

**THE HARARE SCHEME ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS:  
POSSIBLE AMENDMENTS TO THE SCHEME AND DISCUSSION OF  
INTERCEPTION OF COMMUNICATIONS AND RELATED MATTERS**

**Paper by the Commonwealth Secretariat**

**INTRODUCTION AND TERMS OF REFERENCE**

1. At their meeting at St. Vincent and the Grenadines in November 2002, Law Ministers asked their Senior Officials to consider amendments to the Harare Scheme to allow for provisions relating to the interception of communications (including computer communications) and to the preservation of computer data.

2. In 2004, Senior Officials considered possible amendments/additions to the Harare Scheme to provide for the interception of communications, including the preservation and interception of computer communications as part of a series of proposed amendments to the Scheme. Several member countries raised concerns about the amendments, in particular the non-admissibility of evidence gathered through interception and the limited use of the contents of such intercept at the investigation stage. Consequently, Senior Officials were of the view that further consideration should be given to the entire issue.

3. Senior Officials agreed to establish an expert working group charged with preparing draft proposals for the treatment in the Harare Scheme of the preservation of computer data and to examine in depth the issues surrounding the interception of communications, both in domestic law and in the context of mutual legal assistance. Senior Officials stated that work done under the auspices of international agreements should be taken into account and they specifically requested the Expert Working Group to, *inter alia*:

- prepare draft proposals for the treatment in the Harare Scheme of the preservation of computer data;
- consider the interception of communications in domestic law and in the context of Mutual Legal Assistance
- consider the need for adequate safeguards; and
- consider the issue of costs relating to these measures.

4. The Expert Working Group met in Marlborough House, London from 7-9 September 2005 and compiled a report for presentation to Senior Officials at the meeting immediately before the Law Ministers Meeting in October 2005. This paper is a summary of that report. The recommendations of the Expert Working Group are set out in **Annex 1**.

**POSSIBLE AMENDMENTS TO THE HARARE SCHEME ON MUTUAL ASSISTANCE**

**Preservation of Computer Data**

5. The importance of the preservation of data and interception of communications in the investigation of crime has been discussed previously in the paper on Evidence (SOLM(04)6) and the paper by the Commonwealth Secretariat on the Harare Scheme on mutual legal assistance in criminal matters SOLM(04)4.

6. At the meeting the Expert Working Group considered whether proposed amendments to the Harare Scheme could be extended to incorporate both the preservation of data (computer and telephonic) and interception of communications (computer and telephonic). However, interception of communications is an intrusive measure and a sensitive issue amongst member states and requests for mutual legal assistance are routinely declined.

7. Preservation of data is however a less intrusive measure. It deals with existing data held by the providers and requests relating to subscriber information and stored traffic computer data (not telecommunications data) and could be readily adapted into the Harare Scheme. It is distinct from interception of communications as it provides basic information about traffic computer data and is analogous to requests for documentary evidence.

8. Preservation of telecommunication traffic data was confined to computer data. It proved impossible to reach a consensus on a definition of “traffic data”, sufficiently precise and technically correct to be applied to both computer and telephonic traffic data.

9. As a request for mutual assistance for the preservation of computer data was not considered contentious and could be possibly carried out under existing domestic law, a request could be made to preserve stored computer data pending a formal mutual legal assistance request. Nevertheless, the Expert Working Group thought it may still be very useful to specifically include preservation of computer data in the Harare Scheme for the following reasons:

- whilst a request for preservation of computer data can arguably be met under the domestic law of most member states, this may not be an option available in all states. Creating specific provision(s) for it in the Harare Scheme allows member states to determine how it will be implemented under their own domestic law;
- preservation of computer data needs to be defined precisely so as to exclude the inadvertent preservation of data that had been stored in its transmission, for example when e-mail is temporarily stored by mailboxes during the course of its journey from sender to recipient. This would amount to intercept, not preservation;
- specific measures are required to reflect the importance of immediacy in responding to requests for the preservation of computer data. Accordingly, supplementary provisions have been drafted to deal with such requests. These are set out under the heading “REQUESTS FOR THE PRESERVATION OF COMPUTER DATA”.

10. The proposed procedures recommend that requests for preservation of computer data can be made and received in the first instance by “an agency or authority competent to make such a request under the laws of the requesting country” and such a request can only be refused “to the extent that it appears to the requested country that compliance would be contrary to the laws and/or constitution of that country, or would prejudice the security, international relations, or other essential public interests of that country” rather than the more general grounds for refusal. This distinction was drawn so as to prevent the loss of potentially valuable evidence at the initial stage.

11. As the request for preservation of computer data is a preliminary step to seeking production of the data, it is inevitable that there will be a lapse of time before a request for assistance can be submitted through the Central Authorities. The Group agreed that the previously suggested 40 day period was insufficient and suggested that a period of between 90 - 120 days would be more realistic.

12. The proposed amendments do not however reflect the lack of a common standard of communications infrastructure in Commonwealth member states. Some countries may not have the technical knowledge or wherewithal in any event to respond to requests to preserve; it is therefore

important to recognise that if this situation arose it should not be considered by the requesting state to constitute a refusal under the Scheme.

