenditure shown by luxury items such as expensive pets, electronic goods, designer clothing, shoes, bags, accessories, jewellery, expensive household furnishings or features (e.g. marble, expensive tiles, paved driveways, conservatories, spas), cars, motorbikes or bicycles and photographs of luxury items;
- (b) Evidence of wealth and expenditure elsewhere such as photographs of holiday homes, evidence of travel and lifestyle;
- (c) Cash; and
- (d) Passports (numbers, evidence of travel).

3.11.24 Other Uses for Financial Information

3.11.25 Financial information can assist other investigations including:

- (a) Identifying motives, associations and links to people and places;
- (b) Identifying the use of other services such as phones, transport and amenities relevant to the case;
- (c) Locating witnesses or missing persons;

- (d) Providing information on a suspect's movements (proactive, covert use of financial information);
- (e) Providing information to address the issue of prolific and priority offenders where no previous method has been successful; and
- (f) Identifying criminality including acquisitive crime and offences such as fraud and cybercrime.

3.11.26 FI's will also be crucial for investigations into money laundering, confiscation, cash seizure and civil recovery. Table 2 below summarises powers for such investigations. A very useful tool that can further assist the FI, Investigator and Prosecution Team is the Association of Chief Police Officers Practical Advice on Financial Investigation found at:

http://www.surreycc.gov.uk/_data/assets/pdf_file/0007/171970/Advice-on-financial-investigation.pdf

3.11.27 Investigative Powers¹⁷⁹

3.11.28 Production Orders¹⁸⁰ in Antigua and Barbuda, Barbados, Dominica, Saint Christopher and Nevis and Saint Lucia

3.11.29 These will allow an Investigator¹⁸¹ to apply where there are reasonable grounds for suspecting that any person has possession of.¹⁸²

¹⁷⁹ See Annex E for further guidance for applications by Investigators/Prosecutors

¹⁸⁰ See Annex E from paragraph 8 that provides information that could assist when making an application

- (a) A document relevant to:¹⁸³
- Identifying; or
 - Locating; or
 - Quantifying property of the person; or
 - To identifying or locating a document necessary for the transfer of property of such person who has committed or has been convicted of an offence scheduled¹⁸⁴ by the relevant regional Acts; or
- (b) A document relevant to:¹⁸⁵
- Identifying; or
 - Locating; or

¹⁸¹ Usually a Police Officer unless otherwise specified in this section

¹⁸² **Antigua and Barbuda:** Section 42(1)(a) Proceeds of Crime Act; **Barbados:** Section 42(1)(a) Proceeds Of Crime Act – also see section 6A(3)(c) of the Money Laundering and Financing of Terrorism (Prevention and Control) Act that allows the Anti-Money Laundering Authority, after receiving a suspicious activity report from a Financial Institution, and having reasonable grounds to believe that a business transaction involves criminal activity or the proceeds of crime, to require the financial institution to produce the information (other than that protected by legal privilege); **Dominica:** Section 41(1)(a) Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 23(1)(a) Proceeds of Crime Act; **Saint Lucia:** Section 41(1)(a) Proceeds of Crime Act

¹⁸³ **Antigua and Barbuda:** Section 42(1)(a)(i) Proceeds of Crime Act; **Barbados:** Section 42(1)(a)(i) Proceeds of Crime Act; **Dominica:** Section 41(1)(a)(i) Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 23(1)(a)(i) Proceeds of Crime Act; **Saint Lucia:** Section 41(1)(a)(i) Proceeds of Crime Act

¹⁸⁴ In **Saint Christopher and Nevis** a “Serious Offence” defined as any offence triable on indictment or hybrid offences from which a person has benefited – section 2(1)(c) Proceeds of Crime Act

¹⁸⁵ **Antigua and Barbuda:** Section 42(1)(a)(ii) Proceeds of Crime Act; **Barbados:** Section 42(1)(a)(ii) Proceeds of Crime Act; **Dominica:** Section 41(1)(a)(ii) Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 23(1)(a)(ii) Proceeds of Crime Act; **Saint Lucia:** Section 41(1)(a)(ii) Proceeds of Crime Act

- Quantifying tainted property¹⁸⁶ in relation to the scheduled offence in the relevant regional Acts the person has been convicted of; or
- To identifying or locating a document necessary for the transfer of tainted property in relation to the scheduled offence in the relevant Acts¹⁸⁷ the person has been convicted of.

3.11.30 The application will be made ex parte to a High Court Judge in Chambers and in writing and supported by an affidavit from the Police Officer applying.¹⁸⁸

3.11.31 A Judge will only make an order if satisfied that:¹⁸⁹

- (a) The applicant [Police Officer] or if represented by the DPP [or Counsel] such information either orally or in the affidavit as required according to the relevant Acts; and
- (b) The Judge is satisfied that there are reasonable grounds for making the order

¹⁸⁶ Tainted property is generally defined as: (i) property intended for use in, or used in or in connection with the commission of an offence; or (ii) proceeds of crime;

¹⁸⁷ See Table 2 below

¹⁸⁸ **Antigua and Barbuda:** Section 42(2) Proceeds of Crime Act; **Barbados:** Section 42(2) Proceeds of Crime Act; **Dominica:** Section 41(2) Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 23(2) Proceeds of Crime Act; **Saint Lucia:** Section 41(2) Proceeds of Crime Act

¹⁸⁹ **Antigua and Barbuda:** Section 42(7) Proceeds of Crime Act; **Barbados:** Section 42(7) Proceeds of Crime Act; **Dominica:** Section 41(7) Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 23(7) Proceeds of Crime Act; **Saint Lucia:** Section 41(7);

3.11.32 An order will be made that a person produce¹⁹⁰ or allow for inspection,¹⁹¹ such documents as are specified, to a Police Officer at a designated time and place.

3.11.33 Once the documents are produced to the specified Police Officer he may, according to the relevant Acts:¹⁹²

- (a) Inspect the documents;
- (b) Take extracts from the document;
- (c) Make copies of the documents; or
- (d) Retain the documents for so long as is reasonably necessary.

3.11.34 Where documents are retained by the Police Officer he is required to make a copy of the documents available to the person who produced them.¹⁹³

3.11.35 The relevant Acts are clear that the documents produced cannot be used in evidence,¹⁹⁴ except where they are used for a failure to comply

¹⁹⁰ **Antigua and Barbuda:** Section 42(8) Proceeds of Crime Act; **Barbados:** Section 42(8) Proceeds of Crime Act; **Dominica:** Section 41(8) Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 23(8) Proceeds of Crime Act; **Saint Lucia:** Section 41(8) Proceeds of Crime Act

¹⁹¹ **Antigua and Barbuda:** Section 42(9); **Barbados:** Section 42(9) Proceeds of Crime Act; **Dominica:** Section 41(9) Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 23(9) Proceeds of Crime Act; **Saint Lucia:** Section 41(9) Proceeds of Crime Act

¹⁹² **Antigua and Barbuda:** Sections 43(1) and 43(2) Proceeds of Crime Act; **Barbados:** Sections 43(1) and 43(2) Proceeds of Crime Act; **Dominica:** Sections 42(1) and 42(2) Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 24(1) and 24(2) Proceeds of Crime Act; **Saint Lucia:** Section 42(1) and 42(2) Proceeds of Crime Act

¹⁹³ **Antigua and Barbuda:** Section 43(3)(a) Proceeds of Crime Act; **Barbados:** Section 43(3)(a) Proceeds of Crime Act; **Dominica:** Section 42(3)(a) Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 24(3)(a) Proceeds of Crime Act; **Saint Lucia:** Section 42(3)(a) Proceeds of Crime Act

with the Production Order. However any documents produced can be used for intelligence purposes in relation to any criminal investigations and for the tracing of assets for any restraint or confiscation proceedings.

3.11.36 Importantly a person cannot refuse to produce a document/s on the basis that it might incriminate him or that the production would be in breach of an obligation not to disclose.¹⁹⁵ If there is a refusal the Prosecution Team should, applying the Code for Prosecutors, charge for an offence of failing to comply with the Production Order.¹⁹⁶ However consideration will have to be given as to whether charging will alert relevant persons of any covert investigation. An appropriate course of action would be for the matter to be referred back to the issuing Judge to consider an application for a search warrant (see below from paragraph 3.11.57).

3.11.37 Once the order has been made it should be promptly served on the person or company affected by it. If the person affected by the order notifies the suspect of the investigation that they are required to

¹⁹⁴ **Antigua and Barbuda:** Section 44 Proceeds of Crime Act; **Barbados:** Section 44 Proceeds of Crime Act; **Dominica** Section 43; **Saint Christopher and Nevis:** Section 25 Proceeds of Crime Act; **Saint Lucia:** Section 43 Proceeds of Crime Act

¹⁹⁵ **Antigua and Barbuda:** Section 44(3) Proceeds of Crime Act; **Barbados:** Section 44(3) Proceeds of Crime Act; **Dominica:** Section 43(3) Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 25(3) Proceeds of Crime Act; **Saint Lucia:** Section 43(3) Proceeds of Crime Act

¹⁹⁶ **Antigua and Barbuda:** Section 46 Proceeds of Crime Act; **Barbados:** Section 46 Proceeds of Crime Act; **Dominica:** Section 45 Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 27 Proceeds of Crime Act; **Saint Lucia:** Section 45 Proceeds of Crime Act

produce information then they would be guilty of an offence of “*Tipping off*.”¹⁹⁷

3.11.38 Production Orders in Grenada and Saint Vincent and the Grenadines (under the Proceeds of Crime and Money Laundering (Prevention) Act)

3.11.39 In Grenada a law enforcement officer¹⁹⁸ can apply for a Production Order ex parte to a Judge or Magistrate in Chambers.¹⁹⁹ In Saint Vincent and the Grenadines, the DPP, pursuant to the Proceeds of Crime and Money Laundering (Prevention) Act can apply for a Production Order, ex parte to a Judge in Chambers.²⁰⁰ In both jurisdictions the application will be made for the purpose of an investigation into:²⁰¹

- (a) Drug trafficking;²⁰²
- (b) A relevant offence;²⁰³
- (c) Whether any person has benefited from criminal conduct;²⁰⁴ or
- (d) The whereabouts of any proceeds of criminal conduct

3.11.40 A Magistrate or High Court Judge must be satisfied that there are:²⁰⁵

¹⁹⁷ See paragraph 4.5.11 below

¹⁹⁸ Defined in section 2 Proceeds of Crime Act as a customs officer, a police officer, director, deputy director and officers of the Financial Intelligence Unit, who may arrest without warrant, any person whom he reasonably believes has committed an offence under the Act

¹⁹⁹ **Grenada:** Section 53(6) Proceeds of Crime Act

²⁰⁰ **Saint Vincent and the Grenadines:** Section 35(6) Proceeds of Crime and Money Laundering (Prevention) Act

²⁰¹ **Grenada:** Section 53 Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 35 Proceeds of Crime and Money Laundering (Prevention) Act

²⁰² See sections 2(1) of respective Acts for definition of drug trafficking

²⁰³ For definition of “*Relevant Offence*” see section 2(1) of respective Acts in **Grenada** and **Saint Vincent and the Grenadines**

²⁰⁴ See Table 3 below for a definition of criminal conduct

- (a) Reasonable grounds for suspecting that a specific person is involved, in or may be related to, an act of money laundering, or has benefitted from any criminal conduct;
- (b) There are reasonable grounds for suspecting that the material to which the application relates:
 - Is likely to be of substantial value, (whether by itself or together with other material), to the investigation for the purposes of which the application is made; and
 - Does not consist of or include items subject to legal privilege; and
- (c) There are reasonable grounds for believing that it is in the public interest, having regard
 - To the benefit likely to accrue to the investigation if the material is obtained; and
 - To the circumstances under which the person in possession of the material holds it.

3.11.40a If the court is satisfied that the conditions are made out it may make the person in possession of the material produce it, to a law enforcement officer in Grenada, or a Police Officer in Saint Vincent and the Grenadines, to take away or allow, the law enforcement officer in Grenada, or the Police Officer in Saint Vincent and the Grenadines, access to it for a period the order will specify.²⁰⁶ This period will be for

²⁰⁵ **Grenada:** Section 53(2) and (4) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 35(2) and (4) Proceeds of Crime and Money Laundering (Prevention) Act

²⁰⁶ **Grenada:** Section 53(2) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 35(2) Proceeds of Crime and Money Laundering (Prevention) Act

seven days, unless the court decides a longer or shorter period will be appropriate according to the circumstances.²⁰⁷

3.11.41 Where the court orders a Production Order for material that is on premises, it may, on application by the law enforcement officer in Grenada or DPP in Saint Vincent and the Grenadines, require a person who can provide permission to enter the premises to allow, the law enforcement officer in Grenada and Police Officer in Saint Vincent and the Grenadines, into the premises.²⁰⁸

3.11.42 Where any material subject to the Production Order is on a computer, it must be produced in a form that is visible and legible.²⁰⁹

3.11.43 Of course material that is subject to legal privilege cannot be the subject of a Production Order.²¹⁰

3.11.44 There is no section that precludes the use of the material obtained by way of Production Order being used in criminal proceedings. Indeed the Act in Grenada confirms that the material may be retained until the legal proceedings are concluded.²¹¹

²⁰⁷ **Grenada:** Section 53(3) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 35(3) Proceeds of Crime and Money Laundering (Prevention) Act

²⁰⁸ **Grenada:** Section 53(5) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 35(5) Proceeds of Crime and Money Laundering (Prevention) Act

²⁰⁹ **Grenada:** Section 53(8) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 35(7) Proceeds of Crime and Money Laundering (Prevention) Act

²¹⁰ **Grenada:** Section 53(9)(a) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 35(8)(a) Proceeds of Crime and Money Laundering (Prevention) Act

²¹¹ **Grenada:** Section 53(1)(b) Proceeds of Crime Act

3.11.45 A person commits an offence in Grenada if they discloses that an application has been made for a Production Order (which hasn't been refused), or a search warrant has been issued, knowing or suspecting that an investigation is taking place.²¹² The Prosecution Team should, applying the Code for Prosecutors, charge an offence of disclosure and also in both Grenada and Saint Vincent and the Grenadines consider a "*tipping off*" offence²¹³ but will have to decide whether charging will alert any relevant persons of any continuing covert investigation.

3.11.46 If the person required to produce the material fails to do so without reasonable excuse, or provides false or misleading information the Prosecution Team should, applying the Code for Prosecutors, charge for an offence of failure to comply with the Production Order.²¹⁴ However consideration will have to be given as to whether charging will alert relevant persons of any covert investigation. An appropriate course of action would be for the matter to be referred back to the issuing Judge to consider an application for a search warrant (see below from paragraph 3.11.38).

²¹² **Grenada:** Section 53(11) Proceeds of Crime Act;

²¹³ See paragraph 4.5.11 below

²¹⁴ **Grenada:** Section 54 Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 36 Proceeds of Crime and Money Laundering (Prevention) Act

3.11.46a Productions Orders in Saint Vincent and the Grenadines under the Proceeds of Crime Act 2013

3.11.46b In Saint Vincent and the Grenadines the new Proceeds of Crime Act 2013 will allow a Law Enforcement Officer to apply for a production order²¹⁵ ex parte in Chambers²¹⁶. A Law Enforcement Officer is defined as either a Police Officer or a Customs Officer.

3.11.46c The new Act will require an application for a production order to state that the person specified is subject to either a criminal or civil recovery investigation or a money laundering investigation. Civil recovery is a new weapon in the armoury of the investigator and more detail is provided in Part 4 of the Guide. A “*criminal recovery investigation*” is defined in section 2(1) of the Act as, “...an investigation into whether a person has benefited from his criminal conduct or the extent or whereabouts of his benefit from criminal conduct.” This is very wide ranging as “*criminal conduct*” is defined as conduct which would constitute any offence if it occurred in Saint Vincent and the Grenadines.

3.11.46d The application must state why an order is required for the investigation²¹⁷, the required material and that the person specified appears to be in control or in possession of it²¹⁸. “*Appears*” to be in control or in possession, is very wide but will require something more

²¹⁵ **Saint Vincent and the Grenadines:** Section 133(1) Proceeds of Crime Act 2013

²¹⁶ Section 147(1) of the Proceeds of Crime Act only refers to an ex parte application in chambers to a judge and not a master

²¹⁷ **Saint Vincent and the Grenadines:** Section 133(1)(b)(i) Proceeds of Crime Act 2013

²¹⁸ **Saint Vincent and the Grenadines:** Section 133(1)(c) Proceeds of Crime Act 2013

than mere suspicion. It would be best practice to ensure that there is some direct evidence or at the very least a good inference that the material is in the possession or control of the person specified. There is no requirement that the evidence should be in admissible form, but any master or judge considering the application will require reasonable grounds to believe that the person specified is in possession or control.²¹⁹

3.11.46e As mentioned above, in a change to the Proceeds of Crime and Money Laundering (Prevention) Act a “master”²²⁰ as well as a judge can consider a production order application. When determining the application the master or judge must be satisfied that there are reasonable grounds for suspecting that:

- (a) In a criminal recovery investigation the person has benefited from their criminal conduct,²²¹
- (b) In a civil recovery investigation the property is recoverable²²² or associated property,²²³
- (c) In a money laundering investigation the person has committed a money laundering offence.²²⁴

²¹⁹ **Saint Vincent and the Grenadines:** Section 134(1)(b) Proceeds of Crime Act 2013

²²⁰ **Saint Vincent and the Grenadines:** Section 133(1) Proceeds of Crime Act 2013

²²¹ **Saint Vincent and the Grenadines:** Section 134(1)(a)(i) Proceeds of Crime Act 2013

²²² See definition of recoverable property between sections 65 and 73 Proceeds of Crime Act 2013

²²³ **Saint Vincent and the Grenadines:** Section 134(1)(a)(ii) Proceeds of Crime Act 2013 - See definition of associated property at section 72 Proceeds of Crime Act 2013

²²⁴ **Saint Vincent and the Grenadines:** Section 134(1)(a)(iii) Proceeds of Crime Act 2013

From the above it will probably be easier to show some benefit, rather than at this investigative stage that a person has actually committed a money laundering offence.

3.11.46f As well as reasonable grounds to believe that the specified person is in possession or control, there must also be reasonable grounds to believe that the material will be of substantive value to the investigation. This should be straightforward if the material has been identified and the order is sought for the purposes of the investigation.²²⁵

3.11.46g There must also be reasonable grounds for believing that it is in the public interest for the material to be produced having regard to:

- (a) The benefit likely to accrue to the investigation if the material is obtained,²²⁶ and
- (b) The circumstances under which the person in possession of the material holds it.²²⁷

3.11.46h Importantly a production order will not apply to legally privileged material.²²⁸ The tactic suggested at paragraph 3.11.73 below could be deployed if there is any suggestion that material could be legally privileged.

²²⁵ **Saint Vincent and the Grenadines:** Section 134(1)(b)(ii) Proceeds of Crime Act 2013

²²⁶ **Saint Vincent and the Grenadines:** Section 134(1)(c)(i) Proceeds of Crime Act 2013

²²⁷ **Saint Vincent and the Grenadines:** Section 134(1)(c)(ii) Proceeds of Crime Act 2013

²²⁸ **Saint Vincent and the Grenadines:** Section 134(4)(a) Proceeds of Crime Act 2013 – see section 132 for the definition of legally privileged material

3.11.46i However material in possession of any Government department can be made the subject of a production order.²²⁹ Therefore this maybe a last resort if material hasn't been produced by consent from Inland Revenue in relation to tax records as there no equivalent of section 38 of the Proceeds of Crime and Money Laundering (Prevention) Act requiring disclosure by Government Departments

3.11.46j If the master or judge is satisfied that the conditions in sections 133 and 134 are made out it may make the person in possession of the material produce it, to a law enforcement officer or access to it for a period the order will specify.²³⁰ This period will be for seven days, unless the judge²³¹ decides a longer or shorter period will be appropriate according to the circumstances.²³²

3.11.46k Where the judge²³³ orders a Production Order for material that is on premises, it may, on application by the law enforcement officer order permission to enter the premises to allow the law enforcement officer access to the material.²³⁴

²²⁹ **Saint Vincent and the Grenadines:** Section 134(4)(b) Proceeds of Crime Act 2013

²³⁰ **Saint Vincent and the Grenadines:** Section 134(2) Proceeds of Crime Act 2013

²³¹ Section 134(3) only refers to a judge but the intent must have been to include a master too in order to give purpose to this Part of the Act

²³² **Saint Vincent and the Grenadines:** Section 134(3) Proceeds of Crime Act 2013

²³³ Again only a judge is referred too and not a master

²³⁴ **Saint Vincent and the Grenadines:** Section 135 Proceeds of Crime Act 2013

3.11.46l Where any material subject to the Production Order is on a computer, it must be produced or access allowed in a form that is visible and legible.²³⁵

3.11.46m When the material is produced or access is obtained, it is permissible for a law enforcement officer to take copies or photograph it.²³⁶

3.11.46n There is no section that precludes the use of the material obtained by way of Production Order being used in criminal proceedings. Indeed the Act confirms that the material may be retained until the legal proceedings are concluded.²³⁷

3.11.46o A person commits an offence if they fail to comply with any requirement of a Production Order, without reasonable excuse.²³⁸ The Prosecution Team should, applying the Code for Prosecutors, charge such an offence or a “*tipping off*” offence²³⁹ but will have to decide whether charging will alert any relevant persons of any continuing covert investigation. An appropriate course of action would be for the matter to be referred back to the issuing master or judge to consider an application for a search warrant (see below from paragraph 3.11.38).

3.11.46p Significantly, unless the material is privileged, the Act specifically excludes the application of any confidentiality or restriction in

²³⁵ **Saint Vincent and the Grenadines:** Section 136(1)(a) and (b) Proceeds of Crime Act 2013

²³⁶ **Saint Vincent and the Grenadines:** Section 136(2) Proceeds of Crime Act 2013

²³⁷ **Saint Vincent and the Grenadines:** Section 136(4) Proceeds of Crime Act 2013

²³⁸ **Saint Vincent and the Grenadines:** Section 136(5) Proceeds of Crime Act 2013

²³⁹ **Saint Vincent and the Grenadines:** Section 129 Proceeds of Crime Act 2013

disclosure laws. Therefore banking secrecy or confidentiality will not bar the disclosure of information ordered by an account monitoring order.

3.11.47 Property Tracking Order

3.11.48 In Antigua and Barbuda and Dominica, in addition to the production order process under their Proceeds of Crimes Acts, their respective Money Laundering Prevention Acts²⁴⁰ allow the the Supervisory Authority²⁴¹, Law Enforcement Agency²⁴² or the Financial Intelligence Unit²⁴³ to apply to a Judge of the High Court for a Property Tracking Order. In Saint Christopher and Nevis the Financial Intelligence Unit can apply for a Property Tracking Order under the Proceeds of Crime Act.²⁴⁴ The Judge must be satisfied that there are reasonable grounds for believing that:

- (a) A person is committing; or
- (b) Has committed; or
- (c) Is about to commit a money laundering offence; or
- (d) For the purpose of determining whether any property belongs to, is in the possession or under the control of any person

²⁴⁰ **Antigua and Barbuda:** Section 15 Money Laundering Prevention Act 1996; **Dominica:** Section 25 Money Laundering Prevention Act

²⁴¹ In **Antigua and Barbuda** the ONDCP

²⁴² Only in **Antigua and Barbuda** i.e. the Police

²⁴³ In **Dominica** established under section 3 of the Financial Intelligence Unit Act 2011

²⁴⁴ **Saint Christopher and Nevis:** Section 29 Proceeds of Crime Act

3.11.49 The Judge may make an order that any document belonging to, or in the possession or under the control of that person relevant to:

- (a) Identifying, locating or quantifying any property; or
- (b) Identifying or locating any document necessary for the transfer of any property;

be delivered to the relevant Supervisory Authority, Law Enforcement Agency or Financial Intelligence Unit.

3.11.50 In addition in Antigua and Barbuda and Saint Christopher and Nevis, where ordered by the Judge, a Financial Institution should produce to the Supervisory Authority or law enforcement agency (Antigua and Barbuda) or Financial Intelligence Unit (Saint Christopher and Nevis) all information obtained by the institution about any business transaction conducted by or for that person with the institution during such period before or after the date of the Order as the Judge directs.²⁴⁵

3.11.51 In Dominica the Court may seal an application, where supported by evidence in an affidavit when necessary to prevent undermining the investigation or it is in the interests of national security to do so.²⁴⁶

3.11.52 Obtaining Information in Grenada

3.11.53 Under the Financial Intelligence Unit Act 2012 an authorized officer²⁴⁷ where:

²⁴⁵ **Antigua and Barbuda:** Section 15(ii) Money Laundering Prevention Act 1996; **Saint Christopher and Nevis:** Section 29(3)(b) Proceeds of Crime Act

²⁴⁶ **Dominica:** Section 25(2) Money Laundering Prevention Act 2011

- (a) He has reasonable grounds for suspecting that a person has possession; or
- (b) Control;
- (c) Of any information, book, record or document which is relevant to an investigation of a financial crime,²⁴⁸

may serve a notice in writing, requiring that person to provide him with information for the purposes of the investigation.²⁴⁹

3.11.54 The notice served may require the person to:

- (a) Produce to the authorized officer named in the notice, any information, book, record or document that is in the person's possession or control;
- (b) Make any such information, book, record or document that is in the person's possession or control available to the authorized officer for inspection; or
- (c) Answer questions either at once or, at such time and place as may be specified in the notice.²⁵⁰

3.11.55 Importantly any information obtained will not be admissible in any criminal proceedings save for those where the person refused to comply

²⁴⁷ This will include the Director, Deputy Director and any other officer in the FIU authorized by the Director – section 22(1)

²⁴⁸ “*Financial Crime*” is defined in section 2(1) as any offence involving money or other benefits and includes any offence involving fraud, dishonesty, money laundering pursuant to the provisions of the Proceeds of Crime Act or the financing of terrorism, pursuant to the provisions of the Terrorism Act

²⁴⁹ **Grenada:** Section 22(2) Financial Intelligence Unit Act

²⁵⁰ Consideration will have to be given as to whether an Attorney is also invited to be present

with the notice or provided false or misleading information.²⁵¹

3.11.56 Where a notice is not complied with consideration should be given to applying for a search warrant pursuant to section 23 of the Financial Intelligence Unit Act²⁵²

3.11.57 Search Warrants²⁵³ in Antigua and Barbuda, Barbados, Dominica, Saint Christopher and Nevis and Saint Lucia

3.11.58 The High Court can issue a warrant to allow Police Officers to enter premises²⁵⁴ to search and seize documents that are required as part of their investigation.

3.11.59 A High Court Judge will issue a search warrant where.²⁵⁵

- (a) The person is convicted of a scheduled offence²⁵⁶ and there are reasonable grounds to believe that there are in the premises documents as outlined in paragraph 3.11.29 above; or
- (b) There are reasonable grounds for suspecting that the person has committed a scheduled offence²⁵⁷ in the premises are documents as outlined in paragraph 3.11.29 above.

²⁵¹ **Grenada:** Section 22(6) Financial Intelligence Unit Act

²⁵² See paragraph 3.11.75 below

²⁵³ See Annex E from paragraph 40 on information required when making an application, conduct of the search and retention of material

²⁵⁴ Premises includes any place and in particular any building, receptacle or vehicle.

²⁵⁵ **Antigua and Barbuda:** Section 47(1) Proceeds of Crime Act; **Barbados:** Section 47(1) Proceeds of Crime Act; **Dominica:** Section 46(1) Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 28(1); **Saint Lucia:** Section 46(1) Proceeds of Crime Act

²⁵⁶ In **Saint Christopher and Nevis** Serious Offence

3.11.60 A Judge will only make an order if satisfied that:²⁵⁸

- (a) A Production Order has been given in respect of the document and has not been complied with;
- (b) A Production Order in respect of the document would be unlikely to be effective as there are reasonable grounds to suspect that a Production Order will not be complied with;
- (c) The document involved cannot be identified or described with sufficient particularity to enable a Production Order to be obtained;
- (d) It is not practicable to communicate with any person having the power to grant entry to the premises; or
- (e) Entry to the premises will not be granted unless a warrant is produced; or
- (f) The investigation for the purposes of which the application is made might be seriously prejudiced unless the Police Officer is granted immediate access to the document without notice of any person.

3.11.61 A Judge will only make issue a warrant if satisfied that:²⁵⁹

²⁵⁷ In **Saint Christopher and Nevis** Serious Offence

²⁵⁸ **Antigua and Barbuda**: Section 47(3) Proceeds of Crime Act; **Barbados**: Section 47(3) Proceeds of Crime Act; **Dominica**: Section 46(3) Proceeds of Crime Act; **Saint Christopher and Nevis**: Section 28(3) Proceeds of Crime Act; **Saint Lucia**: Section 46(3) Proceeds of Crime Act

- (a) The applicant [Police Officer] or if represented by the DPP [or Counsel] such information either orally or in the affidavit as required according to the relevant Acts; and
- (b) The Judge is satisfied that there are reasonable grounds for issuing the warrant.

3.11.62 If the warrant is issued it must state the following:²⁶⁰

- (a) The purpose for which it is issued, including a reference to the nature of the relevant scheduled offence²⁶¹;
- (b) Whether entry is authorised to be made at any time of the day or night or during specified hours;
- (c) A description of the kind of documents authorised to be seized;
- (d) A time at which the warrant ceases to be in force [no longer than 28 days].

3.11.63 The warrant will enable the Officer, with such assistance and by such force that is necessary and reasonable, to enter the premises to seize and retain:

²⁵⁹ **Antigua and Barbuda:** Section 47(4) Proceeds of Crime Act; **Barbados:** Section 47(4) Proceeds of Crime Act; **Dominica:** Section 46(4) Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 28(4) Proceeds of Crime Act; **Saint Lucia:** Section 46(4) Proceeds of Crime Act

²⁶⁰ **Antigua and Barbuda:** Section 47(5) Proceeds of Crime Act; **Barbados:** Section 47(5) Proceeds of Crime Act; **Dominica:** Section 46(5) Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 28(5) Proceeds of Crime Act; **Saint Lucia:** Section 46(5) Proceeds of Crime Act

²⁶¹ In **Saint Christopher and Nevis** Serious Offence

- (a) Any document, other than items subject to legal privilege, which is likely to be of substantial value to the investigation; and
- (b) Anything that the Police Officer believes, on reasonable grounds, will afford evidence as to the commission of a criminal offence.

3.11.64 It is important that any legally privileged material is not seized and retained. If there are any concerns that material is legally privileged, this should be set out at any application before the Judge. An approach maybe to apply to seize the items and mark them so they are distinct from any other material seized. The material can then be reviewed by an independent Attorney (reporting to the Judge) to assess whether they can be retained as part of the investigation.

3.11.65 Legally privileged material will include:²⁶²

- (a) Communications between an attorney-at-law and his or her client; and
- (b) Communications made in connection with or in contemplation of legal proceedings and for the purposes of these proceedings,

3.11.66 It is important to note that any document can be seized as a result of the search (not described in the warrant or application) if in the opinion of the Police Officer it is likely to be of substantial value (whether by itself or together with other documents) to the investigation in respect of which the application is made.

²⁶² **Antigua and Barbuda:** Section 47(7) Proceeds of Crime Act; **Barbados:** Section 47(7) Proceeds of Crime Act; **Dominica:** Section 46(7) Proceeds of Crime Act; **Saint Lucia:** Section 46(7) Proceeds of Crime Act

3.11.67 In Antigua and Barbuda and Dominica in addition to the warrant process under their Proceeds of Crimes Acts, their respective Money Laundering Prevention Acts²⁶³ allow the the Supervisory Authority²⁶⁴ or the Financial Intelligence Unit²⁶⁵ to apply to a Judge for a warrant upon satisfying him/her that there are reasonable grounds to believe that a Financial institution²⁶⁶ has:

- (a) Failed to keep business transaction reports as required by the Act; or
- (b) Provide business transaction reports as required by the Act; or
- (c) An employee has or is about to commit a money laundering offence;
- (d) In addition in Dominica a Financial Institution has failed without reasonable excuse to comply with any instruction or written warning issued under the Act.

3.11.68 In Barbados²⁶⁷, in addition to the Proceeds of Crime Act a warrant can be issued by a Magistrate to a Police Officer where there are reasonable grounds to believe that:

²⁶³ **Antigua and Barbuda:** Section 14 Money Laundering Prevention Act 1996; **Dominica:** Section 24 Money Laundering Prevention Act

²⁶⁴ In **Antigua and Barbuda** the ONDCP

²⁶⁵ In **Dominica** established under section 3 of the Financial Intelligence Unit Act 2011

²⁶⁶ Any person whose regular occupation or business is the carrying on of any activity listed in schedules in the respective Acts

²⁶⁷ **Barbados:** Section 11 Money Laundering and Financing of Terrorism Act

- (a) A Financial Institution has failed to keep a business transaction record as required by paragraph (a) of section 8(1) (storing of business transactions over five years valuing more than \$10,000 and evidence of identity);
- (b) A Financial Institution has failed to comply with paragraph (b) of section 8(1) (suspicious activity report);
- (c) An officer or employee of a Financial Institution is committing, has committed or is about to commit a money laundering offence.

3.11.69 Search Warrant in Grenada and Saint Vincent and the Grenadines (under the Proceeds of Crime and Money Laundering (Prevention) Act

3.11.70 In Grenada a law enforcement officer²⁶⁸ and a Police Officer in Saint Vincent and the Grenadines can apply for a search warrant to a court,²⁶⁹ for the purpose of an investigation into.²⁷⁰

- (a) Drug trafficking;²⁷¹
- (b) A relevant offence;²⁷²

²⁶⁸ The Proceeds of Crime Act has a typographical error and actually states “enforcement officer” in section 55, but this clearly should have been a law enforcement officer defined in section 2 as a customs officer, a police officer, director, deputy director and officers of the Financial Intelligence Unit, who may arrest without warrant, any person whom he reasonably believes has committed an offence under the Act

²⁶⁹ In **Grenada** the Proceeds of Crime Act refers to “court” which is defined in section 2 as the High Court or Magistrates Court in **Saint Vincent and the Grenadines** “court” is defined as the High Court. There is no reference to obtaining a search warrant ex parte or in Chambers, but best practice would be to do so, thereby not alerting and relevant persons to the application and potentially losing material/evidence.

²⁷⁰ **Grenada**: Section 53 Proceeds of Crime Act

²⁷¹ See sections 2(1) of respective Act for definition of drug trafficking

- (c) Whether any person has benefitted from criminal conduct;²⁷³ or
- (d) The whereabouts of any proceeds of criminal conduct

3.11.71 The court must be satisfied that:²⁷⁴

- (a) A Production Order has not been complied with;
- (b) There are reasonable grounds for suspecting that a specified person has carried on drug trafficking, a relevant offence or has benefitted from criminal conduct;
- (c) There are reasonable grounds for suspecting that the material to which the application relates:
 - Is likely to be of substantial value, (whether by itself or together with other material), to the investigation for the purposes of which the application is made; and
 - Does not consist of or include items subject to legal privilege; and
- (d) There are reasonable grounds for believing that it is in the public interest, having regard:
 - To the benefit likely to accrue to the investigation if the material is obtained; and
- (e) It would not be appropriate to make a Production Order under in relation to the material because:
 - It is not practicable to communicate with any person

²⁷² For definition of “*Relevant Offence*” see section 2(1) of respective Acts in **Grenada** and **Saint Vincent and the Grenadines**

²⁷³ See Table 3 below for a definition of criminal conduct

²⁷⁴ **Grenada**: Section 56(2) Proceeds of Crime Act; **Saint Vincent and the Grenadines**: Section 37(2) Proceeds of Crime and Money Laundering (Prevention) Act

- entitled to produce the material;
- It is not practicable to communicate with any person entitled to grant access to the material, or entitled to grant entry to the premises on which the material is situated; or
- The investigation for the purposes of which the application is made, might be seriously prejudiced, unless a law enforcement officer²⁷⁵ in Grenada or a Police Officer in Saint Vincent and the Grenadines could secure immediate access to the material.

OR

- (f) That there are reasonable grounds for suspecting that a specified person has committed a drug trafficking offence, or a relevant offence or has benefitted from a criminal conduct; and
- (g) That there are reasonable grounds for suspecting that there is, on the premises, any such material relating:
 - To the specified person;
 - To drug trafficking;
 - To a relevant offence;
 - To the question whether that person has benefitted from criminal conduct; or
 - To any question as to the extent or whereabouts of any proceeds of criminal conduct; and
- (h) Is likely to be of substantial value, (whether by itself or together with other material) to the investigation for the purposes of

²⁷⁵ The Proceeds of Crime Act in Grenada has a typographical error and refers to “*enforcement officer*” and should mean law enforcement officer

which the application is made, but that the material cannot at the time of the application be particularised; and

- (i) That:
- It is not practicable to communicate with any person entitled to grant entry to the premises;
 - Entry to the premises will not be granted unless a warrant is produced; or
 - The investigation for the purposes of which the application is made, might be seriously prejudiced, unless a law enforcement officer²⁷⁶ in Grenada or a Police Officer in Saint Vincent and the Grenadines arriving at the premises could secure immediate entry to them.

3.11.72 When a law enforcement officer in Grenada, or Police Officer in Saint Vincent and the Grenadines, executes the warrant he may seize and retain any material, other than items subject to legal privilege, which is likely to be of substantial value to the investigation.²⁷⁷

3.11.73 It is important that any legally privileged material is not seized and retained. If there are any concerns that material is legally privileged, this should be set out at any application before the Judge in Saint Vincent and the Grenadines or Judge or Magistrate in Grenada.

An approach maybe to apply to seize the items and mark them so they

²⁷⁶ The Proceeds of Crime Act in **Grenada** has a typographical error and refers to “*enforcement officer*” and should mean law enforcement officer

²⁷⁷ **Grenada**: Section 56(5) Proceeds of Crime Act; **Saint Vincent and the Grenadines**: Section 37(5) Proceeds of Crime and Money Laundering (Prevention) Act

are distinct from any other material seized. The material can then be reviewed by an independent Attorney (reporting to the Magistrate or Judge) to assess whether they can be retained as part of the investigation.

3.11.74 When any material is seized, photographs or copies may be made and the material in Grenada retained as long as necessary for the purpose of the investigation or until legal proceedings have been concluded.²⁷⁸ No reference is made in the Act in Saint Vincent and the Grenadines as to how long the material seized may be retained.

3.11.74a Search Warrant in Saint Vincent and the Grenadines the Proceeds of Crime Act 2013

3.11.74b Pursuant to the new Proceeds of Crime Act 2013 a law enforcement officer²⁷⁹ can apply for a search warrant to a judge or master if:

- (a) A production order has not been complied with and there are reasonable grounds for believing the material is on the premises;²⁸⁰ or
- (b) The master or judge is satisfied that there are reasonable grounds for suspecting that:
 - In a criminal recovery investigation the person has benefited from their criminal conduct,²⁸¹

²⁷⁸ **Grenada:** Section 56(6) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 37(6) Proceeds of Crime and Money Laundering (Prevention) Act

²⁷⁹ Definition at section 2(1) includes a Police Officer and Customs Officer

²⁸⁰ **Saint Vincent and the Grenadines:** Section 138(1)(a) Proceeds of Crime Act 2013

- In a civil recovery investigation the property is recoverable²⁸² or associated property;²⁸³
- In a money laundering investigation the person has committed a money laundering offence.²⁸⁴ From the above it will probably be easier to show some benefit from criminal conduct, rather than at this investigative stage a person has actually committed a money laundering offence.

3.11.74c If section 138(2) applies (paragraph 3.11.74b(b) above) there must also be reasonable grounds to believe that:

- (a) The material will be of substantive value to the investigation. This should be straightforward if the material has been identified and the warrant is sought for the purposes of the investigation;²⁸⁵ and
- (b) It is in the public interest for the material to be produced having regard to the benefit likely to accrue to the investigation if the material is obtained;²⁸⁶ and

²⁸¹ **Saint Vincent and the Grenadines:** Section 138(2)(a)(i) Proceeds of Crime Act 2013

²⁸² **Saint Vincent and the Grenadines:** Section 138(2)(a)(ii) Proceeds of Crime Act 2013 - See definition of recoverable property between sections 65 and 73 Proceeds of Crime Act 2013

²⁸³ **Saint Vincent and the Grenadines:** Section 138(2)(a)(ii) Proceeds of Crime Act 2013 - See definition of associated property at section 72 Proceeds of Crime Act 2013

²⁸⁴ **Saint Vincent and the Grenadines:** Section 138(2)(a)(iii) Proceeds of Crime Act 2013

²⁸⁵ **Saint Vincent and the Grenadines:** Section 138(3)(a)(i) Proceeds of Crime Act 2013

²⁸⁶ **Saint Vincent and the Grenadines:** Section 138(3)(a)(ii) Proceeds of Crime Act 2013

3.11.74d There are two possible ways to apply for a warrant. The judge or master must determine that it would not be appropriate to make a Production Order as:

- (a) It is not practicable to communicate with any person against who the order could be made;²⁸⁷
- (b) It is not practicable to communicate with any person who would be required to comply with an order to grant entry to the premises;²⁸⁸ or
- (c) The investigation for the purposes might be seriously prejudiced, unless a law enforcement officer is able to secure immediate access to the material.²⁸⁹

OR

- (d) That there are reasonable grounds for believing that there is material, that cannot be identified, on the premises specified in the warrant that:
 - Relates to whether the specified person has benefited from his criminal conduct or the extent or whereabouts of the benefit;²⁹⁰ or
 - Relates to whether the specified property is recoverable or associated property, or who holds such property, or whether other property is held that is recoverable or

²⁸⁷ **Saint Vincent and the Grenadines:** Section 138(3)(b)(i) Proceeds of Crime Act 2013

²⁸⁸ **Saint Vincent and the Grenadines:** Section 138(3)(b)(ii) Proceeds of Crime Act 2013

²⁸⁹ **Saint Vincent and the Grenadines:** Section 138(3)(b)(iii) Proceeds of Crime Act 2013

²⁹⁰ **Saint Vincent and the Grenadines:** Section 138(5)(a) Proceeds of Crime Act 2013

associated property, or the extent or whereabouts of such property;²⁹¹ or

- Relates to whether the specified person has committed a money laundering offence;²⁹² and

(e) Is likely to be of substantial value, (whether by itself or together with other material) to the investigation for the purposes of which the warrant is made.²⁹³

3.11.74e When a law enforcement officer in executes the warrant he may seize and retain any material, other than items subject to legal privilege,²⁹⁴ which is likely to be of substantial value to the investigation.²⁹⁵

3.11.74f It is important that any legally privileged material is not seized and retained. If there are any concerns that material is legally privileged, this should be set out at any application before the judge or master in An approach maybe to apply to seize the items and mark them so they are distinct from any other material seized. The material can then be reviewed by an independent Attorney (reporting to the judge or master) to assess whether they can be retained as part of the investigation.

3.11.74g No reference is made to whether any material seized can be photographed or copies made, or how long the material maybe

²⁹¹ **Saint Vincent and the Grenadines:** Section 138(6)(a) Proceeds of Crime Act 2013

²⁹² **Saint Vincent and the Grenadines:** Section 138(7)(a) Proceeds of Crime Act 2013

²⁹³ **Saint Vincent and the Grenadines:** Section 138(5)(b) or 138(6)(b) or 138(7)(b) Proceeds of Crime Act 2013

²⁹⁴ As defined in section 132 Proceeds of Crime Act 2013

²⁹⁵ **Saint Vincent and the Grenadines:** Section 138(8) Proceeds of Crime Act 2013

retained. However good practice would be to photograph where material is seized from or take a video of the execution of the warrant.

3.11.74h It is an offence to hinder or obstruct a law enforcement officer when executing a warrant.²⁹⁶ When considering charge and applying the Code for Prosecutors and depending on the facts consideration may also be given to a charge of perverting the course of justice if items are destroyed or disposed of preventing material being seized.

3.11.74i As for a Production Order, unless the material is privileged, the Act specifically excludes the application of any confidentiality or restriction in disclosure laws. Therefore banking secrecy or confidentiality will not bar the disclosure of information ordered by an account monitoring order.

3.11.75 Search Warrant in Grenada by the Financial Intelligence Unit

3.11.76 A search warrant will be granted by a Magistrate or Judge,²⁹⁷ in Chambers where satisfied that:²⁹⁸

- (a) A notice²⁹⁹ hasn't been complied with; or
- (b) There are reasonable grounds for suspecting that such a notice will not be complied with; or
- (c) it is not practicable to communicate with any person having the power to grant entry to the premises³⁰⁰; or

²⁹⁶ **Saint Vincent and the Grenadines:** Section 138(9) Proceeds of Crime Act 2013

²⁹⁷ **Grenada:** Section 23(4) Financial Intelligence Unit Act – the application will either be by affidavit or orally

²⁹⁸ **Grenada:** Section 23(3) Financial Intelligence Unit Act

²⁹⁹ See paragraph 3.11.52 above

- (d) Entry to the premises will not be granted unless a warrant is produced; or
- (e) The relevant investigation might be seriously prejudiced unless the authorized officer³⁰¹ is granted immediate access to the book, record or other document without notice to any person.

3.11.77 A search warrant issued will state:³⁰²

- (a) The purpose it is issued, including a reference to the financial crime that has been, or is likely to be committed;
- (b) Whether entry is authorized to be made at any time of the day or night or during specified hours of the day or night;
- (c) A description of the kind of book, record or other document authorized to be seized; and
- (d) The date, not being later than twenty-eight days after the day of issue of the warrant upon which the warrant ceases to have effect.

3.11.78 An authorized officer conducting the search can seize and retain:³⁰³

- (a) Any book, record or other document which is likely to be of substantial value to the investigation; and

³⁰⁰ "Premises" are defined as any place, and in particular any building, receptacle or vehicle – section 23(10) Financial Intelligence Unit Act

³⁰¹ This will include the Director, Deputy Director and any other officer in the FIU authorized by the Director – section 22(1)

³⁰² **Grenada:** Section 23(5) Financial Intelligence Unit Act

³⁰³ **Grenada:** Section 23(6) Financial Intelligence Unit Act

- (b) Any book, record or other document that the authorized officer believes, on reasonable grounds, will afford evidence as to the commission of a financial crime.

3.11.79 An authorized officer shall not seize:³⁰⁴

- (a) Any accounting records used in the ordinary business of a Financial Institution,³⁰⁵ including ledgers, day books, cash books and accounts books; or
- (b) Any document which is subject to legal professional privilege.

3.11.80 There is nothing that precludes the material seized being used in evidence. The Act stipulates that the material seized may be retained for the purposes of any legal proceedings.³⁰⁶

3.11.81 Monitoring Orders³⁰⁷ in Antigua and Barbuda, Barbados, Dominica, Saint Christopher and Nevis and Saint Lucia

3.11.82 This order requires a financial institution to give information to a Police Officer over a period of up to 3 months.³⁰⁸ This could include financial activities such as account transactions, money transfer services and currency exchange. Further there is nothing within the

³⁰⁴ **Grenada:** Section 23(7) Financial Intelligence Unit Act

³⁰⁵ "*Financial Institution*" has the same meaning as prescribed in the **Grenada** Proceeds of Crime Act section 2(1)

³⁰⁶ **Grenada:** Section 23(9) Financial Intelligence Unit Act

³⁰⁷ See Annex E from paragraph 8 for further information required when making an application

³⁰⁸ **Antigua and Barbuda:** Section 48(1) Proceeds of Crime Act; **Barbados:** Section 48(1) Proceeds of Crime Act; **Dominica:** Section 47(1) Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 30(4) Proceeds of Crime Act; **Saint Lucia:** Section 47(1) Proceeds of Crime Act

relevant Acts that prevents the evidence gathered being used as part of the prosecution case.

3.11.83 The application should be made ex parte and in writing to a High Court Judge or Magistrate in Chambers, supported by an affidavit.³⁰⁹

3.11.84 The Judge or the Magistrate must be satisfied that that there are reasonable grounds for suspecting that the person:³¹⁰

- (a) Has committed or was involved in the commission, or is about to commit or be involved in the commission of, a scheduled offence³¹¹; or
- (b) Has benefited directly or indirectly, or is about to benefit directly or indirectly from the commission of a scheduled offence.

3.11.85 The order should specify the following:³¹²

- (a) The name or names in which the account is believed to be held;
- (b) The class of information that the financial institution is required to give; and

³⁰⁹ **Antigua and Barbuda:** Section 48(2) Proceeds of Crime Act **Barbados:** Section 48(2) Proceeds of Crime Act; **Dominica:** Section 47(2) Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 30(2) Proceeds of Crime Act; **Saint Lucia:** Section 47(2) Proceeds of Crime Act

³¹⁰ **Antigua and Barbuda:** Section 48(5) Proceeds of Crime Act; **Barbados:** Section 48(5) Proceeds of Crime Act; **Dominica:** Section 47(5) Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 30(5) Proceeds of Crime Act; **Saint Lucia:** Section 47(5) Proceeds of Crime Act

³¹¹ In **Saint Christopher and Nevis** Serious Offence

³¹² **Antigua and Barbuda:** Section 48(6) Proceeds of Crime Act; **Barbados:** Section 48(6) Proceeds of Crime Act; **Dominica:** Section 47(6) Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 30(6) Proceeds of Crime Act; **Saint Lucia:** Section 47(6) Proceeds of Crime Act

- (c) The names of the Police Officers to whom the information is to be given and the manner in which the information is to be given

3.11.86 It is an offence for the Financial Institution to ignore the order or to provide false or misleading information.³¹³ It is also an offence to disclose the existence of the order.³¹⁴ If the order is ignored or false or misleading information provided, the Prosecution Team should, applying the Code for Prosecutors, charge for the relevant offence. However consideration will have to be given as to whether charging will alert relevant persons of any covert investigation.

3.11.87 Application by Financial Intelligence Unit in Dominica for a Monitoring Order

3.11.88 In Dominica, in addition to the Proceeds of Crime Act, the Financial Intelligence Unit may on an application without notice to a Judge in the High Court, apply for a monitoring order.³¹⁵

3.11.89 The Judge must be satisfied that there are reasonable grounds to believe that a person is committing, has committed or is about to commit a money laundering offence for the purpose of determining

³¹³ **Antigua and Barbuda:** Section 48(8) Proceeds of Crime Act; **Barbados:** Section 48(8) Proceeds of Crime Act; **Dominica:** Section 47(8) Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 30(8) Proceeds of Crime Act; **Saint Lucia:** Section 47(8) Proceeds of Crime Act

³¹⁴ **Antigua and Barbuda:** Section 49 Proceeds of Crime Act; **Barbados:** Section 49 Proceeds of Crime Act; **Dominica:** Section 48 Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 31 Proceeds of Crime Act; **Saint Lucia:** Section 48 Proceeds of Crime Act

³¹⁵ **Dominica:** Section 26 Money Laundering Prevention Act 2011

whether any property belongs to, is in the possession or under the control of that person or any other person on behalf of that person.³¹⁶

3.11.90 The Court may then make an Order that a Financial Institution or person carrying on a scheduled business immediately produce to the Unit:

- (a) All information obtained by the Institution or person carrying on a scheduled business;
- (b) About any business transaction as provided by section 19 of the Act;
- (c) Conducted by or for that person with the Institution or person carrying on a scheduled business;
- (d) During the period or after the date of the Order as the Judge directs.³¹⁷

3.11.91 A Monitoring Order may require the Financial Institution or person carrying on the scheduled business to provide the Unit with a statement or explanation of the information produced.³¹⁸

3.11.92 The Court may seal an application made under this section where it is supported on affidavit evidence that it is necessary to prevent the

³¹⁶ **Dominica:** Section 26(1)(a) and (b) Money Laundering Prevention Act 2011

³¹⁷ **Dominica:** Section 26(1) Money Laundering Prevention Act 2011

³¹⁸ **Dominica:** Section 26(2) Money Laundering Prevention Act 2011

undermining of the investigation or it is in the interest of national security to do so.³¹⁹

3.11.93 Monitoring Orders in Grenada and Saint Vincent and the Grenadines (under the Proceeds of Crime and Money Laundering (Prevention) Act)

3.11.94 A law enforcement officer³²⁰ in Grenada and the DPP in Saint Vincent and the Grenadines can apply ex parte to a Judge in Chambers,³²¹ supported by affidavit, for a Monitoring Order directing a Financial Institution³²² to provide transactions³²³ conducted through an account held by a particular person.³²⁴

³¹⁹ **Dominica:** Section 26(3) Money Laundering Prevention Act 2011

³²⁰ The Proceeds of Crime Act has a typographical error and actually states “enforcement officer” in section 55, but this clearly should have been a law enforcement officer defined in section 2 as a customs officer, a police officer, director, deputy director and officers of the Financial Intelligence Unit, who may arrest without warrant, any person whom he reasonably believes has committed an offence under the Act

³²¹ **Grenada:** Section 55(2) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 39(2) Proceeds of Crime and Money Laundering (Prevention) Act

³²² Financial Institution is defined in section 2 of the Proceeds of Crime Act in Grenada as a public or private institution that collects funds from the public or other institutions, and invests the funds in financial assets, or engages in risk transfers, and includes: (a) a bank licensed under the Banking Act 2005; (b) an institution regulated under the Grenada Authority for the Regulation of Financial Institutions Act 2008; (c) a person licensed under the Securities Act 2001;

³²³ **Grenada:** Section 55(7); **Saint Vincent and the Grenadines:** Section 39(7) Proceeds of Crime and Money Laundering (Prevention) Act - Transactions will include: (a) the making of a fixed term deposit; (b) the transfer of an amount so deposited, or any part of it, at the end of the term; and (c) the existence or use of a deposit box held by the institution.

³²⁴ **Grenada:** Section 55 Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 39 Proceeds of Crime and Money Laundering (Prevention) Act

3.11.95 A Monitoring Order shall not be made, unless the court is satisfied that there are reasonable grounds for suspecting that the person in respect of whom the information is sought:³²⁵

- (a) Has committed, or is about to commit, a drug trafficking offence³²⁶ or a relevant offence;³²⁷
- (b) Was involved in the commission, or is about to be involved in the commission, of such an offence; or
- (c) Has benefitted directly or indirectly, or is about to benefit directly or indirectly, from the commission of such an offence.

3.11.96 When granted, the Monitoring Order will specify:³²⁸

- (a) The name or names in which the account is believed to be held;
- (b) The nature of the information which the institution is required to give; and
- (c) The manner in which the information is to be given.

3.11.97 It is an offence for the Financial Institution to knowingly contravene the order or to provide false or misleading information.³²⁹ The

³²⁵ **Grenada:** Section 55(4) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 39(4) Proceeds of Crime and Money Laundering (Prevention) Act

³²⁶ See sections 2(1) of respective Acts for definition of drug trafficking

³²⁷ For definition of “*Relevant Offence*” see section 2(1) of respective Acts in **Grenada** and **Saint Vincent and the Grenadines**

³²⁸ **Grenada:** Section 55(5) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 39(5) Proceeds of Crime and Money Laundering (Prevention) Act

³²⁹ **Grenada:** Section 55(6) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 39(6) Proceeds of Crime and Money Laundering (Prevention) Act

Prosecution Team should charge, applying the Code for Prosecutors, however consideration will have to be given whether doing so will alert relevant persons of any covert investigation.

3.11.98 The Act doesn't preclude the use of the information from a Monitoring Order being used in evidence.

3.11.98a Account Monitoring Order in Saint Vincent and the Grenadines
(under the Proceeds of Crime Act 2013)

3.11.98b An application by a law enforcement officer³³⁰ for an account monitoring order ex parte in Chambers³³¹ should state:

- (a) That the specified person is:³³²
 - Subject to a criminal recovery investigation³³³; or
 - A money laundering investigation; or
 - That property in the application is a subject to a civil recovery investigation and the specified person appears to hold the property
- (b) The order is sought for the purposes of the investigation;³³⁴ and
- (c) The order is sought against the "*regulated person*"³³⁵ in relation to account information detailed in the application.

³³⁰ Section 2(1) of the Proceeds of Crime Act 2013 defines as a Police Officer or Customs Officer

³³¹ Section 147(1) of the Proceeds of Crime Act only refers to an ex parte application in chambers to a judge and not a master

³³² **Saint Vincent and the Grenadines:** Section 144(2)(a) Proceeds of Crime Act 2013

³³³ See paragraph 3.11.46c for a definition of criminal recovery investigation

³³⁴ **Saint Vincent and the Grenadines:** Section 144(2)(b) Proceeds of Crime Act 2013

3.11.98c The master or judge must be satisfied that there are reasonable grounds for suspecting that:

- (a) In a criminal recovery investigation the person has benefited from their criminal conduct. It should be noted this section refers to a “*confiscation investigation*”, when this should probably state a “*criminal recovery investigation*.” This mistake would suggest that in the absence of clarity an account monitoring order can only be applied for if confiscation will be applied for as part of the criminal proceedings;³³⁶ or
- (b) In a civil recovery investigation the property is recoverable³³⁷ or associated property³³⁸ and the person specified holds some or all of the property;³³⁹ or
- (c) In a money laundering investigation the person has committed a money laundering offence.³⁴⁰ From the above it will probably be easier to show some benefit from criminal conduct, rather than at this investigative stage a person has actually committed a money laundering offence.

³³⁵ Defined in section 2(1) of the Proceeds of Crime Act 2013 as a person who holds a licence specified in the Anti-money Laundering and Terrorist Financing Regulations

³³⁶ **Saint Vincent and the Grenadines:** Section 145(1)(a) Proceeds of Crime Act 2013

³³⁷ **Saint Vincent and the Grenadines:** Section 145(1)(b)(i) Proceeds of Crime Act 2013 - See definition of recoverable property between sections 65 and 73 Proceeds of Crime Act 2013

³³⁸ **Saint Vincent and the Grenadines:** Section 145(1)(b)(i) Proceeds of Crime Act 2013 - See definition of associated property at section 72 Proceeds of Crime Act 2013

³³⁹ **Saint Vincent and the Grenadines:** Section 145(1)(b)(ii) Proceeds of Crime Act 2013

³⁴⁰ **Saint Vincent and the Grenadines:** Section 145(1)(c) Proceeds of Crime Act 2013

3.11.98d If section 145(1) applies (paragraph 3.11.98c above) the judge³⁴¹ must be satisfied there are reasonable grounds to believe that:

- (a) The information will be of substantive value to the investigation. This should be straightforward if the material has been identified and the order is sought for the purposes of the investigation;³⁴² and
- (b) It is in the public interest for the information to be provided having regard to the benefit likely to accrue to the investigation if the information is obtained.³⁴³

3.11.98e The order will not exceed 90 days and will specify when and in what manner the information will be provided to a law enforcement officer. Therefore it would be best practice in an application to specify at what intervals the information will be required.³⁴⁴

3.11.98f As for a Production Order or a search warrant unless the material is privileged, the Act specifically excludes the application of any confidentiality or restriction in disclosure laws. Therefore banking secrecy or confidentiality will not bar the disclosure of information ordered by an account monitoring order.

3.11.98g If a regulated person fails to provide the information in the order, without reasonable excuse, they commit an offence. If the evidential

³⁴¹ Please be aware in section 145(2) Proceeds of Crime Act 2013 there is no reference to “*master*” so an application should be made to a judge

³⁴² **Saint Vincent and the Grenadines:** Section 145(2)(a) Proceeds of Crime Act 2013

³⁴³ **Saint Vincent and the Grenadines:** Section 145(2)(b) Proceeds of Crime Act 2013

³⁴⁴ **Saint Vincent and the Grenadines:** Section 145(4) Proceeds of Crime Act 2013

stage of the Code is satisfied it should always be in the public interest to charge this offence.³⁴⁵

3.11.98h Any statement made by a regulated person in response to an account monitoring order will not be admissible in evidence **against it**³⁴⁶ **unless:**

- (a) For an offence of contempt;³⁴⁷ or
- (b) For restraint or confiscation proceedings;³⁴⁸ or
- (c) If a question is asked or evidence adduced in relation to a previous inconsistent statement in any proceedings against the regulated person³⁴⁹

3.11.98i Therefore there is nothing in the Act that precludes the information obtained being used in any criminal or civil recovery proceedings, against any person other than a regulated person.

3.11.99 Monitoring Orders in Grenada by the Financial Intelligence Unit

3.11.100 A Monitoring Order pursuant to the Financial Intelligence Unit Act requires a Financial Institution, for the period³⁵⁰ stated in the order, to provide account information of to an authorized officer. This could

³⁴⁵ **Saint Vincent and the Grenadines:** Section 145(6) Proceeds of Crime Act 2013

³⁴⁶ **Saint Vincent and the Grenadines:** Section 146(1) Proceeds of Crime Act 2013

³⁴⁷ **Saint Vincent and the Grenadines:** Section 145(2)(b) Proceeds of Crime Act 2013

³⁴⁸ **Saint Vincent and the Grenadines:** Section 145(2)(a) Proceeds of Crime Act 2013

³⁴⁹ **Saint Vincent and the Grenadines:** Section 145(2)(c) Proceeds of Crime Act 2013

³⁵⁰ The period will be for ninety days but can be further extended upon application by an authorized officer by a Judge if satisfied the circumstances so warrant – section 26(6) Financial Intelligence Unit Act

include information on accounts held, or financial transactions or other financial dealings conducted within a specified period.³⁵¹

3.11.101 An application for a Monitoring Order to a Judge in Chambers by an authorized officer³⁵² shall state.³⁵³

- (a) The purposes of the financial crime³⁵⁴ investigation into the specified person; and
- (b) The relevant account information.³⁵⁵

3.11.102 The requirements for making a Monitoring Order pursuant to the Financial Intelligence Unit Act are:³⁵⁶

- (a) There are reasonable grounds for suspecting that the person specified in the application for the order:
 - Has committed or is about to commit a financial crime; or
 - Was involved in the commission, or is about to be involved in the commission of, such an offence; and
 - Has benefited directly or indirectly, or is about to benefit directly or indirectly, from the commission of that offence;
- (b) The account information which may be provided in compliance with

³⁵¹ **Grenada:** Section 26(5) Financial Intelligence Unit Act

³⁵² **Grenada:** Section 26(1) Financial Intelligence Unit Act

³⁵³ **Grenada:** Section 26(3) Financial Intelligence Unit Act

³⁵⁴ *Financial Crime* is defined in section 2(1) as any offence involving money or other benefits and includes any offence involving fraud, dishonesty, money laundering pursuant to the provisions of the Proceeds of Crime Act or the financing of terrorism, pursuant to the provisions of the Terrorism Act;

³⁵⁵ *Account Information* includes information relating to an account held at, or a financial transaction or other financial dealing conducted with, the financial institution specified in the application, by the person specified in the order, whether solely or jointly with another – section 26(4) Financial Intelligence Unit Act

³⁵⁶ **Grenada:** Section 26(2) Financial Intelligence Unit Act

the order is likely to be of substantial value, whether or not by itself, to the investigation for the purposes of which the order is sought; and

- (c) It is in the public interest for the account information to be provided, having regard to the benefit likely to accrue to the investigation if the information is obtained.

3.11.103 It is an offence for the Financial Institution to knowingly contravene the order or to provide false or misleading information.³⁵⁷ The Prosecution Team should charge, applying the Code for Prosecutors, however consideration will have to be given whether doing so will alert relevant persons of any covert investigation.

