



# ICLG

## The International Comparative Legal Guide to: **Business Crime 2018**

### **8th Edition**

A practical cross-border insight into business crime

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# Bermuda

MJM Limited

Jennifer Haworth



## 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?

The Department of Prosecutions (“DPP”) is responsible for instituting and undertaking criminal proceedings in respect of all types of criminal offences, including business crimes, money laundering and terrorist financing in Bermuda. Business crimes are prosecuted by the DPP on a national level only. Bermuda does not have any regional enforcement.

Counsel acting within the DPP also provide legal advice to the Bermuda Police Service (“BPS”) in relation to criminal investigations and the approval of criminal charges. The DPP is also responsible for initiating and conducting civil proceedings for the restraint, forfeiture and confiscation of the proceeds of criminal conduct.

### 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?

The DPP is the sole prosecutorial agency for business crimes. However, the Bermuda Monetary Authority (“BMA”) and the Financial Intelligence Agency (“FIA”) assist with the detection and prevention of financial crime. Both the BMA and the FIA disseminate information to the BPS, who can in turn then pass it on to the DPP for prosecution.

### 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?

Yes, the BMA is the regulatory authority that enforces civil penalties for business crimes. The BMA also represents the administrative enforcement of business crimes. The relevant statutes that the BMA enforce are: the Bank and Deposit Companies Amendment Act 2012; the Corporate Service Providers Business Act 2012; the Insurance Amendment Act 2012; the Investment Business Amendment Act 2012; the Proceeds of Crime Amendment Act 2013; the Proceeds of Crime Regulations (Supervision and Amendment) Act 2008; and the Trusts Regulation of Business (Amendment) Act 2012.

## 2 Organisation of the Courts

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

Bermuda’s court system comprises the Magistrates’ Court, the Supreme Court, the Commercial Court, the Court of Appeal and the Privy Council in the United Kingdom (“UK”). The Magistrates’ Court can hear business crime matters if the offence is punishable on summary conviction. Any offence that is indictable must be tried in the Supreme Court. The Commercial Court of Bermuda hears civil commercial matters only. Decisions of the Magistrates’ Court can be appealed to the Supreme Court, and matters within the Supreme Court can be appealed to the Court of Appeal. The highest Court of Appeal for Bermuda is the Privy Council.

Other than the particular types of offences listed above, Bermuda does not have any other specialised courts to deal with particular crimes.

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

Yes. All criminal matters tried in the Supreme Court are tried by a judge and a jury. The Magistrates’ Court does not have jury trials. The accused has the option to elect to have the case tried by a jury on indictment rather than have it heard summarily within the Magistrates’ Court. If the accused chooses to have the case tried by a jury on indictment, the case proceeds to the Supreme Court for trial.

## 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

Please see the answer relating to market manipulation below.

#### o Accounting fraud

Section 395 (1)(b)(i–iii) of the Criminal Code 1907 (“Code”): frauds by officials of corporations and companies. Any Director, Officer or member of a company who destroys, alters, mutilates or falsifies, or is privy to making, any false entry or is privy to omitting

any material particular into any such book, document, or account among other things, which belongs to the company, with the intent to defraud, is guilty of a misdemeanour.

Section 351 of the Code: false accounting. Where a person dishonestly, with a view to gain for himself or another with intent to cause loss to another, falsified any record, or knowingly makes use of any falsified record, he shall be guilty of an offence. It should be noted that liability under this Section extends to consent or involvement of an Officer of the company, as set out in question 4.2 below.

#### o Insider trading

Section 405 of the Code: insider dealing. When an individual has insider information in relation to price affected investments that he deals, and that information is used to acquire or dispose of the investment on a recognised investment exchange, he is guilty of insider dealing. He is also guilty if he uses that information to encourage another person dealing with price affected investments to acquire or dispose of the investment in relation to that information, whether or not the other person knows that the information is insider information. Also, in general, if a person having inside information discloses that information, other than in the proper performance of the functions of his employment, to another person.

#### o Embezzlement

Sections 395 (1)(a) and 394 of the Code: frauds by officials of corporations and companies. Any Director or Officer of a company, who receives or possesses any of the property of the company otherwise than in payment of a just debt or demand, with the intent to defraud, who does not make a full and true entry in the books and accounts of the company is guilty of a misdemeanour. Additionally, any fraudulent disposal of trust property by a trustee, who destroys the property with the intent to defraud or converts the property to any uses not authorised by the trust, is guilty of a misdemeanour.