13. At the same time the proposed amendments cannot extend to requests for preservation of computer data made by non-Commonwealth states to Commonwealth states unless there is an existing bilateral treaty between them. Whilst preservation of computer data has long been a tool of investigation in domestic criminal proceedings, it had not been formally adopted by the international community as a basis for mutual legal assistance until the more recent multilateral instruments - the Council of Europe Convention on Cybercrime 2001 and the Convention on Mutual Assistance in Criminal Matters Between Member States of the European Union 2000.

#### POSSIBLE ACTION

14. Senior Officials are asked to recommend to Law Ministers that the Harare Scheme be amended as drafted by the Expert Working Group. The Harare Scheme with relevant provisions in bold is set out at **Annex 2**.

15. Senior Officials may wish to recommend to Law Ministers that Commonwealth countries should be encouraged to accede, sign and ratify the Council of Europe Convention on Cybercrime 2001.

#### INTERCEPTION OF COMMUNICATIONS

16. Interception of communications is a highly intrusive and controversial method of law enforcement. Essentially it violates the expectation of privacy of an individual. Equally, it is a vital tool in the investigation of serious crime in an era of advanced and rapidly emerging technology.

17. Most states employ this tool of investigation with the necessary safeguards set out under their domestic law and international obligations. However, states are reluctant to afford mutual legal assistance for interception involving communications of their citizens unless adequate safeguards can be identified and agreed which would have to be reflected in the Harare Scheme.

18. At the same time technology is moving at a phenomenal pace that has created its own difficulties. There seems to be little consensus amongst technical experts on what amounts to, for example, live data and what information falls within preservation and at what point can it be said that interception occurs. Equally, the market practice of the industry prevents any meaningful assessment of costs, which may depend upon where the service providers are located. For example, service providers in the UK have wide differentials in their charging practices whilst some states are seeking to regulate the industry in this regard.

19. In accordance with the recommendations of Senior Officials, the Group heard from delegates concerning the operation of domestic legislation in Australia, Canada, India, Jamaica, Kenya, Malaysia, South Africa, and the UK. An expert from the United States also gave a presentation outlining the US scheme on Mutual Legal Assistance (MLA) in Electronic Crime. For the sake of completion the Expert Working Group also sought the views of the Council of Europe, as it has the only global convention dealing with cybercrime offences, definitions and international co-operation. A summary of the domestic laws of each of the eight member States communications in the context of mutual legal assistance is summarised in the table included at **Annex 3**.

20. At the same time the Expert Working Group considered what safeguards would be necessary to allow for requests for mutual assistance in the interception of communications. To that end they identified the following as initial safeguards which require further deliberation before inclusion in the Harare Scheme: legality, necessity and proportionality; dual criminality; judicial authorisation/review

or other independent oversight of the interception; duration of the interception order; risk of collateral intrusion; restriction on use of the intercepted material to specific proceedings; notification to person affected.

#### **POSSIBLE ACTION**

21. Given the concerns expressed by the expert working group and the technical and legal complexity of interception of communications Senior Officials may wish to consider recommending a further examination of these issues in order to draft meaningful and workable amendments to the Harare Scheme in relation to the interception of communications.

## Summary of Recommendations of the expert working group

- R1. The proposed amendments to the Harare Scheme on Mutual Assistance in Criminal Matters in respect of preserved computer data should be adopted as drafted.
- R2. In accordance with the proposed amendments to the Harare Scheme member states should as a matter of priority review and implement in their domestic laws provisions to allow for the preservation and production of computer data.
- R3. In reviewing their domestic laws member states must be alert to combating transnational crime which uses fast developing technology.
- R4. Member states are encouraged to sign, ratify, accede to and implement the Council of Europe Convention on Cybercrime of 23 November 2001 as a matter of priority as it provides a basis for mutual legal assistance between Commonwealth member states and non-Commonwealth states.
- R5. Interception of communications is an intrusive act and violates the privacy of an individual. In order to draft meaningful and workable amendments to the Harare Scheme in relation to the interception of communications further work is needed to:
- (a) examine the technological advances in this area;
  - (b) examine the issues surrounding the use of evidence obtained through interception;
  - (c) identify and determine the necessary safeguards sufficient to ensure the integrity of the evidence; and
  - (d) consider adequate measures dealing with respect for fundamental human rights.
- R6. R6. In dealing with adequate safeguards consideration should be given to, *inter alia*:
- (a) judicial authorisation/review or other independent oversight of the interception;
  - (b) seriousness of the offence;
  - (c) duration of the interception order;
  - (d) risk of collateral intrusion;
  - (e) notification to person affected; and
  - (f) restriction on use of the intercepted material to specific proceedings.
- R7. Costs for preservation and production of computer data should be borne by the requested state. However, where the requested state regards the expense incurred in carrying out the request as extraordinary the existing measures in Article 12(3) of the Harare Scheme 2002 would apply.
- R8. Consideration should be given to reviewing and extending the 1999 Guidelines on the apportionment of costs incurred in providing mutual legal assistance in criminal matters to requests for preservation and production of computer data.