3.11.104 Nothing in the Act prevents the information obtained being used in evidence in criminal proceedings.

3.11.105 Disclosure of Income Tax Information³⁵⁸ Antigua and Barbuda, Barbados, Dominica, Saint Christopher and Nevis and Saint Lucia

3.11.106 The High Court can issue an order for disclosure of income tax information³⁵⁹ from the Comptroller³⁶⁰ of the Inland Revenue that are required as part of an investigation into a scheduled offence.³⁶¹ Further there is nothing within the relevant Acts that prevents the evidence

³⁵⁷ **Grenada:** Section 26(7) Financial Intelligence Unit Act

³⁵⁸ See Annex E from paragraph 8 for further information required when making an application

³⁵⁹ **Antigua and Barbuda:** Section 55(1) Proceeds of Crime Act; **Barbados:** Section 55(1) Proceeds of Crime Act; **Dominica:** Section 54(1) Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 32(1) Proceeds of Crime Act; **Saint Lucia:** Section 54(1) Proceeds of Crime Act

³⁶⁰ Or Commissioner depending on jurisdiction

³⁶¹ In **Saint Christopher and Nevis** Serious Offence

gathered being used as part of the prosecution case, subject to any objections raised under the Act.³⁶²

3.11.107 This application will be made *ex parte* and shall be in writing and be accompanied by an affidavit sworn on the information and belief of the DPP or a person specially designated by the DPP for that purpose, deposing the following matters, namely:³⁶³

- (a) The scheduled offence³⁶⁴ under investigation;
- (b) The person in relation to whom the information or documents referred to in paragraph (c) are required;
- (c) The type of information or book, record, writing, return or other document in the possession of the Comptroller of Inland Revenue to which access is sought or that is proposed to be examined or communicated; and
- (d) The facts relied on to justify the belief, on reasonable grounds, that the person referred to in paragraph (b) has committed or benefited from the commission of an offence referred to in paragraph (c) are likely to be of substantial value, whether alone or together with other material, to the investigation for the purpose of which the application is made.

3.11.108 The Judge must be satisfied:³⁶⁵

³⁶² See possible objections that can be raised by the Comptroller or Commissioner of Inland Revenue below

³⁶³ **Antigua and Barbuda:** Section 55(2) Proceeds of Crime Act **Barbados:** Section 55(2) Proceeds of Crime Act; **Dominica:** Section 54(2) Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 32(2) Proceeds of Crime Act; **Saint Lucia:** Section 54(2) Proceeds of Crime Act

³⁶⁴ In **Saint Christopher and Nevis** Serious Offence

- (a) Of the grounds in paragraph 3.11.55(d) above; and
- (b) There are reasonable grounds for believing that it is in the public interest to allow access to the information or documents to which the application relates, having regard to the benefit likely to accrue to the investigation if the access is obtained.

3.11.109 The Comptroller of Inland Revenue may object to the disclosure of any information or document in respect of which an order has been made by certifying in writing that the information or document should not be disclosed on the grounds that:³⁶⁶

- (a) The Comptroller of Inland Revenue is prohibited from disclosing the information or document by any bilateral or international treaty, convention or other agreement respecting taxation or exchange of information to which the relevant State is a signatory;
- (b) A privilege is attached by law to the information or document;
- (c) The information or document is placed in a sealed package by law or order of a Court of competent jurisdiction;
- (d) Disclosure of the information or document would not for any other reason be in the public interest.

³⁶⁵ **Antigua and Barbuda:** Section 56(1) Proceeds of Crime Act; **Barbados:** Section 56(1) Proceeds of Crime Act; **Dominica:** Section 55(1) Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 33(1) Proceeds of Crime Act; **Saint Lucia:** Section 55(1) Proceeds of Crime Act

³⁶⁶ **Antigua and Barbuda:** Section 57(1) Proceeds of Crime Act; **Barbados:** Section 57(1) Proceeds of Crime Act; **Dominica:** Section 56(1) Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 34(1) Proceeds of Crime Act; **Saint Lucia:** Section 46(1) Proceeds of Crime Act

3.11.110 Any such objection to the disclosure of information or a document may be determined on application by the Comptroller of Inland Revenue or the DPP to a Judge in Chambers, not later than 14 days from the date of the objection.³⁶⁷

3.11.111 An appeal lies from the Judge's determination of any objection, but must be brought within 14 days from the date of the determination or within such further time as the Court of Appeal considers appropriate in the circumstances.³⁶⁸

3.11.112 Where any copies are made of the documents disclosed they will have the same probative force as the original information or document would have had if it had been proved in the ordinary way.³⁶⁹

3.11.113 Government Information Order³⁷⁰ Antigua and Barbuda, Barbados, Dominica, Saint Christopher and Nevis and Saint Lucia

3.11.114 The DPP may apply to a court (this could include Magistrates and High Court) for an order that the person in charge of any Government department or statutory body, produce or furnish to the DPP or any other person specified in the order any document or information which

³⁶⁷ **Antigua and Barbuda:** Section 57(2) Proceeds of Crime Act; **Barbados:** Section 57(2) Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 34(2) Proceeds of Crime Act; **Saint Lucia:** Section 56(2) Proceeds of Crime Act

³⁶⁸ **Antigua and Barbuda:** Section 57(4) Proceeds of Crime Act; **Barbados:** Section 57(4) Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 34(2) Proceeds of Crime Act; **Saint Lucia:** Section 56(4) Proceeds of Crime Act

³⁶⁹ **Antigua and Barbuda:** Section 58 Proceeds of Crime Act; **Barbados:** Section 58 Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 35 Proceeds of Crime Act; **Saint Lucia:** Section 57 Proceeds of Crime Act

³⁷⁰ See Annex E from paragraph 8 for further information required when making an application

is in his or her possession or under his or her control that is relevant to an investigation.³⁷¹

3.11.115 Best practice would be for such an application to be made *ex parte* and in Chambers. Although the relevant Acts don't specify this, it makes practical sense for this to be the process in common with the above orders and importantly where any investigation is covert. Further it would be good practice to make the application in writing and supported by an affidavit.

3.11.116 The Court will have to be satisfied that the relevant department or statutory body may reasonably have access (not being a document readily available to the public) and that it is relevant to any investigation into, or proceedings, relating to a scheduled offence³⁷² alleged or suspected to have been committed by any person.³⁷³

3.11.117 In Barbados³⁷⁴ the Director of the Anti-Money Laundering Authority, where he has reasonable grounds to believe that an investigation should be conducted for the purposes of the Act and is necessary for the purposes of such investigation, can apply for information from the following:

(a) The Central Bank;

³⁷¹ **Antigua and Barbuda:** Section 60 Proceeds of Crime Act; **Barbados:** Section 60 Proceeds of Crime Act; **Dominica:** Section 59 Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 37 Proceeds of Crime Act; **Saint Lucia:** Section 59 Proceeds of Crime Act

³⁷² In Saint Christopher and Nevis Serious Offence

³⁷³ **Antigua and Barbuda:** Section 60 Proceeds of Crime Act; **Barbados:** Section 60 Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 37 Proceeds of Crime Act; **Saint Lucia:** Section 59 Proceeds of Crime Act

³⁷⁴ **Barbados:** Section 6A(4)(b) of the Money Laundering and Financing of Terrorism Act

- (b) The Customs Department;
- (c) The Immigration Department;
- (d) The Inland Revenue Department;
- (e) The Land Tax Department;
- (f) The National Insurance Department

3.11.118 In Grenada and Saint Vincent and the Grenadines, Government

Departments maybe ordered to disclose information by the High Court that will assist with the making of a restraint order or where a restraint order has already been made.³⁷⁵ The purpose is that any information held be a Government Department in relation to realisable property can be used to facilitate the making of a restraint order or a receiver on a charging order.³⁷⁶

3.11.119 Emergency Applications

3.11.120 In situations where expedited applications have to be made, best practice would be to contact the relevant High Court Registrar to determine the appropriate process and whether the applications can be made orally.

3.11.121 Customer Information Order in Saint Vincent and the Grenadines (under the Proceeds of Crime Act 2013)

³⁷⁵ **Grenada:** Section 57(2) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 38(2) Proceeds of Crime and Money Laundering (Prevention) Act

³⁷⁶ **Grenada:** Section 57(4) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 38(4) Proceeds of Crime and Money Laundering (Prevention) Act

3.11.122 An application by a law enforcement officer³⁷⁷, ex parte in Chambers to a judge or master³⁷⁸ for a customer information order should state:

- (a) That the specified person is:³⁷⁹
 - Subject to a criminal recovery investigation³⁸⁰; or
 - A money laundering investigation; or
 - That property in the application is a subject to a civil recovery investigation and the specified person appears to hold the property
- (b) The order is sought for the purposes of the investigation;³⁸¹ and
- (c) The order is sought against the “*regulated person*”³⁸² in relation to account information detailed in the application.

3.11.123 The master or judge must be satisfied that there are reasonable grounds for suspecting that:

- (a) In a criminal recovery investigation the person has benefited from their criminal conduct.;³⁸³ or

³⁷⁷ Section 2(1) of the Proceeds of Crime Act 2013 defines as a Police Officer or Customs Officer

³⁷⁸ Section 147(1) of the Proceeds of Crime Act only refers to an ex parte application in chambers to a judge and not a master

³⁷⁹ **Saint Vincent and the Grenadines:** Section 140(2)(a) Proceeds of Crime Act 2013

³⁸⁰ See paragraph 3.11.46c for a definition of criminal recovery investigation

³⁸¹ **Saint Vincent and the Grenadines:** Section 140(2)(b) Proceeds of Crime Act 2013

³⁸² Defined in section 2(1) of the Proceeds of Crime Act 2013 as a person who holds a licence specified in the Anti-money Laundering and Terrorist Financing Regulations

³⁸³ **Saint Vincent and the Grenadines:** Section 141(1)(a)(i) Proceeds of Crime Act 2013

- (b) In a civil recovery investigation the property is recoverable³⁸⁴ or associated property³⁸⁵ and the person specified holds some or all of the property; or
- (c) In a money laundering investigation the person has committed a money laundering offence.³⁸⁶ From the above it will probably be easier to show some benefit from criminal conduct, rather than at this investigative stage a person has actually committed a money laundering offence.

3.11.124 If section 141(1) applies (paragraph 3.11.123 above) the judge or master must be satisfied there are reasonable grounds to believe that:

- (a) The customer information will be of substantive value to the investigation. This should be straightforward if the material has been identified and the order is sought for the purposes of the investigation;³⁸⁷ and
- (b) It is in the public interest for the information to be provided having regard to the benefit likely to accrue to the investigation if the information is obtained.³⁸⁸

3.11.125 The order will specify when and in what manner the information will be provided to an “*appropriate*” officer.³⁸⁹ Therefore it would be best

³⁸⁴ **Saint Vincent and the Grenadines:** Section 141(1)(a)(ii) Proceeds of Crime Act 2013 - See definition of recoverable property between sections 65 and 73 Proceeds of Crime Act 2013

³⁸⁵ **Saint Vincent and the Grenadines:** Section 141(1)(a)(ii) Proceeds of Crime Act 2013 - See definition of associated property at section 72 Proceeds of Crime Act 2013

³⁸⁶ **Saint Vincent and the Grenadines:** Section 141(1)(a)(iii) Proceeds of Crime Act 2013

³⁸⁷ **Saint Vincent and the Grenadines:** Section 141(1)(b) Proceeds of Crime Act 2013

³⁸⁸ **Saint Vincent and the Grenadines:** Section 141(1)(c) Proceeds of Crime Act 2013

practice in an application to specify at what intervals the information will be required. Further, the Customer Information Order may require service and a regulated person is only compelled to comply when provided with evidence of the Order.³⁹⁰ Again, good practice would be to serve the order immediately specifying when, how and to whom the information will be given by the regulated person.

3.11.126 As for warrants, Production Orders and Account Monitoring Orders, unless the material is privileged, the Act specifically excludes the application of any confidentiality or restriction in disclosure laws. Therefore banking secrecy or confidentiality will not bar the disclosure of information ordered by an account monitoring order.

3.11.127 If a regulated person fails to provide the information in the order, without reasonable excuse, they commit an offence. If the evidential stage of the Code is satisfied it should always be in the public interest to charge this offence.³⁹¹

3.11.128 Therefore there is nothing in the Act that precludes the information obtained being used in any criminal or civil recovery proceedings, against any person other than a regulated person.

³⁸⁹ **Saint Vincent and the Grenadines:** Section 141(3) Proceeds of Crime Act 2013 – there is no definition within the Act for an “*appropriate officer*” – this should mean a law enforcement officer

³⁹⁰ **Saint Vincent and the Grenadines:** Section 141(4) Proceeds of Crime Act 2013

³⁹¹ **Saint Vincent and the Grenadines:** Section 145(6) Proceeds of Crime Act 2013

Table 2

Country	Act	Power
Antigua and Barbuda	<p>Money Laundering (Prevention) Act No.9 of 1996</p> <p>Proceeds of Crime Act 1993</p>	<p>Section 14: Search Warrant</p> <p>Section 15: (i) Property Tracking and Monitoring Orders; and (ii) Production Order</p> <p>Section 18A: Seizure and Detention of suspected Currency</p> <p>Section 42: Production and Inspection Orders</p> <p>Section 47: Search Warrant</p> <p>Section 48: Monitoring Order</p> <p>Section 55: Disclosure of Income Tax Information</p> <p>Section 60: Disclosure of Information held by Government Departments</p>
Barbados	<p>Money Laundering and Financing of Terrorism (Prevention and Control) Act Cap.129</p> <p>Proceeds of Crime Act Cap.143</p>	<p>Section 11: Search Warrant</p> <p>Section 6A(3)(c): Production Order</p> <p>Section 6A(4)(b): Government Information Order</p> <p>Section 42 Production Order</p> <p>Section 48 Monitoring Order</p> <p>Section 55 Disclosure of Income Tax Information</p> <p>Section 60 Disclosure of Information from Government Departments</p>

Country	Act	Power
Dominica	<p>Money Laundering (Prevention) Act 2011</p> <p>Proceeds of Crime Act 1993</p>	<p>Section 24: Search Warrant</p> <p>Section 25: Property Tracking</p> <p>Section 26: Monitoring Order</p> <p>Section 24: Search Warrant</p> <p>Section 41: Production and Inspection Order</p> <p>Section 47: Monitoring Order</p> <p>Section 54: Disclosure of income tax information</p> <p>Section 59: Disclosure of Information and documents held by Government Departments</p> <p>Section 65: Seizure of cash</p>
Saint Vincent and the Grenadines	<p>Proceeds of Crime and Money Laundering (Prevention) Act 2001 (as amended by Act No.8 of 2005)</p> <p>Proceeds of Crime Act 2013</p>	<p>Section 35: Production Orders</p> <p>Section 37: Search Warrant</p> <p>Section 38: Disclosure of Information by Government Departments</p> <p>Section 39: Monitoring Orders</p> <p>Section 49: Cash seizure</p> <p>Section 134: Production Order</p> <p>Section 138: Search and Seizure Warrant</p> <p>Section 141: Customer Information Order</p> <p>Section 145: Account Monitoring Order</p> <p>Sections 107-117: Cash Seizure</p>

Country	Act	Power
Saint Lucia	Proceeds of Crime Act	<p>Section 24: Search Warrant for tainted property</p> <p>Section 29A: Cash Seizure</p> <p>Section 41: Production and Inspection Orders</p> <p>Section 47: Monitoring Orders</p> <p>Section 54: Order for Disclosure of Income Tax Information</p> <p>Section 59: Access to specified information and documents held by Government Deps</p>
Grenada	Proceeds of Crime Act 2012 (No.6)	<p>Section 56: Search Warrants</p> <p>Section 53: Production Orders</p> <p>Section 57: Disclosure of Information by Government Departments</p> <p>Section 55: Monitoring Orders</p> <p>Section 58: Search for recoverable cash</p> <p>Section 59: Seizure of Cash</p>
Grenada (cont)	Financial Intelligence Unit Act 2012	<p>Section 22: Obtaining Information</p> <p>Section 23: Search Warrant</p> <p>Section 24: Freezing Order</p> <p>Section 25: Restraining Order</p> <p>Section 26 Monitoring Order</p>

Country	Act	Power
Saint Christopher and Nevis	Proceeds of Crime Act 2000 No.16	<p>Section 7: Cash Seizure</p> <p>Section 8: Warrant to search land for tainted property</p> <p>Section 23: Production and Inspection Orders</p> <p>Section 28: Search Warrant to facilitate investigation</p> <p>Section 29: Property Tracking</p> <p>Section 30: Monitoring Orders</p> <p>Section 33: Order for Disclosure of Income Tax Information</p> <p>Section 37: Disclosure of Information and Documents held by Governments Deps</p>

3.12 Evidence from Another Country

3.12.1 The Investigators and Prosecutor should discuss at an early stage, evidence required from another country through Mutual Legal Assistance (“MLA”). This could include proof of conviction of a serious crime/s; evidence of seizure of drugs; evidence from financial institutions; telephone evidence; and emails.

3.12.2 A Letter of Request (LOR) or MLAT maybe pursuant to:

- (a) A Mutual Legal Assistance Bilateral Treaty:
 - Between United States of America and Antigua and Barbuda, Dominica, Grenada and Saint Lucia: [Mutual Legal Assistance in Criminal Matters](#)
 - Between United States of America and Barbados: [Mutual Legal Assistance in Criminal Matters, 1996-02-28](#)

- Between the United States and Saint Christopher and Nevis: [Treaty on Mutual Legal Assistance in Criminal Matters, 1997-09-18](#)
- Between the UK and Antigua and Barbuda re drug trafficking, restraint and confiscation
- Between the UK and Barbados re drug trafficking, restraint and confiscation
- Between the UK and Grenada re drug trafficking, restraint and confiscation

(b) A Multilateral Treaty:

- [Caribbean Mutual Legal Assistance Treaty in Serious Criminal Matters 2000](#)

Signed by Antigua and Barbuda, Barbados (see Mutual Assistance in Criminal Matters (Amendment) Act 2008), Saint Lucia, Saint Christopher and Nevis and Trinidad and Tobago

- [Inter-American Convention Against Corruption](#)

Signed by Barbados.

Ratified, Acceded to or Accepted by: Antigua and Barbuda, Dominica, Grenada, Saint Christopher and Nevis, Saint Lucia and Saint Vincent and the Grenadines

(c) A Commonwealth Agreement:

- [The Harare Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth including amendments made by Law Ministers in April 1990, November 2002 and October 2005](#); or
- (d) Any appropriate UN Convention:
- [United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988](#)
 - [United Nations Convention against Transnational Organized Crime, 2000](#)

3.12.3 An LOR should be prepared at the earliest opportunity in order to secure the evidence. The Central Authority will usually advise, prepare and send a LOR to another Central Authority. However it would be best practice for a Prosecutor to prepare a draft for its Central Authority. This will assist the Central Authority sending the LOR and reduce delays. This LOR should then to be sent to the Central Authority of the receiving State as soon as possible in order that any evidence will be obtained before the Preliminary Inquiry, committal or Sufficiency Hearing. It would also be good practice, on the advice of the Central Authority in the sending country, to send the LOR directly to the department that will conduct the investigations so they know in advance what will be requested of them, to speed up the process.

3.12.4 Mutual Administrative Assistance

3.12.5 Formal letters of request are not automatically required to obtain evidence / information from abroad in every case, as if they were the machinery for making LOR's would grind to a halt. Much of the evidence and information can quite properly be obtained by way of Mutual Administrative Assistance (MAA), often referred to as "*Police-to-Police enquiries*". The Investigators will liaise with their counterparts abroad requesting their assistance in obtaining evidence or information, or in undertaking enquiries abroad. A line of communication is usually through Interpol. As the world's largest international police organisation, Interpol, with 186 member countries can facilitate cross-border police co-operation and supports and assist all organisations, authorities and services whose mission is to prevent or combat international crime. One of its missions is to promote communication and co-operation among the world's law enforcement agencies. Interpol manages databases of information on criminals and criminality that are accessible to all National Central Bureaus (NCB). The information in the databases, which comes from queries, messages, intelligence and submissions from police in member countries, relates to:

- (a) Nominal data;
- (b) Photographs;
- (c) Stolen and lost documents;
- (d) Child sexual abuse images;

- (e) Stolen works of art;
- (f) Stolen motor vehicles;
- (g) Fingerprints;
- (h) Drugs;
- (i) DNA profiles; and
- (j) Notices of persons wanted

Interpol also has specialist units such as the Intellectual Property Crime Action Group, whose members include police and customs representatives from member countries, international organisations and industry bodies. This group works to raise awareness of this threat among policymakers and the general public through promotional, training and operational support.

3.12.6 It must be emphasised that, before obtaining evidence from abroad via MAA, the Prosecution Team must be satisfied that:

- (a) It is lawful to do so under the requesting country's law and there is no reason to believe that it will be excluded as evidence; and
- (b) It is lawful to do so under the law of the foreign State; and
- (c) The foreign State has no objection

3.12.7 MAA and MLA work best when there are no areas of disagreement between States. If by inappropriate actions a Prosecution Team annoys

the authorities in a foreign State, they may be less inclined to help with the next request. Therefore a Prosecution Team must be aware of the sensibilities of other States.

3.12.8 The extent of assistance which can / will be provided without a formal LOR varies from country and is dependent upon factors such as:

- (a) Domestic law;
- (b) The State of relations between the country concerned and the requesting State;
- (c) The attitude and opinions of the people on the ground to whom the request is made (personal contacts in the main by the Investigators can often prove invaluable, often going on to facilitate the execution of formal MLA and extradition requests should these become necessary)

3.12.9 It is impossible to provide a definitive list of the types of enquiries that can be made in this way but generally, if the enquiry is routine and does not require the use of coercive powers it may well be possible to make it without a formal LOR. Examples of enquiries, which may not require a formal LOR, include:

- (a) Obtaining public records (e.g. land registration documents, papers relating to company registration);
- (b) Contacting potential witnesses to see if they are prepared to assist the requesting State enquiries voluntarily;

- (c) Taking a statement from a voluntary witness;
- (d) Locating missing persons;
- (e) Obtaining lists of previous convictions;
- (f) Obtaining basic subscriber details from communication service providers; and
- (g) Intelligence matters, including locating suspects / fugitives

3.12.10 Examples of enquiries, which usually require a formal LOR, include:

- (a) Obtaining a statement from a non-voluntary witness;
- (b) Obtaining account information and documentary evidence from banks;
- (c) Obtaining formal evidence of foreign convictions;
- (d) Requests for search and seizure;
- (e) Obtaining internet records and contents of e-mails;
- (f) Transfer of consenting persons in custody for the purposes of giving evidence; and
- (g) Applications for restraint or confiscation of assets

3.12.11 It is important to check the requirements of the particular country concerned. The Prosecution Team should always have regard to the limits of the various conventions and treaties in relation to MLA and ensure it is to obtain evidence rather than intelligence. One other important area to consider when reviewing a Treaty is the requirement for, “*dual criminality*”. This requirement means a request will only be executed when the alleged criminal conduct is considered criminal under the laws of both the receiving and requesting nations.

3.12.12 Mutual Legal Assistance and Mutual Administrative Assistance in the Eastern Caribbean

3.12.13 Grenada - Mutual Legal Assistance

3.12.14 The Mutual Legal Assistance in Criminal Matters Act (No.14 of 2001) (MLACMA) was enacted to make provision for mutual legal assistance in criminal matters between Grenada and designated countries. A designated country is any Commonwealth country and any non-commonwealth country designated by the Minister. In addition Act No.5 of 2001 Mutual Legal Assistance in Criminal Matters Treaty (Government of Grenada and Government of the United States) governs mutual legal assistance between the two countries. The scope of assistance under this Treaty mirrors that which is set out in the Act.

3.12.15 The Central Authority in Grenada is responsible for all the procedures and decisions in relation to mutual legal assistance. The Central Authority in Grenada is the Office of the Attorney General of Grenada,

or a public officer authorised in writing by the Attorney General to act in that capacity.

3.12.16 The Act and Treaty with the United States of America (USA) are similar to most Mutual Legal Assistance statutes and Treaties with the USA in the region and so this section will detail their application as an introduction to MLA in the Eastern Caribbean.

3.12.17 Part II of the Act deals with requests by Grenada to designated countries for assistance. The Act provides that where there are reasonable grounds to believe that evidence or information relevant to any criminal matter in Grenada maybe obtained, the Central Authority can request assistance from a designated country. Assistance can take the following forms pursuant to section 6(2) of the Act:

- (a) Taking evidence from a person;
- (b) Providing information;
- (c) Subjecting a person, sample, specimen, human remains or other items to examination or testing;
- (d) Producing, copying or examining any judicial or official records;
- (e) Taking, examining or testing samples of any matter or thing;
- (f) Viewing or photographing any building, place or thing;
- (g) Locating or identifying persons;

- (h) Obtaining, searching or seizing articles or things;
- (i) Arranging attendance of persons as witnesses;
- (j) Transferring prisoners who would be subject to certain immunities and privileges;
- (k) Serving documents;
- (l) Tracing property derived from crime; and
- (m) Seizing and confiscating proceeds of instrumentalities of crime

3.12.18 Part III of the Act relates to requests by designated countries to Grenada for assistance. A request would be implemented only to the extent that the Central Authority of Grenada considers it reasonable. Section 17 of the Act stipulates that requests for assistance by a designated country must be executed expeditiously, and where requests are not granted or executed expeditiously the Central Authority should give reasons for such a delay.

3.12.19 The Central Authority may refuse assistance for the following reasons:

- (a) Where the conduct would not constitute an offence under the law of Grenada (dual criminality);
- (b) Where it is an offence or proceedings of a political character;

- (c) Conduct in the country making the request is an offence only under military laws;
- (d) Conduct, which would be an offence under the military laws of Grenada, but is not an offence under the ordinary laws of Grenada;
- (e) Conduct in relation to which the accused suspected of having committed the offence has been acquitted or convicted by a court in Grenada;
- (f) Where the request appears to be contrary to the Constitution of Grenada;
- (g) If the Central Authority has reason to believe that the Central Authority executing the request would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinion;
- (h) Where the steps taken to comply with the request cannot under the laws of Grenada be taken in respect of criminal matters in Grenada.

3.12.20 A request for assistance under this Act by a designated country must:

- (a) Be made by the Central Authority of the requesting country; and be directed to the Central Authority of Grenada;
- (b) Identify the person, agency or authority presenting the request;

- (c) Identify the authority conducting the investigation, prosecution or proceedings in the requesting country;
- (d) Describe the basis upon which the request is made (i.e. Treaty, Scheme or Agreement);
- (e) Describe the nature of the criminal matter, and whether or not criminal proceedings have been initiated;
- (f) Describe the relevant facts of the case including, to the extent possible, the alleged offender(s) and the evidence and information so far obtained;
- (g) Give a legal description of the offence and the applicable penalty, with copies of the relevant law for the requesting country;
- (h) Specify the nature of the assistance required, with precise details of the evidence sought;
- (i) State the connection between the investigation, prosecution or proceedings and the assistance sought, i.e. a description of how the information or evidence sought is relevant to the case;
- (j) Describe the procedures to be followed by Grenada's authorities when gathering or transmitting the evidence or assistance requested so that it will serve the purpose for which it was requested;

- (k) In the case of a request for search and seizure, or for the production of documents, state the basis to believe that the information sought will be found and will afford evidence with respect to the case and describe the documents or items to be searched for and seized or produced;
- (l) In the case for a request for a statement or testimony, state the identification and location of the person from whom the evidence is to be obtained, list the topics to be covered and specify the questions to be asked;
- (m) Indicate any time limit within which compliance with the request is desired giving reasons;
- (n) Set out any other information available to the Central Authority of the requesting country to facilitate execution of the request;
- (o) Otherwise comply with any relevant bilateral agreement or multilateral agreement or scheme relating to mutual legal assistance.

3.12.21 Where a request is refused, it must be communicated by the Central Authority of Grenada to the Central Authority of the requesting country.

3.12.22 Under the Treaty with the USA, Article 5 requires the Attorney General to promptly execute requests from the USA and do everything in his power to do so. The Judicial or other authorities shall also have

powers to issue subpoenas, search warrants, or other orders necessary to execute requests.

3.12.23 Persons can be compelled, if necessary to testify or give evidence including documents and records, as provided for by Article 8.

3.12.24 Article 9 provides for the production of copies of documents that are publicly available and held by government departments and agencies. Such records may be authenticated by the official in charge of maintaining them and shall be admissible in evidence in the USA.

3.12.25 Article 10 provides for Grenada to facilitate the voluntary appearance of persons for the purpose of providing testimony in USA.

3.12.26 Effecting service of judicial documents is provided for in Article 13 and Article 14 deals with the requested State executing requests for the search, seizure and delivery of any item to the requesting State if the request includes the information justifying action under the laws of the requested State.

3.12.27 Article 16 allows for the contracting parties to assist each other to the extent permitted by their own laws in proceedings relating to the forfeiture of the proceeds and instrumentalities of offenses, restitution to the victims of crime, and the collection of fines imposed as sentences in criminal prosecutions. This would also include freezing or restraining the proceeds or instrumentalities pending further proceedings.

3.12.28 Neither the Act nor the Treaty provides for the refusal to grant assistance on the grounds of laws that impose secrecy or confidentiality requirements, such as banking information. The Attorney General usually solicits the assistance of the Financial Investigation Unit (FIU) to obtain necessary information to satisfy requests from designated countries for financial matters.

3.12.29 In respect of the powers of competent authorities as they relate to the provision of assistance, section 19 of the MLACMA states as follows:

The Central Authority of Grenada must ensure that in executing a request under this Act, only such measures of compulsion as are available under the laws of Grenada in respect of criminal matters in Grenada are used.

3.12.30 This provision can be interpreted to mean that the powers afforded to competent authorities (FIU and Police) to compel production, search person and premises, obtain and seize information are authorised under the Act. Further, section 3 mandates that the Attorney General may in writing authorise another public officer to act as the Central Authority of Grenada generally or in respect of any particular requests. The Attorney General has from time to time authorised the DPP, FIU and Police to take witness statements and compel production of records in pursuance of a mutual legal assistance request.

3.12.31 Grenada - Mutual Administrative Assistance

3.12.32 There is effective use of MAA with the Royal Grenada Police Force exchanging information with other police forces via Interpol and the customs authorities as members of the Caribbean Customs Law Enforcement Council, comprising customs administration from the Caribbean and Latin America, Canada, France, the Netherlands, Spain, the United Kingdom and the USA.

3.12.33 The Financial Intelligence Unit Act (FIUA) empowers the FIU to share all relevant information spontaneously or upon official request. Section 21 of the FIUA allows the Director of the Unit to enter in agreement, with approval of the relevant Minister, to share information or other cooperation relevant to the investigation or prosecution of a financial crime. Section 6(2)(e) of the FIUA empowers the unit to share information relating to the commission of an offence or information concerning suspicious transactions with foreign FIU's.

3.12.34 Antigua and Barbuda – Mutual Legal Assistance

3.12.35 Mutual Legal Assistance is generally provided on request by a foreign jurisdiction and in accordance with a bilateral or a multilateral agreement.

3.12.36 The Mutual Legal Assistance in Criminal Matters Act (MACMA) was passed in 1993. The Act provides for a scheme of Mutual Legal Assistance in Criminal Matters within the Commonwealth countries and which can extend to countries other than countries within the

Commonwealth. Section 30(2) of the MACMA provides for the MACMA to:

“Apply in relation to the country specified as if it were a Commonwealth country, subject to such limitations, conditions, exceptions or qualifications (if any) as may be prescribed”.

3.12.37 The MACMA also provides for requests to be made by Antigua and Barbuda to foreign countries. Antigua and Barbuda has signed a bilateral treaty with the USA and any requests for evidence should comply with this.

3.12.38 Provision is also made for mutual legal assistance under other legislation. However, these provisions are read in conjunction with the MACMA. For example Part V of the Money Laundering Prevention Act (MLPA) deals with international cooperation in money laundering matters and gives general guidance on the scope of the powers of authorities designated to act on requests. Section 67 of the Proceeds of Crime Act relates specifically to external forfeiture and confiscation orders.

3.12.39 There is no limitation under section 23(4) of the MLPA as to the types of matters for which assistance may be rendered. Therefore the Antigua and Barbuda authorities may receive and take appropriate measures for assistance related to civil, criminal or administrative investigations, prosecutions or proceedings involving money laundering.

3.12.40 Upon the Central Authority for Antigua and Barbuda, who is the Attorney General, accepting a request for assistance from a requesting State in a criminal matter under the MACMA or under a bilateral or multilateral treaty, the MACMA allows the appropriate authority in Antigua and Barbuda to provide, the same assistance as outlined above at paragraph 3.12.17 for Grenada.

3.12.41 Section 18 of the MACMA and the Schedule thereto set out the procedure to be followed by Commonwealth countries in making requests for assistance under the MACMA.

3.12.42 A request for assistance must:

- (a) Specify the assistance requested;
- (b) The period within which the country wishes the request to be complied with;
- (c) Such information that will facilitate compliance with the request;
- (d) Identify the person, agency or authority that initiated the request;
and
- (e) Attach, where applicable, the relevant certificate or order by a competent authority of the Commonwealth State justifying the need for assistance.

3.12.43 Antigua and Barbuda has in place a clear and effective process for the execution of mutual legal assistance requests. Generally, requests

are received by the Attorney General, assessed, consented to and passed to the Supervisory Authority for action within a few days of receipt.

3.12.44 The Office of the National Drug and Control Policy's (ONDCP) financial investigators and legal department process the LOR's for financial investigations. It is the standard procedure of the ONDCP to fulfil requests for assistance in money laundering matters within three (3) weeks of receipt. This is done in the case of straightforward and uncomplicated requests. In the case of more complex requests, the period for responding would be longer. In relation to other criminal investigations the Attorney General's Office will refer to the relevant department within the Royal Antigua and Barbuda Police Force. A response is then submitted back through the Attorney General to the requesting State. There is scope for further expediting this process in urgent cases.

3.12.45 Conditions for mutual legal assistance under the MACMA are based on the Harare Scheme for Commonwealth countries. It is the policy of the Antigua and Barbuda authorities to render assistance in all cases where it is possible to do so. Assistance is not made subject to unreasonable, disproportionate or unduly restrictive conditions. A request is not refused on the grounds that proceedings have not commenced in the requesting State, nor is a conviction required before assistance is provided. The absence of reciprocity is not a bar to the rendering of assistance.

3.12.46 However, the Antigua and Barbuda Authorities may be inclined to refuse assistance if the request compromises the State's interests. A request based on discriminatory policies relating to a person's race, religion, nationality or political opinions is also likely to be refused.

3.12.47 Secrecy or confidentiality requirements do not impede the rendering of mutual legal assistance. Section 23(6) of the MLPA specifically provides that any provisions referring to secrecy or confidentiality will not be an impediment to compliance when the information is requested by or shared with the Court.

3.12.48 Section 25 of the MLPA in broad terms overrides secrecy obligations under the Act, subject to the provisions of the Constitution. The provisions of the MLPA will have effect notwithstanding any obligation as to secrecy or other restriction upon the disclosure of financial information imposed by any law. However, there may be instances where secrecy or confidentiality will be observed, for example, in circumstances where privilege applies. The decision of **Antigua Commercial Bank Ltd v Hilroy Humphries HCVAP 2007/021** confirms that a bank can only disclose a customer's banking information to a third party if the customer consents, or in accordance with specified procedures. The Court of Appeal considered the following procedures under the MLPA:

- (a) Section 11: Bank can disclose to the supervisory authority (ONDCP in Antigua and Barbuda) Suspicious Activity Report

(SAR) where reasonable grounds to believe a money laundering offence has been or is about to be committed;

- (b) Section 13: SAR when financial institutions to pay special attention to complex, unusual or large business transactions from countries that have not adopted a comprehensive anti-money laundering programme;
- (c) Section 15: Production order on basis of reasonable grounds to believe committing or about to commit a money laundering offence;
- (d) Section 25: Right to circumvent secrecy and confidentiality if a SAR; and
- (e) Section 26: Sharing of SAR with other governmental agencies or regulatory authority in or outside of Antigua and Barbuda for the purpose of assisting the agency in conducting criminal investigations or prosecutions.

3.12.49 On the facts the bank had disclosed information that Mr Humphries held a savings account and a safety deposit box with them. No consent had been obtained and none of the provisions of the MLPA applied. **However, it is important to note that this judgment DOES NOT prevent a LOR requesting information from a bank.** Therefore any LOR will have to ensure that any information is obtained with the customers consent (unlikely if a covert investigation), or in accordance with the specified procedures, pursuant to sections 11,13,15,25 and 26

of the MLPA, which govern the disclosure process and culminate in the issue of an order of the court.

3.12.50 In summary if information relates to a client's account held by a financial institution, it will not be disclosed unless the client is the subject of a criminal investigation involving the offence of money laundering, the court has on application by the Supervisory Authority and the Attorney General ordered the disclosure of the information. It is customary that the client's consent will be sought to have the information disclosed firstly and if this is not appropriate due to the nature of the investigation, this should be specified in the LOR.

3.12.51 In response to mutual legal assistance requests, the MLPA is the principal Act used for identifying, freezing and confiscating laundered property and the instrumentalities used or intended for use in a money laundering offence. Section 23(3) of the MLPA permits the recognition in Antigua and Barbuda of a judicial order or judgment of a foreign Court or competent authority. The order may be recognised as evidence that the property, proceeds or instrumentalities referred to in it may be subject to forfeiture.

3.12.52 Express provision is made under section 67 of the Proceeds of Crime Act for the registration of external forfeiture and confiscation orders.

3.12.53 Where there exist treaties and agreements, these will determine the measures to be applied regarding seizures and confiscation. For example an Agreement has been signed with the United Kingdom concerning the investigation, restraint and confiscation of the Proceeds

and Instruments of Crime. It came into effect on 1st October, 2004 and it extends to Overseas Territories that the Government of the United Kingdom is responsible for.

3.12.54 Antigua and Barbuda - Mutual Administrative Assistance

3.12.55 The ONDCP does conduct inquiries on behalf of foreign FIUs. The Police Force conducts inquiries and investigations on behalf of its counterparts who are members of Interpol. The Customs Division conducts inquiries/investigations on behalf of its foreign counterparts who are members of the World Customs Organization. The Immigration Department conducts similar inquiries upon request made through the Ministry of Foreign Affairs.

3.12.56 One of the functions of the ONDCP under section 10(1)(b) of the Office of the National Drug and Control Policy Act (ONDCPA) is to liaise with law enforcement agencies and Financial Intelligence Units outside Antigua and Barbuda concerning drug trafficking, money laundering and specified offences whether committed in Antigua and Barbuda or elsewhere. This includes conducting investigations on behalf of its foreign counterparts.

3.12.57 Section 12 of the ONDCPA provides for the ONDCP to liaise and cooperate with foreign counterparts. The Director of the ONDCP has ultimate approval. There are no restrictions on information exchange in the legislation.

3.12.58 The Royal Antigua and Barbuda Police Force can share information with its foreign counterpart through Interpol. They can also exchange information via the Association of Caribbean Commissioners of Police (ACCP) Memorandum Of Understanding that was signed among CARICOM Countries. This exchange includes conducting investigations where a criminal offence is suspected to have been committed.

3.12.59 Barbados – Mutual Legal Assistance

3.12.60 Mutual legal assistance is governed principally by the Mutual Assistance in Criminal Matters Act, Chapter 140A of the laws of Barbados (MACMA). The statutory regime is intended to give effect to the Commonwealth Scheme for Mutual Assistance in Criminal Matters (Harare Scheme) as between Barbados and other Commonwealth States, the Caribbean Treaty on Mutual Legal Assistance in Serious Criminal Matters (CTMLASM) and also to make special provision for assistance between Barbados and non-Commonwealth countries. The processes provided under MACMA may be invoked where a “*criminal matter*” (i.e. a criminal investigation or proceeding) is underway either locally or overseas. For purposes of the Act, this expression will include restraint, forfeiture and confiscation proceedings.

3.12.61 It is important to note that MACMA is not intended to be exclusive, and operates without prejudice to existing or prospective cooperative arrangements, whether formal or informal, in the field of mutual assistance (section 5(1)).

3.12.62 The types of assistance which may be requested or rendered are similar to those outlined at paragraph 3.12.17 for Grenada and relate to such matters as search, seizure, production and copying of documents and other material (sections 6, 8, 19, 21 and Article 2(3)(e), (f), (g) and (j) of CTMLASM); taking evidence from persons, including prisoners transferred to the requesting country for the purpose (sections 6, 9, 19, 20, 22, 23 and Articles 2(3)(b) and (i) and Articles 13 and 14 of CTMLASM); and serving documents (sections 11, 24 and Article 12 of CTMLASM).

3.12.63 For asset recovery matters, there is also coverage in the Act to tracing, restraining and forfeiting/confiscating the proceeds of “*serious crimes*”, which is defined in section 2(1) to denote crimes for which there is:

- (a) A fixed sentence in law;
- (b) A minimum custodial sanction of 5 years; or
- (c) A minimum threshold value of the proceeds involved.

3.12.64 Specifically, Barbados may request the help of another Commonwealth country in identifying and valuing proceeds reasonably believed to be located in that jurisdiction, where a person has been charged with or convicted of a “*serious offence*” in Barbados, or alternatively, is reasonably suspected of having committed the offence (section 14 and Articles 16 and 17 of CTMLASM). This power would, for example, facilitate the issue in the other country of search and

seizure warrants locating the relevant property. Under section 16, where:

- (a) A person has been convicted locally, or charges have been, or are likely to be laid, and
- (b) A forfeiture/confiscation order has been, or is expected to be made, there is power to seek a restraining order against suspected proceeds in the other State. Further, under section 15 (see Article 17 of CTMLASM), where a restraining, forfeiture or confiscation order has been issued locally in relation to proceeds of such offences, the authorities may formally seek the enforcement of the order in a foreign State in which there are assets to which the order would apply.

3.12.65 Comparable provisions exist where the investigations or proceedings are underway in the other Commonwealth country, and assets are believed to be located in Barbados (sections 25-27).

3.12.66 By virtue of section 29 of MACMA, these provisions outlined above will also apply, with necessary adjustments, to non-Commonwealth countries which have concluded a bilateral treaty with Barbados dealing with mutual legal assistance, or other countries which are parties to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.

3.12.67 These are all valuable provisions which facilitate reciprocal assistance, but three limitations are observed. Firstly, the linking of

“*serious offences*” to a minimum 5-year custodial penalty seems to run counter to the comparable definition under the UN Convention Against Transnational Organised Crime, which applies a 4-year threshold (For CTMLASM see the definition of Serious Crime at Article 1: *An act or omission under the laws of a State Party which constitutes a criminal offence punishable by at least **twelve months imprisonment** or more and includes an offence against the law relating to **taxation***). There is therefore the potential for some relatively grave offences to fall outside the ambit of certain MACMA provisions.

3.12.68 Secondly, the property to be made the subject of restraint or forfeiture/confiscation is confined to proceeds or benefits of the serious offences; there is no power to target instrumentalities of, or intended for use in, such offences (the same applies to the definition of proceeds of crime in Article 1 of CTMLASM). Additionally, while there may be power under sections 15(1) and 26(1) to reach property of corresponding value, this would not extend to instrumentalities.

3.12.69 Thirdly, sections 16 and 27 only permit the respective authorities to request that the other obtain a restraining order in that other country. (Article 17 of CTMLASM is wider allowing assistance in enforcement by taking appropriate action to secure the proceeds of crime).

3.12.70 There are provisions facilitating international cooperation under other legislation. Under section 6C of the Money Laundering and Financial Terrorism Act (MLFTA), the Director of the FIU may communicate

information that is relevant to money laundering to any national financial intelligence unit of a foreign State:

- (a) Where the unit is located in a State that is party to any agreement with Barbados in respect of the exchange of information under this Act; and
- (b) Where he is satisfied that the State has given appropriate undertakings for protecting the confidentiality of the information and for controlling the use that will be made of it.

3.12.71 It is noteworthy that this facility for information exchange has appropriate safeguards (prerequisite of State-to-State agreement/MOU; confidentiality undertakings) to ensure that crime fighting is balanced with the recognition of individual privacy rights. From an operational point of view, however, the authorities have not concluded any bilateral treaties or other agreements pursuant to this provision; typically, they have relied on multilateral instruments e.g. the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, for information exchange purposes.

3.12.72 Barbados has concluded a Mutual Legal Assistance Treaty with the United States (1996) covering reciprocal assistance in investigation and proceedings relating to criminal matters. This is of general application, and covers cooperation in matters of evidence-taking and gathering, restraint, confiscation and restitution proceedings. There is also a Mutual Legal Assistance Treaty with the United Kingdom that should be used for drugs investigations and proceedings involving either country.

3.12.73 The MACMA regime does impose certain conditions for the approval of requests for assistance, and these are similar to all other jurisdictions in the Eastern Caribbean. Requests are routed through the Attorney General, who is appointed as the Central Authority for these purposes (section 3, Article 4 of CTMLASM). On receipt of an appropriate request for assistance by the Central Authority of Barbados, the request is directed to the relevant agency or department for execution. Assistance is provided in relation to criminal investigations and proceedings, and there is no statutory bar to cooperation where judicial proceedings have not commenced abroad or a conviction has not been secured.

3.12.74 Requesting countries are required to supply to the Central Authority the information set out in the Schedule (section 17, Article 5(2) of CTMLASM), which is designed to elicit sufficient details about the request to enable a proper assessment of the case. Article 9 of CTMLASM, requires both the requesting and requested States that are party to the Treaty to maintain confidentiality. Section 18, in line with the customary approach, elaborates a number of circumstances in which the Central Authority has an obligation, or discretion, to refuse a foreign request. Mandatory refusal of a request applies in several cases including those where approval would:

- (a) Violate Barbadian law e.g. the Constitution, the dual criminality rule (importantly pursuant to Article 7(4) of CTMLASM, dual criminality is not a pre-requisite to providing assistance) or the

rule against double jeopardy (subsection (2)(d), (e), (f) and Article 7(1)(d) of CTMLASM);

(b) Compromise security or public policy (subsection (2)(e) and Article 7(1)(b) of CTMLASM);

(c) Give credence to an offence of a “*political character*” (Article 7(1)(c) of CTMLASM).

3.12.75 Barbados - Mutual Administrative Assistance

3.12.76 Under Section 6C of the MLFTA, the Director of the FIU can share information with foreign FIU's of States that have agreements with Barbados about the exchange of information and where appropriate undertakings for protecting the confidentiality of the information and for controlling the use. The FIU, as a matter of course conducts inquiries on behalf of foreign FIUs including searching its own database with respect to information on SAR's. Section 6A(3)(a) of the MLFTA provides the authority to conduct such investigations as are necessary for the purposes of the Act. All the investigative provisions of the MLFTA, in particular section. 6A, are disposed for use on behalf of foreign counterparts.

3.12.77 The Royal Barbados Police Force is able to cooperate with its international counterparts through Interpol or through bilateral contacts. It can also conduct inquiries on behalf of foreign counterparts. The Customs and Excise Department is able to cooperate with its foreign counterparts through bilateral agreements or through the World

Customs Organisation. The department can collaborate with its regional counterparts via the Caribbean Customs Law Enforcement Council for joint counter-narcotics operations with international law enforcement agencies.

3.12.78 Dominica – Mutual Legal Assistance

3.12.79 The system of Mutual Legal Assistance in Dominica is governed by the Mutual Legal Assistance in Criminal Matters Act, Chapter 12:19, Amendment Act 16/2002 and Statutory Rule and Order (SRO) 47/2002. The legislation allows for the exchange of information and evidence in serious Criminal Matters. It applies to Commonwealth countries, other countries with which Dominica has a bilateral relation, as well as countries which are party to the 1988 United Nations Convention against Illicit Traffic in Narcotic and Psychotropic Substances. In the latter case, cooperation is rendered on the basis of reciprocity. Requests for assistance are made to the Central Authority who is the Attorney General of the Commonwealth of Dominica.

3.12.80 The requests outlined in the section in Grenada at paragraph 3.12.17 apply to Dominica. Also a request can be made for the identification, freezing, seizure, or confiscation of assets laundered or intended to be laundered, and the proceeds of money laundering, as well as the instrumentalities of such offences, and assets of corresponding value (section 27 and 28 of the Mutual Assistance in Criminal Matters Act (MACMA)).

3.12.81 Under the laws of the Commonwealth of Dominica, a request for mutual legal assistance could not be refused on the grounds of laws that impose secrecy or confidentiality requirements on financial institutions, except where the relevant information was obtained in circumstances where legal professional privilege or legal professional secrecy applies.

3.12.82 Dominica is also party to a bi-lateral treaty with the US re cooperation in criminal matters which Dominica signed on October 10, 1996.

3.12.83 Section 39 of the Money Laundering (Prevention) Act 2011 outlines arrangements with other States for identification, tracing, seizing and confiscating all property, property of corresponding values, proceeds or instrumentalities, that are connected to money laundering offences.

3.12.84 Dominica - Mutual Administrative Assistance

3.12.85 The Commonwealth of Dominica Police Force is a member of Interpol and the Interpol intellectual Property Crime Action Group. Being a member of the organisation, information is shared on a regular basis through requests made to and from member countries

3.12.86 In the Commonwealth of Dominica all the competent authorities are authorised to conduct inquiries on behalf of foreign counterparts. The FIU is allowed to consult and liaise with domestic and international law enforcement agencies in responding to requests for assistance. Upon receipt of such requests, the FIU database is searched as well as that of the Police for criminal records information. The FIU also has access

upon request, to the Registrar of Companies information, Customs information and Drug Squad information.

3.12.87 In the Commonwealth of Dominica, law enforcement authorities such as the Police and Customs are authorised to conduct investigations on behalf of foreign counterparts, which can be facilitated through Interpol.

3.12.88 Saint Lucia – Mutual Legal Assistance

3.12.89 The Mutual Assistance in Criminal Matters Act (1996) (MACMA)

provides for assistance within the Commonwealth and to other countries other than Commonwealth countries and to facilitate its operation in Saint Lucia. The Law in its schedule also attaches “*The Treaty*” as the extension and application to the USA. The Law allows the Saint Lucian Central Authority the powers to provide the widest possible range of MLA for investigations, prosecutions and related proceedings.

3.12.90 The Money Laundering Prevention Act (MLPA) also affords the Financial Investigation Authority (FIA) with the ability to provide information to Foreign Financial Authorities within the confines of the laws (dual criminality is mandatory in order to be able to offer assistance.)

3.12.91 The MACMA has been amended by statutory authority to designate the Attorney General as the Central Authority, and not the Minister of Foreign Affairs and trade.

3.12.92 As a separate authority, the FIA or the court is stated as the Central Authority under the MLPA in section 34(2).

3.12.93 Section 5 of the MLPA permits the FIA to provide information relating to money laundering or a SAR to any foreign Financial Intelligence Unit subject to the conditions the FIA may consider appropriate. Pursuant to section 5(2)(g) of the Money Laundering Prevention Act, the FIA may enter into any agreement or arrangement in writing, with any foreign FIU for the purpose of performing its functions.

3.12.94 The Attorney General acts as the Central Authority for all Requests and passes the request to the appropriate agency depending on the nature of the Request. The Attorney General does not make any distinction between itself as the Central Authority for mutual legal assistance to requesting States and the FIA generally. Additionally, the MLPA at section 34(2) does make reference that:

“The court or the authority (FIA) shall cooperate with a court or other competent authority of a Requesting State...”

This can be utilised directly for the taking of evidence (depositions) and for orders for production of records and search warrants and seizures and enforcement of overseas judgments.

3.12.95 Part 2, sections 6 to 13 and Part 3, sections 14 to 16 of MACMA provides and includes the criteria set out as regards obtaining evidence and articles, locating persons, arranging attendance & transferring of

persons, service of documents and restraints, freezing and confiscation of assets.

3.12.96 The MACMA has restrictive conditions. Section 5 places a restriction on the operation of the Act such that its provisions should not derogate from existing forms or prevent the development of other forms of cooperation. Section 12 is a restriction on the use of evidence or information obtained or provided by any person such that it may only be used by or on behalf of Saint Lucia, for the purpose of investigation and criminal proceedings to which the request relates, unless there is consent. Additionally, section 18 outlines a number of conditions upon which a request may be refused to include the lack of dual criminality.

3.12.97 The provisions in section 34 of the MLPA override the rules of secrecy or confidentiality and are subject only to Constitutional rights. Safeguards are established for example by section 12 of MACMA that stipulates that only the information or evidence obtained via request can be used for the purpose to which the request is related or to proceedings which are a consequence of the investigation to which the request related.

3.12.98 Saint Lucia – Mutual Administrative Assistance

3.12.99 The Royal Saint Lucia Police Force is able to share information with its counterparts through Interpol. The Commissioner of Police in Saint Lucia is also the Chief Immigration Officer, which means that the Immigration Department also has the same resources available to it to conduct enquiries on behalf of its counterparts.

3.12.100 The Customs Department is a member of the World Customs Organization and as such conducts enquiries on behalf of its counterparts who are also members of the organization.

3.12.101 The FIA can share information both formally and informally with foreign FIU's in relation to money laundering and other predicate offences. The FIA by virtue of section 5(2)(g) of the MLPA may provide information relating to suspected money laundering to a Foreign FIU or information relating to a suspicious activity report to any foreign FIU subject to any conditions it deems appropriate. The FIA also has the power to require the production of information that is relevant, (section 6) and may consult with any person, institution or organization for the purpose of performing its functions (section 6(1)9(b) MLPA). The FIA though it cannot investigate, is able to delegate this function to the Commissioner of Police, therefore assisting the foreign FIU.

3.12.102 Saint Christopher and Nevis – Mutual Legal Assistance

3.12.103 The Mutual Legal Assistance in Criminal Matters Act, Cap. 435 (MACMA) provides the mechanism for mutual legal assistance in criminal matters to Commonwealth countries and other countries other than Commonwealth countries. The Central Authority is the Office of the Attorney General. Criminal matters refer to any investigations or proceedings that have been instituted for an offence committed or suspected on reasonable grounds to have been committed against the Laws of Saint Christopher and Nevis or the requesting country. The definition extends to forfeiture proceedings, restraint orders, and

proceedings for the imposition of pecuniary penalties calculated by reference to the value of property arising out of criminal proceedings, whether the proceedings are described as criminal or civil proceedings.

3.12.104 This Act does not infringe any existing form of co-operation between Saint Christopher and Nevis and any other country nor does it prevent the development of other forms of relationship between any other law enforcement agencies or prosecuting authorities in Saint Christopher and Nevis and any international organisations such as Interpol. The Act provides for assistance in the same areas as identified above at paragraph 3.12.17 for Grenada.

3.12.105 The Act provides broadly for the provision of assistance where an investigation has been commenced in a criminal matter in the requesting State or proceedings that have been certified to be criminal proceedings have been instituted in that State.

3.12.106 Where a person has been charged with or convicted for a serious offence in a Commonwealth country, or is suspected of committing such an offence then the Central Authority for Saint Christopher and Nevis may render assistance to that country in tracing property which was obtained from that offence if that property is suspected to be in Saint Christopher and Nevis. Similar assistance can be granted to obtain restraining orders and to register certain orders which impose a pecuniary penalty or a restraint order on property which is suspected to be in Saint Christopher and Nevis.

3.12.107 It should be noted that for the purposes of this Act, “*serious offence*” refers to an offence for which the minimum custodial sentence is three (3) years imprisonment or the value of the property derived from the commission of the offence is not less than twenty-five thousand dollars.

3.12.108 Saint Christopher and Nevis may request assistance in all those matters for which they are willing to grant assistance. Section 29 of the MACMA makes provision for assistance to other non-Commonwealth Countries with which they have bilateral arrangement or treaties. One such example is the Mutual Assistance Treaty, which Saint Christopher and Nevis signed with the USA. In 2001, the Saint Christopher and Nevis and the United States of America Treaty on Mutual Assistance in Criminal Matters Act was passed to give effect to that treaty. The Attorney General’s Chambers is the Central Authority for these matters.

3.12.109 The Proceeds of Crimes Act at section 59 provides for the DPP and the FIU to render assistance to the competent authority of another State. The Financial Intelligence Unit Act, Cap. 18:04 (FIUA) also provides for that Unit to render assistance to a Foreign Intelligence Unit on the condition that that Unit is willing to enter into an agreement to render similar assistance. The FIU is empowered among other things, to obtain information, order a bank account to be frozen if the request relates to the proceeds of any crime and may enter into any agreement with a foreign FIU to facilitate the proper execution of its functions. There is no provision in the FIUA for seizing instrumentalities used in or intended for use in the commission of serious offences or for Saint Christopher and Nevis to request the seizure of such instrumentalities.

3.12.110 Where a matter may not fully warrant mutual legal assistance from the Central Authority the FIU may be called upon to assist where possible for financial investigations and the Royal Saint Kitts and Nevis Police Force for other matters.

3.12.111 The restrictions set out in the law are the usual provisions relating primarily to offences of a political character and the requirement of dual criminality. Mutual legal assistance is not prohibited or made subject to unreasonable, disproportionate or unduly restrictive conditions. Restrictions apply to the prosecution or punishment of a person for a political offence, or as a result of his race, sex, religion, nationality, place of origin or political opinion. Where by reason of lapse of time a person could not be prosecuted in Saint Christopher and Nevis then a request in relation to that person may be refused. It should be pointed out that under the MACMA, an offence is not a political offence, if it is an offence under any international convention to which the requesting State and Saint Christopher and Nevis are both parties to (section 18(9)).

3.12.112 The Act does not provide for the refusal of mutual legal assistance on the grounds of secrecy or confidentiality imposed on financial institutions except where legal or professional secrecy apply.

3.12.113 Saint Christopher and Nevis – Mutual Administrative Assistance

3.12.114 The FIU can provide assistance to counterparts. This can be done with or without a MOU (section 4(2)(g) FIUA). This assistance includes

checking its own database, conducting public searches; and indicating if an account exists.

3.12.115 Presently MOU arrangements exist amongst the DPP, Police, Customs and FIU to facilitate the exchange of information at the domestic level to assist with money laundering investigations. This also enhances the exchange of information with respective counterparts subject to relevant clearance.

3.12.116 Customs also has the ability to liaise with counterparts to participate in the information sharing process. The Customs and Excise Department can also share information with their Regional and International counterparts using the Caribbean Customs Law Enforcement Council. Customs also shares information through the World Customs Organisation.

3.12.117 Saint Vincent and the Grenadines – Mutual Legal Assistance

3.12.118 Mutual legal assistance provisions are specified in the Mutual Legal Assistance in Criminal Matters No. 46 of 1993 (the MACMA) and specialized treaties on mutual legal assistance including with the USA, Assistance is also provided through FIU to FIU (see section 4(2)(e) of the Financial Investigations Unit Act (FIUA)) and Police to Police information sharing. The FIU has also adopted a standard operating procedure on foreign requests for assistance that provides the framework by which most requests are processed.

3.12.119 The MACMA allows for wide ranging mutual legal assistance within the Commonwealth and non-Commonwealth countries. The MACMA applies to “*serious offences*” which are defined as indictable offences subject to a sentence of imprisonment for a term of no less than 3 years, or where the value of the property derived or obtained from the commission of the offence is not less than \$20,000 (EC). The concept of a serious offence is somewhat at tension with the broad definition for money laundering for example (see paragraph 4.5.18).

3.12.120 Saint Vincent and the Grenadines has entered into a treaty for MLA with the USA. This treaty is not yet part of the domestic legal framework, i.e. does not have the full force of law because it is only applicable at the executive branch level. Therefore there is a gap in terms of putting MLA treaties into legal effect insofar as regulations called for under the MACMA have not been adopted to give effect to a treaty for bilateral mutual legal assistance (section 30(1) of the MACMA). Such regulations would give equal standing to requests for MLA through bilateral treaties with requests to and from Commonwealth countries.

3.12.121 The Attorney General’s office is the main conduit for mutual legal assistance requests. In most cases, the requests pertaining to money laundering and predicate offences are executed by the FIU on behalf of the government.

3.12.122 Assistance provided under the MACMA includes assisting in obtaining production orders and restraining orders, seizing property,

executing search warrants, taking of witness statements, tracing property, securing transfer of prisoners, locating or identifying persons, and assisting in serving documents. Section 20 of MACMA allows MLA to be provided for the purpose of pursuing criminal proceedings which have been or could be instituted in the requesting State in respect to an offence committed or suspected on reasonable grounds to have been committed against the laws of Saint Vincent and the Grenadines. The Proceeds of Crime Act 2013 allows for production orders³⁹² and search and seizure warrants,³⁹³ when a criminal recovery investigation,³⁹⁴ civil recovery investigation or money laundering investigation relates to criminal conduct committed outside of Saint Vincent and the Grenadines

3.12.123 More specifically, the Proceeds of Crime Act and Money Laundering (Prevention) Act 2001 provides for the enforcement of external confiscation orders at section 52. Section 150 and schedule 3 of the Proceeds of Crime Act allow for external requests and orders. Schedule 3 confirms that all requests will be made to the Attorney General who apply for restraint or confiscation on behalf of the requesting State.

3.12.124 The bases for refusing MLA requests are set out in section 19 of MACMA. These replicate other acts in the region and include that the offence is of a political character; would cause prejudice to a person on

³⁹² **Saint Vincent and the Grenadines:** Section 136(6) Proceeds of Crime Act 2013

³⁹³ **Saint Vincent and the Grenadines:** Section 138(10) Proceeds of Crime Act 2013

³⁹⁴ For definition of criminal recovery investigation and criminal conduct see paragraph 3.11.46c above

account of the person's race, sex, religion, nationality, place of origin, or political opinions; would be a military rather than ordinary criminal offence; would prejudice national security or international relations of Saint Vincent and the Grenadines; or the steps to implement the request to provide MLA would be contrary to Saint Vincent and the Grenadines law or public policy.

3.12.125 No domestic legislation prohibits the provision of assistance arising from the existence of secrecy or confidentiality laws.

3.12.126 Unlike many other Acts in the region the MLAMC authorises the Attorney General to provide MLA in the absence of dual criminality. Specifically, the MLAMC section 19(3) provides that the Attorney General has the discretion to refuse mutual legal assistance in the absence of dual criminality; however, this discretion is rarely exercised.

3.12.127 Saint Vincent and the Grenadines – Mutual Administrative Assistance

3.12.128 The FIU shares information both spontaneously and upon request in relation to both money laundering and the underlying predicate offences. Information provided by the FIU is for intelligence purposes only and is restricted to the use of the receiving FIU only unless the FIU specifically permits otherwise. Other competent authorities do not have operating practices or policies for spontaneous exchanges of information but some of the sector specific acts, (e.g. the Banking Act) do provide for the regulators to share information on a reciprocal basis

but only with respect to issues of preserving the integrity of the financial system.

3.12.129 The FIU Act section 4(2)(f) and the FIU's standard operating procedures are the basis upon which the FIU makes inquiries on behalf of foreign counterparts. The FIU searches its own databases and databases of other governmental authorities, including law enforcement. The authority of the FIU to directly access such other databases and obtain information from other governmental authorities in making inquiries is not clear in the law. The FIU relies on the access of police officers that are assigned to the FIU offices as a basis for access to law enforcement intelligence. In this regard, while inquiries are made on behalf of foreign counterparts, in the absence of a legally sound basis for the FIU accessing such information directly, such inquiries could be subject to judicial challenge if used as evidence.

3.12.130 The Royal Saint Vincent and the Grenadines Police Force regularly exchange information through Interpol and Customs provides information upon request through the Caribbean Customs Law Enforcement Council.

3.12.131 Mutual Legal Assistance from around the world re asset recovery

3.12.132 Please see the following for assistance for recovery of assets from other jurisdictions:

(a) The United Kingdom see: Obtaining Assistance from the UK in

Asset Recovery A Guide for International Partners:

http://www1.worldbank.org/finance/star_site/Arab-Forum/documents/Country-Guides/UK/UK-Guide-to-Asset-Recovery.pdf

The Home Office 2014 Guidelines:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/269208/MLA_Guidelines_2014.pdf

- (b) The British Virgin Islands see: Handbook on International Cooperation and Information Exchange:

<http://www.bvifsc.vg/Portals/2/BVIHandbookonInternationalCooperation%20-%20final%20revised%202.pdf>

- (c) France see: Guide for Asset Recovery:

http://www1.worldbank.org/finance/star_site/Arab-Forum/documents/Country-Guides/France/Guide-for-Asset-Recovery-in-France.pdf

- (d) United States see: U.S. Asset Recovery Tools & Procedures: *A Practical Guide for International Cooperation*

<http://www.state.gov/documents/organization/190690.pdf>

3.13 Extradition

3.13.1 If extradition of a suspect from another jurisdiction is an issue, this must be considered at an early stage by the Prosecution Team and a final decision taken by the DPP. There may be situations where jurisdiction could be in either State. If this is the case there should be discussion with the Prosecution Team and the other State as to where the most appropriate venue is. These discussions will consider:

- (a) Whether the prosecution can be divided into two separate cases in two or more jurisdictions;
- (b) The location and interests of the victim or victims;
- (c) The location and interests of witnesses; and
- (d) Delays

3.13.2 If extradition is pursued, consideration should be given by the Prosecutor to the need for reciprocal legislation between the two States confirming the relevant crimes are extraditable, otherwise known as dual criminality. Furthermore the Prosecutor must apply the rule of speciality, requiring the returned offender only to be tried for the offence/s he was extradited for.

