



# ICLG

The International Comparative Legal Guide to:

## Business Crime 2019

**9th Edition**

A practical cross-border insight into business crime

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# Cayman Islands

Martin Livingston



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Maples and Calder

## 1 General Criminal Law Enforcement

### 1.1 What authorities can prosecute business crimes, and are there different enforcement authorities at the national and regional levels?

There are no regional levels separate from the national level in the Cayman Islands.

In terms of actual criminal prosecution, the Director of Public Prosecutions (the “DPP”) is the Cayman Islands government’s principal legal adviser on criminal proceedings, and is responsible for all criminal proceedings brought within the Cayman Islands. The DPP can bring prosecutions in the Cayman Islands Summary Court, Grand Court and Court of Appeal. The DPP is also responsible for international cooperation on mutual legal assistance and extradition matters.

The position of DPP was created by Section 57 of the Cayman Islands Constitution 2009, with the first DPP appointed by the Governor on 1 May 2011. Criminal proceedings were previously undertaken by either the Solicitor General’s or the Attorney General’s office.

In terms of law enforcement authorities, the key authority is the Royal Cayman Islands Police Service (the “RCIPS”). Business crimes are investigated by the Financial Crimes Unit of the RCIPS. Bribery and corruption crimes are investigated by the Anti-Corruption Commission, and other civil authorities can also investigate potential criminal breaches including the Departments of Immigration, Customs, Environment, etc.

### 1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

This is not applicable.

### 1.3 Is there any civil or administrative enforcement against business crimes? If so, what agencies enforce the laws civilly and which crimes do they combat?

The Cayman Islands Monetary Authority (“CIMA”) is the sole financial services regulator, and has the function of both prudential supervision and compliance by financial service providers with the anti-money laundering regime. CIMA’s regulatory enforcement powers include the ability to suspend or remove directors, revoke licences or impose conditions on a licensee, impose fines, appoint

controllers or auditors over a company and apply to the court for orders necessary to carry out its regulatory/supervisory functions or to intervene in a liquidation. Financial service providers will usually be licensed or registered by CIMA under a regulatory law, under which certain offences may be technically regarded as criminal offences, given the penalties they carry. Any regulatory offence would be prosecuted by the DPP.

Any money laundering offence would also be prosecuted by the DPP, under the Proceeds of Crime Law (2018 Revision) (the “PCL”). Under the PCL, the DPP is permitted to bring civil actions for the restraint and seizure of assets involved in money laundering, in addition to the ability to bring charges and prosecute criminally.

In terms of further administrative and enforcement powers, there are a number of government agencies and statutory authorities with powers relating to potential business crimes, including but not limited to:

- The Anti-Corruption Commission (“AC Commission”) under the Anti-Corruption Law (2018 Revision) (the “ACL”).
- The Financial Reporting Authority (the “FRA”) under the PCL.
- The Tax Information Authority (the “TIA”) under the Tax Information Authority Law (2017 Revision) (the “TIA Law”).
- The Mutual Legal Assistance (United States of America) Law (2015 Revision) and Treaty (the “MLAT”).

### 1.4 Have there been any major business crime cases in your jurisdiction in the past year?

A Caymanian businessman was found guilty in 2016 of the following corruption and money laundering offences:

- (a) conspiracy to Defraud contrary to Common Law;
- (b) conflict of Interest contrary to Sections 19(2) and 19(3) of the ACL;
- (c) fraud on the Government contrary to Section 11(1)(c) of the ACL; and
- (d) Breach of Trust contrary to Section 13 of the ACL.

The conviction related to the award of a Cayman Islands health service swipe card contract to a private company, which was ultimately owned/controlled by the businessman, while he was head of the relevant awarding authority. He was sentenced to a custodial sentence of seven years.

The ex-FIFA vice-president and CONCACAF president, who was Caymanian, has also been charged in connection with the same healthcare fraud case. Although not a government official at the time, he is alleged to have been connected to one of the companies

that secured the lucrative swipe card contract. He faces two charges of conspiracy to defraud and one charge of Breach of Trust, as well as conspiracy to convert criminal property.

He had been arrested in 2015 in Zürich on charges made by the US authorities that he was involved in a US\$150 million FIFA racketeering and bribery scandal. He is currently on bail in the US, and it remains unclear whether he will appear before a Court in the Cayman Islands.

## 2 Organisation of the Courts

### 2.1 How are the criminal courts in your jurisdiction structured? Are there specialised criminal courts for particular crimes?

The criminal courts in the Cayman Islands comprise the following jurisdictions in ascending order within the hierarchy of the Courts.

#### The Summary Court

The Summary Court exercises jurisdiction over a wide variety of criminal matters through a Magistrate without a jury. All criminal cases start in the Summary Court, with more serious cases being committed to the Grand Court for trial on indictment. The Summary Court is empowered to impose sentences of up to four years of imprisonment and, in certain types of drug cases, this power is extended to 20 years or, on second or subsequent convictions, 30 years. Customarily, there are three Summary Court sittings daily.

#### The Grand Court

The Grand Court is the superior court of record of first instance for the Cayman Islands. The caseload of the Grand Court is divided amongst five Divisions: Civil; Family; Admiralty; Financial Services; and Criminal.

Criminal cases before the Grand Court are heard either by Judge alone or by Judge and a jury of seven (12 for murder and money laundering trials). The Grand Court also hears criminal appeals from the Summary Court. The mode of trial in criminal cases is dependent on the nature of the crime.

#### The Court of Appeal

Appeals from the Grand Court are heard by the Court of Appeal, which is also a superior court of record and consists of three Judges sitting together. There is, at present, a roster of four or more appellate Judges. The Court of Appeal usually sits for three regularly scheduled sessions which last for three weeks and take place each year in the Cayman Islands. However, a party may apply in writing for a special sitting of the Court of Appeal to be convened in certain circumstances.