- R9. If the Harare Scheme 2002 is subsequently extended to interception of communications including computer based communications consideration should be given to reviewing and extending the 1999 Guidelines on the apportionment of costs incurred in providing mutual legal assistance in criminal matters.**
- R10. As far as possible efforts to amend the Harare Scheme in relation to interception of communications, including computer based communications, should be included under one legal regime within the Scheme.**

**SCHEME RELATING TO MUTUAL ASSISTANCE  
IN CRIMINAL MATTERS WITHIN THE COMMONWEALTH  
including amendments made by Law Ministers in April 1990 and November 2002**

*Proposed amendments drafted by London Working Group 7-9 September 2005 appear in bold in main text*

**PURPOSE AND SCOPE**

1. (1) The purpose of this Scheme is to increase the level and scope of assistance rendered between Commonwealth Governments in criminal matters. It augments, and in no way derogates from existing forms of co-operation, both formal and informal; nor does it preclude the development of enhanced arrangements in other fora.
- (2) This Scheme provides for the giving of assistance by the competent authorities of one country (the requested country) in respect of criminal matters arising in another country (the requesting country).
- (3) Assistance in criminal matters under this Scheme includes assistance in
  - a) identifying and locating persons;
  - b) serving documents;
  - c) examining witnesses;
  - d) search and seizure;
  - e) obtaining evidence;
  - f) facilitating the personal appearance of witnesses;
  - g) effecting a temporary transfer of persons in custody to appear as a witness;
  - h) obtaining production of judicial or official records;
  - i) tracing, seizing and confiscating the proceeds or instrumentalities of crime; and
  - j) preserving computer data.**

**MEANING OF COUNTRY**

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

## CRIMINAL MATTER

3. (1) For the purposes of this Scheme, a criminal matter arises in a country if the Central Authority of that country certifies that criminal or forfeiture proceedings have been instituted in a court exercising jurisdiction in that country or that there is reasonable cause to believe that an offence has been committed in respect of which such criminal proceedings could be so instituted.
- (2) "Offence", in the case of a federal country or a country having more than one legal system, includes an offence under the law of the country or any part thereof.
- (3) "Forfeiture proceedings" means proceedings, whether civil or criminal, for an order
  - (a) restraining dealings with any property in respect of which there is reasonable cause to believe that it has been
    - (i) derived or obtained, whether directly or indirectly, from; or
    - (ii) used in, or in connection with,  
the commission of an offence;
  - (b) confiscating any property derived or obtained as provided in paragraph (a)(i) or used as provided in paragraph (a)(ii); or
  - (c) imposing a pecuniary penalty calculated by reference to the value of any property derived or obtained as provided in paragraph (a)(i) or used as provided in paragraph (a)(ii).

## REQUESTS FOR COMPUTER DATA - DEFINITIONS

### 4. For the purposes of this Scheme

- (1) "subscriber information" means any information contained in the form of computer data or any other form that is held by a service provider, relating to subscribers of its services other than traffic or content data and by which can be established:
  - a. the type of communication service used, [the technical provisions taken thereto] and the period of service;
  - b. the subscriber's identity, postal or geographic address, telephone and other access number, billing and payment information, available on the basis of the service agreement or arrangement;
  - c. any other information on the site of the installation of communication equipment, available on the basis of the service agreement or arrangement.
- (2) "computer system" means a device or a group of interconnected or related devices, including the Internet, one or more of which, pursuant to a program, performs automatic processing of data;

- (3) “computer data” means any representation of facts, information or concepts in a form suitable for processing in a computer system, including a program suitable to cause a computer system to perform a function;
- (4) “service provider” means:
- a. a public or private entity that provides to users of its services the ability to communicate by means of a computer system, and
  - b. any other entity that processes or stores computer data on behalf of that entity or those users.
- (5) “traffic data” means any computer data:
- a. that relates to a communication by means of a computer system; and
  - b. is generated by a computer system that formed a part in the chain of communication; and
  - c. shows the communication’s origin, destination, route, time, date, size, duration, or type of underlying service.
- (6) “Content data” means the content of the communication; that is, the meaning [or purport] of the communication, or the message or information being conveyed by the communication. It is everything transmitted as part of the communication that is not traffic data.
- (7) “Preservation of computer data” means the protection of computer data which already exists in a stored form from modification or deletion, or from anything that would cause its current quality or condition to change or deteriorate. Computer data that is stored on a highly transitory basis as an integral function of the technology used in its transmission is not computer data which already exists in a stored form for the purposes of this definition.

#### CENTRAL AUTHORITIES

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

#### ACTION IN THE REQUESTING COUNTRY

6. (1) A request for assistance under this Scheme may be initiated by any law enforcement agency or public prosecution or judicial authority competent under the law of the requesting country.
- (2) The Central Authority of the requesting country shall, if it is satisfied that the request can properly be made under this Scheme, transmit the request to the central Authority of the requested country and shall ensure that the request contains all the information required by the provisions of this Scheme.
- (3) The Central Authority of the requesting country shall provide as far as practicable additional information sought by the Central Authority of the requested country.