#### o Bribery of government officials

Section 118A of the Code: corrupting or threatening a holder of a judicial office or law enforcement official: any person who attempts by threats or intimidation of any kind, or by benefits or promises of benefit of any kind, or by other corrupt means, to influence any person, whether a particular person or not, in his conduct as a holder of a judicial office or law enforcement official is guilty of an offence.

Section 112 of the Code: extortion by Public Officers: any person who, being employed in public service, takes or accepts from any person, for the performance of his duty as such Officer, any reward beyond his proper pay and emoluments or any promise of such reward, is guilty of an offence.

The Good Governance Act 2012 (“GGA”) extends to the corruption and bribery of public officials. A Member of Parliament, Senator or any person who is elected or appointed to any public authority commits an offence if he attempts to influence the awarding of a government contract, regardless of whether he has any interest in any of the persons bidding for the contract.

#### o Criminal anti-competition

Section 393 of the Code: conspiracy to defraud. Any person who conspires with another person by deceit or any fraudulent means, to affect the market price of anything publicly sold, to defraud the public or any person, or to extort any property from any person, is guilty of a misdemeanour.

#### o Cartels and other competition offences

Offences of this kind are dealt with under specific regulatory legislative framework. For example, under the Regulatory Authority Act 2011, which established the Bermuda Regulatory Authority to be responsible for certain sectoral oversight, it is an offence under

Section 105 to wilfully obstruct or to knowingly fail to comply with a request for information made by any Commissioner or member of staff of the Regulatory Authority.

#### o Tax crimes

The Taxes Management Act 1976 (“TMA”) and the Stamp Duties Act 1976 have provisions for corporate tax evasion, and state that any person who, by any wilful act or wilful default or by any art or contrivance whatever evades or attempts to evade payment of tax, is guilty of an offence. The TMA also extends liability to Officers of the Company if it is proved that the offence was committed with the consent or connivance of one of the Officers; he, as well as the company or other body corporate, shall be guilty of that offence and be liable to be proceeded against accordingly.

#### o Government-contracting fraud

This is not applicable, aside from the crime of bribery of government officials set out above.

#### o Environmental crimes

The Code has provisions relating to the damaging of plant life and for killing or injuring animals. The accused must be found to have committed the crime wilfully. There are no specific provisions relating to a company carrying out the crime.

#### o Campaign-finance/election law

None, but note the provisions in relation to corrupt practices below.

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

Section 405A of the Code: market manipulation. Any person who performs any act or engages in any course of conduct which creates a false or misleading impression as to the market in or the price or value of any relevant investments is guilty of an offence, if he does so for the purpose of creating that impression and of thereby inducing another person to acquire or dispose of an investment. It is a defence to show that he reasonably believed that his conduct would not create an impression that was false or misleading. The act, or course of conduct must be engaged in Bermuda or the false or misleading impression is created in Bermuda. Also, see the section on criminal anti-competition above.

#### o Money laundering or wire fraud

Pursuant to the Proceeds of Crime Act 1997 (“POCA”), a person is guilty of an offence if he: conceals or disguises any property which is, or in whole or in part directly or indirectly represents, his proceeds of criminal conduct, or converts or transfers that property or removes it from Bermuda; assists another with the retention of proceeds of criminal conduct; or knowing that any property is, or in whole or in part directly or indirectly represents the proceeds of criminal conduct, acquires or uses that property or has possession of it.

The Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Amendment Regulations 2010 (“Regulations”) deal with wire transfers and set out that a person is guilty of an offence if they fail to comply with the Regulations. A person is not guilty of an offence under these regulations if he took all reasonable steps and exercised all due diligence to avoid committing the offence.

#### o Cybersecurity law

None yet, although the government developed the Cabinet Cybersecurity Committee which in turn has adopted the National Institute of Standards and Technology framework to assess the country’s preparedness and mitigation efforts.

#### o Any other crime of particular interest in your jurisdiction

Section 392 of the Code: it is an offence for any person, who being an agent, to corruptly accept or obtain from any person for himself

or any other person, any gift or consideration, as an inducement for doing or not doing, or for having done or not done, any act, or for showing or not showing favour or disfavour to any person in relation to his principals, affairs or business. Additionally, it is also an offence for any person to corruptly give or agree to give any gift or consideration to any agent as an inducement. Furthermore, any person who knowingly gives to any agent or who being an agent, knowingly uses intent to deceive his principal, any receipt, account or other document in respect of which the principal is interested, containing a statement that is false or erroneous in any material particular, which to his knowledge is intended to mislead the principal. An agent includes any persons employed by or acting for another person and any person serving under the Crown or under any municipal corporation.