#### The Privy Council

The Judicial Committee of the Privy Council (the “**Privy Council**”), which sits in London, UK, and occasionally overseas, is the final appellate court for the Cayman Islands.

Appeals from the Cayman Islands to the Privy Council are governed by a coherent code created by combining Cayman Islands and UK statute, in particular:

- The Cayman Islands (Appeals to Privy Council) Order 1984 (as amended).
- The UK’s Judicial Committee (Appellate Jurisdiction) Rules Order 2009.
- The Judicial Committee of the Privy Council Practice Directions.

In criminal cases, leave to appeal to the Privy Council is required.

### The European Court of Human Rights

There is a separate right of petition to the European Court of Human Rights in Strasbourg, France, for persons who reside in the Cayman Islands.

### 2.2 Is there a right to a jury in business crime trials?

There is a general right to a jury in all cases tried on indictment, which will include the majority of all alleged business crimes.

## 3 Particular Statutes and Crimes

### 3.1 Please describe any statutes that are commonly used in your jurisdiction to prosecute business crimes, including the elements of the crimes and the requisite mental state of the accused:

#### o Securities fraud

The main elements of the common law offence of fraud are dishonesty with an intent to gain or cause loss or to expose another to a risk of loss.

Part IX of the Penal Code Law (2018 Revision) (the “**Penal Code**”) deals with deception offences such as fraud and misrepresentation in connection with sales of securities. Such offences are not strict liability offences, and thus require proof that the defendant was acting dishonestly with the intention of permanently depriving the other of the property obtained.

Specifically, Section 257 of the Penal Code creates an offence of making a false statement by a company officer. For an offence to be proven, a company officer must, with intent to deceive members or creditors, publish or concur with publishing a written statement or account which to his knowledge is, or may be misleading, false or deceptive in a material particular.

Part XI of the Penal Code deals with forgery and creates offences that similarly require proof of a specific intent or knowledge that the document in question was false.

See below for further information in relation to insider trading and market manipulation.

#### o Accounting fraud

Part IX of the Penal Code deals with deception offences such as false accounting. Section 255 of the Penal Code states that a person who dishonestly, with a view to gain for himself or another or with intent to cause loss to another (a) destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purpose, or (b) in furnishing information for any purpose, produces or makes use of any account, or any such record or document as aforesaid, which to his knowledge is or may be misleading, false or deceptive in a material particular, is guilty of an offence.

#### o Insider trading

The Securities Investment Business Law (2015 Revision) (the “**SIBL**”) creates criminal offences for insider trading (or insider dealing) and market manipulation.

Insider dealing is defined by Section 25 of the SIBL as cases where a person with insider information either: (a) deals in listed securities that are price-affected in relation to the information; (b) encourages another to so deal; or (c) discloses that information in a way other than in the proper performance of his employment, office or profession, to another person.

The offence is one of strict liability, subject to certain defences set out in Sections 26 to 28 of the SIBL.

#### o Embezzlement

There is no specific offence of embezzlement in the Cayman Islands. Incidences of embezzlement are likely to be prosecuted as fraud (as described above) or as theft under Part IX of the Penal Code. A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it (Section 235(1) of the Penal Code).

#### o Bribery of government officials

The ACL governs a number of corruption offences, including bribery of domestic and foreign public officials and establishes the AC Commission.

In terms of foreign public officials, Section 22 of the ACL states that it is an offence to bribe a foreign public official. A person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly promises, gives, offers or agrees to give or offer a loan, reward, advantage, or benefit of any kind (i.e. an improper payment) to a foreign public officer (either for his benefit or for the benefit of another person) or to any person for the benefit of a foreign public officer as consideration for performing or omitting to perform an act in connection with their duties, or to induce the foreign public officer to use his position to influence any acts or decisions in order to obtain an advantage in the course of business. There are certain exemptions from this offence such as where an improper payment could be defined as a permitted facilitation payment.

In terms of domestic public officials, Section 10 of the ACL states that it is an offence for any person to give or offer a public officer an improper payment with the intent that the public officer should interfere with the administration of justice, procure or facilitate the commission of an offence, or prevent the detection or punishment of a person who has committed or who intends to commit an offence.

In addition, the UK Bribery Act 2010 has extra-territorial application to the Cayman Islands, as the offences of active or passive bribery (in the public or private sector) apply to acts committed overseas (where the act or omission would have been an offence, if done or made in the UK), provided the offender has a close connection with the UK. A close connection includes a British citizen, a British overseas territories citizen (which may include many Cayman Islands citizens), an individual ordinarily resident in the UK or a body incorporated in any part of the UK.

Furthermore, an offence of failing to prevent bribery by not having adequate procedures applies to companies, wherever incorporated, which conduct part of their business in the UK.

#### o Criminal anti-competition

The Utility Regulation and Competition Law (2018 Revision) (the “**URC Law**”) concerns competition within the “Electricity”, “Fuel” and “Information and Communications Technology” markets (the “**Markets**”), which are regulated by the Utility Regulation and Competition Office (the “**Office**”) (an amalgamation of the Information and Communications Technology Authority, the Electricity Regulatory Authority and the Petroleum Inspectorate). Under the URC Law, the Office is granted competition and consumer protection powers and charged with a duty to promote innovation in the Markets.

A knowing refusal or failure to comply with a direction issued by the Office or any relevant sectoral legislation (i.e. market-specific legislation) is an offence resulting, on summary conviction, in a *per diem* fine of approximately US\$4,000 for so long as the refusal or failure continues.

Additionally, a knowing contravention of any statutory duty in the URC Law, the accompanying regulations, or any relevant sectoral legislation is also an offence, resulting, on summary conviction, in a fine of approximately US\$40,000 or imprisonment for a term of two years, or both.