3.13.3 If there is a concern that the suspect may imminently leave the other jurisdiction, consideration should be given to a provisional arrest warrant and the formal documentation sent expeditiously in accordance

with any treaty between the States as incorporated in local statute. The following should be provided by the requesting State:

- (a) Particulars of the person whose return is requested;
- (b) Particulars of the offence/s, including evidence to justify the issuance of a warrant;
- (c) A copy of a warrant issued in the requesting State for the person's arrest;
- (d) The order of the relevant authority in the requested State to proceed with the matter, which would only be issued upon a formal request for assistance made to the relevant authority in the requested State. This would usually require a written request from a diplomatic official of the requesting State followed by a telephone call.

3.13.4 The Prosecution Team should consider the following for a formal extradition request:

- (a) Determine if the person to be extradited is serving imprisonment or is charged with an offence in the requested State. The requesting State should be aware that this would prevent a person being returned to a requesting State until a sentence is served or matter disposed of,³⁹⁵

³⁹⁵ **Earl Hodge et al v Superintendent of Prisons et al** *In the High Court of Justice British Virgin Islands No.s 78-82 of 2012* paragraphs 99-118

- (b) Research if there is an extradition agreement in the form of an Act or a Treaty ratified between the requesting and requested State;³⁹⁶
- (c) Confirm whether the matter is an extraditable offence under the law in the requested State;³⁹⁷
- (d) Ensure that the offence was committed within the jurisdiction of the requested State³⁹⁸ **Somchai Liangsiriprasert v Government of the United States** [1991] 1 A.C 225, PC and **Libman v The Queen** (1985) 21 CCC (3d) 206;
- (e) Ensure that the rule of speciality applies and there are no bars to extradition such as *autrefois acquit* or *autrefois convict*;
- (f) Ensure an extradition package is complete with Authority to Proceed signed by the Attorney General (or the schedule of charges if Authority to Proceed not disclosed) and certificate of speciality. This package should be disclosed to the defence, but disclosure of the witness statements is at the discretion of the Prosecutor;

³⁹⁶ For example the the US extradition treaties with the Organisation of Eastern Caribbean States which can be found at: http://www.oas.org/juridico/mla/en/traites/en_traites-ext-usa-dma.pdf See also Article 16 of the United Nations Convention Against Transnational Crime which could apply

³⁹⁷ **Earl Hodge et al v Superintendent of Prisons et al** *In the High Court of Justice British Virgin Islands No.s 78-82 of 2012* see paragraphs 57-98

³⁹⁸ See paragraph 4.7 below for more detail on jurisdiction and **Earl Hodge et al v Superintendent of Prisons et al** paragraphs 79-98 and reference to jurisdiction on foreign registered planes re drug trafficking

- (g) If the person is convicted then proof will be needed in the form of a certificate of conviction or other duly authorised judicial document confirming conviction. Evidence will also be required that the person to be extradited was identified in court when convicted and is now unlawfully at large. Further ensure that if convicted in absence in the requesting State the appropriate procedure is used when applying for extradition consistent with any Treaty arrangements (see **Fletcher Goodluck v the Superintendent of Prisons Claim No.125 of 2011 Saint Vincent and the Grenadines High Court**);
- (h) Apply for a domestic arrest warrant in the requesting State;
- (i) Determine if a Backing of Warrants Act will apply and the requesting State has been Gazetted pursuant to the Act.

3.13.5 Prosecutors must bear in mind that the description of the conduct contained in an extradition request will usually be the only information upon which the extradition proceedings (including decisions on such matters as the question of bail) will be based.

3.13.6 It is therefore of the utmost importance that the description of the conduct alleged is framed with the greatest care. It is also an essential protection to the person whose extradition is sought.

3.13.7 Whether or not evidence in support of the request is required to be submitted under the extradition scheme in question, the prosecution case must always be put accurately and fairly.

3.13.8 If there is a variance between the case as outlined in the extradition request and that which is subsequently put in court following the accused's extradition, there is a risk that the proceedings may be stayed on the grounds of abuse of process.

3.13.9 Once extradition has been requested, the Prosecutor should continue to review the prospects of securing a conviction. This is important in all cases, but particularly where there is a significant delay between the extradition request being made and extradition. Where information comes to light after the request has been made that significantly alters the basis of the prosecution case, this should be disclosed to the foreign authorities handling the extradition request. If the further information is such as to weaken the prosecution case to the point where there is no longer a reasonable prospect of conviction, this should be disclosed to the relevant authorities in the territory to which the request is addressed and the request withdrawn as matter of urgency. If appropriate, the accused's legal representatives in the requesting State and any victims/witnesses associated with the case should also be notified too.

3.13.10 There must not be an attempt to manipulate the formal extradition procedures to secure a persons surrender. This is known as *veiled extradition* and if it were to arise a stay of proceedings due to an abuse of process is likely to result.

3.13.11 Legislation in the Eastern Caribbean

3.13.12 Antigua and Barbuda

3.13.13 The Extradition Act 1993 (No. 12 of 1993) establishes procedures for responding to an extradition request. The Extradition Act (EA) applies to countries where there exists a treaty or an extradition arrangement between a foreign country and Antigua and Barbuda. The EA defines offences that are extraditable and prescribes the circumstances under which a request for persons in Antigua and Barbuda may be extradited. Provision is also made for regulating treatment of persons returned to Antigua and Barbuda pursuant to an extradition arrangement. The Act also deals with the type of evidence required in Antigua and Barbuda to process extradition request through the courts. Finally, under the EA, certain offences are disqualified as non-extraditable offences. These offences include offences of a political character, offences triable under military law (which are not offences contrary to the general criminal law) and offences with racial or religious undertone.

3.13.14 The EA defines an, “*extradition crime*” as conduct constituting an offence punishable at a minimum with imprisonment for a term of at least twelve months. The Minister of Foreign Affairs is the competent authority to whom extradition requests should be made. Extradition requests may be made by a Commonwealth country, which includes any part or political subdivision, dependency, protectorate or protected State of a Commonwealth country. The procedure for extradition is set out in Part IV of the EA. Special extradition arrangements may be

made with a foreign State with which there are no general extradition arrangements.

3.13.15 Antigua and Barbuda has signed Extradition Treaties with the USA (see footnote 396), the United Kingdom, Canada, the English speaking Caribbean countries and most Commonwealth States. The Treaty with the USA has been ratified in the Extradition Treaty (Government of Antigua and Barbuda and the Government of the United States) Ratification Act 2000.

3.13.16 The EA does not expressly prohibit the extradition of nationals of Antigua and Barbuda. On account that Antigua and Barbuda does not make a distinction between its nationals and non-nationals of Antigua and Barbuda with regard to extradition, there is no need for special measures to ensure the expeditious and efficient prosecution of Antigua and Barbuda nationals.

3.13.17 Section 11(6) of the EA provides that where no period is specified or the application is made under special extradition arrangements, the Court of committal may fix a reasonable period for the extradition to be handled without undue delay. The complexity of the matter and whether extradition formalities have been observed are factors that determine the period in which the extradition is completed.

3.13.18 Where a person waives formal extradition proceedings, the process is considerably more expeditious. However if there is delay, a person committed may still apply for his discharge.

3.13.19 Persons cannot be extradited based only on warrants of arrests or judgments. There must be evidence upon which a Court can act and this evidence must be by way of sworn affidavit. Such evidence will necessarily include particulars of the offence of which the person is accused or was convicted and particulars sufficient to justify the issue of a warrant of arrest under the EA.

3.13.20 Barbados

3.13.21 Extradition is governed principally by the Extradition Act, Chapter 189 of the laws of Barbados. The legislation is applicable to fugitives in Barbados from the criminal law of other States and to fugitives from the criminal law of Barbados in other States. Requisitions for the surrender of a fugitive are made to the Attorney General. The Extradition Act (EA) is applicable to Commonwealth States and to foreign States in respect of which the United Kingdom Acts (known as the Extradition Acts 1870 to 1935), applied immediately before 2nd June, 1980, pursuant to an Order in Council in force and that Act as so applied extended to Barbados. The EA may also be invoked on the basis of the existence of a bi-lateral treaty. For example the Treaty with the USA signed on 28th February 1996 (which can be found at: http://www.oas.org/juridico/mla/en/traites/en_traites-ext-usa-brb.pdf.) In the absence of an extradition treaty, the Attorney General may, in certain circumstances, still issue his warrant for the surrender of a fugitive.

3.13.22 Where a magistrate:

- (a) Is presented with a foreign arrest warrant or information alleging that a person located in Barbados is accused, or has been convicted of, an extradition crime committed in the foreign country; and
- (b) Is satisfied that such conduct if committed in Barbados would justify the issue of an arrest warrant, s/he may issue a warrant to apprehend the fugitive (section 10, 46(e) EA). This sets in train the process leading to an extradition hearing to determine whether the fugitive should be extradited.

3.13.23 The EA prohibits extradition in connection with crimes of a political character. Requests made for the purpose of prosecuting or punishing on the basis of race, tribe, religion, sex, nationality or political opinions will also be refused.

3.13.24 There is no legal prohibition against the extradition of Barbadian nationals, and the authorities will therefore take the necessary procedures where such a situation arises.

3.13.25 Section 22 of the EA stipulates that extradition requests may be made by Commonwealth countries to the Attorney General. Requisitions can be forwarded by the requisite authority of the requesting State either through the consular office of Barbados located in the requesting State or by the consular office of the requesting State located in Barbados. The section also provides for the establishment of other means by arrangement with requesting States. Section 23 makes similar provision, *mutatis mutandis*, where the request emanates from a non-

Commonwealth country. There is also a broadly reciprocal provision under section 43 of the Act where Barbados seeks the extradition of a fugitive located in a Commonwealth or non-Commonwealth country.

3.13.26 Extradition will require the establishment of dual criminality. By section 4 of the Extradition Act, an “*extradition crime*” is described as an offence, “*however described*” that, if committed in Barbados,

- (a) Would be a crime described in the Schedule of the EA (includes murder and genocide, serious sexual offences, money laundering, terrorist acts and financial crimes); or
- (b) Would be a crime that would be so described were the description to contain a reference to any intent or state of mind on the part of the person committing the offence, or to any circumstance of aggravation necessary to constitute the offence, and for which the maximum penalty in that other country or State is death or imprisonment for a term of 12 months or more.

3.13.27 The description of an extradition crime suggests that the elements of the behaviour, rather than exact technical definition or categorisation under law would be the deciding factor in determining dual criminality.

3.13.28 Dominica

3.13.29 The Extradition System in Dominica is governed by the Extradition Act (EA), Chapter 12:04 of the 1990 Revised Laws of Dominica.

Requests for the apprehension, committal and surrender of fugitives are made to the Attorney General of the Commonwealth of Dominica.

3.13.30 Fugitives are persons who are accused of an extradition crime that is alleged to have to have been committed, or convicted of an extradition crime committed at a place in a Commonwealth country or foreign State or within the jurisdiction of a Commonwealth country or foreign State. An extradition crime is one for which the punishment is death or less than 12 months imprisonment.

3.13.31 The fugitive may be arrested in accordance with the Act and brought before a magistrate to determine whether or not he should be surrendered. Provision is made in the Act for appeals, on point of law only, and writs of Habeas Corpus.

3.13.32 Upon the other order of the magistrate the fugitive is surrendered to the requesting authority.

3.13.33 The Extradition Act applies to countries within the Commonwealth and Non-Commonwealth Countries with extradition treaties with or which extend to Dominica. For example the extradition Treaty signed with the USA on 10th October 1996 (see footnote 396 above). In addition, where, in accordance with Act, The Minister of External Affairs orders the Act to be applicable to a certain country with whom there is no treaty, the Act will apply to that country (Sections 40 and 41 EA). However pursuant to section 41(3) EA a person cannot be extradited for any offence committed before any ad hoc arrangement was agreed. In this situation consideration may have to be given to the use of Article

16(4) of the United Nations Convention Against Transnational Crime, which confirms the Convention can be used as the basis for extradition between non-treaty States.

3.13.34 In the Commonwealth of Dominica the laws do not specifically prohibit the extradition of its own nationals.

3.13.35 In relation to money laundering where a national is not extradited, The Commonwealth of Dominica, has the power under section 47 of the Money Laundering (Prevention) Act, 2011, to submit the case without undue delay to its competent authorities for the purpose of prosecution. This section would facilitate the prosecution of persons that are not extradited, once jurisdiction is established.

3.13.36 Grenada

3.13.37 The relevant law with respect to extradition is the Extradition Act 1998 (EA), which sets out the procedure for extradition in Part IV of the Act. Grenada also has bilateral treaties for example with the USA signed on 30th May 1996 (see footnote 396 above).

3.13.38 Extradition requests by foreign States are made through diplomatic channels and cannot be pursued unless authority to proceed is given by Order of the Minister of Foreign Affairs. A warrant for the arrest of a person in Grenada will only be issued by a magistrate or in limited circumstances a Justice of the Peace if he receives information from Interpol or any other credible source that the person subject to the request is or is believed to be in or on his way to Grenada. Requests

are then routed to the Office of the DPP through the Attorney General's Chambers. Quasi-criminal proceedings (committal hearings) are then conducted by the DPP in the Magistrate's Court to determine whether the person should be surrendered to the foreign State.

3.13.39 There are however, restrictions on the surrendering, committal or custody of persons if it appears that the extradition is in connection with offences of a political character; or on the basis of race, religion, nationality, political opinion, sex or status (section 8 EA). The laws in Grenada are not subject to nationality restrictions.

3.13.40 Under the EA, dual criminality is required. Section 4 defines an "*extraditable offence*" as follows (in part):

- (a) Conduct in the territory of a foreign State or a Commonwealth country which, if it occurred in Grenada, would constitute an offence which, on indictment, is punishable with imprisonment for a term of five years, or any greater punishment, and which, however described in the laws of the foreign State or Commonwealth country, is so punishable under those laws; or
- (b) An extra-territorial offence against laws of a foreign State or a Commonwealth country which, on indictment, is punishable under those laws with imprisonment for a term of five years, or any greater punishment.

3.13.41 Although dual criminality is required for extradition technical differences between the laws in the requesting State and laws in the

requested State would not pose any impediment to extradition since the basis for extradition would be the underlying criminal conduct

3.13.42 Saint Christopher and Nevis

3.13.43 Saint Christopher and Nevis follow the provisions of the 1870 United Kingdom legislation on Extradition as far as it relates to non-Commonwealth countries. The gist of that legislation is that it operates on the basis of an extradition treaty or some similar form of treaty in force between Saint Christopher and Nevis and the requesting State. It must be established that extradition is granted on the basis that the person sought will not be tried and punished in the requesting State for previous offences other than those for which his return is requested (rule of specialty).

3.13.44 Saint Christopher and Nevis does have an Extradition treaty with the United States of America (see footnote 396 above), which was given legislative effect by the Saint Christopher and Nevis and the United States of America Extradition Treaty Act of 2001. This extradition treaty concluded with the USA has been tested and affirmed in the case of **Noel Heath and Glenroy Matthew v Government of the United States of America** *Civil Appeal No.18 of 2003*

3.13.45 The Fugitive Offenders Act No. 1 of 1969 (FOA) provides for the return of persons accused of certain specified offences to Commonwealth countries.

3.13.46 The FOA provides for the extradition of persons to the United Kingdom or its dependencies where a person has been accused or convicted of an offence which is punishable by one years imprisonment or more and that offence would have constituted an offence if it was committed in Saint Christopher and Nevis. This means if money laundering is an offence in the United Kingdom or any of its dependencies, once it attracts a minimum penalty of one-year imprisonment then it would be an extraditable offence.

3.13.47 On the other hand a more restrictive standard is applied to designated Commonwealth countries or the Republic of Ireland. For those countries, an extraditable offence is one which falls within the schedule of offences listed in the FOA and which carries a minimum penalty of one-year imprisonment. The designated countries are listed in the Second Schedule to the FOA. Additionally, the recent amendment to the FOA (FOA (Amendment) Act, 2008), money laundering is one of the offences listed in the first schedule as an extraditable offence.

3.13.48 Under the FOA where a person is accused or convicted of certain scheduled offences (an extradition offence) or in certain circumstances, an offence which is punishable by a minimum penalty of one-year imprisonment, then that person is liable to be extradited to the requesting State.

3.13.49 There is no restriction on a national of Saint Christopher and Nevis being extradited to another country once all the legal requirements for extradition have been satisfied.

3.13.50 There is no need for special cooperation on procedural and evidentiary aspects because Saint Christopher and Nevis extradites its nationals once they have been charged or convicted for a crime in a country with which they have a reciprocal extradition arrangement.

3.13.51 There are systems in place to process extradition requests expeditiously and the requesting State should make the necessary inquiries at the earliest opportunity.

3.13.52 Extradition requests are sent directly from the Ministry of Foreign Affairs to the Central Authority and from there to the DPP's office. Persons are extraditable on the basis of the warrant and the judgment of the magistrate. It should be pointed out, however, that no extradition proceedings can commence without an Order to proceed from the Governor General and even after a committal order is issued by the magistrate, the final decision still rests with the Governor General as to whether or not he will issue a warrant for that person to be returned to the requesting State. A request for extradition is normally forwarded to the Governor General with the supporting evidence. He then decides whether to issue an Order to proceed, which is then forwarded to a magistrate.

3.13.53 If on the other hand a magistrate issues an arrest warrant before receiving that Order from the Governor General, that magistrate must forward to the Governor General notice of the proceedings and copies of the warrant and any information or evidence before the Court in order to satisfy him to issue the order to proceed. The magistrate who

has conduct of the matter will then examine the evidence to determine whether it is enough to issue the order for committal.

3.13.54 The evidence normally consists of duly authenticated documents from the requesting country, which contains evidence given under oath in the requesting State or evidence of the fugitive's conviction. If the Court is satisfied with the nature of the evidence then a warrant of committal is issued. If there is an appeal, after that appeal is exhausted then the Governor General may issue a warrant for the fugitive to be extradited. After the magistrate issues a committal order, the fugitive cannot be extradited until fifteen days after the order was issued.

3.13.55 If a person consents to or waives extradition then extradition may occur without having to observe all the necessary formalities.

3.13.56 Saint Lucia

3.13.57 The Extradition Act Cap 2.10 (EA) provides the relevant law and procedure for extradition. When Saint Lucia is the requesting state the Attorney General is the Government official empowered to make the requisition (section 42 EA). Requests for extradition from Saint Lucia are made to the Attorney General through diplomatic channels or through any other means approved by the Attorney General. The Attorney General will then apply to a magistrate for a warrant to apprehend the fugitive (section 9 EA). This warrant can be executed by any police officer (section 10 EA). When apprehended the fugitive may be detained until committal proceedings can be held (section 13(1) EA). After being apprehended the fugitive has to be committed for

surrender (section 12(2) EA) by a magistrate. The proceedings are conducted as if the fugitive had been brought before the magistrate and charged with an offence committed in Saint Lucia that is triable on indictment (section 12(3) EA). In order to show the truth of a charge of an extradition crime or the fact of a conviction for an extradition crime, evidence on oath or affirmation warrants, depositions taken outside Saint Lucia, certificates of conviction or judicial documents stating the fact of conviction in a Commonwealth country or foreign State, or copies thereof will be admissible (section 14 EA). Care should be taken to ensure that all evidence is duly authenticated in the manner prescribed in section 14 of the Act. Albeit please note that further authentication is not required in relation to request from the US. Where the magistrate decides to commit for surrender the fugitive is committed to prison until he / she can be surrendered to the requesting authorities (section 16(2) EA). Dual criminality is always required, there are no exceptions (section 3 EA - see the definition of "Extradition Crime"). The incoming request will have to be in English. The extraditions are automatically refused where the crime is political in nature. (section 6 EA). The Attorney General is given a discretion in determining whether to permit extradition where the death penalty is potential sentence (section 8 EA - provided the relevant crime is also punishable by the death penalty in Saint Lucia). If a fugitive is charged with a matter this will have to be disposed of before extradition (sections 25(2)(b) and 26 EA). Equally a sentence will have to be served before a fugitive is extradited (sections 25(2)(a) and 26 EA).

3.13.58 There is also another system of extradition in Saint Lucia using the Backing of Warrants Act. Applying this Act, when a warrant issued by the requesting country is not available in Saint Lucia, the Attorney General can apply to a magistrate for a provisional arrest warrant to apprehend the fugitive/offender (section 3 BWA). When the warrant from the requesting country is available in Saint Lucia the Attorney General will apply to the magistrate for endorsement of that warrant (section 4 BWA). For an application for a provisional arrest, a magistrate is told by affidavit:

- (a) That an original warrant for the arrest of the person has been issued in the requesting country but that the warrant is not available in Saint Lucia;
- (b) That the person named in the original warrant is, or is suspected of being, in or on his or her way to Saint Lucia;
- (c) The offence the suspected person is charged with, the circumstances surrounding the offence and the means of identifying the person named in the original warrant; and
- (d) The magistrate is satisfied that it is reasonable in the circumstances to issue a provisional warrant.

3.13.59 At an application to endorse a warrant the magistrate is told by affidavit:

- (a) That the person named in the original warrant is, or is suspected of being, in or on his or her way to Saint Lucia; and

(b) The offence the person is charged with, the circumstances surrounding the offence and the means of identifying the person named in the original warrant.

3.13.60 After being apprehended the fugitive / offender will be committed to custody to await surrender to the requesting country (section 8(1)(a)) or into custody awaiting surrender (section 8(1)(b)). The magistrate only has to be satisfied for the person's surrender that they are the person sought on the provisional arrest or endorsed warrant (section 8(2)) (for evidential requirements of warrant issued in requesting country see **Ron Williams v Director of Bordelais Prison SLUHCV2012/013**).

3.13.61 When a person is committed to custody the magistrate shall inform the person that they have a right to apply to the High Court for a writ of habeas corpus and shall not be returned to the requesting country whilst any such application is pending (section 9).

3.13.62 A person can agree by consent to be returned to the requesting country (section 10).

3.13.63 After the magistrate determines that a person should be surrendered the person (section 11(1)) and the requesting country (section 11(2)) will have fifteen (15) days to have the decision reviewed in the High Court (section 11(3)). The High Court will only have the same material before it that the Magistrates' Court reviewed and will either confirm or quash the order of the magistrate and order that the person be released or surrendered (section 11(5)).

3.13.64 If a person is serving a custodial sentence the decision to return to the requesting State shall be determined by the Attorney General (section 10(5)).

3.13.65 When a person is not surrendered within two months after the date the surrender warrant was issued, if the person is serving a custodial sentence or is on bail the date when the person was released or discharged from the recognisance, that person may apply to a magistrate to be released from custody (section 15(1)) . If the magistrate is satisfied that the Attorney General has been informed of the application and there is no reasonable cause for delay that person shall be released from custody (section 15(2)). Reasonable cause for delay would include, a danger to the person's life if surrendered (section 15(3)(a)), there is no suitable means of transport and all reasonable steps have been taken to obtain suitable transport (section 15(3)(b)) or there is a delay by Saint Lucia in responding to a request for permission to transport the person and all reasonable steps are taken to obtain the permission (section 15(3)(c)).

3.13.66 This is obviously a far quicker system of extradition and allows for speed in returning the person to the requesting country for trial or sentence.

3.13.67 An Extradition Treaty has also been concluded between Saint Lucia and the United States of America, signed as a part of a collective treaty with other Caribbean States, on 18th April 1996 (see footnote 396 above).

3.13.68 Saint Vincent and the Grenadines

3.13.69 Extradition is governed by the Fugitive Offenders Act, Cap. 126.

(FOA) which permits persons from Saint Vincent and the Grenadines to be extradited for offences to all Commonwealth countries, the Republic of Ireland, and the other 58 countries listed in the schedule to the Act. Other countries have been subsequently added to the list including every foreign country that is a party to a multinational international convention to which Saint Vincent and the Grenadines is a party (in respect of offences to which such convention relates). Also an Extradition Treaty was concluded between Saint Vincent and the Grenadines and the USA, as part of a collective treaty and signed by six other Caribbean countries, on 15th August 1996 (see footnote 396 above). This treaty governs the extradition of persons between the two States. As provided by section 4 (3) of the FOA:

“Where an extradition treaty concluded between Saint Vincent and the Grenadines and a foreign country comes into effect after the commencement of this Act [1989], the provisions of this Act shall apply to that foreign country subject to such conditions, exceptions, limitations and modifications, if any, as are necessary to give effect to that treaty or to the provisions thereof relating to fugitive offenders.”

3.13.70 The treaty describes an extraditable offence as one punishable under the laws of both contracting States by deprivation of liberty for a period of more than one year, or by a more severe penalty. Use of such a “*dual criminality*” clause rather than a list of offences covered by the

Treaty obviate the need to renegotiate or supplement the Treaty as additional offences become punishable under the laws of both contracting States.

3.13.71 The provisions of section 4(3) of the FOA, with respect to the extradition treaty concluded with the USA has been tested and affirmed in **Cecil Boatwain v The Superintendent of Prisons and the Attorney General** *Civil Appeal No.6 of 2006*.

3.13.72 Under the FOA, the Governor General is the authority to whom extradition requests are made, and who signs the order granting such request.

3.3.73 Under the FOA, dual criminality is based on conduct rather than on names or categories of offences. The competent authority, i.e. the Attorney General, has the discretion to reject a request for extradition or other mutual assistance in the absence of dual criminality. However, as this is discretionary, this provision has been rarely invoked.

3.13.74 Pursuant to section 20 of the FOA Saint Vincent and the Grenadines may extradite its own nationals. Specifically, this section provides that:

“The Governor-General shall not refuse the return of a person who is a citizen of, or a permanent resident in, Saint Vincent and the Grenadines solely on the ground that the person is not also a citizen of the country making the request.”

3.13.75 The FOA provides explicitly and specifically for persons to be arrested, detained and brought before the court on the strength of a provisional warrant. While ordinarily the method of proceeding is by way of a formal extradition request, which would necessitate the issuing of an “*Authority to Proceed*” under the hand of the Governor General, proceedings may commence on the basis of a provisional warrant only, to be followed of course in time by the formal documentation.

3.13.76 Section 11 of the FOA provides, as the side note indicates, for arrest of persons for the purpose of committal. Subsection (1)(b) states that the warrant for the arrest of that person may be issued:

“Without an authority to proceed, by a magistrate in any part of Saint Vincent and the Grenadines upon information that the person is believed to be in, or on his way to Saint Vincent and the Grenadines, and any warrant issued by virtue of paragraph (b) in this Act referred to as a provisional warrant.”

3.13.77 Section 167 of the Proceeds of Crime Act 2013 specifies that money-laundering offences are extraditable offences under the FOA as follows:

“For the purposes of the Fugitive Offenders Act an offence under this Act or the Drug Trafficking Offences Act is an extraditable offence”

3.13.78 Article 3 of the Extradition treaty between Saint Vincent and the Grenadines and the USA provides that extradition shall not be refused

on the ground that the person sought is a national of the requested State. Neither Party, in other words, may invoke nationality as a basis for denying an extradition.

3.13.79 Section 5 of the FOA states:

“Subject to the provisions of this Act, a person found in Saint Vincent and the Grenadines who is accused of a relevant offence in any country being – (a) a Commonwealth country; (b) the republic of Ireland; or (c) a foreign country to which this Act applies, or who is alleged to be unlawfully at large after conviction of such an offence in any such country, may be arrested and returned to that country as provided by this Act.”

3.13.80 Section 20 of the FOA states

“The Governor General shall not refuse the turn of a person who is a citizen of, or a permanent resident in, Saint Vincent and the Grenadines solely on the ground that the person is not a citizen of the country making the request.”

3.13.81 The procedure for extradition according to the FOA, section 10 is:

“(1) Subject to the provisions of this Act relating to provisional warrants, a person shall not be dealt with under this act except in pursuance of an order of the Governor General Issued in pursuance of a request made to him by or on behalf of the appropriate authority in the requesting country in which the person to be returned is accused or

was convicted. (2) There shall be furnished with any request made for the purposes of this section on behalf of any country – (a) in the case of a person accused of an offence, a warrant for his arrest issued in that country; (b) in the case of a person unlawfully at large after conviction of an offence, a certificate of the conviction and sentence in that country, and a statement of the amount, if any, of that sentence which has been served, together, in each case, with particulars of the person whose return is requested and of the facts upon which, and the law under which, he is accused or was convicted, and evidence sufficient to justify the issue of a warrant for his arrest... (3) On receipt of such a request the Governor General may issue an authority to proceed unless it appears to him that an order for the return of the person concerned could nor lawfully be made, or would not in fact be made, in accordance with the provisions of this Act.”

- 3.13.82 A person can be extradited based on a warrant of arrest if sufficient evidence is provided by the requesting State to justify the extradition. The power of a committal magistrate to commit a person to custody pursuant to section 12(4)(a) of the Act to await their return is dependent upon the magistrate being satisfied of three distinct factors (**Dexter Chance v the Superintendent of Prisons SVGHCVAP2009/018**; **Knowles Jr v United States of America & Anor [2006] UK PC 38 (The Bahamas)** and **Gibson v United States of America [2007] UK PC 52**):
- (a) The offence to which the authority to proceed relates is a relevant offence;
 - (b) The evidence against the accused person would be sufficient to

warrant his trial for the offence if it had been committed within the court's jurisdiction; and

- (c) The person's committal is not prohibited by other provisions of the Act.

3.13.83 Section 4(5) of the FOA authorises the Governor General to *inter alia* modify, make exception or limit the requirements of the Act. This would allow for modifying orders to expedite extradition.

3.13.84 Therefore according to the Extradition Treaty between Saint Vincent and the Grenadines and the USA, all requests for extradition must be submitted through the diplomatic channels and be supported by evidence as to the identity and possible location of the person sought. Additionally, the requesting State must provide information relating to the offence and its procedural history. The provisions of law describing the essential elements of the offence for which extradition is requested and the punishment for the offence must also be provided. There must be a precise description of the place or person to be searched and of the articles to be seized; a description of the manner in which any testimony or statement is to be taken and recorded; a list of the questions to be asked of the witness; a description of any particular procedure to be followed in executing the request; information as to the allowances and expenses to which a person asked to appear in a requesting State will be entitled and any other information that may be brought to the attention of the requested State to facilitate its execution of the request.

3.13.85 Alie Baptiste v The Commissioner of Prisons GDAHCV2009/0470

3.13.86 In this recent case the High Court in Grenada considered extradition to the United Kingdom for a cocaine conspiracy. The Judgement of Price Findlay J covers a number of areas of argument and it is worth setting out for all practitioners as a useful guide on the tests to be applied for a writ of habeas corpus and an application for a declaration that a committal for extradition is null and void.

3.13.87 Committal

3.13.88 The task of the Magistrate remains to determine whether sufficient evidence exists as would in a domestic case justify a committal for trial; he does not have to approach the matter as he would approach an actual trial in Magistrate's Court.

3.13.89 As Justice Belle stated in **Blackman & Ors v Commissioner of Prisons**:

"The issue is whether the facts disclosed in the case presented by the requesting State amount to conduct if committed in Grenada would have been considered a conspiracy to traffic the alleged drug." (para. 35)

3.13.90 Sufficiency of the Evidence

3.13.91 Whether there is sufficient evidence to establish the alleged conspiracy beyond a reasonable doubt is not a matter for the magistrate but is a matter for the substantive trial (para 43).

3.13.92 A Court would only be justified in interfering if there was no evidence to support the committal or because no reasonable magistrate would commit the applicant on that evidence or because there was an error of law by the magistrate (para. 44).

3.13.93 Offences - Are They Extraditable?

3.13.94 Section 4 of the Extradition Act (of Grenada) creates an extraterritorial jurisdiction, since the definition of an extraterritorial offence is one committed outside the territory of any State but over which that State would have jurisdiction to try the offender. The reason generally given is that the extraterritorial act constituting the alleged offence has an effect or impact in the requesting State (para. 48).³⁹⁹

3.13.95 Essential Ingredients Missing

3.13.96 It was argued that the applicant didn't know the location, dates and specific law he had contravened. It was held that the applicant didn't require the type of specificity argued and it is sufficient that he is aware in general terms the charge or charges which he will face upon extradition, and that he be made aware of the equivalent local charge (para 53).

³⁹⁹ **Earl Hodge et al v Superintendent of Prisons et al** *In the High Court of Justice British Virgin Islands No.s 78-82 of 2012* see paragraphs 57-98 re insufficient nexus to the US re a drug trafficking conspiracy

3.13.97 Abuse – Delay

3.13.98 The question which has to be asked and answered is: Whether in all the surrounding circumstances has there been such inordinate delay as would entitle the Court to put a stop to these proceedings (para. 69).

3.13.99 Failure to provide a certificate

3.13.100 Failure to provide a certificate pursuant to section 50 of the Drug Abuse (Prevention and Control) Act is not fatal to the proceedings. The applicant on the facts was well aware of the "*corresponding law*" under which he will be charged in the United Kingdom. It is clearly set out in the Authority to Proceed, and is clearly referred to in the evidence contained in the deposition and therefore this submission failed.

Evidence returns from the email provider that "Agro" registered his account in another country as Mr Purple. The Prosecution Team will need to discuss the evidence against Mr Purple applying the Code for Prosecutors. If there is a reasonable prospect of conviction the Prosecutor should discuss with the DPP extradition of Mr Purple. If it is decided that the evidential and public interest stages of the Code for Prosecutors are satisfied the Prosecutor should apply for a warrant for Mr Purples arrest from the Magistrates' Court. This will then enable the receiving State to commence extradition proceedings

once notification is received of this domestic arrest warrant. The Prosecutor should also review any powers in the receiving country enabling a provisional arrest, to avoid Mr Purple leaving the jurisdiction if he is informed of the domestic arrest warrant. Alternatively if the evidential stage of the Code for Prosecutors is not satisfied the Prosecution Team may decide that further investigation is required and a letter of request (MLAT) should be sent to the other country to secure this evidence. However any letter of request should be marked as confidential to ensure that the investigation is not divulged, alerting Mr Purple.

3.13.100 Backing of Warrants in other Jurisdictions

3.13.101 Reference was made at paragraph 3.13.58 to the Backing of Warrants Act in Saint Lucia. Other jurisdictions⁴⁰⁰ are now considering this as a model to develop a second tier of extradition that is quicker, whilst maintaining the rights of the fugitive/offender. Once enacted the Bills can also be used where there is no bi-lateral Treaty or Agreement and for application of the CARICOM Arrest Warrant Treaty.⁴⁰¹ The

⁴⁰⁰ Bills being reviewed in Dominica, Saint Vincent and the Grenadines and Grenada

⁴⁰¹ See: http://www.oas.org/juridico/MLA/en/Treaties/en_CARICOM_Arrest_Warrant_Treaty_2008.pdf - To date signed by Antigua and Barbuda, Saint Christopher and Nevis, Saint Lucia, Suriname and Trinidad and Tobago (also ratified)

application of this legislation is slightly different to that in Saint Lucia and therefore a full explanation of the procedure is provided and a process map provided below.

3.13.102 Importantly, the Bill outlines the application of the proposed Act, so when it is in conflict with the States's Extradition Act the provisions of the Backing of Warrants Act will take precedence.

3.13.103 A State can become a "*requesting country*" when designated as such by Order and published in the Gazette.

3.13.104 There are two ways that a fugitive/offender may be arrested following the issue of an arrest warrant in a requesting country:

- (a) Provisional arrest warrant where the original warrant is unavailable in the extraditing country; or
- (b) Endorsement of a warrant issued in the requesting country.

3.13.105 Provisional Arrest Warrant

3.13.106 A magistrate may issue a provisional arrest warrant when satisfied that:

- (a) On an application made by affidavit (see draft application in Annex Z5) or sworn evidence on behalf of a requesting country that:
 - A warrant has been issued in the requesting country but is not available in the extraditing country;

- The person named in the warrant is in the extraditing country, or is on his or her way to the extraditing country;
- The offence the suspected person is accused of; charged with, failed to appear in court or sentenced to, must be a “relevant offence” i.e. The offence however described, if committed in the extraditing country would be a criminal offence, for which the maximum penalty in the requesting country is imprisonment for a term of 12 months or more ;
- The circumstances surrounding the offence; and
- The means of identifying the person named in the original warrant. The means of identification will be very important as the magistrate will need to ensure that the correct person is arrested. It is advised that fingerprints and a photograph are provided for any application. These can then be used as a means of identifying the arrested person when taken to a police station and fingerprints taken from them and compared with those sent by the requesting country.

(b) There is such evidence as would justify the issue of a warrant for the arrest of the person accused of committing a corresponding offence in the State.

3.13.107 Endorsed Arrest Warrant

3.13.108 A magistrate can endorse a warrant where the original is available in the extraditing country and is satisfied on application by affidavit see draft application in Annex Z5) or evidence on oath:

- (a) That the person named in the original warrant is, or is suspected of being, in or on his or her way to the extraditing country;
- (b) The relevant offence the suspected person is accused of; charged with, failed to appear in court or sentenced to, must be a “relevant offence”;
- (c) The means of identifying the person named in the original warrant; and

3.13.109 Arrest on a Provisional or Endorsed Warrant

3.13.110 After being apprehended the authority representing the requesting country must satisfy the magistrate that the person arrested on the provisional or endorsed warrant is the person named in the original warrant. The Bill sets out that this may be through determination by the magistrate, on the balance of probabilities, that characteristics of the person before the court are similar to those provided in a photograph, fingerprint or other description of the person

3.13.111 The person will either be remanded into custody or granted bail until the surrender proceedings. Suggested conditions of bail are a surety or security and surrender of all travel documents and passport.

3.3.112 The surrender proceedings can either then take place immediately or they are adjourned for up to 28 days where more information is required or it is in the interests of justice (i.e. for the instruction of an Attorney by the fugitive/offender)

3.3.113 Surrender Proceedings

3.3.114 When a person is produced to the magistrate for the surrender proceedings they will be asked if they consent. If they do a surrender warrant will be issued and the person either remanded in custody or granted bail. The Act also prescribes that any consent must be in writing and legal advice must have been provided.

3.13.115 If the person to be returned doesn't consent then magistrate must be satisfied that

- (a) They have been arrested on an endorsed warrant; or
- (b) Arrested on a provisional arrest warrant and the original has now been received.
- (c) The request for surrender is not infact made for the purpose of prosecuting or punishing a person on account of his or her race, tribe, religion, sex, nationality or political opinions, notwithstanding that the request purports to be made on account of a criminal offence; and
- (d) Upon being surrendered:
 - the person would not be prejudiced at his or her trial or punished, detained or restricted in his or her personal liberty by reason of his or her race, tribe, religion, sex, nationality or political opinions.

- the relevant offence for which surrender is sought is not of a trivial nature;
- where the relevant offence is one for which the person is accused but not convicted, the accusation was made in good faith and in the interests of justice;
- an unreasonably lengthy period has not lapsed since the relevant offence was committed; or
- it would be unjust, oppressive or too severe a punishment to surrender the person.

3.13.116 Review

3.13.117 After the magistrate determines that a person should be surrendered the person, or where surrender refused, the requesting country, will have 15 days to have the decision reviewed in the High Court. Where the magistrate refuses to surrender, the requesting country can apply to the magistrate for the person to be further remanded pending any review, when within one hour the requesting country serves written notice on the magistrate and person of an intention to review the refusal

3.13.118 The High Court can consider any points of law or fact and will either confirm or quash the surrender warrant or order that the person be released or surrendered.

3.13.119 Appeal

3.13.120 An appeal does remain to the Court of Appeal under the Bill. Oral notice must either be given when the Court of Appeal pronounces its

decision or within four days of the decision. Again bail can be applied for once an appeal is filed.

3.13.121 Surrender Endorsement by the Attorney General

3.13.122 If a person is serving a custodial sentence or is charged with an offence in the extraditing country and ordered by the magistrate to be surrendered (including a temporary warrant), the decision to return to the requesting country shall be determined by the Attorney General within 30 days. The Attorney General must take into account the following when determining if it would be unjust or oppressive to return the person:

- (a) Whether the offence for which surrender is sought is of a political or trivial nature;
- (b) If the offence is one for which the person is accused but not convicted, the accusation was not made in good faith and in the interests of justice;
- (c) An unreasonably lengthy period has lapsed since the offence was committed; or
- (d) It would be unjust, oppressive or too severe a punishment to surrender the person.

3.13.123 Further the Attorney General will consider, but is not limited to, the following:

- (a) The seriousness of the relevant offence for which surrender is sought;
- (b) The severity of the sentence the person could receive in the requesting country;
- (c) The length of any custodial sentence still to be served in the extraditing country;
- (d) If the interests of the extraditing country are served by surrender to the requesting country where an offence has been charged in the extraditing country –
 - By considering the rights of the victim for the offence charged in the State;
 - Consulting the Director of Public Prosecutions on the impact of proceedings in the State if surrender was ordered

3.13.124 Temporary Surrender Warrant

3.13.125 When a magistrate refers a matter to the Attorney General when a person is either serving a custodial sentence or is charged with an offence in the extraditing country, they may issue a temporary surrender warrant. When determining if a temporary surrender warrant is appropriate the magistrate must be satisfied that:

- (a) The requesting country has given adequate undertaking that the person will be -

- Given a trial or re-trial with a reasonable time in the requesting country;
 - Returned to the extraditing country after the trial or re-trial and sentence; and
- (b) Adequate provision has been made for the travel of the person to the requesting country and for his return to the extraditing country.

3.13.126 Execution of Surrender Warrant

3.13.127 When a person is not surrendered within one month after the date the surrender warrant or temporary surrender was issued, that person may apply to a magistrate to be released from custody. The applicant will be released from custody if the magistrate is satisfied that:

- (a) The authority representing the requesting country has been informed of the application; and
- (b) There is no reasonable cause for delay

3.13.128 Reasonable cause for delay would include, but is not limited to:

- (a) A danger to the person's life if surrendered; or
- (b) There is no suitable means of transport and all reasonable steps have been taken to obtain suitable transport

3.13.129 Of course this only allows for release from custody and the surrender or temporary surrender warrant will still be extant until any issues to extradite are resolved.

3.13.130 Speciality

3.13.131 Importantly a person who has been returned to a requesting country can only be tried for the offences the surrender or temporary surrender warrant was issued for, unless:

- (a) He consents to such prosecution or sentence;
- (b) He is being prosecuted or sentenced for a lesser offence disclosed by the facts upon which the request for surrender had been made;
- (c) The Attorney General in the extraditing country consents to his being so dealt with for another applicable offence; or
- (d) The person accused having had an opportunity to leave the territory of the requesting country to which he has been surrendered has not done so within 45 days of his final discharge, or has returned to that territory after leaving it

3.13.132 Further the Bill specifically requires the extraditing country to provide consent if the person is to be extradited to another (third) State and the proceedings or sentence are yet to be concluded.

3.13.133 Standard of Proof

3.13.134 The Standard of proof for all matters will be the balance of probabilities. This is obviously a lower standard than for criminal proceedings. However any investigator obtaining information to determine the identity of the person should be aware that this will be an important decision for the magistrate. Therefore if there is any evidence available in the form of a transcript where the person was identified if convicted in the requesting country and absconded or any other means (i.e. photographs, fingerprints or DNA) this should be obtained as quickly as possible.

3.13.135 In view of the contents of the Bill that would allow for the release from custody for delay it is imperative that the means for identifying the correct person have been determined before arrest. The quickest way would seem to be by way of fingerprints. This will mean that evidence will have to be given of how any comparison has been completed so the magistrate can decide on the balance of probabilities that the correct person has been arrested on a provisional or endorsed warrant.

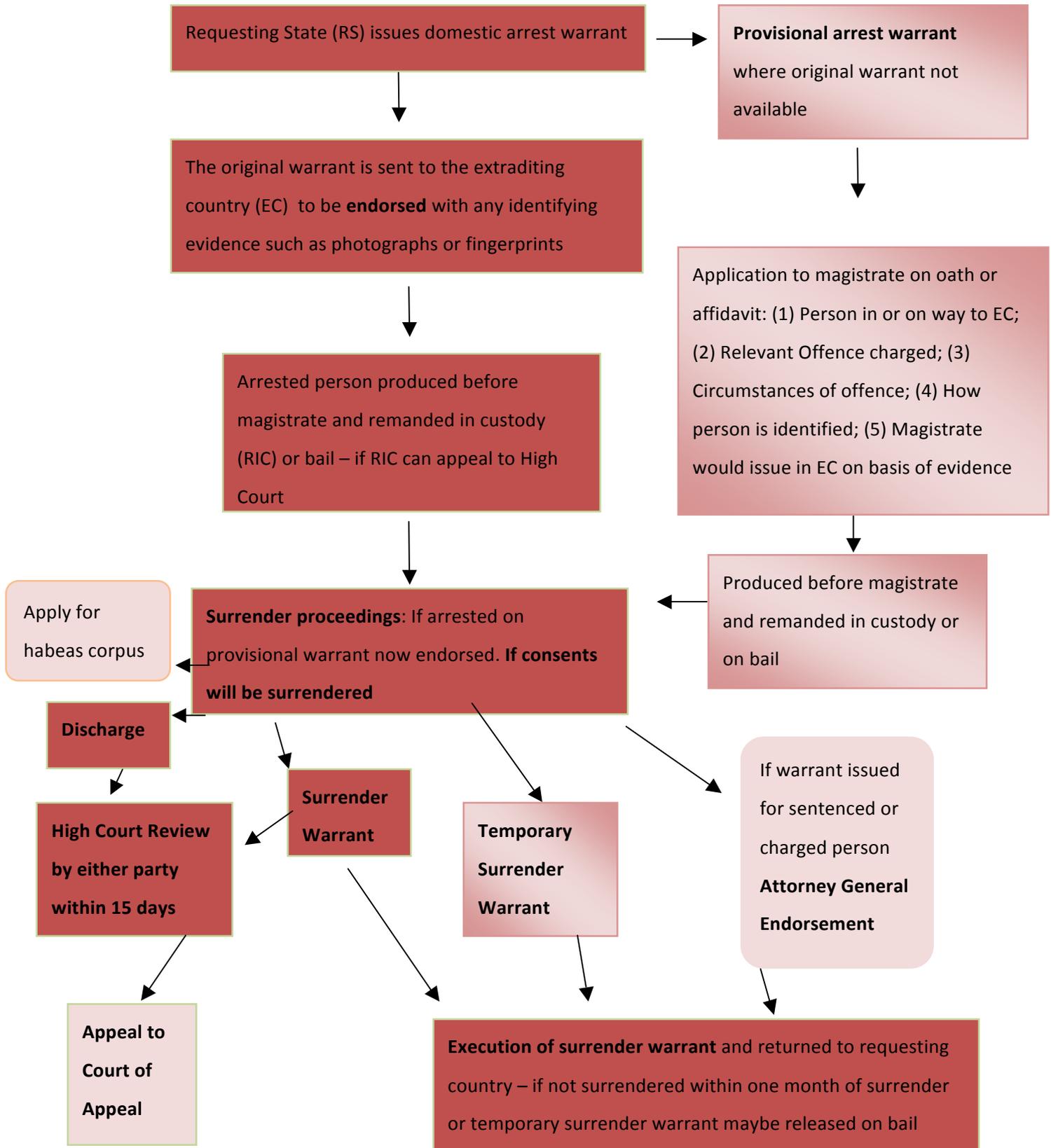
3.13.136 Evidence

3.13.137 Evidence will be admissible in proceedings under the Bill where it would be admissible in the requesting country and was gathered according to their law. There should be limited use for this provision as this new law tries to reduce the time taken for an extradition by removing the requirement to consider evidence at the surrender stage.

3.13.138 Importantly, where a warrant is issued in the requesting country, provision is made in the proposed legislation that there is no need to prove the authenticity of the signature. This should avoid the authentication issues that arose in Saint Lucia in **Ron Williams v Director of Bordelais Prison SLUHCV2012/013** (see paragraph 3.13.60 above). However if a warrant or document needs to be translated then there will need to be a certification from the issuing authority to confirm its accuracy.

3.13.139 The objective if the 2008 CARICOM Arrests Warrants Treaty is to establish, a system of arrest and surrender of requested persons for the purposes of conducting a criminal prosecution for an applicable offence; or executing a custodial sentence where the requested persons have fled from justice after being sentenced. However the Treaty doesn't provide a mechanism to determine how a judicial authority will decide how to return a requested person to a State after a warrant is issued. This legislation once enacted can be used to execute such warrants. Equally the legislation can apply to extradition to those territories outside of CARICOM where the Treaty wouldn't apply, such as Martinique and Guadeloupe.

Backing of Warrants Bill Process Map



3.14 Lawfully Audacious

3.14.1 There may be decisions where the Prosecution Team will have to carefully consider the correct approach and admissibility of evidence. A Prosecutor can be lawfully audacious as long as applying the fundamental rights of the constitution, including the right to a fair trial. Therefore when considering such difficult decisions assess the reasonableness, necessity and proportionality of the investigation method and object to be achieved (see paragraph 3.4.7 above). If the Prosecutor is satisfied after discussion with the DPP and Lead Investigator that the action taken is justified on these principles, then evidence obtained should be presented as part of the prosecution case. The Prosecutor may want to consider other evidence to support the prosecution case in order not to rely upon this one section of evidence alone, so if it is ruled inadmissible, there remains a reasonable prospect of conviction.

3.14.2 Using covert investigation methods can require difficult decisions.

Undercover operations are accepted as the only way in which certain criminal activity can be readily detected; at the same time judges have been careful to give themselves the power to condemn the conduct of the Investigator when it is so seriously improper as to bring the administration of justice into disrepute. The House of Lords decision of **R v Loosely** [2001] 1 WLR 2060 gives reasonable guidance, to those planning such operations.

3.14.3 The following are some examples of covert methods where the evidence has been deemed admissible:

- (a) Small controlled purchases of forbidden items are certainly permitted, provided officers behave like the ordinary member of the public who would purchase such forbidden items (drugs) (see Lord Hoffman in **Loosely**, at paragraph 55 and **East Riding of Yorkshire Council v Dearlove** [2012] EWHC 278 (Admin));
- (b) Large drug purchases are permitted, provided 'the proceedings as a whole were fair' (**R v Latif** [1996] 1 WLR 104);
- (c) Pretending to be an assassin for hire is permitted, provided the customer makes the initial running and the evidence gathered (tape recording) cannot be seriously challenged (**R v Smurthwaite** [1994] 1 All ER 365);
- (d) A van full of cigarettes left in the street with its rear door ajar is a permissible device to catch opportunist thieves if the offence was prevalent in the area (**Williams v DPP** [1993] 3 All ER 365);
- (e) It is impermissible to put in place an experienced informer, pretending to be a cell mate, and coached for that purpose, to coax a suspect to speak after he has consistently refused to do so at earlier police interviews (**Allon v United Kingdom** (2002) 36 EHRR 143). In **R v Bailey** [1993] 3 All ER 513, it had

been accepted that the police could bug the cell of two co-accused who had exercised their right of silence and hope for some incriminating product.

- (f) Undercover officers should not use their role to question offenders; they were restricted to conversations or maintaining their pose as criminals (**R v Edwards** [1997] *Crim. LR* 348).

3.14.4 Audio Probes

3.14.5 Case law concerning covert listening devices (and not telephone intercept) suggests that the courts are inclined to admit evidence gathered,⁴⁰² despite the practice infringing the guarantees of a right to a fair trial and interference of property.⁴⁰³ This is always provided the proceedings as a whole are not unfair, which was the approach adopted by the European Court of Human Rights in **Khan v UK** (2001) 31 *EHRR* 1016.

3.14.6 Controlled Delivery

3.14.7 This tactic can be very important to unravel the organized crime group behind a smuggling operation. A trafficker prematurely intercepted, even if he knows them, may not disclose further links during interview or may even mislead. Especially in the case of post parcels or packets sent by courier service, addresses may be fake and a controlled

⁴⁰² See **Antigua and Barbuda**: Section 60 Evidence (Special Provisions) Act 2009 for procedure to apply for audio probe – this section also covers telephone intercept (see 3.3.155 above)

⁴⁰³ As seen with the equivalent guarantees in the European Convention on Human Rights Articles 6 and 8

delivery can help reveal the identity of the people behind those fake addresses.

3.14.8 The Prosecution Team should consider the following checklist for a successful controlled delivery:

- (a) Where the drugs are removed a warrant to seize the drugs and replace with a dummy package;
- (b) If the drugs are to run (not advised) Bilateral agreements /MOU's to allow – in certain jurisdictions agreement may need to be obtained from a relevant Minister;⁴⁰⁴
- (c) Competent authorities to send any letters of request;
- (d) Case-by-case operation and effective decision making;
- (e) Accurate information (i.e. shipping details, travel details of carrier, change of route, possibility of handing goods to another);
- (f) Knowledge of customs, port and postal procedures;
- (g) Effective surveillance and if possible use of tracking devices;
- (h) Complete trust and understanding between the authorities of the participating countries;
- (i) Constant communication

⁴⁰⁴ For example **Saint Lucia**: section 34 Drugs Prevention of Misuse) Act and **Dominica**: Section 13A Criminal Law and Procedure Act

3.14.9 The Role of the NPS

3.14.10 Whether specific covert techniques should be deployed is an operational decision for the Investigator. The Investigator, should determine the threat, what response is called for, whether the response is necessary and of sufficient duration. The NPS cannot be seen to approve, authorise or condone anything that may be criminal, or contrary to law: neither criminal damage, nor actionable trespass, nor any matter with a serious risk should be advised upon. However, a Prosecutor could be asked to advise if a proposed covert method will provide admissible evidence and will need to balance fairness with the concepts of proportionality, necessity and reasonableness.

4. Charging Issues

4.1 Introduction

4.1.1 For best practice when considering a charge for a Serious Organised Crime offence, the Prosecutor should apply the Code for Prosecutors⁴⁰⁵ and must be satisfied that there is a reasonable prospect of conviction and then confirm that it is in the public interest to proceed.

4.1.2 Charges will reflect the seriousness and extent of the offending and give the court adequate powers of sentence. The following specific issues in this chapter are relevant to charging decisions and the Prosecutor should advise the Investigators where necessary.

4.2 Asset recovery

4.2.1 Confiscation of assets following conviction should be seen as a key element of the prosecution. Without the assets accrued through crime, the suspect is likely to be stripped of his status and ability to commit further Serious Organised Crime.

4.2.2 In anticipation of a confiscation order, the Prosecutor should, where dissipation is likely, apply for a restraint order/freezing order prohibiting the defendant from dissipating his assets. The Prosecutor should consider the use of such orders at an early stage, as it may be appropriate to apply for them before conviction.⁴⁰⁶ The Prosecutor

⁴⁰⁵ See Annex F paragraph 7

⁴⁰⁶ See Part 2 Guidance on Restraint Orders and Annex G for a draft restraint order application for Mr Yellow

should balance making an application for restraint/freezing with any potential damage to a covert operation and should discuss this with the Investigators before applying.

4.2.3 To disrupt organised crime cash flows the Prosecution Team should use provisions allowing cash seizure⁴⁰⁷, detention of seized cash⁴⁰⁸ and forfeiture of seized cash.⁴⁰⁹ Cash in Dominica, Grenada and Saint Vincent and the Grenadines is very broadly defined to include: notes and coins in any currency, postal orders, cheques of any kind including travellers' cheques, bankers drafts, bearer bonds and bearer shares and any other monetary instrument that is prescribed as cash.⁴¹⁰ In Antigua and Barbuda⁴¹¹, Saint Christopher and Nevis⁴¹² and Saint

⁴⁰⁷ **Antigua and Barbuda:** Section 18A(1) Money Laundering Prevention Act; **Dominica:** Section 65 Proceeds of Crime Act; **Grenada:** Section 59 Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 7 Proceeds of Crime Act; **Saint Lucia:** Section 29A(1) Money Laundering Prevention Act; **Saint Vincent and the Grenadines:** Section 49 Proceeds of Crime and Money Laundering (Prevention) Act.

⁴⁰⁸ **Antigua and Barbuda:** Section 18A(3) Money Laundering Prevention Act; **Dominica:** Section 66 Proceeds of Crime Act; **Grenada:** Section 60 Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 7(4) Proceeds of Crime Act; **Saint Lucia:** Section 49A Money Laundering Prevention Act; **Saint Vincent and the Grenadines:** Section 49(2) Proceeds of Crime and Money Laundering (Prevention) Act.

⁴⁰⁹ **Antigua and Barbuda:** Section 18B Money Laundering Prevention Act; **Dominica:** Section 68A Proceeds of Crime Act; **Grenada:** Section 60C Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 7A Proceeds of Crime Act; **Saint Lucia:** Section 49A Proceeds of Crime Act; and **Saint Vincent and the Grenadines:** Section 50 Proceeds of Crime and Money Laundering (Prevention) Act.

⁴¹⁰ **Dominica:** Section 68F Proceeds of Crime Act; **Grenada:** Section 60G Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 51(4) Proceeds of Crime and Money Laundering (Prevention) Act

⁴¹¹ Only includes currency or bearer negotiable financial instruments - section 18C Money Laundering Prevention Act

⁴¹² Only includes coins or notes in any currency or negotiable instrument - section 2(1) Proceeds of Crime Act – under definition of “money”

Lucia⁴¹³ the definition is more restricted. In Saint Christopher and Nevis cash can only be seized where it is being imported or exported⁴¹⁴ and also only a minimum amount can be seized, \$10,000 XCD.⁴¹⁵ When cash is seized⁴¹⁶ the Investigator must make an application to the Magistrates Court after 72 hours in Saint Christopher and Nevis Grenada and Saint Lucia, after 48 hours in Saint Vincent and the Grenadines and after 7 days in Antigua and Barbuda⁴¹⁷ to further detain it.⁴¹⁸ A Magistrate may then extend the detention of the cash up to three months (in Antigua and Barbuda and Saint Christopher and Nevis 6 months)⁴¹⁹ from the date of the order, unless any applications are made to extend this period to an overall maximum of two years.⁴²⁰ In Antigua and Barbuda and Saint Christopher and Nevis the maximum is also for two years save where the criminal proceedings have not

⁴¹³ Only includes coins and bank-notes in any currency and bearer negotiable instruments - section 49C Proceeds of Crime Act

⁴¹⁴ **Saint Christopher and Nevis:** Section 7(1) Proceeds of Crime Act

⁴¹⁵ **Saint Christopher and Nevis:** Section 7(1) Proceeds of Crime Act

⁴¹⁶ Note in **Saint Lucia only** a Corporal or any rank above or a financial investigator of the Financial Intelligence Authority can seize and detain cash (section 29A(1) Proceeds of Crime Act as amended by Act No.14 of 2013)

⁴¹⁷ In **Antigua and Barbuda:** Section 18A(2) Money Laundering Prevention Act; **Grenada:** Section 60 Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 7(4) Proceeds of Crime Act; **Saint Lucia:** Section 29A(2) Proceeds of Crime Act; and **Saint Vincent and the Grenadines:** Section 49(2) Proceeds of Crime and Money Laundering (Prevention) Act).

⁴¹⁸ **Antigua and Barbuda:** Section 18A(3) Money Laundering Prevention Act; **Dominica:** Section 66(2) Proceeds of Crime Act; **Grenada:** Section 60(3) Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 7(4) Proceeds of Crime Act; **Saint Lucia:** Section 29A(2) Proceeds of Crime Act

⁴¹⁹ In **Antigua and Barbuda:** Section 18A(3) Money Laundering Prevention Act; and **Saint Christopher and Nevis:** Section 7(5) Proceeds of Crime Act

⁴²⁰ **Dominica:** Section 66(4) Proceeds of Crime Act; **Grenada:** Section 60(4); **Saint Lucia:** Section 29A(3) Proceeds of Crime Act; and **Saint Vincent and the Grenadines:** Section 49(3) Proceeds of Crime and Money Laundering (Prevention) Act.

concluded.⁴²¹ An applicable ground to extend in each jurisdiction could be criminal proceedings connected to the cash.⁴²² However the Prosecution Team must be fully aware of any time limits as applications made outside of them could be fatal to any further period of detention or successful forfeiture application. For more information on cash seizure, detention of cash seized and applications for forfeiture, Annexes Q and R are essential reading. Annex Q provides standard operating procedures for the seizure and recovery of cash and will provide the Investigator with the necessary tools to ensure that integrity and continuity are preserved. Annex R outlines specimen Magistrates Court Rules and provide an appropriate court procedure to follow when applying for detention and forfeiture.

4.2.4 Cash seizure, detention and forfeiture can be a very effective disruption technique. Further it is easier to prove not just because the standard of proof is lower, but because none of the civil recovery or cash forfeiture laws enacted (so far) require proof of a particular crime. For cash seizure, the court can find that cash directly or indirectly represents any person's proceeds of, or benefit from, or is intended for use in criminal conduct on the basis of circumstantial evidence. In the absence of direct evidence of the involvement in a crime of the person from whom the cash was seized or any other, the Court can nevertheless look to

⁴²¹ **Antigua and Barbuda:** Section 18A(3)(b) Money Laundering Prevention Act; **Saint Christopher and Nevis:** Section 7(5)(b)(ii) Proceeds of Crime Act

⁴²² **Antigua and Barbuda:** Section 18A(3)(a) Money Laundering Prevention Act; **Dominica:** Section 66(3) Proceeds of Crime Act; **Grenada:** Section 60(3) Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 7(5)(b)(ii) Proceeds of Crime Act; **Saint Lucia:** section 29A(2) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 49(6)(b) Proceeds of Crime and Money Laundering (Prevention) Act.

other material to come to a conclusion that on the balance of probabilities it is more likely than not that the cash is connected with crime (see Justice Watkins in **Bassick and Osborne v. Commissioners of Customs and Excise** (CO/1546/92) and **Attorney General of Ontario** 2006 Can LLI 36954 at para 36). In **Angus v UK Border Agency** [2011] EWCH 461, the question for the court was:

“In a case of cash forfeiture does a customs officer have to show that the property seized was obtained through conduct of one of a number of kinds each of which would have been unlawful conduct or is sufficient for the officer to point to criminal conduct of an unspecified kind?”

The court held that **it is NOT sufficient** for the enforcement authority simply to point to criminal **conduct of an unspecified** kind. Therefore some kind of **unlawful activity will** have to be **identified & proved**. However, the commission of a specific offence need not be proved in the sense of proving that a particular person committed a particular offence on a particular occasion, but it must be proved that specific property was obtained by or in return for a criminal offence of an identifiable kind.

4.2.5 But plainly civil actions of this type have as their core an allegation of criminality. And the consequences may be harsh. For example, if the national law allows civil recovery of property used in the commission of crime (and many do), a house might be forfeited on the basis that a tenant used the greenhouse to grow marijuana. This might be regarded

as a penalty for transgression of the criminal law and so a criminal proceeding, equally there may be challenges on the basis of interference of property rights.

4.2.5a Cash Seizure in Saint Vincent and the Grenadines – Proceeds of Crime Act 2013 and Grenada Proceeds of Crime (Amendment) Act 2014

4.2.5b The Proceeds of Crime Act 2013 in Saint Vincent and the Grenadines and the Proceeds of Crime (Amendment) Act 2014 in Grenada make similar changes to the procedure for cash seizure.