Also, of particular note at this time is that the Bribery Act 2016 (“BA”) was passed by the Bermuda legislature demonstrating the Bermuda government’s creation of new offences of bribery based substantially on the UK’s Bribery Act 2010. These new offences will replace existing offences and impose certain new ones. The BA calls for the establishment of the National Anti-Corruption and Bribery Committee to advise the Minister of Finance regarding the effective of Bermuda’s legislation and policy in accordance with Article 6 of the United Nations Convention against Corruption. The BA will come into force on 1 September 2017.

In addition, the Fraud Bill 2017 was tabled in the House of Assembly in May 2017 and is based on and seeks to adopt, with necessary modifications, the provisions of the UK’s Fraud Act 2006.

### 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?

Yes, the Code has provisions relating to attempts to commit offences. 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 said to attempt to commit the offence. It is irrelevant whether the person completes the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion 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.

Additionally, there is provision for an attempt to procure the commission of an offence.

## 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?

A corporation that is convicted of an offence is liable, *in lieu* of any imprisonment that is prescribed as punishment for that offence, to be fined (except where otherwise provided) with the sum not exceeding \$20,000 for a summary offence (i.e. tried in the Magistrates’ Court), or a fine at the discretion of the court for an indictable offence (i.e. tried in the Supreme Court or any appeal court). The Code only deals with liability for the actions of Directors, Officers and members.

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

Where an offence is committed by a body corporate to obtain property by deception or obtain pecuniary advantage by deception or false accounting, and is proved to have been committed with the consent or connivance of any Director, manager, secretary or other similar office of the body corporate, or any person who was purporting to act in any such capacity, the individual, as well as the body corporate, shall be guilty of that offence and shall be liable to be prosecuted and punished accordingly (Section 352 of the Code). A similar general provision is found in Section 73 of the Investment Funds Act 2006. Also, if any member of a partnership, corporation or any association recognised as a Company by the Companies Act 1981 (“Entity”), performs any act or makes any omission with respect to the property of the Entity, which if he were not a member of the Entity would constitute an offence, is criminally responsible to the same extent as if he were not such a member.

### 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?

No, there is no policy or preference as to whether to pursue an Entity or an individual or both. Such a decision will be taken on a case-by-case basis by the authorities.

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

The Companies Act 1981 provides that in the case of a statutory merger or amalgamation, the survivor company or the amalgamated company (as the case may be) continues to be subject to any existing liability to criminal prosecution, that any criminal proceeding pending against the merging or amalgamating companies continues, and that a criminal conviction against a merging or amalgamating company may be enforced against the merged entity or amalgamated company.

## 5 Statutes of Limitations

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

Limitation periods are calculated by reference to the particular offence or enactment setting out such offences, and run from the date of the offence.

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

No, they cannot.

### 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?

No, enforcement agencies in Bermuda do not have jurisdiction to enforce their authority outside Bermuda.

### 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.

An investigation may be commenced if the authorities receive a report that a crime has been committed. Generally, such a report will be made to the BPS, the FIA or the relevant regulatory authority. In the case of offences relating to government contracts, the GGA provides that "whistle-blowers" may also make protected disclosures to public officials such as the Auditor General, the Accountant General and the Director of Project Management and Procurement.

At the time of writing, the only publicly available guidance relating to the enforcement of business crime has been issued by the BMA as follows:

- "Statement of Principles on the Use of Enforcement Powers", published in December 2012: <http://www.bma.bm/document-centre/policy-and-guidance/TRUST%20II/Statement%20of%20Principles%20on%20the%20Use%20of%20Enforcement%20Powers.pdf>.
- "Statement of Principles in respect of the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008", published in October 2010: [http://www.bma.bm/document-centre/policy-and-guidance/AMLATF/Statement%20of%20Principles%20-%20Proceeds%20of%20Crime%20\(Anti-Money%20Laundering%20and%20Anti-Terrorist%20Financing%20Supervision%20and%20Enforcement.pdf](http://www.bma.bm/document-centre/policy-and-guidance/AMLATF/Statement%20of%20Principles%20-%20Proceeds%20of%20Crime%20(Anti-Money%20Laundering%20and%20Anti-Terrorist%20Financing%20Supervision%20and%20Enforcement.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?

