

## **Criminal Proceedings**

### **I. Before you start**

#### **Types of assistance**

1. In broad terms, under Guernsey's legal framework HM Procureur can assist other jurisdictions with the following -
  - a. obtaining documentary and oral evidence for use in investigations, prosecutions and confiscations in the requesting state (NB this includes obtaining an order to preserve electronic material in advance of a request for evidence being made);
  - b. freezing, seizing or confiscating the proceeds of crime or the instrumentalities of crime in support of criminal proceedings in the requesting state;
  - c. conducting investigative interviews in support of proceedings in the requesting state that concern serious or complex fraud;
  - d. service of judicial documents (e.g. witness summonses) issued in the context of criminal proceedings in the requesting state; and
  - e. transfer of persons imprisoned in Guernsey to the requesting state to give evidence or otherwise assist with criminal proceedings there.

#### **Jurisdictions that can be assisted**

2. HM Procureur can receive applications for criminal MLA from any jurisdiction<sup>1</sup>, and accepts LORs directly from the following authorities in your jurisdiction:
  - a. a court or tribunal exercising criminal jurisdiction;
  - b. a prosecuting authority; or
  - c. another authority that the Law Officers deem to exercise such functions.
3. The LOR must relate to:
  - a. criminal proceedings that have been instituted in your jurisdiction; or
  - b. a criminal investigation that is being carried on in your jurisdiction.

### **II. The Letter of Request (LOR)**

#### **The LOR generally**

4. Each LOR should include the following information:
  - a. the identity of the person making the request, and confirmation that that person is authorised to make it;
  - b. the name(s) and details of the person(s) and entity or entities under investigation, charged, or convicted;
  - c. details of the charges faced by, or that are likely to be laid against, the person or entity who is the subject of the enquiry in your jurisdiction;

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<sup>1</sup> References in the relevant legislation to providing assistance to countries that have been designated by Guernsey may be disregarded in light of a change to the legal framework made in 2010 whereby Guernsey is deemed to have exercised this power in respect of all countries. This does not apply if the requested assistance relates to the restraint or forfeiture of instrumentalities in drugs cases, in which case a designation by the UK is required— see below.

- d. a copy of any applicable statutory provisions;
  - e. a description of the relevant facts, including:
    - i. how the suspect(s) or accused person(s) allegedly committed the offences; and
    - ii. details of any elements of serious or complex fraud, if any;
  - b. the current status of the case. For example, whether the matter is at the investigation, prosecution or confiscation stage;
  - c. details of the assistance required (e.g. documentary evidence or the freezing of assets);
  - d. if the request concerns evidence, names and details of the parties within Guernsey from whom the evidence is sought;
  - e. details of any relevant account, company, trust or other entity;
  - f. the date by which you wish the assistance to be provided, and if you consider your request should be treated as urgent, precise reasons as to why;
  - g. if your request is for any form of evidence, a signed undertaking in the appropriate form (see below); and
  - h. confirmation that your jurisdiction would provide the reciprocal assistance that is sought in your LOR.
5. It is very important that the LOR contains sufficient information. We will need to use this to determine whether we are able to assist, and if so, how we can best obtain what you need. A fundamental requirement is that Guernsey law requires HM Procureur to be satisfied that
- a. you have started a criminal investigation or criminal proceedings;
  - b. where the assistance requested involves the production of documents or asset recovery, the activity which is the subject of the criminal investigation or proceedings would be an offence under the law of our jurisdiction if it had happened here (except in the case of drugs -related offences, which are subject to a dedicated regime<sup>2</sup>); and
  - c. the evidence provided will be of substantive value to your investigation or proceedings.

The LOR must therefore demonstrate these aspects.

- 6. Depending on the type of assistance requested, there may be further requirements. These are outlined in section III of this Part below.
- 7. it is a legal requirement.

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<sup>2</sup> For cases involving drugs, it is sufficient that the activity is contrary to the laws of a country that is a signatory to the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

### Undertakings to be given

8. All requests for evidence must be accompanied by an undertaking which sets out the purpose for which any evidence provided may be used, as follows:
  - a. all requests for evidence for use in criminal proceedings require the General Undertaking at Annex A, unless the request is from an Investigating Judge; and
  - b. an Investigating Judge Undertaking is set out at Annex B.
9. The undertaking should be signed by a senior officer of the investigating agency or, where appropriate, an examining magistrate or the Prosecutor responsible for the conduct of the investigation or proceedings.
10. Where an undertaking is required, an MLA Request will not be processed until the MLA Team receives the undertaking.