4.2.5c The definition of “*recoverable cash*” for the purposes of the cash seizure provisions in Saint Vincent and the Grenadines is the same as “*recoverable property*” for civil recovery under the Act.⁴²³ This means that cash obtained through unlawful conduct or tainted property is subject to seizure.⁴²⁴ In Grenada “*recoverable cash*” means “*recoverable property*” or is intended for use in “*unlawful conduct*”.⁴²⁵

4.2.5d “*Unlawful conduct*” includes any conduct, which is unlawful in Saint Vincent and the Grenadines.⁴²⁶ If the conduct occurs outside of Saint Vincent and the Grenadines it must be:

⁴²³ **Saint Vincent and the Grenadines:** Section 107(1) Proceeds of Crime Act 2013

⁴²⁴ **Saint Vincent and the Grenadines:** Section 65(1) Proceeds of Crime Act 2013

⁴²⁵ **Grenada:** Section 60G Proceeds of Crime Act;

⁴²⁶ **Grenada:** Section 31XX Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 63(1)(a) Proceeds of Crime Act 2013

- (a) Unlawful under the criminal law applying in that State/country;⁴²⁷
and
- (b) If it had occurred in Grenada/Saint Vincent and the Grenadines
would also be unlawful under its criminal law.⁴²⁸

4.2.5e The Magistrates Court will decide on the balance of probabilities in respect of proceedings for the recovery of cash (i.e. forfeiture) in Saint Vincent and the Grenadines:

- (a) If any unlawful conduct has occurred,⁴²⁹ or
- (b) If any person intended to use any cash in unlawful conduct;⁴³⁰ or
- (c) That any person used, or intended to use, any property in, or in connection with, unlawful conduct.⁴³¹

In Grenada the Magistrate must be satisfied on the balance of probabilities that for forfeiture of the cash or part of it that:⁴³²

- (a) It is “*recoverable cash*”; or
- (b) Is intended by any person for use in “*unlawful conduct*”

⁴²⁷ **Grenada:** Section 31XX(b)(i) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 63(1)(b)(i) Proceeds of Crime Act 2013

⁴²⁸ **Grenada:** Section 31XX(b)(ii) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 63(1)(b)(ii) Proceeds of Crime Act 2013

⁴²⁹ **Saint Vincent and the Grenadines:** Section 63(2)(a) Proceeds of Crime Act 2013

⁴³⁰ **Saint Vincent and the Grenadines:** Section 63(2)(b) Proceeds of Crime Act 2013

⁴³¹ **Saint Vincent and the Grenadines:** Section 63(2)(c) Proceeds of Crime Act 2013

⁴³² **Grenada:** Section 60C(2) Proceeds of Crime Act;

4.2.5f The Act in Saint Vincent and the Grenadines also makes clear that a person can obtain property through his or another's unlawful conduct.⁴³³ This means that a person may obtain cash by or in return for the unlawful conduct. Also the Act specifies that is immaterial if the cash was to a put a person in a position to carry out the conduct⁴³⁴ and it is not necessary to show what kind of unlawful conduct where there were a number of kinds and each would have amounted to unlawful conduct.⁴³⁵

4.2.5g "*Tainted property*" means property that has been used in connection with unlawful conduct or is intended to be used in unlawful conduct.⁴³⁶ However in Saint Vincent and the Grenadines property cannot be tainted if the unlawful conduct is not by the owner of the property.⁴³⁷ Further where the owner doesn't give his consent, express or implied, to the property being used, this also will not satisfy the definition of tainted property.⁴³⁸ Significantly in both States if the cash is tainted property and it has been disposed of since it became tainted property, it is still recoverable property if it can be followed to another person.⁴³⁹

⁴³³ **Saint Vincent and the Grenadines:** Section 64(1) Proceeds of Crime Act 2013

⁴³⁴ **Saint Vincent and the Grenadines:** Section 64(2)(a) Proceeds of Crime Act 2013

⁴³⁵ **Saint Vincent and the Grenadines:** Section 64(2)(b) Proceeds of Crime Act 2013

⁴³⁶ **Grenada:** Section 31XX Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 62(1) Proceeds of Crime Act 2013

⁴³⁷ **Saint Vincent and the Grenadines:** Section 62(3)(a) Proceeds of Crime Act 2013

⁴³⁸ **Saint Vincent and the Grenadines:** Section 62(3)(b) Proceeds of Crime Act 2013

⁴³⁹ **Grenada:** Section 31CC Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 65(2) Proceeds of Crime Act 2013

4.2.5h In summary the Acts now make it clearer exactly what needs to be established to establish on the balance or probabilities unlawful conduct. However as outlined in paragraph 4.2.4, it is not sufficient to simply point to unlawful conduct of an unspecified kind. Therefore some kind of unlawful conduct will have to be identified & proved.

4.2.5i A law enforcement officer⁴⁴⁰, lawfully on premises may search for cash where he has reasonable grounds for suspecting that there is recoverable cash.⁴⁴¹ The law enforcement officer can require a person to allow a search of any article (i.e. suitcase)⁴⁴² or a search of the person.⁴⁴³ Further the person maybe detained for as long as is necessary to exercise these powers.⁴⁴⁴ Further the powers of search and detention must be exercised as far as reasonably required for the purpose of finding cash.⁴⁴⁵ In Grenada a “*Senior Law Enforcement Officer*” defined as either a Police Officer of the rank of Inspector or above, a Senior Customs Officer or a Senior Officer of the FIU

⁴⁴⁰ **Saint Vincent and the Grenadines:** Defined at section 2(1) as a Police Officer or Customs Officer; **Grenada:** section 2(1) as a Police Officer, Customs Officer, director, deputy director and officers of the Financial Intelligence Unit.

⁴⁴¹ **Grenada:** Section 58 Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 108(1) Proceeds of Crime Act 2013

⁴⁴² **Grenada:** Section 58(2)(a) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 108(2)(a)(i) Proceeds of Crime Act 2013

⁴⁴³ **Grenada:** Section 58(2)(b) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 108(2)(a)(ii) Proceeds of Crime Act 2013

⁴⁴⁴ **Grenada:** Section 58(2) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 108(2)(b) Proceeds of Crime Act 2013

⁴⁴⁵ **Grenada:** Section 58(3) Proceeds of Crime Act (**Note:** an intimate forensic search (as defined in the Police Act, Cap 244) is specifically excluded from this procedure); **Saint Vincent and the Grenadines:** Section 108(3) Proceeds of Crime Act 2013

designated by the Director,⁴⁴⁶ must authorise any search, unless it is not practicable to do so in the circumstances.⁴⁴⁷ Where the search provisions are used without prior approval, a written report justifying their use must be submitted to a senior law enforcement officer as soon as practicable.⁴⁴⁸ Any report must include why it was not practicable to obtain prior approval and what led the law enforcement officer concerned to reasonably suspect there was recoverable cash where no cash is seized or where cash seized was detained for less than seventy-two hours.⁴⁴⁹

4.2.5j Where a law enforcement officer has reasonable grounds for suspecting that any cash is recoverable cash or only part, he may seize that cash (or part).⁴⁵⁰ There is no minimum amount that can be seized and any rank of Police Officer or Customs Officer (in addition in Grenada FIU officer) can use these powers.

4.2.5k After the cash is seized it can be detained for a period of 72 hours.⁴⁵¹ The period of 72 hours excludes any Saturday, Sunday, a public holiday or any other day when the Magistrates Court is closed.⁴⁵²

⁴⁴⁶ **Grenada:** Section 60G Proceeds of Crime Act;

⁴⁴⁷ **Grenada:** Section 58(4) Proceeds of Crime Act;

⁴⁴⁸ **Grenada:** Section 58(5) Proceeds of Crime Act;

⁴⁴⁹ **Grenada:** Section 58(6) Proceeds of Crime Act;

⁴⁵⁰ **Grenada:** Section 59 Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 109 Proceeds of Crime Act 2013

⁴⁵¹ **Grenada:** Section 60(1) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 110(1) Proceeds of Crime Act 2013

⁴⁵² **Saint Vincent and the Grenadines:** Section 107(3) Proceeds of Crime Act 2013

4.2.5l This initial 72 hours maybe extended by an order from the Magistrates Court to three months beginning with the date of the extension order⁴⁵³ or a maximum of two years from the date of the first order.⁴⁵⁴ The law enforcement officer may make any such application to the Magistrates Court.⁴⁵⁵

4.2.5m In any application for continued detention the Magistrate must be satisfied that there are reasonable grounds for suspecting that:

- (a) The cash (or part) is recoverable cash (**Note:** Alternatively in Grenada the cash is intended to be used in unlawful conduct ;⁴⁵⁶ and
- (b) Detention is justified while its origin and derivation or intended use is further investigated or consideration is being given to instigating criminal proceedings either in Grenada/Saint Vincent and the Grenadines or another State,⁴⁵⁷ or

⁴⁵³ **Grenada:** Section 60(4)(a) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 110(2)(a) Proceeds of Crime Act 2013

⁴⁵⁴ **Grenada:** Section 60(4)(b) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 110(2)(b) Proceeds of Crime Act 2013

⁴⁵⁵ **Grenada:** Section 60(2) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 110(3) Proceeds of Crime Act 2013

⁴⁵⁶ **Grenada:** Section 60(3) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 110(3) Proceeds of Crime Act 2013

⁴⁵⁷ **Grenada:** Section 60(3)(a) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 110(3)(a) Proceeds of Crime Act 2013

- (c) Criminal proceedings have been commenced for an offence that the cash is connected to and these are yet to be concluded.⁴⁵⁸

4.2.5n Section 110(4) of the Act in Saint Vincent and the Grenadines also allows detention to be ordered for all cash where part of it is recoverable but it is not reasonable practicable to detain only that part.

4.2.5o At the first opportunity after cash is detained by order of a Magistrate, it should be paid into an interest bearing account.⁴⁵⁹ Where only part is recoverable cash the other part where no suspicion arises, if reasonably practicable to do so, should be released.⁴⁶⁰ Any failure to comply with this section could result in a successful application for compensation.⁴⁶¹ Any cash that is required in evidence for criminal or forfeiture proceedings, needn't be paid into an interest bearing account.⁴⁶²

4.2.5p After an order is made by the Magistrate for detention of the cash, an application maybe made for release of the cash by the person from whom it was seized (or any other person see from paragraph 4.2.5t

⁴⁵⁸ **Grenada:** Section 60(3)(b) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 110(3)(b) Proceeds of Crime Act 2013

⁴⁵⁹ **Grenada:** Section 60A(1) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 111(1) Proceeds of Crime Act 2013

⁴⁶⁰ **Grenada:** Section 60A(2) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 111(2) Proceeds of Crime Act 2013

⁴⁶¹ **Grenada:** Section 60F(2) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 117(1)(b) Proceeds of Crime Act 2013

⁴⁶² **Grenada:** Section 60A(3) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 111(3) Proceeds of Crime Act 2013

below).⁴⁶³ Any application must satisfy the Magistrate that the grounds for detention no longer apply. Further a law enforcement officer (**Note:** In Grenada must be the Commissioner of Police, Comptroller of Customs or Director of the FIU) may also apply to release the cash where its detention is no longer justified under the Act.⁴⁶⁴ However, where criminal proceedings have commenced in connection to the cash in Saint Vincent and the Grenadines or out of State, the cash cannot be released.⁴⁶⁵

4.2.5q A law enforcement officer, where cash is detained, may apply for forfeiture of the cash to a Magistrates Court.⁴⁶⁶ The Magistrate may order forfeiture of the cash to the Confiscated Assets Fund⁴⁶⁷ where:

- (a) It is recoverable cash;⁴⁶⁸ or
- (b) It is intended, by any person, for use in unlawful conduct.⁴⁶⁹

⁴⁶³ **Grenada:** Section 60B(1) and (4) Proceeds of Crime Act (**Note:** other person must have a claim to the cash); **Saint Vincent and the Grenadines:** Section 112(1) Proceeds of Crime Act 2013

⁴⁶⁴ **Grenada:** Section 60B(3) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 112(2) Proceeds of Crime Act 2013

⁴⁶⁵ **Saint Vincent and the Grenadines:** Section 112(3) Proceeds of Crime Act 2013

⁴⁶⁶ **Grenada:** Section 60C Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 113(1) Proceeds of Crime Act 2013

⁴⁶⁷ **Grenada:** Section 60E Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 160(1) Proceeds of Crime Act 2013 – Note that 25% of the fund (after payments for compensation and other expenses) will on an annual basis supplement the annual budget of the FIU.

⁴⁶⁸ **Grenada:** Section 60C(2)(a) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 113(2)(a) Proceeds of Crime Act 2013

⁴⁶⁹ **Grenada:** Section 60C(2)(b) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 113(2)(b) Proceeds of Crime Act 2013

4.2.5r Where recoverable cash belongs jointly to persons one of who is an “*excepted joint owner*” the Magistrate may NOT ORDER forfeiture against this excepted joint owner.⁴⁷⁰ An excepted joint owner is defined as a person who has obtained the cash in circumstances in which it would not be recoverable against him.⁴⁷¹ Therefore the joint ownership is treated as if severed, so this part of the cash can be released to the excepted joint owner.

4.2.5s Any party aggrieved by a detention or forfeiture order of the cash can appeal to the High Court,⁴⁷² within thirty days on which the order is made or service of the order.⁴⁷³ In Saint Vincent and the Grenadines the Magistrate may order release of the detained or forfeited cash to enable legal expenses to be covered for an appeal.⁴⁷⁴ Any such appeal will be by re-hearing and the High Court may make any order it considers appropriate.⁴⁷⁵

⁴⁷⁰ **Grenada:** Section 60C(3) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 113(3) Proceeds of Crime Act 2013

⁴⁷¹ **Grenada:** Section 31XX Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 94(2) Proceeds of Crime Act 2013

⁴⁷² **Grenada:** Section 60D(1) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 114(1) Proceeds of Crime Act 2013

⁴⁷³ **Grenada:** Section 60D(2) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 114(2) Proceeds of Crime Act 2013

⁴⁷⁴ **Saint Vincent and the Grenadines:** Section 114(3) Proceeds of Crime Act 2013

⁴⁷⁵ **Grenada:** Section 60D(3) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 114(4) Proceeds of Crime Act 2013

4.2.5t Any person who claims that cash detained belongs to him may apply to the Magistrates Court for its release.⁴⁷⁶ The Magistrate may order release where:⁴⁷⁷

- (a) The applicant was deprived of the cash by unlawful conduct;
- (b) The cash was not immediately before he was deprived of it recoverable property;
- (c) The cash belongs to the applicant

Further the Magistrate may order release of the cash where:⁴⁷⁸

- (a) The applicant isn't the person from whom the cash was seized;
- (b) The cash belongs to the applicant;
- (c) The grounds for detention are no longer met or forfeiture isn't ordered after an application is made;
- (d) No objection is made by the person from whom the cash was seized.

⁴⁷⁶ **Grenada:** Section 60B(4) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 116(1) Proceeds of Crime Act 2013

⁴⁷⁷ **Grenada:** Section 60B(6) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 116(3) Proceeds of Crime Act 2013

⁴⁷⁸ **Grenada:** Section 60B(7) Proceeds of Crime Act; **Saint Vincent and the Grenadines:** Section 116(4) Proceeds of Crime Act 2013

Cash Seizure Process Map

If a Police Officer comes into contact with cash believed to be the result of a crime or intended for use in crime for any amount, anywhere

1. Inform a supervisor and ask a colleague to witness their actions

2. Telephone Customs Investigations and FIU. Describe what they have found (e.g. half a carrier bag of Euro etc)

3. **Think forensics** do not unwrap or count the cash - Wear gloves and try to touch as little as possible

4. Take the person and the cash to an interview room, ask them tactical questions and write down the Q & A's.

5. Customs Investigations and/or FIU will attend the scene. They will have a cash seizure kit and a camera. They will count the cash with the Officer and the owner. The Police Officer will brief them on the circumstances and they will decide if they are going to arrest the individual for Money Laundering. Customs Investigations and/or FIU will take over the investigation so the Police Officer can continue with their duties after making a statement

4.2.6 Challenges to Civil Recovery and Cash Seizure

4.2.7 Due to a lack of understanding of civil recovery and cash seizure, challenges are common and a Prosecution Team should be aware of the relevant authorities that have decided such proceedings are constitutional where statute is in place. Arguments will often be based on many of the issues discussed in Part 3 at paragraph 33 and will concern whether the relevant statute in question, *“Arbitrarily or excessively invades the enjoyment of the rights according to the standards of a society that has proper respect for the rights and*

freedoms of the individual” (**de Freitas v Permanent Secretary (Agriculture, Fisheries etc)** [1999] 1 A.C. 69) The Privy Council decision of **de Freitas** held that a court must ask itself when considering any breach if:

“(i) the legislative objective is sufficiently important to justify a limiting of fundamental rights; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means to impair the right or freedom are no more is necessary to accomplish the objective.”

4.2.8 The Court of Appeal in **Kent Andrews et al v The Attorney General of Saint Vincent and the Grenadines** *High Court Civil Appeal No.1 of 2010*, involving a cash seizure, held that the Proceeds of Crime and Money Laundering (Prevention) Act was reasonably justifiable, applying the threefold analysis in **de Freitas**. This is a significant decision for the region and emphasises that the Proceeds of Crime and Money Laundering (Prevention) Act, which provides for the prohibition of money laundering, restraint of assets, confiscation as well as cash seizure, does not violate the principles of due process and protection of the law, provided by the Constitution of Saint Vincent and the Grenadines.

4.2.9 A second line of attack in other jurisdictions has been on the basis of civil recovery or cash seizure being essentially criminal proceedings and therefore there is double punishment. In the US, the importance of categorisation between criminal and civil has principally arisen in the

context of the double jeopardy prohibition in the 5th amendment. The leading case is **US v Ursery** (1996) 135 L Ed 2D549. The defendants had already been prosecuted, yet faced civil recovery proceedings. The 5th amendment double jeopardy clause prohibits a second prosecution for the same offence. The issue was therefore whether a civil recovery action amounted to a second prosecution. The Supreme Court held it did not. In national law *in rem* civil forfeitures did not amount to punishment. All members of the Court were clear that recovery of proceeds could not amount to punishment for a criminal wrong. It was merely the removal of property to which the owner had no right. In respect of things used in the commission of crime, instrumentalities, the majority held that this too did not amount to punishment. The statute is directed to owners who are culpable for the misuse of their property whether or not they have committed a criminal act. There is a powerful dissenting speech by Justice Stevens however to the effect that forfeiture of property legally obtained but which is used in the commission of an offence can be a penalty and so engages the double jeopardy protection.

4.2.10 In the UK the Court of Appeal held in **Olupitan** [2008] EWCA Civ 104 held that no particular crime need be alleged as long as the government set out the nature of the crimes alleged in the most general way (e.g. fraud, money laundering, drug trafficking etc). The Irish Supreme Court similarly concluded that no particular crime needed to be identified in **Mck v F and ors** [2005] IESC 6

4.2.11 No jurisdiction to date has found that the proceedings are in reality criminal. In the UK see **Charrington [2005] EWCA Civ 335** where the Court of Appeal explained that there was no charge, arrest, conviction, penalty or criminal record. Absent such hallmarks, the proceedings were civil. These issues were recently revisited in the UK Supreme Court which decided that the proceedings didn't enjoy the criminal protections in article 6(2) of the European Convention on Human Rights (i.e. the presumption of innocence that only applies to criminal cases and requires any criminal allegation to be made out to the criminal standard of proof) in **Gale v SOCA UKSC 2010/190**.

4.2.12 In Ireland in **Gilligan v CAB [2001] IESC**, the Supreme Court explained that the civil recovery law:-

“Concerns the right of the State to take, or the right of a citizen to resist the State in taking, property which is proved on the balance of probabilities to represent the proceeds of crime. In general such a forfeiture is not a punishment and its operation does not require criminal procedures. Application of such legislation must be sensitive to the actual property and other rights of citizens but in principle and subject, no doubt, to special problems which may arise in particular cases, a person in possession of the proceeds of crime can have no constitutional grievance if deprived of their use.”

4.2.13 Similarly in Canada, the Supreme Court of Canada recently tackled this issue in **Chatterjee v Ontario 2009 SCC 19** the issue arose in the context of whether Ontario had the power to make laws which

interfered with sentences which were regulated as part of federal law. If the Ontarian civil recovery laws were in reality criminal and imposed a sentence they would be *ultra vires*. The Supreme Court made it clear that civil recovery laws were indeed civil and imposed no penalty.

4.2.14 The jurisprudence of the European Court of Human Rights (ECHR) results in the same conclusion but for slightly different reasons. The ECHR approaches the issue applying a threefold test. First, the classification under domestic law (which is not decisive, indeed rarely relevant). Second, the nature of the offence. Third, the character of the penalty. Applying these criteria the Court has consistently held civil recovery to be exactly that, civil. This is principally on the basis that such forfeitures do not involve penalties but are preventative measures, which remove from circulation the proceeds of crime or property caught up in the commission of crime. The recovery of articles in this category is not a punishment. The ECHR came to this conclusion in relation to proceeds of civil recovery in **Butler v UK** (*app* 41661/98) 27th June 2002, **Raimondo v Italy** [1994] 18 EHRR 237 and **Walsh v UK** (*app* 43384/05) 21st November 2001. It came to a similar conclusion in relation to instrumentalities (albeit in the context of customs forfeitures) in **AGOSI v UK** [1986] 9 EHRR1 and **Air Canada v UK** [1995] 20 EHRR 150.

4.2.15 Antigua and Barbuda

4.2.16 Antigua and Barbuda does not have expansive civil recovery legislation akin to that found in the United States of America or the United Kingdom. The Supervisory Authority in Antigua and Barbuda currently has comparatively limited power to apply to recover the proceeds of crime in the absence of a conviction. These limited provisions exist in the Proceeds of Crime Act 1993 (POCA) and in the Money Laundering (Prevention) Act 1996 (MLPA). The power to recover the proceeds of crime in the absence of a conviction relate solely to cases where the defendant has absconded pre-charge or conviction (POCA) and in cases where it is more probable than not that the defendant has been engaging in money laundering activity (MLPA).

4.2.17 The Proceeds of Crime Act 1993

4.2.18 The power to recover the proceeds of crime in the absence of a conviction under the Proceeds of Crime Act 1993 (POCA) can be found in sections 9 and 17 of the Act. These sections relate to forfeiture of tainted property in cases where the defendant has absconded pre-conviction. The sections are made all the more important because the confiscation regime does not apply to absconded defendants in Antigua and Barbuda. The mechanics of the sections are set out below.

Diagram 1

Step 1

Is the offence in question a scheduled offence?

The list of scheduled offences are set out in the Proceeds of Crime (Amendment of Schedule) Order 2009. In addition to the specific listed offences, all indictable offences, and all offences which carry a penalty of more than one year imprisonment, are scheduled offences.

Step 2

Was the offence committed after the Act came into force on 10 June 1993?

Step 3

Have proceedings in respect of the scheduled offence committed in relation to the property been commenced?

The Act does not specify when proceedings are deemed to have commenced. See The Magistrates Code of Procedure Act for guidance.

Step 4

Has the defendant absconded?

A defendant is deemed to have absconded when:

- a) an information has been laid alleging the commission of the offence by the person;
- b) a warrant for the arrest of that person has been issued in relation to the information; and
- c) reasonable attempts to arrest the person pursuant to the warrant have been unsuccessful during the period of six months commencing on the day the warrant was issued.

The defendant is deemed to have absconded on the last day of the six month period. **S9(2)**

Step 5

Is the property subject to the application property within the definition of the Act?

The definition of property was revised by the Proceeds of Crime (Amendment) Act 2008. Property now means assets of any kind, corporeal or incorporeal, moveable or immoveable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets. **S2(b)**.

Step 6

Is the property subject to the application 'tainted property'?

Tainted property means:

- a) property used in, in or connection with the commission of the offence; or
- b) property derived, obtained or realised, directly or indirectly from the commission of the offence. **S3.**

Further guidance to the Court on how to determine whether property is tainted is set out in section 10(2) of the Act.

Step 7

If the Director of Public Prosecutions is satisfied that all of the criteria set out above have been met, they may apply to the High Court for a forfeiture order in respect of the tainted property. S9.

Provided that:

- a) before the hearing, notice of the application is given to any person who, in the opinion of the Court, may have an interest in the property; and
- b) direct notice of the application is published in the Official Gazette and in a newspaper which is published and circulating in Antigua and Barbuda for as long as the Court stipulates. **S9(3).**

Step 8

This is not a mandatory regime. If the Court is satisfied, beyond reasonable doubt, that the criteria set out above have been met, they *may* make a forfeiture order in respect of the property. S17.

When considering whether a forfeiture order should be made, the Court must have regard to the following:

- a) the rights and interests of third parties in the property;
- b) the gravity of the offence concerned;
- c) the hardship caused by the order; and
- d) the ordinary use of the property. S10(4).

Step 9

Once the Court makes a forfeiture order against any property, the property vests absolutely in the Crown. S11(1).

If property includes registrable property, it must be registered in accordance with the Act. S11(2).

Property subject to a forfeiture order must not be disposed of until the period allowed for an appeal against the forfeiture order has expired.

S11(3), (4) and (5).

Protection is afforded to innocent third parties under the Act both before the forfeiture order is made and up to 12 months after it is made. S13.

4.2.19 The Money Laundering (Prevention) Act 1996

4.2.20 In 2002, the MLPA was amended to grant the Supervisory Authority the power to apply for Civil Forfeiture and Civil Proceeds Assessment Orders. These orders can both be applied for in the absence of any criminal charge or conviction, the test being only that the Court is satisfied that the Defendant has been engaged in money laundering activity. The standard of proof is the civil standard; the balance of probabilities.

4.2.21 The legislation affords the Supervisory Authority a lot of scope when seeking to prove that the defendant has been engaged in money laundering activity. A finding as to the commission of a particular offence is not required. The Authority only need to demonstrate that '*some offence or other constituting a money laundering activity*' was committed.

4.2.22 Civil Forfeiture Order

4.2.23 A Civil Forfeiture Order may be granted over any property which is subject to a Freeze Order, provided that the Court is satisfied, on the balance of probabilities, that the defendant in respect of whom the Freeze Order was made, has at any time, not more than six years before the application is made, engaged in money laundering activity.

4.2.24 The mechanics relating to Civil Forfeiture Orders are set out below:

Diagram 2 – Step 1

Is a Freeze Order in force pursuant to section 19 of the Act?

The provisions relating to freeze orders have been repeatedly revised under the Money Laundering (Prevention) Amendment Act 2001 and the Money Laundering (Prevention) Amendment Act 2002. Freeze Orders may be applied for in respect of any property in which it is suspected a person has an interest, where the person:

- a) has been convicted of a money laundering offence; or
- b) has been, or is about to be charged with a money laundering offence; or
- c) is suspected of having engaged in money laundering activity.

Step 2

Was the person in respect of whom the freeze order was made, at any time, but not more than six years before the application for civil forfeiture was made, engaged in money laundering activity? S20A(2).

Money laundering activity is defined by section 2H of the Act as anything done by a person that at the time was a money laundering offence, whether or not the person has been charged with the offence and, if charged, whether or not they have been:

- a) tried for the offence; or
- b) tried and acquitted of the offence; or
- c) has been convicted, even if the conviction was quashed or set aside.

Step 3

What is the strength of your evidence that the person was engaged in a money laundering offence?

It is not necessary to prove that the person was engaged in a particular money laundering offence. It is sufficient to prove that the person was engaged in some offence or other which would have constituted money laundering activity. **S20A(3).**

Step 4

If the above criteria are met, the Supervisory Authority may apply to the High Court for a Civil Forfeiture Order, which will forfeit to the Crown any or all interests in property that are subject to the Freeze Order. S20A(2).

Provided that:

The Supervisory Authority gives no less than 14 days notice of the application to the person and any other person he has reason to believe may have an interest in property subject to the application. **S 20A(8).**

Any person notified of the application may appear to give evidence at the hearing of the application. **S20A(9).**

Property is defined under the Act as meaning money, investments, holdings, possessions, assets and all other property real or personal, heritable or moveable including things in action and other tangible or incorporeal property wherever situate (whether in Antigua and Barbuda or elsewhere) and includes interest in such property. **S2.**

Step 5

This is a mandatory regime. If the Court is satisfied, on the balance of probabilities, that the above criteria are met, the Court *must* proceed to make a Civil Forfeiture Order.

S20A(2).

The Court must make the order in respect of specified interests in property. S20A(4).

Step 6

Once a Civil Forfeiture Order is made, the property is forfeited to and vests in the Crown and the Supervisory Authority may take possession of the property on behalf of the Crown. S 20D(1).

The interest in the property must be disposed of by the Supervisory Authority and the proceeds paid into the Forfeiture Fund. S20D(2).

Protection is afforded to innocent third parties under section 21 of the Act.

4.2.25 Civil Proceeds Assessment Order

4.2.26 The Civil Proceeds Assessment Order is similar to the Civil Forfeiture Order, except that the order is not made in respect of property in which the defendant has an interest, but made in an amount assessed to be the person's benefit from money laundering activity. This order, unlike the Civil Forfeiture Order, is in personam and not in rem.

4.2.27 Making such an order requires an assessment by the High Court as to the value of the person's benefit from money laundering over the period of six years before the date the application for the order is made. It is possible to make both a Civil Forfeiture Order and a Civil Proceeds Assessment Order.

4.2.28 The mechanics of the sections relating to Civil Proceeds Assessment Orders are set out below.

Diagram 3

Step 1

Has the person engaged in money laundering activity?

Money laundering activity is defined by section 2H of the Act as anything done by a person that at the time was a money laundering offence, whether or not the person has been charged with the offence and, if charged, whether or not they have been:

- a) tried for the offence; or
- b) tried and acquitted of the offence; or
- c) has been convicted, even if the conviction was quashed or set aside.

Step 2

Did the money laundering activity take place throughout the period commencing no earlier than six years before the application for a Civil Proceeds Assessment Order was made?

Step 3

Did the person derive a benefit from the money laundering activity?

To determine whether a benefit has been derived, the High Court must consider:

- a) the money or value of interest in property other than money which was directly or indirectly acquired by the defendant or any other person at the direction of the defendant as a result of money laundering activity;
- b) the value of any service, benefit or advantage provided for the defendant or any other person at the direction of the defendant as a result of money laundering activity;
- c) the value of the defendant's property before and after the money laundering activity (also see section 20C(2));
- d) the defendant's income and expenditure before and after the money laundering activity (also see section 20C(3), (4) and (5)). **S20C.**

Step 4

What is the strength of your evidence that the person was engaged in a money laundering offence?

It is not necessary to prove that the person was engaged in a particular money laundering offence. It is sufficient to prove that the person was engaged in some offence or other which would have constituted money laundering activity. **S20B(3)**.

Step 5

If the above criteria are met, the Supervisory Authority may apply to the High Court for a Civil Proceeds Assessment Order, which will require a person to pay to the Crown an amount assessed by the High Court to be the amount they have derived from money laundering activity. **S 20B(1)**.

Provided that:

The Supervisory Authority gives no less than 14 days notice of the application to the person and any other person he has reason to believe may have an interest in property subject to the application. **S 20B(8)**.

Any person notified of the application may appear to give evidence at the hearing of the application. **S20B(9)**.

Step 6

This is a mandatory regime. If the Court is satisfied, on the balance of probabilities, that the above criteria are met, the Court *must* proceed to make a Civil Forfeiture Order. S20B(2).

Civil Proceeds Assessment Order is a debt payable to the Crown and is recoverable as such. S20B(10).

If a Civil Proceeds Assessment Order is made against a dead person, section 20B(10) will have effect as if the person died after the making of the order. S20B(11).

Step 7

If a person holds property and the High Court believes the property is in fact under the effective control of the person against whom they have made a Civil Proceeds Assessment Order, they may order that the property is made available to satisfy any order to the extent that other property is not readily available for that purpose. S20F(1).

Provided that:

At least 14 days notice of the application is given to both the person against whom the Civil Proceeds Assessment Order is made, and any person who has an interest in the property.

4.2.29 Civil Recovery: Antigua and Barbuda, Dominica, Grenada and Saint Vincent and the Grenadines

4.2.30 Legislation has now been passed in Antigua and Barbuda, Dominica Grenada and Saint Vincent and the Grenadines to allow for civil recovery and Part 4 of the Guide provides a full explanation on the law and procedure to be applied.

4.3 Drugs⁴⁷⁹

4.3.1 Possession

4.3.2 An issue that often arises in drug prosecutions is establishing possession of controlled drugs in a property, a container, boat or vehicle. The law in relation to possession is well settled. In **DPP v Brooks (1974) 21 WIR 411 at 415** the court explained that:

“In the ordinary use of the word “possession” one has in one’s possession whatever is, to one’s own knowledge, physically in one’s custody or under one’s physical control. This is obviously what was intended to be prohibited in the case of dangerous drugs”

⁴⁷⁹ See the Points to Prove for Drug Offences (Possession and Possession with Intent to Supply) at Annex Z3 to assist the Investigator when taking statements or interviewing a suspect

This means that the prosecution must prove two elements of possession:

- (a) The physical element requires that the thing is in the custody of the accused or subject to his control (**Lambert** [2002] 2 AC 545)
- (b) The mental element requires that the accused must know that the thing in question is under his control. He need not know what its nature is, but so long as he knows that the thing, whatever it is, is under his control, it is in his possession (**Lambert**)⁴⁸⁰. An accused's lack of knowledge of the quality of the thing might be a defence if a court is not satisfied beyond a reasonable doubt that the accused knew that it was a controlled drug (**Lambert** at 158). To meet that defence and satisfy a court that it should be rejected beyond a reasonable doubt the points referred to in paragraph 4.3.26-28 below will be important.

4.3.3 If the drugs were found in a container it is sufficient for the prosecution to prove that the defendant had control of it, knew of its existence and that there was something in it, and that the something was in fact the drug which the prosecution alleges it to be. The prosecution does not need to prove that the accused knew that the thing was a controlled drug (**Lambert**). However if the accused had no right to open the container and ascertain its contents, it is arguable that the accused was not in possession of its contents (**Warner v Metropolitan**

⁴⁸⁰ These two elements are important for a controlled delivery (see paragraphs 3.6.1-2). A charge of importation is appropriate if a clean controlled delivery i.e. the drugs replaced with a placebo/dummy package

Commissioner [1969] 2 AC 256). Where drugs are found in premises occupied by more than one person, or in a car in which there is more than one occupant, **mere knowledge** of the existence of drugs is **not enough** to prove an allegation of joint possession.⁴⁸¹ It is necessary to show that each defendant participated in the offence charged. The prosecution may have to prove either that the drugs have come from a "pool" from which they all might draw or by some other means that each defendant is liable as either a principal or secondary party. What has to be established is that the defendant not only **knew** of the presence of the drugs, but had **some control** over them and/or that he was a participant in their possession by being party to a joint enterprise with the other party: **Searle** [1971] *Crim LR* 592, **Conway and Burker** [1994] *Crim LR* 826; **Ortiz, Castillo, Ortiz, Newball v Police** (1993) 45 WIR 118 and **Leslie v Archer** (1986) 34 WIR 59. In relation to a car, if a person was the user or driver of the car, then, depending on all the circumstances, knowledge may be inferred (**R v Strong and Berry**

⁴⁸¹ See **Grenada**: Section 42 Drug Abuse (Prevention and Control) Act and **Saint Lucia**: Section 41 Drugs (Prevention of Misuse) Act Cap.3.02:

- (a) Where it is proved that a person imported anything containing a controlled drug it shall be presumed, until the contrary is proved, that such person knew that such drug was contained in such a thing;
- (b) Where it is proved that a person had in his or her possession or custody or under his or her control anything containing a controlled drug, it shall be presumed, until the contrary is proved, that such person was in possession of such drug;
- (c) Where it is proved that a person supplied to any other person anything containing a controlled drug, it shall be presumed, until the contrary is proved, that such first-mentioned person knew that such a drug was contained in such thing;
- (d) Where it is proved that a person handled, within the meaning of section 7 (offence of handling controlled drug), anything containing a controlled drug, it shall be presumed, until the contrary is proved, that such person knew that such drug was contained in such thing

[1989] LS Gazette, March 8, 41, CA). To assist, the following paragraphs will provide evidence to infer possession in relation to drugs found in a house or car:

(a) Exclusive Occupancy

If the suspect is the *sole* occupant of the home or car where a drugs are found, exclusive occupancy is often enough to evidence the suspects ability to exercise control over the substance and establish knowledge of its presence.

(b) Non-Exclusive Occupancy

If the suspect is not the sole occupant of the home or car, possession is slightly more difficult to prove. Where there is more than one occupant, there must be additional evidence, such as incriminating facts or circumstances that show both knowledge and control. Below are a few examples of common links between a suspect and a controlled substance.

- The drugs are in plain view;
- The drugs are with the suspect's personal items
- If in a car, they are found on the same side of the car or are in the suspect's immediate proximity;
- If in a home, they are found in the person's bedroom;
- Suspicious behavior during arrest;
- Ownership of drug paraphernalia;
- Ownership or control over the place where the substance is found

4.3.4 The proposition set out in Professor Smith's commentary to the case of **R v McNamara and McNamara** [1998] Crim LR 278 should be applied:

"The evidence must be sufficient to satisfy a jury either that each party was in possession with intent to supply or that someone (in the present case possibly a third party) was and the defendant not only knew that he was but also assisted or encouraged him in the enterprise."

4.3.5 Also there may be situations where a suspect has aided or abetted the suspect in possession of the drugs and should be charged as part of a joint enterprise. In **Lester Charles and Ahmed Williams v Commissioner of Police ECSC CA Antigua and Barbuda MCRAP 2009/001** it was held that:

"A joint enterprise is not defeated by the fact that the vehicle in which the cocaine, firearm and ammunition was found did not belong to the second appellant. Likewise it is not impaired by the fact that the cocaine and firearm were not found on the second appellant. These factors do not by themselves affect the efficacy of a joint enterprise. A joint enterprise requires that the parties are in it together as part of a joint plan or agreement to commit the offence. Such an agreement can be inferred from the behaviour of the parties."

4.3.6 In **Romero and Macrado v R** 1994 46 WIR 151 Chief Justice Sir Vincent Floissac explained:

“Where a crime (e.g. unlawful possession of a controlled drug...) is committed by a principal offender and either before or during the commission of the crime a secondary party renders assistance either by way of aid, abetting, counsel, procurement or encouragement to the principal offender in the commission of the crime, the secondary party will be guilty of the crime as a party to it if he rendered assistance with the mens rea necessary for guilt of that crime or with knowledge, contemplation or foresight of a substantial degree of probability (as distinct from a bare or remote possibility) that the crime was being committed ... by the principal offender.”

4.3.7 Therefore it is right to equate “*aiding and abetting*” with “*joint possession*” in appropriate circumstances: **Kashif Mustaphakhan and Derek Parke v. The Queen** *Criminal Appeals No’s 19 and 20 of 2003*

4.3.8 It is very important to review the evidence when there is an allegation of joint possession and determine what commonsense conclusions can be drawn. In **Lester Charles and Ahmed Williams**, the second appellant was seated in the back seat. He fled the car as the police approached. A package of cocaine fell from the back seat of the car as he fled. Two more packages of cocaine were found on the back seat where he was seated. A large amount of United States currency was also found on the back seat. The first appellant was the driver of the car. Therefore in the circumstances the Court of Appeal decided there was sufficient evidence to infer a joint enterprise.

4.3.9 Meaning of Supply

4.3.10 The definition of supply can be found in **R v Maginnis (1987) 1 All ER 907**, a House of Lords decision. It denotes more than mere transfer of physical control, it requires the recipient being enabled to apply the thing handed over to purposes for which he desires or has a duty to apply it. For example a return of drugs to the "*trafficker*" would be a supply.

4.3.11 In **R v Paton TLR 27.03.2001** the Court of Appeal held that the phrase "*supply*" includes the retention and return of controlled drugs deposited with a "*custodier*" by another person. This applied notwithstanding the custodier's lack of consent to the arrangement.

4.3.12 The motive of the supplier is irrelevant and should not be confused with his intention (**R v X (1994) CLR 827**). Where two people agree to buy drugs for themselves, it is undesirable to charge the one who happens to take physical possession of the drugs with the supply of drugs, when he gives the drugs to the other. Although there is technically a supply, it was inevitable that a person convicted on the basis of such a distribution should be dealt with as for simple possession (**R v Denslow (1998) CLR 566**).

4.3.13 Where the evidence supports a charge of supplying or possessing controlled drugs of any class with intent to supply, such a charge should normally be proceeded with. Possession with intent to supply a controlled drug is a suitable charge in circumstance when a charge of

possession would be justified **together with** evidence of an intent to supply. As in the case with straight possession, a person found in possession of one form of drug but believing it to be another form of drug and intending to supply it to another should be charged with possession with intent of the actual drug. The intent must relate to a **future supply** of controlled drugs. If the evidence points to past supply, a charge of supplying may be appropriate. Prosecutors should always consider whether a charge for past supplying of drugs is more appropriate than a charge for possession with intent. This is particularly important where the evidence to establish a future intent is unclear.

4.3.14 In addition to the supply of a controlled drug, Acts in the region have offences of offering to supply, being concerned in the supply and being concerned in the making of an offer to supply. An offence of offering to supply can be prosecuted simply by proving the existence of an offer. The prosecution does not have to prove either that the defendant intended to produce the drugs or that the drugs were in his/her possession.

4.3.15 A defence of lack of knowledge will not be applicable as the offence is the making of the offer. In deciding whether there has been an offer Prosecutors **DO NOT** have to refer to contract law (**R v Dhillon (2000) CLR 760**). The fact that the drug is different/not controlled/bogus is irrelevant as is the fact that there is/was no intention to supply (**R v Goodard (1992) CLR 588; R v Mitchell (1992) CLR 723; R v Prior (2004) EWCA Crim 1147**). The offer may be by words or conduct (**R v**

Showers (1995) CLR 400). The exact identity of the substance is irrelevant.

4.3.16 The offences of being concerned will cover conduct which is preparatory to the actual supply, although the prosecution must prove that a supply, or an offer to supply, has been made. Prosecutors must examine the actual conduct of the defendant carefully to decide which offence is the most appropriate.

4.3.17 Production and Cultivation

4.3.18 Production includes cultivation (for example see Saint Christopher and Nevis section 2(1) of the Drugs (Prevention and Abatement of the Misuse and Abuse of Drugs) Act Cap 9.08 – this is replicated across the region in the relevant Misuse of Drugs Acts) and, whilst there is a separate offence of cultivation of cannabis under section 7 of the Saint Christopher and Nevis Act, a charge under section 5(1)(a) of this Act of producing cannabis will usually be more appropriate.

4.3.19 Where the production of the drug has moved on to the stage of it being in an advanced state of preparedness and ready for onward distribution, although it may sometimes be appropriate for there to be an additional charge of possession with intent to supply, it would very much depend on the circumstances of the case as to whether such an additional charge was brought. Relevant factors would include the quantity and the location of the prepared product, along with the steps that had been taken to make it ready for onward supply.

4.3.20 This issue arose in **R v Auton (John)** [2011] EWCA Crim 76 where Lord Justice Hughes addressed similar issues when considering a series of conjoined appeals against sentence for matters involving the production of cannabis. His Lordship commented that:

"The proper inference as to what cultivation entailed and what would be likely to happen to the product depends on the fact of each case. In most cases, and not only where the plants have not yet been harvested, it will not be possible to frame a count of possession of identified material with intent to supply. The issue must be dealt with by the judge."

4.3.21 LJ Hughes also went on to say that:

"That does not mean that a Newton Hearing will be needed in every, or even most cases. If however the basis of the plea is accepted by the judge, then on ordinary principles he must honour it in passing."

4.3.22 It will often therefore not be necessary nor indeed possible for there to be additional counts of supply/possession with intent to supply, even where the production of the drug has moved on to the next stage of being prepared for onward distribution.

4.3.23 In one of the appeals in **Auton and others**, the appellant, as well as having significant amounts of cannabis in the growth/production stages, had 1.7 kilogrammes of dried cannabis ready for use. He was sentenced for production alone. The Court of Appeal (UK) endorsed

the approach that any issue around the use/supply of the cannabis was properly resolved by the judge through holding of a Newton Hearing.

4.3.24 In determining whether or not to charge cultivation as opposed to production of cannabis, the scenarios in which cannabis is grown vary widely and prosecutors should be aware of this when deciding which charge is more appropriate. At one end of the spectrum, organised criminals develop highly sophisticated operations for the production of cannabis in large quantities. At the other end cannabis may be grown on a relatively small scale, without there being any evidence of onward supply, and it will possibly have been grown because of a belief in its assistance in alleviating medical conditions.

4.3.25 The public interest stage of the Code for Prosecutors (Annex F) covers a range of factors for and against prosecution. Such a consideration is a factor against prosecuting unless the offence is serious or there is the possibility that it may be repeated. Each case will be decided on its own merits. However, Prosecutors should be aware that once a person goes beyond the growing and tending of a cannabis plant and starts to prepare parts of the plant for consumption, this would fall within the remit of the activity envisaged by the term '*production*'. As the Misuse of Drugs Acts in the region define the word '*produce*' as meaning '*producing it by manufacture, cultivation or any other method*'. This covers situations in which cannabis is being cultivated.

4.3.26 Proof of Commercial Supply

4.3.27 Organised Criminals supply drugs on a commercial scale. Evidence of commercial supply should be an aggravating feature for sentence. Intent to supply may be proved by amounts stipulated by statute⁴⁸² and supported by direct evidence in the form of admissions or witness testimony proving possession of a quantity inconsistent with personal use. There are occasions when only small amounts of drugs are seized but commercial supply can still be inferred. This section of the Guide will assist to prove those drug dealers who may only have possession of a small amount of drugs but are supplying or intending to supply on a commercial basis. Also this section can assist where courts do not apply the statutory requirement reversing the legal burden of proof on the defendant or where a defence is raised of lack of knowledge.⁴⁸³

4.3.28 Evidence from which commercial supply may be inferred will include at least one or, more usually, a combination of the following factors:

⁴⁸² **Saint Vincent and the Grenadines:** Section 7(4) Drugs (Prevention of Misuse) Act Cap 284; **Dominica:** Section 7(4) Drugs (Prevention of Misuse) Act Chapter 40:07; **Saint Christopher and Nevis:** Section 6(4) Drugs (Prevention and Abatement of the Misuse and Abuse) Act; **Saint Lucia:** Section 8(4) Drugs (Prevention of Misuse) Act Cap.3.02 – intent proved if in possession of more than one gramme of cocaine (amongst other drugs) in **Grenada** and **Antigua and Barbuda** no such presumption therefore paragraph 4.3.28 is relevant to prove intent

⁴⁸³ **Antigua and Barbuda:** Section 31 Misuse of Drugs Act; **Saint Vincent and the Grenadines:** Section 30 Drugs (Prevention of Misuse) Act Cap 284; **Dominica:** Section 30 Drugs (Prevention of Misuse) Act Chapter 40:07; **Grenada:** Section 39 Drug Abuse (Prevention and Control) Act; **Saint Christopher and Nevis:** Section 29 Drugs (Prevention and Abatement of the Misuse and Abuse) Act; **Saint Lucia:** Section 40 Drugs (Prevention of Misuse) Act Cap.3.02

- (a) Possession of uncut drugs or drugs in an unusually pure state suggesting proximity to their manufacturer or importer;
- (b) Possession of a variety of drugs may indicate sale rather than personal consumption;
- (c) Evidence that the drug has been prepared for sale. If a drug has been cut into small portions and those portions are wrapped in foil or film, then there is a clear inference that sale is the object;
- (d) Drug related equipment in the care and/or control of the suspect, such as weighing scales, cutting agents, bags or wraps of foil (provided their presence is not consistent with normal domestic use);
- (e) Diaries or other documents containing information tending to confirm drug dealing, which are supportive of a future intent to supply, for example, records of customers' telephone numbers together with quantities or descriptions of drugs;
- (f) Money found on the defendant was considered in **R v Batt** (1994) *Crim.L.R* 592. It is not necessarily evidence of future supply. It may be evidence of supply in the past but on its own the money is not evidence of a future intent to supply. However evidence of large amounts of money in the possession of the defendant, or an extravagant life style which is only prima facie explicable if derived from drug dealing, is admissible if it is of probative significance to an issue in the case (**R v Morris** (1995) 2 *Cr.App.R.*69). However consideration should be given to a

separate charge of money laundering if the cash or lifestyle can be attributed to the drug trafficking.

The Lead Investigator requests advice on the charging decision for Mr Green and Mr Yellow. In particular if there is sufficient evidence for joint possession of the cocaine. The Lead Investigator provides a copy of the following:

1. A summary of the electronic recording of the interviews with each suspect;
2. Statements from the officers on surveillance, arresting and searching the vehicle and house of Mr Yellow;
3. Video of the surveillance and video of the search of Mr Yellow's house

The Prosecutor completes Form 1 of the Manual of Guidance (as shown below on page 245) applying the Code for Prosecutors (applying Drugs (Prevention of Misuse) Act of Saint Vincent and the Grenadines)

4.3.29 Charging Practice

4.3.30 The Misuse of Drugs Acts in the region create a number of offences

and any one set of facts may give rise to more than one offence.

Investigators and Prosecutors should ensure that the offence(s)

charged is the most appropriate to reflect the criminality of the defendant. For example, in a case where there is a prima facie evidence of supplying, possession with intent to supply, being concerned in the supply and permitting premises to be used for supply, it will be unnecessary to charge all offences. The facts and the defendant's overall criminality require careful consideration before the appropriate allegation is made.

4.3.31 Investigators and Prosecutors must avoid more than one class of drug in a single charge. Such a charge would be bad for duplicity (**R v Courtie (1984) 1 All ER 740**). Charging cannabis or cannabis resin in the same count is not bad for duplicity (**R v Best and Others (1979) 70 Cr. App. R 21**). It is best practice to charge different drugs from the same Class in different counts.

4.3.32 Although an indictment should never be overloaded with unnecessary counts, Prosecutors should always consider the use of alternative counts in cases where the defendant's culpability is uncertain. For example, where the evidence of intent to supply is not conclusive, an alternative count for simple possession may be justified. On the other hand, if the prosecution case is that the defendant is heavily involved in the supply of drugs, a count for simple possession would detract from that allegation. It is impossible to be prescriptive when deciding upon the use of alternative counts. If a plea of guilty to the lesser alternative count would not be acceptable, Prosecutors should think carefully before using such a charge. Alternative counts should never be used in

order to *'force'* a plea from a defendant.

4.3.33 If considering charging conspiracy, then Prosecutors will need to assess whether a conspiracy is the best way of presenting the case or whether substantive offences are more appropriate. In cases involving supply where it is difficult to prove specific acts of supply it may well be more appropriate to proceed by way of a conspiracy count in order to demonstrate the overall criminality of the case. Indictments may contain a conspiracy count as well as substantive counts but the judge will require the prosecution to justify their joinder and in the absence of such justification the prosecution will have to elect whether to proceed on the conspiracy or the substantive counts. Joinder is justified where the interests of justice demand it. This may occur where, for example, of three defendants two are husband and wife and there is a possibility of the third being acquitted. Joinder is not generally justified where the substantive counts are merely sample counts illustrative of the way the conspiracy was carried out.

4.3.34 Reverse Burden of Proof

4.3.35 Pursuant to the various Misuse of Drugs Acts in the region, there is a defence of proof of lack of knowledge in which the burden of proof is placed upon the accused. Also statute in the region places a legal burden on the defendant to establish that he is not in possession with intent to supply if found in possession of a stated quantity. The House of Lords, in an obiter dicta statement, considered whether such reverse burdens were compatible with Article 6 of the European Convention of

Human Rights (**R v Lambert** (2001) 3 W.L.R. 206). Their Lordships found that the reverse burden created in the England and Wales Misuse of Drugs Act was not proportionate to the public interest aims that were being pursued, and that by applying section 3(1) of the Human Rights Act (UK) they “*read down*” the legislation to read “*to give sufficient evidence*” rather than “*prove*”.

4.3.36 In the Caribbean, the Privy Council has construed legislation in a similar way so that they are in conformity with the Constitution (**Vasquez v The Queen** (1994) 1 WLR 1304 and **Yearwood v. The Queen (Grenada)** [2001] 1 UKPC (26 June 2001)). Significantly in **Dale Nibbs v the Attorney General of the Virgin Islands** BVIHCV: 2008/0148, the court held that the reverse burden for possession with intent to supply was incompatible with the right of innocence in the Constitution. This judgment has left open the question of constitutional compatibility and all reverse burden offences, and prosecutors should be aware of the potential challenges they could face in trials.⁴⁸⁴

⁴⁸⁴ See paragraph 4.3.27 and how prosecution can prove intent to supply when the legal burden remains with the prosecution

Form 1 - CHARGING or REVIEW of CHARGING DECISION

DEFENDANT(s) NAME(s)	Mr Green and Mr Yellow
EVIDENTIAL STAGE	<p>Refer to the evidence and determine if a reasonable prospect of conviction:</p> <p>Mr Green</p> <p>On 17th June Mr Green was the driver of a car with Mr Yellow who had 2 kilograms of cocaine wrapped in brown paper in a plastic bag. This bag was seized by the police from his feet.</p> <p>I will be considering the following charges:</p> <p>Possession with intent to supply contrary to section 7(4) of the Drugs (Prevention of Misuse) Act (the “Act”) and being concerned in the supply of drugs contrary to the same Act.</p> <p>The issue in relation to possession with intent to supply will be whether Mr Green was in joint possession of the cocaine.</p> <p>What has to be established is that Mr Green not only knew of the presence of the drugs, but had some control over them and/or that he was a participant in their possession by being party to a joint enterprise with Mr Yellow: Searle [1971] Crim LR 592, Conway and Burker [1994] Crim LR 826. As Mr Green was the driver of the car, then, depending on all the circumstances, knowledge maybe inferred (R v Strong and Berry [1989] LS Gazette, March 8, 41, CA)</p> <p>Mr Green’s Knowledge of the cocaine can be inferred from circumstances of the 17th June.</p> <p>Mr Green stated in interview that he had not been in contact</p>

with Mr Yellow before he saw him at the bus stop. The telephone, which he accepts as his was in contact with Mr Yellow before he arrived at the bus stop. There is therefore ample to infer that the meeting was pre-arranged. It is against all commonsense that Mr Green should be calling Mr Yellow just by chance, just before he collects him at the bus stop. This call was not by coincidence.

Also found on Mr Green was a note with the number of Mr Yellow and then an amount of money and the telephone number for a Mr Red. No explanation has been provided for this by Mr Green. I have been informed that the amount is consistent with the amount for the price of 2kg of cocaine. This is admissible evidence and will be important to establish Mr Greens part in this joint enterprise **R v Bryan** *unreported, November 8, 1984 CA.*; **R v Hodges** [2003] 2 Cr.App.R 15);

The fact that Mr Green ran away from the police adds weight to the assertion that he did not want to be arrested. Although this alone does not prove knowledge placed alongside the fact he lied in interview about contact with Mr Yellow, leads to an irresistible inference that Mr Green knew that Mr Yellow had cocaine in his possession **Lester Charles and Ahmed Williams v Commissioner of Police MCRAP** 2009/001

The amount of 2kg proves intent.

Section 30 confirms that a defence will be if the defendant neither knew nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution where it is necessary for the prosecution to prove. Mr Green in interview is alleging that he didn't know the bag contained drugs.

	<p>From the facts his knowledge can be inferred through his earlier contact with Mr Yellow, his lies in interview and conduct by running away.</p> <p>I have also considered an offence of being concerned in the supply of drugs. This would be an appropriate charge if there was any concern in relation to proving joint possession. In my view not only did Mr Green have joint possession but he also had a joint intention to supply the drugs with Mr Yellow. Therefore the correct charge to proceed with is possession with intent to supply.</p> <p>Mr Yellow</p> <p>On the facts Mr Yellow is clearly in possession of the cocaine and the amount proves the intent as outlined above, therefore there is a reasonable prospect of conviction.</p>
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4.4 Firearms⁴⁸⁵

4.4.1 Possession⁴⁸⁶

4.4.2 The Prosecution only has to show that the defendant knew he had something in his possession. It is irrelevant what he knew or thought it was (**R v Hussain (1981) 72 Cr. App. R. 143**; **R v Waller Crim. L.R. 1991, 381**; **Sullivan v Earl of Caithness [1976] 62 Cr. App. R 105**).

⁴⁸⁵ See the Points to Prove at Annex Z3 to assist the Investigator for common firearms offences when taking statements and interviewing the suspect

⁴⁸⁶ For an alternative approach see Belize where the Firearms Act places burden of proof on Defendant to show not in possession where in actual or construction occupation of premises or vehicles where a firearm is seized

4.4.3 Possession is generally both proprietary and custodial (**Hall v Cotton and Treadwell** [1987] 83 Cr. App. R 257 DC).

4.4.4 In **Faultin v Attorney General of Trinidad and Tobago** (1978) 30 WIR 351 the Court of Appeal held, in circumstances where a firearm was found in a motor vehicle, that:

“On a charge of unlawful possession of firearm or ammunition ... on the proof that a person had custody or control of a vehicle that a firearm and ammunition were found inside it and in close proximity to him, the inference may properly be drawn that they were there with his knowledge and that he intended to retain or control them.”

4.4.5 At page 370, the Court said:

“On proof that the appellant had custody or control of the motor vehicle, it is reasonable to draw the inference that the firearm or ammunition found in it and in close proximity to him were there with his knowledge and that he intended to retain or control them. This inference, recognized by the common law is similar to the rational connection test.”

4.4.6 **Evidence to Charge**

4.4.7 When an Investigator recovers a firearm or suspected firearm should a statement should be prepared detailing and exhibiting each and every weapon, component part and item of ammunition stating where each item was found.

4.4.8 The Investigator should provide a full description of each item found, including measurements, where relevant. The length of the barrel of a firearm shall be measured from the muzzle to the point at which the charge is exploded on firing.

4.4.9 . It is good practise to have each weapon and component part photographed alongside a scale to indicate dimensions. For example use a meter rule to measure the length of the barrel – the length of the barrel of a firearm is measured from the muzzle to the point at which the charge is exploded on firing. Copies of the photographs should be provided to the NPS, and a set initialled and dated for use as exhibits. The weapon itself must be presented at court as an exhibit as well.

4.4.10 When a firearm or suspected firearm is recovered, the Investigator should prepare a statement detailing each weapon, component part and item of ammunition. This statement ought to include a full description of each item, including where it was found and measurements. Further the statement should confirm whether the weapon was loaded and if the weapon is an imitation firearm. If it is an imitation, the Investigator should indicate how closely it resembles a real firearm, based on his own knowledge of firearms. Again photographs may be of assistance. It is also important to determine the circumstances surrounding the possession and use of an imitation weapon.

4.4.11 The Prosecutor and the Investigator should identify other relevant forensic lines of enquiry, which may include:

- (a) Fingerprint analysis;
- (b) DNA testing;
- (c) Forensic Discharge Residue (FDR) on clothing and swabs;
- (d) Ballistics;
- (e) Compatibility of firearm with any ammunition recovered;

4.4.12 However the Prosecutor should be mindful of any delays that could be caused by having to send a firearm out of state for classification or any tests and have regard to timescales likely to be set by the court for service of evidence.

4.4.13 Choosing the Charge

4.4.14 Overlaps can occur between the various more serious offences of possessing/using firearms for crime. It is important that the indictment is not unnecessarily overloaded and reflects the overall gravity and nature of the offence. Prosecutors should select charges that reflect the seriousness and extent of the offending behaviour and give the court adequate sentencing powers.

4.4.15 Where a firearm offence is disclosed in addition to another substantive offence, a suitable count should always be included on the indictment so that:

- (a) The issue of whether or not a firearm was used can be determined by the jury if necessary. A defendant is entitled to a jury decision on this issue (**Eubank** (2001) EWCA Crim 891);
- (b) The court has the power to impose the appropriate sentence;
- (c) Although it is not mandatory for a court to pass a consecutive sentence (**AG Ref Nos 21 and 22 R v Hahn and Webster** (2004) 2 Cr. App. R. (S) 13, CA), courts may do so to mark the seriousness of such behaviour and as a deterrent (**R v Greaves and Jaffer** (2004) 2 Cr. App. R. (S) 10 CA);
- (d) Where the weapon in question is not recovered, and thus its status remains unknown, it is not duplicitous to include the phrase "*firearm or imitation firearm*" in a count for an offence of carrying a firearm in certain circumstances⁴⁸⁷ or with intent to commit an offence⁴⁸⁸

4.4.16 Consideration should always be given to the merits of charging an offence of possessing a firearm with intent to injure⁴⁸⁹. All the circumstances surrounding the incident should be considered, with particular regard to the following factors:

- (a) Admissions or explanation given by the defendant in interview;

⁴⁸⁷ **Antigua and Barbuda:** Section 13 Firearms Act Chap 171

⁴⁸⁸ **Dominica:** Section 28 Firearms Act 2011; **Saint Lucia:** Section 27 Firearms Act Cap 14.12

⁴⁸⁹ **Antigua and Barbuda:** Section 12 Firearms Act Chap 171; **Dominica:** Section 27 Firearms Act 2011; **Saint Lucia:** Section 26 Firearms Act Cap 14.12; **Saint Vincent and the Grenadines:** Section 18 Firearms Act Cap 386

- (b) Whether the weapon was real;
- (c) Whether the weapon was loaded;
- (d) The imminence of any probable use;
- (e) Whether the victim or any other person present believed that the weapon was real; and
- (f) Whether the weapon was associated with other criminal activity.

4.4.17 The prosecution do not need to prove an immediate or unconditional intention to endanger life, but the intention required for an offence of possessing a firearm with intent to injure may not necessarily be met by the recovery of a loaded weapon. Any explanation given in interview and the surrounding circumstances should be carefully considered to determine whether an inference could be drawn. Prosecutors should note that this offence can only be committed with a real firearm. Consideration should be given to an attempt where the defendant expresses a belief that the weapon was a real firearm.

4.4.18 Sentencing

4.4.19 Whenever it is the prosecution case that a firearm has been used to commit another offence, the defendant should be charged with the relevant firearms offence in addition to the substantive offence. This allows the jury to determine the issue of whether or not a firearm was used. Newton hearings on this issue are not permissible (**R v Eubank** [2002] 2 Cr.App.R (S) 4). It also enables a consecutive sentence to be

passed, which sends a deterrent message that those who carry firearms when committing other offences are liable to receive a longer sentence.

4.4.20 Prosecutors should be familiar with the sentencing guidelines given by Sir Denis Byron C.J. in **Kenrick Marksman and Commissioner of Police** Magisterial Cr. App No. 41 of 2003 (St Vincent and the Grenadines) 6/12/ 04 and the Court of Appeal (UK) decision in **R v Avis** [1998] 1 Cr. App. R. 420.⁴⁹⁰

4.5 Money Laundering

4.5.1 Introduction to Money Laundering

4.5.2 Criminal confiscation and money laundering offences are inter-linked. In investigating what has happened to the proceeds of crime, money laundering offences are likely to be disclosed.

4.5.3 Money laundering is the process by which criminal proceeds are sanitised to disguise their illicit origins. Acquisitive criminals will attempt to distance themselves from their crimes by finding safe havens for their profits where they can avoid confiscation orders, and where those proceeds can be made to appear legitimate.

⁴⁹⁰ Also see **Kashorn John v Commissioner of Police** Court of Appeal Saint Vincent and the Grenadines MCRAP 2007/086

4.5.4 Money laundering schemes can be very simple or highly sophisticated.

Most sophisticated money laundering schemes involve three stages:

- (a) Placement - the process of getting criminal money into the financial system;
- (b) Layering - the process of moving money in the financial system through complex webs of transactions, often via offshore companies;
- (c) Integration - the process by which criminal money ultimately becomes absorbed into the economy, such as through investment in real estate.

Prosecutions for money laundering can involve any of these stages in the money laundering process.

4.5.5 Money laundering offences are invariably serious. In summary, money laundering

- (a) Incentivises crime by rendering it profitable;
- (b) Provides domestic and transnational organised crime with a cash flow to perpetrate further crimes; and
- (c) Threatens the financial system and its institutions, both domestic and international.

4.5.6 Therefore, where there is sufficient evidence to meet the evidential test under the Code for Prosecutors, the following Public Interest factors in

favour of prosecution for offences of money laundering should be very carefully considered:

- (a) The importance of making it more difficult for criminals to legitimise their ill-gotten gains;
- (b) The importance of deterring professional launderers;
- (c) The importance of protecting the integrity of financial institutions domestically and internationally.

4.5.7 Main types of Money Laundering Prosecutions

4.5.8 There are two types of money laundering prosecution. There are, firstly, those "*mixed*" cases in which money laundering can be charged or included on an indictment in which the underlying proceeds generating predicate offence is included.

4.5.9 The subsets of this are:

- (a) "*Own proceeds*" or "*self laundering*", where the defendant in a money laundering case may also be the author of the predicate crime;
- (b) Laundering by a person or persons other than the author of the predicate offence.