The Bermuda authorities cooperate with foreign prosecuting authorities. The formal mechanisms for cooperating with foreign prosecuting authorities in criminal matters include the Criminal Justice (International Cooperation) Act 1994 and the network of mutual legal assistance agreements entered into by Bermuda with the UK's approval under that statute. Bermuda will also provide information relevant to foreign taxation authorities under the International Cooperation (Tax Information Agreements) Act 2005, without any requirement that the requesting party shall be a prosecuting authority. The UK also has the ability to exercise its power of extradition in appropriate cases, by virtue of the UK's Extradition Acts 1870 and 1873, Bermuda's Extradition Act 1877 and various orders made thereunder.

The U.S.A-Bermuda Tax Convention Act 1986 is the only treaty entered into by Bermuda relating to the exchange of tax information with the United States in criminal tax matters. Bermuda has also entered into a Mutual Legal Assistance Treaty ("MLAT") with the United States which extends beyond tax matters.

## 7 Procedures for Gathering Information from a Company

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

Where the business crime is a regulatory offence, the BMA has wide powers to require a financial institution to provide documents and information relevant to the BMA's functions as regulator, including an explanation of any documents so provided. The BMA may also exercise similar powers at the request of an overseas regulatory authority.

The BPS may obtain search and seizure warrants under the POCA, Anti-Terrorism Laws, regulatory laws and the Criminal Code in order to obtain information and documentation. Pursuant to the POCA, the BPS also has power to obtain monitoring orders and production orders.

Where the request is made by a foreign authority pursuant to an MLAT, the Attorney General may, subject to legal professional privilege, require any person in Bermuda to be deposed, give evidence and produce documents. The Attorney General may also assist in the enforcement of a foreign forfeiture order, and may order the production of any item or issue a warrant for the search of premises and the seizure of such item.

### 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?

Regarding the government's powers to enter premises, please see the answer to question 7.1 above. The regulatory laws generally confer authority on a Magistrate to issue a warrant to the BPS to search premises for the purposes of obtaining information or documents.

Similarly, the POCA and the Anti-Terrorism (Financial and other Measures) Act 2004 ("ATFM") confer power on a Magistrate to issue warrants to the BPS to search premises, take possession of documents and submit any persons to questioning.

### 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? Do the labour laws in your jurisdiction protect personal documents of employees, even if located in company files?

Legal professional privilege may be invoked as a justification for refusing to produce documents to the BMA.

Legal professional privilege may also be invoked in response to requests for documents or information made by the Attorney General at the request of a foreign state under the Criminal Justice (International Cooperation) (Bermuda) Act 1994 or any MLAT entered into by Bermuda with a foreign state pursuant to that act.

There are currently no laws of general application relating to data protection, and Bermuda law does not provide any special protection for the personal documents of employees.

**7.4 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?**

Please see the answer to question 7.1 above. The BMA or the BPS would require a warrant before searching a company employee's office or home.

**7.5 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?**

Please see the answer to question 7.4 above.

**Questioning of Individuals:**

**7.6 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?**

The BMA may arrange for the questioning of persons associated with a licensed Entity (including the Entity's auditors and lawyers) to be questioned during the course of an official investigation. It is an offence to refuse to produce documents or to answer questions. However, no statements given by a person in the course of such an examination may be used in evidence against him, and a person may decline to produce documents or answer questions on the grounds of legal professional privilege. Where there is an investigation by the BPS, the BPS has similar powers, but the exercise of the powers is subject to the procedural safeguards contained in the Police and Criminal Evidence Act 2005 ("PACE").

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

Please see the answer to question 7.6 above.

**7.8 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?**

Section 59 of the PACE provides that a person who is arrested is not obliged to say anything. Where a person has been arrested, he is entitled to have an attorney present during questioning.

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

**8.1 How are criminal cases initiated?**

The procedure for the initiation of criminal cases is set out in Part XXIV of the Code. In practice, this is generally done by charging the defendant at a police station and bringing him before the Magistrate. Alternatively, a warrant may be issued for the arrest of the defendant.

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

Please see the answer to question 6.2 above.

**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 is not generally available, and is currently limited to addiction-related crimes. Bermuda does not have a legislative framework for deferred prosecution agreements.

**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.**

Please see the answer provided at question 8.3 above.

**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.**

The BMA's "statement of principles" referenced in question 6.1 above states that the decision to impose a civil penalty will be influenced by the resources of the licensed Entity, the need to deter the licensed Entity and others from similar practices and the past enforcement practice of the BMA.