### **III. Types of Requests and additional requirements for each**

11. After HM Procureur receives an MLA Request, Guernsey law provides several ways for the MLA Team to procure the material you have requested. The additional information this section asks you to provide in the LOR helps us fulfil your request as efficiently as possible. It also outlines what is required for HM Procureur to be satisfied that the request can be fulfilled, as noted in paragraph 5 above.

#### A: Documentary evidence

12. As a starting point, please note that under Guernsey law, it is possible for HM Procureur to apply for a Court Order to preserve material in electronic form before you have made a request for assistance in obtaining that material to use as evidence. If you wish a preservation order to be made, you should send an initial LOR that
  - a. includes the details set out at paragraph 4 of this Part;
  - b. identifies the person in possession of the data or the computer system on which it is stored;
  - c. sets out the reasons why preservation of the material is considered necessary; and
  - d. states that you intend to submit a further LOR requesting assistance in obtaining the material as evidence.
13. The LOR making a request for documentary evidence should confirm the types of documents required and the date range for which material is needed (which should not extend beyond the date range that is relevant to the period of offending). You should also explain how having these documents will assist your investigation or proceedings, and if not having them could prejudice your investigation.
14. Further to the standard documents available from banks and other financial institutions, we can also help with customer information orders and account monitoring orders (up to 90 days). Please provide the full name and address of the financial institution, any details you have about relevant accounts (such as account numbers), and the types of documents you require.
15. If you require the material to be obtained by way of a search warrant (for example, because there is a real danger the financial institution or witness may destroy documents), please state the location to be searched, the material to be seized, and the exact reasons for

believing that a search warrant is necessary. In particular, there would need to be strong grounds for suggesting that evidence or documents might be destroyed by reputable law firms, banks or other institutions that are subject to Guernsey's rigorous regulatory, licensing and supervisory regimes.

16. Please state whether you need documentary evidence to be accompanied by a witness statement. If you need a witness statement, please also read section B below (*Oral evidence*).

#### B. Oral evidence (including sworn evidence)

17. If you require oral evidence, there are some specific requirements that apply in addition to those set out in relation to documentary evidence in Section A (*Documentary evidence*) above.
18. Please provide a draft for consideration by the relevant witness, as in most cases the evidence is likely to be given in the form of a mutually acceptable pre-written statement. We will then ask the witness whether they are willing to provide the statement on a voluntary basis.
19. If the witness declines to provide a statement voluntarily and declines an invitation to travel to give evidence before your court, it may be possible for evidence to be taken under oath if their evidence is subsequently required for the purposes of proceedings in your jurisdiction.
20. The presiding Guernsey judge will be responsible for the procedure during the taking of evidence. The judge will be prepared to listen to arguments from both the prosecution and defence, so that every effort is made for the evidence to be admissible before your domestic court.
21. Alternatively, Guernsey law provides for evidence to be given by telephone or live television-link. The appropriate Guernsey Court will be responsible for summoning the witness and establishing the identity of the witness. The evidence will then be given under the supervision of the court in your jurisdiction, and in accordance with the laws of your country. If evidence is given by telephone link, the appropriate Guernsey Court will be responsible for notifying the witness of the time of the call, establishing the identity of the witness, and ensuring that he or she is willingly giving evidence by telephone.
22. In all cases, under Guernsey law witnesses cannot be compelled to give any evidence or answer any question that they would not be compelled to answer in criminal proceedings under Guernsey law. Similarly, a witness may seek to rely upon any privilege that would apply in your jurisdiction if the evidence were given there.
23. You may have lawyers from your jurisdiction attend, who can question and cross-examine witnesses. In this case, please provide the names and details of the persons you wish to conduct this process, as well as the witness(es) to be examined and whether the other side will also be attending for cross-examination.