4.5.10 Secondly, there are those cases where money laundering is the sole charge capable of proof or the easiest charge to prove. Again, there are two subsets:

- (a) "Own proceeds" laundering;
- (b) Laundering by a person other than the author of the predicate offence.

4.5.11 The following offences are considered money laundering in the region:⁴⁹¹

- (a) Concealing or disguising criminal property: This requires evidence of concealing or disguising the nature, source, location, disposition, movement or ownership or any rights with respect to criminal property. It is important to be aware that a mere suspicion is not sufficient to support a conviction for the offence of attempting to conceal, disguise criminal property. The prosecution must prove that the defendant knew the property to be criminal property (**R v Pace and Rogers** [2014] EWCA Crim 186)

⁴⁹¹ **Antigua and Barbuda:** Section 61 Proceeds of Crime Act and section 3 Money Laundering Prevention Act; **Barbados:** Section 20 Money Laundering and Financing of Terrorism (Prevention and Control) Act; **Dominica:** Section 3 Money Laundering (Prevention) Act and section 60 Proceeds of Crime Act; **Grenada:** Section 34 assisting another to retain the benefit of criminal conduct; section 35 acquisition, possession or use of proceeds of criminal conduct, section 36 concealing or transferring proceeds of criminal conduct, section 37 attempting, conspiring and inciting Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 4 Proceeds of Crime Act; **Saint Lucia:** Section 28 Money Laundering (Prevention) Act; **Saint Vincent and the Grenadines:** Section 41 concealing or transferring proceeds of criminal conduct, section 42 arranging with another to retain proceeds of criminal conduct, section 43 acquisition, possession or use of proceeds of criminal conduct Proceeds of Crime and Money Laundering (Prevention) Act and section 123 concealing, disguising, converting, transferring and removing criminal property; section 124 arrangements; and section 125 acquisition, use and possession Proceeds of Crime Act 2013

- (b) Arranging: This offence potentially catches a large range of involvement in money laundering offences usually at the layering and integration stages. This is the offence that will often be apt for the prosecution of those who launder on behalf of others. It can catch persons who work in financial or credit institutions, accountants etc, who in the course of their work facilitate money laundering by or on behalf of other persons. For a person to be found guilty of an offence of entering into an arrangement which he knew or suspected facilitated the acquisition of criminal property by or on behalf of another person, that other person had to be identified or at least identifiable at the moment of the arrangement (**Stephen Dare v Crown Prosecution Service [2012] EWHC 2074 (Admin)**).
- (c) Acquisition, use and possession of criminal property: Possession means having physical custody of criminal property. This offence can be committed if a defendant:
- uses criminal property;
 - or (passively) possesses criminal property.

However, a person may **not** commit this offence if the relevant Act provides a defence that the defendant acquired, used or had possession of the property for "*adequate consideration*." It is available to cover those cases where the funds or property have been acquired by a purchaser for a proper market price or similar exchange and to cater for any injustice which might

otherwise arise: for example, in the case of tradesmen who are paid for ordinary consumable goods and services in money that comes from crime. This defence will also apply where professional advisors (such as solicitors or accountants) receive money for or on account of costs (whether from the client or from another person on the client's behalf). This defence would not be available to a professional where the value of the work carried out or intended to be carried out on behalf of the client was significantly less than the money received for or on account of costs. A "*tipping off*" offence may be available to the prosecution where the evidence is insufficient to prove the predicate offence against the defendant.⁴⁹²

4.5.12 Each jurisdiction requires that the proceeds of crime are derived from "*criminal conduct*". It is important that the Prosecution Team have a clear understanding of what "*criminal conduct*" needs to be proved for a money laundering offence and Table 3 below provides some guidance on definitions of "*criminal conduct*" in each country. Two jurisdictions have more than one money laundering Act:

- (a) Antigua and Barbuda: Money Laundering Prevention Act No.9 of 1996 and the Proceeds of Crime Act 1993; and

⁴⁹² **Antigua and Barbuda:** Section 7 Money Laundering Prevention Act; **Barbados:** Section 22(3) Money Laundering and Financing of Terrorism (Prevention and Control) Act; **Dominica:** Section 5 Money Laundering (Prevention) Act; **Grenada:** Section 39 Proceeds of Crime Act; **Saint Christopher and Nevis:** Section 5 Proceeds of Crime Act; **Saint Lucia:** Section 21 Money Laundering (Prevention) Act; **Saint Vincent and the Grenadines:** Section 45 Proceeds of Crime and Money Laundering (Prevention) Act and section 129 Proceeds of Crime Act 2013

(b) Dominica: Money Laundering (Prevention) Act of 2011 and the Proceeds of Crime Act 1993 Act No.4

Table 3

Country	Act	Definitions
Antigua and Barbuda	<p>Money Laundering (Prevention) Act No.9 of 1996</p> <p>Proceeds of Crime Act 1993</p>	<p>Section 2(1) defines money laundering as knowing or having reasonable grounds to suspect that the money, or other property, is derived, obtained or realised, directly or indirectly, from some form of unlawful activity.</p> <p>“unlawful activity” means — an act or omission that constitutes an offence of a law in force in Antigua and Barbuda or against a law in force in a foreign country that would, if it was committed in Antigua and Barbuda, be an offence against a law of Antigua and Barbuda</p> <p>“proceeds of Crime” in section 2(1) is defined as proceeds of a scheduled offence or any property or benefit derived directly or indirectly by any person from any act or omission that, occurred outside Antigua and Barbuda, and would, if it had occurred in Antigua and Barbuda, have constituted a scheduled offence (which includes possession with intent to supply and trafficking of drugs)</p>
Barbados	<p>Money Laundering and Financing of Terrorism (Prevention and Control) Act Cap.129</p>	<p>Section 2(1) defines “proceeds of crime” as the proceeds of unlawful activity.</p> <p>Section 2(1) defines “unlawful activity” as any activity punishable for a period of not less than 12 months imprisonment</p>
Saint Christopher and Nevis	<p>Proceeds of Crime Act 2000 No.16 as amended by the Proceeds of Crime (Amendment) (No.2) Act 2008</p>	<p>Section 2(1) defines “proceeds of crime” as proceeds of a serious offence Section 2(1) defines “serious offence” as any offence triable on indictment or a hybrid offence that attracts a penalty of imprisonment for more than one year</p>

Country	Act	Definitions
Dominica	<p>Money Laundering (Prevention) Act 2011</p> <p>Proceeds of Crime Act 1993</p>	<p>Section 2 defines “proceeds of crime” as any property derived or obtained through the commission of an indictable or hybrid offence</p> <p>Section 2 defines “Proceeds of crime” as proceeds of a scheduled offence or any property or benefits derived, obtained or realised, directly or indirectly, by any person from any act or omission that occurred outside Dominica and would, if it had occurred in Dominica, have constituted a scheduled offence. Scheduled offences include possession with intent to supply, drug trafficking and assisting another to retain the benefit of drug trafficking see Schedule 1 of 2010 (Amendment) Act</p>
Saint Lucia	<p>Money Laundering Prevention Act No.8 of 2010 as amended by the Money Laundering (Prevention) (Amendment) Act No.9 of 2011</p> <p>Proceeds of Crime Act as amended by Act No.4 of 2010</p>	<p>Section 2(1) defines “criminal conduct” as a drug trafficking offence (namely possession with intent to supply, trafficking contrary to section 16 of the Drug (Prevention of Misuse) Act or assisting another to retain the benefit of drug trafficking) indictable, hybrid or scheduled offence</p> <p>Section 2(1) defines “criminal conduct” as a drug trafficking or any relevant offence; “relevant offence” means</p> <ul style="list-style-type: none"> (i) any indictable offence or an offence triable both summarily or on indictment in Saint Lucia; (ii) an offence listed in the Schedule; and include (i) an offence of conspiring to commit any of those offences; (ii) an offence of aiding, abetting, counselling or procuring, or being in any way knowingly concerned in, the commission of any of those offences; (iii) an offence of attempting to commit any of those offences (iv) an offence of inciting another to commit any of those offences

Country	Act	Definitions
Saint Vincent and the Grenadines	<p>Proceeds of Crime and Money Laundering (Prevention) Act 2001 (as amended by Act No.8 of 2005)</p> <p>Proceeds of Crime Act 2013</p>	<p>Section 2 defines “criminal conduct” as a drug trafficking offence as defined in section 2(1) of the Drug Trafficking Offences Act or offences under sections 41, 42 or 43 which relate to the proceeds of drug trafficking or a “relevant offence” which is defined as benefiting (as defined in section 7(3)) from an indictable offence or an offence triable both summarily or on indictment or a summary only offence or those listed in schedule 2.</p> <p>Section 2(1) defines “criminal conduct” as conduct which constitutes an offence or would constitute an offence (“offence” means an indictable offence or a summary offence punishable with more than 1 year imprisonment) if it had occurred in Saint Vincent and the Grenadines</p> <p>Section 121 defines “criminal property” as a persons benefit (in whole or in part, directly or indirectly) from criminal conduct and the alleged offender knows or suspects that it constitutes such a benefit.</p>
Grenada	Proceeds of Crime Act 2012 (No.6)	<p>Section 2(1) defines “criminal conduct” as:</p> <ul style="list-style-type: none"> (a) A drug trafficking offence (importation, exportation, production and or supply of a trafficable quantity of a controlled drug, possession with intent to supply, or handling of controlled drugs and cultivation of cannabis); (b) Assisting in or inducing outside Grenada, commission of an offence punishable under a corresponding law; (c) Money laundering; or <p>A “relevant offence” which is defined in section 2(1) as:</p> <ul style="list-style-type: none"> (a) Any indictable offence, or offence triable both summarily or on indictment in Grenada, from which a person has benefited, as defined in sections 6(9) and (10); (b) Any act or omission which, had it occurred in Grenada, would have constituted an offence as defined in (a); (c) Any offence falling within the “<i>designated category of offences</i>”, outlined under the Financial Action Task Force on money laundering Recommendations and contained in the Schedule; and (d) An offence under the Terrorism Act

4.5.13 Scheduled Offences

4.5.14 If the relevant Act in a jurisdiction required a predicate offence to be proven it would state the specific predicate offences in a schedule. In this situation it would be usual to proceed to trial with the predicate offence as a separate charge in the same proceedings. The predicate offence would then have to be proved to the requisite standard of proof in order for the Prosecutor to prove that the proceeds subject to the money laundering charge were derived or obtained from this offending.

4.5.15 Class of Offences

4.5.16 Where the the prosecution have to show that the property has come from a type or class of offence (but not go so far as to show the predicate offence) the test that was applied in **R v NW [2008] EWCA Crim 2; [2008] Crim. L.R. 900; (now also reported as Prosecution Appeal (No. 11 of 2007), Re R v W, R v C)**, would be relevant so that the prosecution must at least identify a class or type of offence where the proceeds have been derived (see Table 3: Dominica, Grenada Barbados, Saint Christopher and Nevis and Saint Vincent and the Grenadines for an offence contrary to the Proceeds of Crime Act 2013)

4.5.17 However this does not mean the defendant must be convicted of the underlying offence. It is not the case that the only way to prove the defendant had knowledge that property is the proceeds of criminal conduct, is to have him or her prosecuted for the criminal conduct. The prosecution can infer knowledge from any background fact or

circumstances (see **The Queen v Melanie Coye et al** *In the Court of Appeal Belize, Criminal Appeal No.16 of 2010* at paragraph 4.5.25 (f))

4.5.18 Broad Definition

4.5.19 Where the offence is broad so that money laundering is the proceeds of any criminal conduct (see Table 3: Antigua and Barbuda; Saint Vincent and the Grenadines with the 2005 amendment all offences are defined as criminal conduct; and Saint Lucia where almost all criminal offences are defined as criminal conduct) there are two ways of proving the offence (**R v Anwoir** [2008] EWCA Crim 1354):

- (a) Firstly by proving the type of offending that gave rise to the criminal property; or
- (b) Secondly by relying upon circumstantial evidence

4.5.20 **Anwoir** looks at how the prosecution can prove that property is derived from criminal conduct. The Court of Appeal in England and Wales held:

*We consider that in the present case the Crown are correct in their submission that there are two ways in which the Crown can prove the property derives from crime, a) by showing that it derives from conduct of a specific kind or kinds and that conduct of that kind or those kinds is unlawful, or b) by **evidence of the circumstances in which the property is handled which are such as to give rise to the irresistible inference that it can only be derived from crime.** This in our judgment gives proper effect to the decision in Green, and is consistent with the decisions of this court in Gabriel [2007] 2 CAR 11,*

IK [2007] 2 CAR 10 and, of course, Craig. We consider that it is also consistent with the approach of this court in R v El Kurd (unreported CA 26th July 2007, [2007] EWCA Crim 1888).

4.5.21 More recently, the Court of Appeal in England and Wales considered the case of **F [2008] EWCA Crim 1868**. The defendant had been arrested at Heathrow Airport about to board a flight for Tehran. He had checked-in suitcases containing over a million pounds, wrapped in newspapers. The defendant said that he was given the money by another man to take to Iran. He said he had taken cash to Iran for this man in the same way a number of times before and he knew what he was doing was wrong. Airline records show that this was in fact the thirtieth flight the defendant had made to Iran in the past 12 months. On each occasion he checked in a substantial weight of suitcases. The man named by the defendant as the source of the money could not be located.

4.5.22 The prosecution could not point to any source of the cash. They invited the jury to infer from the circumstances that the cash was criminal property. The judge at first instance heard legal argument at the close of the prosecution case. At that point, although **Anwoir** had been argued, the court had not yet handed down judgment. The judge therefore, following **NW**, acceded to a submission of no case from the defence. The appeal was heard on July 17, 2008. Latham L.J., following his own decision in **Anwoir**, allowed the appeal and directed a retrial.

4.5.23 In **DPP v AA Bholah** (*from the Supreme Court of Mauritius*), delivered 20 December 2011, PC Appeal No 0059 of 2010, (2011) UKPC 44 it was submitted that the accused should be informed of the type of criminal conduct resulting in laundered criminal proceeds. The Board concluded that proof of a particular predicate offence was not an “*essential*” element of the broad money laundering offence in Mauritius. However where it was possible to give the accused notice of the type of criminal activity that produced the illegal proceeds, fairness demanded that this information should be supplied.

4.5.24 Evidence

4.5.25 Typically evidence of the criminal origin of proceeds may be provided in money laundering proceedings by:⁴⁹³

- (a) Accomplice evidence;
- (b) Forensic evidence (e.g. contamination of cash with drugs) from which inferences can be drawn that money came from drug trafficking;
- (c) Evidence of complex audit trails, from which an accountancy expert may be able to conclude that the complexity of the

⁴⁹³ However consider if a scheduled offence needs to be proved or a category of offences (i.e. hybrid or indictable). If this is the case (c), (d) and (e) would not be sufficient on their own to prove money laundering. There would need to be other evidence that supported the situations in (c), (d) and (e) that were linked to the criminal conduct alleged.

transactions indicate that the property was the proceeds of crime;

- (d) Drug traffickers often attempt to launder proceeds through a cash intensive business. Where the cash flows appear too large or the profit margins too high this may be capable of giving rise to expert evidence that the business will usually give rise to a particular level of profit and the profits are clearly excessive which together with other available evidence can be sufficient to prove the underlying criminality. See **R v Boam** 1998 Cr. Law *Bulletin*;
- (e) Direct evidence of buying assets with cash, deliberately concealing the true ownership (asking witnesses to put it in their name) and mixing cash flow with legitimate businesses (contrary to accounting principles) could also be given as expert evidence;
- (f) Circumstantial evidence, as referred to in **R v MK and AS** [2009] EWCA Crim 952 (paragraph 12) where it was held that, “... it is open to the prosecution to try to prove guilt from the “evidence of the circumstances in which the property was handled” which It is said “give rise to the irresistible inference that it can only be derived from Crime”. They [prosecution] do not have to prove the specific kind of crime”

Also see **The Queen v Melanie Coye et al** *In the Court of Appeal Belize, Criminal Appeal No.16 of 2010* where inferences

from circumstantial evidence are discussed at length after money was found at the house of Directors of a Company (MEIL), that had obtained money transfers from outside Belize by forgery and fraud. It was irrelevant that the provenance of the money seized from the Directors house couldn't be established. The Court of Appeal (paragraph 25) held that:

“... given that a reasonable jury could infer that the money which was stashed away at the premises of one of MEIL’s directors was obtained illegally, they could as well infer that that money, or at least a part of it, was the money which MEIL had obtained or derived from the forgery and/or the fraud and was now having it concealed at its director’s premises. It is crucial in this regard that the name of one of its other directors, Melanie Coye, was found on a parcel and a suitcase containing the money seized.”

4.5.26 Charging Practice

4.5.27 The underlying offence ought normally to be proceeded with, as it represents the conduct, which gives, rise to the criminal proceedings. Money laundering and the underlying criminality are separate offences. Money laundering activities should not be seen simply as "*part and parcel*" of the underlying criminality.

4.5.28 A money laundering charge ought to be considered where the proceeds are more than *de minimis* in any circumstances where the

defendant who is charged with the underlying offence has done more than simply consume his proceeds of crime.

4.5.29 Where, however, there is any significant attempt to transfer or conceal ill-gotten gains money laundering should normally be considered as an additional charge, in part because the purpose of the concealment will be to defeat or avoid prosecution and confiscation.

4.5.30 A careful judgement will need to be made as to whether it is in the public interest to proceed with the money laundering offence in the event of a plea to the underlying criminality by a defendant who is also indicted for laundering his **own** proceeds. The Prosecutor should take into account whether the laundering activity involves such a significant attempt to conceal ill-gotten gains that a court might consider a consecutive sentence.

4.5.31 In a "*mixed*" case, where the laundering is by X on behalf of Y (the author of the predicate offence), it may be appropriate to proceed against Y for the underlying crime and X in relation to the laundering offence in the same indictment. A good example would be where the wife of a drug trafficker has laundered the proceeds of his criminality. Where the investigation has followed the money trail and there is sufficient *nexus* between the underlying offences and the money laundering then the case may benefit from being run together in one indictment, if it enables the prosecution to be presented in a clear and simple way. The jury will be able to take a global view of the evidence and the inclusion of the launderer (wife) on the indictment may

strengthen the prosecution case. Care should be taken not to overload the indictment, which could lead to a successful application to sever.

4.5.32 Money laundering can be committed in a number of ways, thus permitting the different methods of commission to be alleged in a single count in the alternative. However, this should not be taken to be a licence to allege different methods of commission without discrimination. The prosecution should identify the possible methods of commission and should specify those methods and only those methods. In **R v Middleton and Rourke** (*unreported, January 31, 2008, CA* ([2008] EWCA Crim. 233) the prosecution case against the defendants was involvement in a course of conduct, by laundering the proceeds of their own drug dealing over a number of years (by spending (converting) it into thousands of different transactions, large and small, albeit intermingled with similar transactions representing some legitimate activity. It was largely impossible to untangle that activity, so a single count charging them generally with converting criminal property between 2003 and was not bad for duplicity.

4.5.33 Where a conspiracy to commit any of the principal money laundering offences is charged, it is submitted that the effect of the decision of the House of Lords in **R v Saik** [2007] 1 A.C. 18 is that an intention that the property to be laundered would be criminal property is required where the property had not been identified at the time of the agreement; and, where the property had been so identified, knowledge that the property was criminal property is required.

The Lead Investigator requires the Prosecutor's advice for a potential money laundering charge for Mr Yellow after the search of his house and the seizure of \$100,000US. The Prosecutor completes Form 1. Applying the Money Laundering Prevention Act of Antigua and Barbuda

Form 1 - CHARGING or REVIEW of CHARGING DECISION

DEFENDANT(s) NAME(s)	Mr Yellow
EVIDENTIAL STAGE	<p>Refer to the evidence and determine if a reasonable prospect of conviction:</p> <p>“Money laundering” contrary to section 3 of the Money Laundering (Prevention) Act is defined in section 2 as:</p> <p>(a) engaging directly or indirectly, in a transaction that involves money, or other property, or</p> <p>(b) receiving, possessing, managing, investing, concealing, dsguising, disposing of or bringing into Antigua and Barbuda any money, or other property, knowing or having reasonable grounds to suspect that the money, or other property, is derived, obtained or realised, directly or indirectly, from some form of unlawful activity.</p> <p>“Unlawful activity” is defined in section 2 of the Act as an act or omission that constitutes an offence against a law in force in Antigua and Barbuda or against a law in force in a foreign country that would, if it was committed in Antigua and</p>

	<p>Barbuda, be an offence against a law of Antigua and Barbuda;</p> <p>Proceeds (namely money) derived from a drug trafficking offence would therefore be unlawful activity for a money laundering offence contrary to section 3.</p> <p>On the facts Mr Yellow resides at the property himself therefore there is sufficient evidence with only his personal belongings at the property to establish the money was in his custody and control.</p> <p>Therefore in my view there is reasonable prospect of conviction that Mr Yellow was in possession of the money through the commission of unlawful activity namely drug trafficking. This is on the basis that:</p> <ol style="list-style-type: none"> 1. There is direct evidence of Mr Yellow's involvement in a drugs deal on 17th June when he was arrested in possession of 2kg of cocaine; 2. He has a number of items of drugs paraphernalia at his home address consistent with drug supply; and 3. Failed to give an account when questioned
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4.6 Conspiracy

4.6.1 Where there is a Criminal Code,⁴⁹⁴ conspiracy is an offence, or a Prosecutor should review legislation establishing the substantive offence,⁴⁹⁵ or consider an offence contrary to common law.

⁴⁹⁴ **Saint Vincent and the Grenadines:** Section 310(1) Criminal Code CAP. 171; **Belize:** Section 23 Criminal Code Chapter 101; **Anguilla:** Section 31 Chapter C40, Criminal Code of Anguilla; **Grenada:** Section 48 Criminal Code; **Saint Lucia:** Section 73 Criminal Code 2008

- 4.6.2 This section of the Guide will assist to demonstrate that a conspiracy charge can be effectively used to prosecute Serious Organised Crime as the offenders are usually party to an agreement to commit an unlawful act, such as importation of controlled drugs. The conspiracy charge allows the Prosecutor to present on the same indictment a case against all those involved, from the financier of the operation to the defendant actually importing the drugs.
- 4.6.3 This allows better presentation of the case against the defendants, as the Prosecutor only has to prove that there was an agreement and each defendant intended to be a party to that agreement. It is therefore worth setting out the elements to prove for a conspiracy.
- 4.6.4 The essential element of the crime of conspiracy is the agreement or common design by two or more people to carry out a criminal act. Even if nothing is done in furtherance of the agreement, the offence of conspiracy is complete.
- 4.6.5 The *actus reus* is the agreement. This cannot be a mere mental operation; it must involve spoken or written words or other overt acts. Importantly, if the defendant repents and withdraws immediately after the agreement has been concluded, s/he is still guilty of the offence.
- 4.6.6 There must be an agreement to commit the criminal offence, but the motives of the conspirators are irrelevant. For example, in **Yip Chiu-Cheung v The Queen (1994) 2 All E.R. 924**, the fact that one

⁴⁹⁵ For example **Grenada**: Section 38(1) Drug Abuse (Prevention and Control) Act

conspirator was an undercover Investigator who only entered the conspiracy to catch drug dealers did not prevent the offence of conspiracy from being committed.

4.6.7 Evidence of the agreement may be proved by direct evidence of words or conduct or by proving circumstances from which the jury may presume it (**R v Parsons** (1763) 1 W.B.I. 392; **R v Murphy** (1837) 8 C.& P. 297). Common design is the root of the offence of conspiracy, but it is not necessary to prove that all the parties came together and actually agreed in terms to have the particular common design. Each conspirator may have a particular part to play in the pursuit of the attainment of the common design.

4.6.8 Proof of the existence of a conspiracy is generally a “*matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them*” (**R v Brisac** (1803) 4 East 164 at 171, cited with approval in **Mulcahy v R** (1868) L.R.3 H.L. 306 at 317).

4.6.9 Each co-conspirator must have the requisite mens rea by having an intention to be a party to an unlawful act, for example the importation of controlled drugs (**R v Anderson** [1986] A.C. 27, HL).

4.6.10 A conspiracy charge means the person charged may not necessarily have possession of the drugs, trafficked humans, laundered money or firearms but still be a party to the agreement. Examples of co-conspirators to import controlled drugs (but not limited to these) are:

- (a) A defendant arranging the importation of drugs by recruiting someone to bring drugs into the country by boat – which may be proved by evidence of telephone contact;
- (b) A defendant who has corrupted Investigators to avoid the detection of the consignment;
- (c) Those Investigators knowingly corrupted;
- (d) A defendant who has provided the facilities or technology to facilitate the crime. For example providing the boat for the importation of drugs;
- (e) A defendant who has provided the resources to commit the crime, such as the money to purchase the drugs.

The Investigator requests advice on whether a conspiracy could also be charged. The Prosecutor provides advice and also applies the public interest test to all matters.

Form 1 - CHARGING or REVIEW of CHARGING DECISION	
DEFENDANT(s) NAME(s)	Mr Green and Mr Yellow
EVIDENTIAL STAGE	Refer to the evidence and determine if a reasonable prospect of conviction: The possession with intent to supply will be an alternative charge to one of conspiracy to supply cocaine. Mr Green and Mr Yellow were part of a common

	<p>design to supply cocaine. Of course it is not necessary to prove that all parties came together and actually agreed in terms to have the particular common design. Each conspirator may have a particular part to play in the pursuit of the attainment of the common design. Mr Green was essential as the driver to secure delivery of the cocaine and Mr Yellow was in possession of it to supply. Therefore both had a role to play in the common design of supplying the cocaine to another party, namely Mr Red. It can be shown that Mr Red is the customer as cells seized show a text from Mr Yellow (outbox) to Mr Green (Inbox): “<i>Red says bus stop</i>” It is a reasonable inference, taking this text with the note found in Mr Green’s hand, with reference to Mr Red and an amount of money, that Mr Red was to be the recipient of the cocaine. In those circumstances he should be named as a party to the conspiracy.</p> <p>Proof of the existence of a conspiracy is generally a “<i>matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them</i>” (R v Brisac (1803) 4 East 164 at 171, cited with approval in Mulcahy v R (1868) L.R.3 H.L 306 at 317). On the facts, Mr Green’s actions in driving Mr Yellow who was in possession of the cocaine, Mr Green’s possession of the note and the telephone contact with Mr Yellow, all demonstrate they were both party to the common design and their intention to carry out the agreement.</p>
<p>PUBLIC INTEREST STAGE</p>	<p>I am satisfied that it is in the public interest to prosecute on all charges as both could receive custodial sentences and it is in the public interest to prosecute offences of possession with intent to supply, conspiracy to supply and laundering the proceeds of drug trafficking</p>

After charge the handwriting and drug expert statements are received and reviewed by the Prosecution Team. The handwriting expert confirms the diary is written in the handwriting of Mr Yellow and the Investigator from the drugs squad concludes that the diary has a dealers list with reference to the supply of four kilogrammes of cocaine. As a result the Prosecutor amends the charge to an amount of four kilogrammes. The Prosecutor therefore decides that the particulars of the count for conspiracy will now refer to four kilogrammes of cocaine and Mr Red and Agro will be added as co-conspirators (see Annex M for the case summary explaining how the Prosecution case will be presented).

4.7 Jurisdiction

4.7.1 Serious Organised Crime is transnational and a conspiracy can be planned in one region and executed in another. Therefore it is important at an early stage to determine jurisdiction and which country would be best placed to prosecute the matter.⁴⁹⁶

4.7.2 Generally (using examples of Dominica and Grenada):

- (a) A conspiracy between a person in Dominica and a person in Grenada to commit a crime in Dominica is indictable in Dominica:⁴⁹⁷ **R v Parnell (1881) 14 Cox 508 at 515** and referred

⁴⁹⁶ see 3.13.1

⁴⁹⁷ See **Saint Lucia**: Section 75(1) Criminal Code 2008 which puts this requirement in statutory form

to in **R v Meyrick and Ribuffi**, *Cr.App.R 94 at 99, CCA*, and **R v Hamersley**, *42 Cr.App.R 207 at 217 CCA*;

- (b) A conspiracy in Dominica to commit a crime in Grenada is not indictable at common law in Dominica unless the contemplated crime is one for which an indictment would lie in Dominica.⁴⁹⁸

Board of Trade v Owen [1957] A.C. 602, HL;

- (c) A conspiracy formed in Grenada to commit an offence within Dominica is indictable in Dominica even if no acts in furtherance of the conspiracy are committed within Dominica. As approved by the Privy Council in **Somchai Liangsiriprasert v Government of the United States** [1991] 1 A.C. 225 PC at 251:

“Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England. Accordingly a conspiracy entered into in Thailand with the intention of committing the criminal offence of trafficking in drugs in Hong Kong is justiciable in Hong Kong

⁴⁹⁸ See **Saint Lucia**: Section 75(2) Criminal Code 2008 which puts this requirement in statutory form

even if no overt act pursuant to the conspiracy has yet occurred in Hong Kong.”

4.7.3 Offences on the High Seas

4.7.4 The Prosecution Team may have a situation where an interdiction takes place outside of territorial waters, which will generally be 12 miles off shore. For any matters within territorial waters, there may be specific provision in law to board a vessel.⁴⁹⁹ Equally there may be the authority to search a vessel outside of these limits.⁵⁰⁰ The US Coast Guard will prepare a Case Package where there are any interdictions at sea. For more detail on the contents of these Case Packages, prepared to assist investigations and prosecutions, see Annex 10. In summary a standard drug Case Package will include the following:

- (a) IONSCAN evidence, which will show through plasmagrams whether a suspect has been in contact with drugs. This could be important evidence where the drugs have been disposed of at sea;
- (b) Field Tests of the drugs;
- (c) Digital Imagery, for example of the interdiction. This may be important to show where suspects were located in a vessel vis-à-vis the drugs or any other paraphernalia. If this information hasn't been included a written application maybe made to the

⁴⁹⁹ For example see **Saint Lucia**: Section 638 Criminal Code 2008

⁵⁰⁰ For example **Saint Lucia**: Section 639 Criminal Code 2008 which allows search of a vessel up to 20 miles from shore for items that may have been smuggled and liable to forfeiture

US Coast Guard on the prescribed form (see Annex 9) for any photographs or videos;

- (d) Documentation of any spontaneous statements;
- (e) On scene evidence from any vessel. Where a vessel is sunk as a hazard to navigation photographs may be taken of the fuel tank to show the fuel capacity to support evidence of an importation or exportation.

4.7.5 Power to Board a Ship

4.7.6 This section will refer to the United Nations Convention on the Law of the Sea 1982 (*“the 1982 Convention”*)⁵⁰¹ and the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (*“Vienna Convention”*).⁵⁰² The Caribbean Regional Maritime Agreement may also be referred to. However this has not been ratified by the minimum five States although most Caribbean States have accepted the agreement in principle. Therefore if a Prosecutor is asked for advice on whether a ship can be boarded in international waters they should refer in the first instance to the 1982 Convention and the Vienna Convention.

⁵⁰¹ The European Union, United Kingdom, Barbados, Antigua and Barbuda, Saint Christopher and Nevis, Saint Lucia, Grenada, Dominica and Saint Vincent and the Grenadines are all fully bound by the Convention – The United States is not bound. Text can be found at:

http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm

⁵⁰² The United Kingdom, United States, Barbados, Antigua and Barbuda, Saint Christopher and Nevis, Saint Lucia, Grenada, Dominica and Saint Vincent and the Grenadines are all fully bound by the Convention. For link to text see paragraph 3.12.2 (d)

- 4.7.7 Under Article 110(1) of the 1982 Convention, a warship may proceed to verify a ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration (Article 110(2)).
- 4.7.8 If there is no flag and no documents are provided the officer can authorise the further examination to establish if the reasonable grounds for suspicion in Article 110(1) are correct. This would be in order to verify the ship's status as stipulated in Article 110(2).
- 4.7.9 Contracting parties to the Vienna Convention are required to criminalise not only the organisation, management and financing of drug trafficking but also the conversion, transfer and concealment of the proceeds of drug trafficking (Article 3(1)(a)(v); (b)(i); (b)(ii) and (c)(i)).
- 4.7.10 Under Article 17(3) of the Vienna Convention a State party which has reason to suspect a ship of another party is engaged in illicit traffic has to request authorisation from the flag State to take appropriate measures in regard to that ship.
- 4.7.11 Often a vessel transporting drugs, or money is Stateless and does not fly a flag. As a result it may be boarded (Article 17(4)(a)) and searched (Article 17(4)(b)) . Any Investigator facing a Stateless ship would have

reasonable grounds for believing that such a ship falls into Article 17 of the Vienna Convention, on the basis that:

- (a) The fact the ship is without a flag;
- (b) The ship is a high speed vessel
- (c) The area is well known for the illegal trafficking of narcotics

4.7.12 This Vienna Convention power to board can be used by a warship or any other duly authorised ships or aircraft clearly marked and identifiable as being on government service (Article 17(10)). Therefore this would include a Coastguard vessel.

4.7.13 Seizure

4.7.14 Under the Vienna Convention cash and drugs can be seized applying Article 17(4). This is pursuant to the satisfaction of reasonable grounds as outlined at paragraph 4.7.11 above.

4.7.15 Jurisdiction to Prosecute

4.7.16 Under the Vienna Convention if there is no flag then jurisdiction can be with the country of origin of the offender or the country where that offender is habitually resident (Article 4(1)(b)(i)).

4.7.17 An alternative route to determine jurisdiction is Article 4(1)(b)(ii) of the Vienna Convention that determines the State boarding, searching and

seizing would retain jurisdiction.⁵⁰³ This of course is on the basis that an offence has been committed according to that boarding State.

4.7.18 A ship without a flag will be deprived of many of the benefits and rights available under the legal regime of the high seas.

4.7.19 At common law ships are required to sail under the flag of one State only. A ship that is stateless, and does not fly a flag, may be boarded and seized on the high seas. This point was accepted by the Privy Council in the case of **Naim Molvan v Attorney-General of Palestine** (see also **US v Dominguez**; **US v Cortes**; **US v Monray** and **US v Marino-Garcia**) In the latter case the Court referred to Stateless vessels as "*international pariahs*."⁵⁰⁴ Furthermore jurisdiction is established "*solely as a consequence of the vessel's status as Stateless*." Therefore the State that boards retains jurisdiction.⁵⁰⁵

4.7.20 Dominica now has enforcement powers in respect of ships pursuant to the Criminal Law and Procedure Act.⁵⁰⁶ These are very wide ranging and were drafted in order to allow law enforcement officers to board registered and unregistered ships, but primarily to resolve the issues of unregistered pirogues trafficking drugs. This Act compliant with the Vienna Convention, allows a law enforcement officer, if he has

⁵⁰³ Also confirmed by the Maritime Analysis and Operations Centre. Reference is made to paragraphs 4 and 9 of Article 17 by Article 4(1)(b)(ii) – however with a Stateless ship there is no authorisation required by the flag State therefore paragraphs 4 and 9 are not applicable.

⁵⁰⁴ 679 F.2d 1373 US –v- Marino-Garcia at paragraph 12

⁵⁰⁵ 679 F.2d 1373 US- v – Marino-Garcia at paragraph 17

⁵⁰⁶ **Dominica**: Sections 14J-14P Criminal Law and Procedure Act

reasonable grounds to suspect drug trafficking or money laundering, or an offence of conspiring to defeat the course of justice, to board the ship.⁵⁰⁷ A number of powers once aboard include opening containers⁵⁰⁸, search⁵⁰⁹, require a person to give information⁵¹⁰, take a ship into a port⁵¹¹, take samples⁵¹², take photo's⁵¹³, seize anything found⁵¹⁴ and arrest without warrant.⁵¹⁵ Also the Chief of Police can authorize these powers to be conducted outside of territorial waters if a Convention State requests⁵¹⁶, or for unregistered (ie pirogues) if the Chief authorizes.⁵¹⁷ A precedent of this form is produced at Annex Z1

4.7.21 Where a ship is detained, a law enforcement officer must serve on the master of the vessel, a notice in writing stating that it has been detained, until the notice is withdrawn by the service of another notice.

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4.7.22 It is important to note that this Act now means that for any drug trafficking, money laundering or conspiracy to defeat justice offence committed aboard a ship (and prosecuted pursuant to this Act),

⁵⁰⁷ **Dominica:** Section 14L(1) Criminal Law and Procedure Act

⁵⁰⁸ **Dominica:** Section 14L(1)(e) Criminal Law and Procedure Act

⁵⁰⁹ **Dominica:** Section 14L(1)(c) Criminal Law and Procedure Act

⁵¹⁰ **Dominica:** Section 14L(1)(d) Criminal Law and Procedure Act

⁵¹¹ **Dominica:** Section 14L(1)(a) Criminal Law and Procedure Act

⁵¹² **Dominica:** Section 14L(1)(f) Criminal Law and Procedure Act

⁵¹³ **Dominica:** Section 14L(1)(h) Criminal Law and Procedure Act

⁵¹⁴ **Dominica:** Section 14L(1)(j) Criminal Law and Procedure Act

⁵¹⁵ **Dominica:** Section 14L(1)(i) Criminal Law and Procedure Act

⁵¹⁶ **Dominica:** Section 14L(4) Criminal Law and Procedure Act

⁵¹⁷ **Dominica:** Section 14L(8) Criminal Law and Procedure Act

⁵¹⁸ **Dominica:** Section 14L(2) Criminal Law and Procedure Act

Dominica will have jurisdiction when a certificate purporting to be issued by the Government of any registered vessel is produced confirming that the offences are also prohibited there.⁵¹⁹

4.8 Cybercrime and Identity Theft

4.8.1 The internet has created vast opportunities for organised criminals to accumulate vast profits through fraudulent schemes. There are numerous scams such as advance fee frauds, pyramid schemes, “*pump and dump*” share pushing and the list goes on.

4.8.2 In relation to investigations and prosecutions a traditional law enforcement approach of arresting a suspect, getting an admission charging and placing before the court is out of touch. With cybercrime the suspect maybe out of the jurisdiction, consideration will have to be given to admissibility of evidence, offence/s to be charged, extradition, and expert reports. Therefore such investigations are timely, complex and costly. A Prosecution Team approach is therefore essential.

4.8.3 Many of the difficulties mentioned above are discussed in this Guide, and can be equally applied for cyber crime. For ease of reference:

- (a) Jurisdiction from paragraph 4.7;
- (b) Extradition from paragraph 3.13;
- (c) Hearsay from paragraph 3.3;
- (d) Preservation of evidence paragraph 6.9.8;

⁵¹⁹ **Dominica:** Section 14K(3) Criminal Law and Procedure Act

- (e) Preservation of evidence in another jurisdiction i.e. emails
paragraph 3.5.3 and Annex B Preservation Letter and Letter of Request

4.8.4 An issue that is likely to arise is proving the integrity of computers to establish that, “*the computer was operating properly at all relevant times...*”⁵²⁰ This provision could be a hurdle with so many computers potentially involved in a single transaction. For example, a withdrawal from a cash point in Country X of \$2000 EC by a USA tourist from a USA account. This could require confirmation of integrity of more than one computer, including evidence obtained from another jurisdiction.

4.8.5 However in Antigua and Barbuda section 43 of the Evidence (Special Provisions) Act 2009⁵²¹, Grenada section 36 G of the Evidence Act, Saint Lucia section 136E of the Evidence Act, Dominica section 7 of the Electronic Evidence Act,⁵²² Saint Vincent and the Grenadines section 7 of the Electronic Evidence Act 2004 and 148 of the Evidence Act 2011 of Saint Christopher and Nevis, all make provision for admissibility of computer-generated evidence unless there are

⁵²⁰ For example **Antigua and Barbuda**: Section 43(a) Evidence (Special Provisions) Act 2009

⁵²¹ Also see sections 6 and 7 of the Electronic Evidence Act 2013 (also see same sections in Dominica). Section 7 has alternative methods of proving integrity including if the integrity and content is notarized or recorded on a non-rewritable storage device; or has been examined and its integrity confirmed by an expert appointed by the Court; or electronically certified or has been electronically signed, by a method provided by a security procedure provider.

⁵²² Also apply section 15(2) of the Electronic Transactions Act No. 19 of 2013 which provides for admissibility of an “*electronic communication*” (e.g. an email) when a court considers the reliability of the generation, storage or transmission; reliability of how the information was maintained; how the “*originator*” (e.g. person who sent or generated an email) was identified and any other relevant factor

reasonable grounds to doubt the integrity. Therefore computer generated evidence will be admissible when a statement is adduced, from someone who uses or controls the machine and is familiar with its operation, to show that the computer system or other similar device was operating properly at all times. If there were problems with the operation of the computer or other device, evidence will have to be adduced to confirm that the electronic evidence produced was not effected by any malfunction. This may require evidence from an expert to confirm the operating issue didn't effect the integrity of the evidence. Each of the above sections should be referred to when determining the exact content of the information required from the person who prepares the statement.

4.8.6 For clarity, if integrity is presumed (or proved where no presumption), when a bank's computer transfers funds from one account to another (as a result of a customer's withdrawal request made via a computer linked to the bank's computer) and the computer records the transaction automatically, a printout of the record is not a hearsay assertion that the transaction occurred; it is a record of the transfer itself; production of the record is evidence of proof of the transfer with no hearsay element involved (**R v Governor of Brixton Prison and another, ex p. Levin** [1997] A.C. 741, HL)

4.8.7 In other situations there will have to be a statutory (see from paragraph 3.3.2) or common law exception (see from paragraph 3.3.36 above) to the hearsay rule for the computer record to be admissible.

4.8.8 In relation to offences, there are jurisdictions that do not have specific legislation to tackle cybercrime or identity theft. However the International Telecommunications Union, CARICOM and the Caribbean Telecommunications Union, have established a project called HIPCAR to draft guidelines for uniform policies, legislation and regulatory procedures see: <http://www.itu.int/ITU->

[D/projects/ITU_EC_ACP/hipcar/reports/wg2/docs/HIPCAR_1-5-B_Model-Policy-Guidelines-and-Legislative-Text_Cybercrime.pdf](http://www.itu.int/ITU-D/projects/ITU_EC_ACP/hipcar/reports/wg2/docs/HIPCAR_1-5-B_Model-Policy-Guidelines-and-Legislative-Text_Cybercrime.pdf) The Budapest

Convention is also essential reading for the Prosecutor to assist with any transnational investigations, despite the fact that no Caribbean jurisdictions are signatories yet. It is the first international treaty on crimes committed via the Internet and other computer networks, dealing particularly with infringements of copyright, computer-related fraud, child pornography and violations of network security. It also contains a series of powers and procedures such as the search of computer networks and interception. Its main objective, set out in the preamble, is to pursue a common criminal policy aimed at the protection of society against cybercrime, especially by adopting appropriate legislation and fostering international co-operation.

Signatories to date include, European Council Members, the United States, Canada and Japan. It has been supplemented by an Additional Protocol making any publication of racist and xenophobic propaganda via computer networks a criminal offence. The Convention, list of signatories and an explanatory report can be found at:

<http://conventions.coe.int/Treaty/en/Summaries/Html/185.htm>

4.8.8(a) The Global Prosecutors E –crime Network (GPEN) is another important source of information in relation to cybercrimes. Membership gives enhanced access to certain sites, which will include GPEN and contact points in other countries which can prove to be essential when dealing with cross border criminality. GPEN encourages enhanced international cooperation in the e-crime arena; but it enables all jurisdictions to develop a co-ordinated approach for dealing with e-crime that supports effective prosecutions and promotes the principles of the Council of Europe Cybercrime Convention. The GPEN has been designed so that it can achieve the following:

- (a) Enhance international cooperation in the e-crime arena of member countries;
- (b) Encourage the sharing of best practice and dissemination of lessons learnt;
- (c) Improve the exchange of crucial information and data quickly and efficiently, and;
- (d) Encourage all jurisdictions to develop a joint approach for dealing with e-crime that supports effective prosecutions and promotes the principles of the Council of Europe's Cybercrime Convention.

GPEN consists of four distinct web areas that can only be accessed by International Association of Prosecutors (IAP) members using a password, these are:

- (a) A virtual Global E-Crime Prosecutors' College, containing a database of e-crime training courses and presentations;

- (b) A library collection of e-crime material, for example, national legislation and legal guidance (e.g. the Council of Europe Electronic Evidence Guide:

http://www.coe.int/t/dghl/cooperation/economiccrime/cybercrime/Documents/Electronic%20Evidence%20Guide/2467_EEG_v18protected.pdf

- (c) A discussion forum (message/chat board) for the exchange of queries and advice;
- (d) A contacts database of fellow nominated e-crime prosecutors from around the world.

In order to access GPEN you need to be a member of the IAP. You can access the IAP web page at www.iap-association.org and can click on the GPEN link.

4.8.9 Table 4 below lists relevant cybercrime offences,⁵²³ in the region.

Where there isn't an appropriate cybercrime offence in a State consideration should be given to a relevant dishonesty offence such as deception or theft. It is generally assumed however that deception can only be perpetrated against a person and not a machine (i.e. computer if an online transaction or ATM machine - see obiter in **Re Holmes** [2005] 1WLR 1857). In terms of using another's PIN to obtain money from an ATM, theft (or stealing) would be the appropriate charge (as if using key's to open a safe) and a deception maybe appropriate if bank staff were induced later to act on falsified instructions by computer.

⁵²³ In **Saint Lucia** the Computer Misuse Act No 12 of 2011 is still to be given assent by the Governor General

Table 4

Country	Criminal Offence	Act
Saint Christopher and Nevis	Illegal Access	Section 4 of the Electronic Crimes Act 2009 (ECA) ⁵²⁴
	Interfering with Data	Section 5 of the ECA
	System Interference	Section 6 of the ECA
	Illegal interception	Section 7 of the ECA
	Illegal devices	Section 8 of the ECA
	Unlawful Access	Section 9 of the ECA ⁵²⁵
	Unlawful disclosure of access code	Section 10 of the ECA
	Unauthorised access to restricted computer system	Section 11 of the ECA
	Unauthorised access to computer program or data	Section 12 of the ECA ⁵²⁶
	Child Pornography	Section 13 of the ECA ⁵²⁷
Unlawful communications	Section 14 of the ECA ⁵²⁸	
Saint Vincent and the Grenadines	Illegal Access	Section 66 of the Electronic Transactions Act 2007
	Data Interference	Section 67 of the ETA
	System Interference	Section 68 of the ETA
	Misuse of Devices	Section 70 of the ETA
	Computer Related Fraud	Section 72 of the ETA
Child Pornography	Section 71 of the ETA	

⁵²⁴ Please note the Electronic Crimes (Amendment) Bill 2012 which will include offences of computer related forgery (will become new section 14); data espionage (will become new section 15); identity related crimes (will become new section 16); spam (will become new section 17)

⁵²⁵ Amended by the Electronic Crimes (Amendment) Bill 2012 to be replaced by an offence of computer fraud

⁵²⁶ Section 12 will be repealed by the Electronic Crimes (Amendment) Bill 2012

⁵²⁷ Will become section 12 by way of the Electronic Crimes (Amendment) Bill 2012

⁵²⁸ Will become section 13 by way of the Electronic Crimes (Amendment) Bill 2012

Country	Criminal Offence	Act
Grenada	Computer Related Forgery	Section 441(1) of the Criminal Code
	Computer Related Fraud	Section 441(1) of the Criminal Code
	Copyright Infringement	Chapter 67 of Volume III
	Unauthorised access and interference	Section 5 Electronic Crimes Act (ECA)
	Identify theft	Section 7 ECA
	Electronic forgery	Section 8 ECA
	Electronic fraud	Section 9 ECA
	Violation of privacy	Section 10 ECA
	Misuse of encryption	Section 11 ECA
	Child pornography	Section 12 ECA
	Sensitive electronic system	Section 13 ECA
	Electronic terrorism	Section 14 ECA
	Prank calls to law enforcement	Section 15 ECA
	Spoof and spam	Section 17 ECA
Unauthorised access to code	Section 18 ECA	
Barbados	Illegal Access	Section 4 of the Computer Misuse Act 2005 (CMA)
	Illegal Interception	Section 7 of the CMA
	Data Interference	Section 5 of the CMA
	System Interference	Section 6 of the CMA
	Illegal Devices	Section 8 of the CMA
	Access with intent to commit an offence	Section 9 of the CMA
	Child pornography	Section 13 of the CMA
	Malicious Communication	Section 14 of the CMA

Country	Criminal Offence	Act
Antigua and Barbuda	Unauthorised access and interference	Section 4 Electronic Crimes Act (ECA)
	Sending offensive messages through communication services, etc	Section 5 ECA
	Identify theft	Section 6 ECA
	Electronic defamation	Section 7 ECA
	Electronic forgery	Section 8 ECA
	Electronic fraud	Section 9 ECA
	Malicious Code	Section 10 ECA
	Violation of privacy	Section 11 ECA
	Misuse of encryption	Section 12 ECA
	Child pornography	Section 13 ECA
	Sensitive electronic system	Section 14 ECA
	Electronic terrorism	Section 15 ECA
	Prank calls to law enforcement	Section 16 ECA
	Electronic stalking	Section 17 ECA
	Spoof and spam	Section 18 ECA
Unauthorised access to code	Section 19 ECA	
Saint Lucia	Computer Fraud	Section 267 Criminal Code 2008

Country	Criminal Offence	Act
Dominica	False Statement	Section 3 Electronic Funds Transfer Act (EFTA)
	Theft by taking or retaining possession of cards or details of card	Section 4 EFTA
	Card theft	Section 5 EFTA
	Dealing in card of another	Section 6 EFTA
	Purchase or sale of card of another	Section 7 EFTA
	Obtaining control of card as security	Section 8 EFTA
	Forgery	Section 9 EFTA
	Signing card of another	Section 10 EFTA
	Fraudulent use of card	Section 11 EFTA
	Fraud by person authorised to provide goods, services etc	Section 12 EFTA
	Receipt of money, etc., obtained by fraudulent use of card	Section 13 EFTA
	Obtaining goods, etc., by use of false, expired or revoked card	Section 15 EFTA
	Possession of counterfeit cards, invoices, etc.,	Section 16 EFTA
	Trafficking in counterfeit cards	Section 17 EFTA
Possession of card making equipment	Section 19 EFTA	
Alteration of card invoice	Section 20 EFTA	
Fraudulent electronic fund transfer	Section 21 EFTA	

4.8.10 Conspiracy to Defraud

4.8.11 On the basis that this is not often an offence considered in the region, it is important to review the elements required for this offence contrary to the common law. Equally, it may be an alternative to those offences listed in table 4. However please be alert to those jurisdictions where there are no common law offences.⁵²⁹

4.8.12 Definition

4.8.13 To “*defraud*” ordinarily means to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled (**Scott v Metropolitan Commissioner [1975] AC 819**).

4.8.14 In **R v Ghosh [1982] QB 1053** the Court of Appeal considered that the test to determine whether the prosecution has proved that the defendant was acting dishonestly had two stages:

- (a) A jury must first decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, dishonesty cannot be established and the prosecution must fail; and
- (b) If it is dishonest by the ordinary standards of reasonable and honest people the jury must then consider whether the

⁵²⁹ For example **Grenada**: Section 10 Criminal Code Cap 72A and **Saint Lucia**: Section 3 Criminal Code 2008 BUT NOT in **Saint Vincent and the Grenadines** where the Criminal Code section 2(a) preserves liability for common law offences

defendant himself must have realised that what he was doing was by those standards dishonest.

4.8.15 It is dishonest for the defendant to act in a way which he knows ordinary people consider dishonest, even if he believes that that it was not dishonest or he was morally justified in acting as he did.

4.8.16 “*With intent to defraud*” means “*with intent to practice a fraud*” on someone or other. If anyone may be prejudiced in any way by the fraud, that is enough (**Welham v DPP [1961] AC 103**).

4.8.17 Deceit is not a necessary ingredient to a charge of conspiracy to defraud (**Scott v Metropolitan Police Commissioner [1975] AC 815**).

4.8.18 The elements for an offence of conspiracy (which must be considered) are outlined at paragraph 4.6 above.

4.8.19 Charging Practice

4.8.20 A Law Commission Report on Fraud (England and Wales) in 2002 considered that the circumstances where conspiracy to defraud only can be charged fall within two categories:

- (a) Conduct which involves deception but is not covered by existing deception offences;
- (b) Conduct which does not involve deception but involves a view to gain or an intent to cause loss.

4.8.21 Examples of conduct amounting to conspiracy to defraud identified by the Law Commission include:

- (a) Deception which obtains a benefit which does not count as property, services or any of the other benefits defined in law as an offence of theft;
- (b) Deception which does not obtain a gain, or cause a loss, but which prejudices another's financial interests;
- (c) Deception which causes a loss and obtains a directly corresponding gain, where the two are not the same property (other than a transfer of funds between bank accounts);
- (d) Deception which causes a loss and obtains a gain where the two are neither the same property nor directly correspondent;
- (e) Deception for a non-financial purpose;
- (f) Deception to gain a temporary benefit;
- (g) Deception, which does not cause the obtaining of a benefit;
- (h) Making a secret gain or causing a loss by abusing a position of trust or fiduciary duty;
- (i) Obtaining a service by giving false information to a machine;
- (j) "*Fixing*" an event on which bets have been placed;
- (k) Dishonestly failing to fulfil a contractual obligation;

- (l) Dishonestly infringing another's legal right.

4.8.22 Conspiracy to defraud will commonly be charged:

- (a) If there is doubt that a substantive offence would be committed if the dishonest agreement were to be carried out in accordance with the parties' intentions;
- (b) If there is doubt that a substantive offence has occurred as a result of a dishonest agreement between the parties;
- (c) When any substantive offences are no more than steps in the achievement of a wider dishonest objective and a single count of conspiracy to defraud will allow the prosecution to concentrate on that objective;
- (d) Where the object of the conspiracy was to swindle a large number of people and a conspiracy to commit a substantive offence does not meet the justice of the case;
- (e) Where there is a course of conduct, which involves the conspirators undertaking different and distinct aspects of the fraud, which renders the use of a statutory conspiracy charge impractical.

4.8.23 Procedural Powers

4.8.24 Table 5 below provides information on powers for Investigators to preserve data, intercept and secure evidence for suspected

cybercrime offences applying the Budapest Convention. Where there is not a specific power, thought will have to be given by the Investigator about how to secure and preserve evidence through an equivalent power e.g. through a Production Order or search warrant.

Table 5

Country	Power	Act
Antigua and Barbuda	Preservation order	Section 20 of the Electronic Crimes Act 2013 (ECA)
	Disclosure of preserved data order	Section 21 ECA
	Production order	Section 22 ECA
	Powers of access, search and seizure for the purpose of investigation	Section 23 ECA
	Real time collection of traffic data	Section 24 ECA
	Mobile phone tracking in emergencies	Section 25 ECA
	Arrest without warrant	Section 26 ECA
Grenada	Preservation order	Section 19 of the Electronic Crimes Act 2013 (ECA)
	Disclosure of preserved data order	Section 20 ECA
	Production order	Section 21 ECA
	Powers of access, search and seizure for the purpose of investigation	Section 22 ECA
	Real time collection of traffic data	Section 23 ECA
	Mobile phone tracking in emergencies	Section 24 ECA

Country	Power	Act
Barbados	Preservation of data for criminal proceedings Order for disclosure of data Assisting a Police Officer Production Order Search and Seizure of Stored Computer Data	Sections 20 of the Computer Misuse Act 2005 (CMA) Section 19 of the CMA Section 16 of the CMA Section 18 of the CMA Section 15 of the CMA
Saint Christopher and Nevis	Search Warrant Production Order Record of and access to seized data Access to traffic data Interception	Section 15 of the Electronic Crimes Act 2009 (ECA) ⁵³⁰ Section 16 of the ECA ⁵³¹ Section 17 of the ECA ⁵³² Section 18 of the ECA ⁵³³ Section 19 of the ECA ⁵³⁴
Saint Vincent and the Grenadines	Expedited Preservation of Stored Computer Data Expedited Preservation and Partial Disclosure of Traffic Data Production Order Search and Seizure of Stored Computer Data Real-time Collection of Traffic Data Interception of Content Data	Section 80 of the Electronic Transactions Act 2007 (ETA) Section 79 and 80 of the ETA Section 78 of the ETA Section 75 of the ETA Section 82 of the ETA Section 81 and 82 of the ETA

⁵³⁰ The Electronic Crimes (Amendment) Bill 2012 will amend and re-number to become section 18

⁵³¹ Will become section 19 by way of the Electronic Crimes (Amendment) Bill 2012

⁵³² Will become section 20 by way of the Electronic Crimes (Amendment) Bill 2012

⁵³³ Will become section 21 by way of the Electronic Crimes (Amendment) Bill 2012

⁵³⁴ Will become section 22 by way of the Electronic Crimes (Amendment) Bill 2012

4.9 Corruption

4.9.1 If there are any allegations of defeating the administration of justice, then the Prosecution Team may consider the following offences:

- (a) Unlawful Oath,⁵³⁵
- (b) Witness interference⁵³⁶ or by causing a person to refrain from giving evidence or refusing to obey a witness summons or produce evidence;⁵³⁷
- (c) Compounding crime;⁵³⁸
- (d) Perverting the course of justice;⁵³⁹
- (e) Violence to intimidate Judicial Officers;⁵⁴⁰ and
- (f) Corruption⁵⁴¹

4.9.2 Where corrupt payments have been made to those in public office (i.e. magistrate or judge) or those prosecuting or investigating a Serious

⁵³⁵ **Saint Lucia:** Section 369 Criminal Code 2008; **Grenada:** Section 336 Criminal Code

⁵³⁶ **Grenada:** Section 7(1) The Prevention of Trafficking in Persons Act

⁵³⁷ **Barbados:** Section 6 Transnational Organized Crime Act; **Dominica:** Section 6 Transnational Organized Crime (Prevention and Control) Act; **Saint Lucia:** Sections 374 and 375 Criminal Code 2008; **Grenada:** Section 369 Criminal Code; see also **Saint Christopher and Nevis:** Section 5 Organized Crime (Prevention and Control) Act 2002 and section 6 re obstruction of justice system participant; **Saint Vincent and the Grenadines** see Criminal Code offences relating to the administration of Justice at Chapter VI

⁵³⁸ **Saint Lucia:** Section 371 Criminal Code 2008; **Grenada:** Section 384 Criminal Code; **Saint Vincent and the Grenadines:** Section 104 Criminal Code

⁵³⁹ **Dominica:** Criminal Law and Procedure Code Section 7A; **Saint Lucia:** Section 376 Criminal Code 2008; **Saint Vincent and the Grenadines:** Section 97 Criminal Code

⁵⁴⁰ **Saint Lucia:** Section 377 Criminal Code 2008; **Saint Vincent and the Grenadines** see offences against the administration of justice at Chapter V of the Criminal Code

⁵⁴¹ **Saint Christopher and Nevis:** Section 4 Organized Crime (Prevention and Control) Act 2002

Organised Crime, consideration could also be given to the common law offences of misconduct in a public office or bribery.

4.9.3 Misconduct in a Public Office

4.9.4 Misconduct in public office is an offence at common law triable only on indictment (consider if common law offences can be charged as mentioned at 4.8.11). It carries a maximum sentence of life imprisonment. It is an offence confined to those who are public office holders and is committed when the office holder acts (or fails to act) in a way that constitutes a breach of the duties of that office.

4.9.5 The Court of Appeal in England and Wales has made it clear that the offence should be strictly confined (**Attorney General's Reference No 3 of 2003** [2004] EWCA Crim 868). It can raise complex and sometimes sensitive issues. Prosecutors should therefore consider seeking the advice of the DPP to resolve any uncertainty as to whether it would be appropriate to bring a prosecution for such an offence.

4.9.6 Definition of the Offence

4.9.7 The elements of the offence are summarised in **Attorney General's Reference No 3 of 2003**. The offence is committed when:

- (a) A public officer acting as such;
- (b) Wilfully neglects to perform his duty and/or;
- (c) Wilfully misconducts himself;

- (d) To such a degree as to amount to an abuse of the public's trust in the office holder without reasonable excuse or justification

4.9.8 Scope of the Offence

4.9.9 The offence is, in essence, one of abuse of the power or responsibilities of the office held. Misconduct in public office should be used for serious examples of misconduct when there is no appropriate statutory offence that would adequately describe the nature of the misconduct or give the court adequate sentencing powers.

4.9.10 The third element of the definition of the offence provides an important test when deciding whether to proceed with an offence of misconduct in public office. Unless the misconduct in question amounts to such an abuse of trust, a prosecution for misconduct in public office should not be considered

4.9.11 The culpability must be of such a degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment' (**R v Dytham 1979 QB 722**). For example where an Investigator ignores a serious offence being committed in front of him/her but does nothing.

4.9.12 The fact that a public officer has acted in a way that is in breach of his or her duties, or which might expose him/her to disciplinary proceedings, is not in itself enough to constitute the offence.

4.9.13 Examples of behaviour that have in the past fallen within the offence

include:

- (a) Willful excesses of official authority;
- (b) “*Malicious*” exercises of official authority;
- (c) Willful neglect of a public duty;
- (d) Intentional infliction of bodily harm, imprisonment, or other injury upon a person;
- (e) Frauds and deceits.

4.9.14 There is not a general requirement that the misconduct be dishonest or corrupt. Proof that the defendant was dishonest is, however, an essential ingredient when the allegation of misconduct involves the acquisition of property by theft or fraud. See **R v W [2010] EWCA 372**, which involved a police officer who used a credit card that had been issued to him for personal purchases.

4.9.15 Bear in mind, however, the principle that where there is clear evidence of a substantive offence(s) that should form the basis of the case, with the “*public office*” element being put forward as an aggravating factor.

4.9.16 Some of the most difficult cases involve breaches of public duty that do not involve dishonesty or corruption. In all cases, however, the following matters should be addressed:

- (a) Was there a breach of a duty owed to the public (not merely an employment duty or a general duty of care)?

- (b) Was the breach more than merely negligent or attributable to incompetence or a mistake (even a serious one)?
- (c) Did the defendant have a subjective awareness of a duty to act or subjective recklessness as to the existence of a duty?
- (d) Did the defendant have a subjective awareness that the action or omission might be unlawful?
- (e) Did the defendant have a subjective awareness of the likely consequences of the action or omission?
- (f) Did the officer realise (subjective test) that there was a risk not only that his or her conduct was unlawful but also a risk that the consequences of that behaviour would occur?
- (g) Were those consequences “*likely*” as viewed subjectively by the defendant?
- (h) Did the officer realise that those consequences were “*likely*” and yet went on to take the risk?
- (i) Regard also must be had to motive.

4.9.17 Misconduct in public office should not simply be used as a substitute for other offences without some other aggravating factor. Misconduct by a public officer can often be adequately presented as an aggravating feature of a statutory offence. Where the misconduct can be adequately presented by a statutory offence giving the court adequate sentencing powers, that offence should be the starting point. The fact that the offender is a public officer should be treated as an

aggravating feature of that offence.

4.9.18 An assault by a police officer committed on duty should not, for example, automatically be considered as misconduct in public office. A charge of assault would normally provide the court with adequate sentencing powers and the ability to take into account the breach of trust by the officer as an aggravating factor (**R v Dunn (2003) 2 Cr.App.R.(S)**).

4.9.19 Misconduct in public office should be considered where:

- (a) There was serious misconduct or a deliberate failure to perform a duty owed to the public, with serious potential or actual consequences for the public;
- (b) There is no suitable statutory offence for a piece of serious misconduct (such as a serious breach of or neglect of a public duty that is not in itself a criminal offence);
- (c) The facts are so serious that the court's sentencing powers would otherwise be inadequate; or
- (d) It would assist the presentation of the case as a whole (for example, where a co-defendant has been charged with an indictable offence but the statutory offence is summary only and cannot be committed or sent for trial with the co-defendant).

4.9.20 There may be cases in which a number of statutory offences can be more conveniently indicted as a single charge of misconduct in public office in order to make the case easier to present to the court.

4.9.21 Similar reasoning in this regard applies to the charging of misconduct in public office as to the offence of perverting the course of justice. (**R v Sookoo** (2002) EWCA Crim 800).