## ACTION IN THE REQUESTED COUNTRY

7. (1) Subject to the provisions of this Scheme, the requested country shall grant the assistance requested as expeditiously as practicable.
- (2) The Central Authority of the requested country shall, subject to the following provisions of this paragraph, take the necessary steps to ensure that the competent authorities of that country comply with the request.
- (3) If the Central Authority of the requested country considers
- (a) that the request does not comply with the provisions of this Scheme, or
  - (b) that in accordance with the provisions of this Scheme the request for assistance is to be refused in whole or in part, or
  - (c) that the request cannot be complied with, in whole or in part, or
  - (d) that there are circumstances which are likely to cause a significant delay in complying with the request,

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

- (4) The requested country may make the granting of assistance subject to the requesting country giving an undertaking that:
- (a) the evidence provided will not be used directly or indirectly in relation to the investigation or prosecution of a specified person; or
  - (b) a court in the requesting country will determine whether or not the material is subject to privilege.
- (5) If the requesting country refuses to give the undertaking under sub-paragraph (4), the requested country may refuse to grant the assistance sought in whole or in part.

## REFUSAL OF ASSISTANCE

8. (1) The requested country may refuse to comply in whole or in part with a request for assistance under this Scheme if the criminal matter appears to the Central Authority of that country to concern
- (a) conduct which would not constitute an offence under the law of that country; or
  - (b) an offence or proceedings of a political character; or
  - (c) conduct which in the requesting country is an offence only under military law or a law relating to military obligations; or
  - (d) conduct in relation to which the person accused or suspected of having committed an offence has been acquitted or convicted by a court in the requested country.

- (2) The requested country may refuse to comply in whole or in part with a request for assistance under this Scheme
  - (a) to the extent that it appears to the Central Authority of that country that compliance would be contrary to the Constitution of that country, or would prejudice the security, international relations or other essential public interests of that country; or
  - (b) where there are substantial grounds leading the Central Authority of that country to believe that compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions or would cause prejudice for any of these reasons to any person affected by the request.
- (3) The requested country may refuse to comply in whole or in part with a request for assistance to the extent that the steps required to be taken in order to comply with the request cannot under the law of that country be taken in respect of criminal matters arising in that country.
- (4) An offence shall not be an offence of a political character for the purposes of this paragraph if it is an offence within the scope of any international convention to which both the requesting and requested countries are parties and which imposes on the parties thereto an obligation either to extradite or prosecute a person accused of the commission of the offence.

#### **MEASURES OF COMPULSION**

9.
  - (1) The competent authorities of the requested country shall in complying with a request under this Scheme use only such measures of compulsion as are available under the law of that country in respect of criminal matters arising in that country.
  - (2) Where under the law of the requested country measures of compulsion cannot be applied to any person to take the steps necessary to secure compliance with a request under this Scheme but the person concerned is willing to act voluntarily in compliance or partial compliance with the terms of the request, the competent authorities of the requested country shall make available the necessary facilities.

#### **SCHEME NOT TO COVER ARREST OR EXTRADITION**

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

#### **CONFIDENTIALITY**

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

## LIMITATION OF USE OF INFORMATION OR EVIDENCE

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

## EXPENSES OF COMPLIANCE

13. (1) Except as provided in the following provisions of this paragraph, compliance with a request under this Scheme shall not give rise to any claim against the requesting country for expenses incurred by the Central Authority or other competent authorities of the requested country.
- (2) The requesting country shall be responsible for the travel and incidental expenses of witnesses travelling to the requesting country, including those of accompanying officials, for fees of experts, and for the costs of any translation required by the requesting country.
- (3) If in the opinion of the requested country, the expenses required in order to comply with the request are of an extraordinary nature, the Central Authority of the requested country shall consult with the Central Authority of the requesting country as to the terms and conditions under which compliance with the request may continue, and in the absence of agreement the requested country may refuse to comply further with the request.

## CONTENTS REQUEST FOR ASSISTANCE

14. (1) **Except in the case of a request for the preservation of computer data under Article 1 (3) (j) of this Scheme, a request under the Scheme shall:**
- (a) specify the nature of the assistance requested;
  - (b) contain the information appropriate to the assistance sought as specified in the following provisions of this Scheme;
  - (c) indicate any time-limit within which compliance with the request is desired, stating reasons;
  - (d) contain the following information:
    - (i) the identity of the agency or authority initiating the request;
    - (ii) the nature of the criminal matter; and
    - (iii) whether or not criminal proceedings have been instituted.
  - (e) where criminal proceedings have been instituted, contain the following information:
    - (i) the court exercising jurisdiction in the proceedings;
    - (ii) the identity of the accused person;

- (iii) the offences of which he stands accused, and a summary of the facts;
  - (iv) the stage reached in the proceedings; and
  - (v) any date fixed for further stages in the proceedings.
- (f) where criminal proceedings have not been instituted, state the offence which the Central Authority of the requesting country has reasonable cause to believe to have been committed, with a summary of known facts.
- (2) A request shall normally be in writing, and if made orally in the case of urgency, shall be confirmed in writing forthwith.

