

## Linette A. Gibs

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**Subject:** FW: Update on responses to Parliament Questions August 12 - on Penal Code  
**Attachments:** Final-2-Parliament questions August 12.docx

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**From:** Nancy R. Guishard-Joubert  
**Sent:** Friday, September 13, 2019 5:40 AM  
**To:** Linette A. Gibs  
**Cc:** Ann A. Groen-Gumbs; Garrick J. Richardson; Valerie Brazier  
**Subject:** Fwd: Update on responses to Parliament Questions August 12 - on Penal Code

From: "Ursula, Russell" <[Russell.Ursula@sintmaartengov.org](mailto:Russell.Ursula@sintmaartengov.org)>  
Date: 9/13/19 2:21 AM (GMT-04:00)  
To: "Nancy R. Guishard-Joubert" <[nancy.joubert@sxmparliament.org](mailto:nancy.joubert@sxmparliament.org)>  
Cc: "de Weever, Cornelius" <[Cornelius.deWeever@sintmaartengov.org](mailto:Cornelius.deWeever@sintmaartengov.org)>, "Martina, Eunicio" <[Eunicio.Martina@sintmaartengov.org](mailto:Eunicio.Martina@sintmaartengov.org)>, Eunicio Martina <[eunicio@gmail.com](mailto:eunicio@gmail.com)>  
Subject: Update on responses to Parliament Questions August 12 - on Penal Code

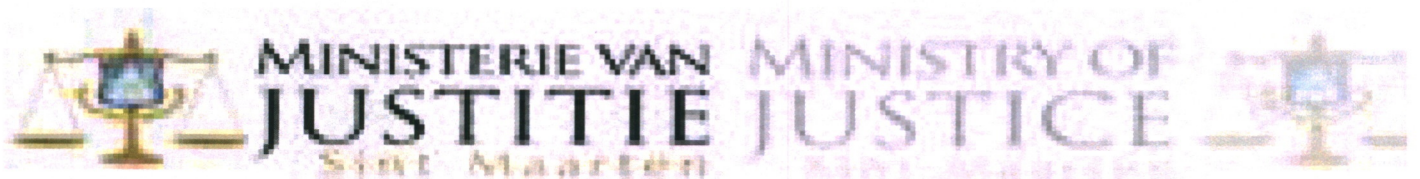
Dear Mrs. Joubert,

Please find attached an updated version of the answers of Parliament posed August 12 on the new Penal Code, and forwarded to you earlier.

Please note that a line has been deleted in the bottom of the 3<sup>rd</sup> page in response to the question: **"What is the punishment for a prosecutor when he holds a case file, even though the lawyer has requested this several times?"**

Apologies for the inconvenience.

Regards,  
Russell



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## ANSWERS TO PARLIAMENT QUESTIONS POSED ON AUGUST 12 - Ontwerp Lv WsR – WvSv - BW 2

### AGENDA ITEM 1 (SR)

#### MP Brison:

- **Who are the “legal professionals”? Most legal offices are not involved (different firms were questioned). Criminal professionals are saying they were not involved. They are asking what is involved.**

A: The draft of the new Penal Process Code was prepared by a joint Committee on the Revision of the Penal Process Code, led by prof. Hans De Doelder (professor of criminal law EU Rotterdam) and his team. For St. Maarten the following were represented in the committee: the Ministry of Justice, the judiciary, the public prosecutor service, the police and the legal profession. Each country had representatives of the stakeholders involved, also from their Bar Associations, who had to give input and feedback from their peers. (See Annex 1). The names of the Sint Maarten representatives are included in the annex, and has been (will be) forwarded to the Honorable Chairlady of the Parliament.

- **Wants for each law the FATF recommendation that deals with it. This to avoid all kind of other issues being regulated.**

A: See Annex 2a, 2b and 2c. It should be pointed out that the FATF recommendations are set up in general terms and should be read in conjunction with their respective Interpretive Notes. Also, recommendations are implemented spread over more than one provision, due to the system of the specific legislation.

- **Action plan of Minister to Trinidad: was there a change in the action plan for Sint Maarten: please provide this to parliament.**

The Action Plan was provided to the Secretariat of the Parliament through e-mail on August 12 (please see attached). The progress made is included with bold letters in the last column from page 22 to page 74. The translation of the three (3) laws adopted by Parliament earlier this year (has been forwarded to the CFATF Secretariat on Friday August 30<sup>th</sup> (Wijzigingslvo van de Landsverordening melding Grensoverschrijdende Geldtransporten; Landsverordening Meldpunt Ongebruikelijke Transakties; and the Landsverordening Bestrijding Witwassen en Terrorisme Financiering), and it is expected that this will be included in the Action Plan in preparations of the November 2019 CFATF Plenary. The English translated versions are also included as annexes with these answers. Please note that this is a free form translation, and that the Dutch version remains the legal technical correct version which should be used for decisive legal interpretations.

#### MP Emmanuel:

- **How many unusual transactions is being prosecuted by the prosecutor’s office right now?**  
Information on potentially ongoing investigations based on unusual transaction reports cannot be provided based on the responsibilities of the MOT and the Prosecutors office.