4.9.22 Bribery at Common Law

4.9.23 It is an offence at common law to bribe the holder of a public office, or for any such office holder to accept such a bribe (**Whitaker** [1914] 3 KB 1283; **Lancaster** (1890) 16 Cox CC 737 - consider if common law offences can be charged as mentioned at 4.8.11). Where the offer is not accepted a charge of attempt should be considered against the offeror.

4.10 Human Trafficking

4.10.1 What is Human Trafficking?⁵⁴²

4.10.2 Human trafficking is the acquisition of people through the use of force, coercion, deception, through debt bondage or other means with the aim of exploiting them. Men, women and children can fall into the hands of traffickers either in their own countries or abroad. Trafficking occurs both across borders and within a country; it is not always visible - exploitative situations are frequently covert and not easily detectable.

4.10.3 Trafficking in human beings is a serious crime which demeans the value of human life. It is a form of modern day slavery and involves the

⁵⁴² See the No Witness No Justice Human Trafficking Community Engagement Short Film at:

<http://youtu.be/Hy0uA-srXig>

recruitment and movement of the most vulnerable men, women and children to exploit them in degrading situations for financial rewards for their traffickers. Trafficking often takes place across international borders; but it can also happen within a country. Victims might be foreign nationals, but can also include Citizens. It has a devastating effect not only on the individuals trafficked but also their families who may themselves be subjected to threats or be in debt to traffickers; it causes harm to the victims and to society as a whole.

4.10.4 The most effective means of combating trafficking are prevention and disruption; by dismantling the criminal network; successful prosecutions and confiscating assets which are the proceeds of crime. Therefore early consultation will need to take place between the Prosecutor and Investigator to ensure that all possible avenues of evidence are explored, and that the correct charge (s) is identified. .

4.10.5 Prosecutors will also work closely with financial Investigators to pursue the financial assets of traffickers. Prosecutors will apply for orders to restrain and confiscate any assets and property traced by Investigators.

4.10.6 International Definition

4.10.7 The Palermo Protocol⁵⁴³ provides the first internationally recognised definition of human trafficking:

⁵⁴³ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organised Crime.

Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or removal of organs.

4.10.8 Human trafficking usually has three constituent elements which are:

- (a) **The Act:** Recruitment, transport, transfer, harbouring and receipt of persons
- (b) **The Mean:** Threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, giving payments or benefits
- (c) **The Purpose:** Exploitation, including: Prostitution of others, sexual exploitation, forced labour, slavery or similar practices, removal of organs and other types of exploitation

4.10.9 The purpose does not always have to be achieved for there to be an offence of trafficking; it is sufficient for there to be an intention to exploit:

- (a) **Sexual:** Frequently through forced sexual exploitation, where victims are placed into off-street brothels, forced to see many clients, and receive either little or no money. Victims may also be transported to clients in hotels or their homes or forced to work on the streets. They regularly suffer sexual and physical violence and abuse. Whilst it predominantly affects women, sexual exploitation also involves young girls, boys and men.

- (b) **Forced labour:** Where victims are forced to work very long hours in hazardous conditions and hand over the majority or all of their wages to their traffickers or controllers. Violence and threats are used against victims or against their families if they fail to comply. There may be threats made to expose the victim to the authorities, for example because of their immigration status, or their passports are confiscated. Many victims or their families are in debt bondage. In some cases the victim may not immediately be aware of their exploitation when given work, transport and accommodation, but their wages may be reduced significantly to pay excessive contributions for those services which may be poor quality and present safety risks.

- (c) **Domestic servitude:** Victims who live and work in households where they are forced to work through threats of serious harm and may be subjected to physical and sexual assaults. There is often restriction of liberty and movement and victims may not be able to leave their accommodation. In essence it is a form of slavery.

- (d) **Enabling others to acquire benefit:** This includes money from state financial assistance such as child benefit, but also includes any benefit derived by the trafficker such as profit, personal benefit or privilege. Victims are often deceived or coerced into helping their traffickers or they may be used by traffickers knowing they are too young or disabled to realise why.
- (e) **Organ harvesting:** Where victims are trafficked in order to sell their body parts and organs for transplant;

4.10.10 Human trafficking is often considered to be organised crime committed on a large commercial scale. But trafficking covers a range of criminal activity, and can also be committed by a single person who may be known or related to the victim. This makes it easier for the trafficker to recruit people as there may already be a relationship of trust.

4.10.11 The means of trafficking may also be more subtle than those described above. For example, victims may have an emotional attachment to their trafficker and may be psychologically bullied or coerced into a situation of exploitation. Or they may be totally dependent on those who are exploiting them. For child victims, consent is irrelevant therefore there is no requirement to show the means. The Palermo Protocol regards children as victims of trafficking whether or not they are evidenced as coerced or deceived into their situation.

4.10.12 What is Smuggling?

4.10.13 Trafficking of human beings should not be confused with "*smuggling*" of human beings. The majority of people who enter the Eastern Caribbean illegally have either done so by themselves or have arranged to be smuggled into the country. The next section explains some of the differences.

4.10.14 Whilst victims who are trafficked have little choice in what happens to them, and it is generally against their will or under some sort of false pretence, people smuggling generally takes place with the consent of the person being smuggled; often payment is made to the smuggler.

4.10.15 Common reasons for individuals seeking to be smuggled include employment and economic opportunity, or escape from persecution or conflict. Once they have been moved across international borders, the relationship with those assisting in the smuggling ends upon arrival at their destination. Smuggling is a crime, which involves the illegal entry into a country of which that person is not a national or resident either clandestinely or through deception, such as the use of fraudulent documents

4.10.16 Factors which help distinguish between smuggling and trafficking are:

- (a) **Consent:** Smuggling is a voluntary act and there is normally little coercion/violence involved or required from those assisting in the smuggling;

- (b) **Exploitation:** There is no exploitation by the smugglers of their victims once they reach their destination, effectively their relationship ends on arrival at destination. Trafficking victims on the other hand are subjected to a cycle of exploitation.
- (c) **Profits:** These are derived for smugglers primarily from transportation and facilitation of illegal entry in another country, whereas traffickers profit primarily from the exploitation of their victims.

4.10.17 However, in some cases the distinction between a smuggled and trafficked person will be blurred and both definitions could easily be applied. The victim may have started out being smuggled into the country, but during their journey or when they arrive at their destination it could develop into or become trafficking.

4.10.18 This can happen if someone has started their journey here being a willing participant, perhaps travelling here to work in a new job. However, either during their journey or when they arrive, they become vulnerable to traffickers and are exploited and harmed. During their journey they may be subjected to unsafe conditions whilst travelling to their destination, subjected to sexual or physical abuse or be forced to participate in other criminal activities. Often there may be more than one person or group involved in facilitating the travel of trafficked victims who may be bought and sold several times in the course of their journey. It is important to examine the end situation when the

victim is recovered to determine whether someone has been smuggled or trafficked.

4.10.19 Victims of Forced Labour and Domestic Servitude

4.10.20 Whilst there is greater awareness of trafficking for the purpose of sexual exploitation, there is less understanding and awareness of trafficking for forced labour and domestic servitude. Trafficking for forced labour or domestic servitude covers a wide spectrum of exploitative situations ranging from those who have been locked up or severely restricted in their freedom of movement, and physically and sexually abused, to those who are deceived about the conditions of their contract; receive little or no financial rewards and reside and work in poor conditions.

4.10.21 All forced labour includes unacceptable working conditions, but not all such working conditions constitute forced labour. Forced labour alone is just one, but often the most serious element of the exploitation experienced by trafficking victims. It crucially implies the use of coercion and lack of freedom/choice afforded to the victim (as is implicit in the use of the term “*trafficking*”).

4.10.22 The International Labour Organisation (ILO) has suggested six elements which, either individually or together, can indicate forced labour:

- (a) Threats or actual physical harm;

- (b) Restriction of movement and confinement to the workplace or to a limited area;
- (c) Debt-bondage;
- (d) Withholding of wages or excessive wage reductions, that violate previously made agreements;
- (e) Retention of passports and identity documents (the workers can neither leave nor prove their identity and status);
- (f) Threat of denunciation to the authorities where the worker is of illegal status.

4.10.23 Migrant workers, whether illegal migrants or legal migrants working illegally, are most at risk of exploitation and traffickers use regular immigration routes and work visas, but then utilise debt bondage, the removal of documents and migrants' uncertainty about their rights and status to subject victims to forced labour. Many come expecting certain kinds of work but end up doing others.

4.10.24 One of the challenges faced in bringing prosecutions against those who traffic and exploit their employees lies in the fact that few people are willing to come forward and complain to the Investigator and if they do will they proceed with a prosecution. Exploited migrant workers do not always consider themselves to be "*victims*" of a crime. They may be aware that they are paid less than the minimum wage and work long hours, but consider their situation here to be better than that offered in

their home country. Any case that involves the exploitation of a migrant worker should be treated seriously by Prosecutors and where the evidence supports a criminal offence, should usually be prosecuted.

4.10.25 Victims and Witnesses

4.10.26 Victims and witnesses have a central role in achieving successful prosecutions. Many victims and witnesses take significant risks in giving evidence against their traffickers and exploiters; they often fear the consequences of giving evidence and may be reluctant to support criminal proceedings. They may also worry that they may not be believed. Victims and witnesses may also be apprehensive or frightened about coming to court to give their evidence. Therefore the Prosecution Team should work with a range of other government and non-government agencies together with the courts to provide them with appropriate protection and support to ensure their safety and to help them to give evidence. The Prosecution Team should consider the range of measures available to support and protect trafficked victims to encourage them to give their best evidence and make appropriate applications to the court for special measures and witness anonymity.⁵⁴⁴

4.10.27 The victim's account in court or statement to the Investigator of what happened to them is evidence and is important to the case in proving each element of the offence of trafficking. For this reason it is important to identify trafficked victims at an early stage and ensure their safety.

⁵⁴⁴ See more detail on these topics in Chapter 5

Prosecutors will consider how best to support them giving evidence in light of the often close, controlling and dependent relationship between the defendant and victim and the increased likelihood of victim intimidation. Sometimes trafficked victims may be reluctant to support criminal proceedings; they may be frightened or may not wish to come to court. If it is suspected that the victim has been threatened or frightened into not giving evidence, the Prosecutor should ask the Investigator to make inquiries. The investigation may reveal new offences, such as witness intimidation. If necessary, the Prosecutor should ask the court to delay any hearing so that a thorough investigation may take place before a decision is made about the future of the case.

4.10.28 What if the Victim Does Not Wish to Give Evidence?

4.10.29 If trafficked victims decide not to give evidence, the suspect can still be charged and prosecuted. Other corroborating or supporting evidence described below will assist in proving a case. This may be possible in the following situations:

- (a) Where the victim has made a complaint and a statement to the Investigator but does not wish to give evidence, The Prosecutor should consider whether it is still possible to continue without the victim's evidence. If there is sufficient other corroborative evidence, that is evidence which supports or confirms the victim's account, such as someone who is able to give direct evidence of what they saw or heard, or medical and scientific

evidence which links the victim to the suspect, it may be possible to prosecute;

- (b) Where the victim makes no complaint or report to the Investigator, as long as there is evidence which proves all the elements of the offence without the need for the victim to make a complaint, the Prosecutor can still proceed to a prosecution for human trafficking. For example, where there is surveillance evidence showing the suspect(s) transporting a victim, vehicle registration details which link the suspect to the car and premises where the victim may have been exploited, e.g. a brothel, together with recovery of exhibits such as false passports, mobile phone text messages or recovery of large sums of money; or
- (c) The Prosecutor might consider other offences which can still be evidenced without the victim's testimony, such as money laundering, forged or false document offences, causing or inciting prostitution for gain.

4.10.30 Children

4.10.31 Children are particularly vulnerable to trafficking and exploitation and are likely to require extra support. Child trafficking is first and foremost a child protection issue; child victims are likely to be in need of welfare services and, in many cases, protection and safeguarding. Although the main responsibility for children's welfare and safety will usually lie with other agencies such as social, health and education services, the

Prosecution Team should positively engage with other authorities and agencies to support them in safeguarding children and in deciding what is the best way to help them.

4.10.32 Children are often trafficked into criminal activities; their first encounter is likely to be with law enforcement. In these circumstances Prosecutors must work with law enforcement and organisations that support child victims of trafficking, to ensure that all relevant information is available and that all appropriate assessments are undertaken.

4.10.33 Age Disputes

4.10.34 Young people may have no identifying information on them, their documents may be false or they may have been told to lie about their age to evade attention from the authorities. Some victims may claim to be adults when they are in fact under 18 years of age.

4.10.35 Where it is not clear whether the young person is a child (i.e. under 18 years of age) then in line with the United Nations Convention of the Rights of the Child, the benefit of the doubt should be given and the young person should be treated as a child.

4.10.36 Working with Others

4.10.37 The NPS is one of a number of agencies that respond to the challenges of dealing with human trafficking and they will need to support the need for a multi-agency response. Non-government organisations will often have greater experience of victims and their

differing needs, and the Prosecution Team should recognise the important role they play. A criminal justice route is not the only way of responding to trafficking; criminal (and civil) law may need to be used in conjunction with support services for victims.

4.10.38 International Role

4.10.39 In responding to this global crime, the Prosecution Team may decide that it is appropriate to form a Joint Investigation Team (JIT) which are multi agency teams involving Investigators and Prosecutors from more than one country, to tackle the chain of criminals across different countries, respond to needs of vulnerable victims and to secure evidence.

4.10.40 Building a Prosecution Case

4.10.41 Prosecutors working with Investigators must ensure that all avenues of enquiry are pursued and that evidence is obtained to construct a strong case to put before a court. In cases of human trafficking, Prosecutors should be involved at an early stage in the investigation to advise the Investigator on the evidence, how it can be obtained from other jurisdictions and also the restraining of criminal property.

4.10.42 How to Build a Prosecution Case

4.10.43 The Prosecution Team will work closely with other law enforcement agencies both domestically and in the countries where the victim has been trafficked from and across to make sure that all available evidence from all sources is gathered to prove the case.

4.10.44 In some cases, consideration will have to be given to collaborating with another country's NPS in order to prosecute traffickers in the most appropriate jurisdiction. That might mean that the traffickers are prosecuted in another country although the victims may have been exploited in the country of the Prosecution Team. When that happens, the Prosecution Team will work with Investigators and Prosecutors in the other jurisdiction to help evidence their case.

4.10.45 When mutual administrative assistance⁵⁴⁵ to gather evidence from overseas in an informal manner cannot be used, a formal request for assistance from abroad must be made through a letter of request. The Letter of request should be issued as early as possible in the investigation. Once evidence is received, it must be reviewed to ensure it is in a form, which is admissible and reliable to support the case and present in a court of law where the proceedings will be commenced.

4.10.45a US Coast Guard Case Package

4.10.45b The US Coast Guard will prepare a Case Package where there are any interdictions at sea. For more detail on the contents of these Case Packages prepared to assist investigations and prosecutions see Annex 10. In summary a standard human trafficking Case Package will include evidence of the following:

- (a) How the vessel was travelling;
- (b) If the vessel responded to Coast Guard presence;

⁵⁴⁵ See paragraph 3.12.4

- (c) If anyone was endangered;
- (d) If the vessel was outfitted for smuggling;
- (e) Were there any electronics or “*tools of the trade*” aboard;
- (f) If there was any fishing gear aboard - was it believable that the traffickers were fishing?
- (g) If the vessel have a history of use for illegal activity;
- (h) The physical condition of the trafficked persons;
- (i) If the trafficked persons appeared to have been exposed to the elements. Further are they sunburnt? Dehydrated? What was the condition of their clothing?
- (j) Any evidence showing that the trafficked persons were or were not on a raft before being embarked by the suspected traffickers;
- (k) If there are any apparent medical problems of the trafficked persons;
- (l) If the vessel was interdicted along a known smuggling route?
- (m) If the traffickers have a history of any trafficking activity?
- (n) Digital Imagery, for example of the interdiction. This maybe important to show where suspects were located in a vessel vis-à-vis the trafficked persons. If this information hasn't been included a written application maybe made to the US Coast Guard on the prescribed form (see Annex 9) for any photographs or videos.

4.10.46 Other Evidence to Prosecute

4.10.47 When investigating a case of human trafficking, the Investigator should always look for corroboration or supporting evidence such as medical or scientific evidence, CCTV evidence, or eyewitnesses to events. Other evidence the Investigators will obtain to prove the offence will include the following:

- (a) **Suspects:** Obtaining reference material from suspects is of primary importance. Where identification may be an issue, photographs can be taken and where physical features, tattoos or jewellery items are described in victim or witness statements, these will be photographed to corroborate victim statements;
- (b) **Forensic for scene-to-scene links:** It may be possible to forensically link for example, vehicles to premises, suspects and victims through use of fingerprints, DNA or contact trace exhibits, even when suspects are not recorded. Imaging through conventional still photographs supported by video and other imaging techniques can confirm features identified in victim statements;
- (c) **Premises:** Examination of scenes from CCTV and use of fingerprint and DNA to link suspects and victims with premises. Searches of premises to recover evidence could include personal documents, passports, travel documents, family papers and documents relating to victims and potential victims home

countries, mobile phones, financial documentation, vehicle documents, documents detailing associates;

- (d) **Vehicles:** These may have been used to transport and move victims around. DNA recovery may be used to identify individuals with access to vehicles and fingerprints;
- (e) **Documents:** Conventional document recovery during searches can be very valuable in proving the commercial nature of human trafficking offences. Computers and other communications equipment offer further opportunities for evidence recovery. In cases of fraudulent document production it may be possible to identify processes and individuals. Downloading cell phone data can also confirm contacts, dates and times;
- (f) **Ports of Entry and Immigration:** Checks should be made to see if passports or visas have been stolen, manipulation of special visas. Equally is there evidence of handlers collecting to guide individuals across borders and then providing transport;
- (g) **Financial History:** Evidence of any accounts for payment of salary or housing for victims. Any evidence of taxes paid by the business or whether there is a legitimate business such as a tourist or employment agency as a front.

4.10.48 Legislation in the Eastern Caribbean

4.10.49 All jurisdictions in the region criminalise human trafficking.⁵⁴⁶ For those that don't the Prosecutor will have to consider if there are any other offences committed against the person trafficked, for example rape or crimes of violence. Prosecutors will be aware when dealing with a case of human trafficking that the victim may not just be a victim of trafficking. Often victims have been subjected to other offences committed during the different stages of their journey and also during their exploitation. For example, a victim of sexual exploitation may have also been raped and threatened by their trafficker over a period of time. Or a victim of forced labour may be falsely imprisoned, assaulted and threatened with violence or death. This is often done as a means of gaining and maintaining control of their victim.

4.10.50 Prosecutors should consider a range of other offences with which to charge suspects, depending on the facts of the case. These other offences may be in addition to, or instead of, charges of human trafficking if the evidence obtained by the Investigator supports them and depending on the circumstances of the case. The choice of

⁵⁴⁶ Legislation is in place making a criminal offence in **Antigua and Barbuda**: Trafficking in Persons (Prevention) Act 2010; **Belize**: Trafficking in Persons (Prohibition) Act 2013; **Barbados**: The Transnational Organized Crime (Prevention and Control) Act 2010 (but requires migration as an element of the offence); **Dominica**: Transnational Organized Crime (Prevention and Control) Act; **Grenada**: The Prevention of Trafficking in Persons Act 2014; **Saint Lucia**: Counter Trafficking Act 2010; **Saint Christopher and Nevis**: Immigration Act, No.10 of 2002 and section 3 Trafficking in Persons (Prevention) Act 2008; **Saint Vincent and the Grenadines**: Prevention of Trafficking in Persons Act 2011

charges must reflect the full extent of the criminality and enable the court to sentence accordingly.

4.10.51 Antigua and Barbuda: Trafficking in Persons (Prevention) Act; Barbados: Transnational Organized Crime Act; Dominica: Transnational Organized Crime (Prevention and Control) Act; Grenada: The Prevention of Trafficking in Persons Act 2014; Saint Christopher and Nevis: Trafficking in Persons (Prevention) Act; Saint Lucia: Counter-Trafficking Act; and Saint Vincent and the Grenadines: Prevention of Trafficking in Persons Act

4.10.52 These Acts give effect to the United Nation Protocol Against Smuggling of Migrants by Land, Sea and Air, signed in New York on the 15th November, 2000 and the United Nations Protocol To Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention against Transnational Organised Crime, 2000. They prohibit the trafficking in persons within and across their borders as well as providing for the offence of trafficking in persons⁵⁴⁷ and other offences associated with trafficking in persons.⁵⁴⁸ In Saint Lucia and Antigua and Barbuda the

⁵⁴⁷ **Antigua and Barbuda:** Sections 13-16 Trafficking in Persons (Prevention) Act; **Barbados:** Section 8 Transnational Organized Crime Act; **Dominica:** Section 8 Transnational Organized Crime (Prevention and Control) Act; **Grenada:** Section 9 The Prevention of Trafficking in Persons Act; **Saint Christopher and Nevis:** Section 3 Trafficking in Persons (Prevention) Act; **Saint Lucia:** Section 5 Counter-Trafficking Act; **Saint Vincent and the Grenadines:** Section 5 Prevention of Trafficking in Persons Act

⁵⁴⁸ For example in **Antigua and Barbuda:** Section 18 using the services of a trafficked person, Section 21 makes, obtains, gives, sells or possesses a fraudulent travel or identity document for the purpose of facilitating trafficking, Section 24 providing facilities in support of trafficking persons and Section 26 harbouring persons involved in trafficking. In **Barbados:** Section 9(1): Intent to obtain a financial

offences are summary only. In Grenada the offence is triable on indictment with increased sentences if it involves a child⁵⁴⁹ or aggravated circumstances are present⁵⁵⁰ the offence is triable on indictment. In Dominica, Saint Christopher and Nevis, Saint Vincent and the Grenadines and Barbados they are indictable only. The Acts also legislate for measures to protect and support trafficked persons and specific law enforcement powers (other than Dominica).

4.10.53 Powers for Investigators include:

- (a) In Antigua and Barbuda, Grenada, Saint Christopher and Nevis, Saint Lucia and Saint Vincent and the Grenadines search and seizure with a warrant,⁵⁵¹
- (b) In Antigua and Barbuda, Grenada and Saint Vincent and the Grenadines search and seizure without a warrant;⁵⁵²

or material benefit by smuggling migrants. In **Saint Christopher and Nevis**: Section 4 unlawful withholding of Identification Papers, section 5 Transporting a person for the purpose of exploiting a person's prostitution and section 12 knowingly receiving a benefit. In **Saint Lucia** and **Saint Vincent and the Grenadines**: Section 6 Unlawful withholding of Identification Papers and section 7 transporting a person for the purpose of exploiting such a person's prostitution. In **Grenada**: Section 16 making, selling, gives, obtains or possessing fraudulent travel documents, section 17 possession, concealment, tampering, destruction or confiscation of travel documents of a trafficked person, section 18 providing facilities in support of trafficking persons, section 19 providing services for purpose of trafficking in persons and section 20 harbouring (i.e. supplying a person with shelter, food, drink, money or clothes, arms, ammunition or means of conveyance, or assisting a person in any way to evade apprehension).

⁵⁴⁹ **Grenada**: Section 10 The Prevention of Trafficking in Persons Act

⁵⁵⁰ **Grenada**: Section 11 The Prevention of Trafficking in Persons Act

⁵⁵¹ **Antigua and Barbuda**: Section 32 Trafficking in Persons (Prevention) Act; Saint Christopher and Nevis: Section 13 Trafficking in Persons (Prevention) Act; **Grenada**: Section 35 The Prevention of Trafficking in Persons Act; **Saint Lucia**: Section 16 Counter-Trafficking Act; **Saint Vincent and the Grenadines**: Section 17 Prevention of Trafficking in Persons Act

- (c) In Antigua and Barbuda access to computerized data.⁵⁵³ This power also includes the right of the Investigator to request and obtain any password, encryption code, decryption code, software or hardware or any other means required for his access to enable comprehension of the computerized data⁵⁵⁴. Failure to give an Investigator conducting a search access to computerized data is an offence with liability on summary conviction to a fine not exceeding fifty thousand dollars or to imprisonment for a term not exceeding two years.
- (d) In Antigua and Barbuda an Investigator may, by notice in writing, require a person who he believes to be acquainted with the facts and circumstances of an investigation to attend before him for examination; produce to him any personal property, record, report or document; or furnish him with a written statement made on oath or affirmation setting out such information as he may require.⁵⁵⁵ Any such person is legally bound to answer all questions unless to do would incriminate himself or expose to a penalty or forfeiture of property.⁵⁵⁶

⁵⁵² **Antigua and Barbuda:** Section 33 Trafficking in Persons (Prevention) Act; **Grenada:** Section 36 The Prevention of Trafficking in Persons Act; **Saint Vincent and the Grenadines:** Section 17(5) Prevention of Trafficking in Persons Act

⁵⁵³ **Antigua and Barbuda:** Section 34 Trafficking in Persons (Prevention) Act

⁵⁵⁴ **Antigua and Barbuda:** Section 34(2) Trafficking in Persons (Prevention) Act

⁵⁵⁵ **Antigua and Barbuda:** Section 36 Trafficking in Persons (Prevention) Act

⁵⁵⁶ **Antigua and Barbuda:** Section 36(2) Trafficking in Persons (Prevention) Act

4.10.54 There are also obligations under the Acts to protect trafficked persons. In Saint Christopher and Nevis, Saint Lucia and Saint Vincent and the Grenadines general guidelines are provided to protect victims.⁵⁵⁷ These require that:

- (a) All steps necessary to identify the victims of the trafficking must be taken;
- (b) Reasonable protection to a victim of the trafficking must be taken to prevent, recapture and secure the victim from threats, reprisals and intimidation by the traffickers and associates of the traffickers;
- (c) Reasonable protection must be taken to secure the victim's family from threats, reprisals or intimidation by traffickers or their associates of the traffickers if the victim's family resides in country; and
- (d) That a victim has an opportunity to consult with the appropriate persons to develop a safety plan.

⁵⁵⁷ **Barbados:** First Schedule Transnational Organized Crime Act see Article 24 of the UN Convention Against Transnational Organized Crime and at the Second Schedule Transnational Organized Crime Act Part 2 of the United Nations Protocol To Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children; **Saint Christopher and Nevis:** Section 16 Trafficking in Persons (Prevention) Act; **Saint Lucia:** Section 19 Counter-Trafficking Act. Additionally at section 20 witness protection allowing for a new identity and relocation if it is determined that an offence involving a crime of violence directed at the witness or potential witness is likely to be committed and section 31(3)(a) allowing a Child Witness to give evidence outside of court or by video; **Saint Vincent and the Grenadines:** Section 20 Prevention of Trafficking in Persons Act and section 21 witness protection allowing for a new identity and relocation if it is determined that an offence involving a crime of violence directed at the witness or potential witness is likely to be committed and section 32(3)(a) allowing a Child Witness to give evidence outside of court or by video

4.10.55 The Grenada and Antigua and Barbuda Acts provide the following procedure for protection:

- (a) Initially a trafficked person will be placed in temporary custody;⁵⁵⁸
- (b) Within 24 hours the Investigator must apply for an interim protection order before a magistrate;⁵⁵⁹
- (c) The magistrate can grant an interim protection order for the trafficked person to be housed in a place of refuge for up to 14 days for the purpose of the Investigator making inquiries for an application for a protection order;⁵⁶⁰
- (d) Within 14 days the magistrate will review a report prepared by the Investigator determining whether the person is a victim of trafficking. If the magistrate is satisfied that the person is a victim of trafficking and is need of care and protection, he/she may order that a non-resident or citizen from outside the State is placed into refuge for 3 months⁵⁶¹ (for citizens or

⁵⁵⁸ **Antigua and Barbuda:** Section 47 Trafficking in Persons (Prevention) Act; **Grenada:** Section 23 The Prevention of Trafficking in Persons Act

⁵⁵⁹ **Antigua and Barbuda:** Section 47(1) Trafficking in Persons (Prevention) Act; **Grenada:** Section 23(1) The Prevention of Trafficking in Persons Act

⁵⁶⁰ **Antigua and Barbuda:** Section 48(1) Trafficking in Persons (Prevention) Act; **Grenada:** Section 23(2) The Prevention of Trafficking in Persons Act

⁵⁶¹ **Antigua and Barbuda:** Section 48(3)(a)(i) Trafficking in Persons (Prevention) Act; **Grenada:** Section 24(3)(a)(ii) The Prevention of Trafficking in Persons Act

permanent residents of Antigua and Barbuda/Grenada up to a year),⁵⁶²

- (e) If at the end of this period of time the trafficked person is still in need of protection, upon application by an Investigator, extend the protection order to a date the magistrate deems fit.⁵⁶³

4.10.56 These powers will be important to ensure a Prosecution Team know where victims are located and making them available for trial.

4.10.57 If persons trafficked have been repatriated or can no longer be traced after a statement has been taken, the Prosecution Team should consider an application to have the statement read at trial.⁵⁶⁴ For example, section 37(c) of the Evidence (Special Provisions) Act 2009 in Antigua and Barbuda applies when a witness is outside of the jurisdiction and it is not reasonably practicable to secure his or her attendance. An Investigator in this situation may have to give evidence to show what steps have been taken to trace unavailable witnesses or what would be required to secure the attendance of a witness outside the country. What is reasonable will depend on the importance of the evidence, the reason for non attendance, prejudice to the defendant

⁵⁶² **Antigua and Barbuda:** Section 48(3)(a)(ii) Trafficking in Persons (Prevention) Act; **Grenada:** Section 23(3)(a)(i) The Prevention of Trafficking in Persons Act

⁵⁶³ **Antigua and Barbuda:** Section 49(2) Trafficking in Persons (Prevention) Act; **Grenada:** Section 23(4) The Prevention of Trafficking in Persons Act

⁵⁶⁴ **Antigua and Barbuda:** Section 37(c) Evidence (Special Provisions) Act 2009 and see para 7.2.20 below re tendering a deposition. See also **Saint Lucia:** Section 25 (1) Counter-Trafficking Act and **Saint Vincent and the Grenadines:** Section 26 Prevention of Trafficking in Persons Act - that allow a trafficked person and their family to reside in State in order to assist an investigation. Also see Paragraphs 5.7 (Unavailable Witness) and 5.8 (video-link for Witness Out of State) below.

and the cost of bringing the witness to court see: **R v Castillo** [1996] 1 Cr. App. R.438). Equally if there is any threat of harm witness anonymity may be applicable,⁵⁶⁵ but this would only be appropriate in cases where the trafficker did not know the identity of the victim.

4.10.58 Acts in the region protect the identity of informers by having documents redacted⁵⁶⁶, witnesses prevented from having their identity disclosed⁵⁶⁷, no undisclosed identification of a trafficked person or a witness to trafficking,⁵⁶⁸ restrictions on media reporting of victims of trafficking⁵⁶⁹ and some hearings where a victim or witness is present heard in camera.⁵⁷⁰ These are all extensive powers that can only assist a traditional law enforcement approach.

4.10.59 Trafficked Person

4.10.60 When reviewing such a case, it may come to the notice of the Prosecutor that the suspect is a "*credible*" trafficked victim. For these

⁵⁶⁵ See from paragraph 5.5.2 for a more detailed explanation of the requirements for an application for witness anonymity

⁵⁶⁶ **Antigua and Barbuda:** Section 55(2) Trafficking in Persons (Prevention) Act

⁵⁶⁷ **Antigua and Barbuda:** Section 55(3) Trafficking in Persons (Prevention) Act; **Saint Vincent and the Grenadines:** Section 22(1) Prevention of Trafficking in Persons Act

⁵⁶⁸ **Antigua and Barbuda:** Section 62 Trafficking in Persons (Prevention) Act

⁵⁶⁹ **Antigua and Barbuda:** Section 65 Trafficking in Persons (Prevention) Act; **Saint Christopher and Nevis:** Section 17(1) Trafficking in Persons (Prevention) Act; **Saint Lucia:** Section 21(1) Counter-Trafficking Act; **Saint Vincent and the Grenadines:** Section 22(1) Prevention of Trafficking in Persons Act

⁵⁷⁰ **Antigua and Barbuda:** Section 63 Trafficking in Persons (Prevention) Act; **Barbados:** Section 10(3) Transnational Organized Crime Act; **Saint Christopher and Nevis:** Section 17(2) Trafficking in Persons (Prevention) Act; **Saint Lucia:** Section 21(2) Counter-Trafficking Act; **Saint Vincent and the Grenadines:** Section 22(2) Prevention of Trafficking in Persons Act

purposes, "*credible*" means that the investigating officers have reason to believe that the person has been trafficked.

4.10.61 In these circumstances, Prosecutors must consider whether the public interest is best served in continuing the prosecution against a trafficked victim in relation to any offences. Prosecutors should consider the circumstances of the person's situation, which might support a defence of duress in law, relevant factors when deciding where the public interest lies, and clarity around the more subtle forms of coercion exercised by traffickers and exploiters. This guidance has been recognised by the courts in the case of **R v O [2008] EWCA Crim 2835** which highlights the need for Prosecutors and defence lawyers to take all reasonable steps to identify victims of trafficking and be proactive in causing enquiries to be made.

4.10.62 The following factors assist to decide where the public interest lies:

- (a) Is the person a "*credible*" trafficked victim;
- (b) The role that the suspect has in the immigration offence;
- (c) Was the immigration offence a direct consequence of their trafficked situation;
- (d) Were violence, threats or coercion used on the trafficked victim to procure the commission of the offence;
- (e) Was the victim vulnerable or put in considerable fear.

4.10.63 Where information has come to light from other sources that a suspect might be the victim of trafficking, for example from a Non-Governmental Organisation (NGO), the Prosecutor should:

- (a) Contact the Investigators;
- (b) Ask the Investigator to make enquiries to obtain information in connection with the claim that the suspect has been trafficked and re-review the immigration case in light of any fresh information or evidence;
- (c) If new evidence obtained supports the claim that the suspect has been trafficked and committed the immigration offences whilst they were coerced, give consideration to discontinuing any prosecution. Where there is clear evidence that the defendant has a credible defence of duress, the case should be discontinued on evidential grounds.

4.10.64 In Antigua and Barbuda a trafficked person will not be prosecuted for:

- (a) His/Her illegal entry into Antigua and Barbuda;
- (b) His/Her period of unlawful residence in Antigua and Barbuda; or
- (c) His/Her procurement or possession of any fraudulent travel or identity document which he obtained, or with which he was supplied, for the purpose of entering the receiving country;

where such acts are the direct consequence of the offence of trafficking in persons committed against him.⁵⁷¹

4.10.65 Consideration should then be given to the trafficked person giving evidence. The Prosecutor should determine if the trafficked person will be repatriated and unavailable for trial. Therefore can the case be proved without their evidence? Are there hearsay exceptions (see paragraphs 4.10.57 above and 5.7), can evidence be taken via video link (see paragraph 5.2 below) and is witness anonymity (see paragraph 5.5.2 below) appropriate.

4.11 Offence of Being Engaged in Organised Crime

4.11.1 The UN Convention Against Transnational Organised Crime, defines an organised criminal group as '*a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes in order to obtain, directly or indirectly, a financial or other material benefit*'. Under the domestic law in Barbados, Dominica, Grenada and Saint Christopher and Nevis,⁵⁷² membership of an organised criminal group is a criminal offence that draws from the UN definition, but also includes penalties for committing crimes overseas, that if committed in these States, would be an offence.

⁵⁷¹ **Antigua and Barbuda:** Section 28 Trafficking in Persons (Prevention) Act

⁵⁷² **Barbados:** Section 3 Transnational Organized Crime Act 2010; **Dominica:** Section 3 Transnational Organized Crime (Prevention and Control) Act 2013; **Grenada:** Section 4 The Prevention of Trafficking in Persons Act 2014; **Saint Christopher and Nevis:** Section 8 Organized Crime (Prevention and Control) Act 2002

4.11.2 This offence extends criminal liability beyond traditional parameters of aiding and abetting or conspiracy, by enabling the prosecution of those who direct criminal organisations without otherwise engaging in criminal acts. These Acts enable the prosecution of leaders and members of organised criminal groups who plan and organise these criminal businesses without “*getting their hands dirty*”. These “*kingpins*” are often the real controllers of criminal activity; the ones who direct others and make the big decisions; the ones young prospects look up to and want to emulate. Therefore, the formulation of the Acts is broad enough to capture recruiting of organised crime group members, and the financing and strategic planning of organised crime activities.⁵⁷³

4.11.3 A group is an organised criminal group if it is a group of three or more people who has as their objective or one of their objectives obtaining material benefits⁵⁷⁴ from the commission of a “*serious offence*” that is punishable by imprisonment for a term of four years or more (in Grenada ten years or more).

4.11.4 The offence requires a transnational element and only occurs when the serious offence is committed:

- (a) In more than one country;

⁵⁷³ Adapted from Parliamentary debate on first reading of Organised Crime (Sentencing and Penalties) Bill of New Zealand

⁵⁷⁴ The Acts do not provide a definition for **obtaining a material benefit – in New Zealand**, where this a similar offence under the Crimes Act 1961, the definition is: “*in relation to doing a thing, means obtain, directly or indirectly, any goods, money, pecuniary advantage, privilege, property or other valuable consideration of any kind for doing the thing (or taking an action that forms part of doing the thing)*”

- (b) In one country but a substantial part of the preparation, planning, direction or control takes place in another country;
- (c) In one country but involves an organised criminal group that engages in criminal activity in more than one country; or
- (d) In one country but has substantial effects in another country.

4.11.5 A group of people is capable of being an organised criminal group for the purposes of the Acts whether or not some of them are subordinates or employees of others; or only some of the people involved in it at a particular time are involved in the planning, arrangement, or execution at that time of any particular action, activity, or transaction, or its membership changes from time to time.

4.11.6 The essence of this offence is that of knowingly taking part as a member of a group which has come together to commit a prescribed activity, whether or not any serious offence has been committed (**R v Mitford** [2005] 1 NZLR 753 (CA)).

4.11.7 To prosecute such matters the Prosecution Team will need to consider the use of:

- (a) Undercover Officers (see paragraphs 3.14.2-3);
- (b) Intercept Evidence (see from paragraph 3.3.47);
- (c) Special Measures (see from paragraph 5.2.1);
- (d) Witness anonymity (see from paragraph 5.5.2);

(e) Investigation anonymity (see from paragraph 5.5.48);

(f) Expert Evidence (see paragraphs 3.8.3(a) – (b))

4.12 Police Bail Pre-Charge

4.12.1 In some jurisdictions⁵⁷⁵ there is statutory power to police bail before charge. This maybe used where realistically investigations cannot conclude within the custody time limit and therefore the evidential stage of the Code cannot be satisfied. Rather than deciding not to charge the suspect, he/she can be bailed to return on a later date and then interviewed when all the evidence is available to the Investigator. A decision can then be made applying the Code about charge. However consideration should be given as to whether a suspect is a flight risk and whether this is an appropriate course of action. In Saint Vincent and the Grenadines a suspect must execute a bond with sureties and this may avert any risk of absconding.

⁵⁷⁵ **Antigua and Barbuda:** Section 18(1)(a) The Office of National Drug and Money Laundering Control Policy Act 2003; **Saint Lucia:** Section 586 Criminal Code; **Saint Vincent and the Grenadines:** Section 35(3) Criminal Procedure Code

5. Victim and Witness Care

5.1 Initial Witness Care

5.1.1 In Serious Organised Crime cases, especially those resulting in violence and/or murder the Investigators may appoint a Family Liaison Officer (FLO) to keep the victim and/or the family informed of the progress of the case. Prosecutors should establish how the FLO would work with their office. There may be local protocols/agreements that define the FLO and the NPS roles and responsibilities in relation to the provision of information and support to victims and witnesses. Good practice would be to draft an individual case agreement, setting out who will undertake which role in respect of each witness. The critical point is that someone is identified as being responsible for this important role and ancillary activities such as arranging pre-trial court visits and referral to support services. A realistic and measured approach to witness care at this early stage is likely to reap substantial dividends as the trial approaches.

5.1.2 There maybe cases where there are victims, such as a trafficked person, and following **AG's Reference (No2 of 1995) (R v S) 1995 Crim LR 835**) it is good practice to obtain a victim personal statement detailing the impact of the criminality. A victim personal statement is a means by which a victim can tell the criminal justice agencies dealing with their case how the crime has affected them physically, emotionally, psychologically, financially or in any other way. One can be made at any time before sentence and a statement made early in

proceedings can be updated. Prosecutors should ensure that it is clear to the victim that the victim personal statement will be disclosed to the defendant's legal representatives

5.1.3 In cases involving a death, Prosecutors should consider whether early informal contact with the victim's family is appropriate. Such contact may allow for the role of the NPS to be explained at an early stage and allows the family to think about what information they may need from the NPS. For example:

- (a) The charging decision;
- (b) The court process; and
- (c) The process for making a victim personal statement. Explaining that attendance at the meeting and the making of a victim personal statement is voluntary.

5.1.4 There should be clarity about how witness intimidation should be reported to the Investigators and about how the Investigators respond to it, set out in an individual case agreement if appropriate. Good practice may include members of the investigation team briefing the DPP in relation to issues of risk in individual cases and advice on proactive investigation of the reasons for any withdrawal of support by the witness.

5.1.5 Best Practice for witness care can be presented in the form of a Witness Charter that explains the important role of a witness. Such a

Charter will also confirm the level of service that a NPS and the Investigator will provide to the witness. An example of this document is at Annex L.

5.2 Protective Measures for Witnesses

5.2.1 Special measures

5.2.2 Some jurisdictions allow for the use of special measures in court⁵⁷⁶ (see table 5a below) and where there are victims of, and witnesses to, Serious Organised Crime offences involving guns or violence they may be eligible for special measures.

5.2.3 The most effective special measure in this type of case is likely to be the use of screens and/or evidence by live link,⁵⁷⁷ and/or evidence given in private.⁵⁷⁸ Consideration should be given to applying for such

⁵⁷⁶ **Dominica:** Section 16 (live link); section 17 (evidence in private); section 18 (video recorded evidence); section 19 (video recorded cross-examination or re-examination); section 20 (examination through an intermediary); and section 21 (aids to communication) Protection of Witnesses Act 2013 – all special measures can be applied for in Magistrates’ and High Court; **Saint Vincent and the Grenadines:** Section 16 (live link); section 17 (evidence in private); section 18 (video recorded evidence); section 19 (video recorded cross-examination or re-examination); section 20 (examination through an intermediary); and section 21 (aids to communication) Witness (Special Measures) Act 2013 – all special measures can be applied for in Magistrates’ and High Court; **Grenada:** Section 23 (live link); section 24 (evidence in private); section 25 (video recorded evidence); section 26 (video recorded cross-examination or re-examination); section 27 (examination through an intermediary); and section 28 (aids to communication) Protection of Witnesses Act 2014 – all special measures can be applied for in Magistrates’ and High Court

⁵⁷⁷ **Saint Lucia:** Section 27A Evidence Act 2002; Antigua: Section 19(2)(d) Evidence (Special Provisions) Act 2009; **Saint Christopher and Nevis:** Evidence Act 2011 Part 5; **Dominica:** Section 16 Protection of Witnesses Act 2013; **Saint Vincent and the Grenadines:** Section 16 Witness (Special Measures) Act

⁵⁷⁸ **Dominica:** Section 17 Protection of Witnesses Act 2013; **Saint Vincent and the Grenadines:** Section 17 Witness (Special Measures) Act; **Grenada:** Section 24 Protection of Witnesses Act 2014

measures (where there is no legislation) using the Court's inherent powers to ensure a fair trial and that the best evidence is given (**Independent Publishing Co. Ltd v Attorney-General for Trinidad and Tobago** 2005 1 All ER 499 (PC) and **Police v S** (1994) DCR 257 (DC)).

5.2.4 Where applicable, applications for special measures should be made as soon as possible so that witnesses have early certainty about how their evidence will be received. This may also be persuasive in them actually giving evidence.

5.2.5 A precedent form to assist applications for special measures can be found at Annex T.⁵⁷⁹

5.2.6 Should there be any challenge, where there is statute, to the use of special measures, reference should be made to **R(D) v Camberwell Green Youth Court** [2005] UKHL 4, [2005] 1 WLR 393. This case concerned special measures, sanctioned by the Youth and Criminal Evidence Act 1999 for the protection of child witnesses in England and Wales, which were upheld by the House of Lords. The measures in question permitted the evidence of the victim and another child to be given by a video recorded interview and a live television link. The evidence was deemed admissible and didn't prejudice the right to a fair trial, as it was produced in the presence of the defendants, who could see and hear it and had every opportunity to challenge it.

⁵⁷⁹ **Dominica:** Schedule Form 4 Protection of Witnesses Act 2013; **Saint Vincent and the Grenadines:** Schedule Form 4 Witness (Special Measures) Act; **Grenada:** Schedule Form 7 Protection of Witnesses Act 2014

5.3 Reporting Restrictions

5.3.1 The DPP has a duty to take measures to protect the administration of justice from abuse such as adverse pre-trial publicity. As the authority in charge of prosecutions the DPP has the power to prosecute contemnors. Early consideration should be given to such restrictions.

5.3.2 Also the advocate should consider the common-law power of a court, sitting in private, to receive a small part of the evidence (such as the name or address of a witness) in a form that is not communicated to the public (see 5.5.1 (a) below)

5.4 Applications to hold a High Court Hearing In Camera

5.4.1 In certain situations proceedings can be heard in private, when the public are excluded and the doors of the courtroom are closed. Applying the common law⁵⁸⁰ the question for the court to decide is whether a sitting in private is "*necessary for the administration of justice*" (**Scott v Scott** [1913] A.C. 417, HL). The necessity principle may be of relevance if a witness is unable or unwilling to give evidence unless the public gallery is cleared. Before making an application for a hearing, or part of a hearing, to be held in camera, Prosecutors must consider whether the legitimate concerns of the witness could be adequately met by any other way, for example by special measures.

⁵⁸⁰ See paragraph 5.2.3 (above) where Statute allows for an application for proceedings in private in Saint Vincent and the Grenadines, Grenada and Dominica.

5.5 Other Protective Measures

5.5.1 Other non-statutory protective measures aimed at ensuring that a witness who is in fear is able to give his/her best evidence may include the following:

- (a) The trial judge/magistrate, in the exercise of his inherent jurisdiction to control proceedings, may permit the name and other identifying details of the witness to be concealed from the public and the press. The witness will not be required to give his or her name at the beginning of examination in chief. The trial judge, in the exercise of his inherent jurisdiction to control the proceedings may, however, permit a witness to be referred to by a pseudonym. In certain types of case this has become accepted practice, e.g. blackmail (**R v Socialist Worker, ex parte Attorney General [1975] QB 637**). Other departures from the usual practice are rare but have included, for example, prostitutes called to give evidence against a woman charged with exercising control over them (**R v Jones, Dee and Gilbert, unreported, December 1973, CCC**). The judge permitted each of the six girls called to give evidence for the prosecution to be referred to throughout the trial by a letter of the alphabet. The rationale was that, unless the anonymity of these former prostitutes was preserved, grave difficulty would be encountered in obtaining evidence in any future case of that nature.

- (b) Access to court building and courtroom via separate entrances to ensure that the supporters of the accused do not see the witness. Also consider a separate waiting area to resolve the same issue.

5.5.2 Witness Anonymity

5.5.3 There are four Acts in the region (see Table 5a below) that have provisions that allow protection of a witness through witness anonymity (sections 18-25 of the Antigua and Barbuda Evidence (Special Provisions Act) 2009, Part 2 of the Protection of Witnesses Act 2013 of Dominica, Part 2 of the Witness (Special Measures) Act of Saint Vincent and the Grenadines and Part 3 of the Protection of Witnesses Act 2014 of Grenada⁵⁸¹. These Acts define a “*witness anonymity order*” as:⁵⁸²

“...an order made by a court that requires such specified measures to be taken in relation to a witness in criminal proceedings as the court considers appropriate to ensure that the identity of the witness is not disclosed in or in connection with the proceedings.”

⁵⁸¹ Also see Part IV of the Evidence Act in **Saint Christopher and Nevis**, however yet to be promulgated

⁵⁸² **Antigua and Barbuda**: Section 19(1) Evidence (Special Provisions) Act 2009; **Dominica**: Section 2 Protection of Witnesses Act 2013; **Saint Vincent and the Grenadines**: Section 2 Witness (Special Measures) Act; **Grenada**: Section 2 Protection of Witnesses Act 2014

5.5.4 The Acts confirm the following kinds of measures that can be taken to secure the anonymity of a witness:⁵⁸³

- “(a) *that the witness’ name and other identifying details may be—*
 - (i) *withheld; and*
 - (ii) *removed from materials disclosed to any party to the proceedings;*
- (b) *that the witness may use a pseudonym;*
- (c) *that the witness is not asked questions of any specified description that might lead to the identification of the witness;*
- (d) *that the witness is screened to any specified extent; and*
- (e) *that the witness’s voice is subjected to modulation to any specified extent.”*

5.5.5 In order to apply for an order, the Acts specify that it must be shown by the applicant (prosecution or defence) that:⁵⁸⁴

- “(a) *the measures to be specified in the order are necessary—*
 - (i) *in order to protect the safety of the witness or another person or to prevent any serious damage to property; or*

⁵⁸³ **Antigua and Barbuda:** Section 19(2) Evidence (Special Provisions) Act 2009; **Dominica:** Section 5 Protection of Witnesses Act 2013; **Saint Vincent and the Grenadines:** Section 5 Witness (Special Measures) Act; **Grenada:** Section 12 Protection of Witnesses Act 2014

⁵⁸⁴ **Antigua and Barbuda:** Section 21(1) Evidence (Special Provisions) Act 2009; **Dominica:** Section 7(1) Protection of Witnesses Act 2013; **Saint Vincent and the Grenadines:** Section 7(1) Witness (Special Measures) Act; **Grenada:** Section 14(1) Protection of Witnesses Act 2014

- (ii) *in order to prevent real harm to the public interest (whether affecting the carrying on of any activities in the public interest or the safety of a person involved in carrying on such activities, or otherwise);*
- (b) *having regard to all the circumstances, the taking of those measures would be consistent with the defendant receiving a fair trial; and*
- (c) *it is necessary to make the order in the interests of justice by reason of the fact that it appears to the court that—*
 - (i) *it is important that the witness should testify; and*
 - (ii) *the witness would not testify if the order were not made.”*

5.5.6 Further:⁵⁸⁵

“In determining whether the measures to be specified in the order are necessary ... the court shall have regard in particular to any reasonable fear on the part of the witness—

- (a) *that the witness or another person would suffer death or injury;*
or
- (b) *that there would be serious damage to property, if the witness were to be identified”*

5.5.7 When the court is considering any application it will take into account:⁵⁸⁶

⁵⁸⁵ **Antigua and Barbuda:** Section 21(2) Evidence (Special Provisions) Act 2009; **Dominica:** Section 7(2) Protection of Witnesses Act 2013; **Saint Vincent and the Grenadines:** Section 7(2) Witness (Special Measures) Act; **Grenada:** Section 14(2) Protection of Witnesses Act 2014

- “(a) *the general right of a defendant in criminal proceedings to know the identity of a witness in the proceedings;*
- (b) *the extent to which the credibility of the witness concerned would be a relevant factor when the weight of his evidence comes to be assessed;*
- (c) *whether evidence given by the witness might be the sole or decisive evidence implicating the defendant;*
- (d) *whether the witness’s evidence could be properly tested (whether on grounds of credibility or otherwise) without his identity being disclosed;*
- (e) *whether there is any reason to believe that the witness—*
 - (i) *has a tendency to be dishonest; or*
 - (ii) *has any motive to be dishonest in the circumstances of the case, having regard (in particular) to any previous convictions of the witness and to any relationship between the witness and the defendant or any associates of the defendant; and*
- (f) *whether it would be reasonably practicable to protect the witness’s identity by any means other than by making a witness anonymity order specifying the measures that are under consideration by the court.”*

5.5.8 The reason for detailing the considerations in full, is that these are the first Acts in the region and a model to follow. The Guide will now

⁵⁸⁶ **Antigua and Barbuda:** Section 22(2) Evidence (Special Provisions) Act 2009; **Dominica:** Section 8(2) Protection of Witnesses Act 2013; **Saint Vincent and the Grenadines:** Section 8(2) Witness (Special Measures) Act; **Grenada:** Section 15(2) Protection of Witnesses Act 2014

consider the principles to be followed by the Investigator and Prosecutor when making an application for a witness anonymity order using this statutory regime. This is drawn from the experience of England and Wales and the DPP's Guidance on the application of the Coroners and Justice Act 2009. This Act is replicated in the Antigua and Barbuda Evidence (Special Provisions) Act 2009, the Dominica Protection of Witnesses Act 2013, the Saint Vincent and the Grenadines Witness (Special Measures) Act and the Grenada Protection of Witnesses Act 2014.

5.5.9 General Principles

5.5.10 It must be remembered in any application for witness anonymity that the overarching principle of criminal justice is that the defendant must receive a fair trial. The prosecution has a vital role to play in delivering fair trials. Where the prosecution can only present its case in a way which denies the defendant's right to a fair trial, it is under a duty to stop the case, no matter how serious the allegation may be.

5.5.11 There is a long-established principle that, subject to certain exceptions and statutory qualifications, the defendant in a criminal trial is entitled to be confronted by his accuser in court.

5.5.12 If the evidence provided by a proposed anonymous witness is truly the sole or decisive evidence against an accused, the application for an anonymity order is likely to fail. Therefore in every case where consideration is to be given to an application the Prosecutor must

ensure that the Investigator has obtained as much corroborative evidence as possible. On occasion any delay in the seeking of such evidence may compromise the ability to secure it and so immediate action in this respect is important. Where the proposed anonymous evidence will not be the sole or decisive evidence it will nevertheless remain important to continue to seek corroboration and the success of an application may depend on the nature and extent of any support, particularly if it is independent of the witness (**Ellis, Simms and Martin v UK ECHR 2012** see [http://www.echr.coe.int/echr/homepage EN](http://www.echr.coe.int/echr/homepage_EN))

5.5.13 Information Required

5.5.14 If an anonymity order is being sought, the Prosecutor must ensure that the Investigator provides, in writing, the information set out below at 5.5.16. Where appropriate, the documents should be marked clearly with the word "**SENSITIVE**". For the purposes of the Acts in Antigua and Barbuda and Dominica the Prosecutor must ensure that the Investigators have evidenced each of the requirements of section 21 (Antigua and Barbuda), section 7 (Dominica and Saint Vincent and the Grenadines), section 14 (Grenada) and to ensure that the conditions are satisfied as far as is reasonably practicable and all the relevant considerations in section 22 (Antigua and Barbuda), section 8 (Dominica and Saint Vincent and the Grenadines) and section 15 (Grenada) have been taken into account and where necessary examined.

5.5.15 The primary responsibility of editing any sensitive information from the

otherwise disclosable documentation lies with the Investigator. When the editing and/or copying process falls to be completed by the NPS for disclosure or any other purposes, the editing must be completed by the Prosecutor and again checked by the Prosecutor following its copying, prior to the documentation being sent to the defence. If a document with sensitive information is to be disclosed during a trial the responsibility for checking the editing of any sensitive information before it is disclosed to the defence lies with the Prosecutor.

5.5.16 The following documentation will be required from the Investigator:

- (a) Either:
 - A full evidential statement from the witness giving their true identity; **or**
 - Where that person is a police officer or a member of any other agency responsible for the investigation of criminal offences, a report from a senior officer setting out why it is appropriate for the Prosecutor to apply to the court to exercise its discretion not to be informed of the identity of the witness;
- (b) A redacted version of the witness' full evidential statement with all elements that could identify the witness removed;
- (c) A statement from the witness setting out their fear about giving evidence if their identity is made known to the defendant, and,

where appropriate, whether the witness will not give evidence without anonymity;

- (d) For police witnesses only, confirmation that witness anonymity is required to prevent real harm to the public interest (whether affecting the carrying on of any activities in the public interest or the safety of a person involved in carrying on such activities, or otherwise);
- (e) A report which includes:
 - A full risk assessment undertaken by the Investigator, which should include an assessment of the reasonableness of the witness' fear and explaining why any other protection measures such as special measures are not adequate;
 - An indication whether any special arrangements have been made with the witness (for example, a house move).

5.5.17 Disclosure

5.5.18 It was said by the Court of Appeal in **R v Mayers** [2008] EWCA Crim 1418 that :

“If the judge entertains reservations about the good faith of the efforts made by the prosecution investigation into any relevant consideration bearing on the question of witness anonymity, an application will be met with a point blank refusal”.

5.5.19 The following principles of disclosure were highlighted by the court:

- (a) The onus is on the prosecution to ensure a fair trial. Where an application for anonymity is being considered, the obligations of the prosecution in respect of disclosure go much further than the ordinary duties of disclosure;
- (b) The disclosure process is crucially engaged in addressing the considerations⁵⁸⁷ and each consideration should specifically be investigated and addressed;
- (c) The prosecution must be proactive, and, if relevant, focus closely on the credibility of the witness. This should if possible be objectively verified;
- (d) A detailed examination of the background of each anonymous witness will almost inevitably be required. This is likely to include a detailed examination into any relationship between the anonymous witness and (i) the victim, (ii) the victim's family and associates, and (iii) other witnesses (including anonymous witnesses). This will include an investigation into the possibility of any improper collusion or cross-contamination between the witness and others involved in the case; and

⁵⁸⁷ As in section 89 Coroners and Justice Act 2009 and are the same as those in section 22 **Antigua and Barbuda**: Evidence (Special Provisions) Act 2009; **Dominica**: Section 8 Protection of Witnesses Act 2013; **Saint Vincent and the Grenadines**: Section 8 Witness (Special Measures) Act; **Grenada**: Section 15 Protection of Witnesses Act 2014

- (e) The following information should be included within the Investigator's report:
- The background of the witness, including previous convictions, any other the background of the witness, including previous convictions, any other bad character evidence and details of their involvement in any previous case where the Investigators know that their evidence may not have been believed;
 - Whether the Investigators are aware of any relationship between the witness and the defendant and any associates of the defendant;
 - Whether the Investigators have any reason to believe that the witness may not provide truthful evidence to the court.

5.5.20 In coming to a decision, the Prosecutor must first evaluate the reasonableness of the fear of the witness. The fear may be connected to a specific incident (such as a threat made to the witness), or it may be based on a general climate of fear in the environment in which the witness lives. In either case, it is essential that the Prosecutor is satisfied that the Investigators have evidence to support the concerns of the witness.

5.5.21 Special Provisions for Investigators

5.5.22 In any case involving a witness who is a member of the public, the Investigator must provide an un-redacted statement providing the true

identity of the witness in respect of whom an application is sought. However, in a case involving a witness who is an Investigator the position may be different. Although the general principle that the Prosecutor should be made aware of the true identity of the witness should be followed wherever possible, there may be occasions when the Investigating agency considers that it is appropriate for the court to exercise its discretion⁵⁸⁸ and not be informed of the identity of the witness.

5.5.23 Where the Investigator is satisfied that the prosecution should be invited to make such an application to the court, he should make a report to that effect to the Prosecutor. In such instances, the Investigator need not supply a full evidential statement from the witness giving their true identity at this stage.

5.5.24 The Prosecutor must consider such a request together with all the other material supplied in accordance with paragraphs 5.5.14-19 of this Guide. The Prosecutor should follow paragraphs 5.5.32-35 of this Guide, which set out the process for considering whether to make an application.

5.5.25 If the Prosecutor is satisfied that it is appropriate to apply for a witness anonymity order and to invite the court not to require the identity of the witness to be supplied to it, the Prosecutor should invite the court to

⁵⁸⁸ See **Antigua and Barbuda**: Section 20(2)(a) Evidence (Special Provisions) Act 2009; **Dominica**: Section 6(2)(a) Protection of Witnesses Act 2013; **Saint Vincent and the Grenadines**: Section 6(2)(a) Witness (Special Measures) Act; **Grenada**: Section 13(2)(a) Protection of Witnesses Act 2014

exercise its discretion⁵⁸⁹ not to require it to be informed of the true identity of the witness concerned.

5.5.26 If the Prosecutor is satisfied that it is appropriate to apply for a witness anonymity order but on the basis that the court should be informed of the true identity of the witness concerned, they should discuss this aspect of the application with the Investigator. If agreement is reached on that basis, the true identity of the witness should be revealed to the Prosecutor in a form that is agreed.

5.5.27 It is a matter for the court to decide whether to grant the order and whether it shall be informed of the identity of the witness.

5.5.28 Where the court decides that it must be informed of the identity of the witness, the Prosecutor and the relevant agency must decide whether they are willing to comply with that part of the court's order.

5.5.29 Where the Prosecutor and the agency decide that it would not be in the public interest for the identity of the witness to be given to the court, the application of a witness anonymity order should be withdrawn.

5.5.30 Where the Prosecutor and the agency decide that it is appropriate to inform the court of the identity of the witness, both the court and the Prosecutor should be informed.

⁵⁸⁹ See **Antigua and Barbuda**: Section 20(2)(a) Evidence (Special Provisions) Act 2009; **Dominica**: Section 6(2)(a) Protection of Witnesses Act 2013; **Saint Vincent and the Grenadines**: Section 6(2)(a) Witness (Special Measures) Act; **Grenada**: Section 13(2)(a) Protection of Witnesses Act 2014

5.5.31 Considering Whether to Make an Application

5.5.32 Prosecutors must be sure that they have sufficient evidence or information to satisfy each of these conditions applicable to any Act.⁵⁹⁰ An anonymity order should be regarded as an exceptional measure of last practicable resort. A judge must be satisfied of each condition of a relevant Act before an order can be made and each application is likely to be fact specific. Only those orders that are truly necessary and that are consistent with a fair trial will be made.

5.5.33 Prosecutors must also be able to show that any fear expressed by the witness that they, or any other person, would suffer death or injury, or that there would be serious damage to property, if they were identified to the defendant, is reasonable.⁵⁹¹ This could be, for example, a threat to the witness's children ("*we'll get your kids*") or a fear that their home will be damaged ("*we'll fire-bomb your house*").

5.5.34 Once the Prosecutor is satisfied that the fear of the witness is reasonable, they must consider whether any statutory special measures or protective measures available to the police would address

⁵⁹⁰ In **Antigua and Barbuda**: Section 21 Evidence (Special Provisions) Act 2009; **Dominica**: Section 7 Protection of Witnesses Act 2013; **Saint Vincent and the Grenadines**: Section 7 Witness (Special Measures) Act; **Grenada**: Section 14 Protection of Witnesses Act 2014

⁵⁹¹ See **Antigua and Barbuda**: Section 21(2)(a) and (b) Evidence (Special Provisions) Act 2009; **Dominica**: Section 7(2)(a) and (b) Protection of Witnesses Act 2013; **Saint Vincent and the Grenadines**: Section 7(2)(a) and (b) Witness (Special Measures) Act; **Grenada**: Section 14(2)(a) Protection of Witnesses Act 2014

the fear of the witness.⁵⁹² These include:

- (a) Applying for special measures for intimidated witnesses; by screening the witness from the accused; evidence by live link; evidence given in private;
- (b) Applying for reporting restrictions;
- (c) Any safeguards that the Investigators could provide, including any witness protection scheme; Prosecutors should, however, note the comments of the Lord Chief Justice in **Mayers**, namely that: "*witness relocation can only be a practicable alternative in the rarest of circumstances*".

5.5.35 Prosecutors should have particular regard to those sections of any relevant Act that deal with the credibility of the witness,⁵⁹³ whether the witness's evidence could be properly tested (whether on grounds of credibility or otherwise) without his or her identity being disclosed,⁵⁹⁴ and whether there is reason to believe that the witness has a tendency,

⁵⁹² See **Antigua and Barbuda**: Section 22(2)(f) Evidence (Special Provisions) Act 2009; **Dominica**: Section 8(2)(f) Protection of Witnesses Act 2013; **Saint Vincent and the Grenadines**: Section 8(2)(f) Witness (Special Measures) Act; **Grenada**: Section 15(2)(f) Protection of Witnesses Act 2014

⁵⁹³ See **Antigua and Barbuda**: Section 22(2)(b) Evidence (Special Provisions) Act 2009; **Dominica**: Section 8(2)(b) Protection of Witnesses Act 2013; **Saint Vincent and the Grenadines**: Section 8(2)(b) Witness (Special Measures) Act; **Grenada**: Section 15(2)(b) Protection of Witnesses Act 2014

⁵⁹⁴ See **Antigua and Barbuda**: Section 22(2)(d) Evidence (Special Provisions) Act 2009 and **Dominica**: Section 8(2)(d) Protection of Witnesses Act 2013; **Saint Vincent and the Grenadines**: Section 8(2)(d) Witness (Special Measures) Act; **Grenada**: Section 15(2)(d) Protection of Witnesses Act 2014

or motive, to be dishonest.⁵⁹⁵

5.5.36 Distinction Between Credibility and Reliability

5.5.37 A key issue for the Prosecutor centres on the distinction between the witness' credibility and their reliability.

5.5.38 In many instances, the only issue for the defence will be the reliability of the witness and the accuracy of their evidence. Here, it may be less critical to know the identity of the witness. This may be the case where the witness is an Investigator acting undercover, or a civilian witness of good character, unconnected with the defendant or other witnesses.