#### o Cartels and other competition offences

The Cayman Islands does not have a specific law in relation to cartels or other competition offences such as monopolies (apart from those described above) and such offences will follow the common law of England and Wales.

#### o Tax crimes

The Cayman Islands is a tax-neutral jurisdiction (i.e. no direct taxation), and therefore does not have specific laws relating to tax crimes. It is possible that certain offences under the Penal Code (or common law) may be ancillary to a tax offence and could be prosecuted (e.g. false accounting, perjury, conspiracy to defraud and uttering false documents) or form a predicate offence for a money laundering offence or similar.

The Penal Code was amended on 1 December 2017. The amendment creates a type of tax evasion offence in the Cayman Islands, which forms a predicate for money laundering. In conjunction with the dual criminality provisions under the PCL (whereby criminal conduct, for the purposes of money laundering, can include conduct committed overseas, as long as it would be an offence under Cayman Islands law), this new offence reinforces the fact that foreign tax evasion and equivalent tax crimes are reportable in the Cayman Islands.

Broadly, it is an offence when a person, with intent to defraud the Cayman Islands Government, wilfully (i) provides false or fraudulent information to a collector of general revenue, (ii) omits information required to be provided to a collector of general revenue, or (iii) obstructs, hinders, intimidates or resists a collector of general revenue.

The Cayman Islands government has also entered into bilateral agreements (and in some cases, a unilateral arrangement) for information exchange with various countries in relation to criminal and civil tax matters, e.g., facilitating the exchange of tax information between the TIA and overseas fiscal authorities. Those agreements and arrangements are recognised under the TIA Law and non-compliance with a notice to produce information issued by the TIA would be an offence.

#### o Government-contracting fraud

There is no specific offence relating to government-contracting fraud; however, such an offence is likely to fall under the general range of fraud-related offences of the Penal Code (or common law), as well as the ACL. Section 11(1)(f) of the ACL states that a person commits an offence if, having made a tender to obtain a contract with the government, he either (a) gives, offers or agrees to give or offer a loan, reward, advantage or other benefit to another person as consideration for that person to withdraw his own competing tender, or (b) agrees to accept from that person any such benefit as consideration for the withdrawal of his tender.

#### o Environmental crimes

Section 169 of the Penal Code contains elements of offences in relation to pollution. The more relevant offences from a business crime perspective relate to “voluntarily vitiating the atmosphere” so as to render it noxious to the health or comfort of persons in the neighbourhood, to the making of loud noises or offensive smells for the purposes of trade or otherwise that interfere with the comfort of persons, and to depositing refuse in the sea within 500 yards of the shore. In relation to the last point, the UK Statutory Instrument 1998 No. 1084 Marine Pollution, the Environment Protection (Overseas Territories) Order 1988 also applies to the Cayman Islands.

It is an offence under Section 22 of the Marine Conservation Law (2013 Revision) (the “MCL”) to directly or indirectly cause (or permit) the flowing (or putting) of any harmful effluents or raw sewage into Cayman waters. The MCL also embodies a battery of offences in relation to the removal of specified marine life and the intentional cutting, carving, injury, mutilation, removal, displacement or breakage of any underwater coral, plant growth or formation in Cayman waters. Upon summary conviction, following the contravention of any provision of the MCL, the offender will be liable to: (i) a fine of approximately US\$400,000; (ii) imprisonment for 12 months; and (iii) if the court orders, the confiscation of any vessel or equipment that it is satisfied has been used for the purpose of committing (or facilitating the commission of) such an offence, or was intended to be used for such a purpose.

Additionally, the Merchant Shipping (Marine Pollution) Law, 2001 (the “MSL”), which seeks to prevent the deliberate, negligent or accidental release of oil and other harmful substances, contains offences in relation to, amongst other things, the dumping of wastes at sea and failure to comply with various Chapters under the MSL requiring the prevention of pollution by:

- (a) oil;
- (b) noxious liquid substances in bulk;
- (c) harmful substances carried by sea in packaged form; and
- (d) garbage, in each case attracting liability on conviction on indictment to fines ranging from approximately US\$40,000 to US\$80,000.

#### o Campaign-finance/election law

Under Section 12 of the ACL, a person commits an offence who, in order to obtain or retain a contract with the government, or as a term of any such contract, directly or indirectly subscribes or gives (or agrees to do so) to any person any loan, reward, advantage or other benefit (a) for the purpose of promoting the election of a candidate or a class or party of candidates to the Cayman Islands Legislative Assembly, or (b) with intent to influence or affect in any way the result of an election conducted for the purpose of electing persons to serve in that Legislative Assembly.

Additionally, pursuant to Section 102(2) of the Elections Law (2017 Revision) (the “Elections Law”), the commission of an “illegal practice” is an offence. Illegal practices under the Elections Law include, but are not limited to: the making of false declarations in relation to election expenses; knowingly exceeding the maximum indicated amount of election expenses to be incurred; the making of a false or incorrect return; and failure to comply with the accounting requirements stipulated in Section 71 of the Elections Law. An offender is liable, on summary conviction, to a fine of US\$400 or to imprisonment for five months.

#### o Market manipulation in connection with the sale of derivatives

As mentioned above, the SIBL creates criminal offences for market manipulation. Under Section 24 of the SIBL, it is an offence for a person to create or do anything which is calculated to create a false or misleading appearance with respect to the market for, or the price of any such securities.

A person who commits such an offence is liable on summary conviction to a fine of approximately US\$5,000 and to imprisonment for one year, or on conviction on indictment to a fine of approximately US\$12,000 and to imprisonment for seven years.

Proceedings with respect to such offences may only be instituted by the Attorney General/DPP.