#### MP Williams:

- **Was there a project group in the Netherlands to deal with the changes in the Penal Code?**  
A: See Annex 1, representatives from the BES. And of course there was Prof. De Doelder c.s. of the Erasmus University of Rotterdam.

**MP Richardson:**

- **Have CURACAO and Aruba past theirs already?**  
A: No, not as yet. It is my understanding that they will begin debating the laws in the near future. However, St. Maarten is not in the same position as Aruba or Curacao since we are one of the most non-compliant in the region and the “last in the class.”

**AGENDA ITEM 2 (SV)**

**MP Emmanuel:**

- **Question: is this giving payment to crown witness for their testimony?**  
A: No direct payment is given by the Prosecutor’s Office (OM). But financial deals could be made pertaining to the seized/frozen assets or when a person is ordered to pay a sum of money to the Country in order to deprive him of unlawfully obtained gains (ontnemingsvordering/verplichting tot betaling van een geldbedrag aan de staat ter ontneming van wederrechtelijk verkregen voordeel).
- **Can the minister confirm or indicate show of transactions that stems from TF transactions or grown roots?**  
A: unusual transaction reports have been submitted to the MOT that are related to terrorism financing and originated in Sint Maarten.
- **What is meant by: there was a suspicion of terrorism financing.**  
A: a suspicion of terrorism financing means that after analysis of the unusual transaction(s) the MOT got an indication that the transaction from one subject to the next subject could be linked to terrorism financing.
- **Which countries are referred to as high risk country?**  
A: high risk countries are North Korea and Iran. There are also other monitored countries that are currently grey listed on the FATF website as having deficient AML/ATF infrastructures (<http://www.fatf-gafi.org/countries/#high-risk>).
- **On which grounds were the Cubans incarcerated: answer: where are the Cubans today awaiting deportation? Are you aware they received a letter from the UNCHR?**  
The Cubans were first detained on the basis of illegally staying in Sint Maarten. One has also been detained on suspicious of human trafficking. They are not able to submit a request for asylum in Sint Maarten. As they were having complaints on their detention the KPSM made contact with UNHCR. The UNHCR is in the process of providing these detained Cubans a refugee status and will indicate to them to which country they may go to receive asylum. This despite the court indicating that Sint Maarten was allowed to deport these Cuban nationals. On this

moment they are residing on Sint Maarten and have obligations to check in weekly with KPSM (meldplicht).

**MP Brison:**

- **Privacy Committee: not there yet, we are contravening our own laws because the privacy committee has not been established as yet. Will we follow our own law first or the CFATF standards?**

A: Sint Maarten has committed itself to live up to the international anti-money laundering and counter terrorism financing standards. Furthermore, the MOT is obligated to take privacy stipulations into account for it to be able to work with its counterparts. A concrete advice on the Privacy Committee will be reviewed and discussed within the CoM in the coming weeks. It is expected that the Privacy Committee will be established soon.

- **Aruba and Curacao approved this law has there been a position of these parliaments? Isn't Aruba and Curacao compliant with the FATF?**

Each country of the Kingdom of the Netherlands have their own different risk profiles. Paint a picture of an island with many casinos in hotels, stand-alone casinos, lotteries and number booths all around without a gaming control board and you will understand the risk associated to St. Maarten. Also the examiners team working on a country's mutual evaluation report are different persons. The time elapse in which countries have been submitted to an evaluation also sometimes provide for different focus by the evaluating teams. Sint Maarten was the last country evaluated in the CFATF third round of mutual evaluations whereby interpretations and expectations on the implementation of FATF recommendations has been shifting.

- **Mullet Bay: was the 100 million transaction reported to the MOT?**  
MOT does not give information on individual reports.

**MP Leonard:**

- **When a case is going on for 6 or 8 years, what is in place to protect people on this (verjaring)?**

A: The Penal Code regulates when the right of the Prosecutor to institute criminal proceedings will be precluded upon lapse of the statute of limitation. An act of prosecution (daad van vervolging) halts the statute of limitation. According to the jurisprudence of the Supreme Court (Hoge Raad) the violation of the reasonable time limit pursuant to Article 6, par. 1, of the ECHR can lead to a reduction in punishment. (Vide: [ECLI:NL:HR:2000:AA7309](#), [ECLI:NL:HR:2001:AA9372](#) and [ECLI:NL:HR:2015:2465](#))

- **What is the punishment for a prosecutor when he holds a case file, even though the lawyer has requested this several times?**

A: There is no punishment when a prosecutor refuses to give the defense council the files. But the defense council may address the Examining Magistrate in order to set a term in which the files have to be presented. The Magistrate has the final say in the judicial system of Sint Maarten.