The BMA may impose civil penalties or remedies. The sanctions imposed by the BMA may include public censure and an order that the person sanctioned is prohibited from carrying on regulated activity.

A defendant can be subject to both criminal and civil sanctions imposed by the BMA. The imposition of criminal sanctions does not preclude the imposition of civil penalties. Where the criminal process does not result in a conviction, the BMA may nevertheless publicly censure the defendant and/or make a prohibition order.

**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?**

The general rule in criminal matters is that the burden is on the prosecution to establish each element of the offence. In the case of civil penalties imposed by the BMA, the burden of proof is on the defendant to show that the defendant took all reasonable steps and exercised all due diligence.

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

For criminal offences, the standard of proof is “beyond all reasonable doubt”. In the case of civil offences, the standard of proof is 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?

In the Magistrates’ Court, the Magistrate determines matters of fact and law. In the case of a trial on indictment, a jury is the arbiter of fact. In the case of a civil offence, the BMA is the arbiter of fact. There is a right of appeal to a tribunal against the imposition of a civil penalty.

## 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?

The Code provides that every person who actually commits the act or makes the omission which constitutes the offence, or who enables or aids another person to commit the offence or who counsels or procures any person to commit the offence, shall be deemed to have taken part in committing the offence and may be charged with ultimately committing it. A person who, with knowledge, assists another person to escape punishment, is an accessory after the fact.

The elements of conspiracy are a common intention between two or more persons to carry out an unlawful purpose. Where an offence is committed in the carrying-out of the unlawful purpose that is a probable consequence of the unlawful purpose, then each such person is deemed to have committed the offence. The money laundering offences created by the POCA and the anti-terrorism offences created by the ATFM do not rely upon the Code, and accessory liability is dealt with directly in the definition of the relevant offences.

## 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?

Except in the case of strict liability offences, the burden of proof is on the prosecution to establish both elements of the offence, namely the facts giving rise to the offence as well as the necessary intention on the part of the defendant to carry out the relevant acts. However, there are some crimes in which the statute reverses the burden of proof to require the defendant to demonstrate on a balance of probability that he or she did not have the requisite intent to commit the crime. For example, where a defendant is charged with providing false or misleading information to a regulatory authority, the burden is on the defendant to show that he or she did not intentionally mislead or intend to mislead the regulator.

### 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?

It is not a defence to a criminal charge that the defendant was ignorant of the law. This is a factor which may be taken into account when considering the appropriate sentence.

### 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?

It is not generally a defence to a criminal charge that the defence was ignorant of the facts. However, it may be a defence if the defendant was not aware of the facts, such that he or she did not have the necessary mental element to commit the offence.

## 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?

In some limited circumstances, there may be a positive legal obligation to disclose that a crime has been committed (for example, money laundering or terrorist financing). No, there is no leniency or “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?

No. In limited circumstances, “whistle-blowers” may be excused from personal liability under the GGA which amends the Employment Act 2000 with the insertion of Section 29A.

### 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.

This is not applicable.

## 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?

A defendant may plead guilty to an offence in exchange for conviction of a lesser charge. Although the prosecution may agree a recommendation for sentence, the sentence is always within the discretion and power of the court, and the prosecution cannot bind the court to give a particular sentence. The prosecutor's recommendation will, however, be taken into account by the court.

### 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?

Please see the answer to question 14.1 above.

## 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.

Sentencing is a separate aspect of the criminal trial process, often involving separate sentencing hearings after investigation into the personal circumstances of the defendant. Sentencing guidelines are developed through case law principles and the practice of the courts, and there may be certain interview criteria for sentencing imposed in the relevant statute. The Code provides that imprisonment should be the sentence of last resort after all other potential punishments have been considered inadequate.

### 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.

Please see the answers to questions 4.1, 4.2 and 4.3 above.

## 16 Appeals

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

A guilty verdict is appealable by the defendant. A non-guilty verdict is not appealable by the crown.

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

Both the prosecution and the defendant may appeal a criminal sentence, but the court will only set aside a side of a lower court if it considers the punishment to be manifestly inadequate.

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

The standard of review is appeal *de novo*. In other words, the court may refer to the trial court's record to determine the facts, but will rule "afresh".

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

The appellate court may quash the conviction of the defendant or substitute a different sentence in relation to an appeal against sentence and increase the sentence, but there is no remedy for injustice by the trial court.

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