#### o Money laundering or wire fraud

Under the Anti-Money Laundering Regulations (2018 Revision) (the “Regulations”) (which are promulgated under the PCL), it

is an offence for a financial service provider (conducting relevant financial business in or from the Cayman Islands) to (amongst other things) form a business relationship, or carry out a one-off transaction, with an applicant for business without maintaining the following anti-money laundering procedures:

- (a) Client Identification and Verification.
- (b) Internal Controls and Communications (Ongoing Monitoring).
- (c) Record Keeping.
- (d) (Suspicious Activity) Reporting and Appointment of a Reporting Officer (and deputy).
- (e) Designation of a Compliance Officer.
- (f) Training and Awareness.

Non-compliance may lead to either, on summary conviction, a fine of approximately US\$600,000, or on indictment, a term of imprisonment for two years and a fine upon conviction.

The PCL, the Misuse of Drugs Law (2017 Revision) (the “MDL”) and the Terrorism Law (2018 Revision) (the “Terrorism Law”) create a number of offences in relation to activities involving the laundering of the proceeds of crime.

Under the PCL, it is an offence to:

- (i) conceal, disguise, convert or transfer criminal property or remove it from the Cayman Islands;
- (ii) acquire, use or have possession of criminal property;
- (iii) become concerned in an arrangement that facilitates the acquisition, use or control of criminal property by another;
- (iv) fail to disclose knowledge (gained through business in the regulated sector), suspicion or reasonable grounds for suspecting, that another person is engaged in criminal conduct; or
- (v) make any disclosure that is likely to prejudice an investigation, or falsify, conceal, destroy or dispose of documents relevant to an investigation.

The term “criminal property” underpins the three main offences and now incorporates the mental element required for prosecution. “Criminal property” constitutes or represents a person’s benefit (in whole, part, directly or indirectly) from criminal conduct and the offender knows or suspects that it constitutes or represents such a benefit. It also includes terrorist property, which serves to bring the Terrorism Law offences under the umbrella of PCL. The term “criminal conduct” covers any offence committed in the Cayman Islands or which would have constituted an offence if committed in the Cayman Islands.

Each of the offences under (i), (ii) and (iii) carry either: a fine of approximately US\$6,000 and a term of two years’ imprisonment on summary conviction; or a term of 14 years’ imprisonment and a fine (likely to be equivalent to the sum of funds laundered, confiscated or lost) upon conviction on indictment. The offences under (iv) and (v) carry either: a fine of approximately US\$6,000 or two years’ imprisonment upon summary conviction; or a term of five years’ imprisonment and an unlimited fine upon conviction on indictment. There are similar, yet bespoke, offence provisions under the Terrorism Law.

Given the recent increase in fines under the Regulations, the penalties under the PCL and Terrorism Law are also due to be increased.

#### o Cybersecurity and data protection law

Pursuant to Part II, Section 9(2) of the Information and Communications Technology Law (2017 Revision) (the “ICT Law”), the Office is responsible, *inter alia*, for the:

- development and maintenance of cybersecurity strategies to enhance and support the security and resilience of national and critical ICT infrastructure; and

- facilitation of intergovernmental and interagency collaboration in support of cybersecurity information sharing and cybersecurity strategies towards local and global efforts to combat cyber threats.

Additionally, offences are created under the ICT Law in relation to prohibited uses of an “ICT network”, “ICT service” or the frequency spectrum. An ICT network is defined under the ICT Law as being any network used in connection with: the provision of any information technology service; telecommunications service; electronic media and broadcast service; digital library and commercial information service; network-based information service and related specialised professional service provided by electronic means; and any other similar service, including a service that consists of, or includes the provision of, dark fibre.

Of particular note are the offences created under the following Sections of Part X of the ICT Law:

- Pursuant to Section 83, any person who removes, alters, damages, disrupts, disables, or destroys any ICT Network or ICT apparatus, except in accordance with the ICT Law, commits an offence and is liable, on summary conviction, to a fine of approximately US\$16,000 or to imprisonment for two years or, on conviction on indictment, to a fine of approximately US\$32,000 or imprisonment for four years.
- Section 88 provides that an originator (defined in the ICT Law as being any person who: originally sends a message; instructs another to send a message that has originated from him on his behalf; or configures and enables his electronic agent to initiate a message on his behalf) who: (a) with knowledge that a message is dangerous to the security of the Islands or contrary to public order; and (b) with intent, sends that message commits an offence and is liable, on conviction on indictment, to a fine of approximately US\$400,000 and to imprisonment for 10 years.
- Under Section 90, any person who knowingly uses an ICT network or ICT service to defraud, abuse, annoy, threaten or harass any other person commits an offence and is liable, on summary conviction, to a fine of approximately US\$8,000 and to imprisonment for a year, or, on conviction on indictment, to a fine of approximately US\$16,000 and to imprisonment for two years.
- Section 92 creates the offence of unlawfully acting, whether within or outside the Cayman Islands, as Administrative Point of Contact or Technical Point of Contact in relation to the top level of the global Internet Domain Name System. An offender, on summary conviction, will be liable to a fine of up to approximately US\$16,000 and two years’ imprisonment.

#### o Trade sanctions and export control violations

European Union economic sanctions are currently extended to the Cayman Islands by UK statutory instrument (orders in council). At present, there are approximately 30 sanctions regimes that apply directly as a matter of Cayman Islands law.

Such sanctions orders apply to:

- any person in the Cayman Islands;
- any British citizen, British overseas territories citizen, British Overseas citizen, British subject, British National (Overseas) or British protected person, who is ordinarily resident in the Cayman Islands; and/or
- a body incorporated or constituted under the law of any part of the Cayman Islands.

The required mental state of the accused, and the results of a breach, depend upon the particular sanctions order. However, other than strict liability offences, in general the accused must either know or have reasonable cause to suspect that what he is doing is in breach of the sanctions order. Liability for breaching the sanctions order is a fine and/or imprisonment.