- **Crown witness: addressed: is it already being implemented? Is it already happening now and needs to become a law?**

A: The crown witness was never regulated in the Caribbean Kingdom countries. From a rule of law point of view this is less than ideal. Regulation is necessary in order to make the use of a crown witness more transparent, controllable and testable by the courts and the defence counsels. The use of crown witnesses is not a new phenomenon that is introduced by the new Penal Procedure Code. It already existed in practice under the Netherlands Antilles and was also allowed by the Dutch Supreme Court (Hoge Raad), which is also the highest Court for the Caribbean Kingdom Countries. The first time in St. Maarten in 1994, This case made it to the Supreme Court (HR 15 februari 1994, NJ 1994, 322) and even to the European Commission on Human Rights. In 2003 a crown witness case in Curacao was also handled by the Supreme Court. It follows from the jurisprudence of the Supreme Court and of the European Court of Human Rights that the use of crown witnesses is allowed in certain criminal cases and under certain conditions to effectively combat crime.

- **What does the CFATF has to do with this whole witness program?**

FATF Recommendation Nr. 30 advises countries to take measures, including legislative ones, at the national level, to allow their competent authorities investigating money laundering and terrorist financing cases to postpone or waive the arrest of suspected persons and/or the seizure of the money, for the purpose of identifying persons involved in such activities or for evidence gathering. The Crown Witness program, which has been applied already in Sint Maarten based on jurisprudence, is now proposed to be legislated.

- **What protection is there for a suspect who has a crown witness against him or her?**

A: The examining magistrate shall hear the witness on the intended agreement and shall review the lawfulness of the agreement. The public prosecutor shall provide the examining magistrate with the information he requires for his review. The review of the deal (between the Prosecutor and the Crown Witness) by the Examining Magistrate is a safeguard for the person who is incriminated by the statement of a Crown Witness. A related example was provided last week in a money laundering case in Zwolle, Netherlands, and involving Curacao suspects. In the case, also known as "Cymbal", the magistrate did not honor a deal that was agreed by the prosecution office with the suspects, and handed out full sentences instead of a reduced deal because of cooperation with the prosecutor's office.

- **Can a witness be considered a witness and a suspect?**

A: In the case of a crown witness: yes.

**MP James:**

- **Are changes proposed by OM, or ministry of justice based on needs seen?**
- **Why did we need to broaden the seizure possibilities?**

A: In the new Penal Procedure Code all objects that may serve to reveal the truth or demonstrate unlawfully obtained gains shall be liable to seizure. Also, all objects whose confiscation or withdrawal from circulation may be ordered shall be liable to seizure (Article

119). Furthermore, objects intended to preserve the right of redress to pay the unlawfully obtained benefit or the purpose of preserving the right of recovery for payment of a fine or of a victim-measure can be seized (Article 119a).

- **Workgroup: who were the members of the workgroup?**

A: See Annex 1

### **AGENDA ITEM 3 (BW-2)**

#### **MP Brison:**

- **Reiterate: who were the legal representative at the presentation?**

A: See Annex 1

- **Can you say that the chamber of commerce can de-register just because entity has received unusual transaction against it?**

A: Government will amend Article 25 of the Civil Code Book 2 to reflect that the Chamber can only deregister after an irrevocable court verdict.

- **Is this in compliance with the ordinance of data protection and privacy.**

A: Yes, this serves the enforcement of the law.

- **Law is stating “foundations” and does not provide for further exceptions? Where are the limitations on foundations included in this legislation?**

A: article 59 paragraph 9 of Book 2 of the Civil Code states that the foundations that have the balance and the total of the income or expenses are less than NAf 100.000 are exempted from the obligation.

- **NPO can be targeted when just a board member commits a crime. How does this reflect on the entire foundation?**

A: Criminal Code article 2: 301: An embezzlement carried out by him who has been detained out of necessity, or by guardians, trustees, administrators, executors of an estate, court-appointed liquidators of an estate or community or liquidators of a company or managers of institutions of goodwill or foundations, in relation to any good that they possess as such, are punishable by imprisonment of a maximum of five years or a fine of the fourth category.

A crime committed by a person working for a company or who occupies an executive position in that company, is dealt with in criminal court.

- **Holland and Europe have the right of bank account etc. Please include this in the current laws as well as a compromise?**

The right to a bank account is a very laudable and positive initiative and no reasonable person can be against this as long as the person to open the bank account can positively be identified. Not only in Europe, but also in Canada where some of our most important banks are

headquartered, you have the right to open a bank account. However, this initiative should be included or dealt with in another more proper finance based legislation or regulations such as The Government Ordinance Regulating the Supervision of Banking Institutions.

**MP Emmanuel:**

- **Please provide information from the Central Bank of Curacao and SXM: where is it regulated that they can request for customers to provide the source of wealth?**

A: National Ordinance combating money laundering and terrorism financing (AB 2019 no. 25) chapter II Customer Due Diligence (CDD), specifically article 8 paragraph 2.

**MP James**

- **NPO: approach seems to be draconian: please provide the NPOs that fall in the FATF definition.**

A: the NPOs that have a balance and total of the income or expenses above the amount of NAf 100.000.

**MP Williams:**

- **Aansprakelijkheid of the chamber of commerce is not included when removing a foundation.**

A: The removing of a foundation from the register will not be a discretionary/facultative power of the Chamber but will be compulsory by law. Therefore, the Chamber can't be held responsible for doing so.