#### REQUESTS FOR THE PRESERVATION OF COMPUTER DATA

15. (1) A request for the preservation of computer data under this Article made by an agency or authority competent to make such a request under the laws of the requesting country can be directly transmitted to an agency or authority competent to receive such a request under the laws of the requested country.
- (2) A request for the preservation of computer data shall
- (a) specify the identity of the agency or authority making the request;
  - (b) contain a brief description of the conduct under investigation;
  - (c) contain a description of the computer data to be preserved and its relationship to the investigation or prosecution, and in particular identifying whether the computer data to be preserved includes:
    - i. subscriber information
    - ii. traffic data
    - iii. content data.
  - (d) contain a statement that the requesting country intends to submit a request for mutual assistance to obtain the computer data within the period permitted under this Article.
- (3) The preservation of computer data pursuant to a request made under this Article shall be for a period of 40 (forty) days, pending submission by the requesting country of a request for assistance to obtain the preserved computer data. Following the receipt of such a request, the data shall continue to be preserved pending the determination of that request and, if the request is granted, until the data is obtained pursuant to the request for assistance.
- (4) If the requested country considers that the preservation of computer data pursuant to a request made under this Article will not ensure the future availability of the computer data, or will threaten the confidentiality of, or otherwise prejudice the investigation in the requesting country, it shall promptly inform the requesting country, which shall then determine whether the request should nevertheless be executed.

- (5) A request for the preservation of computer data under this Article may be refused only to the extent that it appears to the requested country that compliance would be contrary to the laws and/or constitution of that country, or would prejudice the security, international relations, or other essential public interests of that country.

#### IDENTIFYING AND LOCATING PERSONS

16. (1) A request under this Scheme may seek assistance in identifying or locating persons believed to be within the requested country.
- (2) The request shall indicate the purpose for which the information is requested and shall contain such information as is available to the Central Authority of the requesting country as to the whereabouts of the person concerned and such other information as it possesses as may facilitate the identification of that person.

#### SERVICE OF DOCUMENTS

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

#### EXAMINATION OF WITNESSES

18. (1) A request under this Scheme may seek assistance in the examination of witnesses in the requested country.
- (2) The request shall specify, as appropriate and so far as the circumstances of the case permit:

- (a) the names and addresses or the official designations of the witnesses to be examined;
  - (b) the questions to be put to the witnesses or the subject matter about which they are to be examined;
  - (c) whether it is desired that the witnesses be examined orally or in writing;
  - (d) whether it is desired that the oath be administered to the witnesses (or, as the law of the requested country allows, that they be required to make their solemn affirmation);
  - (e) any provisions of the law of the requesting country as to privilege or exemption from giving evidence which appear especially relevant to the request; and
  - (f) any special requirements of the law of the requesting country as to the manner of taking evidence relevant to its admissibility in that country.
- (3) The request may ask that, so far as the law of the requested country permits, the accused person or his legal representative may attend the examination of the witness and ask questions of the witness.

#### SEARCH AND SEIZURE

19. (1) A request under this Scheme may seek assistance in the search for, and seizure of property or **computer data** in the requested country.
- (2) The request shall specify the property or **computer data** to be searched for and seized and shall contain, so far as reasonably practicable, all information available to the Central Authority of the requesting country which may be required to be adduced in an application under the law of the requested country for any necessary warrant or authorization to effect the search and seizure.
- (3) The requested country shall provide such certification as may be required by the requesting country concerning the result of any search, the place and circumstances of seizure, and the subsequent custody of the property or **computer data** seized.

#### OTHER ASSISTANCE IN OBTAINING EVIDENCE

20. (1) A request under this Scheme may seek other assistance in obtaining evidence.
- (2) The request shall specify, as appropriate and so far as the circumstance of the case permit:
- (a) the documents, records, property or **computer data** to be inspected, preserved, photographed, copied or transmitted;
  - (b) the samples of any property or **computer data** to be taken, examined or transmitted; and
  - (c) the site to be viewed or photographed.

## PRIVILEGE

21. (1) No person shall be compelled in response to a request under this Scheme to give any evidence in the requested country which he could not be compelled to give:
- (a) in criminal proceedings in that country; or
  - (b) in criminal proceedings in the requesting country.
- (2) For the purposes of this paragraph any reference to giving evidence includes references to answering any question and to producing any document.

## PRODUCTION OF JUDICIAL OR OFFICIAL RECORDS

22. (1) A request under this Scheme may seek the production of judicial or official records relevant to a criminal matter arising in the requesting country.
- (2) For the purposes of this paragraph "judicial records" means judgements, orders and decisions of courts and other documents held by judicial authorities and "official records" means documents held by government departments or agencies or prosecution authorities.
- (3) The requested country shall provide copies of judicial or official records which are publicly available.
- (4) The requested country may provide copies of judicial or official records not publicly available, to the same extent and under the same conditions as apply to the provision of such records to its own law enforcement agencies or prosecution or judicial authorities.