### 3.2 Is there liability for inchoate crimes in your jurisdiction? Can a person be liable for attempting to commit a crime, whether or not the attempted crime is completed?

Part XII of the Penal Code states that when a person intending to commit an offence begins to put his intention into execution by means adapted to its fulfilment and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own volition from the further prosecution of his intention. It is also immaterial that, by reason of circumstances not known to the offender, it is impossible to commit the offence.

In light of the above, a person deemed to have attempted to commit an offence is guilty of an offence.

Furthermore, specific laws also have provisions for inchoate offences including the PCL, ACL, and Terrorism Law.

## 4 Corporate Criminal Liability

### 4.1 Is there entity liability for criminal offences? If so, under what circumstances will an employee’s conduct be imputed to the entity?

Corporate criminal liability exists within Cayman Islands law on the principal basis that a crime is committed by any “person” who commits an offence. Section 3 of the Interpretation Law (1995 Revision) defines “person” as able to denote (unless inconsistent or otherwise specified) any corporation, either aggregate or sole, and any club, society, association, or other body of one or more persons.

Corporate criminal liability is also addressed under the Penal Code, PCL, ACL, Terrorism Law and the SIBL, among others.

A corporate entity’s liability for an employee’s conduct will depend on whether the offence is one for which there is vicarious liability (see further below). If so, then the corporate entity can be held liable for the act of that employee. If there is no vicarious liability, then the question will turn on whether the employee with the requisite *mens rea* was part of the “directing will or mind” of the corporate entity.

### 4.2 Is there personal liability for managers, officers, and directors if the entity becomes liable for a crime? Under what circumstances?

Managers, officers and/or directors may be held criminally liable if they are found to be part of the “directing will or mind” of the liable corporate entity.

The standard offence for vicarious liability under the laws above generally provides that where an offence is proven to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of a director, manager, secretary or other similar officer of the body corporate (or other form of entity, e.g., partnership) or a person who was purporting to act in any such capacity (however designated), the person committing the offence, as well as the body corporate, shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

#### 4.3 Where there is entity liability and personal liability, do the authorities have a policy or preference as to when to pursue an entity, when to pursue an individual, or both?

The prosecution will have discretion as to whether or not to prosecute a company, or the individual, or both. Both may be prosecuted at the same time and for the same offence. The prosecution may, however, take into account certain other factors, such as whether civil and/or regulatory sanctions are equally applicable to the corporate entity or individual, the level of cooperation with the prosecution/regulatory authorities, the evidence and the evidentiary burden for each offence, as well as the solvency of the individual and the entity.

#### 4.4. In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

Pursuant to Section 236 of the Companies Law (2018 Revision) and under Section 49(1) of the Limited Liability Companies Law (2018 Revision), subject to any specific arrangements entered into by the relevant parties, the surviving or consolidated company shall be liable for and subject, in the same manner as the constituent companies, to all mortgages, charges or security interests, and all contracts, obligations, claims, debts, and liabilities of each of the constituent companies.

As such, where a merger or consolidation occurs, an existing claim, cause or proceeding, whether civil (including arbitration) or criminal pending at the time of the merger or consolidation by (or against) a constituent company, is not abated or discontinued by the merger or consolidation but rather continued by or against the surviving or consolidated company.

In the same manner, a conviction, judgment, ruling, order or claim, due (or to become due) against a constituent company, is not released or impaired by a merger or consolidation, but will apply to the surviving or consolidated company instead of to the constituent company.

## 5 Statutes of Limitations

#### 5.1 How are enforcement-limitations periods calculated, and when does a limitations period begin running?

There are no limitation periods for the prosecution of indictable offences.

In relation to summary offences, the prosecution must generally be commenced within six months from the date on which the offence was committed or discovered.

#### 5.2 Can crimes occurring outside the limitations period be prosecuted if they are part of a pattern or practice, or ongoing conspiracy?

No. As with the law of England and Wales, conspiracies are only triable on indictment.

#### 5.3 Can the limitations period be tolled? If so, how?

No, it cannot.

## 6 Initiation of Investigations

#### 6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

The authorities in the Cayman Islands will not, in the ordinary course, enforce their authority outside of the jurisdiction. However, they can, and do, give and receive mutual legal assistance in relation to criminal matters from certain specified countries under the Criminal Justice (International Cooperation) Law (2015 Revision) and MLAT. Such legal assistance can include taking and providing evidence, executing searches and seizures, examination of objects and sites, identifying or tracing proceeds or property, freezing criminal property, assisting with forfeiture and restitution and facilitating the voluntary transfer of witnesses.

#### 6.2 How are investigations initiated? Are there any rules or guidelines governing the government's initiation of any investigation? If so, please describe them.

Investigations are usually commenced once a complaint or report is made, or the authorities consider that a crime has been committed. There are no publicly accessible rules relating to the initiation of criminal investigations; however, CIMA does set out its approach to enforcement in its Enforcement Manual (available on CIMA's website under the following link: [https://www.cima.ky/upimages/commonfiles/1521058565RevisedEnforcementManual2018\\_1521058565.pdf](https://www.cima.ky/upimages/commonfiles/1521058565RevisedEnforcementManual2018_1521058565.pdf)).

#### 6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

See the response to question 6.1.

## 7 Procedures for Gathering Information from a Company

#### 7.1 What powers does the government have generally to gather information when investigating business crimes?

Under Section 34 of the Monetary Authority Law (2018 Revision), CIMA may, at any time by notice in writing, require a regulated or connected entity (or even any person reasonably believed to have information relevant to enquiries to which the request relates) to provide specified information or documents, or a category of such information or documents. CIMA may also, in certain circumstances, exercise similar powers following a request by an overseas regulatory authority and direct such persons to produce the information.

Under the Regulatory Laws, CIMA is entitled at all reasonable times to have access to a licensed corporate entity's books, records, vouchers, documents, cash and securities.