#### C. Restraining/Freezing assets

24. Upon a request and while a criminal investigation or criminal proceedings in your jurisdiction are not yet concluded, assets can be restrained under an interim asset restraining order to prevent flight of assets. This requires an application to a Guernsey Court by HM Procureur. The Guernsey Court can only make an order if various conditions are met.
25. The LOR should include details of the following:

- a. the identification of assets in Guernsey that you wish to be restrained;
- b. if a suspect has not already been charged, an indication as to when the suspect will be charged;
- c. your grounds for believing that the alleged offender has benefited from their criminal conduct;
- d. how it is believed that the proceeds or instrumentalities of any crime came to be in Guernsey;
- e. whether a confiscation order has been made in your jurisdiction, or your grounds for believing that a confiscation order will be made during proceedings;
- f. confirmation that a request will later be made to Guernsey for enforcement of that order; and
- g. if a restraint order has been issued by a court in your jurisdiction, a copy of the restraint order.

26. It is essential that you keep us informed of progress in your case. If we obtain a restraint order on your behalf, we have an obligation under Guernsey law to periodically review the restraint to ascertain whether it is necessary for it to continue. Therefore, if we do not receive timely responses to requests for updates on the progress of investigations and/or proceedings in your jurisdiction, we will need to consider applying to discharge the restraint order.

#### D. Enforcement of external confiscation/forfeiture orders

27. If you wish to enforce a confiscation order made in your jurisdiction with respect to assets situated in Guernsey, please confirm the following in your LOR:

- a. the external confiscation/forfeiture order is in force and is not subject to appeal;
- b. where the person against whom the order is made did not appear in the proceedings, that he or she received notice of the proceedings in sufficient time to enable him or her to defend them; and
- c. enforcing the order in Guernsey would not be contrary to the interests of justice.

28. The LOR should also include the following further information:

- a. confirmation of the legislation under which the assistance is sought;
- b. details of the offences for which the defendant was convicted and the sentence and confiscation order imposed, together with a copy of any applicable statutory provisions;
- c. a copy of the confiscation order issued in your jurisdiction; and
- d. details of the property subject to the confiscation order that is believed to be in Guernsey, including details of who holds the property and how it is believed the property came to be in Guernsey.

#### E. Service of your jurisdiction's process in Guernsey

29. HM Procureur can cause a witness summons or order from your criminal courts to be served on a person in Guernsey.

30. The LOR should:

- a. request that document(s) be served on a specified person in Guernsey;
- b. enclose those document(s); and
- c. indicate whether personal service is required.

Please note that such service does not require the person to comply with the content of that service under Guernsey law.

#### F. Facilitating transfer of imprisoned persons to your jurisdiction

31. In certain circumstances it is possible to transfer persons who are imprisoned in Guernsey to give evidence or otherwise assist with criminal proceedings in another jurisdiction. If you would like more information about this, contact the MLA team

#### Relevant legislation

*s. 1, Criminal Justice (Fraud Investigation) (Bailiwick of Guernsey) Law, 1991*

*The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999, in particular ss. 25–26, 35, 35A, 36, 45, 46, 48A–C and 48H–I.*

*The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) (Enforcement of Overseas Confiscation Orders) Ordinance, 1999, in particular ss. 1-6 and Schedule 2.*

*The Drug Trafficking (Bailiwick of Guernsey) Law, 2000, in particular ss. 25–26, 35, 36, 44, 47, 48, 49, 63, 64, 67A–C and 67H–I.*

*The Drug Trafficking (Bailiwick of Guernsey) (Designated Countries and Territories) Ordinance, 2000, in particular ss. 1-6 and Schedule 2.*

*The Drug Trafficking (Bailiwick of Guernsey) Law (Enforcement of External Forfeiture Orders) Ordinance<sup>3</sup>, 2000, in particular ss. 1-3 and 7-10.*

*The Criminal Justice (International Co-operation) (Bailiwick of Guernsey) Law, 2001, in particular ss. 1, 4, 4A, 4B, 4C, 5, 7, 8, Schedule 1 and Schedule 2.*

*The Criminal Justice (International Co-operation) (Enforcement of Overseas Forfeiture Orders) (Bailiwick of Guernsey) Ordinance, 2007, in particular ss. 1–3 and 12–15.*

*The Terrorism and Crime (Bailiwick of Guernsey) Law, 2002, in particular ss. 36, 37, 39, Schedule 5, Schedule 6 and Schedule 7.*

*The Terrorism and Crime (Enforcement of External Orders) (Bailiwick of Guernsey) Ordinance, 2007, in particular ss. 2-6 and 9-11.*

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<sup>3</sup> This enables the restraint and confiscation of instrumentalities; it only applies to Convention States that have been designated by the United Kingdom in secondary legislation made under section 9 of the Criminal Justice (International Co-operation) Act 1990.