## TRANSMISSION AND RETURN OF MATERIAL

23. (1) Where compliance with a request under this Scheme would involve the transmission to the requesting country of any document, record or property, the requested country
- (a) may postpone the transmission of the material if it is required in connection with proceedings in that country, and in such a case shall provide certified copies of a document or record pending transmission of the original;
  - (b) may require the requesting country to agree to terms and conditions to protect third party interests in the material to be transmitted and may refuse to effect such transmission pending such agreement.
- (2) Where any document, record or property is transmitted to the requesting country in compliance with a request under this Scheme, it shall be returned to the requested country when it is no longer required in connection with the criminal matter specified in the request unless that country has indicated that its return is not desired.
- (3) The requested country shall authenticate material that is to be transmitted by that country.

## AUTHENTICATION

24. A document or other material transmitted for the purposes of or in response to a request under this Scheme shall be deemed to be duly authenticated if it:
- (a) purports to be signed or certified by a judge or Magistrate, or to bear in the stamp or seal of a Minister, government department or Central Authority; or
  - (b) is verified by the oath of a witness or of a public officer of the Commonwealth country from which the document or material emanates.

## PERSONAL APPEARANCE OF WITNESSES IN THE REQUESTING COUNTRY

25. (1) A request under this Scheme may seek assistance in facilitating the personal appearance of the witnesses before a court exercising jurisdiction in the requesting country.
- (2) The request shall specify
- (a) the subject matter upon which it is desired to examine the witnesses;
  - (b) the reasons for which the personal appearance of the witnesses is required; and
  - (c) details of the travelling, subsistence and other expenses payable by the requesting country in respect of the personal appearance of the witnesses.
- (3) The competent authorities of the requested country shall invite persons whose appearance as witnesses in the requesting country is desired; and
- (a) ask whether they agree to appear;
  - (b) inform the Central Authority of the requesting country of their answer; and
  - (c) if they are willing to appear, make appropriate arrangements to facilitate the personal appearance of the witnesses.
- (4) A person whose appearance as a witness is the subject of a request and who does not agree to appear shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or requested country.

## PERSONAL APPEARANCE OF PERSONS IN CUSTODY

26. (1) A request under this Scheme may seek the temporary transfer of persons in custody in the requested country to appear as witnesses before a court exercising jurisdiction in the requesting country.
- (2) The request shall specify:
- (a) the subject matter upon which it is desired to examine the witnesses;
  - (b) the reasons for which the personal appearance of the witnesses is required.

- (3) The requested country shall refuse to comply with a request for the transfer of persons in custody if the persons concerned do not consent to the transfer.
- (4) The requested country may refuse to comply with a request for the transfer of persons in custody and shall be under no obligation to inform the requesting country of the reasons for such refusal.
- (5) A person in custody whose transfer is the subject of a request and who does not consent to the transfer shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or requested country.
- (6) Where persons in custody are transferred, the requested country shall notify the requesting country of:
  - (a) the dates upon which the persons are due under the law of the requested country to be released from custody; and
  - (b) the dates by which the requested country requires the return of the persons and shall notify any variations in such dates.
- (7) The requesting country shall keep the persons transferred in custody, and shall return the persons to the requested country when their presence as witnesses in the requesting country is no longer required, and in any case by the earlier of the dates notified under sub-paragraph (6).
- (8) The obligation to return the persons transferred shall subsist notwithstanding the fact that they are nationals of the requesting country.
- (9) The period during which the persons transferred are in custody in the requesting country shall be deemed to be service in the requested country of an equivalent period of custody in that country for all purposes.
- (10) Nothing in this paragraph shall preclude the release in the requesting country without return to the requested country of any person transferred where the two countries and the person concerned agreed.

## IMMUNITY OF PERSONS APPEARING

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

nevertheless remained in the requesting country, or having left that country have returned to it;

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

#### TRACING THE PROCEEDS OR INSTRUMENTALITIES OF CRIME

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

#### SEIZING AND CONFISCATING THE PROCEEDS OF INSTRUMENTALITIES OF CRIME

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

- (6) The law of the requested country may provide for the protection of the interests of bona fide third parties in property restrained or confiscated as a result of a request made pursuant to this Scheme, by providing:
- (a) for the giving of notice of the making of orders restraining or confiscating property; and
  - (b) that any third party claiming an interest in property so restrained or confiscated may make an application to a court of competent jurisdiction for an order
    - (i) declaring that the interest of the applicant in the property or part thereof was acquired bona fide; and
    - (ii) restoring such property or the value of the interest therein to the applicant.