The RCIPS has powers under the PCL, Terrorism Law, and similar criminal laws, to obtain warrants to search premises and obtain documentation or information. A Production Order may also be obtained under the PCL by the investigating authorities.

The FRA has the power under the PCL to request the production of information that may clarify or amplify a disclosure or an enquiry from an overseas intelligence agency.

The TIA also has the power under the TIA Law to compel a person to produce information sought under that law.

The AC Commission can require any person to provide information for the purpose of clarifying or amplifying information relating to corruption offences.

## Document Gathering:

### 7.2 Under what circumstances can the government demand that a company under investigation produce documents to the government, and under what circumstances can the government raid a company under investigation and seize documents?

In relation to demands for production of documents, please see the answer to question 7.1 above.

Many of the Regulations give CIMA, or a police officer of the rank of Inspector or above, the power to apply to a Magistrate, Judge or Justice of the Peace, to issue a warrant authorising CIMA, or a police officer and any such other persons, to search, inspect and take possession of records, based on a suspicion or belief that an offence may have been or may be committed.

Under the PCL, investigations have been categorised as either confiscation, money laundering or civil recovery investigations. A Restraint Order (to freeze realisable property liable to confiscation) may be obtained by the DPP once an investigation has commenced, without the need to bring charges within 21 days. In addition to such Orders, the court may grant Disclosure, Customer Information and Account Monitoring Orders.

### 7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

The concept of legal privilege is recognised in the Cayman Islands. Legal privilege can be put forward as a defence to inspection of applicable documents; for example, legal advice provided to the corporate entity in relation to the inspection by the authority. Legal privilege may be applied to avoid production of subject documents in relation to requests for information by the TIA (under the TIA Law) and CIMA (under the Monetary Authority Law).

Legal professional privilege is also available to avoid the obligation to report suspicious activity under the PCL and Terrorism Law, unless in furtherance of the criminal purpose.

The Data Protection Law, 2017 was published on 6 June 2017 but is not yet in force. A commencement order by Cabinet is expected in early 2019. The confidentiality protections afforded by the Confidential Information Disclosure Law, 2016 are, in most cases, overridden by other provisions of Cayman Islands law, in cases of investigations.

### 7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

In terms of duties of confidentiality, Cayman Islands companies may well owe such duties to their employees with respect to their confidential information, which duties continue after the contractual relationship has ended. However, most companies will have included within the contract(s) governing the employment relationship an express consent on the part of the employee for the company to disclose that confidential information in a particular manner (including cross-border). Such express consent on behalf of the principal (here, the employee) is an exception to the duty of confidentiality under the Confidential Information Disclosure Law, 2016, which codifies the various exceptions to the common law duty of confidentiality.

With respect to data protection issues, although not yet in force, the Cayman Islands government has passed the Data Protection Law, 2017 (the "DP Law") which, amongst other things, prescribes the circumstances in which employees' "sensitive personal data" can be "processed". The DP Law is expected to come into force in early 2019.

The DP Law defines "sensitive personal data" as personal data consisting of:

- (a) the racial or ethnic origin of the data subject [i.e. the employee];
- (b) the political opinions of the data subject;
- (c) the data subject's religious beliefs or other beliefs of a similar nature;
- (d) whether the data subject is a member of a trade union;
- (e) genetic data of the data subject;
- (f) the data subject's physical or mental health or condition;
- (g) medical data;
- (h) the data subject's sex life;
- (i) the data subject's commission, or alleged commission, of an offence; or
- (j) any proceedings for any offence committed, or alleged, to have been committed, by the data subject, the disposal of any such proceedings or any sentence of a court in the Cayman Islands or elsewhere.

The DP Law defines "processing" as obtaining, recording or holding data, or carrying out any operation or set of operations on personal data, including:

- (a) organising, adapting or altering the personal data;
- (b) retrieving, consulting or using the personal data;
- (c) disclosing the personal data by transmission, dissemination or otherwise making it available; or
- (d) aligning, combining, blocking, erasing or destroying the personal data.

In addition, although the DP Law is not yet in force, the EU's General Data Protection Regulation (Regulation (EU) 2016/679) does currently apply to companies outside the EU, if they are providing services to EU data subjects or data controllers.

**7.5 Under what circumstances can the government demand that a company employee produce documents to the government, or raid the home or office of an employee and seize documents?**

See the response to question 7.1. As described under question 7.2, a regulatory authority or police officer would need to seek a court warrant before searching and inspecting a company employee's office or home.

**7.6 Under what circumstances can the government demand that a third person or entity produce documents to the government, or raid the home or office of a third person or entity and seize documents?**

See the response to question 7.5.

**Questioning of Individuals:**

**7.7 Under what circumstances can the government demand that an employee, officer, or director of a company under investigation submit to questioning? In what forum can the questioning take place?**

As described under question 7.1, CIMA may apply to the Cayman Islands court to have a person examined on oath and have the results sent to CIMA. There is no set forum where such questioning should take place. The police have similar powers to request and/or compel questioning, although the witness would be permitted to be accompanied by an attorney.

**7.8 Under what circumstances can the government demand that a third person submit to questioning? In what forum can the questioning take place?**

See the response to question 7.7.

Under Section 19 of the Evidence Law (2018 Revision) (the "Evidence Law"), in any criminal proceeding, a spouse of the accused shall be competent and compellable to give evidence for the accused or the prosecution, as long as that spouse is not jointly charged with the accused in that offence.

Under Section 64 of the Evidence Law, if a person under recognisance to appear before a court to give evidence in a criminal proceeding is likely to leave the Cayman Islands before having done so, the court may order that person to give security to ensure he will not leave the country until they have done their duty, or detain such person upon such terms as to costs and compensation for loss of time to such person, if the court thinks fit, until that person has carried out their duty.