5.5.39 In other cases, for example where the witness may be involved in criminal activity or knows the defendant, and particularly where there may be some criminal association between them, the credibility of the witness may be substantially in issue. Prosecutors will have considered any issues surrounding the credibility of the witness when they received the various reports referred to in paragraph 5.5.14-19.

5.5.40 Where it is clear that the credibility of the witness may be in issue, the Prosecutor must consider the relative importance of the witness' evidence to the prosecution case. Where it remains the sole or decisive evidence, it is unlikely that the defendant will be able effectively to cross-examine an anonymised witness.

⁵⁹⁵ See **Antigua and Barbuda**: Section 22(2)(e) Evidence (Special Provisions) Act 2009; **Dominica**: Section 8(2)(e) Protection of Witnesses Act 2013; **Saint Vincent and the Grenadines**: Section 8(2)(e) Witness (Special Measures) Act; **Grenada**: Section 15(2)(e) Protection of Witnesses Act 2014

5.5.41 However, each case must be decided on its own facts. Sometimes, even where credibility may be in issue, the prosecution will be able to provide sufficient material to the defence, short of identifying the witness, to allow an effective cross-examination to take place.

5.5.42 Prosecutors must not allow cases to continue where they have genuine grounds for believing that the granting of a witness anonymity order would prevent the defendant from having a fair trial.

5.5.43 Making an Application

5.5.44 Generally, the Prosecutor should advise the court and the defence that the prosecution intends to apply for a witness anonymity order at the first appearance in the High Court.⁵⁹⁶

5.5.45 The court must give generally give every party to the proceedings the opportunity to be heard on an application for a witness anonymity order, but it also has the power to hear from the prosecution in the absence of the defendant and his legal representative.

5.5.46 In making an application, the Prosecutor must ensure that the court is provided with all material relevant to the application. This should include information about the decision-making process leading up to the application. The information listed at paragraphs 5.5.14-19 should be supplied to the court as a matter of routine. Material will be relevant if the Prosecutor relies upon it to support the application, or if it may

⁵⁹⁶ Or Case Management Conference in **Saint Lucia** (see Rule 11.1 of the Criminal Procedure Rules 2007)

tend to undermine or qualify the justification for making the order or for making it in the form sought by the Prosecutor. The Prosecutor must ensure that the court is addressed on all conditions set down in any relevant Act⁵⁹⁷ and has regard to any relevant considerations.⁵⁹⁸ The court must be informed of the steps taken by the prosecution to try to secure the evidence of the witness short of anonymity. A precedent application form to go with the other above-mentioned documents is produced at Annex S.

5.5.47 At the inter-partes hearing, the defence will be able to make representations, but will not have sight of any sensitive material disclosed to the judge.

5.5.48 Investigation Anonymity

5.5.49 Applications for witness anonymity can be made pre-trial under sections 4 to 10 of the Protection of Witnesses Act 2014 in Grenada. The orders known as investigation anonymity orders can be requested at the very start of an investigation thus providing early certainty to people, who may have relevant information, that their identities will not be disclosed.

5.5.50 Investigation anonymity orders are only available in limited

⁵⁹⁷ In **Antigua and Barbuda**: Section 21 Evidence (Special Provisions) Act 2009; **Dominica**: Section 7 Protection of Witnesses Act 2013; **Saint Vincent and the Grenadines**: Section 7 Witness (Special Measures) Act; **Grenada**: Section 14 Protection of Witnesses Act 2014

⁵⁹⁸ In **Antigua and Barbuda**: Section 22 Evidence (Special Provisions) Act 2009; **Dominica**: Section 8 Protection of Witnesses Act 2013; **Saint Vincent and the Grenadines**: Section 8 Witness (Special Measures) Act; **Grenada**: Section 15 Protection of Witnesses Act 2014

circumstances, which are:

- (a) That a qualifying offence, defined in section 4 as an offence where the maximum penalty is ten years or more imprisonment, has been committed;⁵⁹⁹
- (b) That the person to be anonymised can provide information and more likely than not, will provide that information for a criminal investigation into the qualifying offence;⁶⁰⁰
- (c) That the person to be anonymised has reasonable grounds to fear intimidation or harm if they were identified as assisting the investigation;⁶⁰¹
- (d) That the person likely to have committed the offence is aged over 18⁶⁰² and a member of a group engaging in criminal activity⁶⁰³ where the majority of its members are at least 18 years old⁶⁰⁴

⁵⁹⁹ **Grenada:** Section 8(2)(a) Protection of Witnesses Act 2014

⁶⁰⁰ **Grenada:** Section 8(2)(c) Protection of Witnesses Act 2014

⁶⁰¹ **Grenada:** Section 8(2)(b) Protection of Witnesses Act 2014

⁶⁰² **Grenada:** Section 8(2)(d) Protection of Witnesses Act 2014

⁶⁰³ **Grenada:** Section 8(3)(a) Protection of Witnesses Act 2014: A group is engaged in criminal activity where it is possible to identify them by the criminal activity they commit. For example if an organised crime group are involved in drug trafficking and this can be identified on reasonable grounds to the Magistrate this would be sufficient for the purposes of this definition. At this stage there is no requirement to have this information in admissible form and therefore can be intelligence material – however consideration should be given to the protection of any sensitive information disclosed in the application. There are criminal sanctions for the disclosure of an order and **any information that might enable the person anonymised to be identified** (section 6(1)(b)). Therefore any application should specify if material is sensitive and request an order that if disclosed will identify the anonymised person, to prevent its disclosure.

⁶⁰⁴ **Grenada:** Section 8(2)(e) Protection of Witnesses Act 2014

5.5.51 Applications can be made to a Magistrate by the Commissioner of Police or the DPP⁶⁰⁵ and can be considered on the papers rather than at a hearing.⁶⁰⁶ A precedent application form is provided in Annex Z7.

5.5.52 If the application is refused by a Magistrate, an appeal can be made to the High Court.⁶⁰⁷ An appeal can only be made if an indication is given in the application that an appeal will be made or at the hearing of the application before the Magistrate.⁶⁰⁸ When such notice is provided, the Magistrate will grant an Investigation Anonymity Order pending the High Court appeal.⁶⁰⁹

5.5.53 The granting of an investigation anonymity order does not guarantee that anonymity will be granted at the trial. A separate application has to be made for a trial anonymity order under Part 3 of the Protection of Witnesses Act as outlined above from paragraph 5.5.43.

⁶⁰⁵ **Grenada:** Section 7(1) Protection of Witnesses Act 2014

⁶⁰⁶ **Grenada:** Section 7(4) Protection of Witnesses Act 2014

⁶⁰⁷ **Grenada:** Section 9 Protection of Witnesses Act 2014

⁶⁰⁸ **Grenada:** Section 9(2) Protection of Witnesses Act 2014

⁶⁰⁹ **Grenada:** Section 9(3) and (4) Protection of Witnesses Act 2014

Table 5a

Country	Witness Anonymity	Special Measures
Antigua and Barbuda	Sections 18-25 of the Evidence (Special Provisions) Act 2009	Section 19(2)(d) of the Evidence (Special Provisions) Act 2009 screening of a witness if granted witness anonymity and section 52(2) re live-link for witness out of State
Dominica	Sections 4-11 of the Protection of Witnesses Act 2013	Protection of Witnesses Act 2013 Part 3: Section 12: Eligibility Section 16: Live Link Section 17: Evidence in Private Section 18: Video Recorded Evidence Section 19: Video Recorded Cross Examination Section 20: Examination through an Intermediary Section 21: Aids to Communication Section 22: Status of Evidence Section 23: Warning to Jury Section 24: Prohibition of Accused Cross Examining Section 27: Live Link for witness from out of State
Saint Christopher and Nevis	Part IV of the Evidence Act 2011 (not promulgated)	Section 28(3) of the Evidence Act 2011 that allows use of a video-link, including evidence from a witness who is abroad.
Grenada	Sections 11-18 of the Protection of Witnesses Act 2014 Also see sections 4-10 for an Investigation Anonymity order (pre-trial)	Protection of Witnesses Act 2014 Part 4: Section 19: Eligibility Section 23: Live Link Section 24: Evidence in Private Section 25: Video Recorded Evidence Section 26: Video Recorded Cross Examination Section 27: Examination through an Intermediary Section 28: Aids to Communication Section 29: Status of Evidence Section 30: Warning to Jury Section 31: Prohibition of Accused Cross Examining Section 34: Live-link for witness from out of State

Country	Witness Anonymity	Special Measures
Saint Lucia	No provisions	Section 27A of the Evidence Act (EA): Live link Section 29A: Video recorded evidence of a witness Also see Section 31(3)(a) of the Counter Trafficking Act that allows a child witness to give evidence outside of court or by video.
Saint Vincent and the Grenadines	Sections 4-11 of the Witness (Special Measures) Act 2013	Witness (Special Measures) Act 2013 Part 3: Section 12: Eligibility Section 16: Live Link Section 17: Evidence in Private Section 18: Video Recorded Evidence Section 19: Video Recorded Cross Examination Section 20: Examination through an Intermediary Section 21: Aids to Communication Section 22: Status of Evidence Section 23: Warning to Jury Section 24: Witness using live link out of State Section 27: Prohibition of Accused Cross Examining

5.6 Witness Protection

5.6.1 In some very serious cases the risk to witnesses is so great that they need to relocate to another part of a jurisdiction, or another part of the region and even change their identity. Witness Protection, is generally directed to those persons who have provided crucial evidence and against whom there is a substantial threat.

5.6.2 The ramifications for individual witnesses who have to participate in Witness Protection are immense and it should only be used sparingly. The Investigators should tell the Prosecutor if a witness has been afforded Witness Protection but the Prosecutor should make their own enquiry in cases that appear to realistically raise the prospect.

5.6.3 Alternatives to Witness Protection

5.6.4 Before the expensive step is taken to place a witness in protection consideration must be given as to whether there are alternative methods of encouraging witnesses to testify by alleviating any concerns about their security.

5.6.5 It is important to identify those witnesses who may not require witness protection by provision of other assistance to avert any concerns they may have. Priority should be made for putting the good practices of the Charter into use both by the Investigator and the National Prosecution Service. This will require dedicated members of staff who will regularly update witnesses on the progress of their cases, arrange pre-trial visits and conduct the assessment of whether a witness is vulnerable and if an application should be considered for special measures.

5.6.6 The Investigator can also, following their initial needs assessment as outlined in the Charter⁶¹⁰, determine whether there is a need to provide for a witness management plan⁶¹¹ where there is no immediate requirement to relocate or change the identity of a witness. A witness management plan could include:

- (a) Temporary change of residence to a relative's house or a nearby town;

⁶¹⁰ See para 3 and 4 of Annex L

⁶¹¹ As referred to in the UNODC Witness Protection Manual (pages 29-31) and used in Australia

- (b) Close protection, regular patrolling around the witness's house, escort to and from the court and provision of emergency contacts;
- (c) Arrangement with the telephone company to change the witness's telephone number or assign him or her an unlisted telephone number;
- (d) Monitoring of mail and telephone calls;
- (e) Installation of security devices in the witness's home (such as security alarms);
- (f) Provision of electronic warning devices and mobile telephones with emergency numbers;
- (g) Minimizing of public contacts with uniformed Investigators;
- (h) Use of discreet premises to interview and brief the witness; and
- (i) Safe houses or removing witness to another secure location

5.6.7 Such a witness management plan can be implemented through the Investigating Agency, but independent of the Investigating officers. There is no requirement for such a management plan to be subject to legislation. However it would need to be institutionalized (i.e. in a Charter) in order that such an assessment was conducted on every occasion and to ensure management plans were put into effect

5.6.8 Protection of Assisting Offenders

5.6.9 A person who has taken part in an offence connected with a criminal organisation possesses important knowledge about the organisation's structure, method of operation, activities and links with other local or foreign groups.

5.6.10 Getting defendants to plead earlier will obviously make the criminal justice system run more smoothly. But the real prize is to encourage defendants not only to plead guilty, where they are indeed guilty, but also to co-operate with the prosecution. This will speed up trials, increase the impact of prosecutions on wider networks, drawing in major players, and increase the level of mistrust within serious organised crime groups.

5.6.11 Over the years, the courts have been open to the idea of sentence reductions in return for co-operation. The key case in England and Wales was **R v King** 7 Cr. App. R (S.) 227(1985).⁶¹²

5.6.12 Summing up Lord Lane CJ and Cantley J commented:

One of the most effective weapons in the hands of the detective is the informer . . . It is to the advantage of law-abiding citizens that criminals should be encouraged to inform upon their criminal colleagues. They know that if they do so they are likely to be the subject of unwelcome

⁶¹² See also **R v Sivan** (1988); **R v Debbag and Izzet** (1991); **R v Wood** (1997) and **R v A and B** (1999).

attention, to say the least, for the rest of their lives. They know that their days of living by crime are probably at an end. Consequently, an expectation of some substantial mitigation of what would otherwise be the proper sentence is required in order to produce the desired result, namely the information. The amount of that mitigation, it seems to us, will vary . . . from about one half to two thirds reduction

5.6.13 Despite this clear case law Queen's Evidence is currently underused in the region. This contrasts considerably with the 26% of defendants in US drug trafficking cases who receive sentence reductions as a result of '*substantial co-operation*' with the investigation, and the 10-15% of defendants in serious drug trafficking cases in Australia who take advantage of similar provisions. Furthermore the United States Department of Justice claims a successful conviction rate of 89 per cent when a protected witness testifies⁶¹³.

5.6.14 The combination of lenience in (or even immunity from) prosecution with witness protection is considered a powerful tool in the successful prosecution of organised crime cases.

5.6.15 However, the practice can raise ethical issues as it may be perceived as rewarding criminals with impunity for their crimes. To address those concerns, a growing number of legal systems provide that the "*benefit*" to assisting offenders is not complete immunity for their involvement in

⁶¹³ U.S. Marshals Service talks WitSec to the world", America's Star: FYi, vol. 1, No. 1 (August 2006), available at http://www.usdoj.gov/marshals/witsec/americas_star.pdf

criminal activities but rather a sentence reduction that may be granted only at the end of their full cooperation in the trial process.

5.6.16 Legislation and policy in a number of countries clearly separate admission to a witness protection programme from any benefits that the prosecution or court with respect to past criminal behaviour may grant participants, and they provide that assisting offenders must serve some prison time for their crimes.

5.6.17 Within the prison system, measures are required to protect the life of assisting offenders. A special branch of the prison administration usually administers them in coordination with the protection unit. They include:

- (a) Separation from the general prison population;
- (b) Use of a different name for the prisoner-witness;
- (c) Special transportation arrangements for in-court testimony⁶¹⁴;
- (d) Isolation in separate detention units at the prison or even in special prisons

5.6.18 Following their release from prison, consideration would have to be given as to whether assisting offenders were resettled to a new,

⁶¹⁴ A video link is installed between Bordelais Correctional Facility and the High Court in **Saint Lucia** and could be used for this purpose (due to be installed in **Saint Vincent and the Grenadines**).

secret location under a different identity if the threat to their life persists.⁶¹⁵

5.6.19 Justice Protection Act: Saint Lucia and Justice Protection Bill: Saint Christopher and Nevis

5.6.20 The explanatory note confirms that the purpose of this legislation is to provide for the establishment of a programme for the protection of threatened witnesses, vulnerable victims, jurors who are at risk, judges who are at risk and any other persons who are at risk because of their involvement in the activities of the court.

5.6.21 The law will work together with other laws relating to the making of threats and other similar legislation. The law doesn't prevent law enforcement agencies from offering alternative methods of protection to witnesses and others at risk, but seeks to strengthen the legal and institutional framework for witness protection. Therefore the object of the law is to introduce a more formal and regulated approach to witness protection.

5.6.22 The Bill in Saint Christopher and Nevis, which is a copy of the Act in Saint Lucia, proposes the establishment of a Justice Protection Programme that will have three parts⁶¹⁶:

(a) An Administrative Centre;

⁶¹⁵ Including considerations if a state will allow that collaborator to reside in the state with a known prior (serious) conviction

⁶¹⁶ **Saint Christopher and Nevis:** Clause 3 Justice Protection Bill

- (b) Investigative Department; and
- (c) Protective Department

5.6.23 The Administrative Centre will maintain the Justice Protection Programme and liaise with the DPP and Investigative Department⁶¹⁷

5.6.24 Witness Protection, under this Bill, would generally be directed to those persons who will provide or have provided crucial evidence and against whom there is a real and substantial threat in relation to scheduled offences⁶¹⁸. In order to determine those who should be participants in the programme the DPP will prepare an application in the prescribed form for consideration by the Administrative Centre⁶¹⁹. This will detail the following:⁶²⁰

- (a) The testimony of the prospective participant is credible and essential;
- (b) The prospective participant can be relied upon to give the testimony;
- (c) The significance of the case;
- (d) The prospective defendant;

⁶¹⁷ Ibid Clause 8 defines the functions of the Investigative Department

⁶¹⁸ Ibid clause 5 and First Schedule

⁶¹⁹ Ibid Clause 9(1)

⁶²⁰ Ibid Clause 9(2) and (3)

- (e) The testimony of the prospective participant; and
- (f) The anticipated benefits of a successful prosecution.
- (g) Confirmation if a juror, judicial officer, legal officer, law enforcement officer or any of their associates⁶²¹, is in need of protection or assistance or both.

5.6.25 The Investigative Department will also be required to conduct a threat⁶²² and risk assessment.⁶²³ Also in a case of emergency, they can apply to the Administrative Centre for provisional entry into the Programme by the prospective participant, prior to the determination of any applications.⁶²⁴

5.5.26 The Protection Department are required to submit a report to the Centre on the suitability of a prospective participant for entry into the Justice Protection Programme and for that purpose shall:

- (a) Interview the prospective participant with a view to establishing his suitability for entry into the Programme;

⁶²¹ Ibid Clause 2, Associates is defined as a person including a family member of that person who, by virtue of his relationship or association with a participant or prospective participant, may be considered for protection or assistance or both, under the Justice Protection Programme;

⁶²² Ibid Clause 8(a)(i) this includes a prison report where the prospective participant is in custody – see requirements in clause 2 interpretation

⁶²³ Ibid Clause 8(a)(ii) see requirements of a risk assessment in clause 2 interpretation

⁶²⁴ Ibid Clause 8(c)

- (b) Examine the threat and risk assessments submitted to the Administrative Centre by the Investigative Department; and
- (c) Require a prospective participant or a participant to undergo medical tests or examinations and psychological or psychiatric evaluations and to authorize the results to be made available to the Protective Department;
- (d) Protect participants and persons accorded provisional entry;
- (e) Relocate participants when it is absolutely necessary to do so; and
- (f) Carry out periodic reviews of threat and risk assessments

5.6.27 Each Participant will then sign a memorandum of understanding that will determine the rights and obligations under the Justice Protection Programme⁶²⁵. Schedule two of the Bill sets out the matters that must be included within this MOU.

5.6.28 The Bill also confirms how an identity will be protected and obligations of the Administrative Centre to not disclose or reveal identities of the participants.⁶²⁶ Where, in the determination of legal proceedings, it becomes necessary for a judge or magistrate to be advised of a participant's location and circumstances, an officer of the Administrative Centre shall disclose the relevant information to the

⁶²⁵ Ibid Clause 11(3)

⁶²⁶ Ibid Clauses 21 and 23

judge or magistrate in chambers, but the officer shall not disclose the information if any person other than the judge or magistrate is present.⁶²⁷ There will presumably not be many situations where an identity will need to be revealed to a judge or magistrate, but an advocate should be very careful of the repercussions if the correct procedure isn't followed, as they could be prosecuted for an offence contrary to the Bill.⁶²⁸

5.6.29 Importantly, if in any proceedings in any court, the new identity of a person who is a participant is in issue or leading to potential disclosure, the court shall, unless it considers that the interests of justice require otherwise.⁶²⁹

- (a) Hold that part of the proceedings that relate to the identity of the participant *in camera*; and
- (b) Make such order restricting the publication of evidence given before the court as in its opinion will ensure that the identity of the participant is not disclosed.

5.6.30 There are also provisions that allow for termination of the programme where for example there is a breach of the MOU⁶³⁰ or protection is no longer reasonably justified.⁶³¹

⁶²⁷ Ibid Clause 21(2)

⁶²⁸ Ibid Clause 20

⁶²⁹ Ibid Clause 23

⁶³⁰ Ibid Clause 16(1)(b)(i)

⁶³¹ Ibid Clause 16(1)(b)(vii)

5.6.31 In summary the Bill seeks to strengthen the system for witness protection in a manner that recognizes the immense ramifications that participating in such a programme, especially in terms of change of identity and relocation, could have on the lives of individual witnesses and that such measures should only be used sparingly.

5.7 Unavailable Witnesses

5.7.1 There a number of statutes in the region that would allow a statement to be read as an exception to the hearsay rule if a witness is in fear, unable to attend through threats of bodily harm or will not attend court to give evidence through being in an unfit condition:

- (a) Antigua and Barbuda: see paragraph 3.3.28 above and section 198 of the Magistrate's Code of Procedure Act Cap. 255 where a deposition can be taken before a Preliminary Inquiry from an ill witness or a witness about to leave the State (see paragraph 7.2.21 re tendering such a deposition);
- (b) Barbados: see section 55(2)(a)(i) of the Evidence Act 1994;
- (c) Grenada: see paragraph 3.3.20 above;
- (d) Saint Christopher and Nevis: see paragraph 3.3.33 above;
- (e) Saint Lucia: see section 55(2)(a)(i) of the Evidence Act 2002;
- (f) Saint Vincent and the Grenadines: see section 116(2)(e) of the

- 5.7.2 These are sections where the legislators in the region have recognised and tried to combat the growing ruthlessness of offenders to prevent witnesses attending court. Therefore they should be utilised when appropriate.
- 5.7.3 There has been challenge to the use of a similar section in the Criminal Justice Act 1988 in England and Wales, on the basis that the defendant would not have, as was his one of his minimum rights (Article 6(3)(d) of the European Convention on Human Rights) to “*examine or have examined witnesses against him.*” It was decided that this was merely one aspect of the right to a fair trial and since the judge who allowed a statement to be read on the basis the witness was in fear, had satisfied himself that it was in the interests of justice to do so, the trial considered as a whole was fair **R v Thomas and others** [1998] *Crim L.R.* 887 and **R v Gokal** [1997] 2 *Cr.App.R.*226, CA.
- 5.7.4 When a witness is in fear as a consequence of the material offence, or had been put in fear subsequently in relation to that offence and the possibility of having to testify, a written statement would be admissible (**R v Acton Magistrates’ Court, ex p. McMullen; R v Tower Bridge Magistrates’ Court, Ex p. Lawlor**, 92 *Cr.App.R.DC*). However the fear need not relate to the offence (**R v Fairfax** [1995] *Crim.L.R.*949, CA), nor need it relate to any action by or on behalf of the accused (**R v Rutherford** [1998] *Crim.L.R.*490 CA).

⁶³² See **Horncastle** [2009] *EWCA 964* paragraphs 83-88 for observations on requirements

5.7.5 When it is sought to admit a statement of a witness in this situation an inquiry will usually be held by a judge. The judge will need to know what steps have been taken to alleviate any concerns (i.e. special measures and or witness anonymity); and there should be some direct evidence from the witness about the fear; if oral evidence is not forthcoming it would be good practice to conduct some form of recorded interview with the witness **R v H., W. and M.**, *The Times*, July 6, 2001, CA. However in **Fairfax ante** it was held that a written or oral statement by the witness that they are in fear is admissible for the purpose of proving that he is in fear, such statements are not hearsay as they are being tendered as direct evidence of the maker's state of mind (**R v Blastland** [1986] A.C.41.HL).

5.7.6 When it is known in advance that a witness is unwilling to give evidence any inquiry by the judge should be conducted in the absence of the jury and some innocuous words used to explain the absence (**R v Jennings and Miles** [1995] Crim.L.R. 810, CA). If during the course of the trial the witness unexpectedly refers to an unwillingness to give evidence through fear for his safety or family, the judge should continue with an inquiry in the absence of the jury; if the statement is admitted the jury should be directed to ignore the witness's remarks and, assuming it to be the case, to direct them that there is no direct evidence to link the defendant with the witness's fear (**Jennings and Miles ante**). This assumes that an application to discharge the jury has been refused.

5.7.7 Where the statute requires there to have been threats of bodily harm,

again evidence must be produced applying the principles and procedure outlined at paragraphs 5.7.3-6.

5.7.8 Where the sections refer to being unfit to attend through mental or bodily condition, medical evidence should be adduced to confirm the reason why the witness is unable to attend (Saint Christopher and Nevis, section 57(4) of the Evidence Act 2011 and Saint Lucia and Barbados, section 56(8) of their Evidence Acts – only applies to business documents but good practice would be for all such situations where this exception applies).

5.7.9 Where the witness cannot be found and reasonable efforts have been made to locate the witness by the Investigator the procedure at paragraphs 4.10.57 and 7.2.27 should be followed.

5.8 Witness out of State

5.8.1 Section 52(2) of the Evidence (Special Provisions) Act of Antigua and Barbuda, 28(3) of the Evidence Act of Saint Christopher and Nevis, section 27A of the Evidence Act of Saint Lucia, section 34 of the Protection of Witness Act of Grenada, section 27 of the Protection of Witnesses Act of Dominica and section 24 of the Witness (Special Measures) Act of Saint Vincent and the Grenadines allow witnesses out of State to give evidence via the video link.

5.8.2 These sections could be used to apply for those witnesses, who may otherwise be vulnerable or eligible for special measures, to give evidence via the video link. This could include experts, and persons who reside abroad. Cost savings can then be made using the video

link rather than incurring travel costs for these witnesses.

5.8.3 A precedent application form is available at Annex Z2.

A statement is taken from Mr Green's employer that confirms Mr Green was not working on 17th June. He refuses to give evidence as he received anonymous calls saying that if he did attend trial his family will be at risk. The Prosecutor assesses this evidence is vital to establish that Mr Green lied in interview. Therefore the Prosecutor considers any other way of adducing the evidence. A meeting is held with the witness and Investigator. The witness confirms that he is still in fear of giving evidence due to the calls. The original statement from the witness produced time sheets which would record an employees work schedule. The time sheets for the 17th June show that Mr Green was not working that day. The Prosecutor advises that a recorded statement is taken from the witness explaining about their fear and (if facilities are available) advised about the use of special measures at court. The Prosecutor will then be in a better position to make an application to read the statement on the basis that the witness is in fear of giving evidence and advise the judge (as required in Antigua and Barbuda by section 37(e) of the Evidence

(Special Provisions) Act 2009, and also good practice for other jurisdictions) that there are no alternative methods of protecting the witness from harm. The Prosecutor may also consider applying for the statement to be read as a business document on the basis that the employer compiled the time sheets. Applying in Saint Christopher and Nevis, section 57(1)(a) of the Evidence Act; Saint Lucia and Barbados section 55(1)(a) of their respective Evidence Acts and in Antigua and Barbuda section 40 of the Evidence (Special Provisions) Act 2009. In Saint Lucia and Barbados there is a further requirement that the employer, pursuant to section 57(2)(a)(i), is unfit to attend the trial. This must be confirmed by a medical practitioner. On the facts the employer is in fear rather than unfit. Therefore in Saint Lucia and Barbados the prosecutor could apply section 57(7) of the Evidence Act and adduce the time sheets supported by an affidavit from the employer.

6. Pre-Trial Matters

6.1 Case Summary

6.1.1 In all matters before the first appearance at court the Prosecutor should complete the case summary in accordance with the Manual of Guidance.⁶³³ This will contain an outline of the:

- (a) Evidence, including:
 - Details of the arrest;
 - Any comments made after arrest and recorded appropriately;
 - Details of searches;
 - Summary of the interview

- (b) Summary of how the prosecution put their case

6.2 Bail

6.2.1 Only Barbados⁶³⁴, Saint Lucia⁶³⁵ and Saint Christopher and Nevis⁶³⁶ have legislation detailing the bail procedure. In other jurisdictions the

⁶³³ See Form 5 in Annex C and the example for Mr Yellow and Mr Green at Annex K prepared for trial rather than first appearance

⁶³⁴ **Barbados:** Bail Act 1996

⁶³⁵ **Saint Lucia:** Sections 591-610 Criminal Code 2008

⁶³⁶ **Saint Christopher and Nevis:** Bail Act No.18 of 2012

legislation⁶³⁷ sets the outer limits for the grant of bail and in some cases allude to the discretion of the judge or magistrate but do not state the circumstances the discretion is to be granted.

6.2.2 The Bail Acts of Barbados and Saint Christopher and Nevis law are similar to the Bail Act 1976 of England and Wales and the Mauritius Bail Act 1996. A significant distinction is that in Barbados and Saint Christopher and Nevis a defendant can be released on bail on their own recognizance.

6.2.3 The Acts clarify that there is a presumption of bail. Therefore every person detained or arrested on suspicion of any crime is, by virtue of section 5(3) of the Constitution of Saint Christopher and Nevis and section 13(3) of the Constitution of Barbados, entitled to be released, unless the court withholds bail in accordance with the respective Bail Acts.

6.2.4 In the exercise of these powers, a court, must be satisfied that there are '**substantial grounds for believing**' that one of the events described in the Acts (i.e. fail to surrender to custody, commit offences whilst on bail, interfere with witnesses or otherwise obstruct the course of justice) will occur. Where the application is being made to the High Court after the Magistrate's Court would have found as a fact there are substantial grounds for believing one of the events will happen, the

⁶³⁷ **Antigua and Barbuda:** Magistrates' Code of Procedure Act, Cap 255; **Dominica:** Section 58 Magistrates' Code of Procedure Act, Chap 4:20; **Grenada:** Sections 47-49 Criminal Procedure Code, Cap 2; ; **Belize:** Sections 56-70 Indictable Procedure Chapter 96; **Anguilla:** Section 67 Magistrates' Code of Procedure Act, chapter M5

High Court is allowed to revisit those finding of facts which constitute those 'substantial grounds' for any belief that the court may hold.

6.2.5 The Saint Christopher and Nevis Bail Act 2012 makes it clear that bail can only be denied in certain circumstances. Section 4 of the Act sets out, the 'circumstances in which bail may be denied' to a person charged with an offense which is punishable by imprisonment. The most relevant for the purposes of serious organised crime prosecutions will be:

- (a) Fail to surrender to custody;
- (b) Commit an offence while on bail; or
- (c) Interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person;
- (d) Where the court is satisfied that the defendant should be kept in custody for his own protection or where he is a child or young person, for his own welfare;
- (e) Where he is in custody in pursuance to the sentence of a Court; and
- (f) Where the Court is satisfied that it has not been practicable to obtain sufficient information for the purpose of taking the decision required under this section for want of time since the institution of proceedings against him.

6.2.6 Section 4(3) of the Act provides the court may, in exercising this discretion, consider the following, namely:

- (a) The nature and seriousness of the offence or default and probable method of dealing with the defendant for it;
- (b) The character, antecedents, associations and social ties of the defendant;
- (c) The defendant's record with respect to the fulfillment of his obligations under previous grants of bail in criminal proceedings;
- (d) Except in the case of a defendant whose case is adjourned for inquiries or a report, the strength of the evidence of his having committed the offence or having failed to surrender to custody; and
- (e) Any other factors which appear to be relevant".

6.2.7 A practical and useful judgment to assist with some general guidelines in approaching those factors set out in section 4(3) is **Itesha Huggins v The Commissioner of Police and the DPP** *Saint Christopher and Nevis High Court SKBHCV2013/0239*

6.2.8 Consideration must also be given to those offences listed within the schedule to the Bail Act in Saint Christopher and Nevis where there is no presumption of bail. In Barbados where a defendant is charged with an offence contrary to sections 18, 19 or 20 of the Firearms Act, bail can only be applied for before the High Court.

6.2.9 The Acts clarify that both the defendant and the prosecution has a right to make an application to the High Court in the event that bail is refused or granted as the case may be, by the magistrate. Both the accused and the prosecution have the right to appeal the grant or the

refusal of bail to the Court of Appeal. The Acts also have offences of absconding and breaching bail conditions, each of which can be charged and prosecuted separately from the original substantive offence.

6.2.10 Under the common law a remand in custody should be applied for on the following grounds:⁶³⁸

- (a) The nature of the accusation: The Prosecutor should make reference to the fact that the matter is prosecuted as a Serious Organised Crime and therefore there is a risk the defendant would abscond to avoid justice. This can be further supported by the next ground;
- (b) The nature of the evidence in support: Whilst in **Hurnam v The State** *PC Appeal No. 53 of 2004* the Privy Council made it clear that nature and seriousness of the prosecution are not the essential determinant of whether bail will be granted, they are still important issues to consider as it can be submitted that there is a substantial risk the defendant will fail to surrender if the evidence is strong and then a greater likelihood of conviction;
- (c) The severity of the punishment after conviction: Often in prosecutions of Serious Organised Crime the sentences of imprisonment are extensive. In those circumstances there would be an incentive for the defendant to abscond.

⁶³⁸ Archbold Criminal Pleading: Evidence and Procedure 38th Edn, p 87

6.2.11 In addition consider:

- (a) The risk of the defendant committing offences whilst on bail: The Prosecutor should review the defendant's previous convictions and determine if there have been any previous offences committed on bail. The Prosecutor should refer to **Gentry (1955) 31 Cr App R 195**: where there was a refusal to grant bail in circumstances where the defendant had a bad criminal record. In addition the Prosecutor should refer to **R v Wharton [1955] Crim LR 56** and **Beneby v Commissioner of Police No 28 of 1995 (unreported - Bahamas)** when further offences of a similar type had been committed while on bail or there was credible evidence that the defendant was likely to abscond, bail was reasonably withheld;
- (b) Interference with course of justice and witnesses: (**R v Barthelmy (1852) 169 ER 636**). If there are witnesses to an offence involving Serious Organised Crime that are known to the defendant then the Prosecutor should submit that there is a real risk of interference;
- (c) Failing to surrender: The submissions that can be made are outlined above and the Prosecutor should refer to the fact that there are no possible conditions that can avert the risk of failing to surrender due to the strength of the evidence and the likely outcome of a trial (**Re Robinson 1854 23 LJ QB 286**)

6.2.12 If any conditions of bail are applied for by the defence consider:

- (a) Is the surety independent or indemnified by the accused;
- (b) Has the defendant a fixed abode;
- (c) Has the defendant ties to the community such as family and employment;
- (d) A doorstep condition may be appropriate where it is proportionate, and necessary to enforce a curfew or a residence condition **R (CPS) v Chorley Justices [2002] EWHC 2162** Admin;
- (e) Whether surrender of passport, informing of intention to leave the jurisdiction and reporting to the local Police station can avert the risk of failing to surrender (**Re Robinson (1854) 23 LJ QB 286**);
- (f) Some bail conditions, for example a condition to report to a Police station at designated intervals, might be superficially appealing but be of little or no effect in averting the risk contemplated. For example, the interval between reporting times may be insufficient to prevent a defendant absconding. In cases of Serious Organised Crime the conditions ought not to be recommended.

Both Defendants intend to apply for bail. Before the hearing the Prosecutor discussed the possibility of bail with the Investigator provides Form3 and agrees that bail should be opposed

Mr Green

He is 48 years old with a wife and two children aged 15 and 18. He has no previous convictions and is able to propose a surety of his mother's property valued at \$30,000

Mr Yellow

He is a director of a family business (AB Ltd). He is separated from his wife with whom he has a daughter. He also has family living in Mexico. He has previous convictions for the following:

1. Theft in 2005 – fine of \$100
2. Possession of cocaine in 2010 – fine of \$200
3. Possession of cocaine in 2010 – fine of \$300 – committed on bail for No.2

The Prosecutor opposes bail for both on the grounds of:

Mr Green

1. Interference with the course of justice – as evidence that there has already been intimidation of a witness (the Prosecutor does not name the

witness in open court due to risk of harm to the family) and there are no conditions that can avert against this risk;

2. Failure to surrender – albeit he has ties to the community Mr Green is charged with a serious offence and there is a strong likelihood of imprisonment if convicted therefore he is a substantial flight risk.

The Prosecutor observes that albeit a surety has been proposed, this is his mother who is less likely to ensure surrender to court due to the close relationship and surety on a property is not an immediately realisable asset. Furthermore the court may be unwilling to surrender the mother's recognisance leaving her potentially homeless if the defendant fails to appear. Therefore this is not an appropriate condition to avert against the risk of failing to surrender.

Mr Yellow

1. The evidence against him is strong and therefore there is a substantial risk of him failing to surrender with the expectation of a lengthy prison sentence. Therefore there are no conditions that can avert this risk. The facts show he has access to

large amounts of money and therefore has the ability to leave the jurisdiction. He also has family residing in Mexico and therefore has links abroad that may encourage him to abscond.

2. The defendant has a history of breaching court orders as demonstrated by his second conviction for possession of cocaine. The evidence shows that he has moved from using to now supplying cocaine and he is likely to reoffend if granted bail.

6.3 Disclosure

6.3.1 Unused Material

6.3.2 Organised Crime cases create difficulties for Prosecutors in terms of both the volume and sensitivity of material not actually used as evidence, hereinafter called "*unused material*". Large-scale cases require discipline from Investigators and Prosecutors to ensure plans, timescales, milestones and risk assessments are identified, adopted and monitored to manage this unused material. Otherwise the defence will attack the prosecution by stating that the prosecution is unfair and the jury have not been told the complete "*story*". There is precedent in the region where convictions have been quashed where there have been failures by the defence to disclose witness statements where there are material discrepancies in the content of the statement and

evidence given at trial.⁶³⁹ Therefore the importance of disclosure cannot be underestimated.

6.3.3 Reasonable Lines of Inquiry

6.3.4 Investigators and Prosecutors should consider whether all reasonable lines of inquiry have been pursued, whether these point towards or away from the suspect. If they are not pursued then the defence may attack the credibility of officers when giving evidence for not having completed their job properly. This in turn distracts from the facts of the prosecution case and the strength of the evidence.

6.3.5 Reasonable enquiries pointing away from the suspect will include:

- (a) Need to properly investigate information received ("*tip offs*") which indicate that persons other than the suspect have committed the offence;
- (b) The need to fully investigate the credibility of prosecution witnesses. In particular any witnesses, in respect of which, Witness Protection or immunity might be made. Material relevant to credibility will emerge from various sources including:
 - Previous convictions;
 - Relationship with suspect;
 - Status as informant (and any payments received);

⁶³⁹ See **Milton v R** (1996) 49 WIR 306; **Berry v R** (1992) 41 WIR 244; **Dorsett and Somerset v The State** (1989) 41 WIR 154 and **David v The State** (1989) 41 WIR 154

- Payments received in connection with Witness Protection; and Prison records
- (c) The Investigators need to ensure that robust systems are in place to obtain such relevant material from other investigation departments (e.g. financial Investigators), from other investigative agencies (e.g. Customs) and from third party organisations (e.g. prisons).

6.3.6 Prosecution Disclosure Policy Document

6.3.7 The Prosecutor (with approval from the DPP) should produce a written disclosure policy document to be served on the defence and the court where there is a large volume of unused material (see precedent at Annex Y). The purpose of the document is to provide an open and transparent basis for disclosure decisions regarding non-sensitive unused material and to gain judicial confidence in disclosure decisions.

6.3.8 In the context of Serious Organised Crime cases, the disclosure policy document is likely to deal with the following:

- (a) Extent to which names and other identifying details have been edited out of witness statements served as unused material;
- (b) Method by which the defence can contact unused witnesses whose identity or whose statements have been disclosed. Such contact will typically be via Investigators that will arrange a meeting at a Police station;

- (c) Prosecutor to apply principle in **R v Heggart [2001] 4 Archbold News 2**, which provides that the identity of a person who may have witnessed an incident, giving rise to criminal proceedings will be disclosable;
- (d) Scientific results that do not implicate the defendant – such as a negative fingerprint result on a package of drugs;
- (e) Extent to which CCTV footage has been examined by prosecution;
- (f) Prosecutions current understanding of the defence case, against which disclosure has been applied at the initial stage;
- (g) Staged disclosure: large scale cases will often necessitate service of successive tranches of disclosure on the defence. Policy document will assist defence and court to understand the rationale for this approach;
- (h) Document will emphasise that only material that is required to be disclosed by the prosecution will be disclosed.

The Prosecutor receives results back from the forensic examination of items sent to the laboratory from the Investigator of Form8. There are negative results for both suspects for fingerprints and DNA on the drug

packaging (plastic bag and brown paper) and the scales. As this evidence would assist the defence case the Prosecutor discusses with the Prosecution Team and decides to notify the defence in a written document confirming the results. The date and detail of this notification will also be recorded on the NPS disclosure log (Form9A).

6.3.9 Rigorous Application of Disclosure

6.3.10 Prosecutors **must** ensure that the disclosure regime is scrupulously followed and in particular to ensure that **only** material that it is aware which would tend either to materially weaken the prosecution case or materially strengthen the case for the defence (**Maureen Peters v The Queen** HCRAP 2009/5 Territory of the Virgin Islands; **Donnason Knights v the Queen** Criminal Appeal No.15 of 1995, Grenada; and **R v Ward (Judith Theresa)** [1993] 2 All E.R. 577). Further In Saint Lucia Rule 11.2(2) of the Criminal Procedure Rules provides that the prosecution must disclose material not proposed to be used but which may be exculpatory, unless the Judge excludes material in the public interest. Also in St Lucia⁶⁴⁰ and Dominica⁶⁴¹ the disclosure process is determined by statute. In particular in Indictable trials the requirement of the prosecution to provide the defence with material that undermines their case⁶⁴² or a written statement⁶⁴³ confirming

⁶⁴⁰ **Saint Lucia**: Section 704 Criminal Code re Summary trials and section 908 re Indictable trials

⁶⁴¹ **Dominica**: Sections 31A-31G Criminal Law and Procedure Act

⁶⁴² **Dominica**: Section 31B(1)(a) Criminal Law and Procedure Act; **Saint Lucia**: Section 908(1)(a) Criminal Code

there is no material undermining the Prosecution case. When this duty is complied with by the Prosecution the defence are required to serve a defence statement⁶⁴⁴. The service of a defence statement will be important for the Prosecution and court to know the issues in advance of trial rather than being ambushed. If a defence statement isn't served, with leave of the court, inferences can be made in deciding whether the defendant committed the offence.⁶⁴⁵ To assist the court in deciding whether to allow comment to be made or whether the court should be allowed to draw inferences, the Prosecutor should put the contents of the defence statement to the defendant in cross-examination to elicit the differences between it and the actual defence relied upon and any justification for those differences. Leave of the court is not required for the prosecutor to do this (**R v Tibbs** (2000) 2 Cr App R 309). Upon receipt of a defence statement the Prosecution Team must then review it to determine if in the light of the contents there is any material that may assist the defence case. If the Prosecution fail to disclose material that may reasonably assist the defence case as disclosed, the defence are entitled to apply to the court for an order requiring the Prosecution to disclose such material.⁶⁴⁶ Precedent letters in Annex Z will benefit the Prosecutor throughout each stage of this disclosure process.

6.3.11 Problematic areas include the following and must be considered on a case-by-case basis applying the test at 6.3.10:

⁶⁴³ **Dominica:** Section 31B(1)(b) Criminal Law and Procedure Act; **Saint Lucia:** Section 908(1)(b) Criminal Code

⁶⁴⁴ **Dominica:** Section 31C Criminal Law and Procedure Act; **Saint Lucia:** Section 909(1) Criminal Code

⁶⁴⁵ **Dominica:** Section 31E Criminal Law and Procedure Act; **Saint Lucia:** Section 912 Criminal Code

⁶⁴⁶ **Dominica:** Section 31D Criminal Law and Procedure Act; **Saint Lucia:** Section 910(1) Criminal Code

- (a) No duty to disclose statements that are not helpful to the defence (**Hall v R** [1997] UKPC 223, PC);
- (b) Disclosure may be made when disciplinary proceedings against Investigators are pending (**Glenroy Bishop v The State** [2000] 60 WIR 370 The Trinidad and Tobago Court of Appeal), but apply the test in **Krishna Persad and Ramsingh Jairam v The State** PC (2001) 58 WIR 433 PC, of whether it is necessary to do so to secure a fair trial. Therefore do not disclose if:
- The disciplinary matter is mere complaint or speculation;
 - The prosecution do not need to conduct investigations searching for evidence for the defence that is not a reasonable line of enquiry **R v Brown** [1997] 3 All ER769,HL;
 - Non-material matters. These may include allegations that did not result in disciplinary action

If material is disclosed confirm to the defence in writing that in accordance with the judgements in **R v Edwards** (1991) **R v Guney** (1998) and **R v Zomparelli** (unreported, CA 23 March 2000) the prosecution will object to any cross-examination of the investigator if a criminal prosecution or disciplinary matter is yet to be resolved, unless it can be shown to have substantial relevance to the issues in the case.

The Prosecutor receives information from the defence attorney for Mr Yellow that the officer who seized the

\$100,000 US in the house search is subject to disciplinary proceedings for an alleged assault upon a suspect during an interview. Mr Yellow's defence team therefore request disclosure of the file in relation to this disciplinary matter. The Prosecutor reviews the disciplinary file in order to determine if there is any relevant material that should be subject to disclosure. The file shows a complaint was made by the suspect and the disciplinary hearing is due to be heard after the trial for Mr Yellow and Mr Green. The only statement on the file is that of the complainant and there are no other supporting statements. The officer also has no other disciplinary matters recorded against him. The defence team for Mr Yellow have not disputed to date that the money was planted in the property but the Prosecutor is aware of the comment made in interview about a "set up". In those circumstances the Prosecutor decides to prepare a document that will be served on the defence explaining that the officer is subject to disciplinary proceedings and the nature of these, but confirm that no finding has yet been made. The Prosecutor also adds that this information is disclosed after a review of the disciplinary file and applying the disclosure test in R v

Ward (Judith Theresa). The Prosecutor confirms the date of disclosure and a copy of the document served on the defence on the NPS Disclosure Log, Form 9A.

- (c) Where a witness has been granted immunity from prosecution this must be notified to the defence (**Boodram v AG of Trinidad and Tobago** (1996) 47 WIR);
- (d) That any Public Interest application⁶⁴⁷ (see precedent applications, notices and letters in Annex W) is made in accordance with the principles set out by the House of Lords in **R v H and C [2004] 2 AC 134**. This will relate to material deemed by the Prosecutor to be sensitive and could arguably be disclosed to the defence. In those circumstances an application will be made to the trial Judge to determine if the matters should be disclosed to the defence. The prosecution may reasonably apply to the trial Judge to withhold sensitive material where:
 - Disclosure would mean that other investigations could be compromised;
 - Disclosure of covert methodology would undermine future investigations;

⁶⁴⁷ In **Antigua and Barbuda** see The Evidence (Special Provisions) Act 2009 sections 48 -51: a Government application to oppose disclosure on basis of a specified public interest; **Barbados**: section 109 Evidence Act; **Saint Lucia**: Section 109 Evidence Act; and **Saint Christopher and Nevis**: section 118 Evidence Act 2011 re exclusion of matters of State

- The national interest needs to be protected (**Evans v Chief Constable of Surrey** [1988] QB 588);
 - The identity of an informant needs to be protected **Savage v Chief Constable of Hampshire** [1997] 2 All ER 631⁶⁴⁸
- (e) It is also good practice that throughout the proceedings the prosecution should ensure that a record of documentation disclosed to the defence is maintained. It is important that the prosecution is in a strong position to meet any criticism of the disclosure process.⁶⁴⁹

6.3.12 Non Disclosure of Confidential Communications

6.3.13 Section 106(1) of the Evidence Acts of Barbados and Saint Lucia regulate aspects of disclosure as it relates to confidential communication and documents. Under this section, on the application of a person who is an interested person in relation to a confidential communication or a confidential document, the court has the discretion for evidence not to be heard where the following outweighs its admissibility:

- (a) Harm to an interested person;

⁶⁴⁸ **Dominica:** Section 25 Drugs (Prevention of Misuse) Act A witness is not obliged to disclose an informant's name or address or any information that will disclose the informant's identity. Also if any book, document or paper has reference to an informant's name or could lead to their discovery, this entry can be concealed.

⁶⁴⁹ See NPS Disclosure Log [Form 9A] in the Manual of Guidance at Annex C

- (b) Harm to the relationship in the course of which the confidential communication was made or the confidential documents prepared;
- (c) Harm to the relationship of the kind concerned.

The Prosecutor discusses the intelligence that led to the surveillance on 17th June with the Prosecution Team. The Investigator confirms that the CHIS had named Mr Yellow as the supplier and Mr Red as the customer but he didn't know that Mr Green or Mr Purple were involved. It is arguable that this could assist Mr Green's defence as there was no reference to his involvement. However if this information were disclosed then the CHIS's life could be in danger and the investigation of Mr Red could be compromised. The Prosecutor decides to make a Public Interest Immunity Application to the Trial Judge without notice to the defence and ex parte based on the assertion that the prosecution may reasonably withhold this information due to its sensitivity. The Prosecution Team discuss the options if the Trial Judge refuses to make a ruling that the material should not be disclosed. They decide that it would not be in the public interest to proceed, based on the Code for Prosecutors, as the CHIS's identity would be revealed and a future source of intelligence would be lost. The Trial Judge rules that

the material is potentially disclosable, but in the circumstances sensitive, therefore should not be disclosed. However he will keep the matter under review throughout the trial should the circumstances change. The Prosecutor makes a note of the hearing and the ruling on Form 2 of the Manual of Guidance, files this in the Confidential Disclosure file and stores in a secure container.

6.4 Mode of Trial

6.4.1 The procedure for determining if a trial is heard in the Magistrates' Court or High Court for either way matters, will depend on whether it is a scheduled offence or a hybrid offence.

6.4.2 Scheduled Offence

6.4.3 Legislation⁶⁵⁰ will provide a schedule of those offences where summary trial is available. This legislation will also establish the procedure to be

⁶⁵⁰ **Barbados:** Section 46 Magistrates Courts; **Dominica:** Section 43 Magistrates Code of Procedure Act, Chap 4:20; **Saint Christopher and Nevis:** Section 50 Magistrates Code of Procedure Act, Cap 46; **Saint Vincent and the Grenadines:** Sections 9-12 Criminal Procedure Code, Cap 17. In **Antigua and Barbuda** section 46 of the Magistrates Code of Procedure Act simply stipulates that any offence where the penalty on indictment is under \$10,000 or a period of imprisonment less than 24 months can be dealt with summarily where the defendant pleads guilty or with the defendants consent

followed.⁶⁵¹ These are not usually offences that are defined as Serious Organised Crime⁶⁵² for the purposes of this Guide.

6.4.4 However, if a scheduled offence does fulfil the definition of a Serious Organised Crime,⁶⁵³ the Prosecutor should make representations for the offence to be tried on indictment.

6.4.5 The Magistrate will make a determination of whether a matter should be tried summarily considering the:

- (a) Nature of the offence;
- (b) If the circumstances of the offence make it one of a serious character;
- (c) Whether the Magistrate has sufficient sentencing powers to dispose of the offence on the basis of the facts

6.4.6 The DPP must in appropriate cases of Serious Organised Crime consider the power of veto/reversion/power to direct the Magistrate to switch to indictable proceedings⁶⁵⁴ and insist the matter proceeds on

⁶⁵¹ **Barbados:** Section 46(3) Magistrates Courts Act; **Dominica:** Section 43 Magistrates Code of Procedure Act, Chap 4:20; **Saint Vincent and the Grenadines:** Section 11 Criminal Procedure Code, Cap 172

⁶⁵² For example see **Saint Lucia** section 775(9) Criminal Code 2008 where scheduled offences include noteage, attempted suicide and Post Office Act offences

⁶⁵³ For example see **Saint Lucia** section 775(9)(c) Criminal Code 2008 re Fraud offences

⁶⁵⁴ Section 85 Criminal Procedure Code, Cap 2 or section 7 Act 35 1978 in **Grenada**; For “like” offences see section 8 Act No.14 1995 in **Dominica**, if no statutory power then DPP can discontinue and before the case is completed, re-laid to proceed indictably according to the principles in **Richards (Lloydell) v R** (1992) 41 WIR 263, PC

indictment if considering the above factors he/she disagrees with the magistrate's decision to try summarily. If a Prosecutor considers the DPP should use these powers the matter should be adjourned for the matter to be referred to the DPP.

6.4.7 However it will be the defendant who has the final say as to where he or she will be tried. Therefore the defendant for scheduled offences has the right of election for trial in the Magistrates' Court or before a jury in the High Court.

6.4.8 If two or more defendants are jointly charged each has their own right of election (**Nicholls v Brentwood JJ [1991] 3 All ER 359, HL**). However the exception is in Saint Vincent and the Grenadines where if one defendant elects trial by jury all defendants jointly charged are tried on indictment. Equally if a defendant is charged with more than one offence and elects trial by jury all matters are tried on indictment.⁶⁵⁵

6.4.9 Hybrid Offence

6.4.10 A hybrid offence is one where statute creates particular offences, which stipulate that a person found guilty may on "summary conviction", be liable to a particular sentence and alternatively "*on conviction on indictment*" be liable to a different sentence (**Hastings and Folkestone Glassworks Ltd v Kalsou [1948] 2 All ER 1013**).

6.4.11 For such offences the prosecution can decide whether to charge on

⁶⁵⁵ Saint Vincent and the Grenadines: Section 16 Criminal Procedure Code, Cap 172

indictment or summarily (**Apata v Roberts No.(1) (1981) 29 WIR 69; Apata v Roberts No.(2) (1981) 31 WIR 219**). Therefore if a matter is charged on indictment **it must be** proceeded with on indictment. Therefore drug trafficking matters in Grenada, Saint Christopher and Nevis⁶⁵⁶, Barbados, Saint Lucia and Dominica can be charged on indictment as hybrid offences.

6.4.12 However if the matter is not charged as an indictable offence the defendant will have the right to elect whether the matter is tried in the Magistrates or the High Court (**Chief of Police, Chief Magistrate, Director of Public Prosecutions v Samuel Locker Civil Appeal No.1 of 1991 In the Court of Appeal Saint Christopher and Nevis**).

6.4.13 In Antigua the prosecution can elect whether to have a matter tried on indictment or summarily in relation to an offence that is: “...by virtue of any enactment both an indictable and summary offence.”⁶⁵⁷ This would suggest the prosecution can determine the venue for hybrid offences such as drug trafficking offences⁶⁵⁸ The Antigua and Barbuda Misuse of Drugs Act was amended in 2008 to provide that possession of drugs of over 2 kilograms is now subject to indictment and can only be tried by a judge and jury, removing the requirement of trial by magistrate

⁶⁵⁶ Section 26(6) Drugs (Prevention and Abatement of the Misuse and Abuse of Drugs) Act – the Prosecution can elect whether to proceed on indictment or summarily

⁶⁵⁷ Section 45 (as amended in Act No. 13 of 2004) Magistrates Code of Procedure Cap 255

⁶⁵⁸ See Schedule Two Misuse of Drugs Act, Chap 283 which sets out the different penalties on indictment and on summary conviction

6.4.14 In Saint Vincent and the Grenadines, statute⁶⁵⁹ stipulates that a scheduled offence or one: “...which under any other law is triable summarily or on indictment” will be subject to the defendant’s consent. However this doesn’t prevent the DPP deciding to proceed with a matter on indictment⁶⁶⁰ or the Magistrate deciding to proceed to a preliminary inquiry.⁶⁶¹ In the former the Investigator should discuss this with the Prosecution Team at the outset. For example when there is a hybrid matter so serious, the DPP should proceed on indictment as inevitably the defence will want it dealt with summarily due to the lower range of sentences.

Due to the amount of cocaine involved the Prosecutor at an early stage discusses the matter with the DPP. As a result after the Prosecutor provided the charging advice, he confirmed to the Investigator that the matter should proceed on indictment.

6.5 Saint Lucia Criminal Procedure Rules

6.5.1 These Rules aim to reduce delay by having an effective system of case management throughout the proceedings. This is reflected in Part 6 of the Rules which details how the courts will actively manage cases by:

- (a) The early identification of issues,⁶⁶²

⁶⁵⁹ Saint Vincent and the Grenadines: Section 9(1) Criminal Procedure Code, Cap 172

⁶⁶⁰ Saint Vincent and the Grenadines: Section 140(1)(a) Criminal Procedure Code, Cap 172

⁶⁶¹ Saint Vincent and the Grenadines: Section 140(1)(b) Criminal Procedure Code, Cap 172

⁶⁶² Rule 6.1(a)

- (b) The early identification of the needs of witnesses;⁶⁶³
- (c) Achieving certainty as to what must be done, by whom, and when;⁶⁶⁴
- (d) The early setting of a timetable for the progress of a case;⁶⁶⁵
- (e) Ensuring that evidence, disputed or not, is presented in the shortest and clearest way;⁶⁶⁶
- (f) Discouraging delay, dealing with as many aspects of the case as possible on the same occasion, and avoiding unnecessary hearings;⁶⁶⁷
- (g) Encouraging the participants to co-operate in the progress of the case;⁶⁶⁸
- (h) Making use of technology;⁶⁶⁹
- (i) Giving any direction appropriate to the needs of a case as early as possible.⁶⁷⁰

⁶⁶³ Rule 6.1(b)

⁶⁶⁴ Rule 6.1(c)

⁶⁶⁵ Rule 6.1(d)

⁶⁶⁶ Rule 6.1(e)

⁶⁶⁷ Rule 6.1(f)

⁶⁶⁸ Rule 6.1(g)

⁶⁶⁹ Rule 6.1(h) i.e Prison video link or live link for giving of vulnerable witness evidence

⁶⁷⁰ Rule 6.1(i)

- 6.5.2 It is important that the Prosecution Team has a good working knowledge of these principles in order that they can efficiently manage a case and also make sure that the defence are applying the rules correctly.⁶⁷¹
- 6.5.3 The main area of development within the rules and its overarching objective for the case management of cases is the replacement of preliminary inquiries for indictable offences with a Sufficiency Hearing, where a High Court Judge determines if there is sufficient evidence for the matter to be committed for trial.
- 6.5.4 A Sufficiency Hearing will be fixed 35 days after an Initial Hearing in the Magistrates Court. With a requirement that any evidence to be relied upon will be served upon the defence no less than 7 days before the Sufficiency Hearing.⁶⁷² This is a very tight time limit to serve a case and for a High Court Judge to determine if there is a case to answer. Therefore it is important that the Prosecution Team have their case well prepared according to the principles of this Guide.
- 6.5.5 Part 5 of the Rules establishes the major stages in the management of summary and indictable cases as follows:

⁶⁷¹ See Rule 6.3 which outlines the court's case management powers which can include shortening or extending a time limit (Rule 6.3(2)(h)) and specifying the consequences of failing to comply with a direction (Rule 6.3(2)(i))

⁶⁷² Rule 9.3(3)

6.5.6 Summary Cases

- (a) Orientation Session: This hearing will allow for adjournment requests;⁶⁷³ prepare a bench warrant list for Magistrates' review in the event of defendants who do not appear;⁶⁷⁴ verify contact details for a defendant;⁶⁷⁵

- (b) Initial Hearing: Reading of the charges to the defendant;⁶⁷⁶ consideration of bail⁶⁷⁷ with any application for bail being made in the appropriate practice form;⁶⁷⁸ the Magistrate may conduct a trial at once if the defendant so requests and the Prosecutor consents⁶⁷⁹ – therefore the Prosecution Team should be prepared for this possibility if a matter is to be dealt with summarily; the Magistrate may make a scheduling order which will contain directions for each party to comply with to ensure an effective trial;⁶⁸⁰ and the Magistrate may order disclosure of Police Investigation reports;⁶⁸¹

- (c) Pre-trial Case Management: These will be held as required⁶⁸² and maybe used to make further directions or to address

⁶⁷³ Rule 5.2(2)(b)

⁶⁷⁴ Rule 5.2(2)(c)

⁶⁷⁵ Rule 5.2(2)(d)

⁶⁷⁶ Rule 5.6(2)(c)

⁶⁷⁷ Rule 5.6(2)(e)

⁶⁷⁸ Rule 4.3(1)

⁶⁷⁹ Rule 5.6(3)(a)

⁶⁸⁰ Rule 5.6(3)(b)

⁶⁸¹ Rule 5.6(3)(c)

⁶⁸² Rule 7.1(2)

breaches of directions;

- (d) Omnibus Conference: This will be used to resolve for example any outstanding issues such as service of evidence;⁶⁸³ trial readiness;⁶⁸⁴ to discuss any witness issues⁶⁸⁵ and to discuss any possible changes of plea;⁶⁸⁶
- (e) Trial: It is **very important** that the Prosecution Team is aware that the court shall dismiss any summary case if the charge has been pending for more than **180 days** where the trial has not commenced and the delay is not attributable to the defendant. The court will dismiss a case unless there are exceptional reasons for not doing so.⁶⁸⁷

6.5.7 Indictable Cases

- (a) Orientation Session: See paragraph 6.5.6 (a) above as same procedure conducted for a summary matter
- (b) Initial Hearing: This will be heard within 72 hours of arrest of the defendant.⁶⁸⁸ At the Magistrates Court the defendant will be

⁶⁸³ Rule 7.3(1)(a)

⁶⁸⁴ Rule 7.3(1)(b)

⁶⁸⁵ Rule 7.3(1)(g)

⁶⁸⁶ Rule 7.3(1)(f)

⁶⁸⁷ Rule 7.4

⁶⁸⁸ Rule 9.1 – see Criminal Code 2008 section 593(4) re indictable offences that only a High Court Judge may hear for an application for bail. Includes offence against the Firearms Act or the Drugs (Prevention of Misuse) Act which is triable on indictment and which carries a maximum punishment that exceeds 5 years.