#### **DISPOSAL OR RELEASE OF PROPERTY**

30. (1) The law of the requested country shall apply to determine the disposal of any property
- (a) forfeited; or
  - (b) obtained as a result of the enforcement of a pecuniary penalty order
- as a result of a request under this Scheme.
- (2) The law of the requested country shall apply to determine the circumstances in which property made the subject of interim seizure as a result of a request under this Scheme may be released from the effects of such seizure.
- (3) The law of the requested country may provide that the proceeds of an order of the type referred to in sub-paragraphs 27(2)(b) and (c), or the value thereof, may be
- (a) returned to the requesting country; or
  - (b) shared with the requesting country in such proportion as the requested country in its discretion deems appropriate in all the circumstances.

#### **CONSULTATION**

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

#### **OTHER ASSISTANCE**

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

#### **NOTIFICATION OF DESIGNATIONS**

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

COUNTRY	LEGISLATION GOVERNING INTERCEPTION	AUTHORISATIONS	MUTUAL LEGAL ASSISTANCE
AUSTRALIA	<ul style="list-style-type: none"> <li>• Telecommunications (interception) Act 1979 (T.I. Act) and subsequent amendments.</li> <li>• Surveillance Devices Act 2004.</li> <li>• Mutual Assistance in Criminal Law Matters Act 1987.</li> </ul>	<p>Warrant is necessary. Can only be obtained for certain offences. May only be obtained by specific named persons, or agencies specified in the relevant Acts.</p> <p>With exceptions a warrant may only be granted by a federal court judge or a nominated member of the Administrative Appeals Tribunal.</p> <p>Warrant is issued for 90 days. Extension possible.</p> <p>Product admissible in criminal proceedings.</p>	<p>Interception based solely on the request of a foreign state is not permitted</p> <p>A foreign state may apply for material obtained during a domestic investigation pursuant to a request for mutual assistance in respect of offences punishable by imprisonment for 3 years or more.</p>
CANADA	<p>The Criminal Code governs interception by prohibiting it but creates a scheme for judicial authorization.</p>	<p>Issued by a Superior Court Judge on the application of a representative of the Attorney General of Canada or of a province specially designated for the purpose.</p> <p>The authorization is for an initial period of 60 days but can be renewed. Special exceptions for longer periods can be made depending on the nature of the offence under investigation.</p>	<p>Interception based solely on the request of a foreign state is not permitted.</p> <p>A foreign state may apply for material obtained during a domestic investigation pursuant to a request for mutual assistance.</p>
INDIA	<ul style="list-style-type: none"> <li>• Unlawful Activities (Prevention) Act, 1967;</li> <li>• Information Technology Act, 2000</li> <li>• Indian Telegraph Act, 1885.</li> </ul>	<p>A designated individual can order any Government agency to intercept any information transmitted by computer if it is necessary or expedient to do so in the interests of:</p> <ul style="list-style-type: none"> <li>• the sovereignty or integrity of India,</li> <li>• the security of the state,</li> <li>• friendly relations with foreign states</li> <li>• public order or</li> <li>• for preventing incitement to the commission of any cognizable offence.</li> </ul> <p>The reasons for the order must be recorded in writing. The</p>	<p>MLA requests are dealt with according to applicable treaty/arrangement.</p>

COUNTRY	LEGISLATION GOVERNING INTERCEPTION	AUTHORISATIONS	MUTUAL LEGAL ASSISTANCE
		<p>Information Technology Act 2000 does not prescribe any time limits.</p> <p>The Indian Telegraph Amendment Rules, 1999, included under the Indian Telegraph Act, 1885, states interception of any message may only be ordered by the Secretary for the Government of India in the Ministry of Home Affairs (in Federal cases) or by the Secretary to the State Government (in State cases). In emergencies, such order can be issued by the officer of the rank of Joint Secretary, duly authorised by the Home Secretary, giving reasons for such action. A copy of the order shall be forwarded to the Review Committee within 7 days. The Indian Telecommunication Rules provide for 90 days and not exceeding 180 days.</p> <p>In remote areas or for operational reasons, prior permission cannot be obtained, the officer can intercept subject to confirmation from the competent authority within 15 days.</p>	
JAMAICA	The Interception of Communications Act 2002	<p>Any request for interception must be authorised by a warrant issued by a judge in chambers (ex parte application). The warrant may be issued for a period not exceeding 90 days initially, and is then renewable for a second period not exceeding 90 days and a final renewal not exceeding 90 days from the date of expiration of the second period.</p> <p>Information obtained from the intercept is admissible in criminal proceedings but no evidence may be adduced or questions asked relating to the method of interception or the identity of the person(s) carrying out or assisting in the interception.</p>	The Mutual Assistance (Criminal Matters) Act 1995 contains no specific provisions for the interception of communication or data preservation but does contain a general provision for assistance for “such matters as may be included in an agreement or arrangement in force between Jamaica and a foreign state.”