**7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?**

Persons interviewed under caution may refuse to answer questioning, but adverse inferences may be drawn. All persons interviewed under caution are entitled to representation by an attorney.

In criminal proceedings, Section 18(c) of the Evidence Law states that a person charged or acting as a witness may be asked any question in cross-examination, notwithstanding the fact that it would tend to incriminate him or her in the offence charged. However, in civil proceedings, Section 55 of the Evidence Law includes the right to refuse to answer any question that would expose that person or their spouse to a criminal offence.

**8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions**

**8.1 How are criminal cases initiated?**

The Criminal Procedure Code (2017 Revision) sets out the means by which criminal cases are initiated. In practice, this is generally done either by orally charging the defendant at a police station and bringing him before a Magistrate, or by the police obtaining a warrant for the defendant's arrest.

**8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?**

There is no statutory rule regarding the manner in which the decision to charge an entity or individual with a crime. There is prosecutorial discretion in relation to all alleged criminal offences. In general, no prosecution should be commenced unless there is sufficient evidence, or a *prima facie* case, and it is in the public interest to proceed to prosecute.

The DPP retains the power to take over and continue any criminal proceedings, and may also discontinue those proceedings at any stage before judgment is delivered.

**8.3 Can a defendant and the government agree to resolve a criminal investigation through pretrial diversion or an agreement to defer prosecution? If so, please describe any rules or guidelines governing whether pretrial diversion or deferred prosecution agreements are available to dispose of criminal investigations.**

Pre-trial diversion and deferred prosecution are not generally available in the Cayman Islands.

**8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.**

Deferred prosecution and non-prosecution agreements are not generally available in the Cayman Islands.

**8.5 In addition to, or instead of, any criminal disposition to an investigation, can a defendant be subject to any civil penalties or remedies? If so, please describe the circumstances under which civil penalties or remedies may apply.**

Yes, a defendant can be subject to both civil and criminal remedies. The prosecution of one is not dispositive of the other. For example, where a criminal prosecution does not, for whatever reason, result in

the return of money or assets acquired as a result of the crime, or the defendant is otherwise acquitted, asset recovery proceedings may be instituted by regulatory authorities or persons with a valid claim.

## 9 Burden of Proof

### 9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

In criminal matters, the burden of proof generally lies with the prosecution to establish every element of the offence. In civil or regulatory matters, the burden of proof may vary, depending on what is being alleged.

### 9.2 What is the standard of proof that the party with the burden must satisfy?

The standard of proof for the prosecution on criminal matters is “beyond reasonable doubt”. The standard of proof for civil or administrative matters will be on a balance of probabilities.

### 9.3 In a criminal trial, who is the arbiter of fact? Who determines whether the party has satisfied its burden of proof?

For summary offences, matters of both fact and law are determined by the Magistrates and/or Justices of the Peace.

For indictable offences, the arbiter of fact is nearly always the jury. However, if an accused person is of the opinion that, due to the nature of the case or of the surrounding circumstances, a fair trial with a jury may not be possible, he may elect to be tried by a Judge alone, and the Judge will be the sole arbiter.

## 10 Conspiracy / Aiding and Abetting

### 10.1 Can a person who conspires with or assists another to commit a business crime be liable? If so, what is the nature of the liability and what are the elements of the offence?

Yes. Generally, the Penal Code provides that every person who: (a) does or omits to do any act for the purpose of enabling or aiding any other person to commit an offence; or (b) aids or abets another person in committing an offence, or is deemed to have taken part in committing the offence, may be charged with actually committing that offence.

Further, any person who counsels or procures any person to commit an offence may be charged with committing the offence himself or with counselling or procuring its commission, although the consequences in all respects of conviction are the same. It is immaterial whether the offence actually committed is the same as the one counselled or a different one, provided that the facts constituting the offence actually committed are a probable consequence of the carrying out of the counsel.

Some laws include specific separate inchoate offences, such as the PCL or the ACL which provide for the separate offences of (a) attempting, conspiring or inciting the commission of an offence, and (b) aiding, abetting, counselling or procuring the commission of an offence. For the purposes of the PCL, such inchoate offences are amalgamated into the definition of money laundering.

## 11 Common Defences

### 11.1 Is it a defence to a criminal charge that the defendant did not have the requisite intent to commit the crime? If so, who has the burden of proof with respect to intent?

Usually, with the exception of strict liability crimes, proof of lack of intent will be a defence. Although it will be the onus of the prosecution to prove intent, the burden will shift to the suspect to rebut such proof. Subject to offences relating to negligent or wilful acts and omissions, or strict liability offences, a person is not criminally responsible for an act or omission occurring independently of the exercise of his will or by accident.

### 11.2 Is it a defence to a criminal charge that the defendant was ignorant of the law, i.e., that he did not know that his conduct was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the law?

Ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offence.

### 11.3 Is it a defence to a criminal charge that the defendant was ignorant of the facts, i.e., that he did not know that he had engaged in conduct that he knew was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the facts?

A person who performs, or who omits to perform, an act under an honest and reasonable, but mistaken, belief in the existence of a state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist. The burden of proving the defendant's mistake in such circumstances lies with the prosecution.

## 12 Voluntary Disclosure Obligations

### 12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or “credit” for voluntary disclosure?

The Whistleblower Protection Law, 2015 was brought into force in February 2018. The Law seeks to encourage disclosures of improper conduct, in the public interest, by employees and to protect them from detrimental action (e.g. civil or criminal action). The Law applies to employees/employers of statutory authorities, government agencies and private enterprises.

There are also specific reporting obligations with regards to money laundering and terrorism or terrorist financing.