Read the charges and bail will be considered. A Magistrate shall make a scheduling order fixing dates for the Sufficiency Hearing;⁶⁸⁹ and the dates by which counsel are selected, appointed and appear on the court record;⁶⁹⁰

- (c) Sufficiency Hearing;⁶⁹¹ This will be held **within 35 days of the Initial Hearing**. The Judge at the High Court will determine if the prosecution *“has disclosed sufficient evidence to meet the burden of going forward with the criminal prosecution and thereby require the defendant to stand trial before a judge and jury.”*⁶⁹² Essentially the prosecution must satisfy the Judge that there is a prima facie case.⁶⁹³ A Sufficiency Hearing will usually be held in open court. However if there are circumstances that require confidentiality the proceedings can be held in chambers.⁶⁹⁴ The Prosecution Team may want to consider a hearing in chambers if there are other suspects still to be arrested.
- (d) Indictment: The DPP must prefer an indictment within a reasonable time after the conclusion of the Sufficiency

⁶⁸⁹ Rule 5.6(5)(a)

⁶⁹⁰ Rule 5.6(5)(b), (c) and (d)

⁶⁹¹ Rule 5.1(2)(c) refers to this as the Committal Hearing – Whereas Rule 9.3 refers to the first hearing after the Initial Hearing on an indictable matter as a Sufficiency Hearing. This Guide will refer to this hearing accordingly as a Sufficiency Hearing

⁶⁹² Rule 9.3(1)

⁶⁹³ Rule 9.3(4)

⁶⁹⁴ Rule 9.3(10)

Hearing⁶⁹⁵ and the matter can be dismissed by the Presiding Judge if there is unreasonable delay in preferring an indictment.⁶⁹⁶

- (e) Arraignment: After an indictment has been filed a Judge can arraign the defendant and enter a Scheduling Order directing the next case management steps to be taken⁶⁹⁷ including the dates set for disclosure of the evidence the prosecution intend to rely upon.⁶⁹⁸

- (f) Case Management Conference: If a defendant pleads not guilty the court may schedule a case management conference to streamline and expedite the case for trial.⁶⁹⁹ For example date for service by the Prosecution of any further evidence they will rely upon⁷⁰⁰ and a date for filing of any pre-trial motions.⁷⁰¹
Importantly upon application by the defence or Prosecutor the court can order a witness to give testimony under oath and be cross-examined prior to trial and for that evidence to be used at trial.⁷⁰² This will apply where there is a high probability that the witness will not be available for trial for

⁶⁹⁵ Rule 9.5(3)

⁶⁹⁶ Rule 9.6(1)

⁶⁹⁷ Rule 10.1

⁶⁹⁸ Rule 11.2(1) usually 14 days from preferment of the indictment

⁶⁹⁹ Rule 10.5

⁷⁰⁰ Rule 11.1(3)(a)

⁷⁰¹ Rule 11.1(3)(d)

⁷⁰² Rule 11.1(2)

example through ill health or being abroad. The defence must also give notice to the prosecution, at a date fixed by a scheduling order at this hearing, information as to the particulars of time and place of an alibi and of the witnesses to support the alibi.⁷⁰³ The Case Management Conference can be held immediately after arraignment or at a time fixed by the Judge;⁷⁰⁴

- (g) Omnibus Conference: At this hearing any trial issues still to be resolved will be determined;⁷⁰⁵

- (h) Trial: Again it is **very important** that the Prosecution Team is aware that for defendants remanded in custody a trial should commence before expiry of 60 continuous days in custody, unless a defendant is considered for bail and the prosecution satisfies the court that the defendant should remain in custody and that postponement beyond 60 days is justified.⁷⁰⁶ Equally as far as practicable, a defendant charged for murder should have a trial within 60 days of the preferment of the indictment and for a defendant charged with a violent indictable offence, trial within 30 days of preferment of the indictment.⁷⁰⁷

⁷⁰³ Rule 11.3(2)

⁷⁰⁴ Rule 11.1

⁷⁰⁵ Rule 11.5

⁷⁰⁶ Rule 2.11

⁷⁰⁷ Rule 2.13

6.6 Magistrates' Court Pre-Trial Time Limits Guidelines 2003 of Saint Vincent and the Grenadines

6.6.1 The Prosecutor should also be aware of any time limits set by any local guidelines. For example the Magistrates' Court Pre-Trial Time Limits Guidelines 2003, applied in Saint Vincent and the Grenadines. These establish that a defendant in custody must have a preliminary inquiry within 3 months and that a defendant on bail must have a trial or a preliminary inquiry within 6 months. Failure to abide by these Guidelines could lead to the Magistrate refusing to adjourn without good reason beyond the time limit, resulting in the proceedings being withdrawn, discontinued or a nolle prosequi.

6.7 Presentation of Evidence

6.7.1 The Prosecutor should consider how to present to the court evidence proving the sequence of events (e.g. cell phone evidence, and evidence of surveillance). A colour-coded pictorial timeline may be of benefit to the court. Early consultation with the trial advocate(s) will be appropriate to avoid changes in this document at a later stage, which could undermine the contents if identified by the defence at trial. However such timelines must be supported by evidence otherwise they would be inadmissible as hearsay.

6.7.2 The timeline below in Table 6 uses evidence in the case example of Mr Yellow and Mr Green.

Table 6

DATE and TIME	17 th June 1202	17 th June 1337	17 th June 1455
TELECOMMUNICATION EVIDENCE	Text received at 1202 inbox of Mr Yellow from unknown number: <i>"You ready to meet at the collection point"</i>	Text from Mr Yellow to Mr Green sent at 1337: <i>"Red says bus stop"</i>	Call from Mr Yellow to Mr Green at 1455
OBSERVATION EVIDENCE			Officer N: Mr Yellow was standing by a bus stop in St Peter. He was seen on his telephone making a call and speaking for 3 minutes. He had at his feet a plastic bag Officer L: Video
ATTRIBUTION	Mr Yellow's Cell seized from BRU1 (Officer N)	Mr Green's Cell seized from right trouser pocket (Officer K)	
EXHIBIT	Mr Yellow's Cell: N1 Report on Texts: E1	Mr Yellow's Cell: N1 Mr Green's Cell: K2 Report on Texts:E2	Video of Observations: L1 Telephone Billing: Li3

6.7.3 Technology should be utilised where appropriate. PowerPoint presentations will often make complicated evidence readily intelligible to a jury.

6.7.4 Consideration should also be given to presentation of large documents, such as recorded transcripts of audio probe material. Best practice would be allowing the defence access to the entire exhibit and the prosecution make a decision of those parts it seeks to rely upon. This will reduce the volume and focus the mind of the jury on the relevant

parts of the evidence.

6.8 Exhibits

6.8.1 Producing exhibits

6.8.2 Secondary evidence in the form of photographs of exhibits can be admissible in evidence. The production of chattels or physical objects is not required in order to render parole evidence as to their nature admissible (**Hocking v Ahlquist** [1944] K.B. 120, DC).

6.8.3 There are also security issues with producing certain exhibits at court (e.g. drugs and money) and health risks (e.g. blood stained clothing). Therefore good practice is to take photographs of the exhibits whilst establishing continuity or take samples (see section 132C Barbados Evidence Act).

6.8.4 If it becomes necessary to dispose of exhibits e.g. because they are deteriorating it is wise to give notice to the defence of an intention to photograph and destroy the exhibit (**R v Uxbridge Justices ex p Sofaer and another** 85 Cr. App. R. 367). Also the Prosecutor should advise of any legislation that determines the procedure to be followed if applicable for disposal, as an incorrect disposal could lead to an abuse of process application and the proceedings being stayed.

6.8.5 If the defence wish to inspect the exhibit, the Prosecutor should make arrangements with the person in possession of it to allow inspection.

6.8.6 If the defence request to take possession of an exhibit the Prosecutor should request they sign an undertaking not to part with possession of the exhibit save to a named expert and to return them on or before a specified date in exactly the same condition that they were passed to them in.

6.8.7 The Prosecutor should also consider any legislation that will allow any object or document referred to as an exhibit to be deemed tendered in evidence without the actual physical production of the exhibit in court.⁷⁰⁸

6.9 Continuity

6.9.1 Establishing a proper chain of custody of evidence is essential. The Prosecutor must ensure there is evidence connecting an exhibit found to its eventual destination; for example, in the case of a drug found by the Investigators the chain might be:

- (a) Investigator finding drug, bags tags and seals (remember to determine if a sample needs to be taken in presence of accused according to statute – see section 132C(2)(a) Barbados Evidence Act. If suspects outstanding this means that the drugs cannot be disposed of until a sample is taken in front of any new accused);

⁷⁰⁸ **Antigua and Barbuda:** Section 71(5) Magistrates' Code of Procedure Act re committals; **Saint Lucia:** Criminal Procedure Rules 2007: Rule 9.4(3) for exhibits referred to in written Statements for a Sufficiency Hearing

- (b) Investigator to whom drug is passed who places it in a secure drugs cabinet documents reference to seal/exhibit number, date and time and his actions handling the evidence;
- (c) Investigator who removes drug from cabinet and takes to laboratory again documents reference to seal/exhibit number, date and time and his actions handling the evidence;
- (d) Scientist who examines drug and makes statement confirming seal/exhibit number, date and time and actions handling the evidence. If the evidence is resealed the date and time with reference to the original seal number.

6.9.2 There must be a clearly established link between each stage in the chain of custody, storage, packaging, labelling, security of the evidence, disposal of the evidence and transfer of the evidence, in order to avoid the danger of continuity being lost and the defence challenging the integrity of the exhibit and alleging contamination.⁷⁰⁹

6.9.3 For an example of a breach of continuity, in **Paterson v D.P.P. Independent, April 9, 1990 (QBD)**, the label on a sample container of blood from a suspect bore reference to a different police station to that at which the police officer said the appellant had provided the sample. It was held that on the facts there was no satisfactory proof that the sample analyzed was that provided by the appellant. The difficulty

⁷⁰⁹ See Annex Q and the Standard Operating Procedures for Recovering Cash, Mobile Phones and other items for best practice

could have been overcome if the detailed description of the sample sent for analysis tallied with the description by the analyst of the sample he received, but discrepancies between the descriptions may, unless accounted for, break the chain of continuity, as happened here.

6.9.4 Proof of continuity is not a legal requirement and gaps in continuity are not fatal to the prosecution's case unless they raise a reasonable doubt about the exhibit's integrity. In the absence of a specific requirement or necessity to call as witnesses all persons who may have had possession of an item during the chain of custody, it is a question of fact for the jury whether or not to doubt the accuracy of any forensic results or production of exhibits because of the possibility that security or continuity of items was not maintained (**Damian Hodge v The Queen** HCRAP 2009/001 and **R v Grazette** (2009) 74 WIR 92).

6.9.5 In **R v Larsen** 2001 BCSC 597, Romily J speaks to the chain of custody in a criminal matter by suggesting that:

"...there is no specific requirement as to what evidence must be led or by whom to establish continuity. There is also no specific requirement that every person who may have possession during the chain of transfer should himself or herself give evidence. If there is a gap in continuity and if the trier of fact is not satisfied beyond a reasonable doubt that substances taken from the accused were substances analyzed, the evidence may still be admissible but the weight given to the exhibit and the evidence would be affected."

6.9.6 In **Barry v NZ Police** [2008] NZHC 438 at para 34 the Court cited with approval a passage from **Cameron v Police** HCWN CR1 2005-485-187, 14 March 2006, in which Mackenzie J stated:

“... It is not necessary that every person involved in the chain of communication be called to give evidence of the handling of the sample while it was in their possession. There must be evidence from the officer administering the procedures to establish that he caused it to be conveyed by adopting a system which is sufficient to satisfy the judge dealing with the particular case that any opportunity for interfering with the sample is eliminated so far as that can humanly be done.”

6.9.7 Only in Antigua and Barbuda and Barbados does the legislative framework offer explicit guidelines to govern the handling of evidence in the above-mentioned areas. In Dominica, the legislative framework governs chain of custody issues, and the disposal of evidence. In Saint Christopher and Nevis section 29(2) of the DNA Act determines that a Police Officer must deliver DNA to a laboratory. Issues related to the handling of evidence are not governed by law in Grenada, Saint Lucia and Saint Vincent and the Grenadines and therefore a commonsense approach detailing every Investigator through whom an exhibit passes must be documented.

6.9.8 Preserving data stored on computers and other electronic devices is essential to ensure integrity. The Association of Chief Police Officers (UK) on actions to be taken at the crime scene when searching and

seizing computer-based electronic evidence has provided guidance⁷¹⁰ and it is essential reading for Investigators conducting searches. This Guidance (Good Practice Guide for Computer-Based Electronic Evidence) can be found at: http://www.7safe.com/electronic_evidence/ACPO_guidelines_computer_evidence.pdf

6.10 Adjourments

6.10.1 There should be a rigorous approach to adjourments to avoid the defence delaying matters and Court time being wasted.

6.10.2 A defendant is not entitled to repeated adjourments to secure the right to legal representation (**Robinson v R (1985) 32 WIR 330, PC**).

6.10.3 Although a defendant should not be denied a reasonable application for an adjournment for time to retain counsel to prepare his case and to secure witnesses attendance (**Willoughby, Reeves and Goddard v R (1996) 54 WIR 57; Dunkley and Robinson v R (1994) 45 WIR 318, PC**). The advocate should objectively analyse the grounds for an adjournment and oppose any application that is repeated or would cause an unreasonable delay in the interests of justice.

6.10.4 The court should consider, both the interests of the defendant in getting the matter dealt with and the interests of the public that criminal charges should be adjudicated upon and the guilty convicted as well as

⁷¹⁰ Such evidence includes: Cells, landline telephone, PDA's, pagers, dictating machines, faxes, answering machines, next generation games consoles, internet capable digital TV's and computers

the innocent acquitted. With more serious charges the public interest will carry greater weight (**CPS v Picton** (2006) 170 JP 567).

6.10.5 The Criminal Procedure Rules in Saint Lucia confirm that applications for adjournments will only be granted if good cause is shown. Furthermore the Rules state that the overall objective: “... *is the timely and efficient disposal of cases...*”⁷¹¹

Mr Green represents himself but at trial he applies to adjourn to instruct an attorney and so a witness can be called to confirm he was at school with Mr Yellow to support the reason he picked him up. The Prosecutor does not oppose the adjournment, as this is the first application, and is likely to be granted. However the Prosecutor confirms to the court that agreement to the adjournment is not on the basis of the witness not attending. Mr Green has had sufficient notice of the trial to warn his witness to attend and no explanation was provided as to why he is not available to attend. A clear note is made of these reasons, so if there is a further application the Prosecutor can object stating the interests of justice demand the trial proceeds.

⁷¹¹ Saint Lucia: Criminal Procedure Rules, Rule 2.9

7. Preliminary Inquiry, Trial Process and Sentencing

7.1 Preliminary Inquiry

7.1.1 There should be regular case conferences with the investigating officer, financial investigator and the Prosecutor (the Prosecution Team) to ensure that the preliminary inquiry⁷¹² is ready to proceed, as evidence in Serious Organised Crime cases can take time to be obtained.

7.1.2 It is essential that these regular conferences take place as the DPP can only adduce further evidence unavailable at the committal through careless omission (**R v Gomes (1962) 5 WIR 7**). Furthermore this power is only available by directing the Magistrate on what points he/she wants the further evidence to be taken.⁷¹³

7.1.3 If the Magistrate discharges the defendant, consideration should be given to apply for a voluntary bill of indictment,⁷¹⁴ appeal,⁷¹⁵ remit to the

⁷¹² In **Saint Lucia**: Criminal Procedure Rules where a sufficiency hearing is held within 28 days of the initial hearing (Rule 9.3)

⁷¹³ **Barbados**: Section 26 Magistrates' Courts Act 1996 – 27; **Dominica**: Section 15(6) Criminal Law and Procedure Act, Chap 12:01; **Grenada**: Section 112 Criminal Procedure Code; **Saint Christopher and Nevis**: Section 14 Criminal Procedure Act, Cap 20; **Saint Vincent and the Grenadines**: Section 160 Criminal Procedure Code, Cap 172

⁷¹⁴ **Barbados**: Section 4 Criminal Procedure Act, Cap 127; **Saint Vincent and the Grenadines**: Section 162 Criminal Procedure Code, Cap 172

⁷¹⁵ **Antigua**: Section 191B Act No 13 2004

Magistrate with directions⁷¹⁶ or application to a High Court Judge for arrest and committal.⁷¹⁷

7.1.4 There is statutory provision for paper committals in Antigua, Barbados, Dominica, and Grenada,⁷¹⁸ unless the defendant is not represented or his lawyer intends to make a submission of no case to answer. If these conditions should not apply and all the evidence before the court is in written statements, the Prosecutor should apply for a paper committal.⁷¹⁹ In Saint Vincent and the Grenadines written statements maybe admitted in lieu of a deposition as long as there is a declaration as to the truth of the contents, it is signed by the maker, it is served on the parties to the proceedings and no objection is taken to the evidence being tendered in this way.⁷²⁰

7.1.5 Form 7b of the Manual of Guidance at Annex C should be completed before a Preliminary Inquiry or paper committal to ensure the Prosecution Team are properly prepared.

⁷¹⁶ **Saint Christopher and Nevis:** Section 15 Criminal Procedure Act, Cap 20; **Belize:** Section 43 of Indictable Procedure Act; **Saint Lucia:** Section 649 Criminal Code 2008

⁷¹⁷ **Dominica:** Section 17 Criminal Procedure Act, Chap 12:0; **Grenada:** Section 105 Criminal Procedure Code

⁷¹⁸ and also **Anguilla:** Section 86 Magistrate's Code of Procedure Act, Chapter M5

⁷¹⁹ **Antigua:** Antigua Magistrates Code of Procedure(Amendment) Act No 13 of 2004 ; **Barbados:** Section 20 Magistrates Courts Act 1996-27 and Rule 24 of the Magistrates' Courts (Criminal Procedure) Rules 2001;

Dominica: Section 2 Act no 14 of 1995, The Criminal Procedure (Preliminary Inquiries) Act 1995, amended by Act No 1 of 2004; **Grenada:** Section 2 Act No 35 of 1978, Criminal Procedure (Preliminary Inquiries) Act 1978

⁷²⁰ **Saint Vincent and the Grenadines:** Section 143 Criminal Procedure Code Cap. 172

7.2 Trial

7.2.1 Joint Planning

7.2.2 Multi-agency working is essential in preparing for trial. Consideration should be given to holding a joint meeting with criminal justice partners (e.g. The Court Registrar and Prosecution Team) regarding the effective management and strategy of a trial that is complex, has security threats or involves a large number of defendants.

7.2.3 Secure Travel Arrangements (Entrance to and from Court) for Witnesses who are in Fear

7.2.4 There will need to be close liaison with the Investigators and court to ensure witness security when arriving at and leaving the court building (including use of different entrances and exits, unmarked vehicles and tinted windows). The Investigators will usually deal with such questions and liaise with the NPS and courts accordingly.

7.2.5 However, there will need to be effective liaison between the NPS and Investigators as to the order of witnesses and a Prosecution Team approach to witness management at court should occur. Prosecutors should also be prepared to assist with considerations of the safety of the jury should the trial judge require their input.

7.2.6 Presence of an Investigator at Court with Knowledge of Serious Organised Crime

7.2.7 During the trial an Investigator with experience of dealing with Serious Organised Crime may need to be present and this should be discussed with the Investigation Team. The designated officer can identify risk factors and bring them to the attention of the NPS. For example Organised Crime Group members not involved in the trial process will frequently attend court for the purpose of intimidation. If this occurs an application should be made by the Prosecutor to remove those intimidating from the public gallery and court building.

7.2.8 Liaison with the Press or Media

7.2.9 This is an important aspect of high-profile cases and is covered in more detail below in Chapter 9. It may be useful for the NPS and Investigators to agree a single point of contact to provide information.

7.2.10 Presence of an Overt Security Presence

7.2.11 The trials of those involved in Serious Organised Crime will frequently require the presence of armed officers at court. There should be discussion between the NPS and Investigators about the exact presence required as the defence may wish to make representations to the judge.

7.2.12 Jury Protection

7.2.13 Consideration may have to be given to police protection for the jury if there are concerns of intimidation or interference. A judge has a

common law discretion to allow such protection upon the application of the prosecution. Any application must usually be made in the presence of the defence outlining the reasons for the protection and calling evidence if necessary. Once a judge is satisfied that there have been attempts at intimidation and/or interference then he can order protection and also that any jurors are identified by a number when sworn rather than give their name (**R v Comerford (1998) 1 Cr App R 235**).

7.2.14 There are of course differing degrees of protection and before an application is made the Prosecution Team should consider whether protection is needed in the court building or also after an adjournment.

7.2.15 If an Investigator is a defendant, the Prosecution Team will have to discuss how to present any application and suggest that selection of the protection officers is made by the judge.

7.2.16 An application can also be made for sequestration of the jury if there is a concern of probable interference that could combine with an application for protection.

7.2.17 The prosecution's case will sometimes be advanced by the jury visiting the scene of an incident. The organisation of such a visit will inevitably create security risks and practical problems e.g. cordoning off roads. If such a visit is deemed to be appropriate the Investigators should be instructed to investigate the feasibility in advance of the trial and determine the security arrangements. The Prosecutor can then in

application for a site visit, advise the judge on appropriate arrangements to protect the jury from interference and/or intimidation.

7.2.18 Use of a Witness Summons or Warrants Securing the Attendance of a Witness

7.2.19 Prosecutors will be familiar with the potential for applying to the High Court for a witness summons to secure the attendance of a witness at trial or, if appropriate, a warrant to arrest and bring the witness before the court. When necessary, they should be applied for in good time. It is good practice to identify any witnesses who these procedures may potentially apply to in the early stages of a case. It is often relatively straightforward to anticipate which witnesses will require such applications. The Investigators should be asked to keep a record of all expressions of fear or anxiety by such witnesses as this information may strengthen the impact of such applications.

7.2.20 Tendering a Deposition

7.2.21 There may be a situation at trial where a witness that gave evidence at the Preliminary Inquiry or committal is unable to give evidence at the trial through ill health, death, insanity, cannot be found or is abroad. There are statutory provisions in the region that would allow for the tendering of a deposition subject to the Prosecutor satisfying the court that the deposition was taken pursuant to the statutory provisions and the defence had an opportunity to cross-examine.⁷²¹ Therefore if there

⁷²¹ **Antigua and Barbuda:** Section 197 Magistrate's Code of Procedure Act, Cap 255; **Barbados:** Section 25 Criminal Procedure Act, Cap 127; **Dominica:** Section 170 Magistrate's Code of Procedure Act, Chap 4:20;

has been a paper committal it would appear that the prosecution would be at a disadvantage in any such application as the defence would not have had such an opportunity to cross-examine.

7.2.22 In Antigua, Barbados, Dominica and Saint Christopher and Nevis the legislation provides that the deposition “*shall*” be admitted. Which is in contrast to Saint Vincent and the Grenadines, Grenada and Saint Lucia where there is a discretion to allow the tendering of the deposition. However in **Barnes, Desquattes and Johnson v R, Scott and Walters v R (1989) 37 WIR 330, PC** it was held that the court will have a discretion to admit a deposition even when the law doesn’t provide for a discretion. This leading case considered that the most important consideration will be the quality of the evidence. The Board laid down the following principles to follow:

- (a) The judge should warn the jury that they have not heard the evidence of the deponent being tested in cross-examination and they must consider this when they determine what weight to attach to the evidence;
- (b) The judge should identify any parts of the deposition which are in conflict with other parts of the evidence and how these could have been explored in cross-examination;

Grenada: Section 198 Criminal Procedure Code; **Saint Christopher and Nevis:** Section 193 Magistrate’s Code of Procedure Act, cap 46; **Saint Lucia:** Section 894 Criminal Code 2008; **Saint Vincent and the Grenadines:** Section 193 Criminal Procedure Code Cap 172

- (c) The judge should scrutinise the deposition and exclude those parts which are inadmissible or which would be more prejudicial than probative.

7.2.23 **Barnes** has been followed in a decision from Grenada (**Donason Knights v R (1998) 53 WIR 125, PC**) where a deposition was admitted where a deponent was out of the country at the time of the trial.

7.2.24 Therefore it is important that a Prosecutor considers this available statutory power especially where a witness may be too afraid to give evidence through fear. For example section 198(1)(b) of the Criminal Procedure Code in Grenada reads as follows:

A deposition taken against or for an accused person may be produced and given in evidence at his trial if it is proved to the satisfaction of the Judge ... that the deponent is kept out of the way by the Prosecutor or the accused.

7.2.25 The bold section could be interpreted to mean that the Prosecutor is keeping the deponent away from the trial because to allow them to come to trial may put their life in danger. Equally the actions of the accused, if there are threats made by the accused, kept the deponent away from trial. If the Prosecutor has a situation where a deponent is in fear he/she should make such an application.

7.2.26 There may also be provision within other statute that would allow a witness Statement to be read through exceptions to the hearsay

rule.⁷²² This may be important where jurisdictions have paper committals and the defence have not had an opportunity to cross-examine the witness. For example the witness may not attend a Serious Organised Crime trial through fear. Support may be drawn from an English authority that considered an application to admit a statement from a witness who gave the only identification evidence but was too ill to attend the trial (**Filip Dragic** (1996) 2 Cri App R 232) Where it was held in these circumstances that despite the defence not being able to cross-examine, the statement could still be read if the appropriate warnings as identified in **Barnes** were provided to the jury.

7.2.27 Equally there may be situations when witnesses cannot attend as they are outside of a jurisdiction or cannot be located. If hearsay or the provisions in relation to reading a deposition are to be used Investigators may have to give evidence to show what steps have been taken to trace unavailable witnesses or what would be required to secure the attendance of a witness outside a country. What is reasonable will depend on the importance of the evidence, the reason for non attendance, prejudice to the defendant and the cost of bringing the witness to court (**R v Castillo** [1996] 1 Cr. App. R.438).

7.2.28 Technical Matters

7.2.29 It is important for the advocate to ensure that the technical equipment, which is being used in court for presentation of the evidence, is in good working order and that any screens to be used in the trial are sufficient.

⁷²² **Antigua and Barbuda**: Section 37(e) Evidence (Special Provisions) Act 2009 and see paragraph 5.7 above

7.2.30 Personal Safety of NPS Staff

7.2.31 Due consideration should be given to the security and personal safety of NPS staff and arrangements for leaving and arriving at court discussed with the Investigators.

7.2.32 Keeping a Record of Preparation for Trial

7.2.33 Form 7a of the Case Management Manual at Annex C should be completed before trial to ensure the Prosecution Team are properly prepared.

7.2.34 Prosecution Appeal

7.2.35 In Saint Vincent and the Grenadines⁷²³ and Antigua and Barbuda⁷²⁴ the DPP may appeal any judgment, sentence or order to the Court of Appeal. In Saint Vincent this maybe an appeal on a point of law or fact (or both).⁷²⁵ In Antigua and Barbuda it is limited to appeal only on a point of law.⁷²⁶ The Prosecution may also consider an appeal by way of Case Stated on a question of law.⁷²⁷ When considering an appeal the Prosecution Team should consider if there is a realistic prospect of success. Often the Court of Appeal will not interfere with a Magistrates factual determination unless it was so perverse. On points of law the

⁷²³ **Saint Vincent and the Grenadines:** Section 212A Criminal Procedure Code

⁷²⁴ **Antigua and Barbuda:** Section 50B(1)(a) Criminal Procedure Act

⁷²⁵ **Saint Vincent and the Grenadines:** Section 212A(2) Criminal Procedure Code

⁷²⁶ **Antigua and Barbuda:** Section 50B(2)(a) Criminal Procedure Act

⁷²⁷ Part 61 Eastern Caribbean Supreme Court Civil Procedure Rules 2000

Prosecution Team will have to consider if the decision by the Magistrate would have effected the outcome of the case.

7.3 Conviction at the Magistrates Court

7.3.1 The Prosecutor should be aware of the power available to the Magistrate's Court, if the Magistrate is of the opinion after summary trial of an offence triable either way that the courts sentencing powers are insufficient, and after obtaining information about character and antecedents of the defendant, that the defendant should be committed to the High Court for sentence⁷²⁸ and where appropriate confiscation.⁷²⁹

7.4 Sentencing

7.4.1 Preparation

7.4.2 The Prosecutor should complete Form 8 of the Manual of Guidance and be prepared for sentence in order to present to the Court:

⁷²⁸ **Barbados:** Section 65 Magistrates' Courts Act 1996-27; **Saint Vincent and the Grenadines:** Sections 19 and 171-176A Criminal Procedure Code, Cap 172 and section 26 Misuse of Drugs Act; **Belize:** Section 27 Misuse of Drugs Act; **Dominica:** Section 52 Magistrates Code of Procedure Chap 4:20 and sections 18-23 and 52 Criminal Law and Procedure Act Chap 12:01 (where confession of guilt at PI) and section 26 Drugs (Prevention of Misuse) Act; **Saint Christopher and Nevis:** Section 59 Magistrates Code of Procedure Act Cap 46 and Criminal Procedure (Committal for Sentence) Act, Cap 21 and section 25 of the Drugs (Prevention and Abatement of the Misuse and Abuse of Drugs) Act, **Anguilla:** Section 48 Magistrate's Code of Procedure Act, Chapter M5; **Saint Lucia:** Section 36 Drugs (Prevention of Misuse) Act Cap.3.02; in **Grenada** if accused admits guilt at a preliminary hearing will be committed for sentence rather than trial: section 115 Criminal Procedure Code and also see paragraph 3.1.3 in Part 3 re committal for confiscation in Grenada –**NO POWER IN ANTIGUA and BARBUDA**

⁷²⁹ **Saint Vincent and the Grenadines:** Section 6(6)(b) (re drug trafficking offences) and 7(6)(b) (other relevant offences defined in section 2) Proceeds of Crime and Money Laundering (Prevention) Act 2001

- (a) Aggravating features of the offence/s;
- (b) Mitigating features of the offence/s;
- (c) Any sentencing Guidelines – see Annex Z6 for a sentencing guidelines compendium;
- (d) Whether a Newton Hearing is required;⁷³⁰
- (e) Timetable of service of relevant documents for a Confiscation Hearing.

In readiness for sentence the Prosecutor prepares Form 8 applying the law in Saint Lucia

Form 8 – PLEA and SENTENCE DOCUMENT	
DATE	13 th January
DEFENDANT/S	Mr Green and Mr Yellow
CHARGES	Conspiracy to supply cocaine – 4 kg – Mr Yellow and Mr Green Money Laundering – \$100,000 - US Mr Yellow
LIST AGGRAVATING FEATURES OF CHARGES	Mr Yellow Previous Convictions: 1. Possession of cocaine in 2010 - fine of \$200 2. Possession of cocaine in 2010 – fine of \$300 – committed on bail for No.2

⁷³⁰ See paragraph 7.4.5

<p>LIST MITIGATING FEATURES OF CHARGES</p>	<p>Mr Green: Good Character</p>												
<p>LIST GUIDELINE AUTHORITIES AND ATTACH</p>	<p>The Queen vs. Julian Theodore <i>SLUHCR2008/0063-0064</i> 3 years imprisonment for possession with intent to supply cocaine after trial (amount unknown)</p> <p>The Queen vs. Booda Rodriques and Euices Marino Luna <i>SLUCRD2009/1028-1035</i> 4 years imprisonment on a guilty plea of possession with intent to supply cocaine (amount unknown)</p> <p>The Queen v Cuthbert Felix <i>SLUHCR 2007/2639,2640,2641 & 2642</i> 15.628 kilograms of cocaine (4 years imprisonment) and 4.385 kilograms of cannabis (3 years imprisonment)</p> <p>Charles Constance v Commissioner of Police <i>MCRAP 2007/084 [SVG]</i> \$24,870 US seized from appellants property – 4 and a half years imprisonment for second offence</p> <p>Charles Constance v Commissioner of Police <i>Magisterial Criminal Appeal No.23 of 2007</i> – Possession of \$26,000 - 9-12 months imprisonment starting point</p>												
<p>IS THERE A DISPUTE WITH THE DEFENDANT’S BASIS OF PLEA REQUIRING A NEWTON HEARING</p>	<p>Yes - If yes set out factors that are in dispute: Mr Yellow submits he was a just a courier. Prosecution maintain he was a distributor of cocaine on the basis of the contents of his diary with reference to amounts of drugs supplied, \$100,000 US and associated drugs paraphernalia consistent with supply seized from his property</p>												
<p>IS A CONFISCATION ORDER BEING APPLIED FOR</p>	<p>Yes - Apply for timetable to be fixed before proceeding to sentence:</p> <table border="0"> <tr> <td></td> <td style="text-align: right;">Date</td> </tr> <tr> <td>Service of Prosecutors Statement:</td> <td style="text-align: right;">13th February</td> </tr> <tr> <td>Reply from Defendant:</td> <td style="text-align: right;">22nd February</td> </tr> <tr> <td>Prosecution Response to Defendant’s reply:</td> <td style="text-align: right;">2nd March</td> </tr> <tr> <td>Skeleton Arguments:</td> <td style="text-align: right;">7th March</td> </tr> <tr> <td>Date fixed for Confiscation Hearing:</td> <td style="text-align: right;">26th March</td> </tr> </table>		Date	Service of Prosecutors Statement:	13 th February	Reply from Defendant:	22 nd February	Prosecution Response to Defendant’s reply:	2 nd March	Skeleton Arguments:	7 th March	Date fixed for Confiscation Hearing:	26 th March
	Date												
Service of Prosecutors Statement:	13 th February												
Reply from Defendant:	22 nd February												
Prosecution Response to Defendant’s reply:	2 nd March												
Skeleton Arguments:	7 th March												
Date fixed for Confiscation Hearing:	26 th March												

<p>ANY OTHER ORDERS REQUIRED</p>	<p>Compensation (name of victim and amount): Forfeiture (details of property): Drug Paraphernalia and Drugs Costs (amount): Any other ancillary orders:</p>
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7.4.3 Impact on the Local Community

7.4.4 Judges may value local information on the impact of criminality involving Serious Organised Crime. If a sentencer is minded to increase a sentence on the basis that the particular crime is prevalent in the locality, there must be supporting evidence to show this (**R v Ooshuizen (2005) CLR 979**).

7.4.5 Newton Hearing

7.4.6 If the court decides a Newton Hearing (**R v Newton (1982) 77 Cr App R 13**) is necessary the Prosecutor must be prepared for this. A Newton Hearing maybe required when the defendant offers offence mitigation, which is contrary to the prosecution evidence. For example stating he was a courier of drugs rather than organiser. This would result in a substantial disparity of sentence and the Prosecutor should suggest a Newton Hearing.

7.4.7 Evidence will be called in the usual way and the prosecution will have to prove their facts beyond a reasonable doubt (**R v Gandy (1989) 11 Cr App R (S) 564**)

7.4.8 If the prosecution prove their case then the defendant will lose credit for any timely guilty plea (**R v Beswick** (1995) 160 JP 33).

On the day the trial is to proceed Mr Yellow offers a guilty plea to conspiracy to supply on the basis that he was a courier only. The Prosecutor requests Mr Yellow's defence attorney puts the basis in writing. Upon receipt of the written basis the Prosecutor discusses the offer with the Prosecution Team and they decide to reject it. This is on the basis that there is sufficient evidence to establish that Mr Yellow was participating in the distribution of drugs. This can be proved beyond a reasonable doubt by the paraphernalia, diary (dealers list) and the large amount of money seized at his home address. Furthermore the Prosecutor advises the Prosecution Team that if Mr Yellow entered a guilty plea on this basis then the Prosecution would submit there should be a *Newton Hearing* as the difference in facts could have a material effect on sentence. A dealer in cocaine will be sentenced to a more significant penalty than a defendant who is a mere courier and custodian of drugs. Therefore the Prosecutor replies

in writing to the defence attorney for Mr Yellow that the basis of plea will not be acceptable and the reasons for the decision. Furthermore the Prosecutor explains that if the plea is entered on the basis advanced the Prosecution will submit that there should be a *Newton Hearing*.

7.4.9 Unduly Lenient Sentence: Prosecution Appeal⁷³¹

7.4.10 Early consideration should be given, in advance of the sentence, as to what might be considered an unduly lenient sentence. Prosecutors should be vigilant for potentially unduly lenient sentences. It is vital that those responsible for submitting any sentence for the consideration of the DPP are familiar with the authorities and the stringent timescale within which any application to the Court of Appeal must be made.

7.4.11 Confiscation

7.4.12 Confiscation should be seen as a key element of the prosecution and hence where the defendant is convicted of a relevant offence, the Prosecutor should ensure there is an application for confiscation in appropriate cases.⁷³²

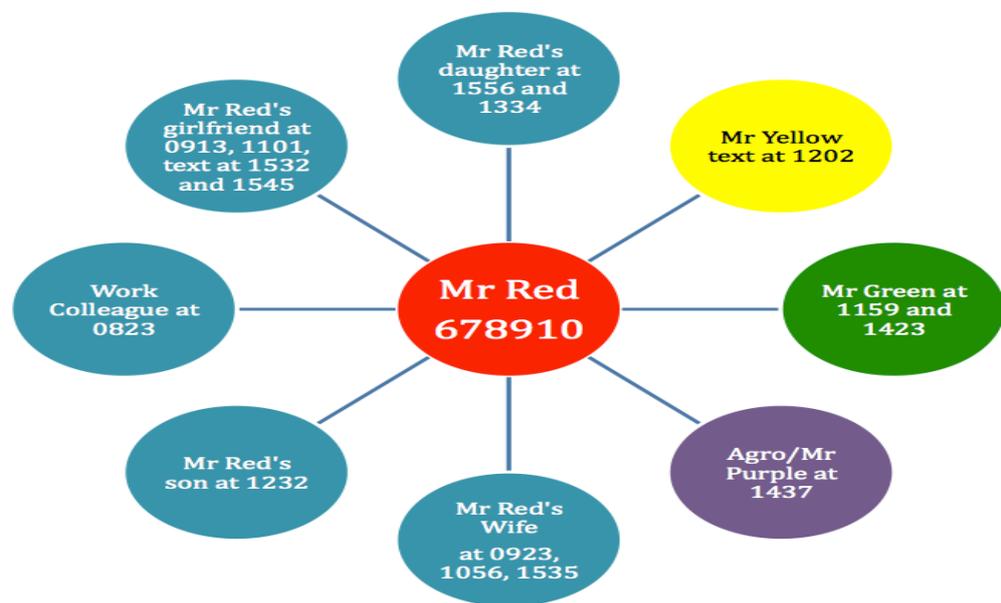
⁷³¹ **Antigua and Barbuda:** From the Magistrates Court - Section 50B(1)(a) Criminal Procedure Act; **Barbados:** Act No.5 of 2000 The Criminal Appeal (Amendment) Act 2000; **Saint Christopher and Nevis:** Section 38A Eastern Caribbean Supreme Court (St Christopher, Nevis) Act as amended by Act 10 of 1998; **Saint Vincent and the Grenadines:** From the High Court - Act, Cap 24 of 2007 creating a new part IIA of the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act and from the Magistrates section 212A Criminal Procedure Code

⁷³² See Confiscation Order Guidance in Part 3

7.5 De-Brief

7.5.1 After trial and sentencing, a de-brief should be held between the Investigators and the NPS. The aim will be to determine any lessons learnt and any improvements that could be made for future prosecutions by the NPS.

Table 7



At the de-brief the Prosecution Team discuss whether Mr Red could be charged now if located or he requires further investigation. The Investigation Team have information from a CHIS that Mr Red uses cell number (678910). The Prosecution Team discuss if Mr Red were found in possession of that phone would there be an even better evidential link to the evidence they already have

against him for the events on 17th June. A review of the billing of the cells seized from Mr Yellow and Mr Green shows two calls from Mr Yellow to Mr Green at 1323 and 1435 and then Mr Green calling Mr Red on number 678910 at 1423. This clearly establishes a relationship between the three parties. Also the text message received by Mr Yellow at 1202: "*You ready to meet at the collection point*" was from number 678910. Mr Green's billing shows contact with Mr Yellow at 1157 and with 678910 at 1159 which would be consistent with the text from Mr Red about meeting at the collection point. With the note seized from Mr Green and entries in the dealers list in the diary, there is now even more persuasive evidence of his involvement with the conspiracy to supply cocaine, on the basis that he was to be the recipient of the cocaine seized from Mr Yellow. However the Investigation Team will need to seize the phone and attribute it to Mr Red. The Prosecution Team decide that this maybe an opportunity to conduct surveillance upon Mr Red as the intelligence is assessed as cogent. The CHIS confirms that Mr Red uses this cell, so when he is observed using

it he will be arrested. If there are still issues attributing Mr Red to the phone for 17th June then billing should be obtained. If there are calls for example to any relatives or a partner/wife then this can be used to support the assertion that he was in possession of the phone on the 17th June. Mr Red is subsequently arrested as planned when he is using cell 678910. The cell is analysed and billing obtained. The diagram below shows a basic anacapa diagram of those who have called Mr Red's cell on 17th June. The inference is that he had this telephone on him that day. The Investigators obtain the telephone numbers for the callers either from subscriber checks or reference to the number in the telephone book stored on Mr Red's cell. This analysis also shows an association with Mr Purple that will again lead to further investigations and a possible arrest once Mr Purple is identified and the emails reviewed.

8. Community Engagement

8.1 Aims of Community Engagement

8.1.1 The purpose of engagement with the wider community in the context of organised crime is to be proactive in increasing the willingness of members of the community to report relevant information to the Investigators; build and maintain community confidence in the handling of cases as they progress; encourage witnesses to come forward and remain with the process to its conclusion; and ensure wider awareness of the role and function of the NPS in bringing perpetrators of organised crime to justice.

8.2 Community Engagement Strategy

8.2.1 Following a Serious Organised Crime incident, a community engagement strategy may be developed by the NPS. This will usually be where the Serious Organised Crime incident has affected the community. For example, a violent incident involving guns causing serious injury or death; or where a large number of the community are witnesses; or where a prominent person is charged. The strategy should be developed in partnership with Investigators and community partners.

8.2.2 The following principles are relevant in planning the strategy:

- (a) Develop early on to ensure the visibility of the NPS at the outset of the case. Focus should be both on the case in question and on emphasising the anti-crime message generally;
- (b) Research into the effectiveness of previous community engagement activity (in the relevant area or nationally) that might inform strategy. Ensure the early involvement of those community groups which have been established in direct response to localised crime;
- (c) Establish a single point of contact at the NPS for community organisations to use if they want to keep informed or provide information;
- (d) The views of the victims and their families must be sought. Some may wish to be involved in the community engagement. Particular sensitivities exist when the victims and witnesses are themselves involved in Serious Organised Crime;
- (e) Strategy must address equality and diversity issues. Adopt a proactive and joined up approach to engaging with diverse communities;
- (f) Incorporate community engagement activity targeted at young people who may be vulnerable to the influence of drugs and the use of guns;

- (g) Consideration of community engagement following the finalisation of the case.

8.3 Key Actions

8.3.1 The following activities might be included in the community engagement strategy:

- (a) Attendance of appropriate NPS staff at local community events or meetings already arranged or instigated by the NPS. Emphasise the potential availability of measures to protect witnesses (whilst being careful not to provide assurances which are unrealistic);
- (b) Making contact with members of the community, and in particular young people, via a form of media that will be accessed by the target group e.g. local radio, local youth publications, websites, posters and leaflets distributed at appropriate venues;
- (c) Engage with existing services working with young people e.g. Youth Workers, youth club leaders, schools, Investigators, and faith communities. Where possible, communicate directly with young people themselves.

8.4 School Engagement

8.4.1 No Witness No Justice

8.4.2 At Annex K there is an Information Pack for a School Engagement Programme. The aim of the Programme is to encourage greater witness participation.

8.4.3 Of course a more effective and efficient Criminal Justice System (“CJS”) will make the Eastern Caribbean a less attractive environment for criminal activity, so impacting upon threats to social development and regional stability; as well as leading to greater access to justice for victims, a quicker resolution of cases, and an increased observance to human rights and the rule of law.

8.4.4 The School Engagement Programme provides information on the role of the NPS and a witness. This is explained through a number of lessons culminating in a mock trial. A DVD set is available to implement its use and should be available at the NPS.

8.4.5 This Information Pack is ready to use and is an effective way for the NPS to engage with the public. A successful model has been used in Saint Vincent and the Grenadines where Crown Counsel has been appointed as a Community Engagement Officer and conducts the lessons at schools. A film on the No Witness No Justice Project, to assist with community engagement and to encourage witness participation can be viewed at:

<http://www.youtube.com/watch?v=MkfmsBexqtI>

9. Media Handling

9.1 General

9.1.1 Although each case will inevitably have its own unique set of circumstances, the following guidance will allow the NPS to manage the media interest in a case. The Prosecutor can also refer to the Code for Prosecutors⁷³³ at paragraph 19 for further guidance.

9.1.2 When communicating with the public through the media, Prosecutors are guided by five principles. These are:

- (a) Avoiding prejudice to fair trial interests;
- (b) Supporting the administration of justice and the integrity of the criminal justice system;
- (c) Respecting the principle of open justice;
- (d) Recognising the public interest in receiving accurate information about the criminal justice system and criminal prosecutions; and
- (e) Treating victims of crime with courtesy and compassion, and respecting their dignity and privacy.

⁷³³ See Annex C

9.2 National Media Interest

9.2.1 In cases where the crime itself and the investigation have already attracted or are likely to attract widespread local and national media attention, the DPP will determine the handling of the media.

9.2.2 Contempt

9.2.3 Where there is pre-trial publicity adverse to the fairness of the proceedings the DPP by convention is primarily responsible for prosecution at common law for criminal contempt of court (**Boodrum v Attorney General of Trinidad and Tobago** (1996) 47 WIR 459, PC). In practice it is usual for the DPP to make the decision and personally prosecute the resulting proceedings. When carrying out this function the focus is on conduct that is corrosive of the criminal justice system as a whole. If the DPP fails to perform this function then the court may be more persuaded to allow an application for abuse of process to succeed (**Vermette** (1984) 15 DLR 4 218).

9.2.4 Abuse of Process⁷³⁴

9.2.5 Situations where a stay may be considered necessary to protect the integrity of the criminal justice system have as their primary consideration fairness (**Warren v Att.-Gen. of Jersey** [2011] 3 WLR 464).

⁷³⁴ The following is an analysis of case law from a Preliminary Ruling in R V Halliwell 9th May 2012 Bristol Crown Court

9.2.6 The question is whether that test is met on the evidence in this case. For a stay to be imposed there must be a connection between the wrongdoing and the trial, such that not only the wrongdoing but also the trial would be an affront to the public conscience (**R v Ahmed and Ahmed** [2011] Crim LR 734 CA). The court has to strike a balance between the public interest in ensuring that those who are accused of serious crimes should be tried and the competing public interest in ensuring that executive misconduct does not undermine public confidence in the criminal justice system and bring it into disrepute (**Warren**).

9.2.7 Authorities relating to pre-trial publicity and its effects upon the fairness of a trial were comprehensively considered by the England and Wales Court of Appeal Criminal Division in **R v Stone** [2001] EWCA Crim 297. In **R v Kray** [1969] 53 Cr App R 412, the issue was the extent to which publicity relating to the appellant's conviction of murder in an earlier trial would influence jurors' minds and unfairly prejudice the appellant in a second trial on another charge of murder. Acknowledging the presumption that anyone who may have read the publicity might find it difficult to reach a verdict in a fair-minded way, Kennedy LJ, giving the judgment of the Court in **Stone**, said as follows at page 415:

"It is, however, a matter of human experience, and certainly a matter of the experience of those who practise in the criminal courts, first, that the public's recollection is short, and, secondly, that the drama, if I may

use that term, of a trial almost always has the effect of excluding from recollection that which went before.”

9.2.8 He went on to observe:

“... to a very large extent juries are trusted by our system to concentrate on what is relevant and to ignore irrelevant and prejudicial matters even when they know of them.”

9.2.9 In **R v Central Criminal Court ex parte The Telegraph PLC and Others** [1994] 98 Cr App R 91, the Court had applied this reasoning, Lord Taylor CJ stating as follows at page 98:

“In determining whether publication of a matter would cause a substantial risk of prejudice to a future trial, a court should credit the jury with the will and ability to abide by the judge’s direction to decide the case only on the evidence before them. The court should also bear in mind that the staying power and detail of publicity, even in cases of notoriety, are limited and that the nature of the trial is to focus the jury’s mind on the evidence put before them rather than on matters outside the courtroom: see Kray ...”

9.2.10 As Kennedy LJ observed, the question for judgment in each case is whether the particular facts mean that the line has been crossed and a fair trial is no longer possible, so that the proceedings should be stayed. In deciding that question he said that the Judge should bear in

mind, as Scott Baker J said in **Ex parte B**, 17 February 1994 (unreported) that:

“In most cases, one day’s headline news is the next day’s firelighter. Most members of the public do not remember in any detail what they have seen on television, heard on the radio or read in the newspaper except for a very short period of time.”

9.2.11 The same point was made by the Divisional Court in the case of **Attorney General v ITN and Others** [1995] 1 Cr App R 204, where Leggatt LJ said:

“During the nine months that passed after anyone had read the offending articles, the likelihood is that he no longer would remember it sufficiently to prejudice the trial. When the long odds against the potential juror reading any of the publications is multiplied by the long odds against any reader remembering it, the risk of prejudice is, in my judgment, remote.”

9.2.12 At paragraphs 47 – 50 Kennedy LJ endorsed the approach taken by Phillips J (as he then was) in considering the adverse publicity which had been accorded to Kevin and Ian Maxwell before they appeared for trial, as follows:

“ No stay should be imposed unless the defendant shows on the balance of probabilities that owing to the extent and the nature of the pre-trial publicity he will suffer serious prejudice to the extent that no

fair trial can be held. I would accept this test, so far as it goes, but it remains necessary to identify the essential aspects of a fair trial for the purpose of the test. If it were enough to render a trial unfair that publicity has created the risk of prejudice against the defendant our system of criminal justice would be seriously flawed. There will inevitably be cases where the facts are so dramatic that almost everyone in the land will know of them. There will be circumstances when arrests are made of defendants whose guilt will, or may, appear likely. Intense media coverage may well take place before a suspect is identified or apprehended. If in the most notorious cases defendants were to claim immunity from trial because of the risk of prejudice public confidence in the criminal justice system would be destroyed.'

9.2.13 The judge continued:

'Our system of criminal justice is founded on the belief that the jury trial provides the fairest and most reliable method of determining whether guilt is established. This belief is based on the premise that the jury will do their best to be true to their oath and to try the case according to the evidence. The ability of the jury to disregard extrinsic material has been repeatedly emphasised by judges of great experience.'

9.2.14 PhillipsJ then cited from **Kray** and concluded:

'It seems to me that the court will only be justified in staying a trial on the ground of adverse pre-trial publicity if satisfied on a balance of probabilities that if the jury return a verdict of guilty the effect of the pre-

trial publicity will be such as to render that verdict unsafe and unsatisfactory. In considering this question the court has to consider the likely length of time the jury will be subject to the trial process, the issues that are likely to arise and the evidence that is likely to be called in order to form a view as to whether it is probable that – try as they may to disregard the pre-trial publicity – the jury’s verdict will be rendered unsafe on account of it.’

9.2.15 The Court of Appeal Criminal Division considered the issue again in **R v Abu Hamza** [2006] EWCA Crim 2918, where the then Lord Chief Justice referred to applications for a stay of proceedings on the ground of abuse of process being a “*growth area in our criminal process*” and stated that in general the Courts have not been prepared to accede to submissions that publicity before a trial has made a fair trial impossible.

9.2.16 At paragraph 91 he endorsed the statement of the President of the Queen’s Bench Division in the case of **In re Barot** [2006] EWCA Crim 2692, that:

“There is a feature of our trial system which is sometimes overlooked or taken for granted. The collective experience of this constitution as well as the previous constitution of the court, both when we were in practice at the Bar and judicially, has demonstrated to us time and time again, that juries up and down the country have a passionate and profound belief in, and a commitment to, the right of a defendant to be given a fair trial. They know that it is integral to their responsibility. It is, when all is said and done, their birthright; it is shared by each one of

them with the defendant. They guard it faithfully. The integrity of the jury is an essential feature of our trial process. Juries follow the directions which the judge will give them to focus exclusively on the evidence and to ignore anything they may have heard or read out of court. No doubt in this case Butterfield J will give appropriate directions, tailor-made to the individual facts in the light of any trial post the sentencing hearing, after hearing submissions from counsel for the defendants. We cannot too strongly emphasise that the jury will follow them, not only because they will loyally abide by the directions of law which they will be given by the judge, but also because the directions themselves will appeal directly to their own instinctive and fundamental belief in the need for the trial process to be fair.”

9.2.17 Observing that the position is the same in Scotland, the Lord Chief Justice noted the remarks of Lord Hope of Craighead, in the Privy Council’s decision in **Montgomery v HM Advocate** [2003] 1 AC 641, that Article 6 of the European Convention on Human Rights did not set out to make it impracticable to bring those accused of crime to judgment. The Strasbourg Court did not require the issue of objective impartiality to be resolved with mathematical accuracy. Account was taken of the fact that certainty in these matters was not achievable. Lord Hope went on to observe:

“Recent research conducted for the New Zealand Law Commission suggests that the impact of pre-trial publicity and of prejudicial media coverage during the trial, even in high profile cases, is minimal: Young,

Cameron & Tinsley, Juries in Criminal Trials: part Two, vol 1, ch 9, para 287 (New Zealand Law Commission preliminary paper no 37, November 1999). The lapse of time since the last exposure may increasingly be regarded, with each month that passes, in itself as some kind of a safeguard. Nevertheless the risk that the widespread, prolonged and prejudicial publicity that occurred in this case will have a residual effect on the minds of at least some members of the jury cannot be regarded as negligible. The principal safeguards of the objective impartiality of the tribunal lie in the trial process itself and the conduct of the trial by the trial judge. On the one hand there is the discipline to which the jury will be subjected of listening to and thinking about the evidence. The actions of seeing and hearing the witnesses may be expected to have a far greater impact on their minds than such residual recollections as may exist about reports about the case in the media. This impact can be expected to be reinforced on the other hand by such warnings and directions as the trial judge may think it appropriate to give them as the trial proceeds, in particular when he delivers his charge before they retire to consider their verdicts.... the entire system of trial by jury is based upon the assumption that the jury will follow the instructions which they receive from the trial judge and that they will return a true verdict in accordance with the evidence.”

9.2.18 Acknowledging that the risk that members of a jury may be affected by prejudice is one that cannot wholly be eliminated, the Lord Chief Justice continued, at paragraph 93:

“The fact, however, that adverse publicity may have risked prejudicing a fair trial is no reason for not proceeding with the trial if the judge concludes that, with his assistance, it will be possible to have a fair trial. In considering this question it is right for the judge to have regard to his own experience and that of his fellow judges as to the manner in which juries normally perform their duties.”

9.2.19 More recently the present Lord Chief Justice gave the judgment of the Court in **R v Dobson** [2011] EWCA Crim 1255. Noting that the “Stephen Lawrence” case had attracted an unusually high level of publicity, he noted that news “spikes” had continued since the collapse of the original prosecution in April 1996. At paragraphs 84 – 86 he identified the issue and the Court’s approach as follows:

“84. The issue is stark. The question is not whether the publicity over the years was wise or ill-advised, but whether now, or at the date when the new trial, if ordered, would take place, the impact of that publicity would make a fair trial unlikely. Mr Roberts submitted that the effect of the publicity would be to prejudice any future juror, perhaps without the juror in question even appreciating that he or she had unconscious prejudice against any of the original suspects. The effect would be insurmountable. Mr Mark Ellison QC for whose equally careful submissions we are no less indebted, accepted that over the years there had been publicity for the case which was potentially prejudicial to the suspects, but he argued that the difficulties identified by Mr Roberts could and would be dispelled by appropriate judicial direction,

in a trial in which the emotional aspects of the case would quickly give way to the practical reality that the jury would have to concentrate on the new scientific findings, the circumstances in which they were made, and the weight to be attached to them in the light of the defence case that post-incident contamination could not be excluded.

85. If Mr Roberts is right, whatever new evidence may emerge, however powerful it may be, neither of the two original suspects who have not faced trial could ever face trial, nor could any of the three original suspects who have been tried and acquitted, be made the subject of a successful application for the acquittal to be quashed and a new trial ordered. That is because, on Mr Robert's contention, any further trial, however carefully managed, regardless of the directions given by the judge, would be unlikely to be fair. In effect therefore, if he is right, the publicity over the years has now created an ineradicable prejudice against them with the result that they have been immunised against the risk of prosecution. That would indeed be a remarkable result.

86. Our conclusion is a matter of impression based on a careful analysis of the material which contains the potentially prejudicial publicity and ultimately judgment."

9.2.20 Referring to the previous authorities the Court concluded that the vast amount of publicity relating to the case was unlikely to render the subsequent trial unfair.

9.2.21 Finally, in the case of **R v Abdullah Ahmed Ali and Others [2011] EWCA Crim 1266**, a different constitution of the Court of Appeal Criminal Division considered whether the appellants could now have a fair trial in the light of publicity after the first trial. Thomas LJ, giving the judgment of the Court, referred to the first trial having attracted “*world wide publicity*” and to the “*avalanche of publicity*” on the day that verdicts were delivered and over the following days.

9.2.22 Acknowledging the fundamental importance of the requirement for an impartial tribunal, Thomas LJ said that the Court must in each case have regard to the trial process and its ability to deal with the publicity that had arisen. Referring to a number of the authorities he then addressed the appellants’ specific concern that jurors would inevitably discover information on the internet notwithstanding the Judge’s clear direction to them not to do so, saying as follows:

“To the extent that there remains the risk that, despite what jurors are told by a judge, an individual juror might look up matters on the internet, any attempt by an individual juror to use what was found to influence the views of other jurors is, in our judgement, bound to fail. For what was found on the internet to have any influence on the verdict of a jury, it would require other members of the jury to disobey their oath. In our judgement, the observations in Barot and in Abu Hamza hold good and the trial process in this trial was capable of coping with the adverse publicity.”

9.2.23 Therefore when a question concerning the effect of media coverage on a trial is formally raised with the court, Prosecutors should advise the DPP. The DPP will need to manage any possible abuse arguments, considering the above authorities, and whether any future prosecution for contempt is appropriate.

9.3 Media Considerations Pre-Charge

9.3.1 Generally

9.3.2 Comment by Prosecutors prior to charges being laid will rarely be appropriate. Any comment should be limited to providing an explanation of the general issues raised and should not address the particular case or its circumstances.

9.3.3 Media Appeals for Witnesses

9.3.4 There may be a role for Prosecutors to play during the media appeal stage, particularly in relation to explaining special measures that can be applied for on behalf of witnesses. Careful consideration will need to be given to any involvement in this type of appeal. The Prosecutor, DPP and Investigators will need to liaise closely on this issue.

9.3.5 Announcing a Charging Decision

9.3.6 Consideration should always be given to announcing a charging decision in a high profile case or one of major interest in the locality. This announcement can be made jointly with the Investigators.

9.3.7 Once charges have been laid the obligation to avoid prejudice to a fair trial becomes acute. At this stage (including bail hearings) it is usually appropriate to provide information about the charges, the defendant and the progress of proceedings. In particular, the Prosecutor may state:

- (a) The fact and location of the arrest, the general nature of the criminal charges;
- (b) Once the defendant has appeared in court, the name, age and residence (town or city or region only) of the accused (subject always to reporting restrictions or other rules);
- (c) Date and location of next court appearance;
- (d) Guidance on the type of hearing: Remand, committal, preliminary inquiry etc;
- (e) Names of prosecution and defence representatives/counsel who have appeared in court;
- (f) Information about what has happened procedurally with the case e.g. whether case has been discontinued, charges reduced etc.

9.3.8 In general, the following information should not be provided or comment should not be made:

- (a) Any previous convictions of the defendant whether directly or indirectly unless these have been ruled admissible and referred to in open court. For example, public comment that the accused was at the time of the offence on bail would constitute contempt of court (**Solicitor-General v Wellington Newspapers Ltd [1995] 1 NZLR 45**);
- (b) Personal information, address or telephone number of witnesses and victims unless there is express consent and in some instances, defendants;
- (c) Information concerning chambers/*in camera* hearings including information provided during bail hearings;
- (d) Personal opinions in relation to a particular case, including especially about the outcome of a hearing, an individual's guilt or innocence, or a sentencing outcome;

9.4 Media Considerations Post-Charge

9.4.1 Pre-Trial Briefing

9.4.2 Where media interest is high and/or when there are complex legal issues involved in a case, a media pre-trial briefing may be necessary. A pre-trial briefing will serve to assist the media in reporting the trial accurately and knowledgeably. The DPP will advise on the details and will lead in facilitating any pre-trial briefing involving national media.

9.4.3 Release of Prosecution Material

9.4.4 The overriding objective should be to provide an open and accountable prosecution process, by ensuring the media have access to all relevant material wherever possible, and at the earliest appropriate opportunity. Early consideration should be given to determining what, when and how material will be released by the DPP on a case-by-case basis.

Two weeks before the trial the local paper publishes an article stating that Mr Green is part of a criminal gang that smuggles drugs and he has never been prosecuted because witnesses are too scared to attend court through the gang's intimidation tactics. They support this with the fact that Mr Green's brother was prosecuted for murdering a witness to a drugs matter last year. As this is clearly prejudicial pre-trial publicity the Prosecutor reports this to the DPP to consider any measures that can be taken to ensure a fair trial can still occur. The DPP decides to instigate contempt proceedings. The DPP also suggests that the Prosecutor raise the following possible solutions to the court to allow a fair trial to proceed, endorsing the procedures suggested by the Privy Council in *Boodrum v. Attorney General of Trinidad and Tobago (1996) 47 WIR 459, PC*:

1. Sequestration of the jury;

2. Challenge in cause of selection of the jury by permitting questions to be asked of potential jurors at selection as to whether they have been prejudiced by the article, but only where the defence have established a foundation of fact to support prejudice;
3. Robust instructions to the jury as to what matters they should consider and those they ignore;
4. Adjourning the case; and
5. Change of venue

At court the Prosecutor outlines these options and the judge directs (applying local conditions of a small population and the papers wide distribution) that the defence can proceed with 2 and he will apply 3. If there are insufficient jurors the trial will be adjourned to another date when challenge can be made again but the prejudice should be less due to lapse of time.

9.5 Media Considerations Post-Conviction or Acquittal

9.5.1 Release of any further information to the media by the DPP should be on a case-by-case basis. It should always be remembered that there is a right of appeal and personal comments should not be made about the conviction, acquittal or the sentence.

9.5.2 Responding to Inaccurate Information

9.5.3 From time to time Prosecutors may be aware that inaccurate information about the proceedings has been published. Subject to the principles outlined above and any reporting restrictions, it may be appropriate to offer factual explanations of the relevant law or procedure to correct errors and ensure accurate reporting.

9.5.4 Information on the Internet

9.5.5 The widespread availability of information on the internet poses new challenges to Prosecutors. Information released to any person may be rapidly and widely available.

9.5.6 The enduring nature of information in that medium means that Prosecutors may need to take steps more frequently and at an earlier stage of the proceedings to seek reporting restrictions. In addition, historical information on the internet may raise issues of contempt in the face of current proceedings, even though it did not raise such concerns when posted. One example is information concerning prior convictions.

9.5.7 Where a Prosecutor becomes aware of the existence on the internet of information which may amount to contempt the Prosecutor may be required to draw this to the attention of the court and the DPP.

9.6 Media Considerations Between the NPS and the Investigator

9.6.1 Prosecutors should assist the Investigators to observe the law of contempt and deal with the media in a way which protects fair trial.

9.6.2 Until sentencing is completed, a prosecution is in the hands of the NPS. The Prosecutor is likely to be held responsible for any media comments by the Prosecution or Investigating Agency. Any media queries should therefore be considered in consultation with the Prosecutor and decisions made about whether the Prosecutor or the Investigator should respond. These situations will need to be managed on a case-by-case basis depending on the nature of the query and the kind of information which is sought.

9.6.3 Generally Investigators should ensure when dealing with the media that:

- (a) Officers in charge of investigations and operations are required to avoid making comment on an investigation/operation during pre-arrest interactions with the media that could later be construed as being prejudicial to the case when it goes to court;
- (b) Officers in charge of investigation and operations are required not to comment on matters (other than procedural matters) that are still in the court process. This includes post-conviction, prior to sentencing and to any appeal and until all matters have been completed. Where matters are in the hands of the NPS, officers

in charge should consult with the Prosecutor (if possible) before comments are made;

- (c) Investigators are reminded to avoid any comment that could be construed as criticism of judicial decisions.

9.7 Media Protocol

9.7.1 A working relationship with the media is essential in order to achieve open justice. As outlined above the media can be very important to inform the public of incidents and locate witnesses. In many jurisdictions a protocol has been agreed between the media, NPS and investigators. An example is available at Annex P. This establishes basic rules of engagement between the police, NPS and the media from the investigation stage (including action at scenes of crimes) through to release of prosecution material following disposal.

NOTES

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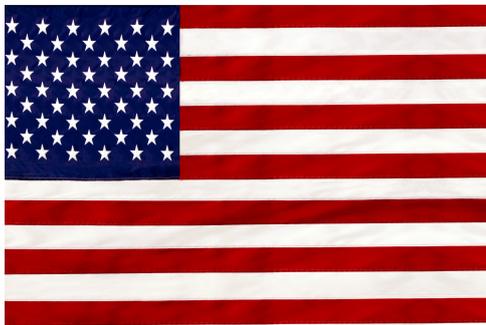
**Guide to Investigation and Prosecution of
Serious Organised Crime**

PART 1

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EMBASSY of the UNITED STATES of AMERICA to BARBADOS,
the EASTERN CARIBBEAN, and the OECS



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