COUNTRY	LEGISLATION GOVERNING INTERCEPTION	AUTHORISATIONS	MUTUAL LEGAL ASSISTANCE
KENYA	<ul style="list-style-type: none"> <li>• Criminal Procedure Code</li> <li>• Communications Act 1998.</li> </ul>	<p>Any request for interception must be authorised by the Attorney General and be made by a judge or magistrate. The product obtained is admissible in criminal proceedings.</p>	<p>A draft bill is to be presented before Parliament dealing with mutual legal assistance.</p> <p>Consideration of any request for assistance will take into account human rights issues including the protection of privacy.</p> <p>It is envisaged that manageable costs will be borne by Kenya; but extraordinary costs will be shared between Kenya and the requesting state.</p>
MALAYSIA	<ul style="list-style-type: none"> <li>• The Communication and Multimedia Act 1998</li> <li>• The Criminal Procedure Code; and</li> <li>• The Kidnapping Act 1957</li> </ul>	<p>The Attorney General is the person designated as competent to issue an authorisation for a police officer to obtain an intercept warrant from the Court. Intercept warrants can only be obtained for specific offences contained in the relevant legislation.</p>	<p>The Acts do not provide for MLA for interception at the request of a foreign state but amendments are under consideration</p>
SOUTH AFRICA	<ul style="list-style-type: none"> <li>• Electronic Communications and Transactions Act 2002 (Act 25 of 2002)</li> <li>• Regulation of Interception of Communication and Provision of Communications-Related Information Act 2002 (Act 70 of 2002).</li> </ul>	<p>Any request for interception must be made to a judge or a magistrate who authorises the request by issuing a direction. The product obtained from an interception is admissible in criminal proceedings.</p>	<p>The Act provides for compliance with a request for interception from a foreign state, but the judge or magistrate must be satisfied that an offence has been or is about to be committed.</p>

COUNTRY	LEGISLATION GOVERNING INTERCEPTION	AUTHORISATIONS	MUTUAL LEGAL ASSISTANCE
UK	<p>Regulation of Investigatory Powers Act 2000 (RIPA).</p>	<p>Lawful public interception is by a warrant issued by the Secretary of State and it must be both necessary and proportionate. The product of interception is for intelligence purposes only and cannot be admitted in proceedings. The product of private intercept, when carried out with the consent of the systems controller and subject to defined criteria, is admissible as evidence in court proceedings.</p>	<p>No request pursuant to any designated international agreement for assistance of interception is to be made except with lawful authority. The EU Convention on MLA in criminal matters (2000) is the only designated international agreement.</p> <p>A request made outside a designated agreement is capable of being complied with but is subject to the discretion of the Home Secretary and whether it is the product of an on-going UK investigation.</p>
USA	<p>Federal statutory law:</p> <ul style="list-style-type: none"> <li>• <i>Interception of contents</i>. The statutory scheme relating to interception of contents of communications is specified in Title 18, United States Code, Sections 2510-2522:</li> <li>• <i>Interception of Wire, Oral, and Electronic Communications</i>.</li> <li>• <i>Collection of traffic data</i>. The statutory scheme relating to real-time collection of traffic data is specified in Title 18, United States Code, Sections 3121-3127: Pen Registers and Trap and Trace Devices.</li> <li>• Other powers related to collection and disclosure of</li> </ul>	<p><i>Interception of content</i>. A judicial authority must authorize real-time interception of content on application from a designated high-ranking executive official from the Department of Justice, or by an authorized principal prosecuting attorney within a constituent State or subdivision thereof.</p> <p><i>Collection of traffic data</i>. A judicial authority must authorize real-time collection of traffic data, following application by an attorney for the government.</p> <p><i>Emergency authorizations</i>. A high-ranking executive official, in specified emergency situations generally involving an immediate threat to life or limb or to national security, may authorize either interception of content or collection of traffic data for a limited time without prior judicial authority. Emergency authorizations must be followed by a full application for the appropriate order from the</p>	<p>The United States is not able to intercept contents of communications based solely upon a mutual legal assistance request of a foreign state but it may share proceeds of lawful domestic intercepts with a foreign state.</p> <p>Traffic data can be captured on behalf of a foreign state following a MLA request in furtherance of an ongoing criminal investigation</p> <p>The proceeds of lawful intercepts authorized under domestic procedures may be shared with foreign law enforcement officials to the extent that such disclosure is</p>

COUNTRY	LEGISLATION GOVERNING INTERCEPTION	AUTHORISATIONS	MUTUAL LEGAL ASSISTANCE
	<p>stored data, including preservation of data, are included in Title 18, United States Code, Sections 2701-2712: Stored Wire and Electronic Communications and Transactional Records Access.</p>	<p>appropriate judicial authority within 48 hours of the initiation of the collection.</p> <p><i>Time Limits</i></p> <ul style="list-style-type: none"> <li>• For content interceptions authorisations are for an initial period of 30 days subject to renewal following re-application in the same manner.</li> <li>• For real time traffic data interceptions authorisations are for 60 days, and subject to renewals for up to sixty days authorised by the judicial authority if the initial requirements are still met.</li> </ul> <p>Both lawfully intercepted content and lawfully captured traffic data are admissible in criminal proceedings, subject to any other evidentiary privilege (e.g., privileged attorney-client communications)</p>	<p>appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.</p> <p>In the case of real-time collection of traffic data, the request would be submitted for judicial approval, as is the case under its domestic law. The same requirements and time limits apply.</p>