With respect to the offence of money laundering, under the PCL, a person commits an offence if he knows and suspects or has reasonable grounds for knowing or suspecting that another person is engaged in criminal conduct, where the knowledge or suspicion

is based on information obtained in the course of business and they fail to make a disclosure to a nominated person (ordinarily the money laundering reporting officer in their business) or the FRA. It is a defence, however, if that person had a reasonable excuse for not making the required disclosure, if the information came to him under privileged circumstances and he did not know or suspect that the other person is engaged in money laundering and he has not been provided with training by his employer as required by the Regulations.

There are similar mandatory reporting obligations under the Terrorism Law, ACL and legislation applying sanctions (usually adopted by extension of a Statutory Instrument from the UK) implemented by the United Nations or European Union.

There is no formal process for “credit” for voluntary disclosure.

### 13 Cooperation Provisions / Leniency

**13.1 If a person or entity voluntarily discloses criminal conduct to the government or cooperates in a government criminal investigation of the person or entity, can the person or entity request leniency or “credit” from the government? If so, what rules or guidelines govern the government’s ability to offer leniency or “credit” in exchange for voluntary disclosures or cooperation?**

The DPP has a wide discretion in determining whether to initiate proceedings, or if prosecution is initiated, whether a more lenient charge or credit can be applied. We are not aware of any published rules or protocols in this regard.

**13.2 Describe the extent of cooperation, including the steps that an entity would take, that is generally required of entities seeking leniency in your jurisdiction, and describe the favourable treatment generally received.**

As noted above, there are no set protocols of which we are aware, in relation to the application by the prosecution of leniency or plea agreements. There is no guarantee that cooperation with the authorities in a criminal investigation will avoid prosecution or result in a reduced financial penalty. However, assisting the police usually merits reduced sentences, subject to the degree of assistance. When assessing the value of information provided by the accused in mitigation, the court will consider the seriousness of the offence, the value of the accused’s assistance and the potential risk to the accused and their family in assisting and the need to punish the accused for their involvement in the offence.

### 14 Plea Bargaining

**14.1 Can a defendant voluntarily decline to contest criminal charges in exchange for a conviction on reduced charges, or in exchange for an agreed-upon sentence?**

Agreements to sentencing are not judicially recognised; however, there are instances where a defendant may arrange a deal with the prosecution to the effect that a guilty plea in relation to one charge may result in certain other charges either being discontinued or not pursued.

**14.2 Please describe any rules or guidelines governing the government’s ability to plea bargain with a defendant. Must any aspects of the plea bargain be approved by the court?**

There are no formal rules or guidelines in relation to plea bargaining with the prosecution as far as we are aware. Negotiations with the defendant will be dealt with by the prosecution. However, a basis of plea is always subject to the approval of the court, which will consider whether it is fair and in the interests of justice.

### 15 Elements of a Corporate Sentence

**15.1 After the court determines that a defendant is guilty of a crime, are there any rules or guidelines governing the court’s imposition of a sentence on the defendant? Please describe the sentencing process.**

Although the courts have sentencing guidelines, these are limited in scope with respect to some modern offences which have not been previously committed. Before passing sentence, the court will generally consider the statutory penalty first. The court will then request and review any evidence as it thinks fit as to the proper sentence passed and may hear submissions on mitigation or other circumstances which may be relevant.

**15.2 Before imposing a sentence on a corporation, must the court determine whether the sentence satisfies any elements? If so, please describe those elements.**

The primary aims of sentencing are rehabilitation, deterrence, incapacitation and restitution, but not necessarily in that order. When determining whether to impose a sentence, the court will consider general deterrence, the offender’s culpability and influence on future behaviour by subjecting the defendant to an appropriate measure of supervision, treatment or preventative confinement. The court will decide which objective should prevail in the particular case depending on the particular circumstances.

### 16 Appeals

**16.1 Is a guilty or a non-guilty verdict appealable by either the defendant or the government?**

Any person dissatisfied with any judgment or sentence order of the Summary Court may appeal to the Grand Court on matters of law or fact (or both). This applies to both the defendant and the prosecution.

Either the defendant or the prosecution may appeal a judgment to the Court of Appeal on any ground which involves a point of law, or against sentence, but not on any question of fact.

Further, where the defendant has been discharged or acquitted in the Grand Court, whether by jury or by Judge alone, or has been convicted of an offence other than one in which he has been charged, the prosecution may appeal to the Court of Appeal on any ground of appeal that the decision of the trial Judge is erroneous on a point of law.

The procedure for appeals is set out in specific rules relating to the specific appellate court.

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**16.2 Is a criminal sentence following a guilty verdict appealable? If so, which party may appeal?**

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Both the defendant and the prosecution may appeal the extent or legality of a criminal sentence to the Grand Court (see question 16.1).

Where the DPP finds the sentencing of a person in the Grand Court has been unduly lenient, or is wrong in law, and the sentence is passed on an offence triable on indictment, the DPP may refer the matter to it for review of the sentence, with leave of the Court of Appeal.

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**16.3 What is the appellate court's standard of review?**

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The grounds on which a conviction may be allowed are very similar to the English grounds, i.e.: (a) the conviction was unsafe or unsatisfactory; (b) it was wrong on a question of law; or (c) there was a material irregularity in the course of the trial.

The appellate court may vary sentence only if it is: (a) unjustified in law; (b) based on factual error; (c) based on factors not to be considered/admissible; or (d) manifestly excessive or wrong in principle.

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**16.4 If the appellate court upholds the appeal, what powers does it have to remedy any injustice by the trial court?**

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The Grand Court may confirm, vary or modify the decision of the Summary Court, including the passing of a lesser sentence, or remit the matter back to the Summary Court for re-trial or review of sentencing, or may make such other order in the matter as it may think just, and may, by such order, exercise any power which the Summary Court might have exercised, including the payment of costs.

The Court of Appeal may quash the conviction and direct that a judgment and verdict of acquittal be entered, or, if the interests of justice so require, may order a new trial in accordance with its further direction. It may also either quash the sentence or enter a different sentence.

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